

Zoning # 486
Planned Unit Development Zoning in Wisconsin
September 30, 2006

Summary - Zoning 486

Comment provides overview of planned development district (PDD) (more commonly identified as planned unit development (PUD)) zoning authority in Wisconsin with a discussion of PUD purposes, criticisms and key statutory standards for creating such zoning districts. 9/30/06.

2006 marks the 80th birthday of the landmark zoning decision *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) wherein the U.S. Supreme Court upheld the constitutionality of one of the most important, if not the most important, local government powers, zoning.

In particular, the Court affirmed a zoning scheme that divided a municipality into specific zoning districts dedicated to a particular type of land use (residential, commercial, industrial) which applied a set of uniform development restrictions (setback, height, lot size, etc.) to each structure or use allowed in that district. This traditional form of zoning is commonly referred to as "Euclidean zoning" after the Village of Euclid case.

The uniform lot-by-lot regulations that form the backbone of traditional or Euclidean zoning offer local officials and property owners the advantages of certainty and predictability. However, these advantages impose some significant costs.

The rigidity of traditional zoning is often in direct conflict with the natural topography. If compliance with traditional zoning requirements is not immediately possible because the land is not flat, the response under traditional zoning is alteration of the natural landscape to create land easily divisible into lots that could be developed in conformity with the zoning regulations. This rearrangement of the earth is not only costly but environmentally harmful.

The rigidity of traditional zoning can also conflict with principles of good planning. The single use character of traditional zoning has expressed itself in patterns of large exclusive use developments. With large residential developments separated from large retail developments, driving has become the sole means of going from one to the other and imposed the environmental costs of greater vehicle dependence. Moreover, the traditional zoning assumption of lot-by-lot development that translates into a regulatory system for low density development

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has been a significant contributor to urban sprawl.

One technique developed in the 1960s as a solution to some of the traditional zoning problems is planned unit development (PUD). Initially employed to address the cost concerns of developers and environmental concerns of communities, PUDs more recently have been employed by planners and officials in some communities seeking to diminish the high costs of urban sprawl and improve the quality of their communities.

PUD ZONING DEFINED

The Wisconsin Court of Appeals cited a modest definition of PUD zoning in a 1993 decision:

A Planned Unit Development (PUD) is a type of zoning district designed to encourage the efficient and optimal utilization of land. A typical PUD may contain a planned mix of residential (detached homes, townhouses, apartments, or combinations of such buildings), commercial and industrial uses. PUD's [sic] are premised on the concept of density zoning, that is, the intensity of use to which land may properly be developed. The PUD differs from the traditional zoning in that the type, density and placement of land uses and buildings, instead of being detailed and confined to specified districts by local legislation in advance, is determined by contract, or deal, as to each development between the developer and the municipal administrative authority, under broad guidelines laid down by state enabling legislation and an implementing local ordinance. [citation omitted]

Old Tuckaway Associates v. City of Greenfield, 180 Wis.2d 254, 262, fn. 1, 509 N.W.2d 323 (Ct. App. 1993).

In Wisconsin, Wis. Stat. sec. 62.23(7)(b) defines PUDs as zoning districts:

with regulations in each, which in addition to those provided in [62.23(7)(c)], will over a period of time tend to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses.

These definitions exemplify a common trait of PUD definition, definition by or in relation to PUD purposes.

PUD PURPOSES

PUD zoning was clearly a response to the limitations of traditional zoning as applied to residential development.¹ In this context, three major purposes of PUD zoning are typically identified.

The first and most commonly cited PUD purpose, flexibility, is not explicitly stated in the Wisconsin PUD enabling law but has been identified by our courts. See *City of Waukesha v. Town of Waukesha*, 198 Wis. 2d 592, 543 N.W.2d 515, *rev. den'd*, 201 Wis. 2d 436, 549 N.W.2d 732 (Ct. App. 1995) ("PUDs were intended to be 'a flexible approach to the regulation of land use without sacrificing the values which zoning was intended to preserve.'") Thus, PUD flexibility is not just flexibility for flexibility's sake. It is flexibility that continues to further the broad public interests served by traditional land use regulation systems.

