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## PLANNED UNIT DEVELOPMENT

### LEGISLATION:

### A SUMMARY OF NECESSARY CONSIDERATIONS

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The object of this article is to present some of the basic considerations which must be undertaken prior to developing a local planned unit development (PUD) ordinance. Since model ordinances often embody the legal framework of the area or state of their origination, a distant political subdivision often finds it awkward and unwieldy to adapt a model to its particular situation and land use philosophy. After extensive manipulation and/or amendment, a model often continues to remain unresponsive to local need. A rigid, fill-in-the-blanks methodology will therefore not be presented here; rather, what will be produced is a statement of principles and goals arranged in logical ordinance sequence. We leave to the planners and attor-

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neys of individual states the specific ordinance structure and language necessary to tailor this very general message to the particular set of local circumstances.

In presenting this article, we are particularly fortunate to have the benefit of the latest national study on planned unit development, *Planned Unit Development Ordinances*,<sup>1</sup> just completed by the American Society of Planning Officials (ASPO), as well as a series of papers presented at a conference conducted by the Rutgers University Center for Urban Policy Research and reprinted in *The Frontiers of Planned Unit Development: A Synthesis of Expert Opinion*.<sup>2</sup> In these two sources, experts and professionals were asked to respond to very specific questions in the area of PUD procedure. Their remarks will be repeated, for the most part, in whole. We thus gratefully acknowledge and reproduce fully the very pertinent remarks of such legal experts as Jan Z. Krasnowiecki, Norman Williams, Jr., Daniel R. Mandelker, I. Michael Heyman, Leonard L. Wolfe, and Frank S. Bangs, Jr. It is largely the efforts of these individuals that have allowed us to catalogue and to present in some structured fashion the material that follows.

#### I. BACKGROUND/CLARIFICATION OF CONCEPT

To paraphrase the words of Frank S. Bangs, Jr.<sup>3</sup>—In the late fifties and early sixties, planners and developers began to reach a consensus about the desirability of more innovative patterns of land development, particularly in urban renewal areas and the suburbs. Those who were cutting slum cancer out of central cities with bulldozers under the banner of urban renewal were not anxious to rebuild in the image of the old. Comprehensive plans for entire redevelopment project areas were ill-served by conventional lot areas and building bulk regulations.

Out on the urban fringe, where the postwar housing boom continued unabated, some planners and developers had become disenchanted with cookie-cutter subdivisions marching to the horizon.

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1. F. SO, D. MOSENA & F. BANGS, JR., *PLANNED UNIT DEVELOPMENT ORDINANCES* (ASPO Planning Advisory Service) (May 1973) [hereinafter cited as So, MOSENA & BANGS].

2. *THE FRONTIERS OF PLANNED UNIT DEVELOPMENT: A SYNTHESIS OF EXPERT OPINION* (R. Burchell ed. 1973) [hereinafter cited as PUD FRONTIERS].

3. This applies for the next two paragraphs. Bangs, *PUD in Practice: The State and Local Legislative Response*, in PUD FRONTIERS 24.

This pattern of development, as they saw it, was protected and perpetuated by Euclidian zoning.<sup>4</sup> With flexibility as their war cry, they turned to the ordinance drafters and lawyers for help. Simple "cluster" provisions and embryonic PUD ordinances began to appear.<sup>5</sup> This situation was improved by the drafting of a model PUD ordinance (ULI Model Act) in 1965<sup>6</sup> and an additional model act in 1969.<sup>7</sup>

Yet the appearance of ordinances at the local level was quite haphazard, bearing only slight resemblance to activity in those states permitting PUD development through the enactment of "full blown" enabling laws (New Jersey,<sup>8</sup> Pennsylvania,<sup>9</sup> Connecticut,<sup>10</sup> Kansas,<sup>11</sup> Colorado,<sup>12</sup> Nevada<sup>13</sup>).

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4. Krasnowiecki, *Legal Aspects of Planned Unit Development: In Theory and in Practice*, in PUD FRONTIERS 104. "Euclidian zoning" refers to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

5. For a discussion of some of the social and economic forces encouraging PUD and New Town development see R. BURCHELL & J. HUGHES, *PLANNED UNIT DEVELOPMENT: NEW COMMUNITIES AMERICAN STYLE* (1972) [hereinafter cited as BURCHELL & HUGHES]; J. CLAPP, *NEW TOWNS AND URBAN POLICY: PLANNING METROPOLITAN GROWTH* (1971); H. MAXWELL, *PUD: A BETTER WAY FOR SUBURBS* (1971); Bosselman, *Synthesis of a National Growth Policy: The Role of Planned Unit Development*, in PUD FRONTIERS; Sternlieb, Burchell & Hughes, *Planned Unit Development: Environmental Suboptimization*, 1 ENVIRONMENTAL AFFAIRS 694 (1972). For some of the early legal discussions of PUD and similar housing developments see Bair, *How to Regulate Planned Unit Developments for Housing—Summary of a Regulatory Approach*, 17 ZONING DIGEST 185, 221 (1965); Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959); Krasnowiecki, *Legal Aspects of Planned Unit Residential Development*, Technical Bull. No. 52, Part I (Urban Land Inst. 1965); Lovelace, *Zoning for Large-Scale Developments*, 14 ZONING DIGEST 129 (1962); *Symposium—Planned Unit Development*, 114 U. PA. L. REV. 3-135 (1965).

6. Babcock, McBride & Krasnowiecki, *Suggested Legislation for Planned Unit Residential Development*, Technical Bull. No. 52, Part II (Urban Land Inst. 1965) [hereinafter cited as Babcock, McBride & Krasnowiecki].

7. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *NEW PROPOSALS FOR 1970: ACIR STATE LEGISLATIVE PROGRAMS*, § 31-36-00 (1969).

8. N.J. STAT. ANN. §§ 40:55-54 to -67 (1967).

9. PA. STAT. ANN. tit. 53, §§ 10701-10711 (Purdon 1972).

10. CONN. GEN. STAT. ANN. §§ 8-13b-k (Supp. 1969).

11. KAN. STAT. ANN. §§ 12-725 to -733 (Supp. 1972).

12. COLO. REV. STAT. ANN. §§ 106-6-1 *et seq.* (Supp. 1972).

13. Nev. Senate Bill No. 126 (April 19, 1973), *amending Title 22, NEV. REV. STAT.* (1971).

New York,<sup>14</sup> Indiana,<sup>15</sup> Wisconsin,<sup>16</sup> Ohio<sup>17</sup> and Illinois<sup>18</sup> make bare mention of PUD in their planning and zoning enabling legislation, but allow local ordinances to provide for PUD as a special use, special district, etc.

Finally, in a few states (California, Virginia and Maryland), PUD has thrived locally without specific mention of the concept in any statewide enabling legislation.<sup>19</sup>

Yet, despite the efforts of those who contributed to the models of existing enabling legislation, PUD has not had a massive impact nationally. To the degree that this is a result of difficulty in interpreting the ULI Model Act, it will be the task of this article to attempt to provide both clarity and currency to the model. As prelude to substantive material, PUD will be defined and, in so doing, compared to the traditional means of land use regulation.

