

# NEW PERSPECTIVES ON PLANNED UNIT DEVELOPMENTS

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*Author's Synopsis: Planned unit developments, also called planned communities, are a major development type. Originally cluster housing projects with common open space, they can be planned today as infill in downtown areas or as a major master-planned community. They require discretionary review, are often dominant in the zoning process, and present a challenge to the zoning system. A threshold question is how municipalities should zone for planned unit developments, and this Article discusses conditional use, base zone, and rezoning alternatives. This Article next discusses the zoning review process for these developments, which must operate fairly and produce acceptable decisions. Alternatives that can avoid or supplement discretionary review are considered next, and this Article concludes with a discussion of affordable housing as a social responsibility.*

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## I. INTRODUCTION

North of Atlanta, a major mixed-use development in the shape of a new town, rises on a new site.<sup>1</sup> In Connecticut, a university town builds a new mixed-use town center.<sup>2</sup> The first example is a master-planned community. The second example is infill development in town centers. Both are contemporary examples of a zoning technique called planned unit

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<sup>1</sup> See URB. LAND INST., *ULI Case Studies: Avalon*, at 1 (Oct. 2016), [http://case.studies.uli.org/wp-content/uploads/sites/98/2016/11/avalon\\_16pg\\_v3.pdf](http://case.studies.uli.org/wp-content/uploads/sites/98/2016/11/avalon_16pg_v3.pdf). Avalon is an 86-acre “mixed-use town center that, in its first phase, includes retail, restaurant, multi-family rental housing, single-family for-sale housing, and office uses surrounding a main street and a central plaza.” *Id.* Avalon is twenty-five miles north of downtown Atlanta. *See id.* at 2; *see also* Marlene Cimos, *The Most Sustainable Town in America*, NEXUS MEDIA, (Mar. 10, 2017), <https://nexusmedianews.com/the-most-sustainable-town-in-america-a4330330700a#te9beln4z> (discussing Babcock Ranch, a major planned community in Florida planned as a sustainable project).

<sup>2</sup> See URB. LAND INST., *ULI Case Studies: Storrs Center* (Aug. 2016) [hereinafter *Storrs Center*], [https://casestudies.uli.org/wp-content/uploads/sites/98/2016/08/Storrs\\_AUG2016\\_F.pdf](https://casestudies.uli.org/wp-content/uploads/sites/98/2016/08/Storrs_AUG2016_F.pdf); Wayne Senville, *Building a New Downtown – Part I*, PLANNERS WEB (Sept. 24, 2012), <http://plannersweb.com/2012/09/building-new-downtown-parti/> (discussing the Storrs Center development); Wayne Senville, *Building a New Downtown – Part II*, PLANNERS WEB (Sept. 25, 2012), <http://plannersweb.com/2012/09/building-new-downtown-partii/> (continuing discussion of Storrs Center); *see also* Mansfield, Conn., ZONING REGULATIONS OF THE TOWN OF MANSFIELD CONNECTICUT, art. 10, § S., [http://www.mansfieldct.gov/filestorage/1904/1932/2036/20170620\\_zoning\\_regs.pdf](http://www.mansfieldct.gov/filestorage/1904/1932/2036/20170620_zoning_regs.pdf).

Storrs Center created a new, mixed-use downtown for the town of Mansfield, Connecticut, replacing a small shopping center adjacent to the University of Connecticut. Its 11 mixed-use buildings house 626 rental apartments and 139,707 square feet of retail and office space; 42 for-sale townhouses and condominiums are also on the site. New retailers, such as a supermarket, restaurants, a medical center, and a bookstore create an eclectic college-town atmosphere, while a half-acre town square and 20 acres of nature preserves provide places for gathering and recreation.

*Storrs Center, supra*, at 1.

development,<sup>3</sup> a discretionary zoning process for approving development projects also known as planned, or master-planned, communities.<sup>4</sup> These visionary projects are a major change from the original purpose of planned unit development.<sup>5</sup> Planned unit development initially provided

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<sup>3</sup> Planned unit development (PUD) originated in the 1960s. *See generally* DANIEL R. MANDELKER, CONTROLLING PLANNED UNIT DEVELOPMENT (Am. Soc’y of Planning Official, 1966) [hereinafter 1966 Report]. Planned development (PD) or planned area development (PAD) are examples of contemporary terminology sometimes included in zoning ordinances. Additional acronyms also appear such as PRD, for planned residential development; PCD, for planned commercial development; or PDO, for planned development overlay district. They may also be called planned development districts (PDD) and special development districts (SDD). *See, e.g.,* SAN CARLOS, CAL., MUNICIPAL CODE ch. 18.10, <https://www.codepublishing.com/CA/SanCarlos/html/SanCarlos18/SanCarlos1810.html> (establishing a PDD); NEWTOWN, CONN., CODE §§ 595-158 to 595-163, <http://ecode360.com/15304088> (providing for a SDD). This Article uses the term “planned unit development” to describe these development forms. This Article only considers the use of planned unit development for residential or mixed-use developments, though planned unit development is also used for industrial and commercial projects.

<sup>4</sup> Whether zoning legislation provided authority for PUD was an initial concern and created an interest in model legislation:

The first model PUD law was drafted in 1965 by the late Chicago land-use lawyer Richard Babcock and other attorneys for a joint project of the Urban Land Institute (ULI) and the National Association of Home Builders. The model was proposed as a means to use “recent planning innovations” to better serve the general objectives of the Standard Zoning Enabling Act and to meet new demands for housing.

DANIEL R. MANDELKER, PLANNED UNIT DEVELOPMENTS, PLANNING ADVISORY SERV. REP. No. 545, 118 (Am. Planning Ass’n 2007) [hereinafter 2007 Report]. I spoke at a conference in Washington, D.C., in 1966, that introduced the model PUD law. Since that time, PUD law has evolved, and a lack of statutory authority may not necessarily be a problem. *See generally* *Campion v. Bd. of Aldermen of the City of New Haven*, 899 A.2d 542 (Conn. 2006) (approving a PUD district under Standard Zoning Enabling Act and analogizing it to floating zones). Indeed, Connecticut enacted planned unit development enabling legislation and later repealed it as unnecessary. *See* CONN. GEN. STAT. §§ 8-13b to 8-13k (repealed 1985); *see also id.* § 8-2d (providing under current statutory law that PUD and PRD regulations promulgated pursuant to the previous statutes “shall continue to be valid,” and that any PUD or PRD that was in compliance under those provisions “shall continue to be governed by the provisions of such regulations”). For discussion of planned unit development legislation, see Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419 (2008) [hereinafter *Legislation*].

<sup>5</sup> *See* Mahlon Apgar, IV, *Placemaking: Innovations in New Communities*, URB. LAND INST. (2014), [http://uli.org/wp-content/uploads/ULI-Documents/INNOVATIONS-IN-NEW-COMMUNITIES\\_final.pdf](http://uli.org/wp-content/uploads/ULI-Documents/INNOVATIONS-IN-NEW-COMMUNITIES_final.pdf) (detailing a survey of New Communities in the United States and the United Kingdom); *see also* Camilla McLaughlin, *New Keys for*

flexibility in a rigid zoning system and was first used for single-family residential projects, known as cluster housing. Residential densities do not usually increase with clustering because designers lay out homes compactly at higher densities in return for dedicated common, open space elsewhere in the project.<sup>6</sup> This type of development is not possible under traditional regulations.

Practice has moved beyond this limited purpose.<sup>7</sup> Master-planned communities are common, infill projects are done in urban areas, mixed use has become a project objective, and projects include new objectives such as natural resource preservation and sustainability.<sup>8</sup> Planned unit development is a major and sometimes dominant method by which communities manage new projects. Instead of an add-on option when

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*Modern Master-Planned Communities*, URBAN LAND (July 15, 2015), <https://urbanland.uli.org/planning-design/new-keys-modern-master-planned-communities/> (discussing changes in development concepts and an increase in urban projects; noting that golf course and large clubhouse projects are becoming outdated).

<sup>6</sup> Zoning and subdivision regulation did not allow this kind of development as they required standardized “cookie cutter” lots, and there was no provision for common open space. Preservation of open space was an important motivation, and William Whyte’s book provided important momentum. See William H. Whyte, CLUSTER DEVELOPMENT (1964); see also NEW APPROACHES TO RESIDENTIAL LAND DEVELOPMENT: A STUDY OF CONCEPTS AND INNOVATIONS, ULI Technical Bulletin No. 40 (1961). Professor Whittemore views cluster development as the reason for adopting planned unit development as a zoning process, and he claims it has failed; he discusses a case study done in Los Angeles in the 1960s about neighborhood opposition to and rejection of this type of development. See generally Andrew H. Whittemore, *The New Communalism: The Unrealized Mid-Twentieth Century Vision of Planned Unit Development*, 14 J. PLAN. HIST. 244 (2015). This view of planned unit development is too restricted. Cluster development has been successful elsewhere, and planned unit development has taken other forms. See *supra* notes 1 and 2.

<sup>7</sup> Other types of planned unit development include (1) single-use development, such as residential or nonresidential development, with an increase in density; (2) mixed-use development with or without an increase in density; and (3) a master-planned community. See VT. LAND USE EDUC. & TRAINING COLLABORATIVE, PLANNED UNIT DEVELOPMENT (2007), <http://vpic.info/Publications/Reports/Implementation/PlannedUnitDevelopment.pdf>. But see Whittemore, *supra* note 6. These are mixed-use communities, often of substantial size, that contain one or more residential villages and town centers. Planned unit developments may occur on open greenfield sites in suburban areas or on infill sites where the planned unit development will be surrounded by existing urban development.

<sup>8</sup> See generally RICHARD FRANKO ET AL., DEVELOPING SUSTAINABLE PLANNED COMMUNITIES (2007); KALVIN PLATT, MASTER-PLANNED COMMUNITIES: LESSONS FROM THE DEVELOPMENTS OF CHUCK COBB 184–86 (2011).

traditional zoning does not produce optimal results, planned unit development has become an instrumentality for improvements in site design and development.

Planned unit development today presents challenges to the zoning system that have not been fully resolved. An important concern is the elimination of by-right conventional zoning. Under by-right zoning, an ordinance contains the rules that apply to new development, and a developer can build under them without further review.<sup>9</sup> The developer has an entitlement. There is no need for discretionary approval, and there is no public participation in an approval process. Planned unit development requires a discretionary review that eliminates this entitlement.<sup>10</sup>

This shift to discretionary review is a major and critical change. By-right zoning provides certainty, and planned unit development review removes certainty. This change creates problems for developers who invest in new projects, neighbors affected by project proposals, and municipalities that control project outcomes. The process must be managed so that developers enter with minimal risk, and municipal and citizen concerns are considered. There must be decisions about when and how municipalities review planned unit developments and under what standards. The system must maintain public control while providing opportunities for flexibility and design. Public participation must be constructive, not destructive.

This Article explores the primary issues raised by planned unit development. My reports on planned unit development<sup>11</sup> and my book on

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<sup>9</sup> However, a land use attorney with forty years of experience stated that he very rarely had a zoning project that his client could develop by right under a zoning ordinance and that these situations occur much less frequently now than they may have twenty years ago. *See* Telephone Interview with Gary Feder, Husch Blackwell (Jan. 25, 2017); *see also infra* note 14 and Appendix A.

<sup>10</sup> A PUD developer may be in a stronger position after receiving zoning and development plan approval than she was under the existing zoning. The development plan will govern the project subject to amendment at the developer's request. *See* 2007 Report, *supra* note 4, at 51. A major amendment requiring council action may become necessary, however, and may face opposition. Minor amendments can go to staff. *See id.* at 50–52 (describing amendment process). Vesting rights for a multi-phase project is difficult. *See infra* note 264 and accompanying text. Development agreements can provide an alternative. *See infra* Part IV.C.

<sup>11</sup> *See* 1966 Report, *supra* note 3; *see also* 2007 Report, *supra* note 4. I was asked to write the 1966 Report, *supra* note 3, by the American Society of Planning Officials, now the American Planning Association, shortly after model legislation was proposed for planned unit developments, and this kind of development became attractive.

planned community design,<sup>12</sup> which include model ordinances, are a starting point. I update those publications by reviewing planned unit development practice based on an analysis of planned unit development ordinances<sup>13</sup> and telephone interviews<sup>14</sup> with land use lawyers and planners. The major issues are adequate control of the decision-making process and how the process responds to development problems. This Article considers zoning alternatives for planned unit developments and the tradeoffs they create, and suggests improvements for better practice. Neither a simple fix nor perfect model exists—communities must decide what kind of planned unit development they want and how it should be handled.

A threshold question is how municipalities<sup>15</sup> should zone for planned unit developments. Part I introduces planned unit developments. Part II discusses conditional use, base zone, and rezoning alternatives. Approval as a conditional use is suitable for projects that do not require major zoning change. Under a base zone alternative, a planned unit development must comply with the base zone in which it is located. Under a rezoning alternative, a municipality creates a new planned unit development district and then approves the project and its development plan.

The zoning review process, which Part III considers, must operate fairly to produce acceptable decisions. One alternative is review based on a concept plan, followed by approval of a detailed development plan. The

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<sup>12</sup> See DANIEL R. MANDELKER, *DESIGNING PLANNED COMMUNITIES* (2010) [hereinafter *DESIGNING*], <http://law.wustl.edu/landuselaw/BookDPC/Designing%20Planned%20Communities.pdf>.

<sup>13</sup> Appendix B lists the ordinances reviewed with internet addresses. It is a representative, national sample and includes states where planned unit development is active. American Planning Association research staff suggested ordinances from about twenty-five cities and counties where planned unit development is occurring. I collected ordinances from these and other cities that illustrate contemporary planned unit development practice, with an emphasis on Florida, Arizona, and Nevada—states where planned unit development is active. The Article cites ordinances by jurisdiction. All state statutory citations in this Article refer to the current statute unless otherwise indicated. The same applies to state regulations and ordinances.

<sup>14</sup> Appendix A lists the interviewees, their job titles, and employers, which the footnotes cite by last name and location of the interviewees. The interviews include a nationwide sample of planners and lawyers with experience in planned unit development practice from representative areas, cities, and counties. The interviews were conducted via telephone in December 2016 through March 2017.

<sup>15</sup> In this Article, the term “municipality” includes counties and other local units of government, such as townships and boroughs.

other is approval based on a detailed development plan without concept plan approval. The chosen alternative has important consequences for developer investment, municipal control, and public participation.

Part IV discusses alternatives that can avoid or supplement discretionary review. By-right zoning for infill developments in urban areas is one option. Form-based codes regulate building form, public spaces, and how they relate. Form-based codes can be helpful in regulating design and site detail. Development agreements provide supplementary controls.

Affordable housing, discussed in Part V, is a social responsibility that planned unit developments can meet. One option is inclusionary zoning, which requires a percentage of project housing to be set aside as affordable. Housing elements in comprehensive plans can provide policies for affordable housing, including site designations. A jobs-housing balance requirement, which requires jobs for project residents to reduce commuting, can make housing affordable by reducing transportation costs. Part VI concludes.

## II. ZONING FOR PLANNED UNIT DEVELOPMENT

Planned unit developments are usually approved under the zoning ordinance.<sup>16</sup> The interviews<sup>17</sup> reported they are an active, and sometimes the dominant, form of development in their community.<sup>18</sup> Activity occurs in both counties and cities,<sup>19</sup> and a wide variety of projects are allowed.<sup>20</sup>

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<sup>16</sup> Ordinances may be either long-form or short-form. *See* 2007 Report, *supra* note 4, at 14–18, 23 (including a table listing essential provisions of planned unit development ordinances).

<sup>17</sup> *See supra* note 14; *infra* Appendix A.

<sup>18</sup> *See also* TODD LARUE & BRIAN MARTIN, THE TOP-SELLING MASTER-PLANNED COMMUNITIES OF 2016 (RCLCO, Jan. 4, 2017), <http://www.rclco.com/advisory-mpc-survey-2016-year-end-2017-01-04> (showing six-percent yearly increase in home sales in these communities).

<sup>19</sup> *See, e.g.*, Telephone Interview with Jeffrey Borchardt, Assoc. Planner, Cmty. Dev. Dep't, City of Reno, Nev. (Dec. 30, 2016) [hereinafter Borchardt (Reno, Nev.)]; Telephone Interview with Brian Connolly & Tom Ragonetti (Dec. 13, 2016) [hereinafter Connolly & Ragonetti (Denver, Colo.)] (occurring in unincorporated areas of counties and selected cities); Telephone Interview with Bryan Davis, Urban Designer/Principal Planner, Palm Beach Cty. Planning Div., Fla. (Dec. 13, 2016) [hereinafter Davis (Palm Beach Cty., Fla.)] (discussing developers have internalized planned unit development); Telephone Interview with Olan D. Hill, Chief Planner, Orange Cty. Planning Div., Fla. (Dec. 12, 2016) [hereinafter Hill (Orange Cty., Fla.)]; Telephone Interview with Sandy Hoffmann, Dir. of Planning Div., Phoenix, Ariz. (Jan. 4, 2016) [hereinafter Hoffman

There is a mix of both undeveloped greenfield and infill sites,<sup>21</sup> though infill development was dominant in some cities.<sup>22</sup> Size is another distinction. Often, ordinances have size limits that are not substantial, so projects can be built on small lots.<sup>23</sup> Ordinances that require large-scale master-planned community are the other extreme.<sup>24</sup>

An important factor is whether a project requires a change in use, density, or both.<sup>25</sup> Ordinances can be simpler when use and density

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(Phoenix, Ariz.)] (stating that planned unit development is common); Telephone Interview with Aric Jensen, Dir. of Cmty. Dev., City of Reno, Nev. (Jan. 4, 2017) [hereinafter Jensen (Reno, Nev.)] (explaining planned development extremely active; Reno has standard zoning strategy); Telephone Interview with Doug Jorden, Jorden Hiser & Joy, PLC (Jan. 4, 2017) [hereinafter Jorden (Phoenix, Ariz.)] (stating that planned unit development is very active and anything of significance is a planned unit development); Telephone Interview with Robert I. McMurry, Robert McMurry Law Offices (Jan. 13, 2017) [hereinafter McMurry (Anaheim, Cal.)] (stating planned unit development is the way to do development in California); Telephone Interview with Barry Wilcox, Div. Manager, Tallahassee/Leon Cty. Planning Dep't (Sept. 15, 2016) [hereinafter Wilcox (Leon Cty., Fla.)] (stating that Leon County is still approving planned unit developments). Some jurisdictions, however, reported reduced activity. *See* Telephone Interview with George Kramer, S&ME, Inc. (Dec. 15, 2016) [hereinafter Kramer (Orlando, Fla.)] (stating that in Orlando, Fla., planned unit development is still a little active); Telephone Interview with Bruce L. Lewis, City Planning Supervisor, City of Jacksonville, Fla. (Dec. 19, 2016) [hereinafter Lewis (Jacksonville, Fla.)] (illustrating Jacksonville new sites and infill).

<sup>20</sup> For a more detailed breakdown of planned unit development categories, see 2007 Report, *supra* note 4, at 20.

<sup>21</sup> *See, e.g.,* Borchardt (Reno, Nev.), *supra* note 19 (discussing greenfield and smaller infill sites); Hoffman (Phoenix, Ariz.), *supra* note 19 (discussing infill and greenfield); Kramer (Orlando, Fla.), *supra* note 19 (explaining that in Orlando it is usually greenfield); Lewis (Jacksonville, Fla.), *supra* note 19 (discussing infill and some greenfield sites); Telephone Interview with Dwight Merriam, Robinson & Cole, L.L.P. (Dec. 28, 2016) [hereinafter Merriam (Hartford, Conn.)] (primarily greenfield).

<sup>22</sup> *See* Telephone Interview with Daniel Cobb, Planning Dir., City of Brevard, N.C. (Jan. 3, 2017) [hereinafter Cobb (Brevard, N.C.)]; Telephone Interview with Jim Mazzocco, Hearing Exam'r, City of Tucson, Ariz. (Dec. 14, 2016) [hereinafter Mazzocco (Tucson, Ariz.)] (mostly infill); Telephone Interview with Keri Silvyn, Lazarus, Silvyn & Bangs, P.C. (Dec. 29, 2016) [hereinafter Silvyn (Tucson, Ariz.)] (Downtown infill works well.).

<sup>23</sup> *See* Cobb (Brevard, N.C.), *supra* note 22; Hill (Orange Cty., Fla.), *supra* note 19.

<sup>24</sup> *See generally* PLATT, *supra* note 8 (describing and discussing how master-planned communities developed over several decades).

<sup>25</sup> *See* AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MGMT. OF CHANGE 3-101 (Stuart. Meck ed., 2002)

changes are not required, as with residential cluster development.<sup>26</sup> Project type can affect the way an ordinance is structured, but most ordinances are in a single format that does not distinguish between different types of projects.<sup>27</sup> There are three zoning alternatives: approval as a conditional use, assigning the planned unit development to a base zone, or a rezoning for a new planned unit development district.<sup>28</sup>

#### A. As a Conditional Use

An ordinance can allow a planned unit development as a conditional use.<sup>29</sup> A conditional use is arguably compatible with uses allowed in a zoning district, but needs review to decide whether it is appropriate.<sup>30</sup> Approval is given under standards contained in the ordinance, and conditions are usually attached.<sup>31</sup> This procedure is intended for only one use.<sup>32</sup> It is not easily applied to planned unit developments, which may require changes in use and density, and a comprehensive review of their

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[hereinafter LEGISLATIVE GUIDEBOOK] (defining “development” as “any change in the intensity or use of land”).

