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# Reviews and Reflections on Planned Communities

Stephen R. Miller

*University of Idaho College of Law, millers@uidaho.edu*

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# Reviews and Reflections on Planned Communities

Ronald S. Cope,\* Kimberly Freimuth\*\* and  
Stephen R. Miller\*\*\*

THIS ARTICLE IS SUBMITTED BY THE LAND USE COMMITTEE'S SUBCOMMITTEE ON PLANNED COMMUNITIES.<sup>1</sup> It contains contributions by subcommittee members that review a planned community in Ohio, recent cases on the review of planned communities, and a review of a report on planned communities by the Urban Land Institute.

## I. The Art of the Planned Unit Development<sup>2</sup>

Claude Monet, Don Constable, J.M.W. Turner, and Georgia O'Keefe were great artists who painted beautiful and memorable landscapes. We admire their genius. They were able to make a scene come to life and invoke profound thoughts and emotions. It is a remarkable achievement to blend colors on a canvas or board in such an inspired manner that generations of art lovers can admire these great works as they hang in museums.

A Planned Unit Development (PUD) can also be a great work of art. Instead of being painted on a canvas it comes to life on twenty-five or more acres of vacant land using a wide array of materials in combinations and designs calculated by planners, architects, engineers, and contractors.

However, a PUD is also a creature of the law. In particular, it is a combination of zoning laws and subdivision laws which are usually incorporated into a zoning ordinance of a municipality or county. The following can be said of a PUD:

The purpose of the Planned Unit Development regulations is to allow more creative and imaginative design for land developments than is possible under the more conventional zoning regulations. In this regard, the bulk and use regulations of any district may be modified within a Planned Unit Development. . . . Preservation of

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\* Partner, Nixon Peabody.

\*\* Partner, Fox Rothschild.

\*\*\* Associate Professor of Law, University of Idaho College of Law.

1. Daniel R. Mandelker, Stamper Professor of Law, Washington University at Saint Louis, is Chair of the Subcommittee and edited this article.

2. Ronald S. Cope contributed this section.

natural site qualities, better urban amenities, more open space and a higher quality project are desired results of the Planned Unit Development process.<sup>3</sup>

This article discusses Crocker Park, a PUD in Westlake, Ohio. This development is an excellent example of how an imaginative and determined developer can use the flexibility that a PUD ordinance provides to create a living work of art. Westlake, Ohio is a municipality with a population of 32,720 residents.<sup>4</sup> It is located on 15.97 square miles in Cuyahoga County.<sup>5</sup> It is approximately one mile south of the shore of Lake Erie and it is a fifteen minute commute via I-90 to downtown Cleveland.<sup>6</sup> The Westlake zoning ordinance has a provision for PUDs.<sup>7</sup> This ordinance sets forth the following purposes of the PUD:

- (a) To encourage skillful planning of resident development by allowing flexibility in type and placement of buildings while promoting coordinated architectural design within a unified development area.
- (b) To utilize topographic and landscape features to enhance and unify the development and to insulate the development from major arterials as well as protect adjacent residential neighborhoods.
- (c) To expand the scope of land planning from the concept of unrelated individual parcels and buildings to a coordinated and harmonious development.
- (d) To promote the efficient use of land, utilities, streets and services.
- (e) To promote increased open space and landscaped areas between uses and along public roads.
- (f) To control the vehicular circulation and access to existing roads to reduce congestion and increase safety.<sup>8</sup>

The Westlake zoning ordinance also requires that a PUD be not less than twenty-five acres of contiguous land, that the gross density of the PUD not exceed 9.9 dwelling units per acre, that not less than 7.5% of the entire land area be designated for public uses and public parks for common use, and that not more than 35% of the total floor area of all

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3. RONALD S. COPE, *ZONING HANDBOOK FOR MUNICIPAL OFFICIALS* 280 (2012).

4. See *Community Profile*, CITY OF WESTLAKE OHIO, <http://www.cityofwestlake.org/458/Community-Profile> (last visited Apr. 23, 2017).

5. See *id.*

6. See *id.*

7. See WEST LAKE, OHIO, *ZONING CODE* § 1212.03 (2009).

8. *Id.* § 1212.01(a)-(g).

buildings including the ground floor and all floors above the ground floor be devoted to retail uses.<sup>9</sup>

The zoning ordinance also has an unusual requirement. The applicant must in normal fashion obtain approval of a preliminary plan of development, which includes the approved location of the area, types, number and density of dwellings in the PUD<sup>10</sup> In addition, however, after approval of the preliminary development plan and the approval of the zoning amendment, the rezoning must be “placed on the ballot to be voted on by the electorate at the next general election if the rezoning increases the density or permits multifamily dwellings where such dwellings and/or density were not previously permitted in the area to be rezoned.”<sup>11</sup> Requiring a referendum on a PUD is a fascinating concept designed to ease the political burden on the members of the City Council or Village Board but may not necessarily result in good planning or a good outcome for an otherwise approved development to take place in the municipality.

Crocker Park was required to go through this referendum process. It has been reliably reported that this became a contested election with developers of other shopping centers opposing this new development.<sup>12</sup> In short, the Crocker Park developer had to actually engage in a political campaign to get this project approved. While local politics is often an inherent part of obtaining zoning approval,<sup>13</sup> it is unusual to have to engage in an election campaign.

