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*Mr. Lloyd presents with considerable force and insight the almost overwhelming difficulties that face a developer who undertakes a planned unit. The theme of his article is that the interpretation of existing legislation, the structure of the administrative system, and the political vulnerability of local officials combine to discourage departures from the status quo. Builders therefore are forced to produce conventional housing which is less and less likely to meet the aesthetic, social and economic needs of a changing public.*

## A DEVELOPER LOOKS AT PLANNED UNIT DEVELOPMENT

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### *Introduction*

Many developers are disenchanted with our contemporary massive developments of uniform housing types, be they of the single family or multi-family variety. This disenchantment is not purely aesthetic; it is rooted in the belief that the segregation of age and income groups, which such developments produce, results in the creation of socially sterile communities. Builders are convinced, moreover, that there are market limitations for certain of the uniform housing types closest to the hearts of zoning authorities. The increasing proportion of young adults and senior citizens, for example, has made the single family detached house situated on a sizable plot a less widely desired form of housing. Similarly, the increasing costs of construction and land

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preparation have put such housing out of the reach of a substantial portion of the population.

Planned unit development is a concept designed to avoid most of the unfortunate results of uniform housing development. The planned unit enables the builder to create, within the confines of a sizable development, a variety of housing types which will broaden and diversify his market while at the same time enhancing the possibilities of attractive environmental design and providing the public with open space and other common facilities. In addition, the planned unit provides the builder with the appealing possibility of accommodating a greater density of living units without sacrificing spaciousness and livability.

Desirable as the planned unit may be, there are a considerable number of obstacles which must be overcome before it can become a concrete reality. To begin with, the builder may be greatly tempted not to depart from the comfortable familiarity of conventional housing in which zoning ordinances are well defined, lenders and governmental agencies are familiar with market acceptance and administrative procedure, and construction costs and building "know how" have been refined. More important than the security of the old, however, are the host of political, legal, administrative and production problems which beset any developer bold enough to embark on a new course. Indeed, most builders give up before they have gotten very far. Many who have carried their project through are sorry that they did, and even those who have made money often think twice before starting again.

#### *Zoning: Public Defense of the Status Quo*

For many years we have been engaged in the erection of elaborate zoning edifices designed to halt the rape of the countryside. We have tried to defend ourselves against the marauding bulldozers, hit and run operators, and greedy carpetbaggers who build match boxes, pollute streams, ruin the character of towns, introduce undesirable elements, and overcrowd the schools with unwanted children. Unfortunately, instead of serving as an intelligent guide to future growth which would provide a variety of housing types, recreational amenities, and planned utility and road programs, planning and zoning have been used primarily as a means to forestall growth, to prevent construction, and to slow down the provision of community-wide utilities for sewage disposal and water supply. To the extent that we could not prevent growth altogether, we have tried to make that growth as expensive as possible to both the builder and the homeowner so that houses would be costly, yield higher school taxes, and prevent undesirable

elements from settling in the community. This effort has not only aborted the planning process but has actually contributed in large measure to the vast financial and social malaise which now engulfs most of our metropolitan suburbs.

The zoning ordinance, the master plan, and the subdivision regulation are all bulwarks against the innovator. Their very rigidity is the essence of their usefulness. The constant lowering of population densities, while open land disappears at an unprecedented rate, thins out the potential population so that when all the match boxes have been placed on larger and larger lots, our worthy citizens can breathe a sigh of relief and exclaim: "Hallelujah, there is no more land"! The absence of public means of sewage disposal, while relegating some of the best agricultural land and potential industrial flatlands to uneconomical low density residential development, prevents the higher density development dependent on sewage disposal, and also limits the builder to those lands which show good soil percolation for septic tanks. Many a town which has large areas of impervious clay, wet lands, hard shale or shelf rock subsoil, considers itself extremely fortunate that the health department can set septic standards high enough to keep out builders and newcomers. Similarly, we are interested in preventing a 10,000 dollar dwelling unit from being built if, by requiring large lots and enacting stiff codes, we can make sure that nothing less than a 25,000 dollar house can be built. If we are for single family houses, it is not because our senior citizens and young marrieds can afford them, but because it is the most expensive type of house we can force them to acquire. We are for open space only because open space is not available for home building. Thus, many a park has been acquired not because people love birds and trees, but because anything is preferable to the construction of new houses.