<sup>26</sup> For discussion of short-form ordinances, see 2007 Report, *supra* note 4, at 15–17.

<sup>27</sup> See, e.g., BALT. CITY, MD., CODE art. 32, § 13-203 (omitting project type as a factor that must be considered in government review of planned unit development); CLARK COUNTY, NEV., DEVELOPMENT CODE § 30.24 (choosing not to require project type plan in submitting planned unit development application); KERRVILLE, TEX., CITY OF KERRVILLE ZONING CODE art. 11-I-15 (making no mention of project type in declining requirements of planned unit development concept plan); SHERWOOD, OR., CODE OF ORDINANCES ch. 16.40 (requiring only details of particular uses in preliminary development plan). Some jurisdictions distinguish between residential and nonresidential developments. See SHERWOOD, OR. CODE, *supra*; see also KITTITAS COUNTY, WASH., KITTITAS COUNTY ZONING CODE § 17.36 (applying different requirements inside and outside “Urban Growth” areas).

<sup>28</sup> See 2007 Report, *supra* note 4, at 21–22, 27–30.

<sup>29</sup> See, e.g., Newark, Cal., Newark Zoning Ordinances § 17.40.020 (allowing conditional use permits); see also 2007 Report, *supra* note 4, at 30; Jensen (Reno, Nev.), *supra* note 19 (conditional use approval faster). For a model statute authorizing approval as a conditional use, see LEGISLATIVE GUIDEBOOK, *supra* note 25, § 8-303(b).

<sup>30</sup> See DANIEL R. MANDELKER & MICHAEL ALLEN WOLFE, LAND USE LAW §§ 6.50 to 6.51 (6th ed. 2015) [hereinafter LAND USE LAW].

<sup>31</sup> For example, local governments may execute development agreements with planned units developed in this manner. See 2007 Report, *supra* note 4, at 47.

<sup>32</sup> See 2007 Report, *supra* note 4, at 50 (noting complications can arise where there is a change in use, intensity of use, or density of use).

development features.<sup>33</sup> It might be acceptable as a method for approving cluster housing.

## B. The Base Zone Alternative

### 1. *How It Is Done*

A base zone alternative provides an existing set of regulations that apply to a planned unit development.<sup>34</sup> It has advantages because uses and densities are fixed and only a development plan must be approved, reducing uncertainty and the time needed for approval. Reliance on existing zoning can also lessen or eliminate neighbor opposition,<sup>35</sup> which reduces uncertainty and can prevent project rejection. A base zone alternative works best with single-family residential cluster development where the issue is a map adjustment without a change in use or density.<sup>36</sup> A base zone alternative clusters housing in one part of the development at higher densities in return for offsetting common open space elsewhere, but the overall density remains the same.<sup>37</sup> Several jurisdictions use this development model.<sup>38</sup>

Despite these advantages, some interviews reported problems with this option.<sup>39</sup> It can be clumsy to administer because zoning codes are

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<sup>33</sup> *See id.*

<sup>34</sup> *See, e.g.,* DAVIS, CAL., MUNICIPAL CODE § 40.32.060 (stipulating that “gross population density and building intensity . . . shall remain unchanged,” but changes can be authorized for lot dimensions, building setbacks, and area to achieve “more functional and desirable use”); LOUISVILLE, COLO., LOUISVILLE MUNICIPAL CODE § 17.14.050 (regulating permitted uses in commercial districts and mixed-use zones); MARICOPA COUNTY, ARIZ., MARICOPA COUNTY, ZONING ORDINANCE art. 1001.3 (describing general conditions required for approval of planned area development); MESA, ARIZ., MESA ZONING ORDINANCE § 11-22-2 (utilizing planned area development overlay to prescribe and limit counties for approval of planned unit development); MOBILE, ALA., CODE OF ORDINANCES § 64-5(B) (regulating but with modifications in ordinance).

<sup>35</sup> *See* Jensen (Reno, Nev.), *supra* note 19.

<sup>36</sup> *See* 2007 Report, *supra* note 4, at 60–62.

<sup>37</sup> Because the lots are clustered in one part of the development, the ordinance must provide a basis for calculating the number of lots allowed that will not increase the density allowed by the ordinance without clustering. *See id.*

<sup>38</sup> *See* Connolly & Ragonetti (Denver, Colo.), *supra* note 19; Hill (Orange Cty., Fla.), *supra* note 19; Mazzocco (Tucson, Ariz.), *supra* note 22.

<sup>39</sup> *See* Borchardt (Reno, Nev.), *supra* note 19; Telephone Interview with Travis Crane, Assistant Planning Dir., Raleigh, N.C. (Jan. 6, 2017) [hereinafter Crane (Raleigh, N.C.)]; Wilcox (Leon Cty., Fla.), *supra* note 19.

complicated and all the base restrictions that apply may not be known.<sup>40</sup> Reliance on existing zoning may also limit flexibility and creativity.<sup>41</sup> Many ordinances allow exceptions to the base zoning to provide flexibility, but they are limited because they are back-handed changes to existing restrictions.<sup>42</sup> They may also require support in a quasi-judicial hearing, where flexibility to consider project needs may not be available.<sup>43</sup> Procedures may be time consuming, and numerous exceptions can cause delays and unnecessary expense.<sup>44</sup> Exceptions can also destroy the certainty the base zone provides.<sup>45</sup>

*City of Gig Harbor v. North Pacific Design, Inc.*<sup>46</sup> illustrates the confusion base zoning can create.<sup>47</sup> A hearing examiner approved a conditional use permit for an 18.8-acre Planned Residential Development (PRD) at a density of 11.75 units per acre as a buffer between high intensity commercial and lower intensity residential areas.<sup>48</sup> The underlying base zone authorized an increase in density from eight units to twelve units per acre if “allowed as a conditional use.”<sup>49</sup> Uses allowed as a PRD in a Planned Residential District could include “conditional uses permitted in the underlying zoning district.”<sup>50</sup> It was not clear whether an increase in density allowed in the base zone was a conditional use allowed in the Planned Residential District.

The city argued the PRD option was not available because the approval was a rezone, even though it did not involve a change in use, because it departed from the base zoning.<sup>51</sup> The court disagreed and

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<sup>40</sup> See Silvyn (Tucson, Ariz.), *supra* note 22.

<sup>41</sup> See McMurry (Anaheim, Cal.), *supra* note 19.

<sup>42</sup> *See id.*

<sup>43</sup> See Telephone Interview with Mark White, White & Smith, Kansas City, Mo. (Dec. 21, 2016) [hereinafter White (Kansas City, Mo.)]. White points out that a decision made in a quasi-judicial hearing requires a public record supported by evidence. *See id.* He believes neighbors are more likely to participate in an informal legislative process where there is no cross-examination, and where the only recourse is judicial review. *See id.*

<sup>44</sup> See 2007 Report, *supra* note 4, at 23.

<sup>45</sup> *See id.* at 16–18.

<sup>46</sup> 201 P.3d 1096 (Wash. Ct. App. 2009).

<sup>47</sup> *See id.* at 1097.

<sup>48</sup> *See id.* at 1098.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1100.

<sup>51</sup> *See id.* at 1100–01.

replied that the “Municipal Code here expressly allowed a density increase of up to 12 dwelling units per acre as a conditional use in the underlying zone.”<sup>52</sup> There was no “mix-and-match” of the different ordinances.<sup>53</sup> An ordinance can deal with this problem by making it clear that approval of a planned unit development “designation does not establish an underlying zone or enlarge the uses provided by a zoning classification.”<sup>54</sup>

## 2. *Exceptions*

If exceptions are allowed from the base zone, the ordinance should include standards and procedures for deciding when they should be made. One cautious option for a residential development is to authorize nonresidential uses up to a designated percentage, which limits change.<sup>55</sup> Most ordinances do not take this approach and instead contain discretionary standards for exceptions, treating them as guarded departures from the base zoning.<sup>56</sup> Compatibility with uses in the surrounding area

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<sup>52</sup> *Id.* at 1101. The Code also provided that “PRDs involving ‘primary, accessory and conditional uses permitted in the underlying zoning district’ did not require a rezone application. . . .” *Id.* There was also a statement of purpose providing that “[t]he intent of the PRD zone is to allow opportunity for more creative and imaginative residential projects than generally possible under strict application of the zoning regulations in order that such projects shall provide substantial additional benefit to the general community.” *Id.* at 1100. It is not clear whether the statement of intent also was a condition for approval of a PRD.

<sup>53</sup> *Id.* at 1103–04.

<sup>54</sup> Alexandra Croft Moravec, *An Analysis of Planned Unit Development (PUD) Regulations and Processes in Washington, DC: A Development Risk Management Case Study*, 63 (2009), <https://cdr.lib.unc.edu/indexablecontent/uuid:fd4996b3-7a7d-44ee-84fd-a2431a2770eb>, [hereinafter *Analysis*] (detailing a masters project submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Master of Regional Planning in the Department of City and Regional Planning, 2007). Moravec conducted interviews in Washington, D.C., and elsewhere with planners and other participants in the planned unit development process. *See id.*

<sup>55</sup> *See* MOLALLA, OR., MUNICIPAL CODE § 19.20.110(D)(3)(b) (“[A] maximum of 25% of the total gross floor area may be used for multifamily dwellings in those commercial zones that do not list multifamily dwellings as an outright use. Such a use must be located above or behind the central commercial retail.”).

<sup>56</sup> *But see* Silvyn (Tucson, Ariz.), *supra* note 22 (noting decision on exception from base zoning is open-ended political process without criteria).

and design quality are common requirements.<sup>57</sup> For example, the Grand Forks, North Dakota, ordinance<sup>58</sup> provides that exceptions must be consistent with the purposes of the ordinance, provide greater functionality and higher amenity to the neighborhood, and be in the interest of the neighborhood and entire community.<sup>59</sup>

An ordinance can include more detailed standards. Eagle County, Colorado's ordinance<sup>60</sup> contains standards for several features, stating that “[a] variation may be allowed that permits the integration of mixed

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<sup>57</sup> See, e.g., AVON, IND., ZONING ORDINANCE § 5-2 (including requirements to achieve purposes of planned unit developments, not violate zoning ordinance or comprehensive plan, not unduly burden adjacent roadways, and provide compensating amenities); DAVIS, CAL., MUNICIPAL CODE § 40.32.060(a) (“[L]ot dimensions, building setbacks and area do not have to meet the specific requirements of this chapter; provided, that a more functional and desirable use of the land is made.”); FORT COLLINS, COLO., LAND USE CODE § 4-29(B) (requiring compatibility with other listed permitted uses, mitigation of impacts, and compliance with land use standards in ordinance); GRAND FORKS, N.D., LAND DEVELOPMENT CODE § 18-0223(3)(D) (stating that zoning must be consistent with the purposes of this section, provide greater functionality and higher amenity to the neighborhood, and be in the interest of the neighborhood and entire community); HENDERSON, NEV., DEVELOPMENT CODE §§ 19.4.5.D(4), 19.7.11(B) (requiring compliance with “a range of site and building design options for sustainability to enhance other mandatory sustainability related requirements integrated throughout this Code” and also requiring that the PUD must include “adequate provisions for utility services and emergency vehicle access”); KANE COUNTY, ILL., COUNTY CODE § 25-3-1 (requiring “assurances of an overall quality of development, including any specific features which will be of exceptional benefit to the County as a whole”); LOUISVILLE, COLO., CODE OF ORDINANCES § 17.28.110 (listing spirit and intent of the development plan criteria, usable open space in common park area in excess of public use dedication requirements, design and amenities, usable or functional open space and buffer areas); MOBILE, ALA., CODE OF ORDINANCES § 64-5(B)(1)(a) (detailing uses incidental and compatible with residential use and compatible business uses providing substantial services); see also *In re* Pierce Subdivision Application, 965 A.2d 468 (upholding similar compatibility standards); Mazzocco, (Tucson, Ariz.), *supra* note 22 (explaining that changes from base zoning can be consistent with a comprehensive plan).

<sup>58</sup> GRAND FORKS, N.D., LAND DEVELOPMENT CODE § 18-0223(3)(D).

<sup>59</sup> See *id.*

<sup>60</sup> EAGLE COUNTY, COLO., LAND USE REGULATIONS § 5-240F.3f(3). Please note that Eagle County, Colorado, uses the term “regulations” in describing its ordinances. The regulations are approved and administered by the elected Eagle County Board of Commissioners, which serve “both as an administrative and policy making body for the county.” See TOWN OF EAGLE, *Eagle County*, <http://www.townofeagle.org/463/Eagle-County> (last visited Oct. 3, 2017). Additionally, the municipalities located within Eagle County have incorporated the regulations into their own ordinances. See TOWN OF EAGLE, COLO., LAND USE & DEVELOPMENT CODE § 4.04.040(D).

uses or allows for greater variety in the type, design and layout of buildings.”<sup>61</sup> Detailed design guidelines are provided, such as “height, mass, scale, orientation and configuration, with other structures.”<sup>62</sup> The ordinance should also provide guidance on whether the restrictions in the base zoning should be changed.<sup>63</sup>

Some ordinances require a showing of benefit to the community in addition to compliance with other standards,<sup>64</sup> such as the Model Land Development Code<sup>65</sup> prepared by the Oregon Land Conservation and Development Department. It requires a “net benefit” for one or more of the following: housing variety, more receptive useable open space, more protection of natural features than the code requires, avoidance of natural hazards, or improved transportation connectivity.<sup>66</sup> A public benefit standard is acceptable if it is appropriate to require a public gain.<sup>67</sup>

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<sup>61</sup> EAGLE COUNTY, COLO., LAND USE REGULATIONS § 5-240F.3.f(3); *see* ST. CHARLES, ILL., ZONING ORDINANCE § 17.04.400(2) (listing seven factors, including high quality design, energy efficient building and site design and superior landscaping, and buffering or screening); WILMETTE, ILL., CODE OF ORDINANCES § 20-6.5. The standards are like those in Eagle County, but add compatibility, protection from danger and public benefit requirements. *See* WILMETTE, ILL., CODE OF ORDINANCES § 20-6.5. Several public benefits are listed, including public amenities, sustainable design and architecture, preservation of historically significant and environmental features, and affordable or senior housing set-asides. *See id.*

<sup>62</sup> EAGLE COUNTY, COLO., LAND USE REGULATIONS § 5-250D.1.

<sup>63</sup> *See, e.g.*, 2007 Report, *supra* note 4, at 92 (recommending an exception to bulk regulations that “serves the purpose of promoting an integrated site plan no less beneficial to the residents or occupants of the PUD, as well as the neighboring property, than is allowable under the bulk regulations of the underlying zoning district for buildings developed on separated zoning lots”).

<sup>64</sup> *See* HENDERSON, NEV., DEVELOPMENT CODE § 19.4.5.D.4; *see also* KANE COUNTY, ILL., COUNTY CODE § 25-3-1.

<sup>65</sup> OREGON MODEL DEVELOPMENT CODE, ED. 3.1, § 4.8.040(B) (OR. DEP’T OF LAND CONSERVATION & DEVELOPMENT, 2015), [http://www.oregon.gov/LCD/TGM/docs/modelcode/Wholemodelcode\\_ed3.1.pdf](http://www.oregon.gov/LCD/TGM/docs/modelcode/Wholemodelcode_ed3.1.pdf). The Code also requires compliance with the comprehensive plan and that “[t]he modification equally or better meets the purpose and intent of the Development Code section(s) to be modified, as compared to a project that strictly conforms to code standards.” *Id.* § 4.8.040(C).

<sup>66</sup> *Id.* § 4.8.040(C). Modification of design standards requires approval of a separate variance given concurrently with a master planned development. *See id.* § 4.8.04(D).

<sup>67</sup> A developer may have to give an exaction in order to comply with the public benefit requirement, such as the dedication of natural resource land to a public agency. An exaction is subject to challenge under the takings clause. *See* LAND USE LAW, *supra* note 30, §§ 9.11 to 9.16. Planned unit developments provide a good opportunity to

Procedures for the exception decision are needed. Some ordinances authorize approval of an exception when the municipality approves the planned unit development<sup>68</sup> or the preliminary plan.<sup>69</sup> Procedures will then be in place elsewhere in the ordinance and may be adequate.<sup>70</sup> Several ordinances do not explicitly provide procedures, but authorize departures from base district regulations that may possibly require approval in the project review process—though this requirement is not explicit.<sup>71</sup> Other ordinances require approval by the city council<sup>72</sup> or the planning commission<sup>73</sup> but do not specify procedure. The procedure problem requires more attention. The ordinance should provide procedures for the exception decision or apply procedures found elsewhere in the ordinance.

### C. The Rezoning Alternative

#### 1. *How It Is Done*

Rezoning<sup>74</sup> is a frequently used method for approving planned unit developments.<sup>75</sup> In a typical procedure, the municipality rezones for a

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require exactions. *See* Telephone Interview with Lee Einsweiler, Principal Code Studio (Dec. 19, 2016) [hereinafter Einsweiler (Austin, Tex.)] (stating that a PUD is the best exaction tool, which can be used as lever for affordable housing and common open space).

<sup>68</sup> *See, e.g.*, LOUISVILLE, COLO., CODE OF ORDINANCES § 17.14.040(A) (citing section 17.28 and noting that an existing regulation may be waived or modified through the approval process of the planned unit development); MESA, ARIZ., ZONING ORDINANCE § 11-22-2 (“Limitations and standards of use also may be established in the overlay district as conditions of approval for individual developments.”).

<sup>69</sup> *See, e.g.*, EAGLE COUNTY, COLO., LAND USE REGULATIONS § 5-240F.3.f(3).

<sup>70</sup> The type of decision authorized to change base zoning regulations varies, but if it is an exception, most courts put the burden of proof on the applicant. *See* LAND USE LAW, *supra* note 30, § 6.53.

<sup>71</sup> *See* DAVIS, CAL., MUNICIPAL CODE § 40.32.060(a); FORT COLLINS, COLO., LAND USE CODE § 4-29(B); GRAND FORKS, N.D., LAND DEVELOPMENT CODE § 18-0223(3)(D); KANE COUNTY, ILL., COUNTY CODE § 25-3-1; MALTA, N.Y., ZONING CODE § 167-26(F).

<sup>72</sup> *See* WILMETTE, ILL., CODE OF ORDINANCES § 20-6.5 (stating that plan commission can recommend and village board can approve); *see also* HENDERSON, NEV., DEVELOPMENT CODE § 19.4.5.D.4.

<sup>73</sup> *See* MOBILE, ALA., CODE OF ORDINANCES § 64-5(B)(1)(a); *see also* 2007 Report, *supra* note 4, at 92 (explaining that city council or planning commission may approve exception to bulk regulations in base zone).

<sup>74</sup> *See, e.g.*, D.C., ZONING REGULATIONS, subtit. X, § 300.4 (stating that related zoning is allowed); *see also* COLUMBUS, IND., ZONING ORDINANCE, § 5.4 (rezoning);

planned unit development district and then applies standards<sup>76</sup> contained in the ordinance to approve a development plan for the project.<sup>77</sup> It can also consider both together.<sup>78</sup> The planning commission will review and provide recommendations for legislative decisions.<sup>79</sup> Development occurs under any regulations that apply and under the development plan.<sup>80</sup>

A zoning amendment, such as an amendment for a planned unit development district,<sup>81</sup> is a legislative act in most states.<sup>82</sup> The

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HALLANDALE BEACH, FLA., CODE OF ORDINANCES § 32-186(f) (city-initiated rezoning); KANE COUNTY, ILL., COUNTY CODE, § 12-1-2 (containing rezoning to PUD district). For a description of the planned unit development zoning process in Austin, Texas, with an accompanying chart, see OFF. OF THE CITY AUDITOR, CITY OF AUSTIN, SPECIAL REQUEST REP. ON PLANNED UNIT DEVELOPMENT (PUD) APPLICATION PROCESS (2016), <https://www.austintexas.gov/sites/default/files/files/Auditor/AS16102.pdf>.

<sup>75</sup> A municipality may also approve a planned unit development as a floating zone. This is a zone first adopted in the text of the zoning ordinance that the municipality later applies to individual sites. *See* *Campion v. Bd. of Aldermen of the City of New Haven*, 899 A.2d 542, 553 (Conn. 2006) (approving use of floating zones for planned unit developments).

<sup>76</sup> *See, e.g.*, FRANKLIN, TENN., ZONING ORDINANCE § 2.4.2(7) (maintaining the importance of consistency with plan and ordinance, design, public facilities and infrastructure, open space, and phasing); GRAND PRAIRIE, TEX., LAND DEVELOPMENT CODE § 7.17(A) (containing site plan; includes safety, egress, parking, and landscaping criteria); KITTITATIS COUNTY, WASH., COUNTY CODE § 17.36.045 (requiring PUDs to “make[] economic and efficient use of land, streets, and public services”; “preserve[] usable open space, important natural feature, and other amenities”; “provide[] site design features that reasonably mitigate off-site impacts”; and have the “[p]ublic benefits of [the] PUD outweigh the effect of the modification of underlying zoning standards”).

