INTRODUCTION TO PLANNED DEVELOPMENT ZONING*

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Introduction

Planned development zoning_and other flexible zoning techniques were developed to overcome the rigidity of traditional zoning. Traditional zoning divides a jurisdiction into districts (e.g., Single Family 1, Retail, Office). The zoning ordinance specifies regulations (e.g., use, yard, and building bulk requirements) that apply uniformly to all property within the same zoning district. Traditional zoning ensures consistent application of regulations , but it does not easily accommodate innovative development, especially where mixed-use projects are proposed, if the project does not conform to district regulations. (1) Traditional zoning also does not permit devising site-specific regulations in response to on-site conditions or to mitigate off-site impacts. Under traditional zoning, changing regulations to meet the needs of a specific project or property requires amending the district's regulations or granting variances to the regulations. Amending district regulations is difficult because the amendment would apply to all property within the district. A variance is difficult because it typically depends on demonstrating a unique hardship related to the physical characteristics of the property. The merits of the development concept alone are not proper reasons for granting a variance. Planned development zoning (also termed planned unit development) was created as a means of tailoring zoning regulation to the specific needs of a project plan and the unique characteristics of a site.

During the 1960s, many organizations, including the Urban Land Institute, National Association of Homebuilders and American Society of Planning Officials, published technical reports on the planned unit development (PUD) concept and model PUD ordinances.(2) The term "planned unit development" was coined to describe a site specific zoning process which permits greater regulatory flexibility tied to site plan review. Early PUD literature cites three objectives for creating PUD ordinances: (1) unitary

development review (combining zoning, site planning and

subdivision regulation); (2) flexible site plan based regulation; and (3) lower development cost. This literature primarily addresses the use of planned development zoning to regulate innovative residential development. Cluster housing, patio homes and zero lot-line homes are types of housing commonly cited as projects that are more easily accomplished as planned developments. These reports also refer to integrating other uses into residential areas and creating mixed use developments through planned development zoning, but the primary focus is residential development.

Planners support the use of planned unit development zoning because it offers the ability to facilitate innovation and respond to specific site conditions. Increasingly traditional land use regulations are criticized for reinforcing the pattern of sterile, homogeneous development characteristic of suburban areas.(3) Planning commissioners and city council members also find advantages to planned development zoning because it provides a vehicle for negotiation unavailable in the yes/no options of traditional zoning. This is especially valuable in accommodating the demands of homeowners and other adjacent property owners who want negotiated agreements made enforceable by ordinance. Today, the use of planned development zoning- is firmly established and in common use throughout Texas and the remainder of the country.

Methods for Establishing Planned Developments

The method for establishing and administering planned development zoning varies among cities. Texas zoning legislation (Chapter 211, Local Government Code) does not directly address the use of planned development zoning, but the concept of planned development zoning has been held valid by Texas courts, provided the specific Methods of planned development zoning used by a city conform to the general requirements of state law pertaining to zoning. Planned development zoning establishes land use regulations for a specified area either as a unique zoning district or as an area specific amendment to the regulations of a

standard district. A planned development zoning district may be any size and include one or more land uses. Establishing a planned development zoning district typically includes the approval of a development plan. Requirements for a development plan vary in content and detail. Generally the plan illustrates the boundaries of the area being zoned (or rezoned) and the location of land uses, roads, lots, buildings, other surface improvements, and open space.

The ordinance establishing the district will contain the regulations and standards necessary to execute the plan. A planned development zoning district may be created as a freestanding district or as an overlay district. The use of both methods is further described below.

- **Free Standing PD Districts -** Each PD is a unique district tailored to the specific site and development. Typically, the zoning map designates the area zoned with the letters "PD" followed by a number used to reference the ordinance containing the regulations. The ordinance defines permitted uses, yard, height, bulk and other regulations for the property, similar to any other zoning district.

- **PD Overlay Districts -** PD districts are created by superimposing additional regulations to alter (i.e. add, delete, modify) the standards of the base zoning district. As an example, an area may be zoned Residential-1, permitting single-family houses centered on lots of 9,000 square feet or larger. A PD overlay is attached allowing cluster housing on smaller lots and requiring 15 percent of the area to be common open space. The zoning map shows 'the base zoning, the PD overlay designation, and an ordinance reference number. The ordinance describes changes to the base zoning requirements. Except as modified by the overlay district, the requirements of the base zoning district still apply.

Plan Approval — Most cities use a two step plan approval process. The first step is the approval of a conceptual or schematic development plan concurrent with establishing the zoning district. The second step is the approval of a final development plan prior to application and approval of plats and building permits. Planned residential districts frequently require an intermediate "preliminary" or "tentative" development plan to coincide with preliminary plat approval. Some ordinances, particularly those addressing mixed use, distinguish between a "development plan" for a phase of the project and a "site plan" for individual, non-single family uses. The conceptual plan aids in understanding the development proposal and negotiating the specific regulations to be included in the PD ordinance. Conceptual plans are very useful in coordinating the phased development of large projects. 'The conceptual plan may be approved administratively or as a part of the actual ordinance establishing the zoning

district. If the plan is administratively approved, it may be amended from time to time so long as it conforms to the district's regulations. Conceptual plans that are directly incorporated into the ordinance establishing the zoning district may only be amended by the same procedure as rezoning.