Both the Ohio and California interpretations of PUD are similar and summarize the dominant view found within the literature.

As used in this section, "planned-unit development" means a development which is planned to integrate residential use with collateral uses, and in which lot size, setback lines, yard areas, and dwelling types may be varied and modified to achieve particular design objectives and make provisions for open spaces, common areas, utilities, public improvements, and collateral non-residential uses.<sup>20</sup>

[A] planned unit development might be described as a tract of land absolved from conventional zoning to permit clustering of residential use and perhaps compatible commercial and industrial uses, and permitting structures of differing heights.<sup>21</sup>

The general goals and structure of any PUD ordinance must therefore be formulated according to the principle that the planned unit development concept is a departure from the traditional concepts of

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14. N.Y. TOWN LAW § 281 (McKinney Supp. 1972); N.Y. VILLAGE LAW § 7-738 (McKinney Supp. 1973); N.Y. GEN. CITY LAW § 37 (McKinney 1968).

15. IND. ANN. STAT. § 53-756(7) (1964).

16. WIS. STAT. ANN. § 62.23(7)(b) (Supp. 1973).

17. OHIO REV. CODE ANN. §§ 303.022, 519.021 (Page Supp. 1972).

18. ILL. ANN. STAT. ch. 24, § 11-13-1.1 (Smith-Hurd Supp. 1973).

19. Bangs, *supra* note 3.

20. OHIO REV. CODE ANN. § 519.021 (Page Supp. 1972).

21. Orinda Homeowners Comm. v. Board of Supervisors, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (Dist. Ct. App. 1970).

planning, zoning, and subdivision regulation. Consequently, aside from the preset standards of traditional regulations, a major addition to a municipality's land use controls is necessary to give the developer the fixed format he is entitled to expect and to give the municipality the authority to permit variations required by planned unit developments.

Although controls in varying degrees are already available within existing land use regulations, PUD, under a *single* umbrella, permits a mixture of land uses (residential, commercial, and industrial) on the same land tract, increased flexibility in design (including the clustering and mixing of dwelling types), and the garnering of public and common open space, the latter to be used by and maintained for the residents of the proposed development. The land tract is developed as a whole according to a plan, with one or more of the nonresidential elements potentially able to serve regional as well as local needs.

The specific elements of the concept's name attest to its land use uniqueness. *Planned development* in this case refers to physical development via mid-range (four to eight years) programming. The time span is sufficiently long to enable a community to attempt to control its tempo and sequence of development, yet short enough to allow both the developer's cash flow requirements and management capabilities to be realistic.

The PUD alternative is a program that hinges on balances—a balance in the use of land in terms of residential and nonresidential requirements; balances among public open space, commons to be used and maintained by groups and associations, and private land; variation in location and grouping of buildings to create a choice of physical environments; and balances among walkways, roads, and highways of different types to ensure safe and convenient movement of people and vehicles.

A legally binding plan (effectively a regulation) permitting control of the tempo and sequence of a development is important because a community can now protect itself from some of the deleterious side effects of growth. It is possible to schedule services when they are needed in a way that makes their cost least burdensome. Tempo and sequence of development in the PUD may be controlled so that land uses that provide only moderate local revenue, but require large municipal and school service costs, are scheduled simultaneously with those that provide more revenue but are not as costly to service.

Scheduled development makes inroads on previously undeveloped areas in a steady, calculable manner enabling a municipality to plan and service growth regularly. In addition, housing is accompanied by shopping and industry so that the development is in the position of "paying its own way."

*Unit development* envisions a single agency dealing with a single manager of an area's growth. The one-to-one relationship develops the land area as a whole, providing sufficient design and service criteria to meet the needs and desires of the prospective populace. The very scale of a typical PUD permits the inclusion of amenity levels that more conventional patterns of real estate activity simply cannot incorporate. Besides the basic servicing hardware (water supply, utilities, sewerage, and storm drainage), additional elements, such as recreation facilities, parks, school and church sites, neighborhood centers, etc., become part of the neighborhood mosaic. These are anticipated and do not spring up erratically as the demand emerges for such services.

## II. SUBSTANTIVE PROVISIONS OF PUD ORDINANCES

### A. *Enactment*

According to a recent ASPO<sup>22</sup> report, of those communities surveyed and having PUD provisions (30%), three-quarters indicated that planned unit development is in some fashion directly associated with the local zoning ordinance as opposed to other existing land use regulations. The literature of the field also seems to emphasize this approach.<sup>23</sup> Since PUD may potentially involve a change in the use designation of an existing tract of land, a legislative determination similar to that required for a rezoning seems to be the appropriate vehicle either to confer locally a means with which to handle PUD or to determine whether other avenues of development are more appropriate or desirable.

As an adjunct part of the zoning ordinance, the PUD provision may take several forms, for example, floating zone,<sup>24</sup> conditional (per-

22. So, MOSENA & BANGS 10.

23. See D. MANDELKER, *CONTROLLING PLANNED RESIDENTIAL DEVELOPMENTS* (ASPO monograph) (1966); N. WILLIAMS, JR., *LAND USE AND THE POLICE POWER* ch. 48 (forthcoming 1974); Subcommittee on Public Regulation of Land Use, *Planned Unit Developments and Floating Zones*, 7 *REAL PROPERTY PROBATE AND TRUST JOURNAL* 61, 63 (1972).

PUD LEGISLATION

mitted) use, special exception, etc. In a 1966 study conducted by the New Jersey Department of Community Affairs, 65% of the sample ordinances surveyed placed planned development in floating zones, while most other ordinances used the technique of conditional use.<sup>25</sup>

In the just completed ASPO report, although the question was not specifically asked, it was the feeling of Frank S. Bangs, Jr. that "PUD districts are usually handled as floating zones, where the PUD designation is affixed to a particular parcel only upon application of the developer and approval by the designated public body."<sup>26</sup> In this same study, PUD's that were channeled through the zoning ordinance received the following procedural emphases:

<i>Zoning Technique</i>	<i>Number</i>	<i>Per cent</i>
Special Exception	11	9.2
Conditional Use	23	19.2
Separate PUD Provisions in Existing District Regulations	21	17.5
Overlay District	13	10.8
Separate District Zoned for PUD	33	27.5
Other	19	15.8
Total Responses	120	100.0

The current New Jersey PUD enabling legislation<sup>27</sup> utilizes a combination of the above procedures. The conditions imposed on PUD's resemble a conditional use, and the fixing of PUD boundaries at the time of approval resembles a floating zone. At its origination, it was

24. See Aloï, *Legal Problems in Planned Unit Development*, 1 REAL ESTATE L.J. 5, 18 (1972); Krasnowiecki, *supra* note 4; Subcommittee on Public Regulation of Land Use, *supra* note 23. See also Babcock, *An Introduction to the Model Enabling Act for Planned Residential Development*, 114 U. PA. L. REV. 136 (1965); Krasnowiecki, *supra* note 5; Krasnowiecki, *Model Land Use and Development Code*, 1971 URBAN L. ANN. 101. For cases discussing the legality of floating zones see *Sheridan v. Planning Bd.*, 159 Conn. 1, 266 A.2d 396 (1969); *Aubinoe v. Lewis*, 250 Md. 645, 244 A.2d 879 (1968); *Anderson v. Township of Highland*, 21 Mich. App. 64, 174 N.W.2d 909 (1969); *Prevost v. Township of Macomb*, 6 Mich. App. 462, 149 N.W.2d 453 (1967); *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (1951).