Zoning ordinances and master plans have assumed an almost religious significance. They are defended with a fanaticism out of all proportion to their intrinsic merit. New pejorative phrases have entered the real estate vocabulary: spot zoning, down grading, down zoning and contract zoning. These terms are reserved for any low character greedy and corrupt enough to suggest a more intensive use of land, or any other development technique which might lower the cost of housing. In such an atmosphere, the aesthetic or social merit of a planned unit development has little chance of receiving an objective hearing. Treatment of proposals is governed by a broad complex of fears and pressures which bear only slight relation to the particular project under consideration. Compulsive suspicion, not level-headed skepticism, is the predominant outlook of the citizenry.

### *Official Reaction*

Because of the public suspicion and hostility toward departures from orthodox zoning, proposals for a planned unit development are a threat to the politician or administrator charged with approving or disapproving them. Any official taking a clear stand in favor of a planned unit development, and the liberalizations which such development would require in the zoning ordinances, is taking tremendous political risks. Usually, it will be said that he has been bought or gone soft in the head. The larger or more novel the planned unit, the more violent the opposition. As a result, officials seldom commit themselves outright; instead they temporize, equivocate, and hedge. Rarely does a developer know whether he really has local administrative approval until a politician has "run up the flag to see who salutes." Rarely does the developer obtain any significant support from civic organizations, including the respectable and well established ones. He may, therefore, look forward to a period of great uncertainty and costly preparation before he can be sure that he will be permitted to build what he has contemplated. If he has bought land for planned unit development, he may find that he is eventually forced to unload it or use it for something else. If he has optioned land, the term of the option frequently expires before he has obtained administrative approval. Even after the builder has received what he believes to be administrative approval, he may be confronted with a local revolution in the form of referendums to change the local form of government, to impeach the mayor, to draw up a new master plan, to change planning consultants, or to nullify the approval by rezoning the property. It takes strong nerves, sizable financial reserves, and great sophistication to weather these storms. It also takes a readiness to accept an eventual compromise design which may be only a bare shadow of the original noble vision.

### *The Judicial Morass*

The road through the law is a rocky one. Since a planned unit development in its most desirable form represents a fusion of elements unique to a particular location, it is difficult to create a set of uniform standards which properly handle a great number of different applications. But many courts have held that zoning regulations must have a high degree of uniformity and predictability in order to prevent arbitrary or discriminatory treatment of applicants. Moreover, many state enabling statutes do not contain any provisions for the kind of freewheeling density disposition and design which is such an important

feature of planned unit development. With the enabling statutes vague, precedents small in number or nonexistent, and court decisions devoid of a reliable pattern of interpretation, planned unit developments are highly vulnerable to legal challenge. Not only an applicant's attorney, but the town's attorney as well, will have to meet charges of spot zoning, contract zoning, arbitrary or discriminatory treatment, contravention of existing zoning regulations, poorly defined administrative jurisdiction or presence of procedural defects.

Even before the developer begins work, his attorney must resolve a myriad of thorny legal problems. Can approval of a planned unit be obtained on the basis of a mere zoning modification, or must a new zoning category be created and land zoned for it prior to approval? Must such zoning be reflected in the master plan or comprehensive plan? Can approval for a unit of a certain kind given to one applicant be withheld from a second or third applicant without charges of arbitrariness or discrimination? What criteria are to be applied, how are they to be articulated, and what record must the boards keep to satisfy future court challenge? When are approvals exclusively amenable to decision by a planning board, and when do they require action by the elected legislative body? If common facilities such as parks, playgrounds, utility companies, and community centers are created must they be dedicated to the municipality or can they be retained by a neighborhood association or by the developer? How are these facilities to be assessed; how is their maintenance to be assured? If modifications are made in road specifications, utilities specifications, street widths, drainage disposal, or road grades, as well as in the bulk regulations of structures and lots, at what point does planning board jurisdiction cease and the responsibility of the town's engineer begin? Will it be necessary to amend the subdivision regulations and road specifications, as well as the zoning ordinance and the master plan, before approval can be granted? Can the local planning board grant modifications of conditions adopted or imposed by larger governmental bodies, such as widths of main rights of way or the necessity of carrying utilities in the center of paved streets?