Administrative approval of the conceptual plan provides greater flexibility by accommodating plan amendments without the necessity of going through the rezoning process. This flexibility can, however, yield an amended plan that is significantly different from the original even if still within the terms of a broadly drawn adopting ordinance. Because of the limited discretion available through an administrative review process, a city may be unable to deny the plan or to impose additional development conditions. For this and other reasons discussed in succeeding sections, the preferred method is to incorporate the conceptual plan into the ordinance establishing the district. Alternatively, if a conceptual plan is administratively approved, the ordinance establishing the PD district should include all requirements and specifications that must be met if approval is later sought for a new or amended conceptual plan.

Generally, the final development (or site) plan is a detailed, scaled drawing of site improvements and buildings. Plan approval is required prior to the release of engineering plans and the issuance of building permits. The plan may be for the entire project or a portion of the project. Plan approval usually is a administrative function assigned by ordinance to staff, the planning commission or city council, although some ordinances confer considerable discretion on decision-makers at this stage of the process.[4] The purpose of the review is to ensure that the proposed development conforms to the PD regulations and the prior approved plans. Although the site planning process is typically coupled with planned, development zoning, this is not always the case. Some cities use planned development zoning to modify standard zoning requirements for specific properties without requiring site plan approval concurrent or subsequent to the zoning approval.

Expiration of PD Approval - The creation of a planned development district is a legislative action. Once approved, the ordinance will remain in place and run with the land until a subsequent legislative action (i.e., rezoning) occurs. Depending on the terms of a city's zoning ordinance and whether or not a plan

for the development was adopted by ordinance, site plan approval may expire if the project is not built. A new plan may be submitted to replace the expired plan, but the new plan must comply with the ordinance establishing this district and other applicable regulations. Regulations pertaining to the expiration of administratively approved plans must be adopted prior to the acceptance of an application for plan approval. Tex. Loc. Gov't Code section 245.002(a) states: "Each regulatory agency shall consider the approval, disapproval, or conditional approval of any application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates or other properly adopted requirements in effect at the time the original application for permit is filed."

Use of Planned Development Zoninein Texas

In 1991, the authors of this chapter conducted a survey of the twenty largest (by population) cities in Texas to determine their use of planned development zoning. Seventeen of the twenty largest cities in Texas used planned development zoning. Of the three cities not using PD zoning, Houston and Pasadena did not have a zoning ordinance. Lubbock had a zoning ordinance but did not *use* planned development .zoning. All of the cities using planned development zoning had specific sections within their zoning ordinances authorizing planned development regulations and defining procedures for establishing districts. All but three of the ordinances contained very brief purpose statements relating to the use of planned development zoning. Most PD purpose statements generally stated the need for flexibility. Few of the ordinances cited within the purpose statement the relationship of planned development zoning to implementing the community's comprehensive plan.

All but one of the cities could potentially use planned development zoning to regulate any type of development. The ordinances generally permitted planned development districts to be of any size deemed appropriate. Despite the residential origin of planned development zoning, very few of the ordinances showed a bias toward regulating residential vs. non-residential development. The majority of cities surveyed frequently used planned development zoning to regulate permitted uses, intensity and density of use, location and bulk of buildings and the extent of landscaping. Less than a third of the cities frequently used planned development zoning to specify architecture, public improvements

or development phasing. Only a few ordinances required or mentioned the use of a schedule to define the sequence and timing of development.

Use of Site Plans - Most of the Texas ordinances reviewed either required or allowed the submittal of a conceptual plan in conjunction with an application for planned development zoning, and required the conceptual plan to be adopted by ordinance as a part of the zoning. Very few of the ordinances specifically addressed the meaning of the plan as a regulation. Most of the ordinances stated that subsequent plans are to conform to the conceptual plan but did not define criteria for determining conformity. Many of the ordinances provided for minor amendments to the conceptual plan without rezoning. The responsibility for approving minor amendments was typically assigned to the planning director. Ordinances varied considerably on what is considered to be a minor amendment. The ability to request a minor amendment presumably resided only with the property owner, since none of the ordinances specifically stated that the city may make minor adjustments to conform the proposed development to new standards or to solve engineering problems.

Final development plans were typically required prior to the issuance of a building permit. Council approval of the final site plan was often required. Only a few ordinances provided for the expiration of development plans. Only one ordinance addressed the issue of vesting plans for partially built developments. A few ordinances required development schedules and stated that the city may call a public hearing to consider appropriate zoning if the schedule is not met and an extension is not approved.

One of the objectives of the PD concept stated in early literature is the integration of zoning, site planning and subdivision regulation. However, only a few of the Texas ordinances reviewed referenced the city's subdivision regulations and the need to coordinate platting and site planning.

One of the most interesting findings of the survey was how frequently the cities used planned development zoning. Seven percent of zoning cases approved during 1991 by the seventeen cities involved the use of planned development districts. Four cities reported that twenty percent or more of their zoning cases involved use of planned development districts. The frequency of use was greatest in the Dallas/Fort Worth area.

Pros and Cons of PD Zoning Cited by Texas Cities - The respondents in the cities surveyed were asked to list the reasons they support the use of

planned development zoning and concerns they have about its use. Listed below are their responses.

Reasons for Supporting PD Zoning:

- Greater flexibility;
- Ability to negotiate;
- Ability to assess and mitigate site specific impacts;
- Ability to address public concerns;
- Ability to compensate for deficiencies in standard zoning districts;
- Ability to better regulate large scale mixed use development; and,
- Ability to address site-specific considerations.
- Concerns About Use of PD Zoning:
- Contract zoning (inappropriate bargaining);
- Time consuming to establish and administer PD districts;
- More vulnerable to politics;
- Erosion of standard zoning requirements;
- Over use;
- Lack of an automatic revocation if project is not built;
- Manipulation of regulations to gain approval;
- Lack of consistency among districts; and,
- Difficulty in administering regulations when the district is split among multiple owners.