From the outset the developer, Stark Enterprises of Cleveland, Ohio and its Chief Executive, Robert Stark, had a vision that was unique and encompassed Stark’s sense of aesthetic. As stated in the design guidelines which are part of the PUD, were approved by the Westlake Planning Commission back in 2001, and subsequently revised and approved again by the Westlake Planning Commission on April 16, 2012 and the Westlake City Council on April 19, 2012, the vision for Crocker Park was stated as follows:

How do you create a place that is vibrant always changing, safe, comfortable and belongs to everyone? Achieving all of these objectives is best accomplished in a mixed use environment that highlights green parks, lovely homes, bustling sidewalks, upscale stores, professional offices and restaurants that inspire return visits.<sup>14</sup>

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9. *See id.* § 1212.03(a), (d), (g), (h).

10. *See id.* § 1212.12(e).

11. *See id.* §1212.12(f).

12. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* (1966); RONALD S. COPE, *THE ZONING AND LAND USE HANDBOOK* xvii (2016).

13. *Id.*

14. *See generally* CITY OF WESTLAKE, OHIO, *DESIGN GUIDELINES: MIXED-USE AREA CROCKER PARK* (2012), <http://oh-westlake.civicplus.com/DocumentCenter/View/444>.

Bob Stark first envisioned this development more than 20 years ago. Crocker Park's first phase opened in the Fall of 2004. Twelve years later the property had undergone several expansions to its current footprint which stands over 120 acres and twenty city blocks with nearly 20 million visitors per year. The following is a break out in numbers of this development:

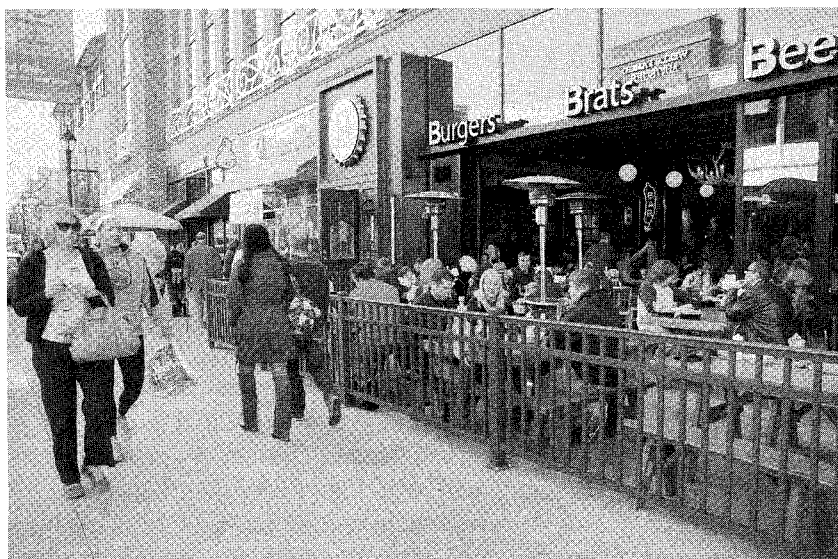
### **Crocker Park: By-the-Numbers**

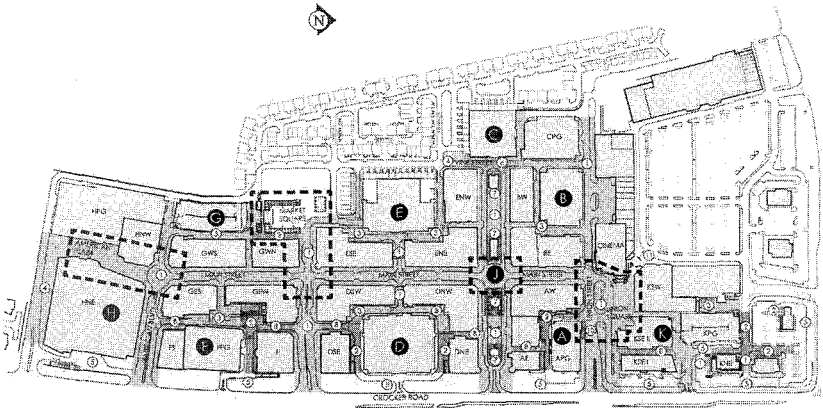
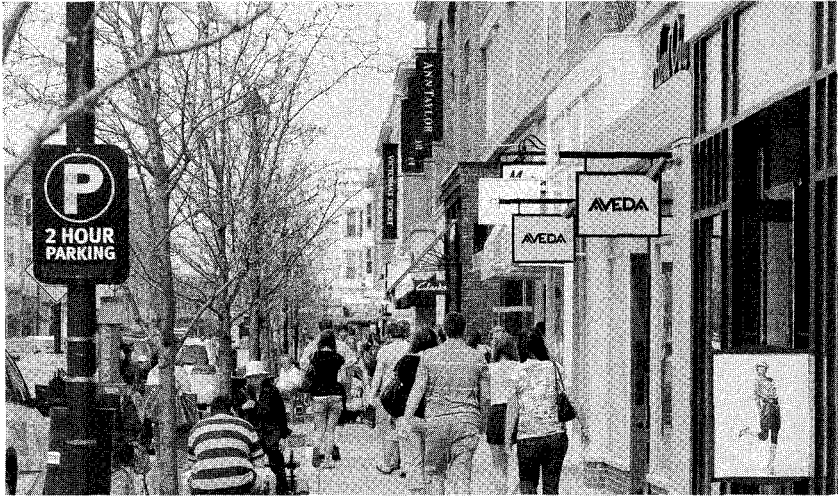
- 1M+ square feet of retail
  - 100+ stores
  - 35+ restaurants
- 725,000 square feet of office
  - 23 offices
- 536 luxury for rent apartments
- 100+ for sale luxury homes
- Hyatt Place Hotel
  - 110 rooms
- Regal Cinema
  - 16-screen theater with IMAX technology
- Two full-service grocery stores
- LA Fitness
  - State-of-the-art two-story fitness facility
- Eight parking garages
  - Interior garages with service drives to support tenants and traffic flow
- 10 event/social spaces booked year-round for farmer's markets, concerts, outdoor fitness classes and movies, art shows, races and numerous other community affairs<sup>15</sup>