25. N.J. Dept. of Conservation and Economic Development, *Planned Unit Development: A New Goal for Achieving a More Desirable Environment* (1966) (unpublished).

26. Bangs, *supra* note 3, at 34.

27. See note 8 *supra*.



thought that the New Jersey procedure combined the best of both worlds. To some degree, the general location of potential PUD's were known (*i.e.*, within districts meeting certain conditions), but other than an implied linkage, no specific districts were specified. Yet, according to the lower court decision in *Rudderow v. Township Commission* (subsequently overturned),<sup>28</sup> if the "purposes" section of New Jersey's enabling legislation was to be taken literally, PUD, if in accordance with the zoning power, should be viewed as applying only to certain specified districts. In this case, the conditional use would appear to be the most appropriate vehicle to permit PUD. PUD may take place in specified districts provided that certain conditions of development and application are met.

Consideration of PUD's treatment, however, necessitates remembering its origin. PUD represents the culmination of flexibility in land use matters;<sup>29</sup> preset regulation has been replaced by increased administrative discretion available to the planning board. It must be accepted in mature fashion that this movement away from the rule of law carries with it a natural loss of predictability in land use matters. There would seem to be no reason why PUD should be restricted to certain areas of a municipality if it were not for this "predictability" matter.

This latter view is inherent in the decision by the appellate court in *Rudderow*.<sup>30</sup> As Krasnowiecki states:

[T]he Township had made the PUD approach available in every district in the Township. Opponents of a project which was approved under the ordinance challenged the project and the ordinance on various grounds, among them, the ground that the PUD should have been districted. The trial court held [in *Rudderow*] that the PUD must be districted relying in part on the New Jersey Constitution which states that in the exercise of their zoning powers municipalities *may* divide the municipality into districts. The court read the "may" as a "shall." The Appellate Division reversed the trial court on this point, as well as on some others which I will mention later. *So strong is the*

28. 114 N.J. Super. 104, 274 A.2d 854 (L. Div. 1971), *rev'd*, 121 N.J. Super. 409, 297 A.2d 583 (App. Div. 1972).

29. See KAN. STAT. ANN. § 12-725 (Supp. 1972); PA. STAT. ANN. tit. 53, § 10701 (Purdon 1972). Some have argued that PUD statutes are more restrictive and subject to more controls than normal Euclidean zoning. See *Moore v. City of Boulder*, 29 Colo. App. 248, 484 P.2d 134 (1971); Subcommittee on Public Regulation of Land Use, *supra* note 23.

30. See note 28 and accompanying text *supra*.

## PUD LEGISLATION

*language of the Appellate Division rejecting the districting idea that it raises the question whether, under the Model PUD statute (which is similar in this respect in New Jersey as well as in the other states that have adopted it) districting is at all permissible.*<sup>31</sup>

### B. Designation

One of the reasons for the preference of PUD over traditional elements of the existing land use system is its ability to consolidate the approval authority in one agency:

[B]e it the legislative body or some appointed administrator, we hoped to come as close as possible to the unitary permit concept . . . a single permit procedure for all elements of the development. Thus the Model Statute expressly combines elements of the development traditionally falling within the zoning power (use, bulk, location of buildings and structure) with elements traditionally falling within the subdivision and site planning control (streets, sidewalks, grading, lighting, etc.) by granting to the municipal authority exclusive jurisdiction to approve the development as to all such elements.<sup>32</sup>

The municipal agency designated to administer PUD can either be the planning board, the board of adjustment, or the legislative body of the municipality. "The Model Act did not attempt to prescribe what official or body on the local level should serve as the 'municipal authority.' Rather, the choice was left with the local governing body, the statute authorizing the local legislative body to appoint itself, 'or any committee or commission.'"<sup>33</sup>

A recent ASPO survey indicates that 53% of the communities that implement PUD through the special exception or conditional use approach use the planning board as the primary agency for review and approval. The legislative body may be required to take formal action on approval (in 59% of the responses using the special permit technique), or render a final decision in case of an appeal from the action of the planning commission.<sup>34</sup>

In the limited experience to date in New Jersey, once a legislative determination has been made to permit PUD within the community as

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31. Krasnowiecki, *supra* note 4, at 106 (emphasis added and footnotes deleted).

32. See Krasnowiecki, *supra* note 4, at 101.

33. *Id.*

34. *So, MOSENA & BANGS* 10.

a development technique, the planning board is given the authority to grant or deny specific PUD applications, basically when certain conditions are met allowing rezoning a portion of the community without resort to legislative action.

This may strike some of the more conservative members of the bar as a vast departure from established practice. An examination of the ordinances, (i.e., Twin Rivers, N.J.) however, leads inescapably to the conclusion that what the original Enabling Act and the refinements of the local ordinance are attempting to deal with is the creation of a "micro city" which is a situation that is *sui generis*. There would seem to be no sound reason why this cannot be done in this way. In effect, what the legislative body is saying is that "We are going to have a population problem in the area and we might as well control it. You, the Planning Board, are best equipped to handle this situation and to plan the creation of the entire community and control it to the best advantage of all concerned under the general and specific guidelines we have set—do so." This is a very different matter from ordinary zoning.<sup>35</sup>

### C. Purposes

The "purpose" section of any model ordinance<sup>36</sup> should contain as many pertinent explanatory statements as possible. The gist of these statements typically refer to the reasons why PUD originated: to handle the peculiar development realities of large developments, to emphasize the blending rather than the separation of land uses, to incorporate improvements in land assemblage and development techniques, to encourage the creative use of open space, and to relate various land use elements within a large development to the specific limitations of a particular site.

The Colorado enabling legislation, borrowing some additional features relating to industrial uses from New Jersey, parrots the Model Act in its statement of purpose:

LEGISLATIVE DECLARATION (1) (a) In order that the public health, safety, integrity, and general welfare may be furthered in an era of increasing urbanization and of growing demand for housing of all types and design, the powers set forth

35. Wolfe, *New Zoning Landmarks in Planned Unit Developments*, Technical Bull. No. 62 (Urban Land Inst. 1968).

36. For statements of PUD's desirability see N.Y. TOWN LAW § 281 (McKinney Supp. 1972); PA. STAT. ANN. tit. 53, § 10701 (Purdon 1972); KAN. STAT. ANN. § 12-725 (Supp. 1972).