<sup>77</sup> Arizona and California authorize the preparation of specific plans, a subarea element of a comprehensive plan. *See* ARIZ. REV. STAT., § 9.461.08; *see also* CALIF. SPECIFIC PLANS CODE §§ 65450–57. The use of specific plans to manage planned unit developments occurs in these states. *See* 2007 Report, *supra* note 4, at 25.

<sup>78</sup> *See, e.g.*, CONWAY, ARK., ZONING ORDINANCE § 401.10(A). Considering the rezoning and the development plan at the same time may not be advisable if it does not allow an adequate review period for each decision.

<sup>79</sup> *See, e.g.*, COLUMBUS, IND., ZONING ORDINANCE art. 5, § 5.1 (including a diagram that shows a good example of the approval process).

<sup>80</sup> *See, e.g.*, COLLIER COUNTY, FLA., LAND DEVELOPMENT CODE § 10.02.13(C).

<sup>81</sup> *See* LAND USE LAW, *supra* note 30.

<sup>82</sup> *See* *Stokes v. City of Mishawaka*, 441 N.E.2d 24, 29 (Ind. Ct. App. 1982); *see also* *Todd Mart, Inc. v. Town Bd. of Town of Webster*, 370 N.Y.S.2d 683, 689 (N.Y. App. Div. 1975) (discussing cases); *State ex rel. Zonders v. Delaware Cty. Bd. of Elections*, 630 N.E.2d 313, 319 (Ohio 1994) (holding that township’s rezoning of land

protections of adjudicatory process, such as reviewable findings of fact, are not available. However, judicial recourse is available if neighbors challenge the amendment as spot zoning.<sup>83</sup> Courts review spot zoning under a multifactor test that considers issues such as consistency with a comprehensive plan and compatibility with adjacent development.<sup>84</sup> Review is usually deferential,<sup>85</sup> and courts have applied the multifactor test to approve<sup>86</sup> or disapprove<sup>87</sup> spot zonings for planned unit developments. Defense of a spot zoning may be the first judicial test of a planned unit development.

A different set of problems arises when the legislative body approves a planned unit development. There is no separation of powers at the local government level, so a local legislative body acts either legislatively or

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from rural-residential district to planned-residential district was legislative action subject to referendum); *Shaheen v. Cuyahoga Falls City Council*, No. 24472, 2010 WL 625828, at \*8 (Ohio Ct. App. Feb. 24, 2010) (rezoning to conservation overlay district for cluster planned unit development permitted); *Lutz v. City of Longview*, 520 P.2d 1374, 1376 (Wash. 1974); LAND USE LAW, *supra* note 30, § 6.26.

<sup>83</sup> See, e.g., Daniel R. Mandelker, *Spot Zoning: New Ideas for an Old Problem*, 48 URB. LAW. 737, 741 (2016) [hereinafter *Spot Zoning*].

<sup>84</sup> See *id.* at 782 (concluding that case law does not provide a disciplined and systematic basis for reviewing spot zoning, and suggesting that consistency with a comprehensive plan is the preferred test).

<sup>85</sup> *Id.* at 757–60; see also *Blakeman v. Planning & Zoning Comm’n of City of Shelton*, 846 A.2d 950, 958 (Conn. App. Ct. 2004) (discussing limited scope of judicial review).

<sup>86</sup> See, e.g., *Evans v. Teton Cty.*, 73 P.3d 84, 89–94 (Idaho 2003) (considering several plan policies before approving a 780-acre golf course and residential resort planned unit development); see also *Baumgarten v. Town Bd. of the Town of Northampton*, 826 N.Y.S.2d 811, 813–14 (N.Y. App. Div. 2006) (asserting that approval of an 18-acre parcel, located in mixed-use area, had no adverse impact on surrounding properties, and benefitted the general welfare of the community by creating seasonal housing to accommodate tourism); *Murden Cove Pres. Ass’n v. Kitsap Cty.*, 704 P.2d 1242, 1246–47 (Wash. Ct. App. 1985) (holding 11.7 acres of land being rezoned from rural undeveloped to light manufacturing, as part of a proposed planned unit development, was consistent with plan for nonresidential use and urban concentration concept because the county had shown there was sufficient change in the neighborhood being rezoned, and rezoning would not be totally inconsistent with surrounding area). None of these developments were on the very small lots that are usually associated with spot zoning.

<sup>87</sup> See, e.g., *Greater Yellowstone Coal., Inc. v. Bd. of Cty. Comm’rs of Gallatin Cty.*, 25 P.3d 168, 174 (Mont. 2001) (rejecting spot zoning for 323-acre planned unit development that was incompatible with the surrounding area, which was mainly publicly-owned, and inconsistent with comprehensive plan).

administratively when it makes the decision.<sup>88</sup> Courts divide on whether a decision by a legislative body to approve a planned unit development is legislative or quasi-judicial.<sup>89</sup> They also divide on whether an approval of a development plan,<sup>90</sup> or a rezoning that includes the approval of a development plan, is legislative or quasi-judicial.<sup>91</sup> Compliance with

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<sup>88</sup> See *State ex rel. Helujon, Ltd. v. Jefferson Cty.*, 964 S.W.2d 531, 536 (Mo. Ct. App. 1998) (stating not every act of a zoning authority is legislative); see also *Shaheen v. Cuyahoga Falls City Council*, No. 24472, 2010 WL 625828, at \*4 (Ohio Ct. App. Feb. 24, 2010); Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 260 (2000) (stating that much of what local “legislative” bodies do is, in reality, something other than “legislative”).

<sup>89</sup> See, e.g., *Blakeman*, 846 A.2d at 958 (holding creation of district and approval of plan is legislative act); *Kenwood Gardens Condo., Inc. v. Whalen Props., LLC*, 144 A.3d 647, 659 (Md. 2016). *But see* *City of Fairfield v. Superior Court*, 537 P.2d 375, 381–82 (Cal. 1975) (en banc) (held to be administrative act); *Best v. La Plata Planning Comm’n*, 701 P.2d 91, 94 (Colo. Ct. App. 1984) (approval of sketch plan); *Hirt v. Polk Cty. Bd. of Cty. Comm’rs*, 578 So. 2d 415, 418 (Fla. Dist. Ct. App. 1991); *Sutton v. Dubuque City Council*, 729 N.W.2d 796, 798 (Iowa 2006); *State ex rel. Zonders v. Del. Cty. Bd. of Elections*, 630 N.E.2d 313, 319 (Ohio 1994). Referenda are available only on legislative actions. See *State ex rel. Comm. for the Referendum of Ordinance No. 3844-02 v. Norris*, 792 N.E.2d 186, 193 (Ohio 2003) (holding that adoption of final development plans and final plats for portions of planned community development is administrative).

<sup>90</sup> Compare *Gray v. Trs., Monclova Twp.*, 313 N.E.2d 366, 370 (Ohio 1974) (holding that an amendment to a plan that was the equivalent of rezoning was an unreasonable execution of board’s legislative power), *Kenwood Gardens Condo., Inc.*, 144 A.3d at 662 (holding preliminary approval with no fact-intensive findings to be not administrative), and *Sheridan Planning Ass’n v. Bd. of Sheridan Cty. Comm’rs*, 924 P.2d 988, 990 (Wyo. 1996) (held to be legislative), with *State ex rel. Marsalek v. Council of the City of S. Euclid*, 855 N.E.2d 811, 815 (Ohio 2006) (approval as conditional use held administrative), and *Norris*, 792 N.E.2d 186, 192 (Ohio 2003) (held to be administrative).

<sup>91</sup> Compare *Blakeman*, 846 A.2d at 958 (rezoning included consideration of development plans and was held to be legislative), *State ex rel. Helujon, Ltd.* 964 S.W.2d at 536 (rezoning included approval of site plan and was held to be legislative), and *Solove v. Westerville City Council*, No. 01AP-1213, 2002 WL 1291797, at \*16 (Ohio Ct. App. Oct. 23, 2002) (rezoning included approval of plan and was held to be legislative), with *Maryland Overpak Corp. v. Mayor of Balt.*, 909 A.2d 235, 249 (Md. 2006) (rezoning focused on plans for specific site and was held to be administrative), and *Peachtree Dev. Co. v. Paul*, 423 N.E.2d 1087, 1092 (Ohio 1981) (stating that board’s action approving plan was functional equivalent of altering zoning classification of sizeable section of township). For a discussion of approval of development plan at time of rezoning, see 2007 Report, *supra* note 4, at 29.

approval standards is required even if the decision is legislative,<sup>92</sup> but judicial review is more demanding if the decision is quasi-judicial,<sup>93</sup> and constitutional delegation of power and vagueness restrictions apply.<sup>94</sup> When the decision is quasi-judicial, a statute or the ordinance should apply disciplined procedures.<sup>95</sup>

## 2. Approval Standards

Planned unit development ordinances include standards for project approval, and standards that control important development features are common. Most ordinances contain multiple standards, which may be fixed,<sup>96</sup> generally stated approval standards,<sup>97</sup> or only generally stated standards<sup>98</sup>—which some practitioners support.<sup>99</sup> There may be a

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<sup>92</sup> See *City of Tuscaloosa v. Bryan*, 505 So. 2d 330, 338 (Ala. 1987) (rejecting approval for failure to comply with ordinance standards).

<sup>93</sup> See generally Todd W. Prall, *Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review*, 2004 BYU L. REV. 1049, 1066 (2004).

<sup>94</sup> See DESIGNING, *supra* note 12, at 82–86 (stating vagueness restrictions are based on substantive due process).

<sup>95</sup> See LEGISLATIVE GUIDEBOOK, *supra* note 25, at ch. 10 (including a model act trust providing detailed procedures for quasi-judicial decisions).

<sup>96</sup> See *Davis* (Palm Beach Cty., Fla.), *supra* note 19.

<sup>97</sup> See *Cobb* (Brevard, N.C.), *supra* note 22; *Hill* (Orange Cty., Fla.), *supra* note 19.

<sup>98</sup> See Telephone Interview with Anonymous, San Diego Cty., Cal., (Mar. 10, 2017) [hereinafter Anonymous (San Diego Cty., Cal.)] (requiring consistency with the comprehensive plan, compatibility, and other standards); *Wilcox* (Leon Cty., Fla.), *supra* note 19.

<sup>99</sup> See *Connolly & Ragonetti* (Denver, Colo.), *supra* note 19 (advocating for three basic standards: change in the surrounding neighborhood, consistency with the comprehensive plan, and compatibility with neighbors; no difficulties reported in complying with these standards); see also *Jensen* (Reno, Nev.), *supra* note 19; *Wilcox* (Leon Cty., Fla.), *supra* note 19. Some state statutes require the inclusion of approval criteria in the ordinance. See COLO. REV. STAT. §§ 24-67-104 to -105 (requiring ordinances to include standards and conditions for evaluation and conformity with any comprehensive or master plan); IND. CODE ANN. § 36-7-4-1503 (requiring planned unit development district ordinances to specify “range of uses” and “requirements” for development); NEB. REV. STAT. § 18-3001(2) (requiring an ordinance to include criteria relating to the review of proposed PUDs to ensure “the PUD is compatible with adjacent uses of land and the capacities of public services and utilities affected by such planned unit development and . . . consistent with the public health, safety, and general welfare of the city or village and in accordance with the comprehensive plan”); NEV. REV. STAT. §§ 278A.090, .100, .120 (requiring ordinances to include “the standards and conditions” for proposed PUDs to be evaluated; “the uses permitted” in a PUD; and “provisions by which the amount and

minimum size requirement.<sup>100</sup> Common open space<sup>101</sup> and internal circulation system requirements<sup>102</sup> are common and may be fixed or generally

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location of any corridor space is determined and its improvement and maintenance secured"); Borchardt (Reno, Nev.), *supra* note 19 (explaining Nev. statutes). *But see* R.I. GEN. LAWS ANN. § 45-24-47(c) (stating that ordinances may include minimum area, uses, densities, and buffer areas); VT. STAT. ANN. tit. 24, § 4417(c) (requiring bylaws to include certain provisions, but permitting bylaws to "vary the density or intensity of land use" through: "location and physical characteristics of the proposed planned unit development"; "location, design, type, and use of the lots and structures proposed"; and "amount, location, and proposed use of open space"). For discussion of legislative standards, see *Legislation*, *supra* note 4, at 441–44.

<sup>100</sup> Many municipalities have size requirements, which vary from as few as 40,000 square feet to 20 acres. *See, e.g.*, BARTOW COUNTY, GA., CODE OF ORDINANCES § 7.15.2 (requiring 20 acres); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 39-339(a) (requiring 5 acres); HORRY COUNTY, S.C., CODE OF ORDINANCES app. B, art. 7 § 721.1(B) (requiring 2 or 5 acres, depending on whether minor or major uses); WATERTOWN, N.Y., ZONING CODE § 310-12(D) (requiring PUDs to be at least 40,000 square feet).

<sup>101</sup> The interviews reported that requirements for common open space are typical. *See* Anonymous (San Diego Cty., Cal.), *supra* note 98 (encouraging common open space); Borchardt (Reno, Nev.), *supra* note 19 (stating common open spaces are encouraged in sensitive areas, like wetlands); Connolly & Ragonetti (Denver, Colo.), *supra* note 19; Davis (Palm Beach Cty., Fla.), *supra* note 19 (stating common space amounts varies with size); Hill (Orange Cty., Fla.), *supra* note 19 (typically required); Jensen (Reno, Nev.), *supra* note 19; Jorden (Phoenix, Ariz.), *supra* note 19; Kramer (Orlando, Fla.), *supra* note 19 (stating common open space varies; definitions and arguments on active versus passive open space; for example, wetlands); Lewis (Jacksonville, Fla.), *supra* note 19; Mazzocco (Tucson, Ariz.), *supra* note 22; McMurry (Anaheim, Cal.), *supra* note 19; Merriam (Hartford, Conn.), *supra* note 21; Silvyn (Tucson, Ariz.), *supra* note 22 (some use); White (Kansas City, Mo.), *supra* note 43 (describing use palette of open space, plazas in urban settings, green space in larger areas, point system, and different typologies).

<sup>102</sup> *See, e.g.*, CONWAY, ARK., ZONING ORDINANCE § 401.10(B); PALM BEACH COUNTY, FLA., LAND DEVELOPMENT CODE § 3.E.1.c.2.a.5 (requiring Street Layout Plan to achieve balance between cul-de-sacs and connectivity). Connectivity is an important circulation design issue. Cul-de-sac development is traditional, but modern practice requires connectivity to provide continuity in circulation systems. *See* 2007 Report, *supra* note 4, at 75–78. Some interviews reported connectivity requirements. Borchardt (Reno, Nev.), *supra* note 19; Cobb (Brevard, N.C.), *supra* note 22; Connolly & Ragonetti (Denver, Colo.), *supra* note 19 (stating that cul-de-sacs are reasonably frequent at boundaries); Davis (Palm Beach Cty., Fla.), *supra* note 19 (discussing non-residential planned development); Hill (Orange Cty., Fla.), *supra* note 19 (stating that policies on this are in the comprehensive plan, and that the county board now supports staff); Jensen (Reno, Nev.), *supra* note 19 (explaining how Reno's robust educational program is slow in some communities but turned the corner in Bountiful); McMurry (Anaheim, Cal.), *supra* note 19 (allowing cul-de-sac only if geography requires). *But see* Mazzocco (Tucson, Ariz.), *supra* note 22 (explaining how the comprehensive plan was not as

stated. The ordinance can also specify allowable uses,<sup>103</sup> densities,<sup>104</sup> site treatment,<sup>105</sup> and may allow density increases through bonuses.<sup>106</sup> As an alternative, the legislative body can decide what uses<sup>107</sup> and densities<sup>108</sup> to allow when it approves the development plan.<sup>109</sup> The ordinance can also address social issues, such as affordable housing, preserving natural resources and sustainability,<sup>110</sup> and requirements for adequate public services.<sup>111</sup>

The mix of standards in an ordinance, how they are stated, and whether they confer discretion, determines the character of planned unit developments in a community. An ordinance can require large-scale developments with freedom to increase density or allow any-sized development but limit that freedom. These are only two examples.

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successful as he would have liked because the council overturned it); Merriam (Hartford, Conn.), *supra* note 21 (not so much).

<sup>103</sup> See 2007 Report, *supra* note 4, at 83–85. “A density bonus is an incentive-based tool that permits developers to increase the maximum allowable development on a property in exchange for helping the community achieve public policy goals.” *Planning Implementation Tools: Density Bonus*, CTR. FOR LAND USE EDUC. (Nov. 2005), [https://www.uwsp.edu/cnr-ap/clue/Documents/PlanImplementaiton/Density\\_Bonus.pdf](https://www.uwsp.edu/cnr-ap/clue/Documents/PlanImplementaiton/Density_Bonus.pdf).

<sup>104</sup> See 2007 Report, *supra* note 4, at 91–92.

<sup>105</sup> See *id.* at 92–98.

<sup>106</sup> See *id.* at 89–91; see also PALM BEACH COUNTY, FLA., UNIFIED LAND DEVELOPMENT CODE § 3.E.1.B.2.c.1.

<sup>107</sup> See 2007 Report, *supra* note 4, at 92; see also PALM BEACH COUNTY, FLA., UNIFIED LAND DEVELOPMENT CODE § 3.E.1.B.4. (explaining land use designation of the planned development district); SPARKS, NEV., CODE OF ORDINANCES § 20.02.012(B)(1) (allowing any use in any zone classification, provided that the combination of uses is planned in a manner compatible to each and to the surrounding environment).

<sup>108</sup> See, e.g., PALM BEACH COUNTY, FLA., UNIFIED LAND DEVELOPMENT CODE § 3.E.1.B.2.

<sup>109</sup> See, e.g., ORANGE COUNTY, FLA., ZONING ORDINANCE § 38-1251(c) (detailing how maximum density is based on compatibility with adjacent zoning districts and comprehensive plan, preservation of natural features and environmental assets, and adequate public facilities).

<sup>110</sup> See FRANKO, *supra* note 8, at 38–65 (integrating planning and design).

<sup>111</sup> See generally D.C., ZONING REGULATIONS tit. 11, subtit. X, § 304.4(C) (“specific public benefits and project amenities”); FAIRFAX, CAL., MUNICIPAL CODE § 17.112.040 (discussing safe building sites, hazards, and the “cumulative impact of the development on existing circulation and drainage systems”); KALISPELL, MONT., MUNICIPAL CODE § 27.19.020 (mandating adequate provision for public services, and providing adequate control over vehicular traffic).

Ordinances also contain generally stated standards to guide decisions on whether a planned unit development should be approved. Because they require a compromise of interests, they can be a challenge to draft.<sup>112</sup> An initial concern is the statement of purpose, which recites the objectives the ordinance is intended to achieve.<sup>113</sup> It often reflects concern for design innovation and a flexible zoning process. The statement of purpose in the Brevard, North Carolina, ordinance reflects this dual objective.<sup>114</sup> It states, “The planned development zoning district classification allows projects of innovative design and layout that would not otherwise be permitted under this ordinance because of the strict application of zoning district or general development standards.”<sup>115</sup> Other

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<sup>112</sup> See *Dupont Circle Citizens Ass’n v. D.C. Zoning Comm’n*, 426 A.2d 327, 336 (D.C. 1981) (“By its very purpose a PUD requires a compromise of interests among developers, business, citizens, and municipality.”).

<sup>113</sup> A court can rely on a purpose clause if it is part of the ordinance and not a preamble. See *Pomeranc-Burke, LLC v. Wicomico Env’tl. Tr., Ltd.*, 14 A.3d 1266, 1286 (Md. App. 2011); cf. *Dupont Circle Citizens Ass’n*, 426 A.2d at 334 (explaining that the purpose clause did not create a contested issue requiring specific findings of fact and conclusions of law on benefit of the proposed PUD over possible structures permitted under existing zoning; but compliance with purpose clause must be supported by subsidiary findings of basic facts on material issues).

<sup>114</sup> See BREVARD, N.C., UNIFIED DEVELOPMENT ORDINANCE § 2.1(E)(1).

<sup>115</sup> *Id.* The ordinance reinforces this statement: “[I]n return for greater flexibility in site design requirements, planned developments are expected to deliver exceptional quality community designs that” meet listed design objectives. *Id.* The statement of purpose also specifies certain design qualities, such as “[a]llowing greater freedom in providing a mix of land uses in the same development.” *Id.* Purpose statements may contain additional objectives. See HENDERSON, NEV., DEVELOPMENT CODE § 19.3.18(A)(2) (“[T]he PC [planned community] district may be utilized to ensure Comprehensive Planning of large areas of land and to create efficient and stable developments offering a combination of planned land uses.”); TUCSON, ARIZ., UNIFIED DEVELOPMENT CODE § 3.5.6(A)(1), (3)–(4) (stating the purpose is to “[a]ccommodate large-scaled, unified planned developments that conform to the best practices, policies and programs within the City’s General Plan, applicable specific plans, and other sustainability and conservation programs”; “[p]rovide a framework to promote sustainable land use patterns and mobility options while being responsive and sensitive to the natural features and topography of the desert environment”; and provide a variety of housing and public facilities). Another good example of a statement of purpose is found in Jacksonville, Florida. See JACKSONVILLE/DUVAL COUNTY, ZONING CODE § 656.340 (“It is the intent and purpose . . . to create living environments that are responsive to the needs of their inhabitants; to provide flexibility in planning, design and development; to encourage innovative approaches to the design of community environments; to encourage the fulfillment of housing needs appropriate to various lifestyles and income levels; to encourage the integration of different housing types within a development; provide an

statements of purpose contain similar policies.<sup>116</sup> They may also contain other objectives, such as the conservation of natural resources and sustainability,<sup>117</sup> but the emphasis on design and process is common. A few ordinances require municipalities to consider the statement of purpose when they approve planned unit developments,<sup>118</sup> and a link between statements of purpose and approval standards is advisable.