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15. Working on these ideas and helping to develop them were Street-Works located at 181 Westchester Avenue, Port Charles, New York, a planning consultant firm, and Richard K. Levitz, LLC, Architecture and Planner located at 2859 E. Rhode, Shaker Heights, Ohio, Architecture, Planning and Project Management.

(Attached are photos of Crocker Park showing the large crowds visiting the development as well as the imaginative layout of the streets and design of the buildings.)





The key component of development can be understood by a review of the design standards as they reflect the streetscapes. Crocker Park is founded on the notion of mixed use streets. These areas provide alternatives for living, shopping and working. Restaurants and upscale shops provide choices for entertainment and shopping. A brief analysis of the streets layout explains how this principle has been put to use.

First, Market Street runs parallel to Crocker Park Boulevard. Market Street is lined with shops, offices and apartments and is adorned with public art. Market Street ends at Market Square which is the civic space. This space is a plaza and a neighborhood green signifying a transition from a public community space to the entrance into Crocker Park's residential neighborhood.<sup>16</sup>

Union Street is the northern most gateway to Crocker Park and is the entertainment district. It is distinguished by a cosmopolitan flavor full of life and vigor as stated in the guidelines. At the crossing of Union Street and Main Street is the illuminated theater marquee which is a landmark focal point that can be viewed from Crocker Road. Union Street has a hotel as well as day/night entertainment venues.

American Avenue is the most formal and monumental street. It includes high-end office buildings, retail as well as mixed use residential.

Vine Street extends north/south through the entire development and acts as a transition to different levels of activity, building use, scale, and the mixed use core.

There are a variety of different types of open spaces that relate to the overall pattern of the streets. These open spaces are key elements around which land uses and development have been organized. Closing streets for festivals and other community events expands the available space in Crocker Park for gathering and celebrating various events as can be seen in the photos that accompany this article.

One of the interesting and unique features of Crocker Park is the layout of plazas in a European style. These plazas include fountains, benches, public art, gazebos, park-style kiosks, shops, eateries, and seating areas.

The architectural style of Crocker Park is "inspired from the Western Reserve region's architectural history."<sup>17</sup> Further, quoting from the guidelines:

Elements such as overhanging eaves, decorative trusses, tall windows and dormers connect Crocker Park to the surrounding community's architectural tradition.<sup>18</sup>

Further, in regard to the architecture, Guidelines state as follows:

Wood and masonry construction types are seen locally through the Tudor, Stick, Western Reserve, Jeffersonian and Craftsman styles.<sup>19</sup>

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16. See the attached Plan of Development for a better understanding of the layout of the development.

17. See CITY OF WESTLAKE, OHIO, *supra* note 14, at § 6.1.

18. See *id.*

19. See *id.*



Building finishes and materials are “selected to express Crocker Park’s architectural design. Materials familiar to historic and recent construction in the Westlake area, such as brick, stone, wood, stucco and plaster, are incorporated into Crocker Park’s architecture and make strong contributions to the sense of ‘always having been there.’”<sup>20</sup>

One of the most interesting features of Crocker Park are the “Sign Criteria and Master Sign Plan.”<sup>21</sup> The general statement regarding signage is as follows:

The Sign Criteria and Master Sign Plan will insure that signage used by individual businesses will contribute to the vitality and interests of Crocker Park while respecting the variety of the architecture, creating a lively and provocative atmosphere. Signs will work with other street amenities in establishing the character of the street on which they front, while clearly identifying businesses, encouraging window shopping and enhancing the pedestrian experience.<sup>22</sup>

It is the developer’s eye for detail that singles out Crocker Park from other PUDs around the country. This developer has the ability to hit on what is most aesthetically pleasing. Crocker Park is, in fact, the embodiment of its guidelines. It is a place where you can live, work and play without ever having to leave its boundaries. Of course, as has already been noted, visitors by the thousands come to Crocker Park and those interested in seeing a well-organized, and one might even say artistic masterpiece, should make it a point to visit this Planned Unit Development.

## II. Recent Court Decisions on Planned Communities<sup>23</sup>

Courts continually deal with planned communities and the legal issues they present. The following cases consider problems that arise when a municipality takes a planned community under review and decides whether to approve or disapprove it.

In the case of *Durant v. D.C. Zoning Commission*,<sup>24</sup> the Washington D.C. Court of Appeals considered whether an application for PUD approval complied with the District’s Comprehensive Plan. In this case, the applicant proposed to construct a six-story sixty foot building on a parcel of land, which building would include up to eight commercial tenants on the ground floor and over two hundred residential units above

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20. *Id.*

21. See CITY OF WESTLAKE, OHIO, SIGN CRITERIA AND MASTER SIGN PLAN, MIXED-USE AREA CROCKER PARK § 1.1 (2013), <http://www.cityofwestlake.org/DocumentCenter/View/1492>.