## PUD LEGISLATION

in this article are granted to all counties and municipalities for the following purposes:

(b) To provide for necessary commercial, recreational, and educational facilities conveniently located to such housing;

(c) To provide for well located, clean, safe, and pleasant industrial sites involving a minimum of strain on transportation facilities;

(d) To insure that the provisions of the zoning laws which direct the uniform treatment of dwelling type, bulk density, and open space within each zoning district will not be applied to the improvement of land by other than lot by lot development in a manner which would distort the objectives of the zoning laws;

(e) To encourage innovations in residential, commercial, and industrial development and renewal so that the growing demands of the population may be met by greater variety in type, design, and layout of buildings and by the conservation and more efficient use of open space ancillary to said buildings;

(f) To encourage a more efficient use of land and/or public services, or private services in lieu thereof, and to reflect changes in the technology of land development so that resulting economies may enure to the benefit of those who need homes;

(g) To lessen the burden of traffic on streets and highways;

(h) To encourage the building of new towns incorporating the best features of modern design;

(i) To conserve the value of the land;

(j) To provide a procedure which can relate the type, design, and layout of residential, commercial, and industrial development to the particular site, thereby encouraging preservation of the site's natural characteristics; and

(k) To encourage integrated planning in order to achieve the above purposes.<sup>37</sup>

The section on purposes should also present elements tailored to the local situation so as to identify more precisely the unique circumstances involved. For example, the above section from the Colorado Enabling Act may be much more appropriate for a municipality on the suburban-rural fringe. In contrast, an urban core municipality

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37. COLO. REV. STAT. ANN. § 106-6-2 (Supp. 1972).

may desire to use PUD in a redevelopment framework. For such a reason, the purposes section might include the following:

In recognition of the urgent need for the redevelopment of those congested and blighted areas abutting the central areas of the City, in order to furnish adequate housing facilities in proximity to the commercial and civic amenities of the central areas of the City, and in the belief that private investment should be encouraged to contribute to that redevelopment; and in recognition that such necessary redevelopment cannot be expected to take place in strict accordance with those uniform regulations appropriate to more viable and established residential areas of the City, this zoning ordinance is hereby amended . . . .<sup>38</sup>

Although the above statements of objective are quite inclusive, a municipality should strive to tailor the wording of its ordinance to specific needs of the local situation. Unfortunately, in this part of the ordinance, "clip and paste," rather than sound forethought, frequently prevails.

#### D. *Definitions*

Most of the definitions found in enabling legislation and local ordinances repeat the language of the Model Act. Connecticut's enabling legislation is an example:

**Definitions.** As used in this chapter, "municipality" means the unit of government which is encompassed within the boundaries of a town, except that political units whose areas are within the boundaries of a town but not coexistent with the boundaries of such town shall not be considered a municipality; "common open space" means a parcel or parcels of land, or an area of water, or a combination of land and water, within the site designated for a planned unit development, and designed and intended for the use and enjoyment of residents of the planned unit development and may contain such complementary structures and improvements as are necessary and appropriate for the benefit and enjoyment of such residents; "owner" means the legal or beneficial owner or owners of the land proposed to be included in a planned unit development and the holder of an option or contract to purchase, or other person having an enforceable interest in such land, shall be deemed to be an owner; "plan" means the provisions for development of a planned unit development, including but not limited to, a plat of subdivision, covenants relating to use, location and bulk of buildings and other structures, intensity of use or density of development, private streets, ways and

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38. Babcock, McBride & Krasnowiecki 87.

parking facilities, and common open space and public facilities; "planned unit development" means an area of land controlled by an owner, to be developed as a single entity for not less than twenty-five dwelling units, the plan for which does not correspond in lot size, bulk, type of dwelling, density, lot coverage and required open space to the regulations established in any zoning district created, from time to time, under the provisions of the zoning ordinances or regulations of the municipality; "statement of objectives for planned unit development" means a written statement of the goals of the municipality with respect to land use for residential purposes, density of population, direction of growth, location and function of streets and other public facilities, and common open space for recreation or visual benefit, or both, and such other factors as the planning commission, or planning and zoning commission, of such municipality may find relevant in determining whether a planned unit development shall be authorized.<sup>39</sup>

Important additions should include clarification of the difference between "common" and "public" open space and recognition of the potential regional nature of the PUD's nonresidential elements. While the first issue amounts to nothing more than a procedural omission in the Model Act and most earlier ordinances, the second issue is more substantive and volatile, occasioning in the *Rudderow* case the setting aside of a local ordinance only to have it reinstated by an appellate court.<sup>40</sup> The argument in this New Jersey case turns, among other things, on the question of the regional potential of inclusive PUD commercial uses.

Since New Jersey extended the PUD concept to include industry<sup>41</sup> (by definition regional), the question of "regional commercial" becomes moot. The *industrial* use, and associated work trip, in any form other than a "company town" is non-local in nature. Why shouldn't the commercial uses also be afforded a regional position? If the issue is *economic feasibility*, that is, allowing nothing more in a PUD than can be supported by its intended resident, then the law is in the position of granting the developer the right to determine his market in one area (industry) and not in the other (commercial). If the developer, for one reason or another, feels he can fill his industry and

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39. CONN. GEN. STAT. ANN. § 8-13b (Supp. 1969).

40. See note 28 and accompanying text *supra*.

41. N.J. STAT. ANN. §§ 40:55-55, -57(d), -66 (1967). See Krasnowiecki, *supra* note 4.

will bank it, there is no reason why the developer cannot be counted on to also fill his commercial uses or go broke on both. The community is protected from the latter situation by a substantial application fee that covers the expense of hiring experts to evaluate the developer's intended proposal.

In contrast, if the argument is one of bringing nondevelopment people into the development area (since industry, by definition regional already, proposes to do this), the people within the PUD should be protected from the "deleterious byproducts" of either commercial and industrial land uses or from neither. Obviously, the former alternative has not been deemed necessary; only the latter remains as an acceptable alternative.

If the commercial portion of a PUD is not allowed to grow to regional stature, a serious consideration arises as to whether two PUD's, both required to demonstrate sustained economic feasibility, can so demonstrate, relying solely on the strength of their industrial components. In New Jersey, the broadening of the original enabling legislation via the proposed state land use law expands the PUD concept to acknowledge potential regionality of commercial uses with no conflict to its evolutionary origins.

#### E. *Standards*

The "standards" section is the core of the modern PUD ordinance because it represents specific community constructs as to the direction and form local planned development will take. It is important that the standards chosen reflect community goals and circumstances peculiar to the development area. It is also important to remember, however, that PUD attempts to regulate land use through greater reliance on administrative discretion and less reliance on specific standards. According to Krasnowiecki's interpretation, the basic PUD concept established a procedure "under which a municipality would be encouraged to 'throw away the book' and sit down with the developer to negotiate a better product, hopefully a less expensive one for the consumer."<sup>42</sup>

In essence, the municipality has specific ideas on the ideal type of development desired, while the developer, with a profit motive, approaches the municipality with a practical concept. The negotiation

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42. Krasnowiecki, *supra* note 4, at 107.

## PUD LEGISLATION

results in a trade-off or mixture of ideas. This meeting of the minds, however, becomes more difficult given the volume of detail emerging in PUD ordinances.<sup>43</sup> Thus, a bargaining approach which was designed to encourage flexibility is beginning to look more and more like standard zoning. The broad result is the emergence of the PUD paradox: flexibility versus preset standards.