Authority For and Legal Challenges to PD Zoning

This section of the chapter reviews legal authority for planned .development zoning and possible legal challenges to its use. Texas statutory authority and case law are surveyed generally. Additional case law, federal and of other states, are noted where principles may also apply to the use of planned development zoning in Texas.

Planned development zoning was not anticipated in the Standard Zoning Enabling Act, and is not expressly authorized in Texas' zoning enabling act or in special statutes. In the absence of express enabling authority, however, most courts have been willing to broadly construe the state's zoning enabling act to find authority for PDs as valid exercises of the zoning power. In Teer v. Duddlesten,[5] the Texas Supreme Court upheld the City of Bellaire's planned

development district against a challenge by neighbors that PDs were not authorized under the zoning enabling act. In construing the act to allow PDs, the court noted that the enabling act did not specifically prohibit the use of PDs, and concluded, therefore, that PDs were not per se "spot zoning."(6)

Planned development zoning has been found to advance the purposes set forth in the standard zoning enabling act, such as the provision of open space and the prevention of overcrowding. A variety of reasons are given by courts interpreting statutes to authorize PDs.(7) Authority for PD may also be found in home rule powers. Where home rule powers are strong, as in Texas, enabling statutes act as limitations, not grants of authority on local governmental powers (8)

Local governments must follow their own ordinances in regulating PDs (9) Generally, local governments may not condition PD approval :upon standards not contained in their regulations, nor may they apply more stringent standards than appear in the ordinance. Requirements of other ordinances, however, such as subdivision regulations, may be incorporated by reference into the PD ordinance, or may be implied by a reviewing court based on common definitions {1°)

Typical Challenges (and Defenses) to PD Techniques - All zoning actions are afforded a• strong presumption of validity.(11) Because PDs depart from traditional concepts of zoning, however, they have been more closely scrutinized by reviewing courts than more typical zoning mechanisms.

Standards for Review - In determining whether PD regulations are arbitrary and capricious, or unreasonable, judicial inquiry frequently is focused on the absence of standards by which PDs are established or evaluated. In Beaver Meadows v. Bd. of County Commissioners,(12) the County attempted to condition the approval of Beaver Meadows' planned development on the provision of off-site facilities and assurances for the provision of emergency medical services. While the trial court upheld these conditions, the Colorado Supreme Court reversed, in favor of Beaver Meadows. The Court held that, while the County ordinance appeared to authorize the Board to review the application, the regulation lacked the necessary detail to support the conditions.(13)

If PD ordinances do not contain sufficient standards to enable a reviewing court to determine the reasonableness of the local decision, they may be held invalid as an unlawful delegation of legislative authority.")

In *Accordance* With a Comprehensive Plan - General limitations on the amendment of zoning ordinances and other exercises of the zoning power apply to PDs. For example, PD districts must be established in accordance with a comprehensive plan. Where PDs are established as an overlay district or floating zone, the consistency doctrine -- where recognized -may limit the location of such districts and the types and intensity of uses available.

Under the standard zoning enabling act, the requirement that zoning regulations be "in accordance with a comprehensive plan" may be satisfied by comparing a particular zoning amendment with the comprehensive zoning ordinance map, if such map presents a plan for orderly development.(15) On the other hand, if a community has a separately adopted comprehensive plan, the court may rely upon such document in determining whether a particular zoning amendment conforms to the comprehensive plan. Accordingly, in Mayhew v. Town of Surmyvale,(16) the court determined that the town zoning ordinance was in conflict with its adopted comprehensive plan and, consequently, that the applicant's planned unit development could not be refused on the basis of such zoning ordinance.

Soot Zoning - Situations where a zoning amendment is sought to establish a use prohibited by the existing regulations are frequently challenged as "spot zoning." Although PD overlay districts usually incorporate a concept plan for particular uses which identifies specific uses at the time of rezoning, this generally does not render the creation of the district as spot zoning.(17) A number of factors will be taken into consideration to determine whether the zoning amendment constitutes spot zoning, such as: use of neighboring property; suitability of the tract for anticipated uses; relationship to valid police power objectives; and size of the tract rezoned.(18) The conclusion that a particular zoning amendment involves "spot zoning" can be avoided if the comprehensive plan for the area designates the site as suitable for location of a "floating zone," such as a planned unit development.

Uniformity - The uniformity clause in the Standard Zoning Enabling Act requires that similar use be treated uniformly. Courts have upheld PDs challenges under this provision on the interpretation that uniformity is required only within, not among, zoning districts.(19) In the Chrinko case, the court dismissed the uniformity challenge on the basis that the ordinance accomplished uniformity since the PD "option" was open to all developers.

