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PHOTOS BY CAROLYN TORMA

The Glen is a PUD developed by the village of Glenview, Illinois, on the site of a former naval air base. It incorporates a mix of housing, recreation, and commercial uses.

# PUDs and Master Planned Communities

PLANNING TOOLS

A MODERN ZONING CODE INCLUDES AN OFTEN COMPLEX array of standards and processes. These include use, setback, building height, and coverage requirements for zoning districts, with more progressive codes featuring building and site design standards. A development that complies with these standards can be approved "by right" or through a discretionary process such as a conditional use permit. These can work well for individual lots where the development can feasibly integrate the standards, and variance processes can allow exceptions where the standards create an individual hardship. The trend in modern codes is to expand the range of by-right approvals, with development outcomes described with precise detail.

But what about projects that break the mold? What if an applicant has a better idea? What about large, integrated developments where the community's zoning (or even form-based) rules don't work—but that achieve other, important comprehensive planning policies? Many communities have an option for planned unit developments that allow for a negotiated approval process.

**Why do communities have PUDs?**

PUDs emerged from the desire for developers of master planned communities to avoid the cookie-cutter metrics of conventional zoning. Relief from rigid use, setback, height, parking, and similar restrictions would open communities to more creative master planning. Accordingly, communities developed PUDs to negotiate development approvals with very general, flexible standards. The result was a design outcome produced by negotiations between the applicant and the community, rather than the strict limits of zoning.

These negotiated development approvals were thought to yield the following benefits.

**FLEXIBILITY**. By negotiating alternative standards, applicants may calibrate their projects more closely to current market conditions, financing demands, topography, and their development program than the existing zoning standards—which may have been written years ago.

**COMPATIBILITY**. A better designed project is likely to provide a better fit for the neighborhood, with standards suited to current conditions rather than an outdated code.

**INTEGRATION**. PUDs often allow the negotiation of all facets of a development, from permitted uses to site design to infrastructure. This can ensure that buildings, sites, and streets are integrated, creating a more successful outcome from both a community design and market perspective.

Of course, another cure for many of the issues mentioned above is to update the development code. Putting good, plan- and market-friendly standards in place can obviate the need to negotiate better developments. Form-based codes can effectively integrate lot, building, and site design

with infrastructure. Modern building, site, landscaping, and sustainable development standards can answer many questions about development parameters without resorting to lengthy negotiations.

**How are PUDs codified, approved, and enforced?**

PUDs are often codified as a separate zoning district, and approval requires rezoning. In most states, this is a legislative decision. If the decision is quasi-judicial, it requires standards—albeit very general ones. Typical standards may include "compatibility with the surrounding area," "harmony with neighborhood character," and that "streets are suitable and adequate to carry anticipated traffic. . . ." Some communities also require that exceptions granted through the PUD process are offset by the project's design and amenities.

Some communities also codify PUDs as a form of discretionary approval, such as a conditional use permit. In states where rezoning is considered legislative, this gives property owners some protection in court if the decision-making body acts in an arbitrary manner. But it offers little advantage in terms of the cost, certainty, or timing of the development approval process.

PUDs are often enforced through staged development approvals (typical of master planned development), zoning conditions followed by traditional enforcement mechanisms, or development agreements. Development agreements are an increasingly popular tool, locking in the developer's rights on a long-term basis while giving communities contractual remedies that are not available through traditional zoning enforcement.

**What are the problems with PUDs?**

PUDs are, almost by definition, the exception rather than the rule. Unfortunately, for many communities, PUD approval is the norm.

This can tie up planning commissions, legislative bodies (such as city councils and county commissions), staff, and the general public in endless negotiations. This reduces certainty in the approval process, drives up development costs, and absorbs an inordinate amount of staff time. It also diverts legislative bodies from legislation and planning commissions from planning, involving them in administration. Legislative officials often respond to the immediate gripes of surrounding neighborhoods (i.e., their voters) rather than long-range, comprehensive planning goals. While the PUD projects often demonstrate a high level of design quality, this could come at a cost—from increased expenses to the failure of good projects that die the death of a thousand cuts.

If this scenario doesn't sound like good planning to you, there are ways to tame the PUD process. First, update your zoning code. Clear, workable standards are usually a better alternative for all parties than the uncertainty of negotiation. Second, build conditions that are routinely negotiated into the development standards. Finally, clarify in the PUD standards or findings that the PUD is only available when the other standards cannot work for the development—assuming that the existing standards reflect best practices for the community.