The PUD concept encourages a symbiotic relationship between developer and regulatory authority. The intimacy of this relationship, however, is being undermined by an emerging rigidity. Consequently, two contradictory lines of thought have been isolated in the ASPO survey.<sup>44</sup> The innovation most praised by survey respondents is the flexibility allowed under their PUD ordinances. One community essentially says to the developer, "Give us your best, and if we like it, we will approve it. Compete with the future. Be imaginative. Give us good neighborhoods to live in. Don't worry about standards—show us it will work."<sup>45</sup> The result is negotiation, and the outcome is a trade-off of ideas leading to a superior final product.

At the same time, of the complaints expressed by respondents of the ASPO survey, most centered on the lack of substantive standards by which to guide development. The following table indicates some of the more common standards used and the frequency of their occurrence in the ordinances surveyed.<sup>46</sup>

<i>Specific PUD Ordinance Standards</i>	<i>Percentage of Ordinances With Specific Standards</i>
Minimum parcel size	92.6
Uses permitted	79.0
Density	77.8
Quantity of parking spaces	74.1
Maximum site coverage	51.9
Streets and utilities	48.1
Building height and bulk	46.9
Usable public open space	46.9

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43. For other problems in the PUD bargaining process, *e.g.*, pressures on local officials not to allow growth, see N. WILLIAMS, JR., *supra* note 23, ch. 48.

44. *So*, MOSENA & BANGS 26.

45. *Id.* at 5-7.

46. *Id.* at 26.



Building spacing	44.4
Screening and fencing	38.3
Signs and street lighting	35.8
Perimeter requirements	34.6
Private open space	33.3
Landscaping	33.3
School and recreation site dedication	25.9
Location of parking spaces	24.7
View protection	7.4
Building architecture	4.9

A fine line must therefore be straddled. A PUD that is overly restrictive defeats its own purpose. Although tempted, one should be restrained from overloading this section of the ordinance. Yet a by-product of generality is arbitrariness and unpredictability. PUD standards must be specific enough to limit these latter two elements yet sufficiently general to allow increased flexibility in land use.

#### 1. Size

PUD's should be of sufficient size<sup>47</sup> to accomplish their basic objectives.<sup>48</sup> Central city ordinances may therefore have much less restrictive size criteria than suburban ordinances. In the latter case, if features such as a variety of housing types, compatibility with the surrounding area, and an open space network are desired, a relatively large size would be needed. Moreover, a large number of dwelling units are required to make economically feasible the provision of significant open space improvements. Furthermore, too low a size limit encourages many applications that are not truly PUD's.

Small PUD's (less than 250' acres) increase the concept's usage, yet

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47. For a discussion of PUD size and density see Annot., 43 A.L.R.3d 888 (1972); Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15 (1965); Lloyd, *A Developer Looks at Planned Unit Development*, 114 U. PA. L. REV. 3 (1965).

48. Minimum PUD sizes differ by locale. Portland, Ore., for example, requires a minimum four-acre PUD while the county surrounding Portland will accept a smaller PUD if special circumstances exist. Los Angeles has recently eliminated its minimum five-acre PUD size. Hendersonville, N.C. has a one-acre minimum for planned commercial developments and a two-acre minimum for planned residential home parks. In most cases, planners overseeing PUD ordinances would prefer smaller "minimums" than the ordinance actually permits. *See* So, MOSENA & BANGS 29.

have a tendency to also increase adjacent sprawl in peripheral or rural areas. They are not large enough to control the development within the town and to promote, at a faster rate, development external to the PUD. They may be perfectly adaptable to suburban or urban areas and, according to ASPO, are quite popular nationally.

Moderate size PUD's (250-1,000 acres) have been the most frequently used size in New Jersey. There seems to be a critical balance between scope of development and cash flow requirements that accords with New Jersey developers' management capacities.

Larger PUD's (in excess of 1,000 acres) may be most efficient both as a means of controlling sprawl and in terms of ordinance-processing-effort versus final product. Yet, these PUD's may also strain the local developer's management capacity. The documentation a developer is required to produce as part of the procedural requirements should be closely scrutinized to provide additional assurance that he is up to the larger PUD task.

## 2. Relationship of Uses<sup>49</sup>

This standard is again a critical part of the PUD ordinance. Multiple land uses are a distinguishing feature of planned unit development. The residential to nonresidential (commercial and industrial uses) ratio must be established necessarily to reflect community desires. Severe nonresidential percentages (combined commercial and industrial uses in excess of 40% of the total acreage) dominate the local market to effectively limit development in a community to a single PUD. Very limited nonresidential percentages (less than 10% for combined industrial and commercial uses) will permit several PUD's in the same municipality, yet the "even" growth normally associated with PUD's maintenance of a level, local property tax rate may not be as great.

Originally, the ULI Model Act limited nonresidential uses to those that were "designed and intended to serve the residents" of the PUD.<sup>50</sup> As a function of hindsight this can probably be considered a mistake largely incurred for reasons of expediency rather than theory. It was thought at the time that the PUD idea would be opposed if there were any suggestion of extensive commercial or industrial use. For a

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49. See BURCHELL & HUGHES 235.

50. Babcock, McBride & Krasnowiecki 70.

smaller PUD, however, shopping facilities designed to serve only the residents are often simply not viable.

When Pennsylvania<sup>51</sup> adopted the Model Act it specifically modified the above limitation to permit "those nonresidential uses deemed to be appropriate for incorporation in the design of the planned residential development."<sup>52</sup> The New Jersey version went even further. The statute included references to commercial and industrial developments in the preamble and modified the residential bias in a number of other places,<sup>53</sup> but failed to remove the ULI limitation in Section 3 (a) (2) of the Model Act. As noted previously, this oversight represented one of the more important issues in *Rudderow*.<sup>54</sup>

Although the New Jersey legislature had expanded the PUD concept to include commercial as well as industrial development in numerous portions of the statute, the trial court in *Rudderow* fixed its attention on the single sentence in the statute containing the limitation and ruled that a commercial facility serving the broader region could not be approved as part of a PUD.<sup>55</sup> The appellate division reversed and stated: "Municipalities, as part of their comprehensive zoning plans, may properly anticipate and provide for the present needs of the public now residing in the areas surrounding the planned community, as well as the reasonably foreseeable future needs of the public they anticipate will move into the area and require servicing."<sup>56</sup> This probably represents a sound interpretation of the New Jersey statute as well as an eminently sensible view as to the extent a nonresidential use may be incorporated within an otherwise residential planned unit development.

### 3. Density

The net density for residential areas usually corresponds to the density ranges specified in the local comprehensive plan. The residential density categories specified in PUD ordinances also correspond to those specified in the comprehensive plan, although the extremely low-density, single-family, detached categories may be deleted. There

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51. This discussion is based upon Krasnowiecki, *supra* note 4, at 111.