Statements of purpose are implemented by standards that control the approval decision. Courts interpret these standards to decide what an ordinance requires. For example, in *Sinkler v. County of Charleston*,<sup>119</sup> the court struck down a rezoning from an agricultural to a planned development (PD) district for a residential project.<sup>120</sup> The agricultural zoning had maximum densities, and the rezoning reduced lot sizes but left residential uses and maximum densities unchanged.<sup>121</sup> A state statute

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opportunity for new approaches to ownership; to provide for an efficient use of land; to provide an environment compatible with surrounding land use; to adapt the zoning process to changes in construction and development technology; to encourage the preservation of the natural site features; to provide community environments that are so designed and located as to be an integral part of the total ecosystem; to encourage the design of communities and structures adapted to the local climate . . . .”).

<sup>116</sup> See, e.g., AUSTIN, TEX., LAND DEVELOPMENT CODE, ch. 25-2, subch. B, art. 2, div. 5, subpt. A, § 1.1 (“preserving the natural environment, encouraging high quality development and innovative design, and ensuring adequate public facilities and services”); AVON, IND., ZONING ORDINANCE § 5-1 (including innovation and creativity in design and layout, greater degree of flexibility in the design of developments, and imaginative uses of common areas and open space); FRANKLIN, TENN., ZONING ORDINANCE § 2.4.2(1) (including “reducing or eliminating the inflexibility,” “promoting quality design”); MALTA, N.Y., ZONING ORDINANCE § 167-26(A) (stating “creative architectural or planning concepts . . . in a manner not otherwise available through development under the Town’s existing zoning”); PHOENIX, ARIZ., ZONING CODE § 671(A) (2011) (stating purpose is to “create a built environment that is superior to that produced by conventional zoning districts and design guidelines”).

<sup>117</sup> See, e.g., AUSTIN, TEX., LAND DEVELOPMENT CODE, ch. 25-2, subch. B, art. 2, div. 5, subpt. A, § 1.1 (“preserving the natural environment”); TUCSON, ARIZ., UNIFIED DEVELOPMENT CODE § 3.5.6(A)(3) (“promot[ing] sustainable land use patterns and mobility options while being responsive and sensitive to the natural features and topography of the desert environment”).

<sup>118</sup> See DUBLIN, CAL., MUNICIPAL CODE § 8.32.070(A)–(B); GEORGETOWN TOWNSHIP, MICH., ZONING ORDINANCE § 22.10(A)–(E); TALLAHASSEE, FLA., LAND DEVELOPMENT CODE § 10-165(e).

<sup>119</sup> 690 S.E.2d 777 (S.C. 2010).

<sup>120</sup> See *id.* at 782.

<sup>121</sup> See *id.* at 778.

defined a PD as a mixed-use project,<sup>122</sup> and stated it should “result in improved design, character, and quality of new mixed-use developments.”<sup>123</sup> Similar standards are included in planned unit development ordinances. These directives, the court held, made the rezoning invalid because its only effect was to reduce the size of the lots, a feature of cluster housing.<sup>124</sup>

*Sinkler* indicates a statute or ordinance can require a design outcome for planned unit developments, not just a change in existing regulations that favors the developer. Some ordinances do this by authorizing a departure from existing zoning only if the planned unit development will produce a superior development.<sup>125</sup> There may be a cap on how extensive a departure the municipality can allow.<sup>126</sup>

Indeterminate standards like these, and those in the *Sinkler* statute,<sup>127</sup> raise an uncertainty problem because they may be too ambiguous to prevent abusive, arbitrary decision-making.<sup>128</sup> Developers are then at the

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<sup>122</sup> See S.C. CODE ANN. § 6-29-720(C)(4) (“[A] development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development and is characterized by a unified site design for a mixed use development.”). A planned unit development ordinance can include a similar definition.

<sup>123</sup> *Id.* § 6-29-740. The statute also states that “planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.” *Id.*

<sup>124</sup> See *Sinkler*, 690 S.E.2d at 779, 782.

<sup>125</sup> See, e.g., AUSTIN, TEX., LAND DEVELOPMENT CODE, ch. 25-2, subch. B, art. 2, div. 5, subpt. A, § 2.4 (deciding to allow departures based on a list of designated features); DAVIS, CAL., MUNICIPAL CODE § 40.32.070 (“[D]evelopment of a harmonious, integrated plan justifies exceptions.”); HALLANDALE BEACH, FLA., CODE OF ORDINANCES § 32-186(g)(5) (“equal or higher quality”); KALISPELL, MONT., MUNICIPAL CODE § 27.19.020 (indicating they must consider departure from existing regulations); PALM BEACH COUNTY, FLA., UNIFIED LAND DEVELOPMENT CODE § 3.E.2.A.4 (stating it must exceed plan policies and regulatory requirements).

<sup>126</sup> See, e.g., NEWARK, CAL., CODE OF ORDINANCES 17.40.040 (“at least equivalent”); BALTIMORE, MD., ZONING CODE § 9-112(a) (2007); DAVIS, CAL. MUNICIPAL CODE § 40.32.070 (“not substantially higher”).

<sup>127</sup> S.C. CODE ANN. §§ 6-29-740, -720(C)(4).

<sup>128</sup> See OFFICE OF THE CITY AUDITOR, A REPORT TO THE AUSTIN CITY COUNCIL, SPECIAL REQUEST REPORT ON PLANNED UNIT DEVELOPMENT (PUD) APPLICATION PROCESS 3 (2016), <https://www.austintexas.gov/sites/default/files/files/Auditor/AS16102.pdf> (negotiation and review process judgment-based); Kramer (Orlando, Fla.), *supra* note 19 (indicating that vague standards create a problem if no shared vision); see also Wilcox

mercy of municipal review, creating time delay and cost uncertainties.<sup>129</sup> These uncertainties are problematic<sup>130</sup> because developers must be able to forecast their project needs accurately before they start a project.<sup>131</sup> Uncertainty prevents them from doing this, and can cause financial loss and project failure.<sup>132</sup> Additionally, judicial help may not be available. Courts will strike down standards that are too vague to meet due process requirements if the approval decision is quasi-judicial, but courts are usually receptive and accept standards even if they have some ambiguities.<sup>133</sup>

Approval standards vary widely. Some ordinances have extensive standards, and some have only a few. Most contain indeterminate standards,<sup>134</sup> which are probably definite enough to pass the constitutional vagueness test but still leave considerable room for an exercise of discretion. Surprisingly, standards that require creative project design and flexibility in applying land use regulations are not as common as might be expected, despite the inclusion of these objectives in purpose clauses.<sup>135</sup> Criteria requiring good design for planned unit developments are infrequent,<sup>136</sup> though some cities have design standards for the entire community.<sup>137</sup>

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(Leon Cty., Fla.), *supra* note 19 (indicating reviewers do not like flexibility because it provides opportunity for abuse).

<sup>129</sup> Developers can also adjust to uncertainty and may prefer negotiation under indeterminate standards for a final approval when they can decide whether to proceed. *See* Jensen (Reno, Nev.), *supra* note 19 (reporting successful negotiation process).

<sup>130</sup> *See* Analysis, *supra* note 54, at 26 (deciding on the final outcome of benefits and amenities negotiation is a “major and overarching weakness”).

<sup>131</sup> *See* PETER BYRNE, RISK, UNCERTAINTY AND DECISION-MAKING IN PROPERTY DEVELOPMENT 28–58 (2d ed. 1984) (assessing risk and uncertainty).

<sup>132</sup> *See* DAVID ADAMS ET AL., PLANNING, PUBLIC POLICY & PROPERTY MARKETS 38 (2005) (“[A] prime role for public policy is to reduce or contain risk and uncertainty in order to enhance user, developer and investor confidence in new forms of development.”); Analysis, *supra* note 54, at 36–37.

<sup>133</sup> *See, e.g.,* Pinecrest Homeowners Assn v. Cloninger & Assocs., 87 P.3d 1176, 1183 (Wash. 2004) (approving fourteen policies for mixed-use development); DAVID ADAMS ET AL., PLANNING, PUBLIC POLICY & PROPERTY MARKETS 96–97 (2005); DESIGNING, *supra* note 12, at 82.

<sup>134</sup> *See, e.g.,* DESIGNING, *supra* note 12, at 87.

<sup>135</sup> *See id.* at 60–81 (discussing design standards in zoning ordinances).

<sup>136</sup> *See* BALT., MD., ZONING CODE § 9-112(a); DAVIS, CAL., MUNICIPAL CODE § 40.32.070 (“residential environment of sustained desirability and stability”); KALISPELL, MONT., MUNICIPAL CODE § 27.19.020 (“[T]he Zoning Commission shall

Supplementing ordinance standards with additional guidance is recommended. For design issues, an independent set of design standards for planned unit developments can be helpful and can be implemented through design manuals and guidelines.<sup>138</sup> Careful decision-making that includes findings of fact and reasons for the decision and careful record-keeping of decisions to establish precedent, will help establish guidelines for the decision-making process.

Compatibility with the surrounding area is a standard that appears most frequently<sup>139</sup> and is like the compatibility test for spot zoning.<sup>140</sup> A compatibility test is useful for infill development in urban areas, but whether it should apply to all planned unit developments is debatable. Large-scale, master-planned communities can create their own

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review . . . [t]he overall internal integrity of the PUD including the appropriate use of internal design elements.”).

<sup>137</sup> See MILLER SELLEN CONNER & WALSH, JACKSONVILLE [FLORIDA] DESIGN GUIDELINES AND BEST PRACTICES HANDBOOK, <http://www.coj.net/departments/planning-and-development/docs/current-planning-division/misc/final-design-guidelines---1-2-3-4-5.aspx> (discussing city wide standard). For design concepts in a comprehensive plan, see FRANKLIN [TENNESSEE], ENVISION FRANKLIN 24–95 (2017), <http://www.franklin-gov.com/home/showdocument?id=25168> (discussing design concepts within a comprehensive plan).

<sup>138</sup> See DESIGNING, *supra* note 12, at 37–59 (discussing design standards in comprehensive plans, design manuals, and guidelines).

<sup>139</sup> See BALT., MD., ZONING ORDINANCE § 9-112(a); CHAMBLEE, GA., CODE OF ORDINANCES § 280-6(c)(3)(a)(1)–(c)(3)(a)(2) (discussing suitability and adverse effect); COLLIER COUNTY, FLA., LAND DEVELOPMENT CODE § 10.02.13(B)(5)(d) (“internal and external compatibility”); DAVIS, CAL., MUNICIPAL CODE § 40.32.070 (requiring the project to be “in harmony with the character of the surrounding neighborhood”); D.C., ZONING REGULATIONS tit. 11, subtit. X, § 304.4(b) (requiring that the project “does not result in unacceptable project impacts”); DUBLIN, CAL., MUNICIPAL CODE § 8.32.070(B) (requiring the project to be “harmonious and compatible with existing and future development in the surrounding area”); GEORGETOWN TOWNSHIP, MICH., ZONING ORDINANCE § 22.10(B) (indicating compatibility is the standard); HALLANDALE BEACH, FLA., CODE OF ORDINANCES, § 32-186(g)(5) (requiring “compatibility with the adjacent area”); JACKSONVILLE/DUVAL COUNTY, FLA. CODE OF ORDINANCES § 656-341(d); MALTA, N.Y., CODE § 167-26(G) (requiring that the “existing character of the neighborhood in which the use would be located be maintained”); PLEASANTON, CAL., MUNICIPAL CODE 18.68.030 (requiring the project be “compatible with the purposes of this title, the neighborhood and general vicinity of the proposed project . . .”); *see also* FLA. STAT. ANN. § 163.3177(6)(a)(3)(g) (requiring all comprehensive plans to “[p]rovide for the compatibility of adjacent land uses . . .”); FLA. STAT. ANN. § 163.3164(9) (defining compatibility).

<sup>140</sup> See *Spot Zoning*, *supra* note 83, at 769–75.

environment and provide buffering that protects adjacent areas.<sup>141</sup> Mixed-use developments that differ from surrounding areas may be appropriate and can also provide buffering protection.<sup>142</sup> A compatibility test at the rezoning stage may be enough.

Consistency with the comprehensive plan is an essential consideration, especially if consistency is required. Plans contain land use policies for the entire community based on community consensus,<sup>143</sup> which can provide a basis for approving planned unit developments. Plans can also provide a defense to spot zoning challenges because community consensus on land use policies provides fair and equitable support for zoning amendments.<sup>144</sup>

Some planned unit development ordinances require consistency.<sup>145</sup> A minority of states require, by statute or case law, that zoning ordinances and all zoning decisions be consistent with the comprehensive plan.<sup>146</sup> This requirement applies to planned unit developments.<sup>147</sup> How much

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<sup>141</sup> See *id.* at 771–72.

<sup>142</sup> See *id.* 769–75 (making these and similar arguments as reasons for not accepting a compatibility test for spot zonings).

<sup>143</sup> See *id.* at 775–82.

<sup>144</sup> See *supra* notes 84–87 and accompanying text.

<sup>145</sup> See Connolly & Ragonetti (Denver, Colo.), *supra* note 19 (listing three basic standards: change in the surrounding neighborhood, consistency with the comprehensive plan, and compatibility with neighbors).

<sup>146</sup> See Laura F. Ashley, *Re-Building New Orleans: How the Big Easy Can Be the Next Big Example*, 55 LOY. L. REV. 353, 364–73 (2009) (discussing how jurisdictions assess the interaction between zoning regulations and comprehensive plans); see also Stuart Meck, *The Legislative Requirement That Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL'Y 295, 305–15 (2000) (discussing statutes that require consistency); Edward J. Sullivan, *The Evolving Role of the Comprehensive Plan*, 32 URB. LAW. 813, 822–23 (2000) (noting trend toward accepting plan as criterion for evaluating land use regulations and actions).

<sup>147</sup> See, e.g., Anonymous (San Diego Cty., Cal.), *supra* note 98; Connolly & Ragonetti (Denver, Colo.), *supra* note 19; see also FAIRFAX, CAL., MUNICIPAL CODE § 17.112.040(A) (requiring compliance with comprehensive plan and any specific plans); *Condiotti v. Bd. of Cty. Comm'rs of Cty. of La Plata*, 983 P.2d 184, 186 (Colo. App. 1999) (explaining when master plans are more than advisory). Some states have statutes modeled on the National Environmental Policy Act that apply to zoning decisions and that require an environmental analysis of the zoning decision. See DANIEL R. MANDELKER ET AL., NEPA LAW AND LITIGATION ch. 12 (2017 ed.) (listing California, New York, and Washington). In these states, compliance with the environmental review process is a major factor in any land use decision, including the approval of planned unit

guidance a comprehensive plan can provide depends on where it applies. Neighborhood plans can provide guidance for infill development in urban areas if they consider context and design issues.<sup>148</sup> Comprehensive plans in suburban and fringe areas can designate areas where planned unit developments are allowed, and can specify land uses and densities, but are not likely to consider design.<sup>149</sup>

### III. THE APPROVAL PROCESS

The most important feature of planned unit development is negotiation between the developer and the municipality,<sup>150</sup> often with participation by neighbors and neighborhood associations, at least when review is governed by general standards. In its best form, the approval process is a collaboration between both public and private sectors.<sup>151</sup> All interests at stake should be involved.<sup>152</sup>

After the municipality has adopted the planned unit development zone, the developer begins the process by presenting a development plan for approval.<sup>153</sup> There are usually two alternatives that determine what the developer must provide.<sup>154</sup> Under one alternative, the legislative body approves a generalized concept plan, followed by the approval of a detailed preliminary and final development plan, either by the legislative

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developments. *See, e.g.*, McMurry (Anaheim, Cal.), *supra* note 19 (noting the importance of California Environmental Quality Act).

<sup>148</sup> *See* WENDELYN A. MARTZ, NEIGHBORHOOD-BASED PLANNING: FIVE CASE STUDIES, PLAN. ADVISORY REP. NO. 455 (Am. Plan. Ass'n 1995).

<sup>149</sup> *See generally* Edward J. Kaiser & David R. Godschalk, *Twentieth Century Land Use Planning: A Stalwart Family Tree*, 61 J. AM. PLAN. ASS'N 365 (1995) (discussing evolution of planning and different types of plans); KING CTY., KING COUNTY COMPREHENSIVE PLAN (2016), <http://www.kingcounty.gov/~media/depts/executive/performance-strategy-budget/regional-planning/2016CompPlanUpdate/2016Adopted-KCCP/KingCountyCompPlan-ADO-120516.ashx?la=en>.

<sup>150</sup> A key task is to anticipate the issues to be negotiated and prepare a strategy that will produce favorable outcomes at the end of the process.

<sup>151</sup> *See* Analysis, *supra* note 54, at 41 (explaining why collaboration between public and private entities is helpful).

<sup>152</sup> A good process requires a disciplined notice, hearing, and decision process. *See* LEGISLATIVE GUIDEBOOK, *supra* note 25, at ch. 10 (detailing quasi-judicial procedures for zoning decisions in a model act).

<sup>153</sup> *See* 2007 Report, *supra* note 4, at ch. 3.

<sup>154</sup> *See id.* at 28. It is also possible to approve a final development plan without the approval of a preliminary development plan. *See id.*

body or the planning commission.<sup>155</sup> This is a three-step process.<sup>156</sup> Under the second alternative, a concept plan is not submitted for approval.<sup>157</sup> The process begins with the approval of a preliminary development plan followed by approval of a final plan if it complies with the preliminary development plan.<sup>158</sup> This is a two-step process.<sup>159</sup>

#### A. Concept and Development Plans

Whether to require a concept plan as a first step in the approval process, or go immediately to the approval of a development plan, affects how the review process is managed, the willingness of developers to enter the process, and the ability of neighbors to participate effectively in project decisions.<sup>160</sup> A concept plan, sometimes called a sketch or “bubble” plan,<sup>161</sup> outlines the general concept of the planned unit development.<sup>162</sup> Concept plans typically show the following: the objectives and character of the development; approximate location of development areas, common open space, public facilities, and other features; generalized uses, densities, and intensities; approximate proposed traffic and circulation plans; and relationship to adjacent areas.<sup>163</sup> Many planned unit development ordinances require concept plans,<sup>164</sup> and the interviews indicated that concept plans are extensively used.<sup>165</sup>

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<sup>155</sup> See *Cheney v. Vill. 2 at New Hope, Inc.*, 241 A.2d 81, 89 (Pa. 1968) (upholding delegation to planning commission of authority to approve development plan as authorized by zoning act based on Standard State Zoning Enabling Act); see also *Sheridan Planning Ass’n v. Bd. of Sheridan Cty. Comm’rs*, 924 P.2d 988, 991 (Wyo. 1996).

<sup>156</sup> See 2007 Report, *supra* note 4, at 33–40.

<sup>157</sup> See *id.* at 35–40.

<sup>158</sup> See *id.*

<sup>159</sup> The legislative body can also approve the development plan when it approves the rezoning. See *id.* at 29; see also *Spot Zoning*, *supra* note 83, at 741.

<sup>160</sup> See 2007 Report, *supra* note 4, at 28.

<sup>161</sup> The term arose because the plan shows uses and densities in circles, or “bubbles.” See *id.* at 17.

<sup>162</sup> See *DESIGNING*, *supra* note 12, at 6, 89.

<sup>163</sup> See *id.* at 80.

<sup>164</sup> See, e.g., MESA, ARIZ., ZONING ORDINANCE § 11-22-5(B)(1); see also DUBLIN, CAL., MUNICIPAL CODE § 8.32.040(A) (containing a Stage 1 Development Plan); GLENNVILLE, ILL., CODE OF ORDINANCES § 98-493(a)(1); ORANGE COUNTY, FLA., CODE § 38-1204 (detailed requirements).

<sup>165</sup> See *Connolly & Ragonetti* (Denver, Colo.), *supra* note 19; *Davis* (Palm Beach Cty., Fla.), *supra* note 19 (showing configuration, location, unit type, access points, and

If a concept plan is not required, the approval of a more detailed development plan is the final step in the approval of a planned unit development.<sup>166</sup> A development plan is a site plan at the lot level that shows uses, densities and intensities, building elevations, open space, circulation and utility systems, grading, landscaping, circulation systems, and other project features, such as signage and lighting.<sup>167</sup> It may also show floor area and height and include sketches.<sup>168</sup> Documents showing easements and dedications can be added.<sup>169</sup> This kind of plan, with the engineering, time, and resources that go with it, requires a major investment.