**Use PUDs with caution**

PUDs are a useful tool to process unusual or large developments, and can even produce better design outcomes than traditional zoning standards. However, there are better tools for communities to provide desired outcomes—such as performance- or form-based zoning. Even with a well-designed code, there is always room for unusual developments—those that provide offsetting public benefits and creative master planning. PUDs can also bridge the transition from an old to a new code. In their proper context they are a useful—but costly—tool.

*— Mark White, AICP*

*White is a principal in the firm of White & Smith, LLC, Planning and Law Group.*

The Glen, in Glenview, Illinois, planned in the mid-1990s, provides both single-family homes and multifamily housing.


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The New York City Department of Transportation's capital streets projects plan has created pedestrian-friendly plazas and improved bike lanes on streets.

# The Planning Commission's Contribution to the Capital Improvement Plan

**BEST PRACTICES**

AN OFTEN OVERLOOKED, BUT USEFUL, TOOL FOR PLANNING commissions is the capital improvement plan. What are these plans and how do they relate to the planning commission? The website of the National Capital Planning Commission, the planning agency for the Washington, D.C. area, says, "Capital improvement plans provide a link between the visions articulated by comprehensive plans and annual capital expenditure budgets. They allow for a systematic, simultaneous evaluation of potential projects. They also facilitate coordination among the units of government that are responsible for project implementation." Concord, North Carolina, defines the CIP in the following manner: "The purpose of the Capital Improvement Plan (CIP) is to forecast and match projected revenues and capital needs over a (5)-year period. Long range capital planning is an important management tool that strengthens the linkages between community infrastructure needs and the financial capacity of the City."

The CIP is one important means of linking plans to budget and implementation. By participating in the CIP process, the planning commission can provide valuable advice to elected officials on which projects further sound planning in the community. Planning staff can facilitate the engagement of the commission as they often participate with the municipal manager and finance and engineering staff as part of the preparation team. All municipal departments are asked to contribute to the plan with requests for funding.

It is important to note that the CIP focuses on major projects planned for a three- to six-year span, the sources of revenue for funding, and the annual expected expenditure. The CIP is not an annual budget of recurring expenses, such as running the community library. Examples of projects in the CIP might include construction of a new sewage plant, acquisition and development of a new park, or major street reconstruction. Infrastructure is often a major focus of the CIP.

The late Terry Holzheimer, FAICP, wrote in the April 2010 issue of PAS *QuickNotes* that best practices include "an economic analysis of the fiscal impact of new investments, including the life cycle costs of maintenance. . . ." He suggested that communities should have a set of adopted facilities standards and a comprehensive public facilities plan that will guide the short-term CIP.

Elected officials use the CIP to announce new development projects to the community. Holzheimer clarified that the CIP "is often required by law and usually involves a relatively formal process of public hearings and adoption by the local governing body. Many states provide a handbook for preparing a CIP in the context of specific state statutes."

Stuart Meck, FAICP, described how the CIP is funded in a 1996 issue of *The Commissioner*. "In the CIP, the local government decides how it is going to finance improvements and how the projects are to be phased. For some improvements, like street resurfacing, the local government may simply set aside an amount from its general fund—an unrestricted fund whose source is local property, sales, and income taxes and other miscellaneous revenues. . . . Other improvements, like water and sewer lines, may be paid for through enterprise funds, which are supported through utility rates and tap-in fees. . . . In some cases, the local government may decide that it has to sell bonds to pay for the improvements. General obligation bonds are used to fund costly improvements. . . ."

Other revenue sources may include special fund accounts, like park impact fees, infrastructure loan programs, and assessments. Holzheimer described the funding strategy that starts with "projections of annual aggregate costs for facilities and infrastructure as a cash-flow model," adding that "this should be developed with consideration for population and employment."

Financing the CIP has become more expensive in recent decades. Therefore, local governments have looked to exactions, fees, and linkage programs, among other strategies, to help fund capital projects.

In reviewing the CIP, the planning commission can assess projects that impact the community's physical development. This review will always take place within the context of the comprehensive plan.


KEN TANNENBAUM/iStock/Thinkstock

Major infrastructure improvements, like this one in New York City, are frequent elements of capital improvement plans.

Once the planning commission and other reviewers have passed along their comments, the city council or other legislative body deliberates. How the body adopts the plan is spelled out in the ordinance; the plan is then manifested as the capital budget. Again, the legislative body works with two budgets, the other being the operating budget.