Contract Zoning - Because many PDs are "negotiated," they are susceptible to challenge as unlawful contract zoning. In most jurisdictions, contract zoning is distinguished from permissible conditional zoning on the basis of whether the alleged agreement is bilateral (contract zoning) or unilateral (conditional zoning) in nature. In Teer v. Duddlesten,(2°) supra, the city had obtained the developer's promise to perform conditions attached to the requested planned development amendment. Although the Court of Appeals found that the city had merely preserved its police power instead of bargaining it away with the acceptance agreement, the Supreme Court held that such arrangement amounted to illegal "contract zoning." The Supreme Court held that the city could accomplish its objectives by conditioning the rezoning. Such "conditional zoning" was unilateral in character, according to the Court, and was not personal to the applicant(21)

Statutory Procedures - In recent cases, most courts invalidating PDs have done so on the basis of the local government's failure to follow statutory procedures or those established by local ordinances. Standard zoning procedures for amendment of zoning ordinances or approval of special use permits must be followed. In Wallace v. Daniel,(22) a developer sought rezoning of a tract for use as a planned unit development, but failed to submit a detailed description of the proposed development as required by local ordinance. The planning commission recommended -approval of the development without such detail. Although the developer subsequently submitted a specific plan to the county council prior to approval of the ordinance, the court held that the procedure was fatally flawed. Because the planning commission did not have before it essential information concerning the nature of the project, it could not make an effective recommendation to the county council, the court reasoned.

The court in Wallace held that the enabling act required by implication that municipalities must follow their own procedures when adopting ordinance amendments. Failure to consider a specific plan when approving a PD amendment recommendation from the planning commission violated this municipal ordinance.(23)

Challenges by PD Applicants - Challenges by applicants most frequently arise when initial approval or approval of the development plan is heavily conditioned, or when the local government attempts to rezone or otherwise impose new regulations on subsequent phases of the project:

Excessive Conditions - A condition imposed on development approval must substantially advance a legitimate governmental objective [24] Generally speaking, a PD may be lawfully conditioned on the provision of improvements or amenities to serve the development which are contemplated; in the enabling act; in parallel statutes, such as subdivision laws; in the comprehensive plan; or in the zoning ordinance itself. The issue frequently is raised when the development plan is reviewed by the city. In Board of Supervisors v. West Chestnut Realty Corp.,[25] the court upheld the denial of the application for development plan on the ground that the developer was required to depict specific improvements, including utilities, at all phases of the application process. According to the court, additional detail was required regarding storm water management, considering the location of the property in relation to storm water facilities. Although the township's ordinance did not expressly require additional detail, the court found that such information was required based upon a reasonable construction of all of the township regulations.

In Municipality of Upper St. Clair v. Boyce Road Partnership,[26] the issue concerned what conditions the city could apply to subsequent phases of a multi-phase PD project. The court found that the developer's failure to install electric lines underground, failure to submit proof of project financing, and failure to comply with the township's interim floodplain ordinance constituted valid grounds for denying final approval of the third and fourth phases of the project. The court held that the conditions had been imposed at the time of granting final approval to previous phases of the development and that compliance with the conditions was required prior to final approval of subsequent phases.

Ad hoc conditions- unsupported by standards, however, may be invalidated. In RIB Development Corp. v. City of Norwalk,[27] the PD was denied on the grounds that the development posed safety hazards to school children. The court invalidated the denial, because the PD ordinance contained specific site development standards, but did not include the grounds for denial advanced by the city.

Some PD ordinances include exactions of land or improvements for public facilities as conditions of zoning or plan approval, similar to those imposed on subdivision plats. In such cases, cities must observe constitutional standards in imposing the conditions: In 1994, the United Supreme Court announced its "rough proportionality" standard governing development exactions in Dolan v. City of Tigard [28] Under this test, a land dedication requirement (and perhaps other forms of development exactions)[29] must be "roughly proportional" to the nature and extent of the impacts on community facilities resulting from the development. Although mathematical precision is not required, the test requires that some quantification of this

relationship is necessary. The Texas Supreme Court in applying standards under the State's constitution requires that there be a "reasonable connection" between the exaction and both the need for the facilities exacted and the benefit to the development.(3°)

This type of analysis was applied by the Colorado Supreme Court to invalidate a road exaction imposed on a planned development. Thus in Beaver Meadows v. Bd. of County Commissioners,(313 the board of commissioners conditioned approval of a planned unit development on improving an access road for 4.73 miles and arrangement for emergency medical services to serve the development. Although the county intended to pursue the formation of an improvement district to assist with the costs, the developer was required to pay the total initial cost of the improvement pending the formation of the district. The Colorado Supreme Court invalidated the conditions, reasoning that the county's regulations did not support the conditions imposed in the case. The Court construed the subdivision and planned unit development laws together, concluding that the county had the authority to impose conditions relating to road planning and improvements. The county's regulations, however, contained no criteria for evaluating roads to serve a particular development project. Because the regulations provided no guidance, the developer could not be required to install improvements which would obviously benefit other property owners. The Court also held that the county could have required provision for emergency medical services if the statutory authority were supported by standards in the regulations. In the absence of such local guidelines, the condition to provide emergency services could not be imposed ad hoc. Generally speaking, the conditions applied at the time of development plan approval must be contemplated in the concept plan.(32)

Regulatory Takings - Where local governments rezone or otherwise impose new regulations on undeveloped phases of a PD, thereby changing uses, reducing intensity of use, or imposing stricter development standards, a property owner may challenge the action as a deprivation of economically viable use of the property under federal or state constitutional provisions prohibiting the taking of private property for public use without just compensation(33) Under most circumstances, a court will not evaluate the effect of a regulation on a single interest in the property, but will ascertain the impact. on the property when taken as a whole (34) Applying this principle in a regulatory taking challenge, a reviewing court should take into account the beneficial uses that already have *been* developed in earlier phases of

the project when weighing the economic impacts of the new regulations.