52. PA. STAT. ANN. tit. 53, § 10705(a)(2) (Purdon 1972).

53. See note 41 *supra*.

54. See note 28 and accompanying text *supra*.

55. 114 N.J. Super. 104, 274 A.2d 854 (L. Div. 1971).

56. 121 N.J. Super. at 416, 297 A.2d at 587.

is a growing tendency, however, to restrict the densities in a PUD to those permitted under standard zoning of the same land. The reason for this is not complex—municipalities fear the potential growth that a PUD represents.

Concern over potential growth is reflected in other ways. A very large amount of detail is beginning to filter into PUD ordinances. The apparent rationale is to find a way to turn down a developer.<sup>57</sup> You may not like his design, record of management, or financial responsibility, or maybe enough housing for one year has been approved. Other legitimate land use reasons for refusal are also convenient. Increasing the requirements insures that the developer will have to invest heavily and therefore build for the wealthy. Nonetheless, density bonuses beyond the given standards have been given by municipalities for providing amenities in excess of conventional open space, recreation facilities, underground utilities, architectural treatment, etc.

A more encompassing measure of density is FHA's Land Use Intensity (LUI) rating. It covers a broader field of planning factors (*i.e.*, floor area, open space, livability, and recreation spaces), correlates the factors and distills them into a single numerical rating.

At the September 1973 Zoning Game Conference at Pennsylvania State University, Fred H. Bair, Jr. proposed a mock LUI provision for a local PUD ordinance. This provision, which appears below, is the substance if not the form communities might follow should they opt for Land Use Intensity to control the relationships of structural mass and open space.

*Land Use Intensity Ratings and Related Requirements.*

For purposes of regulating PD-H [planned development-housing] districts, the municipality is hereby divided into Land Use Intensity (LUI) sectors as indicated on the official zoning map by overlay. Within any such sector, minimum area required for creation of a PD-H district and standard ratios establishing maximum residential floor area, minimum residential open space, livability space and recreation space are governed by the LUI rating of the district indicated in the table below.

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57. Krasnowiecki, *supra* note 4, at 106.

*Minimum Area Requirements and Standard Ratios for PD-H Districts*

	<i>Land Use Intensity</i>				
	40	45	50	55	60
Min. area required for district (acres)	40	40	20	10	5
<i>Ratios</i>					
Max. residential floor area	0.200	0.283	0.400	0.566	0.800
Min. open space	3.8	2.6	1.8	1.3	0.85
Min. livability space	2.6	1.7	1.1	0.71	0.50
Min. recreation space	0.18	0.15	0.13	0.11	0.10

Application of standard ratios:

Gross land area  $\times$  floor area ratio = maximum permitted residential floor area

Actual floor area  $\times$  open space ratio = minimum required open space

Actual floor area  $\times$  livability space ratio = minimum required livability space, a portion of total open space

Actual floor area  $\times$  recreation space ratio = minimum required recreation space, a portion of livability space

*Example of ratios applied to PD-H district, LUI 50, with 100 acres gross land area*

Gross land area 100 acres	$\times$ 43,560 sq. ft. per acre	= 4,356,000 sq. ft.
	$\times$ floor area ratio	.400

*Maximum residential floor area permitted* = 1,742,400 sq. ft.

Residential floor area actually proposed	1,725,000 sq. ft.
$\times$ open space ratio	1.8

*Minimum open space required* = 3,105,000 sq. ft.

Residential floor area actually proposed	1,725,000 sq. ft.
$\times$ livability space ratio	1.1

*Minimum livability space required* = 1,897,500 sq. ft.

Residential floor area actually proposed	1,725,000 sq. ft.
$\times$ recreation space ratio	0.13

*Minimum recreation space required* = 224,250 sq. ft.

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Note: In this example, minimum open space required would be approximately 72% of the gross area of the tract, leaving 28% for building coverage.

Livability space (landscaped or otherwise appropriately improved open space closed to vehicles) subtracted from total open space would leave 1,207,500 sq. ft. of open space for parking, drives, delivery areas and the like.

#### 4. Utilities

The development of utilities and services so that they are available and usable when needed by future residents is an integral part of the PUD concept. The developer is increasingly being called to bear the initial costs (he subsequently passes them on to the consumer) under the theory that his development of the land creates a need for the improvements and he later will derive benefit from them. Most improvements required of the developer are well established in local land use law. Other improvements beyond what would normally be required may be traded off against, for example, increased density.

#### 5. Site and Structure Regulations

Site and structure regulations in a PUD are usually kept to a minimum.<sup>58</sup> Certain specific requirements are set forth, such as rights of ingress and egress, maximum number of attached units, street widths and ways, buffering, parking requirements, and height limitations. These specifics are bare minimums required for reasons of safety (for example, access for fire equipment). There is no attempt to emulate the precise "standards" that regulate lot size, yards, and height and bulk, which normally are found in conventional land use regulations. A PUD ordinance is purposely "thin" in these areas to permit increased creativity in land use, a major purpose of PUD.

#### 6. Permitted Uses

The PUD envisions a broad variety of residential uses.<sup>59</sup> While this trend parallels PUD's evolution from existing land use regulations, that is, a movement away from zones of repetitive and monotonous development, it is conceivable that a forced mixture of residential uses may, from an economic standpoint, be a misuse of a specific tract of land. A local determination is therefore definitely required regarding the extent of the mixture of dwelling types ultimately per-

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58. BURCHELL & HUGHES 237.

59. See Aloï, *supra* note 24, at 6; Subcommittee on Public Regulation of Land Use, *supra* note 23, at 63.

mitted. A wide variety of residential uses, however, has been successfully blended in existing PUD's.

Planned commercial and industrial uses are definitely seen as part of the PUD concept. Again, this is in keeping with the literature advocating both "flexibility" in modern zoning and implementation of performance standards as a means of blending various types of land uses, emphasizing their compatibility rather than their disharmony.

## 7. Open Space

The requirements for open space, if a condition of approval, usually contain provisions covering quantity, location and maintenance. The first requirement is either stated as minimum acreage per dwelling unit or necessary open space acreage per gross acreage. The second requirement frequently calls for planning board approval of the proposed open space location. Finally, maintenance of the open space may be assigned to the development's residents in the form of a "Homes Association" or "Community Trust," or to the municipality upon the land's allocation for public use. While the "Homes Association" appears to be the legal device most extensively used, the "Community Trust" has developed quite a following in both Pennsylvania and New Jersey.

One of the most articulated fears of municipalities over development proposals that involve common lands is that the beneficial owners will allow the space to deteriorate to the detriment of the entire municipality. The section on open space dealing with maintenance gives the municipality a means to create a private organization to perform this responsibility.

The purpose of the developer-instituted organizations is to take care of the open land, recreation facilities, amenities, roads, parking space, and such necessities as garbage and trash collection, leaf raking, lawn mowing, and snow plowing. In addition, the organizations may take care of the painting, siding replacement, and roofing of multi-family units and townhouses. The open space maintenance assessment falls upon those properties "that have a right of enjoyment" in the common land. Similarly, the exterior structural maintenance is only assessed as to those properties participating in that program.