A second purpose of PUDs is diversification. This purpose is specifically identified in the Wisconsin PUD zoning enabling law. See Wis. Stat. 62.23(7)(b) which directs that PUD regulations promote "diversified location of structures and mixed compatible uses." Therefore, PUDs are seen as a method for avoiding the unimaginative use-exclusive "cookie cutter" service-free (*i.e.*, no neighborhood businesses that provide services) residential development patterns of the mid-20th century.

Lastly, PUDs are also viewed as a vehicle for securing the benefits of more comprehensive planning of large spaces. This purpose is also identified in the Wisconsin PUD zoning enabling law. See Wis. Stat. 62.23(7)(b) which directs that PUD regulations promote "coordinated area planning." Such benefits would include efficient, economical and environmentally sound land utilization as well as safe and attractive development patterns among other typical goals of good land use planning for communities or neighborhoods versus individual lots.

PUD CRITICISMS

Some early opposition to PUDs was based on the potential harm it might bring to traditional zoning. See Moesna & Bangs, *Planned Unit Development Ordinances*, 2. Am. Soc'y of Planning Officials, Planning Advisory Service Rep. No. 291, where the authors note the opposition and resistance to the PUD concept is primarily based on the argument that such development would harm the conventional "Euclidean" form of zoning. However, this concern failed to recognize that even traditional zoning regulation schemes could be modified and used to implement a PUD concept.

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A more lasting concern with PUDs is the potential for misuse of the discretion it provides. At one level, an abuse of discretion might implicate due process concerns for the developer. See e.g., *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998) where the Texas Supreme Court upheld the action of a town in denying PUD approval in a case involving broad challenges to the local procedures and criteria for the decision. At another level, the PUD discretion could be misused as a tool for simply circumventing zoning restrictions without promoting basic zoning values. See e.g., *City of Miami v. Save Brickell Avenue, Inc.*, 426 So. 2d 1100 (Fla. 1983) where the court found a planned area development (PAD) ordinance which contained standards that were entirely permissive and could be used to ignore zoning laws altogether constitutionally defective. Thus, it is important for Wisconsin local officials to be aware of the limits of the PUD zoning authority they have in order to avoid misuse of this valuable land use planning tool.

WISCONSIN PUD ZONING AUTHORITY

In some states, the courts have construed the general zoning enabling law to find municipal authority for PUD zoning.² In others, specific enabling laws were adopted to authorize PUD zoning. Wisconsin is one of these states.

In 1970, the Wisconsin State Legislature adopted 1969 Senate Bill 105. It amended the municipal zoning enabling law to authorize planned development zoning by cities and villages as part of Wis. Stat. sec. 62.23(7)(b) which provides in relevant part:

For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section: and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. **The council may with the consent of the owners establish special districts, to be called planned development districts, with regulations in each, which in addition to those provided in par. (c), will over a period of time tend to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses. Such regulations shall provide for a safe and efficient system for pedestrian and vehicular traffic, attractive recreation and landscaped open spaces, economic design and location of public and private utilities and community facilities and insure adequate standards of construction and planning. Such regulations may also provide for the development of the land in**

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such districts with one or more principal structures and related accessory uses, and in such districts the regulations need not be uniform [emphasis added].

Thus, Wisconsin cities and villages have direct authority to create PUD zoning districts³ in their jurisdiction. However, this specific authorization does raise some questions about the permissible scope of that PUD zoning power, including the method for creating a PUD and the standards that a municipality must follow for a PUD. These are important questions to consider since they may determine whether the exercise of the delegated PUD authority is valid.

METHOD FOR CREATING A PUD

A variety of zoning mechanisms have been used to create a PUD. These include rezoning to a separate PUD zoning district; by special permit process which allows PUDs as a use by review in certain zones; by overlay zoning which creates PUD as a secondary zoning level available for developments that meet certain criteria but without rezoning; by making PUD a "use by right" in some zones; and by rezoning individual parcels in accordance with a PUD plan to implement the proposed development. In some instances, the specific mechanism for creating a PUD is influenced or controlled by the PUD zoning enabling law.