Before challenging local government zoning regulations, the property owner usually must satisfy ripeness requirements imposed under federal and state law. Typically this requires that the property owner attempt to vary the application of new regulations or modify his development proposal before the claim matures.(35) In the case of Williamson County Regional Planning Comm'n v. Hamilton Bank, the county disapproved a subdivision plat for the latter phases of a development project because the plat did not comply with newly enacted zoning and subdivision regulations, even though the first phases of the project had already been developed. The Supreme Court overturned the damage award of $350,000 for a temporary taking of the property because the developer had failed to apply for variances to the regulations. Under the county's testimony, some 300 units could have been constructed on the site under variance provisions. In the context of planned developments, a property owner may be required to seek relief from the *new* regulations by submitting a concrete development proposal, coupled with variance requests, before his claim ripens.

Vested Rights - When cities impose new regulations on subsequent phases of a planned development, landowners also may seek to enjoin such actions on the basis of "vested rights." In most cases, challenges will be based on Tex. Loc. Gov't Code ch. 245, a 1999 replacement statute for former "HB 4."(36) The new law attempts to make vested rights provisions retrospective to cover the period of the repeal, roughly two years. Because most planned developments involve multiple phases, however, it also is possible that the common law doctrine of vested rights will come into play. Under this seldom applied standard, a city may be estopped from applying new regulations, where a property owner has made substantial expenditures on a development in progress in good faith reliance on a validly issued permit.(37)

Chapter 245 of the Texas Local Government Code, the usual vehicle for challenging new regulations, requires that " approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application permit is filed."(38) The law further states, "if a series of permits is required for a project, the orders, regulations, ordinances, or other requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for

the completion of the project. All permits required for a project are considered to be a single series of permits. Preliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project (39)

There are certain exemptions to the provisions of Chapter 245 identified in Section 245.004. The exemption of most utility in addressing planned developments is that for "municipal zoning regulations that do not affect lot size, lot dimensions, lot coverage, or building size, or that do not change development permitted by a restrictive covenant required by a city." Thus even if subsequent applications for approval of later phases of a planned development are considered part of the same series of permits for a project, some types of new zoning regulations may be applied to limit development, including use restrictions.

A separate issue under the vesting statute is whether plans associated with establishment of PD districts are the type of "site plans" that qualify as "development permits" under the law. Approval of a planned development zoning district itself is a legislative act and should not be viewed as the issuance of a development permit. However, the concurrent review and approval of a development plan prepared in association with an application for PD zoning may trigger vesting of a "project" as defined by Chapter 245. The outcome depends in large measure on whether the "concept plan" is incorporated as part of the adopting ordinance; if the conceptual Plan is approved as an administrative action, it almost certainly will be considered a "site plan" triggering rights under ch. 245.

Procedures pertaining to the processing of a series of plans, plats and permits required to develop within a planned development district must be carefully drafted to avoid unreasonable freezing of development regulations. Each required approval should expire if applicant fails to proceed to the next required step with a defined time period. The procedures should also provide standards for determining when a plan amendment is substantially different than the original project and therefore may be regulated as a new project. These procedures must be placed before an application is filed for the first permit required to conduct a project. Chapter 245 prohibits retroactive application of new regulations, including permit expiration dates to projects in progress.

Section 245.005 includes language addressing dormant projects, a provision that may be useful considering the extended life of some planned developments. Dormant projects include those projects for which the permit

does not have an expiration date and on which no progress has been made towards completion of the project "Progress towards completion of the project" is defined as being any one or more of the following: application for a final plat, a good-faith attempt to file an application with a regulatory agency, incurred of costs for developing the project, posting of fiscal security to ensure performance, or payment of utility connection fees or impact *fees* for the project. Fortunately, Section 245.005 also provides for the expiration of some dormant projects that already have permits. After May 11, 2000, cities may place an expiration date on a permit that has no expiration date if no progress has been made toward completion of the project. If a city imposes an expiration date on such a "dormant project," the expiration date may not be earlier than May 11, 2004.

Discretionary v. Ministerial Actions - In a recent Dallas Court of Appeals decision, Bartlett v. Cinemark USA, Inc., (40) approval of the second stage of a planned development was held to be a ministerial decision rather than an act of discretion on the part of the City Council.

Consequently, the Court found that the City's Council's denial of the development plan for a movie theater complex subjected the City and individual council members to civil rights hal:Jay. In reaching this result, the Court distinguished the Council's role in initially adopting PD zoning (a legislative function) from that the functions it played in acting on the subsequent development plan, which it ultimately characterized as "ministerial" in nature.(41)

- Although the facts in the Cinemark case were unique in many respects, the Dallas PD ordinance under consideration was not significantly different from that of many other cities. The ordinance required that the PD district be established on the basis of a detailed site plan approved with the ordinance. The developer could choose to submit the plan in two stages. If this option was taken, the first "conceptual plan" was incorporated .as part of the ordinance establishing the district. A development plan that was consistent with the conceptual plan had to be submitted within six months of approval of the district, supplying additional details for the project.

The case counsels great caution in applying PD standards to approval of site plan approvals after the first "conceptual" site plan is approved. The nature of subsequent site plans must be first determined from the text of the PD ordinance itself, with the key distinction being whether such stages of approval constitute a form of zoning amendment or at least allow the application of some measure of

discretion by the decision-makers. Clearly, the identity of the decisionmaker—whether the City Council, the Planning and Zoning Commission, or the Planning Director—is immaterial to characterization of the decision by the courts. Both the nature of the standards and the nature of the procedures to be applied at subsequent stages of the PD development process are relevant in determining whether such decisions constitute at least some measure of the exercise of discretion. This point in turn is important for determining the scope of immunities available to public officials under the federal civil rights act.