22. See *id.*

23. Kimberly Freimuth contributed this section.

24. 139 A.3d 880, 882 (D.C. Cir. 2016).

the commercial units.<sup>25</sup> After the PUD application was approved by the Commission, a group of individuals living within 200 feet of the project, known as the “200-Footers”, challenged the Commission’s order claiming the PUD was inconsistent with the comprehensive plan.<sup>26</sup>

Notably, the Commission had originally approved the PUD in June 2012, which original approval the 200-Footers appealed to this same court, which remanded the matter to the Commission to further explain its reasoning.<sup>27</sup> Thereafter, the Commission again approved the PUD, concluding it was a moderate-density development and therefore was consistent with the comprehensive plan.<sup>28</sup> The 200-Footers again appealed that decision and this court again remanded the matter to the Commission to further address whether the proposed PUD should be properly characterized as a moderate-density residential use or a medium-density residential use.<sup>29</sup> Following this second remand, the Commission, for the third time, approved the PUD and concluded it was a moderate-density residential development which was consistent with the comprehensive plan.<sup>30</sup> The 200-Footers then brought the current appeal.

The court began by noting the standard of review and confirmed that the court normally defers to an agency’s decision if it flows rationally from the facts and is supported by the evidence.<sup>31</sup> However, the court noted that it would not defer to an interpretation that was unreasonable or contrary to the language of the applicable provisions.<sup>32</sup>

In reviewing the matter, the court considered the manner in which the Commission decided that the proposed PUD would constitute a moderate-density residential development and ultimately found that the Commission’s explanation for its conclusion was lacking in several respects.

The court noted that the Commission failed to explain how a proposed six-story apartment building should not be characterized as a mid-rise apartment building, which is generally consistent with medium-density residential use, as opposed to moderate-density residential use which generally consists of smaller scale structures such as single family homes, low-rise garden apartments and row homes.<sup>33</sup> In addition, the

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25. *See id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 883.

33. *Id.*

court did not find persuasive the Commission's reliance on either the architectural features of the proposed building or the Commission's opinion of the visual impact of the building to support the Commission's conclusion that the building would be more akin to a moderate-density residential development than a medium-density residential development.<sup>34</sup> The court did not entirely dismiss the architectural features as being entirely irrelevant, but the court noted that the physical characteristics of the building should have been the Commission's focus rather than the building's appearance.<sup>35</sup>

Much of the reasoning behind the court's decision was the Commission's failure to adequately articulate the support for its findings and conclusions and, as a result, the Commission's decision was set aside and the PUD denied.<sup>36</sup>

Less than seven months after the *Durant* case was decided, the D.C. Court of Appeals faced a similar case. In *Friends of McMillan Park v. D.C. Zoning Commission*,<sup>37</sup> Vision McMillan Partners, LLC (VMP) proposed to develop a 25-acre parcel of land for a PUD consisting of a mix of uses, including a 115-foot high health care facility, a mixed use building containing a ground floor supermarket with 280 residential units, 146 individual row homes and a community center.<sup>38</sup> The subject property is listed in the D.C. Inventory of Historic Sites and the National Register of Historic Places, as the site contains a filtration plant constructed in the early 1900s by the U.S. Army Corps of engineers that used sand to filter drinking water.<sup>39</sup>

The Zoning Commission approved the PUD application and the Mayor's Agent for Historic Preservation issued two orders approving two permits allowing VMP to demolish certain structures on the site and allowing VMP to subdivide the site.<sup>40</sup> Friends of McMillan Park (FOMP) challenged the PUD approval and the two orders issued by the Mayor's Agent, arguing that the PUD should not have been approved because it was inconsistent with the District's Comprehensive Plan.<sup>41</sup> FOMP also argued that the Mayor's Agent should not have issued the orders because it was incorrectly determined that the project

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34. *Id.* at 884.

35. *Id.*

36. *Id.*

37. *See generally* *Friends of McMillan Park v. District of Columbia Zoning Comm'n*, 149 A.3d 1027 (D.C. Cir. 2016).

38. *Id.* at 1032.

39. *Id.*

40. *Id.*

41. *Id.* at 1031.

had “special merit” and incorrectly found that the project’s special merit outweighed the historic preservation losses the project would create.<sup>42</sup>

As it had done in *Durant*, the court first noted that when reviewing a decision of the Commission, the decision must be affirmed so long as (1) the Commission has made findings of fact on each material contested issue, (2) there is substantial evidence in the record to support each finding, and (3) the conclusions of law follow rationally from those findings.<sup>43</sup> Further, because the Commission is an expert body, the Court noted its general deference to the Commission’s interpretation on zoning regulations.<sup>44</sup> As a result, only those interpretations that are plainly erroneous or inconsistent with the regulations are the ones typically not upheld by the Court.<sup>45</sup>

In reviewing a PUD application, the Commission must evaluate the relative value of the project amenities and public benefits offered, the degree of development incentives requested and any potential adverse effects of the project.<sup>46</sup> Further, the Commission should not approve a PUD that is inconsistent with the Comprehensive Plan.<sup>47</sup> FOMP raised several reasons why it believed the proposed PUD was not consistent with the Comprehensive Plan. Most of FOMP’s arguments focused on the failure of the Commission to adequately explain why it was disregarding certain policies within the Comprehensive Plan in order to advance other competing policies in the Comprehensive Plan.<sup>48</sup> The court agreed with FOMP’s arguments and found that, similar to *Durant*, the Commission neither provided a specific basis for its conclusions nor stated reasons for giving greater weight to certain policies over other policies.<sup>49</sup> As a result, the court vacated the Commission’s order approving the PUD and remanded the matter to the Commission for further proceedings, which the court noted was not solely for the purpose of redrafting findings and conclusions to facilitate the court’s further review, but the Commission was also permitted to conduct further hearings or even reach a different result.<sup>50</sup>

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42. *Id.*

43. *Id.* at 1032.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1033.