There are several advantages to the concept plan approach. A principal advantage is that approving a concept plan as a first step provides flexibility because the developer has a decision on the project before substantial resources are committed to a development plan.<sup>170</sup> Neighbors can participate at the concept plan stage on major design details,<sup>171</sup> an opportunity that can avoid neighbor opposition.<sup>172</sup> Approval at the concept plan stage also provides a legislative judgment on use, density, and road layout.<sup>173</sup> Preparing detailed design plans as the only basis for approval can be counterproductive because it is difficult to design for a

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effectively deciding density); Hill (Orange Cty., Fla), *supra* note 19; Jensen (Reno, Nev.), *supra* note 19; McMurry (Anaheim, Cal.), *supra* note 19 (containing more detail than usual bubble); Merriam (Hartford, Conn.), *supra* note 21; *see also* Telephone Interview with Dean Schwanke, Principal, Schwanke Consulting & Commc'ns. (Jan. 13, 2017) [hereinafter Schwanke (Arlington, Va.)] (explaining that detailed plans are less common); White (Kansas City, Mo.), *supra* note 43 (likes three-step process).

<sup>166</sup> *See* 2007 Report, *supra* note 4, at 28.

<sup>167</sup> *See id.* at 35–38.

<sup>168</sup> *See id.*

<sup>169</sup> *See id.*; *see also* AUBURN, ALA., ZONING ORDINANCE § 505; FAIRFAX, CAL., MUNICIPAL CODE OF ORDINANCES § 117.112.060; MANHATTAN, KAN., ZONING REGULATIONS § 9-106(A)(B).

<sup>170</sup> *See* Merriam (Hartford, Conn.), *supra* note 21; Schwanke (Arlington, Va.), *supra* note 165; White (Kansas City, Mo.), *supra* note 43; *see also* Bob Bengford, *Planned Unit Developments – Real World Experiences* 7 (Nov. 1, 2012), <http://www.mrsc.org/Home/Stay-Informed/MRSC-Insight/November-2012/Planned-Unit-Developments-Real-World-Experiences.aspx> (explaining that county advocated for conceptual development plan as a means to ensure that property owners and applicants were looking at the big picture).

<sup>171</sup> *See* White (Kansas City, Mo.), *supra* note 43.

<sup>172</sup> *See* Merriam (Hartford, Conn.), *supra* note 21.

<sup>173</sup> *See id.*

long buildout, which is required for major developments.<sup>174</sup> Redesign is common.<sup>175</sup> These arguments may not apply as forcefully to cluster housing, which is usually limited in size and does not require major departures from existing regulations or major redesign.<sup>176</sup>

Omitting concept plan approval and beginning immediately with a development plan approval has support. Some municipalities begin the process with development plans,<sup>177</sup> or at least encourage them.<sup>178</sup> One advantage of this approach is that it provides more certainty for developers because project details are approved,<sup>179</sup> and the municipality may want the details a development plan can provide.<sup>180</sup> Beginning with a development plan also shortens the time for decision. Other comments indicate there is no clear preference, and the alternative used may vary by jurisdiction<sup>181</sup> and may depend on the size of the project and the

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<sup>174</sup> See McMurry (Anaheim, Cal.), *supra* note 19.

<sup>175</sup> See *id.* (noting one master-planned community was redesigned twenty-three times). Beginning with a concept plan supports phasing for large projects because it allows the developer to make changes based on market factors, infrastructure costs, and other considerations without having to renegotiate a detailed development plan before moving on the next phase. Computer-aided design can assist the presentation of concept plans by providing design options without having to invest resources in physically preparing design alternatives. See Davis (Palm Beach Cty., Fla.), *supra* note 19. Computer-aided design software is used by architects, engineers, and drafters to create precision drawings or technical illustrations. See generally YEHUDA E. KALAY, ARCHITECTURE'S NEW MEDIA: PRINCIPLES, THEORIES, AND METHODS OF COMPUTER-AIDED DESIGN (2004).

<sup>176</sup> See DESIGNING, *supra* note 12, at 3–4.

<sup>177</sup> See Anonymous (San Diego Cty., Cal.), *supra* note 98; Hoffman (Phoenix, Ariz.), *supra* note 19 (discussing corner photos, site plan, building elevations, and landscape palette); Wilcox (Leon Cty., Fla.), *supra* note 19 (explaining that in Leon County the concept and detailed plan are done at same time); see also Borchardt (Reno, Nev.), *supra* note 19 (stating handbook is more specific than bubble plan).

<sup>178</sup> See Cobb (Brevard, N.C.), *supra* note 22 (explaining it is up to property owner; can have both at same time); Lewis (Jacksonville, Fla.), *supra* note 19 (prefers detailed plan).

<sup>179</sup> See Jordan (Phoenix, Ariz.), *supra* note 19; see also Hoffman (Phoenix, Ariz.), *supra* note 19 (indicating plan can impact other jurisdictions). Approval of a concept plan does not guarantee approval of the details required in the development plan.

<sup>180</sup> See Wilcox (Leon Cty., Fla.), *supra* note 19.

<sup>181</sup> See Silvyn (Tucson, Ariz.), *supra* note 22 (reporting differences in Arizona where outer areas more likely to use conceptual plans and infill development areas require commitment).

client. A concept plan may be used for large projects, while some developers prefer development plans.<sup>182</sup>

#### B. The Delay Problem

Zoning reviews of planned unit developments can be problematic, and they can cause delay that creates uncertainty and adds costs. The amount of time a decision takes can vary considerably among jurisdictions, ranging from a few months to several years.<sup>183</sup> Delay is more likely when there is a three-stage process that includes a concept plan.<sup>184</sup> Smaller projects should take less time.

There may be no easy remedy for this problem<sup>185</sup>—a review process takes time to get it right. This problem does not occur only with planned unit developments, and comprehensive redesign of the entire zoning process may be needed.<sup>186</sup> There are several options. One is to shorten

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<sup>182</sup> See Kramer (Orlando, Fla.), *supra* note 19 (noting the use of a concept plan for projects over 2500 acres); Silvyn (Tucson, Ariz.), *supra* note 22 (explaining a concept plan is not used if project is not a large section of land).

<sup>183</sup> See Anonymous (San Diego Cty., Cal.), *supra* note 98 (indicating a two and one-half to three years delay for master-planned communities and one and one-half to three years for smaller projects); Connolly & Ragonetti (Denver, Colo.), *supra* note 19 (noting delay can make projects obsolete); Jensen (Reno, Nev.), *supra* note 19 (indicating six to twelve weeks of delay and noting infill as more contentious in urban areas); McMurry (Anaheim, Cal.), *supra* note 19 (noting a three to five year's delay for compliance with California Environmental Quality Act, three years to litigate, and enormous added cost); see also Analysis, *supra* note 54, at 26 (explaining that a nine to twelve month delay is typical, but can be held up for years by angry community members); Kramer (Orlando, Fla.), *supra* note 19 (noting that implementation of concept plans has been expedient, but has also led to delay when there is no competence in administration and no shared vision, which can cause struggles for small towns). *But see* Hoffman (Phoenix, Ariz.), *supra* note 19 (indicating that planned unit developments take only six to seven months in Phoenix).

<sup>184</sup> See Cobb (Brevard, N.C.), *supra* note 22 (noting that developers can be obstinate and slow the process).

<sup>185</sup> See Merriam (Hartford, Conn.), *supra* note 21. One alternative is a statute that sets time limits on applications for approval and provides the application is "deemed approved" if not acted on within the statutory time. See LEGISLATIVE GUIDEBOOK, *supra* note 25, § 10-201 (containing a model statute with time limits, and providing commentary citing legislation adopting this requirement). Time limits would have to be generous enough to provide enough time for considering major planned unit developments and would not apply to legislative actions such as rezoning for planned unit development districts.

<sup>186</sup> See, e.g., MASS. ASS'N OF REGIONAL PLAN. AGENCIES, A BEST PRACTICES MODEL FOR STREAMLINED LOCAL PERMITTING (2007), <http://www.mass.gov/hed/docs/permitting/permitting-bestpracticesguide.pdf>; LEGISLATIVE GUIDEBOOK, *supra* note 25, § 10-208

the review process by omitting unnecessary steps. For planned unit developments, for example, some jurisdictions approve the development plan at the same time as the rezoning is approved.<sup>187</sup> Combining these decisions saves time if it is possible to decide both issues adequately in one hearing. Another option is for the decision agency to take a more active role. A simple change would have the agency condition approvals on the developer's submission of changes, rather than returning the application to allow the developer to make these changes, which can take several months.<sup>188</sup>

### C. Neighbor Participation

Neighbor participation in decisions about planned unit development is important, either individually or through neighbor organizations. Problems arise if participation becomes obstinate and unyielding, an example of the Not In My Back Yard (NIMBY) syndrome.<sup>189</sup> Opposition to any kind of zoning changes, often from neighbors, is all too common. Planned unit developments are no exception, as they may require a change in use or density that neighbors oppose. Opposition can delay or prevent the approval of a project, require changes in design, and raise costs.

The interviews with land use lawyers and planners asked whether neighbor opposition to planned unit development was a problem. Responses varied. Some believed the problem was not serious,<sup>190</sup> or at

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(explaining consolidated permit review process); Norman Wright, *Practice Process Improvement*, ZONING PRACTICE, May, 2017, <https://planning-org-uploaded-media.s3.amazonaws.com/document/Zoning-Practice-2017-07-05.pdf>.

<sup>187</sup> See 2007 Report, *supra* note 4, at 29–30.

<sup>188</sup> See Analysis, *supra* note 54, at 60–61; see also Anonymous (San Diego Cty., Cal.), *supra* note 98 (explaining applicants present a scoping letter with their detailed plan, which speeds up the process); Hoffman (Phoenix, Ariz.), *supra* note 19 (suggesting that rezoning and pre-application meetings would be combined). By-right alternatives are an option that avoids discretionary review, such as the incentive infill zoning adopted by Tucson. See *infra* notes 230–37 and accompanying text.

<sup>189</sup> See Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288 (1992); see also Caressa Shively, *Understanding the NIMBY and LULU Phenomena: Reassessing Our Knowledge Base and Informing Future Research*, 21 J. PLAN. LIT. 255 (2007). Planned unit development can also be a LULU, a Locally Unwanted Land Use. *Id.*

<sup>190</sup> See Hoffman (Phoenix, Ariz.), *supra* note 19 (stating neighbor opposition not much of a concern).

least no more serious than for other types of development.<sup>191</sup> Opposition also depended on location<sup>192</sup> and may be less for greenfield sites,<sup>193</sup> where projects may be larger.<sup>194</sup> Existing development may not be adjacent to these sites, and larger projects can provide buffering through landscaping and other measures that mitigate impacts on adjacent areas.

Other comments reported that neighbor opposition was a problem.<sup>195</sup> Infill sites in urban areas are one example where there is opposition to increased density,<sup>196</sup> noise, traffic, and other problems.<sup>197</sup> Objection to change may be greater where development patterns are long-established. Other reports were highly negative. Neighbor opposition was reported as inevitable and negative, and planned unit development was described as a bad model for urban growth and change.<sup>198</sup> Almost every major project in California is challenged, sometimes causing years of delay and substantial cost increases.<sup>199</sup>

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<sup>191</sup> Kramer (Orlando, Fla.), *supra* note 19 (stating that opposition to planned unit development was no more than any other project because neighbors want planned unit developments, which have policies that address their concerns); White (Kansas City, Mo.), *supra* note 43 (explaining that opposition has not increased or decreased because neighbors have always been against something bigger, denser, or taller, and the pushback on regulations has gotten worse).

<sup>192</sup> See Hoffman (Phoenix, Ariz.), *supra* note 19 (stating that certain neighborhoods with large lot single family zoning do not want change); Lewis (Jacksonville, Fla.), *supra* note 19 (noting that every area is distinct in Jacksonville); White (Kansas City, Mo.), *supra* note 43.

<sup>193</sup> See Jorden (Phoenix, Ariz.), *supra* note 19 (noting that, in Arizona, a neighbor opposition to a planned unit development is less of an issue for greenfield sites).

<sup>194</sup> See Anonymous (San Diego Cty., Cal.), *supra* note 98 (noting no problem with big development).

<sup>195</sup> See Borchardt (Reno, Nev.), *supra* note 19 (indicating a lot of neighbor opposition in Reno); Davis (Palm Beach Cty., Fla.), *supra* note 19 (explaining the density of planned unit development projects is lower, so neighbors in Palm Beach County claim loss in value and object to loss of open space, leading to slowed or changed projects).

<sup>196</sup> See Lewis (Jacksonville, Fla.), *supra* note 19; Wilcox (Leon Cty., Fla.), *supra* note 19.

<sup>197</sup> See Mazzocco (Tucson, Ariz.), *supra* note 22.

<sup>198</sup> *But cf.* Einsweiler (Austin, Tex.), *supra* note 67 (noting tolerance for planned unit developments in some communities, especially wealthy communities where there is growth pressure, though planning goals may be lowered).

<sup>199</sup> For example, one large master-planned community has lost in litigation three times since the 1990s, has not built a single house, has made major investments over twenty years, and is proposing its fourth design. See McMurry (Anaheim, Cal.), *supra* note 19. Another project development was defeated and then sold to a developer at an

Neighborhood participation in zoning decisions is needed, but participation should be managed in a way that addresses both developer and neighbor concerns.<sup>200</sup> The challenge is to find successful practices that will give neighbors a voice, yet prevent the NIMBY syndrome from occurring.<sup>201</sup> Some cities have a network of neighborhood advisory councils, and municipalities can work through these organizations to get a better understanding of community concerns as a basis for dealing with projects such as planned unit developments.<sup>202</sup> Land use attorney Dwight

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88%, \$8 billion, loss. *See id.* A small portion of the development has been finally approved, and the carrying costs are \$240,000 a day. *See id.*

<sup>200</sup> *See generally* GRACE DAWSON, NO LITTLE PLANS: FAIRFAX COUNTY'S PLUS PROGRAM FOR MANAGING GROWTH (1977) (describing how active citizen organizations in small groups, backed by their local politicians, were effective in blocking unwanted development near homes and limiting the growth management program in Fairfax County, Virginia).

<sup>201</sup> There may be a ward-courtesy practice in municipalities that elect legislative body members in a ward system. *See* KENNETH B. BLEY, USE OF THE CIVIL RIGHTS ACTS TO RECOVER DAMAGES IN LAND USE CASES 811 (2005), Westlaw SK045 ALI-ABA 767 (defining "ward courtesy" as "deferring to the wishes of the legislator who is responsible for the area where land is located. . ."). All members will support the decision made by the member of the ward where a zoning change is requested, and they will oppose the change if the ward member opposes the change. This practice can give a veto power to residents of the ward if they are powerful enough to influence their representative. Judicial reaction to ward courtesy systems is mixed. Compare *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964) (invalidating ward courtesy system for obtaining a liquor license), with *Arroyo Vista Partners v. City of Santa Barbara*, 732 F. Supp. 1046, 1051 (Cal. Dist. Ct. App. 1990) (recognizing the validity of ward courtesy system for denying an application for development plan).

<sup>202</sup> *See* Erica C. Barnett, *How Seattle Is Dismantling a NIMBY Power Structure*, NEXT CITY (Apr. 3, 2017), <https://nextcity.org/features/view/seattle-nimbys-neighborhood-planning-decisions>. For discussion of neighborhood organizations, see Matthew J. Parlow, *Revolutions in Local Democracy?: Neighborhood Councils and Broadening Inclusion in the Local Political Process*, 16 MICH. J. RACE & L. 81 (2010); *see also* Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137 (2008). Advisory Neighborhood Commissions in the District of Columbia may give advice on "all proposed matters of District government policy" including planning. D.C. CODE ANN. § 1-309.10(a). "Great weight" is to be given to this advice by the government entity, which is to articulate its decision in writing, but may reject it. *See Quincy Park Condo. Unit Owners' Ass'n v. D.C. Bd. of Zoning Adjustment*, 4 A.3d 1283, 1287 (D.C. App. 2010) (upholding board's rejection of Commission's request for rehearing on grant of zoning relief to developer).

Merriam has outlined a program of community outreach.<sup>203</sup> He suggests ten cardinal principles that can win over opposition, including treating possible opponents as allies, having a plan of action, and knowing the community's agenda.<sup>204</sup> An outreach program like this is critical to deal effectively with neighbor involvement.

Neighborhood meetings on planned unit development applications are another alternative.<sup>205</sup> They can be mandatory or voluntary, and managed by the developer or the municipality. Whether municipal staff should be present and what their role should be must be decided. For example, the Henderson, Nevada, planned unit development ordinance requires a mandatory neighborhood meeting and details requirements such as the contents of the meeting notification, meeting conduct, and preparation of a summary report.<sup>206</sup> Staff attendance is optional, and staff are there only to advise on code provisions that apply.<sup>207</sup> However, ordinances could allow staff to play a more active role in dealing with neighbor concerns and providing guidance on municipal policy. Neighborhood meetings are a common practice in the jurisdictions surveyed and are reported as helpful "eyes on the ground."<sup>208</sup> They are

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<sup>203</sup> See 2007 Report, *supra* note 4, at 8–9; see also Merriam (Hartford, Conn.), *supra* note 21.

<sup>204</sup> See 2007 Report, *supra* note 4, at 8–9. The principles also include "being willing to set aside perceptions of what constitutes the public's agenda when there is better information," "following negotiation principles, hiring a public relations professional, preventing the community from taking a premature public stance, showing concern, showing gratitude," and "fight[ing] only for that which makes economic sense." *Id.*

<sup>205</sup> A pre-application meeting between the developer and planning staff to discuss the project and provide staff feedback is also common. See 2007 Report, *supra* note 4, at 30–31 (detailing requirements for the meeting). See generally COLLIER COUNTY, FLA., LAND DEVELOPMENT CODE § 10.02.13 (detailing meeting requirements); ST. CHARLES, ILL., ZONING ORDINANCE § 17.04.410(A).

<sup>206</sup> See HENDERSON, NEV., DEVELOPMENT CODE § 19.6.3(b)(d).

<sup>207</sup> See *id.* § 19.6.3(a)(3). Staff are not to serve as facilitators or become involved in negotiations; the purpose of the meeting is "to receive public suggestions, identify neighborhood concerns, and encourage dialogue at an early stage in the review process." *Id.* § 19.6.3(a); see also FRANKLIN, TENN., ZONING ORDINANCE § 2.4.2(d) (detailing requirements for meeting, staff attendance, and summary of neighbor concerns).

<sup>208</sup> See Anonymous (San Diego Cty., Cal.), *supra* note 98 (stating there are twenty-six local planning groups, and that applications are sent to local groups then local meeting held); Borchardt (Reno, Nev.), *supra* note 19 (indicating that community meetings are required for zoning amendment, staff are present, meetings are very helpful and provide eyes on the ground, changes are usually made at the meetings, there is usually no staff support if no resident support, and the council listens to residents); Cobb

either mandatory<sup>209</sup> or voluntary, and may be encouraged if not mandatory.<sup>210</sup> Legislative bodies and staff will not consider project applications in some municipalities without neighborhood support.<sup>211</sup>

Not all comments were positive, as some indicated that meetings may not be effective and can slow the process.<sup>212</sup> A study of planned unit development in Washington, D.C., claimed the community involvement process at that time was broken.<sup>213</sup> Neighborhoods did not know when and how to get and stay involved, neighborhood organizations spoke only for a few, regulations did not specifically specify the roles of the community and the developer, and developers had no way of explaining their efforts with a neighborhood if unable to reach agreement.<sup>214</sup> The study made a number of suggestions: regulations should clearly state the

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(Brevard, N.C.), *supra* note 22 (explaining that Brevard stopped doing the required neighborhood meetings as regularly, and the meetings are staff facilitated but developer led); Davis (Palm Beach Cty., Fla.), *supra* note 19 (stating that community meetings not mandatory in Palm Beach County, but council will not consider project if not done and council will approve if neighborhood refuses to meet); Hill (Orange Cty., Fla.), *supra* note 19 (explaining that community meetings are required for all applications in Orange County and will work through, if controversial); Hoffman (Phoenix, Ariz.), *supra* note 19 (stating that there are mandatory community meetings in Phoenix in which a village hearing must occur before it goes before the planning commission); Jorden (Phoenix, Ariz.), *supra* note 19 (discussing how citizen review meetings are required in statute for general plan amendment, applicant driven, helpful if used, and at least help to avoid misconceptions); Kramer (Orlando, Fla.), *supra* note 19 (discussing how neighborhood meetings can help and that some communities require or encourage them); Lewis (Jacksonville, Fla.), *supra* note 19 (stating that Jacksonville has six area advisory councils that are relatively powerless, participation rates differ, area advisory councils frequently see PUDs and make recommendations, and the developer comes to the monthly meeting eighty percent of the time); Mazzocco (Tucson, Ariz.), *supra* note 22 (showing neighborhood meeting is required); McMurry (Anaheim, Cal.), *supra* note 19 (describing a scoping meeting process to comply with California Environmental Quality Act and entertaining comments by public and government agencies to deter lawsuits).

<sup>209</sup> See Merriam (Hartford, Conn.), *supra* note 21 (suggesting mandatory outreach to neighborhoods).

