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GREEN BUILDING DEVELOPMENT IN MISSISSIPPI: ISSUES ON THE HORIZON

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I. INTRODUCTION

Green, not the color, but an increased environmental sensitivity, conservation and energy efficiency, is sweeping the nation. Prior to the current economic downturn, green building development was proving to be one of the hottest trends in commercial real estate development.[3] The federal government has also made green building development a priority.[4]

Even without incentives or directives from the federal government, green building development has found its way to Mississippi. The campus of Jackson State University became home to the first state-funded green building when it completed its $21 million School of Engineering.[5] Two new office buildings, one in Jackson and one in Ridgeland, plan to be certified green buildings.[6] White Construction, located in Ridgeland, Mississippi, has recently been recognized for a green hospital constructed in Austin, Texas.[7] Mississippi is not immune to the "green" trend.

There are a myriad of issues – regulatory, environmental, and contractual – involved in the concept of green building development. This article does not attempt to address all such issues. Rather, the authors seek to introduce two issues regularly associated with green building development: LEED certification and the New Urbanism concept of land use. With regard to both issues, the authors will endeavor to explain the concept and then analyze how this concept may be implemented effectively under existing Mississippi law.

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3. *See* Elaine Misonzhnik, *Project Greenlight*, RETAIL TRAFFIC, Dec. 2007, at 27, *available at* http://retailtrafficmag.com/management/green/retail_developers_green_design/ (discussing green trends in the retail industry).

4. *See* U.S. Green Building Council, http://www.usbc.org (2008).

5. Elizabeth Crisp, *Higher Ed Efforts Help Environment, Save Money,* CLARION LEDGER, Feb. 23, 2009, at A1.

6. Wally Northway, *Lawfirm Embraces Green in Move to Highland Colony Parkway*, MISS. BUS. J., Mar. 31, 2008, at 10B; Lynn Lofton, *Jackson Place Design: People and Nature Together Downtown*, MISS. BUS. J., Feb. 19, 2007, at 3.

7. Mississippi Business Journal Online, *White makes 'green' history*, Feb. 27, 2009, http://www.msbusiness.com/article.cfm?ID=7693.

II. ANALYSIS

A. *LEED Certification*

1. What is it LEED Certification?

Leadership in Energy and Environmental Design ("LEED") is a third-party certification rating system, created by the United States Green Building Counsel ("USGBC"), designed to promote and recognize environmental leadership in the building industry, raise awareness of green building benefits, and transfer the building industry toward sustainability.[8] There are LEED guidelines for New Construction, Existing Buildings, Commercial Interiors, Core & Shell, Schools, Retail, Healthcare, and Neighborhood Development.[9] By design, the standards for certification are not static. Instead, they are regularly revised so as to promote the use of new and more sustainable materials and design.[10]

For a project to become LEED certified, it must be awarded points in a variety of categories.[11] Some points are mandatory and must be received for the building to be considered, while other points are discretionary, achieved at the builder's discretion.[12] Different levels of certification are awarded depending on the number of points achieved.[13] As of the writing of this article, the following scale was in place for new construction:[14]

Certified: 26-32 points

Silver: 33-38 points

Gold: 39-51 points

Platinum: 52-69 points

Achieving a certain level of certification can be critical to the success of a construction project. In addition to impacting the value of the property itself, many owners are now dictating particular levels of certification. For example, numerous federal agencies require new buildings to be LEED certified.[15] The USGBC lists the following federal initiatives on their website:[16]

8. About USGBC, http://www.usgbcorg/DisplayPage.apx?CMSPageID=124 (follow USGBC Programs: LEED Green Building Rating System) (last visited Apr. 21, 2009).

9. LEED Rating Systems, *supra* note 8.

10. The USGBC LEED Program Benefits and LEEDs Points, http://usgbc.leedspoints.com/2007/10/06/the-usgbc-leed-program-benefits-and-leeds-points.aspx (last visited Apr. 21, 2009).