Subdivision Laws - Property division within land zoned for PDs is subject to enforcement of subdivison laws and ordinance requirements [42} Where residential development is involved, preliminary plats or tentative maps may be approved simultaneous with initial approval of the PD.[43] Under the Nevada legislation, cities and counties are given the power to modify subdivision as well as zoning requireinents in approving a PD. The statute requires that "all planning, zoning and subdivision matters relating to the platting, use and development of the planned unit development and subsequent modifications of the regulations relating thereto to the extent modification is vested in the city or county, must "?_- determined and established by the city or county [in the PD regulations]."[44]

Unintended divisions may occur, however, where property ownership is divided through foreclosure. Although there is little case law on the subject to date, in such instances, subdivision of the PD may be required prior to further rezoning or development approval on the resultant tracts. The result may depend upon the wording of the state subdivision laws. In Texas, for example, any division of a tract into two or more parts constitutes a subdivision.[45] There are no express statutory exemptions. Consequently, local ordinance must exempt divisions that would occur by means of foreclosure.[46] In other jurisdictions, divisions resulting from foreclosure may be expressly exempt from subdivision requirements.[47] On the other hand, the Nevada enabling authority for PDs expressly requires that the property must be rezoned and resubdivided if the landowner abandons the development plan or fails to carry out the plan within the specified period of time.[48]

Rights of Third Parties - Although PDs typically are conditioned to address complaints of adjoining landowners, local government action may be undone if such conditions amount to a delegation of zoning authority to neighbors.[49] By the same token, adjoining property owners do not acquire an

enforceable interest in the zoning of the land as PD or in particular conditions or restrictions governing development of the site. In American Aggregates Corp. v. Warren County Comm'rs[50], the county denied the plaintiffs request to build a concrete batching facility on property zoned for industrial purposes adjacent to its sand and gravel pit. The pit abutted a residential neighborhood, also zoned for industrial use. The local ordinance required the plaintiff to submit a planned unit development overlay for the affected area. The County approved the PD, but denied a requested modification for the batching plant following a public hearing at which residents of the adjoining subdivision objected. The Ohio Court of Appeals invalidated the planned unit development, reasoning that Ohio statutes authorized the use of such techniques only for uses zoned for residential purposes. The Court found that the sand and gravel operation did not constitute a nuisance to adjacent neighbors, since such residences were built on industrially-zoned property. The Court also ruled that the county could not impose the PD merely because the land could ultimately be reclaimed for residential purposes in the future.

In Young v. Jewish Welfare Federation of Dallas[5l], the city revised a site plan submitted in conjunction with approval of a special use permit, authorizing the holder of the special use permit to use right-of-way previously submitted in a deed of dedication as a parking lot. The city had not accepted the 25-foot strip as a public street, and the property owner had withdrawn its offer of dedication. The adjoining property owner sued the city, claiming that the amendment of the site plan without notification to him was unlawful and that he had acquired an interest in the street being placed adjacent to his property. The court rejected the claim, finding that the property had never been dedicated to the city and, consequently, the plaintiff was not entitled to rely upon dedication of the street in purchasing his property.

Issues Concerning Planned Development Zoning

While planned development zoning is a valuable tool in regulating development, its very flexibility can cause a number of problems. Since Texas' zoning statutes do not directly address planned development zoning, cities are provided little guidance on the use of PD zoning and procedures for establishing and administering PD districts. Some of the major concerns identified in the course of this study are reviewed below.

Ordinance Construction and administration - Each city's zoning ordinance must authorize the use of planned development zoning and define procedures for the creation and administration of districts. The text of the zoning ordinance governing PD districts should clearly specify whether the district is intended to be free-standing (in which case all pertinent zoning standards must be defined) or function as an overlay district. In the latter case, the ordinance should define the extent to which planned development zoning may be used to vary standard development regulations. Without proper authority PD zoning should not be used to alter subdivision ordinance or building code requirements. Unified development codes and cross authorizations may offer some ability, but this power should not be automatically assumed.

Drafting of specific planned development district regulations must avoid ambiguities to ensure intended results. Most planned development zoning requests involve complex issues and expectations.. The use of conceptual plans and illustrations is helpful in gaining an understanding of what can be done if the zoning is approved; however, unless the ordinance creating the planned development district clearly identifies the extent to which the conceptual plan is part of the district regulations (and hence part of the zoning for the district), the development proposed in subsequent plans may differ considerably from that shown on drawings at the time the zoning was approved, particularly if considerable time has elapsed since the original approval. Controversy over the intent of the ordinance inevitably arises in such circumstances. One technique to avoid ambiguities is to distinguish in the zoning ordinance between those features of a conceptual plan that are "regulatory" in character from those that are purely "informational." The difference is that regulatory elements require rezoning to change; informational features do not.

A related drafting issue is clarification of ambiguities concerning the level of discretion to be applied at later stages of the planned development process. This should be done in the text of the zoning ordinance that defines general standards for PD districts, rather than in the ordinances establishing individual PD districts. Discretion is mandated where the original conceptual plan is very general (or absent altogether), or the adopting ordinance fails to specify all uses or standards that are applicable to development within the PD district (for example, setbacks, heights applicable to structures, etc.). In some cases, the next stage of PD development constitutes in effect a zoning amendment to the original approval, necessitating appropriate notice and hearing procedures. In any event, the standards for approval, where discretion is called for in approving subsequent plans, should necessarily be broad.