<sup>210</sup> See, e.g., ST. CHARLES, ILL., ZONING ORDINANCE § 17.04.410(B).

<sup>211</sup> This response has been reported in cities that make use of neighbor participation.

<sup>212</sup> See Cobb (Brevard, N.C.), *supra* note 22 (stating that neighborhood meetings in Brevard slow the process and neighbors did not always come to board meeting after the original neighborhood meeting).

<sup>213</sup> See Analysis, *supra* note 54, at 6–7.

<sup>214</sup> See *id.* at 27–31.

rules for community involvement, the agency should educate communities on how the process works, the agency should serve as a facilitator, and it or an independent third party should serve as mediator.<sup>215</sup> Mediation and arbitration are pre-adjudicatory options that can avoid tensions between a developer and a neighborhood by moving dispute resolution to an independent mediator.<sup>216</sup> A pre-application or scoping meeting, followed by a notice clearly specifying the issues to be considered, is also strongly recommended.<sup>217</sup>

Although it cannot completely prevent objection, the comprehensive plan can be helpful in dealing with neighbor concerns. Planning programs typically provide for public participation in preparing and adopting comprehensive plans, which allows citizens and neighborhood organizations to contribute to land use policies.<sup>218</sup> Participation can ensure consensus on land use policies that can guide zoning for planned unit developments.<sup>219</sup>

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<sup>215</sup> See *id.* at 49–54. There should also be a process in which a developer can show it has done its best if agreement with the community is not reached. See *id.* at 54–55.

<sup>216</sup> See Merriam (Hartford, Conn.), *supra* note 21 (indicating that a neutral ombudsman has been effective in Utah, suggesting that the statute of limitations for appealing zoning decisions to court should be suspended if parties agree to pursue alternative dispute resolutions, identifying that short time limits force premature litigation to avoid being closed out by the statute and litigation may harden the positions of the parties, making alternative dispute resolution more difficult, and indicating that suspending time limits will need legislative action).

<sup>217</sup> See Memorandum on Public Hearing Report for ZC #08-06-12, Proposed Amendments to Zoning Regulations – Planned Unit Developments (PUD) 17–18 (D.C. Office of Planning 2010) (on file with author) (proposing recommendations for securing a clear process for community input, including a pre-application meeting); see also PLANNING & DEV. SERVS., IID NEIGHBORHOOD LIAISON POLICY (2015) (explaining that for downtown incentive district, applicant provides written agenda, including a written request for appointment of neighborhood liaison, and prepares a written summary of meeting to send to neighborhood liaison, who may concur or dissent); McMurry (Anaheim, Cal.), *supra* note 19 (describing scoping meeting). See generally Schwanke (Arlington, Va.), *supra* note 165 (indicating the developer for the Avalon development resolved opposition by taking residents on a national tour to see similar projects and by using visualization techniques to show residents what the project would be like, including social media); *supra* note 208 (discussing methods of pre-application meetings).

<sup>218</sup> See LEGISLATIVE GUIDEBOOK, *supra* note 25, § 7-204 (model statute detailing contents of land use element).

<sup>219</sup> See, e.g., *PlanPHX General Plan Update – 2015*, CITY OF PHOENIX, <https://www.phoenix.gov/pdd/pz/general-plan-update> (explaining village summit meetings as part of update process, and listing video presentations); see also LEGISLATIVE GUIDEBOOK, *supra*

Ultimately, the recourse is to the courts if neighbor opposition blocks project approval, and denials can attract constitutional challenge if based on fear and unsupported complaint. Courts reject neighborhood opposition if it does not have an adequate basis, but persuading a court that opposition is unacceptable can be difficult, and the decisions are mixed.<sup>220</sup> For a developer of a planned unit development, an opportunity for lengthy litigation is not welcome and increases uncertainty.<sup>221</sup> A litigation remedy is also limited by the three-fourths vote requirement for zoning amendments, which most state statutes contain, if twenty percent or more of the adjacent owners object.<sup>222</sup> Neighbor objections over the threshold often require a supermajority vote for approval, which may be difficult.

#### IV. INFILL PROJECTS, FORM-BASED CODES, AND DEVELOPMENT AGREEMENTS

Some observers claim that extensive neighborhood opposition makes planned unit development a dysfunctional strategy and that alternatives are required.<sup>223</sup> By-right systems that do not require discretionary review are one alternative.<sup>224</sup> They create an entitlement by allowing a project to move forward once a developer shows compliance with the regulations.

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note 25, § 7-401 (containing model statute detailing public participation procedures for reviewing, adopting, and amending comprehensive plans); Patricia Salkin, COLLABORATIVE PROCESSES FOR PREPARING AND ADOPTING A COMPREHENSIVE PLAN, MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS, VOL. 2 (Am. Plan. Ass'n 1998).

<sup>220</sup> See Muni Saadir, *Neighbor Opposition to Zoning Change*, 49 URB. LAW. (forthcoming 2017) (detailing judicial treatment of neighbor opposition, including equal protection objections, and noting mixed results in the courts). See generally Harold A. Ellis, *Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 LAND USE & ENVTL. L. REV. 275 (1992) (reviewing results of earlier cases).

<sup>221</sup> But see Merriam (Hartford, Conn.), *supra* note 21 (explaining that developers generally will not abandon a project when faced with neighbor opposition because they have deep pockets and can stick it out).

<sup>222</sup> Many state zoning acts include this provision. See, e.g., *Hyland v. City of Mesa*, 537 P.2d 936 (Ariz. 1975) (en banc). See generally U.S. DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT § 5, at 7–8 (1926), [https://planning-org-uploaded-media.s3.amazonaws.com/legacy\\_resources/growingsmart/pdf/SZEnablingAct1926.pdf](https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf) (proposing this requirement).

<sup>223</sup> See Einsweiler (Austin, Tex.), *supra* note 67; White (Kansas City, Mo.), *supra* note 43.

<sup>224</sup> See Analysis, *supra* note 54, at 21.

Certainty is created, and delays created by discretionary reviews are avoided. Public participation occurs when the municipality adopts the regulations, and neighbor opposition cannot block a project unless neighbors obtain a downzoning.<sup>225</sup> These advantages should be balanced against the opportunities discretionary review provides for achieving better design and social objectives, such as affordable housing.<sup>226</sup>

#### A. Infill Development

Infill projects<sup>227</sup> in town centers and urban areas provide a by-right alternative because the character of the surrounding area provides a basis for standards that can guide project design. Incentive downtown zoning districts for infill development are an example.<sup>228</sup> They contain development standards fitted to the area, permit creativity, and use project review to determine compliance. There is some flexibility, but the development plan review typical of planned unit development ordinances does not occur. Design plans for downtown areas can provide important backup.<sup>229</sup>

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<sup>225</sup> See LAND USE LAW, *supra* note 30, §§ 6.34 to 6.36 (noting that down zonings are subject to judicial disapproval if they are arbitrary).

<sup>226</sup> See Analysis, *supra* note 54, at 21–22 (discussing opportunities for design review, citizen input, and higher density development). The report also argues that planned unit developments allow the city to obtain site-specific benefits and amenities, allow the city to rezone properties consistent with the comprehensive plan, and provide a means for allowing more interesting, creative buildings to be built. See Analysis, *supra* note 54, at 22–23. These benefits may apply only to Washington, D.C.

<sup>227</sup> See, e.g., Wayne Senville, *We Don't Let Planning Get in the Way, Part I*, PLANNED WEB (Sept. 23, 2012), <http://plannersweb.com/2012/09/we-dont-let-planning-get-in-the-way-part-i/>; Wayne Senville, *We Don't Let Planning Get in the Way, Part II*, PLANNED WEB (Sept. 24, 2012), <http://plannersweb.com/2012/09/we-dont-let-planning-get-in-the-way-part-ii/> (discussing Blue Back Square infill development in Hartford, Conn.); see also *supra* note 2.

<sup>228</sup> See Mazzocco (Tucson, Ariz.), *supra* note 22 (noting several Arizona cities have adopted this alternative). These cities may see infill development “as a preferential place to pursue a rezoning through a regular privately-initiated rezoning.” E-mail from Jim Mazzocco, Gov't Hearing Exam'r, Tucson, Ariz., to author (March 22, 2017, 19:07 CST) [hereinafter Mazzocco, E-mail] (on file with author).

<sup>229</sup> See, e.g., CITY OF BREMERTON, COMPREHENSIVE PLAN, LAND USE L-15 (2016), <http://www.ci.bremerton.wa.us/DocumentCenter/View/192>; *City of Reno, Downtown Reno Regional Center Plan* (2011), <http://www.reno.gov/home/showdocument?id=31008>; see also Orly Linovski & Anastasia Loukaitou-Sideris, *Evolution of Urban Design Plans in the United States and Canada: What Do the Plans Tell Us About Urban*

The Downtown Incentive Infill District in Tucson, Arizona, is an example of this approach.<sup>230</sup> It solves contextual design problems while allowing creativity and flexibility through alternate ways of compliance and standards that leave room for design choices.<sup>231</sup> The Unified Development Code establishes and maps the Infill District and its subdistricts, and the Unified Development Code contains both mandatory and optional overlay zone standards and requirements.<sup>232</sup> The Planning and Development Services Department must approve a plan that complies with general development standards, such as Streetscape Design and Development Transition standards, and includes an “urban design best practice option.”<sup>233</sup> The plan must also comply with subdistrict standards, such as those for the Downtown Core Subdistrict.<sup>234</sup> These

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*Design Practice*, 33 J. PLAN. EDUC. & RES. 66 (2012); David Dixon, *Managing Change with Urban Design*, PLANNING, June 2014, at 42.

<sup>230</sup> A statute authorizes infill incentive districts when three of the following requirements are met:

1. There is a large number of vacant older or dilapidated buildings or structures.
2. There is a large number of vacant or underused parcels of property, obsolete or inappropriate lot or parcel sizes or environmentally contaminated sites.
3. There is a large number of buildings or other places where nuisances exist or occur.
4. There is an absence of development and investment activity compared to other areas in the city or town.
5. There is a high occurrence of crime.
6. There is a continuing decline in population.

ARIZ. REV. STAT. ANN. § 9-499.10(A). The governing body “shall adopt an infill incentive plan to encourage redevelopment in the district,” which may include “1. Expedited zoning or rezoning procedures. 2. Expedited processing of plans and proposals. 3. Waivers of municipal fees for development activities as long as the waivers are not funded by other development fees. 4. Relief from development standards.” *Id.* § 9-499.10(B).

<sup>231</sup> See TUCSON, ARIZ., UNIFIED DEVELOPMENT CODE § 1.3 (“The provisions of the UPC are established to . . . encourage the most efficient use of land through site sensitive design . . .”).

<sup>232</sup> See generally *id.* §§ 5–9. The purpose of the Urban Overlay District and Downtown Area Infill Incentive District is to “provide flexible development options to landowners rather than mandatory requirements.” *Id.* § 5.1.

<sup>233</sup> *Id.* § 5.12.8(C); see also DOWNTOWN TUCSON PARTNERSHIP, REVITALIZING DOWNTOWN TUCSON: BUILDING THE NEW PUEBLO (2010), <http://www.downtowntucson.org/wp-content/uploads/2011/07/RevitalizeMar10.pdf>.

<sup>234</sup> See TUCSON, ARIZ., UNIFIED DEVELOPMENT CODE § 5.12.10.

include design, use, height, and landscaping standards, subject to exemptions and modifications.<sup>235</sup> Modifications may require judgment.<sup>236</sup> A modification for pedestrian access, for example, can allow “[a]lternative pedestrian access that creates connectivity between public entrances to the project and abutting sidewalks . . . as long as no safety hazard is created.”<sup>237</sup>

An alternate approach keeps discretionary review but includes context-specific review standards that are sensitive to the existing environment. The Tallahassee, Florida, Urban Planned Unit Development Zoning District is an example of this approach.<sup>238</sup> One purpose of this district is to “[e]ncourage infill and rehabilitation of existing urban areas with readily available services and infrastructure.”<sup>239</sup> Review criteria require sensitivity to context and that “[b]uilding design shall contribute to making and perceiving downtown and surrounding central core areas as a pattern of spaces and structures rather than a series of unrelated buildings and streets.”<sup>240</sup> The ordinance lists “[c]haracter elements and amenities” for consideration “in determining whether the project design contributes to the public realm” that emphasize context and require design consistent with a downtown environment.<sup>241</sup>

## B. Form-Based Codes

Form-based codes are a by-right alternative that has an enthusiastic following. They respond to a concern that traditional zoning is a rigid format that prohibits, rather than encourages, good development. One critical problem is the rigid use separation that prevents mixed-use

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<sup>235</sup> See *id.* § 5.12.10(B).

<sup>236</sup> See *id.* § 5.12.10(C).

<sup>237</sup> *Id.* § 5.12.10(D)(1). “In Tucson the first step may involve a review by the Design Review Committee with a recommendation for the decision by the PDSO Director.” Mazzocco, E-mail, *supra* note 228. “The whole process may be three to four months depending on the complexity of the building plans.” *Id.*; see also Hoffman (Phoenix, Ariz.), *supra* note 19 (discussing infill development in Phoenix).

<sup>238</sup> See TALLAHASSEE, FLA., LAND DEVELOPMENT CODE § 10-200.

<sup>239</sup> *Id.* § 10-200(a)(1).

<sup>240</sup> *Id.* § 10-200(b)(1).

<sup>241</sup> *Id.* § 10-200(b)(7). For example, the ordinance requires “building mass that relates to the scale of the street” and “ground floor transparency appropriate to use.” *Id.*

development.<sup>242</sup> “A form-based code is a land development regulation that fosters predictable built results and a high-quality public realm by using physical form (rather than separation of uses) as the organizing principle for the code.”<sup>243</sup> In practice, form-based codes regulate land use, but “form is more important than rigid use separation.”<sup>244</sup> The code regulates relationships “between building facades and the public realm, the form and mass of buildings . . . , and the scale and types of streets and blocks,” and it is a highly-detailed list of specifications for these features.<sup>245</sup> There is no room for discretion.<sup>246</sup> New development must comply with the code, but then the new development has an entitlement. Certainty encourages investment.<sup>247</sup> Nothing could be more different from the discretionary approval process used for planned unit developments.

There is agreement that form-based codes are suitable for redevelopment of downtown areas, buildings, and urban blocks.<sup>248</sup> There is

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<sup>242</sup> See John M. Barry, *Form-Based Codes: Measured Success Through Both Mandatory and Optional Implementation*, 41 CONN. L. REV. 305, 308 (2008).

<sup>243</sup> *Form-Based Codes Defined*, FORM-BASED CODES INST., <http://formbasedcodes.org/definition/>. The web site has a detailed explanation with examples. See *id.* Form-based codes have a regulating plan that indexes development rules, explains where they apply, and describes development requirements. See Daniel G. Parolek, Karen Parolek, & Paul C. Crawford, FORM-BASED CODES: A GUIDE FOR PLANNERS, URBAN DESIGNERS, MUNICIPALITIES, AND DEVELOPERS 17–27 (2008); Barry, *supra* note 242 (detailing experience with form-based codes in several cities). See generally Richard Rogers, *Regional Form-Based Zoning: Repairing and Preventing the Negative Effects of Suburban Sprawl*, 40 ZONING & PLAN. REP., No. 4, (2017) (explaining how form-based codes are implemented with examples in selected cities, including downtown and urban areas).

<sup>244</sup> E-mail from Nancy Stroud, to author (June 23, 2017, 13:18 CST) (on file with author).

<sup>245</sup> *Form Based Codes Defined*, *supra* note 243.

<sup>246</sup> See generally Barry, *supra* note 242, at 308.

<sup>247</sup> See Kramer (Orlando, Fla.), *supra* note 19 (adding that planned unit development is a crutch that may discourage investment and cover up bad development regulation); see also Cobb (Brevard, N.C.), *supra* note 22 (revising ordinance with form-based code emphasis for downtown will extend to neighborhoods later and will not then need planned unit developments that are often tweaked variances).

<sup>248</sup> See Cobb (Brevard, N.C.), *supra* note 22 (revising ordinance with form-based code emphasis in downtown); Hoffman (Phoenix, Ariz.), *supra* note 19 (discussing character areas downtown; planned unit development not needed); Jensen (Reno, Nev.), *supra* note 19 (reporting form-based code downtown near transit use); Kramer (Orlando,

concern about applying them to superblocks and planned unit developments.<sup>249</sup> “[T]he most problematic application is on properties that have already been developed in a suburban density and form.”<sup>250</sup> A model Smart Code for form-based codes authorizes a specific district that can be adapted for use with planned unit developments, but critics argue this option is not adequate.<sup>251</sup> Another option is to combine form-based codes with planned unit development to create a hybrid system.<sup>252</sup>

Critics of form-based codes point to difficulties with the system that make them challenging to implement.<sup>253</sup> Municipalities have complicated the codes by adding land use regulations and making these disparate regulations work together can be difficult. Design standards can be long, over prescriptive, difficult to verify, and do not deal with the basic concepts raised by planned unit developments,<sup>254</sup> though supporters claim “[a] well-written code is not unwieldy.”<sup>255</sup>

Raleigh, North Carolina, is an example of a city that adopted a modified form-based code in its Unified Development Ordinance to reduce reliance on planned unit developments.<sup>256</sup> The code includes

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Fla.), *supra* note 19 (discussing urban redevelopment areas); White (Kansas City, Mo.), *supra* note 43 (discussing urban block).

<sup>249</sup> See Telephone Interview with Don Elliott, Dir., Clarion Associates (Mar. 15, 2017) [hereinafter Elliott (Denver, Colo.)] (stating form-based codes cannot apply to broad concepts of planned unit development); Jensen (Reno, Nev.), *supra* note 19; White (Kansas City, Mo.), *supra* note 43.

<sup>250</sup> E-mail from George M. Kramer, Dir. of Planning, S&ME, to author (July 5, 2017, 8:46 CST) (on file with author).

<sup>251</sup> See SMART CODE VERSION 9.2 § 3.6, <http://www.dpz.com/uploads/Books/SmartCode-v9.2.pdf>; see also Stroud, *supra* note 244 (explaining use of specific district). Ms. Stroud participated in the drafting of a form-based code for Miami, Florida. Mr. White argues that specific districts are difficult to use. See White (Kansas City, Mo.), *supra* note 43.

<sup>252</sup> See Merriam (Hartford, Conn.), *supra* note 21 (noting planned unit development district used with form-based code).

<sup>253</sup> See Elliott (Denver, Colo.), *supra* note 249 (recommending attention to basic issues). Mr. Elliott has extensive experience with land development regulations. For a critique of the use of form-based codes in older suburbs, see Nicole Garnett, *Old Suburbs Meets New Urbanism*, NOTRE DAME L. SCH. (2015).

<sup>254</sup> See Elliott (Denver, Colo.), *supra* note 249. For example, a code could prescribe a ceiling height that is too high for some developments and too low for others.

<sup>255</sup> Stroud, *supra* note 244 (recommending application to planned unit developments).

<sup>256</sup> See *Unified Development Ordinance*, CITY OF RALEIGH, N.C., <https://www.raleighnc.gov/business/content/PlanDev/Articles/Zoning/ZoningRemapping.html>

form-based elements that regulate mixed-use development in commercial districts<sup>257</sup> and permit development by right without review.<sup>258</sup> It regulates building form, adds street frontage and height regulation, and recognizes land use differences by applying different form-based controls to different mixed-use combinations.<sup>259</sup> Planned unit developments are used occasionally when neighbor opposition is expected because they provide an opportunity to comment on building form.<sup>260</sup>

### C. Development Agreements

Development agreements, which are authorized by statute in some states, are used by some municipalities to supplement development plans for planned unit developments.<sup>261</sup> A development agreement is a private agreement between a developer and a municipality in which each party agrees on terms that will control the development of the project.<sup>262</sup> It is

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(last updated Aug. 18, 2016). *See generally* Lolita Buckner Inniss, *Back to the Future: Is Form-Based Code an Efficacious Tool for Shaping Modern Civic Life?*, 11 U. PA. J. L. & SOC. CHANGE 75 (2008) (containing a critique of form based codes); Roger E. Eastman, *Going Hybrid*, PLANNING, Feb. 2012, at 25 (explaining a similar hybrid form-based code adopted in Flagstaff, Ariz.).

<sup>257</sup> *See* Crane (Raleigh, N.C.), *supra* note 39 (noting that the development community has not caught up with the new ordinance). The ordinance does not include design review because a state statute requires quasi-judicial process for this type of decision. *See* N.C. GEN. STAT. § 160A-393; Crane (Raleigh, N.C.), *supra* note 39; *see also* CODE STUDIO, RALEIGH'S NEW DEVELOPMENT CODE: DIAGNOSTIC AND APPROACH REPORT (Public Review Draft 2010) (on file with author). *See generally* RALEIGH, N.C., UNIFIED DEVELOPMENT ORDINANCE, <https://www.raleighnc.gov/content/extra/Books/PlanDev/UnifiedDevelopmentOrdinance/#58> (demonstrating an example of a development ordinance).

<sup>258</sup> *See* RALEIGH, N.C., UNIFIED DEVELOPMENT ORDINANCE § 10.2.5(E)(3).

<sup>259</sup> *See id.* arts. 3.2 to 3.5.