According to the ASPO survey, one of the most effective methods to assure the availability of funds for common open space maintenance seems to be through retention by the city of the right to enforce the

articles of a homeowners' association as well as the collection of maintenance fees, which in some cases constitute a lien against the property.<sup>60</sup>

Some municipalities have required that open space be suitably improved unless natural features are worthy of preservation. These may be left unimproved. The basic philosophy behind open space use is to conserve and enhance the area, paying specific attention to the maintenance of unique, natural features within the realm of community needs.

#### F. *Control: Internal and External*

##### 1. Internal Control—Tempo and Sequence of Development<sup>61</sup>

In dealing with a PUD's staging of development, the problem of balancing the twin objectives of flexibility and control again comes into play.<sup>62</sup> The creative developer requires flexibility while the municipality must insure that the development will be eventually carried out as proposed. The former may be achieved at the possible expense of the latter, but the latter still may not be achieved by any volume of specific standards or regulations. According to Mandelker:

Short of requirements that hold the developer to the completion of his project through bonding or other methods, the municipality may live at the mercy of the developer's good intentions. Whether the costs imposed on the developer are justified by the risk is another matter, however. There may also be hidden costs in such a system if the developer sacrifices the flexibility and good design which the PUD opportunity provides by limiting the differences between one segment of his PUD and the other, thus minimizing the staging problem.<sup>63</sup>

Moreover, no direct method of municipal control can require developers to complete projects they choose to abandon in midstream.

As nonresidential uses become more extensive, the staging provisions must correspondingly become more extensive; the municipality must

60. So, MOSENA & BANGS 33-34.

61. The ULI Model PUD Act provided the following PUD timing mechanism: "An ordinance may establish regulations setting forth the timing of development among the various types of dwellings and may specify whether some or all non-residential uses are to be built before, after or at the same time as the residential uses." See Babcock, McBride & Krasnowiecki 70.

62. This discussion is based upon Mandelker, *Planned Unit Development: Internal Procedures and External Effects*, in PUD FRONTIERS 134-39.

63. *Id.* at 138.



be able to review each stage as a separate entity or mini-PUD before approval for any stage is given. The problem is to relate the timing of nonresidential development with density staging.

Mandelker suggests an alternative approach to the staging problem which, in effect, is similar to the procedure currently observed in the East Windsor, N.J., ordinance. The PUD stages would be placed on a development schedule to be filled in by the developer and then approved by the municipality as part of the initial approval process. This approach allows the municipality to review the entire PUD at the time of initial approval and to determine at each stage the permissible departures from the various standards imposed on the overall PUD. The preliminary review of staging as a part of an overall development schedule gives the municipality the opportunity to arrange the development sequence so as to minimize the negative effects of project abandonment at any time. Moreover, the development schedule enables the municipality to control PUD progress after approval.

Thus an ordinance could require the developer to submit a development schedule as part of his application for a PUD project. This schedule could include the stages, their uses, and their densities. An ordinance statement such as the following could be included:

The municipality shall not approve a planned unit development unless it finds that the uses, densities, and residential dwelling types to be constructed in each stage are consistent with the comprehensive plan for the municipality, and that each stage which is proposed for the planned unit development would have been approved had none of the other stages proposed for development been included in the planned unit development application.<sup>64</sup>

The municipality could therefore refuse approval of a staging plan unless it would have approved each stage as if each had been submitted separately. Alternatively, the municipality can apply the final development plan approval process to each stage in order to review it in light of the standards, uses, and past development in the PUD. The municipality should be able to refuse additional stages unless the uses in those stages, taken together with uses in stages containing departures from standards, restore the balance of uses in the entire PUD.

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64. *Id.*

## 2. External Control: The Periphery of the PUD<sup>65</sup>

Local authorities have a limited set of tools to apply to competing land uses adjacent to a PUD. While low density residential PUD's present little problem in this regard, PUD's containing nonresidential or high density residential uses may cause adjacent property owners to try to capture favorable development opportunities by constructing competing uses. In essence, a lack of control external to the PUD boundaries may have the effect of proliferating a development style the PUD concept attempted to ameliorate.

According to Mandelker:

Short of a major reshaping of underlying doctrine in the field of zoning jurisprudence, control techniques which can deal effectively with the problem of development adjacent to planned unit projects are difficult to construct. At least one county has dealt with this problem by requiring developers of planned unit developments to acquire enough additional land to include otherwise adjacent areas that would have been influenced by the construction of the project. The county thus avoids the problem of competitive adjacent uses by enlarging the planned unit development to bring in all of the potential surrounding area in which competitive uses are likely to occur. The use of such a technique raises some difficult legal questions, however. Presumably the county will take the position with a would-be developer that it will refuse approval of any planned unit development not sufficiently enlarged to satisfy the informal requirement of the county that areas of potentially competing uses be included. To the extent that it is rested on a desire to stifle competition, this argument will not stand up. On the other hand, the county may easily be able to accomplish by indirection what it cannot accomplish directly, and may be able to find grounds for refusal for supportable reasons when the real proposal is to force the developer into acquiring additional land. Especially is this so if, as one court has suggested, the reviewing agency can consider the effect of the planned unit development on the surrounding area. To take one example, the county might insist that the developer acquire enough adjacent land to bring his planned unit development out to a major highway. If he does not do so, the county (depending on the road patterns) may be able to refuse approval of the development on the ground that road access is inadequate.<sup>66</sup>

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65. For an analysis of this and similar problems see *Brown v. Wimpress*, 250 Md. 200, 242 A.2d 157 (1968); *Bigenho v. Montgomery County Council*, 248 Md. 386, 237 A.2d 53 (1968).

66. Mandelker, *supra* note 62, at 145.

A possible design strategy may be useful toward at least part of the periphery; that is, if the outer edges of the PUD follow the following criteria:

1. Relate PUD structures to structures on adjacent properties (height, shape, etc.).
2. Relate PUD densities to densities of adjacent properties.
3. Relate PUD land uses to uses of adjacent properties.
4. Require that peripheral lots be of the size standard for the zoning district.

Additionally, if the higher density and nonresidential uses are internalized, then adjacent property owners may find it more difficult to justify competing uses since the uses would not be consistent with the adjacent PUD development.

### *G. Procedures for Approval*

#### **1. Conformity to Standards**

Granting approval to a planned unit development is based on certain conditions being fulfilled. These conditions are very general standards covering such areas as type of control (both during and after development), minimum size, permitted uses, maximum density, and providing open space and public facilities.

A PUD ordinance frequently requests from the applicant basic data with which the approving body may evaluate the proposal. Usually what is requested is a presentation of the project specifications according to the general standards required by the ordinance. The most important part of this section is an agreement on what information is required from the developer in terms of the previously stated requirements of the ordinance.

When the standards of the ordinance are clearly stated, and procedures for project approval require documentation to the effect that these standards have been met (and preferably neither more nor less), the public hearings usually mandated by procedure flow logically and smoothly. When inconsistencies arise between what the developer is required to produce and what the minimal standards of the ordinance dictate, just the reverse condition is true.