Administration of planned development zoning is complicated by numerous factors. All zoning ordinances provide fertile ground for argument. Terminology, definitions and questions of intent seem produce endless debate. This problem seems even greater with planned development zoning. The problems of interpretation and enforcement only grows as the time between zoning approval and development lengthens and is further compounded by changes in property ownership and city staff.

Few planned developments are built as they were originally approved. As time passes, the market changes and unforeseen conditions and circumstances arise. Unfortunately, a change, even a minor change, to the development plan may require rezoning. This is especially true if the PD contains a long list of detailed requirements or if a preliminary development plan was incorporated by reference into the zoning. If rezoning is required, the process takes time, it may be expensive and may lead to opposition and renegotiation. Large planned developments are seldom built all at once. Zoning ordinances (both the general PD provisions of the zoning ordinance or the specific ordinance for the property) should deal with typical phasing problems. A related concern is the vesting of development plans when a portion of the project is built. Again, ordinances should directly define when vesting occurs.

Normally, the creation of a planned development district is initiated by a single property owner/developer. It is usually understood that a large project-will be built in phases by multiple owners/developers, but that the overall development will be coordinated through the zoning and master plan. Planned development ordinances should anticipate how to manage the plan and zoning rights if the owners are not cooperating and disagree on the meaning and distribution of development rights. This problem is common in the major metropolitan areas of Texas. The banking and real estate collapse resulted in foreclosures and the division and transfer of property within planned developments to such an extent that many PDs cannot be developed as zoned. The general provisions of a city's zoning ordinance should contain procedures for resolving issues concerning distribution of development rights and approval of development plans where a planned development district is divided into multiple ownerships.

Proliferation of Planned Development Zoning - The survey of Texas cities shows planned development zoning is used frequently. A number of forces have generated this demand. Neighborhood organizations are becoming stronger participants in the development decision-making process. Neighborhood associations

are insisting that negotiated concessions be made enforceable by recording them in the PD ordinance. Developers have found planned development zoning a successful strategy for gaining approval. Developers freely negotiate restrictions and concessions to win approval. Planners have promoted the use of planned development districts as a means of adding regulations that they have not been successful in getting approved as general ordinance amendments. All of the forces have resulted in the growing ad hoc use of planned development zoning.

Conclusion

Planned development zoning can be very valuable tool for regulating development. It offers tremendous flexibility in allowing development regulations to be tailored to the needs of a specific area based on actual conditions and development plans. The technique allows developers and cities to be innovative and more effective in ensuring sound development, consistent with the city's comprehensive plan and compatible with surrounding properties.

Successful use of planned development zoning depends on a well-written local zoning ordinance that defines the purpose, limits and abilities, and methods for establishing and administering PD districts. Specific PDs must be carefully written to ensure the accomplishment of the intended purpose. Overuse of planned development zoning should be guarded against. PDs should not be used to correct deficiencies of a standard district, nor should PDs be used as a means of legislatively granting a variance. Instead, PDs should be reserved to accommodate innovation and to respond to :unique site conditions in accordance with the citys comprehensive plan.

Notes

1. Typically, zoning ordinances do not include residential and commercial land use within the same district Texas law does not permit use variances. Thus, planned development zoning is frequently used to regulate mixed-use development.

2. See FHA, Planned-Unit Development with a Homes Association (U.S. Government Printing Office, 1963); NAHB & ULI, Innovation v. Transitions in Community Development: A Comparative Study in Residential Land Use (Urban Land Institute, 1963); Huntoon, PUD: A Better Way for the Suburbs (Urban Land Institute, 1971); So, et al., Planned United Development Ordinances (American Society of Planning Officials, 1973).

3. See Porter, et al., Flexible Zoning-How It Works (Urban Land Institute, 1988).

4. Most zoning ordinances require site plans to be approved by the planning and zoning commission or city council even though this is a administrative function. Councils and commissions often incorrectly assume that site plan review gives them the power to make changes to the plan or to add requirements above those contained in the zoning.

5. 26 Tex. Sup. Ct. J. 544 (July 20, 1983), op. withdrawn and rev'd, 664 S. W. 2d 702 (Tex. 1984).

6. See, e.g., Ahearn v. Zoning Bd. of Appeals, 551 N.Y. S. 2d 392 (App. Div. 1990); Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, 426 A2d 327 (D.C. Appl. 1981).

7. See, e.g., Chrinko v. South Brunswick Township Bd., 187 A2d 221 (N.J. L. Div. 1963).

8. City of College Station v. Turtle Rock Corp., 680 S.W. 2d 802, 087 (Tex. 1984).

9. Board of Supervisors *v.* West Chestmut.Realty Corp., 532 A2d 942 (Pa. Commw. Ct. 1987).

10. Ibid.

11. Peabody v. City of Phoenix, 14 Ariz. App. 576, 485 P. 2d 565 (1971); City of Waxahachie v. Watkins, 154 Tex 206, 275 S.W. 2d 477 (1955).

12. 709 P.2d 928 (Colo. 1985).

13. See also Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo, 1982); Doran Investments v. Muhlenberg Township, 10 Pa. Commw. 143, 309 A. 2d 450 (1973).

14. Nemeroff Realty Corp. v. Kerr, 32 N.Y. 2d 873, 299 N.E. 2d 897, 346 N.Y.S. 2d 532 (1973); Cheney v. Village 2 at New Hope, Inc., 420 Pa. 626, 241 A.2d 81 (1968).