As the project develops, a host of legal difficulties will present themselves which may require consent of higher governmental agencies, approval of other municipal departments, and sometimes even amendment of state legislation. Even if these authorizations have been obtained, the developer is only as safe as the perspicacity and good will of the judge who will hear the almost certain law suits brought by civic associations. Moreover, local civic associations have now grouped themselves into federations. A threat to the zoning stability of one

town is a threat to the zoning stability of all. Sooner or later, the developer may face the possible intervention of associations of mayors of towns and villages, and planning consultants prodded to action by their fearful municipal clients. Because of such pressures, many a judge has refused to make law and has declared a zoning approval invalid on purely technical or procedural grounds.

### *The Perils of Divided Powers*

The developer must determine which board or agency of the local government has jurisdiction to approve various phases of the planned unit. Since the organization of authority differs among states, and sometimes even among subdivisions of the same state, a procedure valid in one area may not be proper in another. But since future safety from legal challenge is essential, there must be no question as to the jurisdiction of the hearing body. Ideally, the body conducting the hearing and granting the approval should be the same. This is because the approval of a planned unit development represents a process akin to a bargaining session. Thus, the board may take the position that it will approve narrow noncirculating roads if extra wide main traffic arteries are provided. The board may permit reduced setbacks if such setbacks are not essential to off street parking. The board's approval of diminished lot sizes may be contingent on more intensive landscaping. The change from one house type to another may be linked to the placement of housing groups on the property in such a way that maximum compatibility with, or adequate screening from, adjacent properties is assured. Changes in road specifications or minimum rights of way may be made in exchange for keeping roadways private rather than dedicating them. "U" streets may be preferred to cul-de-sacs because of greater access for fire fighting equipment or to provide loops for water lines. A requirement may be set for intensive development of recreational spaces in exchange for their reduction in size. Height limitations may be modified to permit a few high buildings instead of having a series of low buildings cover a large percentage of the ground. Lot sizes may be reduced to compensate for the cost of an expensive sewage treatment installation. Minimum grades of roads may be modified to permit blending of roads into the topography without massive excavation. Yard dimensions may be altered to accommodate natural features such as streams or trees. These adjustments may take weeks or months to work out, and in the acceptance or rejection of any one condition, the builder must revise his design, his costs, and his market projection accordingly. If the approving

body is different from the deliberating body, it is often impossible to recapitulate the long process of negotiation by means of a brief report. It often happens that the approving body, not fully cognizant of why certain choices were made by the hearing body, insists on reestablishing previous minimum conditions and dimensions without permitting the builder to change those features to which he consented in exchange for the modifications granted. Since the developer's bargaining has been intimately related to his cost estimates, the unilateral and insensitive alteration of his compromise with the hearing body will make the planned unit either unprofitable or unmarketable. Thus piece-meal revision of the package of standards previously agreed on, and the failure to fully understand the criteria which governed the decision of the hearing body can, in effect, nullify the approval or destroy the design.

If it creates legal difficulties to combine the hearing and approving functions in one body, then continuing communication between the two separate bodies becomes extremely important. In addition, the approving body should conduct preliminary informal hearings before the proposal goes to public hearing and final decision. Where the town engineer or town attorney must be consulted prior to approval, it is imperative that he be present at the meetings before the hearing body to render his opinions and give approvals on a step by step basis. The practice of conducting extensive hearings leading to a completed plan before the town engineer or attorney is consulted has led to unnecessary anguish, delay, and expense.

In many cases, local decisions are subject to regional or county review. Here again, communication must not be delayed until the plan is finished. Agencies such as the health department must be consulted at an early date, since the hearing body may impose a requirement for sewage disposal which the health department rejects because it considers the disposal stream unsuitable. The hearing body may be satisfied with primary sewage treatment costing 200,000 dollars. The health department may insist on tertiary treatment costing one million dollars. The hearing body may approve a light road specification for minor roads costing two dollars a square yard. The town engineer may insist on a specification costing four dollars a square yard. The hearing body may approve utility lines which are not in the right of way. The public works department may insist that the lines be put back in the right of way. The list of agencies required to give approval does not end here. The hearing body may permit houses without improved public road frontage. The assessor's office or, for that matter, the lending institution may reject such an arrangement.