11. LEEDs Points, *supra* note 10.

12. What Makes a Home Green, http://www.hgtvpro.com/hpro/bp_green_building/article/0,,HPRO_29336_5499975,00.html (last visited Apr. 21, 2009).

13. LEEDs Points, *supra* note 10.

14. LEEDs Points, *supra* note 10.

15. Government Resources, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779 (last visited Apr. 21, 2009).

16. LEED Initiatives in Government and Schools, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852 (last visited Apr. 21, 2009).

Department of Agriculture: New or major renovation must reach LEED silver certification.

Department of Agriculture – Forest Services: "LEED registration and certification at the Silver level for all new construction of office buildings, visitor centers, research facilities, and climate controlled warehouses 2,500 GSF or greater in size."

Department of Energy: "[N]ew department buildings of $5M or greater" must have Gold certification; in selecting leased spaces, preference will be given to spaces with Gold certification.

Department of Health and Human Resources: ". . . all construction projects built with federal funds over $3 million will achieve LEED certification . . ."

Department of Interior: Supports LEED for Existing Buildings and on partnered projects.

Department of State: "[C]ommitted to using LEED on the construction of new embassies worldwide over the next 10 years . . ."

Environmental Protection Agency: Gold certification required for new construction over 20,000 square feet; multiple projects currently "registered for LEED for New Construction certification and supported the development of LEED for Existing Buildings."

General Services Administration: As of 2003, "all capital building projects" must be at least LEED Certified; as of 2008, it is mandatory for "all lease construction to earn LEED Silver certification."

National Aeronautics and Space Administration: "New construction and major renovations of NASA facilities projects planned for FY2006 and beyond are required to meet LEED Silver certification, and strive for LEED Gold."

Smithsonian Institute: Issued a directive setting a goal to "design, build, and maintain facilities that are eligible for, and that obtain, LEED certification."

U.S. Air Force: ". . . encourages the use of LEED for new or major renovations for MILCON projects . . ."

U.S. Army: "All new vertical construction projects will achieve LEED Silver certification. Additionally, the Army has committed to adopting LEED for [h]omes . . ."

U.S. Navy: ". . . uses LEED as a tool in applying sustainable development principles and as a metric to measure the sustainability achieved."

Many state and local governments have also mandated the use of LEED.[17] In short, LEED appears to be the new standard for construction. Because of the process of achieving LEED certification, this will have a tremendous impact on construction contracting.

2. LEED Certification and Relationships within the Construction Contract

One of the most common factual disputes in construction cases involves an owner and/or his design professional asserting that a contractor failed to perform the contract in accordance with the plans and specifications versus a contractor who argues that the plans and specifications are defective and/or deficient. Generally, courts have held that the owner is responsible to a contractor for defective plans.[18] Should a court find plans to be defective, the contractor may be able to recover from both the owner and the design professional for any delays or increased costs incurred because of the design flaw.[19] Conversely, if a Court finds that a contractor failed to build the project in accordance with the plans, the contractor will be in breach of contract. Obviously, it is important for everyone involved in a construction project to understand the responsibilities and potential liability that can result from defects in the plans and specifications.

Many, if not most, construction projects are built pursuant to a form contract prepared by the American Institute of Architects ("AIA").[20] The AIA contract provides that the contractor is responsible for "construction means and methods."[21] This means that, so long as the project is built in accordance with the plans and specifications, the contractor gets to decide how to build the building. As set forth below, in the case of a LEED project, this could lead to some problems regarding who is responsible for making sure some of the sought after points are received.

Building a project with the intent that the project become LEED certified places some new complexities into the relationships between the Owner, Architect, and Contractor. As shown above, it might be critical that a project reach the desired level of certification. Should a building not receive the desired level of certification, it could be financially devastating

17. Government Resources, *supra* note 15.

18. United States v. Spearin, 248 U.S. 132, 136 (1918); Trustees of First Baptist Church of Corinth v. McElroy, 78 So. 2d 138, 141 (Miss. 1955).