48. *See id.*

49. *Id.* at 1035.

50. *Id.*

FOMP also argued that the PUD regulations direct the Commission to consider the environmental benefits associated with a PUD and to generally consider any potential adverse effects, which FOMP argued the Commission only considered to a degree.<sup>51</sup> FOMP argued that the Commission failed to adequately consider the potential effects on neighboring property values and displacement of residents—both of which are topics addressed in the Comprehensive Plan.<sup>52</sup> The court, in affirming its remand to the Commission on these matters noted that the “mere existence of testimony touching on a topic, however, does not demonstrate that the Commission considered and adequately addressed that topic.”<sup>53</sup> As a result, it was not enough for these matters to have been raised and briefly discussed before the Commission.<sup>54</sup> Rather, the Commission needed to make specific findings and conclusions related to these issues and the burden was on VMP, as the applicant, to resolve these matters and to justify approval of the application.<sup>55</sup>

While the court in both *Durant* and *Vision McMillan Partners* began by noting that much deference is given to the Commission’s findings and interpretations when reviewing a decision of the Commission, in both cases the court found that the Commission failed to adequately address certain matters and failed to adequately explain the bases for its decisions.<sup>56</sup> Developer applicants cannot control the findings of fact and conclusions of law issued by a Commission. Yet it is clear that if poorly written findings and conclusions are issued, that could result, as it did in these cases, in additional time and money required to move the development forward, which may ultimately hurt the economic viability of the project down the road—even a project which was, in both of these cases, supported by the Commission. The lesson for developer applicants from these case is to offer to the decision-making body, if it will accept such an offer prior to issuing its decision in the matter, proposed findings of fact and conclusions of law that are specific and contain sufficient detail on each and every item required to satisfy the applicant’s burden of proof, as this case demonstrates the significance of the need for specific findings of fact and conclusions of law which can be supported on appeal.

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51. *Id.* at 1036.

52. *Id.* at 1036.

53. *Id.* at 1038.

54. *Id.*

55. *Id.* at 1032.

56. *Durant v. District of Columbia Zoning Comm’n*, 139 A.3d 880, 882-83 (D.C. Cir. 2016).

In the case of *Continental Property Group, LLC v. City of Wayzata*,<sup>57</sup> Continental Property Group, LLC (CPG) proposed a PUD consisting a five story mixed-use building containing 6,281 square feet of retail space, office space and 148 luxury apartments on two adjacent parcels of land. One of the parcels was subject to a parking easement providing eighty-five parking spaces to a neighboring property which was not part of the PUD<sup>58</sup> In order to develop the project, CPG needed not only approval of the PUD, but also a building height variance to allow five stories rather than the three stories permitted.<sup>59</sup>

The planning commission held a public hearing on the application and voted unanimously to recommend denial of both the PUD and the requested height variance.<sup>60</sup> Thereafter, city council also voted unanimously to deny both the PUD application and the height variance.<sup>61</sup> CPG then sought a declaratory judgment from the district court, which granted summary judgment in favor of the city.<sup>62</sup> CPG then appealed that decision to the Minnesota Court of Appeals.<sup>63</sup>

At the outset, the Court noted the standard of its review and acknowledged that no special deference is given to the conclusion of lower courts.<sup>64</sup> Rather, the Court makes its own independent examination of the record to arrive at its conclusions.<sup>65</sup> In addition, the Court noted that a city's denial of a zoning request is not deemed to be arbitrary, even if the decision is considered debatable, if there is a rational basis for at least one of the reasons for denial.<sup>66</sup>

Unlike the *Durant* and *Vision McMillan Partners* cases, the Court in this case found that the written findings and conclusions of the city supported its decision to deny the proposed PUD and the requested height variance.<sup>67</sup> The Court explained that the city provided the following four reasons for denying the application: (1) the PUD would negatively impact views, noise levels, traffic flows and parking in the area and, as a result, was not consistent with the PUD ordinance; (2) the PUD was inconsistent with the city's Comprehensive Plan

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57. *Continental Property Group, LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693, at \*1 (Minn. Ct. App. Apr. 18, 2016).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at \*2.

which permitted third story uses if the third story was setback significantly more than the front façade of the floor below, which was not the case with the proposed PUD; (3) the proposed density of the PUD far exceeded the current density for the location and would be out of scale with the amount of lot area contained on the subject properties; and (4) the height of the building did not meet the applicable height standards and the city did not find the a variance should be granted to allow the proposed height.<sup>68</sup>

In upholding the city's decision to deny the PUD, the court found that more than one of the city's reasons was supported by a rational basis and, therefore, the city's decision was legally sufficient and supported by the facts in the record.<sup>69</sup>

### III. A Review of *Placemaking: Innovations in New Communities*<sup>70</sup>

In November 2014, the Royal Institution of Chartered Surveyors (RICS) and the Urban Land Institute (ULI) released *Placemaking: Innovations in New Communities* (the RICS/ULI New Communities Report or Report),<sup>71</sup> a report that synthesizes best practices from more than 700 survey responses, twenty in-depth interviews, and three workshops of staff and advisors who work on planned communities in both the public and private sectors.<sup>72</sup> The Report offers a useful comparative approach, evaluating new communities in both the United States and the United Kingdom.<sup>73</sup> The examples pull from the greenfield context, which represents development of previously undeveloped land, and the urban context, which represents redevelopment of underutilized urban areas.<sup>74</sup> The Report also evaluates projects that represent a wide variety of development scales from Milton Keynes, a 1960s United Kingdom new city with a population of nearly 250,000 persons to redevelopment of San Francisco's Presidio, which anticipates just 160 units.<sup>75</sup> Across these relative differences, the Report offers a definition of new communities, then offers five "innovations" that new communities have brought

68. *Id.* at \*2-3.