In cases where the FHA is involved, the planning board should consult them before settling the details of land use innovation.

Ideally the planning body, the elective body, the assessor's office, the town attorney, the town engineer, the health department, the public works department and the FHA should all work in harmony. But it is not at all unusual for a sharp conflict to exist between one or more of these authorities. For example, it is not uncommon for the elected legislative body to reject the recommendations of its planning agency out of sheer political spite.

It is possible to overcome many of the difficulties of constructing a planned unit development if both the planning authority and municipal government are cooperative and responsible and if both maintain constant communication with state and federal agencies. Most planning authorities, however, expect the developer to obtain the approvals of other agencies by himself. In other words, the planning board usually does not accept responsibility for its own actions.

Planned unit development requires not only a mature builder, but also a mature administrative system. Moreover, the approval system will not function smoothly unless a permanent professional staff is attached to the planning body. In the absence of such competence and administrative centralization, planned units usually succeed only where there is bossism, blight so bad that almost anything is preferable to the status quo, or an absence of development pressure resulting in a highly tolerant planning climate.

### *Financing Problems*

It is well known that institutions supplying equity capital and mortgage money to the building industry are extremely conservative. Perhaps this is inevitable, since most of them handle other people's money. Banking institutions have evolved elaborate formulas and rules of thumb to be applied to mortgage loans on such well accepted products as single family homes, garden apartments, and high-rises in conventional settings. Indices such as room counts based on specified minimum room sizes, gross rent multipliers, capitalization rates, recognized expense factors, ratios of net income to debt service, allowable costs per cubic foot or square foot, maximum dollar allowances per room, and approved room mixes are so strictly followed that most mortgage brokers advise a client to design with the lenders favorite ratios, not people, foremost in mind. Unfortunately bankers have little experience with the valuation for mortgage purposes of environmental design, open space, common recreational facilities, and other comparable amenities. I remember once designing a town house project with a four

acre park on valuable land where it would have been perfectly legal to subdivide the park into an additional forty or more units. The planners liked it, the people loved it, the local authorities were impressed with it, but to the bankers it was a meaningless nuisance that they would tolerate only if the municipality would accept dedication.

When a governmental agency such as the FHA becomes involved in the financing of a planned unit, the developer's problems multiply. Different parts of the planned unit development may come under different divisions with different programs, different personnel, and different regulations. For example, town houses for sale may be under the single family division, while town houses in condominiums come under the regulations of the multi-family division. The government agency may tie riders to the development, and link it to some favored hobby horse of "advanced planning concepts." The agency may require a sociologically preconceived mix to accommodate "X" percent high income, "X" percent middle income, "X" percent lower middle income, "X" percent low income, "X" percent of a minority group, or "X" percent bicycle riders. There have even been projects in which the government agency has conspired with builders to maintain a racial quota system in violation of its own anti-discrimination laws. Proposals to create large communities and "new towns" are the favorite targets of such preconceived notions. Thus to all the tasks facing the innovator, our government agencies want to add that of being a social benefactor. Considering how difficult it is to make a market judgment about a planned unit development, the innovator should be left alone long enough to create a marketing record before being forced to become a social revolutionary.

Government participation in the financing of a planned unit also entails the inconvenience of bureaucratic inertia. It takes government agencies a long time to embrace any innovation, and when they finally do, they tend to institutionalize the innovation along lines almost as rigid as their previous conservatism. I do not mean to disparage some of FHA's very worthwhile efforts to update its procedures with such novel approaches as the "Planned Unit With the Homes Association" regulations. The spirit of these regulations, however, has not filtered down to the field offices, and administrative procedures have not yet been brought in line with objectives.

Securing approval from government and commercial financial institutions, does not end the builder's troubles. Almost invariably the builder's need for equity capital or operating capital increases drastically when he undertakes a planned unit development. It will take him longer to get approval, with consequent increased overhead

and capital carrying charges. His planning must be in much greater detail showing perhaps final design of a large area though he may build in sections. Where open space is projected, he will often be required to dedicate the land free of all liens before completion. If densities in various parts of the land will differ, local authorities may compel him to follow the rigid procedure of constructing the low density areas before the high density areas. Lenders may wish to receive extra points or service charges to cover the work generated by the unfamiliarity with processing documentary and inspection phases which may be associated with innovations. Moreover, if the developer plans and obtains approval for common facilities, he will probably have to make cash deposits, post bonds or construct the facilities in advance in order to assure the public that the facilities will in fact be completed.