Questions the planning commission should ask:

- Does the project appear in the local government's comprehensive plan?
- Does the plan include special policies that ensure that new facilities such as civic and recreational centers and libraries are accessible by different modes of transportation . . . or that they carry out certain urban design or architectural themes?
- Is the project itself well thought out? Have feasibility studies on alternatives been adequate?
- Do the estimates of the project cost seem realistic based on current contractors' bids for similar projects in the area?
- Is the project related to other projects, and is the sequence of construction reasonable?
- If the project will serve a developing area, such as the addition of new sewer lines, what are the assumptions as to the service levels and the ultimate population of the area?
- Have all agencies that might be affected by a project been contacted?
- Is there a good balance between repair and maintenance of facilities in mature neighborhoods versus installations of new improvements in developing areas?
- In general, is the local government spending enough on capital projects in comparison with annual operating expenses?

(Adapted from Stuart Meck, FAICP, "The CIP: A Planning Commission's Powerful Tool," *The Commissioner*, Spring 1996.)

*—Carolyn Torma*

*Torma is APA's director of education and citizen engagement and editor of* The Commissioner.

# Fairness in Siting of Nontraditional Housing

LAW

COMMUNITIES BUILD SPECIAL, NONTRADITIONAL HOUSING to accommodate populations that are not adequately served by traditional housing. Traditional housing most often includes permanent single- and multifamily housing. It can be market-rate or affordable housing, and either rented or owner-occupied. Special nontraditional housing types include emergency shelters, transitional housing, permanent supportive housing, and group homes. These uses are defined by the status of the populations they serve, their physical characteristics, and the type of ancillary social services provided on the premises.

Communities commonly regulate the placement of nontraditional housing types and their attendant social services by imposing a "spacing requirement." Whether a court will uphold a spacing requirement depends on the type of social service or housing at issue, the types of individuals served by the program or housing, the way in which the requirement is applied in a particular situation, and the laws of the state in which the community is located. When a community imposes a spacing requirement on a use that is protected by the federal Fair Housing Act, the requirement will typically be struck down unless a community can provide strong support and evidence to overcome the FHA's "reasonable accommodation" requirement.

**The federal Fair Housing Act**

The Fair Housing Act prohibits making a dwelling "unavailable" to a person because of race, color, national origin, religion, sex, familial status, or disability (42 U.S.C. §§ 3601-3631). The FHA also protects individuals who are recovering from substance abuse, but it does not cover individuals who are engaged in the current illegal use of or addiction to a controlled substance (42 U.S.C. § 3602(h)(1)). Congress has carved out some other exceptions to the FHA, such as owner-occupied homes, religious organizations, and housing for persons 55 and older, but no such exception exists for social service housing providers. Local governments have violated the FHA in a number of ways, including the enactment and administration of zoning requirements that result in the unavailability of applicable "dwellings" to persons in one of the "protected" classes listed above. In instances where a community imposes a spacing requirement on a social service use that qualifies as a "dwelling" under the FHA, and the requirement is so burdensome that it "make[s] a dwelling unavailable" to a protected class of persons, the requirement will be found to be in violation of the FHA.

The FHA defines a "dwelling" as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for the sale or lease for the construction or location thereon of any such building, structure, or portion thereof" (42 U.S.C. § 3602(b)). Unfortunately, a "residence" is not defined by the statute. Courts have concluded that many uses, such as hotels, hospitals, and prisons, do not qualify as "residences" under the FHA. Permanent housing, subject to certain exemptions, always qualifies as a residence. Some nontraditional housing types that include social services, such as permanent supportive housing and group homes, are clearly considered permanent housing to which the FHA applies. Courts are in disagreement as to whether other nontraditional housing types such as emergency shelters and transitional housing qualify as residences. Some courts have broadly construed the FHA to apply to emergency shelters and other social services that generally serve individuals on a transient or temporary basis.

**Fair housing and spacing requirements**

Despite a community's best intentions, courts are reluctant to uphold separation requirements between housing types qualifying as "dwellings" under the FHA, including group homes and permanent supportive housing, and sometimes even emergency shelters or transitional housing. Even if the requirement appears on its face to be nondiscriminatory and intended to be in the best interests of individuals whose housing is subject to the requirement, the court will generally invalidate the requirement.