69. *Id.* at \*3.

70. Stephen R. Miller contributed this section.

71. See generally MAHLON APGAR, *PLACEMAKING: INNOVATIONS IN NEW COMMUNITIES* (2014), [http://uli.org/wp-content/uploads/ULI-Documents/INNOVATIONS-IN-NEW-COMMUNITIES\\_final.pdf](http://uli.org/wp-content/uploads/ULI-Documents/INNOVATIONS-IN-NEW-COMMUNITIES_final.pdf).

72. *Id.* at 3.

73. *Id.* at 7.

74. *Id.*

75. *Id.*

to the development community and five “initiatives” that would further improve the practice of new community building.<sup>76</sup>

### A. *Defining New Communities*

The RICS/ULI New Communities Report defines new communities as “planned, residentially-based, mixed-use settlements for populations from 1,000 to 100,000 that are located in urban and suburban areas.”<sup>77</sup> While new communities in the United States are primarily private sector ventures that are often referred to as “master-planned communities,” in the United Kingdom, they are primarily public sector initiatives known as “new towns.”<sup>78</sup> The origins of master-planned communities in the United States are often traced to foundational projects such as Radburn, New Jersey, which sought to implement Clarence Perry’s notion of a super-block, which would have community buildings—schools, churches, community centers—located at the center of such a block, residential lanes connecting homes to those buildings, and neighborhood-serving commercial lining the external arterials.<sup>79</sup> In the United Kingdom, similar innovations emerged from Cadbury’s 1890s efforts to create better conditions for his workers through a company town at Bournville; Ebenezer Howard-inspired garden cities<sup>80</sup> that included 1920s privately-sponsored projects in Letchworth and Welwyn; 1950s public New Town Development Corporations; and current policies to revive those very first century-old garden cities.<sup>81</sup> The Report argues that there are six ways that these new community projects differ from typical single-use real estate projects. These differences are:

- 1) large-scale, to enable economies, efficiencies and tradeoffs that elude smaller projects;
- 2) comprehensive scope, to incorporate social, economic, and environmental objectives while cross-fertilizing individual uses;
- 3) unitary organizations, with the sharp focus, management depth and technical expertise to develop and operate complex projects;

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76. *Id.* at 5.

77. *Id.* at 6.

78. *Id.*

79. *Id.*; see also, Clarence Arthur Perry, *City Planning for Neighborhood Life*, 8 SOC. FORCES 98, 100 (1929) (“Once the neighborhood-unit scheme is adopted, it becomes possible to approach from a new angle a number of vital questions in the field of community organization.”).

80. See EBENEZER HOWARD, *GARDEN CITIES OF TOMORROW* (1902).

81. APGAR, *supra* note 71, at 6.



- 4) multiple real estate uses and mutually reinforcing activities to capitalize on the project's scale and scope;
- 5) portfolio financing and management to ensure that sufficient funds are available at each stage and that asset performance is monitored throughout the NC's life; and
- 6) "partnership" structure and style to solve ongoing problems in a collaborative, constructive manner.<sup>82</sup>

While these differences offer innumerable opportunities that are often not available through the regular application of zoning codes and other standardized land use controls, the scale necessary to make such development economically feasible is a challenge, especially where upfront costs are substantial and a developer—public or private—must be able to sustain a long-term financing horizon to see a profit.<sup>83</sup> For those that can make such a long-term investment, the economic rewards are often enormous, as are the social and cultural benefits offered to the new community.

Five community preferences topped the lists of the Report's survey of industry professionals in both the United States and the United Kingdom: public transportation / infrastructure (92% total / 92% US / 93% UK); innovative design (92% / 92% / 93%); market-driven mixed uses (87% / 88% / 81%); business opportunities (87% / 87% / 89%); and lifestyle benefits (86% / 87% / 81%).<sup>84</sup> Cross-cultural differences did emerge in the study, however. For instance, in the UK, industry professionals envisioned new communities on a scale about five times as large as those in the US, and the UK industry professionals envisioned much higher densities in the new communities.<sup>85</sup>

#### 1. INNOVATIONS IN NEW COMMUNITIES

The Report details five innovations that new communities have brought to the development business.

First, new communities embraced what the Report calls "comprehensive planning," which the Report defines more broadly than the term is typically used in the US.<sup>86</sup> On the one hand, the Report defines the term as a means of achieving long-term social, cultural, and environmental benefits for residents of the community that can only occur when differ-

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82. *Id.*

83. *Id.*; see also *id.* at 18-19 (discussing proposal for an investment fund to relieve this financial disincentive to new communities).

84. *Id.* at 8.