19. *McElroy*, 78 So. 2d at 141.

20. There are other form contracts drafted by other organizations that are regularly used. However, the AIA contract is the contract most often used. In an article sufficiently brief for this publication, it is not possible to discuss the many different contracts regularly in use. It is imperative in any construction case that the attorney handling the case carefully review the contract.

21. AIA Document A201-1997 § 3.3.1 *available at* http://wvhepcdoc.wvnet.edu/resources/pmanualforms/ConstructionServices/AIAA201-97GeneralConditionsforConst.pdf.

to the owner. Thus, it is critical to establish who is responsible for satisfying the requirements for each of the points the project plans to be awarded.

The standard AIA contract does not necessarily do a good job in this regard. As an example, a project can receive up to two points for diverting construction waste from disposal. There is nothing in the standard AIA contract that would require a contractor to take the steps necessary to divert construction waste away from disposal. In fact, because the contractor is responsible for construction "means and methods," the architect would not be able to dictate how waste should be disposed. Without some contractual protection, the owner could very well lose points it was counting on for certification. This is just one example, there are dozens more that could be shown.

If an owner desires to achieve LEED certification, at any level, he would be wise to take steps to insure that the sought-after level of LEED certification is achieved. In order to accomplish this, the owner will have to work closely with his architect and contractor to insure that someone is contractually responsible for each of the points sought. Specifically, the owner should take steps to ensure that sufficient points are possible in the design and construction of the building to achieve the desired level of certification. Furthermore, the owner should work with his lawyer and architect to insure that the contract assigns responsibility for each of the desired points.

B. New Urbanism

1. What Is New Urbanism?

New Urbanism is an anti-suburban sprawl theory of land use and planning which advocates the creation of communities wherein, among other things, the need for automobile usage is minimized.[22] Andres Duany and his wife, Elizabeth Plater-Zyberk, of the Florida architectural firm Duany, Plater-Zyberk, and Company ("DPZ") have been at the forefront of the New Urbanist movement.[23] Perhaps the most widely-known New Urbanist project is Seaside, Florida, which was designed and planned by DPZ and featured in the 1998 film, *The Truman Show*.[24] Duany and Plater-Zyberk helped to found the Congress of New Urbanism ("CNU") and are widely regarded as the "parents of new urbanism."[25]

The objective of New Urbanism can best be described with reference to the charter of the CNU:

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22. Peter Hetherington, *Urban Legend*, THE GUARDIAN (London), Sept. 20, 2006, at Society Section 5.

23. *Id.*

24. *Id.*

25. Jennifer Richter, *Duany and Plater-Zyberk Donate Driehaus Winnings*, Apr. 16, 2008, ARCHITECTURAL RECORD, at 196, *available at* http://archrecord.construction.com/news/daily/archives/080416driehaus.asp.

> We advocate the restructuring of public schools and development practices to support the following principles: neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally acceptable public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.[26]

The CNU, the USGBC, and the Natural Resource Defense Council ("NRDC") have collaborated on a LEED certification for neighborhoods.[27] The LEED for Neighborhood Development ("LEED-ND") certification will incorporate the tenants of New Urbanism with the energy and environmental design standards developed by the USGBC.[28] The pilot standards have been developed and subjected to an initial round of public comment and are poised for a second round.[29] It is anticipated that LEED-ND standards will be adopted by mid-2009.[30]

Mixed use neighborhood developments are at the center of the New Urbanist concept and form a substantial aspect of the proposed LEED-ND standards.[31] Consistent with the New Urbanist philosophy, the recent trend in commercial real estate development has been toward more mixed-use developments.[32] Such developments incorporate residential, office, and retail uses within close proximity. As these developments must operate within the confines of the applicable zoning and land use regulations, it is important to have a general understanding of how these regulations work and may be amended.