Three theories of liability exist to establish an FHA violation: (1) disparate treatment (or intentional discrimination); (2) disparate impact (or discriminatory effect); and (3) a failure of a municipality to make a reasonable accommodation.

One way in which communities impose spacing requirements on social services is to require a minimum distance between the social service and some other type of use that is meant to be protected, such as a school or traditional residential uses. This method is generally based on the rationale that the social service use will have an adverse impact on the non-social service use, and thus, the non-social service use should be protected. Without a community's strong documentation of the potential adverse impacts the social service or nontraditional housing may have on the protected use, this regulation may be considered discriminatory on its face and be invalidated.

A second way in which communities impose spacing requirements on social services is to require a minimum separation between two of the same use, such as a minimum 1,000 foot distance between two group homes. The rationale for this type of separation requirement is twofold. First, similar to the other spacing method, this method may attempt to prevent a concentration of uses that may be adverse to other, non-social service uses. Second, separation requirements may serve to advance the concept of "deinstitutionalization." By preventing a concentration of a particular class of individuals in one area, such as those with disabilities, separation requirements serve to maximize those individuals' opportunities for community integration and acceptance. Again, without a strong showing that the separation requirement legitimately serves the best interests of the community, is not intentionally discrimi-

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natory, and does not result in a disparate impact on the population served by the type of housing at issue, this separation requirement will be invalidated.

Communities should thoroughly entertain an applicant's "reasonable accommodation" request made pursuant to the FHA, even instances where the zoning code does not provide for such relief. Where a social service is proposed for a location that does not satisfy a zoning code's minimum distance requirements, typically the only relief available is a variance, special exception, or some other similar type of relief that goes before a community's zoning board and is subject to a public notice and hearing process.

If the social service or nontraditional housing use serves a population that is protected under the FHA and the type of housing is a "dwelling" under the FHA, the community is required to review the reasonable accommodation request according to the FHA. The acceptable burdens of proof and review processes for a reasonable accommodation under the FHA almost never coincide with the notice, hearing, and standards of review provided for a variance, special exception, or the like. In other words, a variance hearing before a zoning board is generally not sufficient "reasonable accommodation" review and may run afoul of a community's obligations under the FHA.

Communities should review the way in which they define and regulate nontraditional housing types within their zoning codes, and should be aware of how the courts in their state and federal districts view the various types of nontraditional housing relative to the FHA. If a community wishes to impose minimum distance requirements on social services and nontraditional housing, they should do so with caution, keeping in mind that the applicant may have a right to a reasonable accommodation under the FHA that supersedes the traditional methods for relief, such as variances and special exceptions.

*—Kathleen Farro Ryan*

*Ryan is an attorney and urban planner with Manley Burke in Cincinnati.*

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## HISTORY

**The Rise of Historic Preservation in America**. In a recent speech, President Barack Obama remarked, "The notion of a national monument is interesting because it reminds us that America belongs to all of us—not just some of us."

Ever since the Antiquities Act was signed into law by President Theodore Roosevelt in 1906, nearly every president has used this power to designate vast tracts of land and individual structures with national monument status. While local preservation actions appeared as early as the 1850s in New York State, this was the first time the preservation of our historic sites was recognized as a nationally important issue. This act paved the way for further important preservation legislation including the Organic Act of 1916 and the National Historic Preservation Act of 1966. Pictured here is the African Burial Ground National Monument in New York City, designated in 1993.

*—Ben Leitschuh*

*Leitschuh is APA's education associate.*

## RESOURCE FINDER

**Planned unit developments** have often been used to accommodate large developments. With the current availability of form-based codes and other tools, consider whether they are the right choice for your community.

**In the Zone: Got a legal question about a PUD or an MPC? Dan Mandelker is the man to see.**
Ruth Eckdish Knack, AICP
*Planning*, July 2007
www.planning.org/planning/2007/jul/inthezone.htm

**Planned Unit Developments and Master Planned Communities: Review and Approval Processes**
Daniel R. Mandelker, FAICP
*Zoning Practice*, June 2007
www.planning.org/zoningpractice/2007/pdf/jun.pdf

**Planned Unit Developments**
*Planning Advisory Service Report* No.545, 2007
Daniel R. Mandelker, FAICP
www.planning.org/store/product/?ProductCode=BOOK_P545

**Understanding Planned Unit Development**
*PAS QuickNotes*, No. 22, 2009
www.planning.org/pas/quicknotes/pdf/QN22.pdf

*—Ben Leitschuh*