85. *Id.*

86. *Id.*

ent parts of the development team—builders, architects, landscape designers and the rest—have the opportunity to emerge from their professional silos and imagine how respective parts of the development process affect the whole.<sup>87</sup> On the other hand, such comprehensive planning, as defined by the Report, means establishing short- and long-term financial and organizational resources that could sustain massive building projects that often last decades.<sup>88</sup> This required the maturation of the real estate industry to move from “doing deals” to envisioning real estate as a management practice with “product” that utilized the financial modeling of the country’s best MBAs and lawyers.<sup>89</sup> Charles Fraser, the resort community developer responsible for Hilton Head Island, South Carolina, was a leader in doing precisely this.<sup>90</sup> This comprehensive planning envisions a variety of income streams that permit the developer to move beyond one type of product, such as incorporating neighborhood retail or local professional offices into a residential project.<sup>91</sup>

Second, new communities utilize portfolio economics, an approach to project finance that permits for large, upfront investments that yield financial benefits over long time horizons.<sup>92</sup> The Report suggests there are four approaches that make portfolio economics most effective:

- 1) front-end capital commitments for infrastructure and common areas before revenues are generated from sales and rents;
- 2) “patient capital” which defers repayments and returns on front-end investments before the project can afford them;
- 3) phased planning and expenditures to balance cash outflows with value appreciation; and
- 4) close financial and operations management throughout the project lifecycle to periodically monetize increased values without imperiling the long-term capital structure.<sup>93</sup>

More than half of respondents noted the importance of long-term financing as their foremost problem, and many developers had to change a long-term project as originally envisioned to accommodate financial commitments.<sup>94</sup>

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87. *Id.*

88. *Id.* at 9.

89. *Id.*

90. *Id.*

91. *Id.* at 10.

92. *Id.*

93. *Id.*

94. *Id.* at 11.

Third, new communities possess integrative business models that, in turn, help to re-envision traditional models of real estate project finance.<sup>95</sup> For decades, “long-term returns in land development projects have ranged from 15% to 30%, and in specific cases, considerably higher; while debt/equity ratios typically have centered in the 50% to 70% range.”<sup>96</sup> To achieve these returns, developers have stuck to standard real estate products that seemed safe, but left little room for innovation.<sup>97</sup> New community developers, on the other hand, have achieved multiple economic and social objectives, as well as distinguished their projects from smaller, single-use competitors, by having multiple income streams that derive for a variety of different types of products that occur in the same project.<sup>98</sup>

Fourth, new communities “realize public purpose through private enterprise,” often leveraging the best of the public and private sectors.<sup>99</sup> The best known “public private partnership,” or “P3 model,” was pioneered by the U.S. Army’s Residential Communities Initiative, which attracted \$12 billion in capital from ten development groups to produce 86,000 new and renovated units on 44 Army installations.<sup>100</sup> The U.S. Army projected 16% long-term returns over fifty years for projects with between \$250 million and \$1 billion in each project, which was consistent with institutional markets at the time, though requiring a significantly longer time to recoup those profits than traditional financial institutions might otherwise request.<sup>101</sup>

Fifth, neighborhood communities have pioneered reframing responsibilities of traditional local government services in an age when local governments are more and more restricted in what they can do.<sup>102</sup> Services offered by some developments include schools, parks, safety, sanitation, and the ubiquitous homeowner’s association.<sup>103</sup> Perhaps most notable, however, are the rise of community associations, such as the Columbia Association, for the Columbia, Maryland development.<sup>104</sup> The Columbia Association has over 100 functions and forty facilities,

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 12-13. See *Residential Communities Initiative*, U.S. ARMY, <http://www.rci.army.mil/> (last visited Mar. 13, 2017).

101. AFGAR, *supra* note 71, at 12.

102. *Id.*

103. *Id.* at 14.

104. *Id.*; see also COLUMBIA ASS’N, <https://www.columbiaassociation.org/> (last visited May 17, 2017).

including childcare and fitness centers, with a \$66 million budget and 1,500 full- and part-time professional staff.<sup>105</sup> These community associations have proven highly successful; in 2017, Columbia, Maryland, was named the number one small city in America by Money Magazine.<sup>106</sup>

## 2. INITIATIVES FOR NEW COMMUNITIES

The Report also highlights five “initiatives” that would assist in making new communities a greater force for innovation in the real estate development world.

First, the Report suggests that the development community—both public and private—must “promote new communities as generators and organizers of responsible, responsive urban growth through partnerships with business entrepreneurs, knowledge-based institutions, and natural resource-based sponsors.”<sup>107</sup> Corporations produced some of the first socially responsible new communities, such as Cadbury’s Bournville development, continuing up through today with companies like Facebook creating urban neighborhoods with the services needed for their workers.<sup>108</sup> Developers and universities, such as the University of California, are also common participants in such plans.<sup>109</sup> Although not noted in the Report, technology companies, such as Panasonic with its 50,000-person new community outside of Denver, are also driving new communities as they try to exhibit how smart, data-driven cities can respond to environmental and social concerns of residents.<sup>110</sup>

Second, new communities are increasingly utilizing information and analytics in decision-making around development, which has all-too-often exhibited a “back of the envelope” approach to development and management.<sup>111</sup> The Report suggests five ways in which information remains a challenge for the industry:

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105. COLUMBIA ASS’N, *supra* note 104.

106. *Id.*; see e.g., *Best Places to Live 2016: Columbia, Md.*, TIME MONEY, <http://time.com/money/collection-post/4480692/columbia-maryland/> (last visited Sept. 18, 2016).