2. New Urbanism and Mississippi Zoning

a. Zoning and the Comprehensive Plan

The police power of a state is inherent in the existence of the state's government.[33] The State of Mississippi has the power to regulate the use of land through its police power to protect the general welfare, health, and safety of the citizens of Mississippi.[34] The state has delegated this authority

26. Charter of New Urbanism, http://www.cnu.org/sites/files/charter_english.pdf (2001).

27. LEED for Neighborhood Development, http://www.cnu.org/leednd (last visited Apr. 21, 2009).

28. LEED for Neighborhood Development, *supra* note 27.

29. LEED for Neighborhood Development, *supra* note 27.

30. LEED for Neighborhood Development, *supra* note 27.

31. Charter of New Urbanism, *supra* note 26 ("Neighborhoods should be compact, pedestrian-friendly, and mixed-use.").

32. *Mixed-Use Twist*, RETAILTRAFFIC, March 2008, at 18, *available at* http://retailtrafficmag.com/mag/retail_mixeduse_twist_0312/.

33. Pace v. State *ex rel.* Rice, 4 So. 2d 270, 276 (Miss. 1941).

34. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); City of Jackson v. McPherson, 138 So. 604, 605 (Miss. 1932).

to municipalities and counties through an enabling statute[35] which gives the legislative bodies of municipalities and counties the power to "divide the municipality or county into zones."[36] Acting under this authority, municipal and county governments may regulate the "height, number of stories and size of building and other structures, the percentage of lot that may be occupied, the size of the yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes[.]"[37]

However, prior to enacting zoning regulations, a municipality or county must first adopt a comprehensive plan.[38] A comprehensive plan is "a statement of public policy for the physical development of the entire municipality or county adopted by resolution of the governing body[.]"[39] This comprehensive plan must include long-range goals for the development of the city or county.[40] These goals at a minimum must address "residential, commercial and industrial development; parks, open space and recreation; street or road improvements; public schools and community facilities."[41] The comprehensive plan must also include a land use plan, a transportation plan, and a community facilities plan.[42] All zoning ordinances must be in compliance with the comprehensive plan.[43]

Revisions to the comprehensive plan can be quite expensive. Notwithstanding, a municipality looking to attract New Urbanist developments would be well advised to carefully examine its current comprehensive plan and zoning ordinance to determine whether or not the plan and the ordinance provide for these types of mixed-use developments.[44] As discussed below, rezoning to accommodate a mixed-use project can be difficult.

b. Mistake or Change in Character

Current zoning practices tend to zone like uses together.[45] As such, zoning changes are frequently necessary in order to allow for a mixed-use development. Where a zoning change is sought to accommodate a particular project, opponents of the development may have greater ability to successfully challenge the change under Mississippi law.

Mississippi Code Annotated Section 17-1-17 provides for the amendment of zoning regulations. In order to adopt such a change, the local authority must hold a public hearing and must give notice of such hearing by

35. MISS. CODE ANN. §§ 17-1-1 to -39 (West 2008).
36. MISS. CODE ANN. § 17-1-7 (West 2008).
37. MISS. CODE ANN. § 17-1-3 (West 2008).
38. Morris v. City of Columbia, 186 So. 292, 293 (Miss. 1939).
39. MISS. CODE ANN. § 17-1-1(c) (West 2008).
40. *Id.* at § 17-1-1(c)(i).
41. *Id.*
42. *Id.*, at § 17-1-1(c)(ii)-(iv).
43. MISS. CODE ANN. § 17-1-9 (West 2008).
44. Several cities in Mississippi have taken steps in this direction recently, including Jackson, Vicksburg, Pass Christian, and Gulfport.
45. Mark S. Davies, *Understanding Sprawl: Lessons from Architecture for Legal Scholars*, 99 MICH. L. REV. 1520, 1529-1530 (2001).