<sup>260</sup> *See* Crane (Raleigh, N.C.), *supra* note 39 (noting that developers want certainty and to avoid the risk of public comment).

<sup>261</sup> *See, e.g.*, MANATEE COUNTY, FLA., LAND DEVELOPMENT CODE § 350; *see also* Cleanwater Liganore, Inc. v. Frederick Cty., 151 A.3d 44, 55 (Md. Ct. Spec. App. 2016) (holding that statute authorizes development agreements to apply to more than zoning controls); *see generally* DAVID CALLIES ET AL., BARGAINING FOR DEVELOPMENT (2003); John Delaney, *Development Agreements: The Road from Prohibition to "Let's Make a Deal!"*, 25 URB. LAW. 49 (1993). Development agreements originated in California as a response to a negative case on vested rights. *See* Avco Cmty. Devs. Inc. v. S. Coast Regulatory Comm'n, 553 P.2d 546, 550–57 (Cal. 1976).

<sup>262</sup> *See* 2007 Report, *supra* note 4, at 47–49; *see also* Analysis, *supra* note 54, at 45. Professor Callies has explained the purpose of development agreements:

considered necessary in some areas because it protects the developer from a change in rules that applied when the agreement was executed.<sup>263</sup> These assurances are important because it is difficult to secure vested rights in planned unit developments, especially when they are built over a long period of time.<sup>264</sup> Without an agreement, changes made in zoning regulations after the development has started will apply and can disrupt a project. Development agreements can also give municipalities private controls not available through zoning that supplement the development plan.<sup>265</sup> They can be quite extensive and cover all aspects of a project, including land use, design, financing, capital facilities, and affordable housing.<sup>266</sup>

Despite these advantages, development agreements can create problems when used with planned unit developments. There can be an unclear line between a development agreement and the development plan

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1. Permit local government to require public facilities and improvements beyond those which it may legally require as generated by a proposed land development project.
  2. Permit local government greater flexibility in regulating large, multiphase projects extending over many years.
  3. Strengthen the public planning process and encourage public and private participation in comprehensive planning.
  4. Reduce the economic cost of development and allow for the orderly planning of public facilities and services and the allocation of costs.

2007 Report, *supra* note 4, at 48.

<sup>263</sup> See E-mail from Robert McMurry, to author (July 5, 2017 21:54 CST) (on file with author) (“With the myriad of regulations in California and the increasing use of general plans to contain zoning-like provisions (which removed the greater certainty zoning affords), stakeholders are increasingly using development agreements to customise the regulations and provide enforceable rules for developers.”).

<sup>264</sup> See 2007 Report, *supra* note 4, at 47, 106–08 (discussing statutes in some states that confer vested rights); see also WASH. REV. CODE ANN. § 36.70B.180 (prohibiting “zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement”).

<sup>265</sup> See Jorden (Phoenix, Ariz.), *supra* note 19 (stating agreements can cover infrastructure and land use); McMurry (Anaheim, Cal.), *supra* note 19 (noting development agreements avoid problems and are a win-win for both parties).

<sup>266</sup> See, e.g., Development Agreement between City of Issaquah, Wash., and Lakeside Industries, Inc. (Jan. 29, 2013), <http://mrsc.org/getmedia/f49affb8-6fa7-4626-9d49-6e1ed914bc5d/i75lakeside.pdf.aspx>. For examples of different development agreements, see DEVELOPMENT AGREEMENTS, MUN. RES. & SERVS. CTR. (Sept. 13, 2017, 1:46 PM), <http://mrsc.org/Home/Explore-Topics/Planning/Land-Use-Administration/Development-Agreements.aspx>.

that makes implementation difficult,<sup>267</sup> and potential conflicts must be considered in the zoning ordinance.<sup>268</sup> There is also concern that development agreements violate fundamental public law norms because they are negotiated without the protections of legislative and administrative process.<sup>269</sup> They are acceptable if negotiation limited to the developer and the municipality is an acceptable way of regulating land development.

### V. SOCIAL RESPONSIBILITIES: AFFORDABLE HOUSING

Zoning for planned unit development provides an opportunity to consider social responsibilities. Affordable housing is an example.<sup>270</sup> Planned unit developments can provide an opportunity for affordable housing, which can be one of the objectives included in a statement of purpose.<sup>271</sup> Inclusionary zoning is one option. This is a program in which a municipality requires all developers to provide a certain percentage of

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<sup>267</sup> See Jorden (Phoenix, Ariz.), *supra* note 19.

<sup>268</sup> It is also common to require a developer to agree to the establishment of private restrictive covenants. A restrictive covenant is a privately imposed restriction on what an owner can do with its land. See RESTATEMENT (THIRD) OF PROP.: SERVIDITUDES § 1.3(3) (AM. LAW INST. 2000). Restrictive covenants have a binding effect if properly done. Restrictive covenants are often required for the dedication and maintenance of common open space in planned unit developments, which can require the creation of a homeowner's association with enforcement powers. See 2007 Report, *supra* note 4, at 99–105 (containing model ordinance requirements and commentary for the provision of common open space and creation of a homeowner's association with enforcement authority). See generally GERALD KORNGOLD, PRIVATE LAND ARRANGEMENTS: EASEMENTS, REAL COVENANTS, & EQUITABLE SERVIDITUDES chs. 8–11 (3d ed. 2016). Covenants covering other issues can also be included and may overlap with zoning requirements. See Connolly & Ragonetti (Denver, Colo.), *supra* note 19 (noting that some governments mandate covenants, but most prefer to leave enforcement to private associations and special districts).

<sup>269</sup> See generally Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011) (criticizing the use of negotiated agreements).

<sup>270</sup> See generally JOINT CTR. FOR HOUSING STUD. OF HARV. U., THE STATE OF THE NATION'S HOUSING (2016), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs\\_2016\\_state\\_of\\_the\\_nations\\_housing\\_lowres.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_2016_state_of_the_nations_housing_lowres.pdf) (discussing the affordable housing problem).

<sup>271</sup> See EAGLE COUNTY, COLO., LAND USE REGULATIONS § 5.240A.f (establishing incentives for provision of long term affordable housing); TUCSON, ARIZ., UNIFIED DEVELOPMENT CODE § 3.5.6(A) (providing a variety of housing); see also OSCEOLA COUNTY, FLA., LAND DEVELOPMENT CODE § 3.11(A) (creating a variety of housing types and compatible neighborhood arrangements that provide housing choice).

their housing as affordable.<sup>272</sup> An inclusionary zoning requirement can be included in a planned unit development ordinance.<sup>273</sup>

Inclusionary zoning programs are complex. They require decisions on whether the program will be mandatory or voluntary, the size of the developments covered, the amount of affordable housing required, income levels for housing occupants, how affordable housing will be distributed in the project, and controls on resale and rental to keep the housing affordable. Density bonuses may be available and must be calculated.<sup>274</sup> Long-term controls on rents and resale values, which maintain

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<sup>272</sup> See Robert Hickey et al., *Achieving Lasting Affordability through Inclusionary Housing*, LINCOLN INST. (forthcoming 2014), <http://www.lincolninst.edu/sites/default/files/pubfiles/achieving-lasting-affordability-through-inclusionary-housing-full.pdf>; RICK JACOBUS, LINCOLN INST., *INCLUSIONARY HOUSING: CREATING AND MAINTAINING EQUITABLE COMMUNITIES* 24 (2015), <http://www.lincolninst.edu/publications/policy-focus-reports/inclusionary-housing>; Vicki Been et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, D.C. and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441, 441 (2009); Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 CITYSCAPE 217, 221 (2017), <https://www.huduser.gov/portal/periodicals/cityscpe/vol19num1/article11.html>; Lisa Sturtevant, *Separating Fact from Fiction to Design Effective Inclusionary Housing Programs*, LISA STUREVANT & ASSOCIATES (May 12, 2016), <https://www.lisasturtevant.com/single-post/2016/05/12/Separating-Fact-from-Fiction-in-Research-on-Inclusionary-Housing-Programs>. Inclusionary zoning programs are prohibited in some states. See ARIZ. REV. STAT. ANN. § 9-961.16 (permitting incentives, density bonuses and other voluntary provisions); see also *Apartment Ass'n of S. Cent. Wis., Inc. v. City of Madison*, 722 N.W.2d 614, 620–26 (Wis. Ct. App. 2006) (holding inclusionary zoning ordinance preempted by statute prohibiting rent control); *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30, 32–33 (Colo. 2000) (holding the same as *Apartment Ass'n of S. Cent. Wis., Inc.*). Inclusionary zoning can be challenged as an exaction because a developer does not receive compensation for providing affordable housing. See *Cal. Building Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 991 (Cal. 2015) (holding not an exaction); see also *Home Builders Ass'n v. City of Napa*, 90 Cal. App. 4th 188, 196–200 (Cal. Ct. App. 2001) (relying on mitigating features of inclusionary zoning ordinance to reject takings claim). The Supreme Court has not decided whether inclusionary zoning is an exaction.

<sup>273</sup> See 2007 Report, *supra* note 4, at 88–89. As an alternative to providing housing in the development, the ordinance can provide for an optional payment of fees into a housing trust fund to be used for affordable housing, or it can provide density bonuses to offset the cost of providing below-market housing.

<sup>274</sup> See MODEL AFFORDABLE HOUSING DENSITY BONUS ORDINANCE (AM. PLANNING ASS'N 2007), <https://smartgrowthamerica.org/app/legacy/images/IH-model-ordinance-APA%20.pdf>; see also E-mail from Robert McMurry, to author (July 6, 2017, 09:27 PM PST) (on file with author) (growing pressure to encourage affordable housing has increased density bonuses beyond typical 10% to 15% bonus; for example, 35% bonus

the housing in the affordable market, can be especially difficult to administer. These problems can discourage the adoption of affordable housing requirements for planned unit developments. An affordable housing program is likely to be effective only for large planned communities that have a significant amount of housing, however, unless an in-lieu fee could be charged against smaller developments that cannot develop housing on the site.

The interviews reflect these concerns. Some reported affordable housing requirements for planned unit developments,<sup>275</sup> though they may only apply to larger projects,<sup>276</sup> or were voluntary and offered density or height bonuses.<sup>277</sup> Several reported that affordable housing requirements were not adopted<sup>278</sup> or were included in other ordinances. Some planned unit development ordinances require or authorize the provision of affordable housing.<sup>279</sup>

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has been approved for low and very low housing in California). Compatibility and market factors may limit density, and existing density limits may not be low enough to make a bonus attractive. Prices may not be high enough in some jurisdictions to make price reductions meaningful.

<sup>275</sup> See Connolly & Ragonetti (Denver, Colo.), *supra* note 19 (depending on project and jurisdiction, mountain communities in Colorado have them for employees); Hoffman (Phoenix, Ariz.), *supra* note 19 (noting that fee required if not provided in development); Schwanke (Arlington, Va.), *supra* note 165 (requiring affordable housing to be part of the planned unit developments).

<sup>276</sup> See Cobb (Brevard, N.C.), *supra* note 22 (explaining for large sites, it was done in recent planned unit developments); Connolly & Ragonetti (Denver, Colo.), *supra* note 19 (applying to some big projects in Denver).

<sup>277</sup> See Hoffman (Phoenix, Ariz.), *supra* note 19 (providing height waiver if included in development).

<sup>278</sup> See Jensen (Reno, Nev.), *supra* note 19 (explaining it is not an issue in cities with good supply of older affordable housing); Jorden (Phoenix, Ariz.), *supra* note 19 (having few affordable options); Mazzocco (Tucson, Ariz.), *supra* note 22 (explaining it is not usual, but a one-time deal and regularly, do not want to monitor over long period of time); Merriam (Hartford, Conn.), *supra* note 21. *But see* Jensen (Reno, Nev.), *supra* note 19 (stating affordable housing is not an issue in cities with good supply of older housing); White (Kansas City, Mo.), *supra* note 43 (stating affordable housing is not an issue in his communities).

<sup>279</sup> See AUSTIN, TEX., LAND DEVELOPMENT CODE, ch. 25-2, subch. B, art. 2, div. 5, subpt. A, § 2.4 (containing affordable housing part of Tier II requirements); BALTIMORE, MD., ZONING CODE § 9-310(a)(2) (authorizing a density bonus for affordable housing); D.C., ZONING REGULATIONS tit. 11, subtit. X, § 305.5(g) (authorizing affordable housing as public benefit); EAGLE COUNTY, COLO., LAND USE REGULATIONS § 5-240F.3.f (authorizing variation to extend incentives for affordable housing); LOUISVILLE, COLO., CODE OF ORDINANCES § 17.28.040 (authorizing amount to be determined by city

Inclusionary zoning is only one option for providing affordable housing. There are other strategies,<sup>280</sup> such as including housing elements in comprehensive plans that require the calculation of affordable housing needs and the designation of sites to meet those needs.<sup>281</sup> About one-half of the states require housing elements.<sup>282</sup> Where states require them, developers may be required to provide affordable housing in planned unit developments to satisfy affordable housing needs and site designations.<sup>283</sup>

Another alternative is to require a jobs-housing balance, which is a balanced proportion of jobs and housing within a planned unit

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practices); MALTA, N.Y., ZONING ORDINANCE § 167-26(C) (requiring PUDs to set aside options to persons of varying financial resources).

<sup>280</sup> See, e.g., SEATTLE HOUSING AFFORDABILITY AND LIVABILITY AGENDA, (2015) [http://murray.seattle.gov/wp-content/uploads/2015/07/HALA\\_Report\\_2015.pdf](http://murray.seattle.gov/wp-content/uploads/2015/07/HALA_Report_2015.pdf). Oregon provides a two-track alternative for needed housing in urban growth areas. See OR. REV. STAT. § 197.307(4). A developer can choose discretionary review, usually in return for extra density, or review with clear and objective standards. See *id.* § 197.307.

<sup>281</sup> See, e.g., MUN. ASS'N OF S.C., 2014 COMPREHENSIVE PLANNING GUIDE FOR LOCAL GOVERNMENT 9–12 (2014), <https://www.masc.sc/SiteCollectionDocuments/Land%20Use%20Planning/Comp%20Planning%20Guide.pdf>.

<sup>282</sup> Housing elements may be brief or detailed. See, e.g., ARIZ. REV. STAT. ANN. § 9-461.05(E)(6) (requiring brief identification and analysis of housing need and provision of adequate sites); FLA. STAT. ANN. § 163.3177(6)(f)(1)–(6)(f)(3) (including provision of adequate sites for workforce housing, data and analysis of housing need, “creation and preservation of affordable housing for all current and anticipated future residents of the jurisdiction”); see also LEGISLATIVE GUIDEBOOK, *supra* note 25, 7-277 to 7-279 & tbl. 7-5 (containing a list of statutes that require housing elements); see also Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555, 557–58 (2003) (noting that housing element contains substantive standards and can conflict with other plan elements). Some states have statutes allowing developers of affordable housing who are denied approval, or receive a burdensome conditioned approval, to appeal to a state board or court. See, e.g., MASS. GEN. LAWS ch. 40B §§ 20–23. See generally Sharon Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381 (2001) (surveying data and finding municipalities have become more accommodating over time because of high developer success rate before the board).

<sup>283</sup> See Anonymous (San Diego Cty., Cal.), *supra* note 98 (can get higher density under statute); see also McMurry (Anaheim, Cal.), *supra* note 19 (explaining there are 10%-15% in planned unit developments and more with density bonus). As applied to a rezoning for affordable housing in a planned unit development, the housing element can provide a defense against spot zoning claims. See *Spot Zoning*, *supra* note 83, at 766, 768.

development.<sup>284</sup> A jobs-housing balance can help make housing affordable because it reduces the commuting time to jobs. Transportation costs are an important part of housing costs and can make housing unaffordable.<sup>285</sup> Lower-cost housing is likely to be on the edge of a metropolitan area, so transportation costs from these locations will be high due to increased commutes. A jobs-housing balance, by bringing jobs within planned unit developments, can decrease transportation costs significantly.<sup>286</sup>

A jobs-housing balance has its own complexities. It can be difficult to calculate because it assumes that housing units are a good representation of the work force.<sup>287</sup> It also requires large-scale planned communities to provide the jobs that make a jobs-housing balance meaningful.<sup>288</sup> The interviews reflect these problems. A few reported jobs-housing balance requirements,<sup>289</sup> but most reported they are not used<sup>290</sup> or are being abandoned.<sup>291</sup>

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<sup>284</sup> See 2007 Report, *supra* note 4, at 74; PLATT, *supra* note 8 (discussing economic development and jobs-housing balance in planned communities).

<sup>285</sup> See Tanya Snyder, *HUD and U.S. DOT Embrace Housing + Transportation Metric for Affordability*, STREET BLOG USA (Nov. 12, 2013), <http://usa.streetsblog.org/2013/11/12/hud-and-u-s-dot-embrace-housing-transportation-metric-to-determine-affordability/>.

<sup>286</sup> It can also decrease infrastructure costs and air pollution by decreasing miles traveled for commuting. See JERRY WEITZ, *JOBS-HOUSING BALANCE* 1–3 (2003).

<sup>287</sup> See *id.* at 20–21. It also creates a phasing problem because jobs may not be immediately available for residents in the early stages of a community's development.

<sup>288</sup> See Sara Leicht, *PALMER RANCH NEIGHBORHOODS*, [palmerranchneighborhoods.com](http://palmerranchneighborhoods.com) (last visited Sept. 28, 2017) (describing 10,000-acre master-planned community with substantial job creation).

<sup>289</sup> See Borchardt (Reno, Nev.), *supra* note 19 (analyzing jobs-housing balance as part of application); McMurry (Anaheim, Cal.), *supra* note 19 (noting jobs-housing balance is required in environmental reports under California Environmental Quality Act); White (Kansas City, Mo.), *supra* note 43 (noting jobs-housing balance required in one county he consulted, which did not want giant residential subdivisions).

<sup>290</sup> See Anonymous (San Diego Cty., Cal.), *supra* note 98 (explaining that state has mandatory housing element requirement); Jorden (Phoenix, Ariz.), *supra* note 19 (seeking to minimize driving); Merriam (Hartford, Conn.), *supra* note 21 (stating they do not see job-house balance); Schwanke (Arlington, Va.), *supra* note 165 (noting they are more interested in full range of uses).

<sup>291</sup> See Borchardt (Reno, Nev.), *supra* note 19 (looking at one major scale in the city, will do update on where density and jobs go); Hill (Orange Cty., Fla), *supra* note 19 (moving away from this requirement because it is hard to track, using form-based codes, acquiring jobs because of mixed-uses, and more is done in the review process).

## VI. CONCLUSION

Planned unit development began as an add-on strategy to conventional zoning that can provide flexibility and better design. As applied originally to single-family residential housing, it can create developments in which housing is clustered on one part of the site in return for common open space elsewhere. Practice has now taken planned unit development beyond this simple form. Mixed-use development is common, as are infill developments in urban areas and master-planned communities.

Planned unit development regulations work reasonably well. The treatment of some issues is not always adequate, but no solution is without its problems and choices must be made. Communities will have to decide how to zone for planned unit development; whether it will consider alternatives to discretionary review; and whether it will meet social obligations, such as providing for affordable housing. Planned unit development has become a dominant zoning strategy that requires major attention as a zoning process.

**APPENDIX A**  
**INTERVIEWS\***

<u>NAME</u>	<u>AFFILIATION</u>	<u>POSITION</u>	<u>LOCATION</u>
Anonymous	Intentionally Omitted	Intentionally Omitted	San Diego County, Cal.
Jeff Borchardt	City of Reno	Associate Planner	Reno, Nev.
Daniel Cobb	City of Bevard	Planning Director	Brevard, N.C.
Brian Connolly & Tom Ragonetti	Otten Johnson Robinson Neff & Ragonetti	Associate	Denver, Colo.
		Shareholder	
Travis Crane	City of Raleigh	Assistant Planning Director	Raleigh, N.C.
Bryan Davis	Palm Beach County	Urban Designer/Principal Planner	Palm Beach County, Fla.
Lee Einsweiler	Code Studio	Principal	Austin, Tex.
Don Elliott	Clarion Associates	Director	Denver, Colo.
Gary Feder	Husch Blackwell	Senior Counsel	Clayton, Mo.
Olan Hill	Orange County	Assistant Manager	Orange County, Fla.
Sandra Hoffman	City of Phoenix	Deputy Director, Planning & Development Department	Phoenix, Ariz.
Aric Jensen	City of Reno	Director of Community Development	Reno, Nev.
Doug Jorden	Jorden Hiser & Joy, PLC	Partner	Phoenix, Ariz.
George M. Kramer	S&ME	Director of Planning	Orlando, Fla.
Bruce E. Lewis	City of Jacksonville	City Planning Supervisor	Jacksonville, Fla.

<u>NAME</u>	<u>AFFILIATION</u>	<u>POSITION</u>	<u>LOCATION</u>
Jim Mazzocco	City of Tucson	Zoning Administrator (Retired)	Tucson, Ariz.
Robert L. McMurry	Robert McMurry Law Offices	Owner	Anaheim, Cal.
Dwight Merriam	Robinson & Cole	Partner	Hartford, Conn.
Dean Schwanke	Schwanke Consulting & Communications	Principal	Arlington, Va.
Keri L. Silvyn	Lazarus, Silvyn & Bangs, P.C.	Partner	Tucson, Ariz.
Mark White	White & Smith, LLC	Partner	Kansas City, Mo.
Barry Wilcox	Florida Development Support & Environmental Management	Chief Development Resources Officer	Leon County, Fla.