#### **2. Filing Fee**

Another procedural requirement is the solicitation of an application fee. Since a planned unit development requires the community to extend itself to a larger degree both in terms of the scope and

vagaries of a particular development, the application fee should be large enough to enable the municipality to obtain professional assistance to evaluate cost-revenue and other implications of the proposed PUD plan. By fixing the fee in terms of size and scope of the project (*i.e.*, dollars per residential unit, dollars per 1,000 square feet of commercial and industrial space), at least some attention is given to a fee schedule based upon potential effort expenditure of municipal consultants who will evaluate the proposed development.

### 3. Submission and Approval

The basic philosophy behind the application and approval procedures (public hearings, transcript of sessions,<sup>67</sup> written findings as to reasons for approval or disapproval) is that they be considered quasi-judicial rather than quasi-legislative in nature. The procedures are thus removed from the taint of flexible case-by-case land use control, which is typically characterized as having no procedural setting and being immune from judicial scrutiny.

In terms of procedure, where a proposed PUD comes in the form of a special exception, conditional use, or floating zone, a development proposal in most states is then submitted directly to the planning commission, which confers with other government agencies (frequently the local legislative body) and, after public hearings, grants approval or disapproval. Thus, PUD substitutes a single review process for the customary three-stage review: platting approval under subdivision regulations, land use reclassification under zoning, and site review under building and zoning codes.<sup>68</sup> If the project is granted tentative approval, application for final approval may be made at once or in stages.

A hearing may not be required for the final plan if it is in substantial compliance with the previous plan given tentative approval. If the staged plan is opted for, upon compliance with the tentative plan and upon evidence that the stages will be functionally self-contained units (to protect the municipality should the developer abandon in midstream), final stage approval may also be given without a hearing.

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67. Absence of a transcript can prove fatal to a PUD proposal. *See* Dover Township Homeowners & Tenants Ass'n v. Township of Dover, 114 N.J. Super. 270, 277, 276 A.2d 156, 160 (App. Div. 1971).

68. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 111 (1968).

The public hearings provision may do no more than adopt the conventional statutory provisions for the conduct of public hearings on zoning matters. The procedures are usually tightened, however, because the more the substantive provisions allow flexibility, the greater the need for tighter controls. Thus a municipality may decide to expand other requirements, such as written notices.

#### 4. Mutual Safeguards

All PUD ordinances should contain provisions protecting both the developer and the municipality in the event that either fails to live up to original agreements or has a change of heart concerning the substantive details previously agreed upon. Developer protection is afforded by the following provision:

A plan which has been given tentative approval as submitted, or which has been given tentative approval with conditions which have been accepted by the landowner (and provided that the landowner has not defaulted nor violated any of the conditions of the tentative approval), shall not be modified, revoked or otherwise impaired by action of the municipality pending an application or applications for final approval, without the consent of the landowner . . . .<sup>69</sup>

A municipality may be protected by the following provision:

A plan submitted for final approval shall be deemed to be in substantial compliance with the plan previously given tentative approval [and thus not require further public hearings] provided any modification by the landowner of the plan as tentatively approved does not:

1. Vary the proposed gross residential density or intensity of use by more than — per cent,  
or
2. Involve a reduction of the area set aside for common open space nor the substantial relocation of such area:
3. Increase by more than — per cent the total ground areas covered by buildings nor involve a substantial change in the height of buildings.<sup>70</sup>

The procedural steps encompassing the plat approval process guarantee prompt and singular action on the developer's proposal and

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69. N.J. STAT. ANN. § 40:55-62(b) (1967).

70. BURCHELL & HUGHES 245-46.

similarly assure the municipality that the developer's final plan is in substantial agreement with what was proposed and tentatively approved.

#### CONCLUSIONS/IMPLICATIONS FOR POLICY

The PUD situation in today's legal literature appears to express, for the most part, both conceptual acceptance and procedural rejection.

The reasons given for accepting PUD are frequently that the development will be better—improved design, closer relationships to topography, better use of open space, more stringent control, etc.<sup>71</sup> The reasons for PUD's rejection are that, in the process, some party's rights have been either abridged or given undue emphasis, a governmental agency has exceeded or misinterpreted legislative authority, or basic elements of procedure have been overlooked or forgotten during application or approval.<sup>72</sup>

While the courts have expressed approval of the technique imposing only minimal restraints in the area of procedure, the fact remains that PUD and its resultant proliferation and sustenance may be part of issues that transcend mere physical improvements in land planning. For example, the planned unit development, a synthesis of the legal procedures occasioned by the suburban emergence of various building forms, becomes a tool of those who currently occupy these suburban enclaves.

In the sixties, when growth was deemed a local "good," PUD was desirable because it provided a way of balancing the costs of massive residential intrusion into areas that had no nonresidential infrastructure. In the decade of the seventies, when "no growth" or phased<sup>73</sup> or slow growth is rearing its head as the accepted norm,

71. *See, e.g.*, *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr. 88 (Dist. Ct. App. 1970); *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (Dist. Ct. App. 1969); *Moore v. City of Boulder*, 29 Colo. App. 248, 484 P.2d 134 (1971); *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968).

72. *See, e.g.*, note 67 *supra*; *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 162 Cal. App. 2d 222, 69 Cal. Rptr. 251 (Dist. Ct. App. 1968); *Mann v. City of Ft. Thomas*, 437 S.W.2d 209 (Ky. App. 1969); *Lund v. City of Tumwater*, 2 Wash. App. 750, 472 P.2d 550 (1970).

73. *See* E. FINKLER, *NONGROWTH AS A PLANNING ALTERNATIVE: A PRELIMINARY EXAMINATION OF AN EMERGING ISSUE* (ASPO monograph) (1972). For a discussion of the legal issues of phased growth see *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

PUD is being sought because it offers a legitimate vehicle to delay or forestall growth based on a variety of criteria. While the by-product frequently is desirable (improved design and organization of segments of communities), one wonders at times if this is the price we must pay for such land use upgrading.

In terms of the poor, who in most cases are not included in the private market planned unit development, the PUD has consistently occasioned them a disservice. In the sixties, PUD fostered and did not deter a job/worker maldistribution; in the seventies, the entrance of low-income citizens into the suburbs, just when exclusionary zoning barriers were falling, has been forestalled by PUD.

The most salient issue here is the inclusion or noninclusion of the poor in this latest, and in many cases largest, manifestation of the suburbanization process. It would now appear necessary for local political subdivisions, once a handhold is gotten onto the PUD concept in terms of improved and modified ordinances, to find ways to include within the PUD bargaining process the needs of the poor.

Local municipalities must also move to PUD for "PUD's sake." Improved land use is a valid local goal and should not come about as the by-product of more insidious trends. It should be remembered that the recent New Jersey experience concerning the uncertainty of the local property tax was reflected in a period of very slow PUD growth. If there were to be no direct, local monetary benefit as a function of the PUD provision of nonresidential ratables, there would be little interest in PUD. Refinements in land use must be separated from the "carrot" of improved financial position for present occupants of areas in which those refinements are being introduced if the refinements are to be judged fairly and, ultimately, to stand or fall on their own merit.