107. APGAR, *supra* note 71, at 14.

108. *Id.* See also *Bournville Village*, CADBURY WORLD, <https://www.cadburyworld.co.uk/plan-your-visit/bournville-village> (last visited May 17, 2017); Eliot Brown, *Facebook’s Answer to Silicon Valley Housing Crunch: Build Apartments*, WALL ST. JOURNAL (July 26, 2016), <https://www.wsj.com/articles/facebooks-answer-to-silicon-valley-housing-crunch-build-apartments-1469534402>.

109. APGAR, *supra* note 71, at 15.

110. *Panasonic is Helping the City of Denver Create a Brighter Future*, PANASONIC, <http://panasoniccitynow.com/panasonic-is-helping-the-city-of-denver-create-a-brighter-future/> (last visited May 17, 2017).

111. See e.g., APGAR, *supra* note 71, at 15.

- 1) defining decision-makers' needs and priorities for analytical information amid the tsunami of available data;
- 2) identifying metrics of those needs among near infinite possibilities;
- 3) designing report formats to highlight relevant metrics for stakeholders' issue agendas;
- 4) selecting systems for efficient, cost effective data processing; and
- 5) disseminating timely results to the right users in usable formats.<sup>112</sup>

The questions around information management become all the more important for developers of new communities as projects such as Panasonic's Denver project illustrate how data at a micro-scale can be utilized to create hyper-localized social, cultural, and environmental benefits.<sup>113</sup>

Third, new communities provide an avenue in which "to test, evaluate and apply urban policies, targeting new and underserved markets and investment opportunities."<sup>114</sup> The Report notes such innovations as new communities that re-use abandoned suburban corporate campuses for new residential communities and the revitalization of alleyways for accessory housing units in crowded cities.<sup>115</sup> In addition, new communities might also consider how they could utilize platform-based companies of the "sharing economy," and, in particular, how they might aggregate low income markets for housing and transportation to facilitate market growth in such platform-based industries.<sup>116</sup>

Fourth, new communities can provide a platform to create a "sense of place" and "experiment with novel community-level and individual building designs."<sup>117</sup> The strictures of Euclidean zoning, and its resulting conformity and perceived "staleness," gave rise to the flexibility of the planned unit development.<sup>118</sup> That remains a hallmark of the new com-

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112. *Id.*

113. *See Panasonic is Helping the City of Denver Create a Brighter Future*, PANASONIC, <http://panasoniccitynow.com/panasonic-is-helping-the-city-of-denver-create-a-brighter-future/> (last visited May 17, 2017).

114. *See, e.g.*, APGAR, *supra* note 71, at 15.

115. *Id.* at 16.

116. *See* Stephen R. Miller, *Decentralized, Disruptive, and On-Demand: Opportunities for Local Government in the Sharing Economy*, 77 OHIO ST. L. J. FURTHERMORE 47, 51-54 (2016).

117. *See e.g.*, APGAR, *supra* note 71, at 17.

118. *See generally* Byron R. Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15 (1965).

munity in both the US and the UK. The Report notes that, when done effectively, new communities illustrate this through seven principles:

- 1) assemble specialists, from designers and engineers to subject and functional experts;
- 2) set the tone of free-form dialogue with problem-solving direction;
- 3) tap generalists, with broad, deep experience in NCs and in other complex arenas;
- 4) promote mini-pilots to test game-changers which entail large investments and high risks but could yield significant benefits;
- 5) scrutinize existing services—who provides them, to whom and where, and how each could invigorate community spaces;
- 6) apply workplace improvements, such as flat organizations, space intensification, and sensor-enabled facilities; and
- 7) ‘hug the trees,’ both to beautify the streetscape and to sustain the NC’s ecology and economy.<sup>119</sup>

These projects often result in creative uses that result in extraordinary placemaking, such as the renovation of Denver’s Union Station, or plans for Chicago’s adaptation of a former US Steel mill to a 700-acre green new community.<sup>120</sup>

Fifth, the Report calls for a private investment fund “with sovereign wealth investors, pension funds, urban-oriented philanthropies, public venture funds, and other opportunistic sources.”<sup>121</sup> As the Report discusses throughout, “patient capital” is arguably the most problematic issue in community building today: investors want returns faster than the best communities can produce them, even when long-term profits would be as good, or better, than those demanded by short-term interests.<sup>122</sup> A fund of this sort would seek to invest in new communities that prioritize social, cultural, and environmental benefits but that are also committed to financing that permits those visions to be fulfilled over several decades. The Report notes two sound arguments, one private, one public, to this approach. For private investors, the ar-

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119. *Id.* at 17.

120. *Id.* See also Jay Koziarz, *Developers Unveil a New Plan for Chicago’s Long-Vacant US Steel South Works Site*, CURBED CHICAGO (Jan. 31, 2017, 10:29 AM), <http://chicago.curbed.com/2017/1/31/14445698/chicago-south-works-us-steel-new-development-plan> (detailing 12,000-unit plan for former steel mill site).

121. AFGAR, *supra* note 71, at 18.

122. *Id.* at 11.

gument would be that new communities “house the hard and soft assets that incubate your new ventures; and if some fail, as the ‘dot.com’ era proved, the [new communities] underlying property values and development opportunities remain.”<sup>123</sup> The public argument is simple: by avoiding public financing, this type of development avoids the warp-and-woof of politics, which has killed previous efforts both in the US and UK to create precisely this kind of development bank.<sup>124</sup>

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123. *Id.* at 19.

124. *Id.*