### *Production Problems*

The great bulk of builders are in a sense their own general contractors, relying on subcontractors for land development and construction. Subcontractors have refined their techniques of conventional construction to the point where they know their costs to the penny, their labor is trained and their unions are cooperative. Ask a subcontractor to quote you on an unfamiliar operation, and all kinds of fears beset him. Will the laborers get used to the new materials and techniques? Will the quantity output be comparable to the older techniques? Will the union recognize the new techniques or will they give rise to jurisdictional disputes and stoppages over conflicts or work rules? Will the new techniques keep the subcontractor in business if they become widespread and is it in his interest to encourage them? As a rule, a subcontractor will quote higher prices for an unfamiliar product, even though it can be shown that both materials and labor are cheaper. It may take a considerable time and a considerable volume of production before acceptable new prices can be established. It may take an exhausting fight to persuade the unions to cooperate. Even then, the builder may face labor trouble in the middle of a job because some union suddenly decides that a new technique represents a threat to its hold on the trade or the volume of employment. In short, while planned units may seem to offer a faster rate of construction, lower costs, and greater efficiency, the builder may find these objectives defeated unless he has the cooperation of both the subcontractors and the unions.

### *Determining the Market*

The developer of a planned unit is forced to take a great gamble on market acceptance. Because the construction of planned units is

relatively new, he is unlikely to have acquired substantial experience. Gauging the market by "feel" is difficult, and the use of so-called "market research" is often even more difficult. Current public attitudes, moreover, make marketing extremely hazardous. The developer is usually required by the authorities to predesign to the last detail a large planned unit development whose content is based, at best, on sound guesses. After half a dozen or more agencies, administrators, lenders, and political and community associations have given their approval, few developers have the stamina to try to effect any changes which would require a second difficult journey through the whole cumbersome process. Since immense study and care is necessary to formulate a sound planned unit development, but since the authorities and the public are anxious to see pretty pictures, much early planning is of the "frosting-on-the-cake" variety. Only when a developer knows that he will actually be permitted to proceed can he afford the tremendous costs of careful, detailed planning. But when the public has seen the pretty pictures and the "artist's conception," it feels cheated by any subsequent change, whether the change is, in fact, for better or worse. Therefore, execution of many planned unit developments must follow a preliminary plan which was made without a study in depth; significant modifications, which only subsequent detailed investigation and experience could suggest, are not feasible. Thus the gamble on marketability which the developer is forced to take is much greater than it need be.

### *Conclusion*

Although my description of problems and pitfalls might seem designed to discourage any developer from attempting a truly original planned unit development, all I am really trying to point out is the complete unsuitability of our present administrative techniques to a truly venturesome and exciting wave of innovation. When control stifles creation, it is time to throw the book away and rely on judgment, humanity, and basic standards to create a new framework for regulation.

We must begin to revamp our entire administrative planning and zoning structure. Independent administrative authorities must be coordinated, and processing put into the hands of professionals. Planning jurisdictions must be large enough so that officials can acquire competence and remain aloof from intense localism and so-called civic vigilante action. "Home rule" must not be construed as a legal license to use zoning statutes to solve school tax problems and indulge local snobbery. Courts must realize the need for legal standards suf-

ficiently flexible to encourage new developments. Above all, we must take pains not to reconstruct our administrative procedures so rigidly that we do not leave room for further creativity and experimentation. We must permit the entrepreneur to test his judgment and to adapt to changes in the market as he constructs the planned unit.

Today we no longer have a seller's market, and the inexperienced or incompetent builder is rapidly disappearing. Regulation of the building industry, therefore, can safely be confined to performance standards which will ensure the health and welfare of homeowners. Only if sweeping changes in administration and regulation are made will the planned unit development become a tool for rational change rather than a political football. Without such changes a few able pioneers will push through their projects, but much of our landscape may be dominated by the sterile and unimaginative product of "advanced cliché" planning.