15. See Teer, N. 5 supra.

16. 774 S.W. 2d 284 (Tex. App. - Dallas 1989).

17. Cheney v. Village 2 at New Hope, Inc., N. IS supra, 241 A.2d 81.

18. City of Pharr v. Tippitt, 616 S.W. 2d 173 (Tex. 1981).

19. Orinda Homeowners Comm. v. Bd. of Supervisors, 90 Cal. Rpt. 88 (Cal. App. 1970); Chrinko v. South Brunswick Township Planning Bd.,N. 7 supra, 187 A.2d 221.

20. N. 5 supra.

21. See also Rutland Environmental Protection Ass'n v. Kane County, 334 N.E. 2d 215 (111. Appl. 1975); see generally Wegner, Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals, 1988 Land Use & Envir. L. Rev. 245.

22. 409 S.W. 2d 184 (Tex. Civ. App. - Tyler 1966, *writ refd n.r.e.)*

23. See, e.g., Turner v. Barber, 380 S.E. 2d 811 (S.C. 1989).

24. Nollan v. California Coastal Comm'n, 483 U.S. 825 107 S. Ct. 3141 (1987); Leroy Land Development Corp. v. Tahoe Regional Planning Agency, 735 F. Supp. 1399 (D. Nev. 1990); compare Arrington v. Mattox, 767 S.W. 2d 957 (Tex. App. 1989).

25. N. 10 supra, 532 A. 2d 942.

26. 531 A. 2d 111 (Pa. Cornmw. 1987).

27. 242 A.2d 781 (Conn. 1968).

28. 114 S.Ct. 2409 (U.S. 1994).

29. It appears that the Court intended to limit its ruling in this case to exaction's of an interest in land. See City of Monterrey v. Del Monte Dunes at Monterrey, Ltd., v., 119 S.Ct. 1624 (U.S. 1999).]

30. City of College Station v Turtle Rock Corp., 680 S.W. 2d 802 (Tex. 1984).

31. N. 12 supra, 709 P.2d 928.

32. Board of Supervisors v. West chestnut Realty Corp., N. 10 supra, 532 A. 2d 942.

33. See Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978); Mayhew v. Town of Sunnyvale, 964 S.W. 2d 922 (Tex. 1998)

34. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Presbytery of Seattle v. King County, 787 P.2d 907 (1990); but see Ciampetti v. United States, 18 C. Ct. 548 (1989); Corrigan v. City of Scottsdale, 149 Ariz. 553, 720 P.2d 528 (1985); see generally Shonkwiler & Morgan,Land Use Litigation, Section 3.05 (West 1991 Supp.).

35. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. et 3108 (1985); City of El Paso v. Madero Development & Construction Co., Inc., 803 S.W. 2d 396 (Tex. App. -- El Paso 1991, writ denied); Mac Donald, Sommer & Prates v. County of Yolo, 477 U.S. 340 (1986); see generally Shonkwiler & Morgan N. 37 supra, at Ch. 8; Morgan, "Regulator Takings: A State and Federal Perspective," 1991 Institute of Planning, Zoning & Eminent Doman, Ch. 6 (Matthew Bender 1991).

36. BB 4, formerly Tex. Gov't Code sections 481.141 et seq, was inadvertently repealed by the 1997 Legislature. Other states also have vested rights legislation, see e.gs., Colo. Rev. Stat. Section 24-68-101 et seq.; Nev. Rev. Stat. Section 278 A.520 to 278A.540; see generally Morgan, "The Texas Permit Processing Law: Legislating Vested Development Rights" in 1996 Institute on Planning, Zoning and Eminent Domain, ch. 3]

37. See Caruthers v. Board of Adjustment, 290 S.W.2d 340 (Tex. Civ. App-Houston 1956); Biddle v. Board of Adjustment, 316 S.W. 2d 437 (Tex. Civ. App.-Houston 1958); see generally Cunningham & Kremer, "Vested Rights, Estoppel and the Land Development Process," 29 Hastings L.J. 625 (1978).

38. Section 245.002(a).

39. Id. at subsection (b).

40. 908 S.W.2d 229 (Tex. App. Dallas 1995, no writ.

41. Administrative actions may involve the exercise of discretion, in which case "qualified" immunity extend to
public officials under the civil rights act; where no discretion is involved, officials may be subject to damages for violation of constitutional rights such as alleged in the Cinemark case.

42. Prince George's County v. M&B Construction Co., 197 A2d 683 (Md. 1972).

43. See e.g., Nev. Rev. Stat. Section 278A.460.

44. Ibid.

45. See, e.g., Tex. Loc. Gov't Code Section 212.004.

46. See Tex. Loc. Gov't Code Section 212.0045.

See, e.g., Nev. Rev. Stat Section 278.320 (1)(c), providing that "any division of land which is ordered by any court in this state or created by operation of law" is not a subdivision.

47. Nev. Rev. Stat Section 278A.580.

48. See, e.g., Williams v. Whitten, 451 S.W. 2d 535 (Tex. Civ. App. — Tyler 1970, *no writ).*

See also Minton v. St. Worth Planning Comm'n, 786 S.W. 2d 563 (Tex. App. — Ft. Worth 1990).

50. 528 N.E. 2d 1266 (Ohio App.).

51 371 SM. 2d 767 (Tex. Civ. App. -- Dallas 1963, writ refd n.r.e.).

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