In Wisconsin, the PUD zoning enabling law authorizes PUD zoning through the creation of "special districts, to be called planned development districts." Sec. 62.23(7)(b). Although not yet resolved by a Wisconsin court, the plain language of this statute probably requires municipalities to create PUDs by amending the zoning ordinance to create a PUD zoning district.

However, there is at least one decision by a Wisconsin court which seems to run counter to this proposition.⁴ In that case, the court considered the validity of a town ordinance which attempted to use a conditional use permit procedure for creating PUDs.

The court focused on the town's attempt to allow PUD approval by way of conditional use permit (CUP) in all zoning districts which "fail[ed] to require that an approved PUD be in harmony with the zoning restrictions of the underlying district" The court found this particular CUP process invalid because:

An ordinance allowing a local plan commission to authorize a PUD as a conditional use must specify particular areas for the placement of any proposed PUD, and the placement must comport with the zoning restrictions of the designated districts. The town

ordinance was deficient in this regard.

While this statement might be read as support for creating PUDs by conditional use permit, the legitimacy of which a leading commentator on zoning has described as "dubious,"⁵ such a reading must be tempered by the knowledge that the court never addressed the question of whether sec. 62.23(7)(b) imposes any constraint on the method by which a municipality may create a PUD. The decision does not even refer to or cite any language from sec. 62.23(7)(b). Thus, the decision does not effectively resolve the issue of whether a PUD must be created as a zoning district as seemingly directed by the statutory language.

Creating a PUD by rezoning is a common method of creating a PUD. If a PUD is implemented by rezoning, the procedural requirements for amending a zoning ordinance must be followed. See *Gloudeman v. City of St. Francis*, 143 Wis. 2d 780, 422 N.W.2d 864 (Ct. App. 1988) ("Locally zoned planned development districts are authorized by statute. However, zoning ordinance amendments authorizing a planned development district and ordinances which change the zoning classification of a specific parcel of land must comport with statutory notice requirements.")

STANDARDS FOR CREATING A PUD

Courts have generally required that local standards be incorporated into a PUD ordinance in order to protect against arbitrary government action. One commentator notes:

Requiring such standards, does not undercut the flexibility of PUD as a zoning tool, but rather ensures that a city council's enhanced discretion under the planned development ordinance will be guided by proper considerations, and that a benchmark for measuring the council's actions will be available in case of subsequent judicial review. In other words, because the Planning Board is required to exercise its discretion when making a determination of a PUD, adequate guides and standards must be established by the legislation "to protect the citizen against arbitrary and unreasonable exercise" of that discretion.

Gail R. Gudder, *A Primer on Planned Unit Developments*, Zoning and Planning Law Report, Vol. 21, No. 3, p. 20 (March 1998).

The variety of local standards and procedures prevents any meaningful discussion in this comment. However, local standards are not the only ones that must be followed when a Wisconsin city or village creates a PUD. In Wisconsin, there are statutory standards that apply to

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local PUD zoning. Significantly, these standards are controlling to the extent that they impose a higher standard than imposed by local regulation.

Wis. Stat. sec. 62.23(7)(g). Therefore, failure to comply with these statutory standards would significantly undermine the validity of a particular PUD.

IN ACCORDANCE WITH A COMPREHENSIVE PLAN: SPOT ZONING

Our state zoning enabling statute, like the standard state zoning enabling act, requires that zoning legislation be "in accordance with a comprehensive plan."

Wis. Stat. sec. 62.23(7)(c). Thus, all zoning, including PUD zoning, must comply with the two requirements of this standard.

It is important to note that the requirement for a "comprehensive plan" imposed by this standard does not mean a separate formal document titled as such. *Bell v. City of Elkhorn*, 122 Wis. 2d 558 (1984) ("While sec. 62.23(7)(c) requires that zoning regulations be made 'in accordance with a comprehensive plan,' the statute contains no requirement that a comprehensive plan must be a formal document separate from the zoning ordinance nor does it require that a comprehensive plan be adopted prior to the enactment of a zoning ordinance. The purpose of a comprehensive plan is to provide an orderly method of land use regulation for the community. That purpose can be accomplished by the zoning ordinance itself without the need of a separate document labeled 'Comprehensive Plan.'")