advertising the time and place in an official newspaper for fifteen days.[46] An aggrieved party may challenge the zoning change and bring a petition against such a change in the zoning regulations.[47] Protest by the owners of twenty percent or more of the property within 160 feet of the lots affected by such a change will prevent the zoning change unless three-fifths of the governing authority vote favorably for it.[48] Further, a local authority's decision to re-zone may be appealed to the relevant circuit court by one with standing pursuant to Miss. Code Ann. § 11-51-75.[49]

The Supreme Court of Mississippi has held that a governing authority's decision regarding rezoning "must remain undisturbed unless the board's order: (1) is beyond the scope or power granted to the board by statute; (2) violates the constitutional rights or statutory rights of the aggrieved party; (3) is not supported by substantial evidence; or (4) is arbitrary or capricious."[50] An arbitrary act is one done not in accordance with reason or judgment, but solely dependent upon the will alone.[51] A capricious act is one done with disregard of facts and controlling principles.[52] The governing authority's decision is presumed valid and will not be disturbed if the decision appears to be fairly debatable.[53] Notwithstanding the deferential standard of review, the burden of proof to justify a rezoning can be difficult to meet.

The "mistake or change" rule applies to appeals of decisions regarding rezoning. The "mistake or change" rule can be best explained as follows: a governing authority of a municipality or county may only grant a petition to rezone if the petitioner proves by clear and convincing evidence that there was a mistake in the original zoning, or that the character of the neighborhood was changed to such an extent as to justify rezoning, and that public need exists for rezoning.[54] This rule is based on the presumption that the original zoning ordinances were intended to be "more or less permanent, subject to change only to meet a genuine change in conditions."[55]

As rezoning based upon mistake is limited to clerical or administrative errors, the more common assertion is that there has been a substantial change in the neighborhood. Evidence of a substantial change may take the form of "previous rezonings, statistics or mapped circumstances of

46. MISS. CODE ANN. § 17-1-17 (West 2008).

47. *Id.*

48. *Id.*

49. Luter v. Oakhurst Associates, Ltd., 529 So. 2d 889, 892 (Miss. 1988).

50. Hinds County Board of Supervisors v. Leggette, 833 So. 2d 586, 590 (Miss. Ct. App. 2002) (citing Board of Law Enforcement Officers Standards and Training v. Butler, 672 So. 2d. 1196, 1199 (Miss. 1996)).

51. Briarwood, Inc. v. City of Clarksdale, 766 So. 2d 73, 80 (Miss. Ct. App. 2000).

52. *Briarwood*, 766 So. 2d at 80.

53. *Id; see also*, Board of Aldermen of Clinton v. Conerly, 509 So. 2d 877, 884-85 (Miss. 1987).

54. For the purposes of the mistake or change rule, a mistake "is not a mistake of judgment, but, rather, a clerical or administrative mistake." City of New Albany v. Ray, 417 So. 2d 550, 552 (Miss. 1982)

55. Town of Florence v. Sea Lands, Ltd., 759 So. 2d 1221, 1227 (Miss. 2000).

growing change[.]"[56] The record should "at a minimum . . . contain a map showing the circumstances of the area, the changes in the neighborhood, statistics showing a public need . . . ."[57] Absent such proof in the record, the Mississippi courts may conclude "there was neither change nor public need."[58]

Of course all zoning ordinances must be consistent with the comprehensive plan.[59] For this reason, changes that occur simultaneously with a like change or update to the comprehensive plan, as opposed to a project-specific re-zoning, should pose fewer issues as long as the statutory procedures are followed and clear and convincing evidence of a change is provided by the revised comprehensive plan.