\*Interviews were conducted in December 2016 and January-March 2017

**APPENDIX B****CITY & COUNTY PLANNED UNIT DEVELOPMENT ORDINANCES**

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>Alabama</u></b>		
<b>Auburn</b>	<a href="https://www.auburnalabama.org/planning/development-services/zoning-ordinance/2017%20March%20ZO.pdf">https://www.auburnalabama.org/planning/development-services/zoning-ordinance/2017%20March%20ZO.pdf</a>	auburnalabama.org
<b>Mobile</b>	<a href="https://www.municode.com/library/al/mobile/codes/code_of_ordinances?nodeId=CO_CH64ZO_S64-5PLUNDE">https://www.municode.com/library/al/mobile/codes/code_of_ordinances?nodeId=CO_CH64ZO_S64-5PLUNDE</a>	cityofmobile.org/
<b><u>Arizona</u></b>		
<b>Maricopa County</b>	<a href="https://www.maricopa.gov/DocumentCenter/View/4785">https://www.maricopa.gov/DocumentCenter/View/4785</a>	maricopa.gov/
<b>Mesa</b>	<a href="http://www.mesaaz.gov/home/showdocument?id=12470">http://www.mesaaz.gov/home/showdocument?id=12470</a>	mesaaz.gov/
<b>Phoenix</b>	<a href="http://www.codepublishing.com/AZ/Phoenix/">http://www.codepublishing.com/AZ/Phoenix/</a>	phoenix.gov/
<b>Tucson</b>	<a href="http://library.amlegal.com/nxt/gateway.dll/Arizona/tucson_az_udc/tucsonazunifieddevelopmentcode?f=templates\$fn=default.htm\$3.0\$vid=amlegal:tucson_udc_az">http://library.amlegal.com/nxt/gateway.dll/Arizona/tucson_az_udc/tucsonazunifieddevelopmentcode?f=templates\$fn=default.htm\$3.0\$vid=amlegal:tucson_udc_az</a>	tucsonaz.gov
<b><u>Arkansas</u></b>		
<b>Conway</b>	<a href="http://www.cityofconway.org/media/government/planning-development/ZON_ORD.pdf">http://www.cityofconway.org/media/government/planning-development/ZON_ORD.pdf</a>	cityofconway.org
<b><u>California</u></b>		
<b>Davis</b>	<a href="http://qcode.us/codes/davis/view.php?topic=40-40_32&amp;frames=on">http://qcode.us/codes/davis/view.php?topic=40-40_32&amp;frames=on</a>	cityofdavis.org/
<b>Dublin</b>	<a href="http://www.codepublishing.com/CA/Dublin/Dublin08/Dublin0832.html">http://www.codepublishing.com/CA/Dublin/Dublin08/Dublin0832.html</a>	ci.dublin.ca.us/
<b>Fairfax</b>	<a href="http://library.amlegal.com/nxt/gateway.dll/California/fairfax_ca/title17zoning?f=templates\$fn=default.htm\$3.0\$vid=amlegal:fairfax_ca\$anc=JD_Title17">http://library.amlegal.com/nxt/gateway.dll/California/fairfax_ca/title17zoning?f=templates\$fn=default.htm\$3.0\$vid=amlegal:fairfax_ca\$anc=JD_Title17</a>	town-of-fairfax.org

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>California (cont'd)</u></b>		
<b>Newark</b>	<a href="https://www.municode.com/library/ca/newark/codes/code_of_ordinances?nodeId=CD_ORD_TIT17ZO_CH17.40PLUNDE">https://www.municode.com/library/ca/newark/codes/code_of_ordinances?nodeId=CD_ORD_TIT17ZO_CH17.40PLUNDE</a>	ci.newark.ca.us/
<b>Palm Springs</b>	<a href="http://www.qcode.us/codes/palmsprings/">http://www.qcode.us/codes/palmsprings/</a>	ci.palm-springs.ca.us
<b>Pleasanton</b>	<a href="http://qcode.us/codes/pleasanton/">http://qcode.us/codes/pleasanton/</a>	cityofpleasantonca.gov
<b>San Diego County</b>	PUD ordinance, <a href="http://www.sandiegocounty.gov/pds/zoning/z6000.pdf">http://www.sandiegocounty.gov/pds/zoning/z6000.pdf</a> –	Sandiegocounty.gov
<b><u>Colorado</u></b>		
<b>Eagle</b>	<a href="http://www.townofeagle.org/DocumentCenter/View/12104">http://www.townofeagle.org/DocumentCenter/View/12104</a>	<a href="https://www.townofeagle.org/">https://www.townofeagle.org/</a>
<b>Eagle County</b>	<a href="http://www.eaglecounty.us/Planning/Documents/2015_Article_5_Administration_CLEAN_031015/">http://www.eaglecounty.us/Planning/Documents/2015_Article_5_Administration_CLEAN_031015/</a>	eaglecounty.us
<b>Fort Collins</b>	<a href="https://www.municode.com/library/co/fort_collins/codes/land_use?nodeId=ART4DI_DIV4.29PLDEOVDIPD">https://www.municode.com/library/co/fort_collins/codes/land_use?nodeId=ART4DI_DIV4.29PLDEOVDIPD</a>	fcgov.com
<b>Louisville</b>	<a href="https://library.municode.com/co/louisville/codes/code_of_ordinances?nodeId=TIT17ZO">https://library.municode.com/co/louisville/codes/code_of_ordinances?nodeId=TIT17ZO</a>	louisvilleco.gov
<b><u>District of Columbia</u></b>		
	<a href="https://dcoz.dc.gov/sites/default/files/dc/sites/dcoz/publication/attachments/SubtitleX_0.pdf">https://dcoz.dc.gov/sites/default/files/dc/sites/dcoz/publication/attachments/SubtitleX_0.pdf</a>	dc.gov
<b><u>Florida</u></b>		
<b>Broward County</b>	<a href="https://www.municode.com/library/fl/broward_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH39ZO_ARTXXPLDEDI">https://www.municode.com/library/fl/broward_county/codes/code_of_ordinances?nodeId=PTIICOOR_CH39ZO_ARTXXPLDEDI</a>	broward.org/Pages/Welcome.aspx
<b>Clay County</b>	<a href="http://www.claycountygov.com/Home/ShowDocument?id=1266">http://www.claycountygov.com/Home/ShowDocument?id=1266</a>	claycountygov.com

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>Florida (cont'd)</u></b>		
<b>Collier County</b>	<a href="https://library.municode.com/FL/Collier_County/codes/land_development_code?nodeId=CH10APREDEKIPR_10.02.00APRE">https://library.municode.com/FL/Collier_County/codes/land_development_code?nodeId=CH10APREDEKIPR_10.02.00APRE</a>	colliergov.net
<b>Hallandale Beach</b>	<a href="https://www.municode.com/library/fl/hallandale_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH32ZOLADECO_ARTIIIIZO_DIV2ZODIOV_SDIVPLDEOV">https://www.municode.com/library/fl/hallandale_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH32ZOLADECO_ARTIIIIZO_DIV2ZODIOV_SDIVPLDEOV</a>	hallandalebeach.org
<b>Jacksonville/ Duval County</b>	<a href="https://library.municode.com/fl/jacksonville/codes/code_of_ordinances?nodeId=ZOSE_CH656ZOCO_PT3SCDIRE_SFPPLUNDE">https://library.municode.com/fl/jacksonville/codes/code_of_ordinances?nodeId=ZOSE_CH656ZOCO_PT3SCDIRE_SFPPLUNDE</a>	coj.net
<b>Manatee County</b>	<a href="https://www.municode.com/library/fl/manatee_county/codes/land_development_code?nodeId=CH3REAUPR_PTVIIOTAP_S350DEAG">https://www.municode.com/library/fl/manatee_county/codes/land_development_code?nodeId=CH3REAUPR_PTVIIOTAP_S350DEAG</a>	mymanatee.org
<b>Martin County</b>	<a href="https://www.municode.com/library/fl/martin_county/codes/land_development_code?nodeId=LADERE_ART3ZODI_DIV5PLUNDE">https://www.municode.com/library/fl/martin_county/codes/land_development_code?nodeId=LADERE_ART3ZODI_DIV5PLUNDE</a>	martin.fl.us
<b>Nassau County</b>	<a href="https://www.municode.com/library/fl/nassau_county/codes/code_of_ordinances?nodeId=APXALADECO_ORDINANCE_NO_97-19_NASSAU_CO_FLORIDA_ART25PLUNDEPU">https://www.municode.com/library/fl/nassau_county/codes/code_of_ordinances?nodeId=APXALADECO_ORDINANCE_NO_97-19_NASSAU_CO_FLORIDA_ART25PLUNDEPU</a>	nassaucountyfl.com
<b>Orange County</b>	<a href="https://www.municode.com/library/fl/orange_county/codes/code_of_ordinances?nodeId=ORCOCO_CH38ZO_ARTVIIIPLDEDI">https://www.municode.com/library/fl/orange_county/codes/code_of_ordinances?nodeId=ORCOCO_CH38ZO_ARTVIIIPLDEDI</a>	orangecountyfl.net
<b>Orlando</b>	<a href="https://www.municode.com/library/fl/orlando/codes/code_of_ordinances?nodeId=ITIICICO_CH58ZODIUS_PT2DIRE_2QPDPLDEDI">https://www.municode.com/library/fl/orlando/codes/code_of_ordinances?nodeId=ITIICICO_CH58ZODIUS_PT2DIRE_2QPDPLDEDI</a>	cityoforlando.net
<b>Osceola County</b>	<a href="http://www.osceola.org/core/fileparse.php/2731/urlt/082817_LDC-Ch3.pdf">http://www.osceola.org/core/fileparse.php/2731/urlt/082817_LDC-Ch3.pdf</a>	osceola.org/
<b>Palm Beach County</b>	<a href="http://discover.pbcgov.org/pzb/zoning/ULDC/Articles.aspx">http://discover.pbcgov.org/pzb/zoning/ULDC/Articles.aspx</a>	co.palm-beach.fl.us

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>Florida (cont'd)</u></b>		
<b>Tallahassee</b>	<a href="https://library.municode.com/fl/tallahassee/codes/land_development_code?nodeId=LADECO_CH10ZO">https://library.municode.com/fl/tallahassee/codes/land_development_code?nodeId=LADECO_CH10ZO</a>	talgov.com
<b><u>Georgia</u></b>		
<b>Bartow County</b>	<a href="https://www.municode.com/library/ga/bartow_county/codes/code_of_ordinances?nodeId=APXAZO_ARTVIIUSREDISPDI_S7.15PUPLUNDEDI">https://www.municode.com/library/ga/bartow_county/codes/code_of_ordinances?nodeId=APXAZO_ARTVIIUSREDISPDI_S7.15PUPLUNDEDI</a>	bartowga.org
<b>Chamblee</b>	<a href="https://www.municode.com/library/ga/chamblee/codes/code_of_ordinances?nodeId=PTIICOOR_APXAUNDEOR_TIT2L_AUSZO_CH280PR_S280-6PLUNDEDECOIM">https://www.municode.com/library/ga/chamblee/codes/code_of_ordinances?nodeId=PTIICOOR_APXAUNDEOR_TIT2L_AUSZO_CH280PR_S280-6PLUNDEDECOIM</a>	chambleega.com
<b><u>Illinois</u></b>		
<b>City of Gilbert</b>	<a href="http://www.villageofgilberts.com/modules/news/photos/002890021002989.pdf">http://www.villageofgilberts.com/modules/news/photos/002890021002989.pdf</a>	villageofgilberts.com/
<b>Glenview</b>	<a href="https://www.municode.com/library/il/glenview/codes/code_of_ordinances?nodeId=MUCO_CH98ZO_ARTXPLDE">https://www.municode.com/library/il/glenview/codes/code_of_ordinances?nodeId=MUCO_CH98ZO_ARTXPLDE</a>	glenview.il.us
<b>Kane County</b>	<a href="http://www.sterlingcodifiers.com/codebook/index.php?book_id=973">http://www.sterlingcodifiers.com/codebook/index.php?book_id=973</a>	countyofkane.org
<b>St. Charles</b>	<a href="https://codebook.stcharlesil.gov/title-17-zoning/c1704#node-2508">https://codebook.stcharlesil.gov/title-17-zoning/c1704#node-2508</a>	stcharlesil.gov/
<b>Wilmette</b>	<a href="http://library.amlegal.com/nxt/gateway.dll/Illinois/wilmette_il/villageofwilmetteillinoiscodeofordinance?f=templates\$fn=default.htm\$3.0\$vid=amlegal:wilmette_il">http://library.amlegal.com/nxt/gateway.dll/Illinois/wilmette_il/villageofwilmetteillinoiscodeofordinance?f=templates\$fn=default.htm\$3.0\$vid=amlegal:wilmette_il</a>	wilmette.com
<b><u>Indiana</u></b>		
<b>Avon</b>	<a href="http://www.avongov.org/egov/documents/1264525877_60516.pdf">http://www.avongov.org/egov/documents/1264525877_60516.pdf</a>	avongov.org/
<b>Columbus</b>	<a href="https://www.dropbox.com/s/nixwv4h7bblb9ox/05_Planned%20Unit%20Development.pdf?dl=0">https://www.dropbox.com/s/nixwv4h7bblb9ox/05_Planned%20Unit%20Development.pdf?dl=0</a>	columbus.in.gov/planning/zoning/

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>Indiana (cont'd)</u></b>		
<b>Fishers</b>	<a href="http://www.fishers.in.us/egov/docs/1163779146868.htm">http://www.fishers.in.us/egov/docs/1163779146868.htm</a> <a href="http://www.fishers.in.us/DocumentCenter/View/9396">http://www.fishers.in.us/DocumentCenter/View/9396</a>	fishers.in.us/
<b><u>Kansas</u></b>		
<b>Manhattan</b>	<a href="https://cityofmhk.com/DocumentCenter/Home/View/639">https://cityofmhk.com/DocumentCenter/Home/View/639</a>	cityofmhk.com/
<b><u>Louisiana</u></b>		
<b>St. Tammany Parish</b>	<a href="http://www2.stpgov.org/planning/udc/section_6.01_pud_-_planned_unit_development_overlay.pdf">http://www2.stpgov.org/planning/udc/section_6.01_pud_-_planned_unit_development_overlay.pdf</a>	stpgov.org/
<b><u>Maryland</u></b>		
<b>Baltimore</b>	<a href="http://ca.baltimorecity.gov/codes/Art%2032%20-%20Zoning.pdf">http://ca.baltimorecity.gov/codes/Art%2032%20-%20Zoning.pdf</a>	baltimorecity.gov
<b><u>Massachusetts</u></b>		
<b>Somerville</b>	<a href="https://www.municode.com/library/ma/somerville/codes/zoning_ordinances?nodeId=ZOORSOMA_ART16PLUNDEPU">https://www.municode.com/library/ma/somerville/codes/zoning_ordinances?nodeId=ZOORSOMA_ART16PLUNDEPU</a>	<a href="https://www.somervillema.gov/">https://www.somervillema.gov/</a>
<b><u>Michigan</u></b>		
<b>Georgetown</b>	<a href="http://www.gtwp.com/DocumentCenter/Home/View/321">http://www.gtwp.com/DocumentCenter/Home/View/321</a>	gtwp.com
<b><u>Montana</u></b>		
<b>Kalispell</b>	<a href="http://qcode.us/codes/kalispell/">http://qcode.us/codes/kalispell/</a>	kalispell.com/home/
<b><u>Nevada</u></b>		
<b>Clark County</b>	<a href="https://www.municode.com/library/nv/clark_county/codes/code_of_ordinances?nodeId=TIT30UNDECO_30.24PLUNDEPU">https://www.municode.com/library/nv/clark_county/codes/code_of_ordinances?nodeId=TIT30UNDECO_30.24PLUNDEPU</a>	clarkcountynv.gov
<b>Henderson</b>	<a href="http://www.cityofhenderson.com/community-development/development-code/development-code-revisions">http://www.cityofhenderson.com/community-development/development-code/development-code-revisions</a>	cityofhenderson.com

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>Nevada (cont'd)</u></b>		
<b>Reno</b>	<a href="https://www.municode.com/library/nv/reno/codes/land_development_code?nodeId=LAND_DEVELOPMENT_CODE_CH18.06ADPR_ARTIVZOREAPPR_S18.06.403PLUNDERE">https://www.municode.com/library/nv/reno/codes/land_development_code?nodeId=LAND_DEVELOPMENT_CODE_CH18.06ADPR_ARTIVZOREAPPR_S18.06.403PLUNDERE</a>	reno.gov/home
<b>Sparks</b>	<a href="https://www.municode.com/library/nv/sparks/codes/code_of_ordinances?nodeId=TIT20ZOCO_CH20.02ZODI_S20.02.012PLDE">https://www.municode.com/library/nv/sparks/codes/code_of_ordinances?nodeId=TIT20ZOCO_CH20.02ZODI_S20.02.012PLDE</a>	cityofsparks.us
<b><u>New York</u></b>		
<b>Malta</b>	<a href="http://ecode360.com/8558875">http://ecode360.com/8558875</a>	malta-town.org
<b>Watertown</b>	<a href="http://ecode360.com/10498649">http://ecode360.com/10498649</a>	watertown-ny.gov/
<b><u>North Carolina</u></b>		
<b>Brevard</b>	<a href="http://www.municode.com/library/nc/brevard/codes/code_of_ordinances?nodeId=UNDEOR_CH2DIPR">www.municode.com/library/nc/brevard/codes/code_of_ordinances?nodeId=UNDEOR_CH2DIPR</a>	cityofbrevard.com
<b><u>North Dakota</u></b>		
<b>Grand Forks</b>	<a href="https://www.municode.com/library/nd/grand_forks/codes/code_of_ordinances?nodeId=PTICICO_CHXVIII LADECO_ART2ZO_18-0223PUPLUNDEDI">https://www.municode.com/library/nd/grand_forks/codes/code_of_ordinances?nodeId=PTICICO_CHXVIII LADECO_ART2ZO_18-0223PUPLUNDEDI</a>	grandforksgov.com
<b><u>Oregon</u></b>		
<b>Beaverton</b>	<a href="https://www.codepublishing.com/OR/Beaverton/html/pdfs/beavertonfullcode0117.pdf">https://www.codepublishing.com/OR/Beaverton/html/pdfs/beavertonfullcode0117.pdf</a>	beavertonoregon.gov
<b>Molalla</b>	<a href="http://qcode.us/codes/molalla/?view=desktop&amp;topic=17-17_08-17_08_100">http://qcode.us/codes/molalla/?view=desktop&amp;topic=17-17_08-17_08_100</a>	cityofmolalla.com/planning
<b>Sherwood</b>	<a href="https://www.municode.com/library/or/sherwood/codes/code_of_ordinances?nodeId=TIT16ZOCODECO_DIVIIILAUSDE_CH16.40PLUNDEPU">https://www.municode.com/library/or/sherwood/codes/code_of_ordinances?nodeId=TIT16ZOCODECO_DIVIIILAUSDE_CH16.40PLUNDEPU</a>	sherwoodoregon.gov/planning
<b><u>South Carolina</u></b>		
<b>Horry County</b>	<a href="https://library.municode.com/sc/horry_county/codes/code_of_ordinances">https://library.municode.com/sc/horry_county/codes/code_of_ordinances</a>	horrycounty.org

<u>LOCAL JURISDICTION</u>	<u>WEBPAGE</u>	<u>SITE</u>
<b><u>Tennessee</u></b>		
<b>Franklin</b>	<a href="http://www.franklin-gov.com/home/showdocument?id=24529">http://www.franklin-gov.com/home/showdocument?id=24529</a>	franklin-gov.com/
<b><u>Texas</u></b>		
<b>Austin</b>	<a href="https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT25LADE">https://library.municode.com/tx/austin/codes/code_of_ordinances?nodeId=TIT25LADE</a>	austintexas.gov
<b>Grand Prairie</b>	<a href="http://www.gptx.org/home/showdocument?id=562">http://www.gptx.org/home/showdocument?id=562</a>	gptx.org
<b>Kerrville</b>	<a href="http://www.kerrvilletx.gov/DocumentCenter/Home/View/724">http://www.kerrvilletx.gov/DocumentCenter/Home/View/724</a>	kerrvilletx.gov
<b>San Antonio</b>	<a href="https://library.municode.com/tx/san_antonio/codes/unified_development_code">https://library.municode.com/tx/san_antonio/codes/unified_development_code</a>	sanantonio.gov
<b><u>Washington</u></b>		
<b>Anacortes</b>	<a href="https://www.municode.com/library/wa/anacortes/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.44PLUNDECOHO">https://www.municode.com/library/wa/anacortes/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.44PLUNDECOHO</a>	cityofanacortes.org/
<b>Kittitas County</b>	<a href="https://www.co.kittitas.wa.us/boc/countycode/title17.aspx#Chapter_17.36">https://www.co.kittitas.wa.us/boc/countycode/title17.aspx#Chapter_17.36</a>	co.kittitas.wa.us/