Conversely, a project-specific rezoning will have to present sufficient evidence to establish an existing change in the character of the neighborhood warranting the rezoning and may be open to attack as illegal spot zoning.[60] In considering whether spot zoning has occurred, Mississippi appellate courts have not used the deferential language of "arbitrary or capricious."[61] The Court of Appeals of Mississippi has noted, "The mere fact that the use for which a piece of property is re-zoned will be inconsistent with the previous zoning classification, or even with some of the other uses of nearby property, does not necessarily make a re-zoning decision spot zoning."[62] Rather, the court will look to see whether the amendment was intended to impermissibly "favor someone" without regard for the greater good.[63]

In light of the forgoing, it is easy to see the difficulty that might be posed in meeting the mistake or change standard where rezoning is sought to accommodate a mixed-use development under a zoning ordinance that does not provide for such uses. Meeting this burden may be difficult, if not impossible, where such a development has not previously existed and is not contemplated by the relevant comprehensive plan. An alternative to rezoning in this circumstance may be the use of Planned Unit Developments ("PUD").

The Mississippi Supreme Court has recognized a PUD as a "a planned mix of residential, commercial, and even industrial uses . . . subject to restrictions calculated to achieve compatible and efficient use of the land . . . ."[64] However, the Mississippi Supreme Court has noted that a PUD can be quite restrictive:

56. Cockrell v. Panola County Bd. of Supervisors, 950 So. 2d 1086, 1095 (Miss. Ct. App. 2007).

57. *Conerly*, 509 So. 2d at 886.

58. *Id.*

59. MISS. CODE ANN. § 17-1-9 (West 2008).

60. Jitney-Jungle, Inc. v. City of Brookhaven, 311 So. 2d 652, 654 (Miss. 1975).

61. *See, e.g., Tippitt v. City Of Hernando*, 2005 WL 147740 (Miss. Ct. App. 2005); *Kuluz v. City Of D'Iberville*, 890 So. 2d 938, 944 (Miss. Ct. App. 2004); *Briarwood*, 766 So. 2d 73; *Jitney-Jungle*, 311 So. 2d 652; McKibben v. City of Jackson, 193 So. 2d 741(Miss. 1967).

62. *Kuluz*, 890 So. 2d at 944.

63. *Id.*

64. Old Canton Hills Homeowners Ass'n v. Mayor and City Council of Jackson, 749 So. 2d 54, 59 (Miss. 1999) (citing 83 AM. JUR. 2d *Zoning and Planning* § 497 (1992)).

> A Planned Unit Development, or PUD, is a modern alternative to traditional zoning classifications. Under a PUD ordinance, the applicant may only build exactly what it proposes to build, thus making a PUD one of the most restrictive types of classifications available.[65]

As such, while a PUD may provide an immediate zoning solution for a mixed-use development to go forward, it allows little flexibility, in the long term, to easily adjust the project to accommodate for changing market conditions once constructed. There is very little case law regarding the amendment of a PUD, much less standards, for amending the original project. Indeed, the only case the authors were able to identify even mentioning the issue held that the proposed amendment was premature.[66]

A developer seeking to build a mixed-use development in the New Urbanist model would be wise to look very carefully at the relevant existing zoning ordinance in place as early in the project as possible. If the ordinance does not already include mixed-use zoning districts and/or a PUD provision, another site with more appropriate zoning may be the most cost-effective solution. Barring that, a strategy aimed at working with the local authorities in revising the comprehensive plan and generating community support for an overall change in the zoning regulations to promote green building development may be possible. However, should the developer be required to go forward with a site-specific rezoning petition, a strategy aimed at identifying and addressing the concerns of any opponents to the rezoning and in building the strongest record possible to support the requested rezoning is advisable.

III. CONCLUSION

LEED certification and New Urbanism are just two aspects of a trend poised to take on momentum in the future. This Article does not attempt to address all such aspects. Rather, it is hoped that this Article will encourage discussion and encourage those seeking to construct or attract green building developments to examine all aspects critically at the onset. As in all endeavors a broad base of knowledge and an anticipation of issues that may arise should help to avoid unnecessary delays, costs, and conflicts.

65. Fondren North Renaissance v. City of Jackson, 749 So. 2d 974, 982 (Miss. 1999).

66. *A & F Properties, LLC v. Madison County Bd. of* Supervisors, 933 So. 2d 296, 300 (Miss. 2006).