Thus, Wisconsin follows the general rule that the "comprehensive plan" requirement in the zoning enabling statute does not require a separate document with that label for the exercise of zoning power to be valid. Instead, the zoning ordinance can satisfy the "comprehensive plan" requirement of sec. 62.23(7)(c).

However, this statutory zoning standard not only imposes a requirement for a comprehensive plan, it also directs that zoning actions be "in accordance with" that plan. Thus, it imposes a test for evaluating the propriety of zoning actions by local government through consideration of the level of agreement between the zoning action and the plan.

In some jurisdictions, the "in accordance with" test can be somewhat stringent. In *Martin County v. Section 28 Partnership, Ltd.*, 676 So. 2d 532 (Fla. App. 1996), the court ruled that a landowner seeking to rezone property had the initial burden of proving that the proposed development was consistent with the comprehensive plan, but the burden shifted to the government to demonstrate that it would not be arbitrary, discriminatory, or unreasonable for the board to deny the rezoning.

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In other jurisdictions, the "in accordance with" requirement does not impose a significant limitation on zoning action. *In Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968), the court found that a PUD does not violate the requirement that zoning be in accordance with a comprehensive plan if it shows "sensitivity to the community as a whole, and the impact that the new ordinance will have on the community."

There is no Wisconsin decision specifically analyzing and defining the "in accordance with" requirement of sec. 62.23(7)(c). Rather, and not surprisingly given the significant relationship between this requirement and spot zoning claims, the analysis of this provision in Wisconsin has occurred in conjunction with such claims.

The most recent example is the decision in *Step Now Citizens Group v. Town of Utica Planning & Zoning Committee*, 264 Wis. 2d 662 (Ct. App. 2003). There the court addressed the claim that a rezoning was not consistent with the comprehensive plan for the community and, therefore, amounted to illegal spot zoning. The court disagreed with the claim because it read *Bell* to say that a "comprehensive plan" is not mandatory.⁶ It reasoned that "If a comprehensive land use plan is not mandatory, then it stands to reason that once a comprehensive land use plan is enacted, the plan is merely advisory." Thus, under the *Step Now* ruling, there is very little demand imposed on local governments by the "in accordance with" requirement since failing to be in accordance with a plan that is only advisory is not an error likely to generate much concern or judicial attention. Moreover, a local PUD zoning decision should easily survive most challenges in Wisconsin based on the argument that the proposed PUD zone is not in accordance with the comprehensive plan.

However, satisfying the "in accordance with a comprehensive plan" standard is not the only hurdle for a PUD action. As the *Step Now* court noted, there are a set of general standards Wisconsin courts employ to evaluate the propriety of a zoning decision:

In determining the validity of a zoning ordinance, we recognize that each case must be determined on the facts. The factors to be weighed in considering the validity and reasonableness of rezoning are several. The pertinent inquiries go to whether the rezoning is consistent with long-range planning and based upon considerations which affect the whole community. The nature and character of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant. Finally, the interests of public health, morals and safety must also be considered, as well as the promotion of public welfare, convenience and general prosperity (citations omitted).

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These are fairly general standards that rarely lead to a finding of invalidity, particularly in light of the judicial rule that local zoning decisions are presumed valid.⁷ However, the analysis for determining the validity of a PUD in Wisconsin is complicated by the fact that our PUD enabling law imposes specific standards on PUDs which could affect the judicial determination of whether a PUD rezoning "is consistent with long-range planning and based upon considerations which affect the whole community" or is "in accordance with a comprehensive plan."

SPECIFIC STATUTORY PUD STANDARDS

The power to enact zoning regulations is a delegated power and must be exercised by cities and villages in accordance with the substantive and procedural requirements of sec. 62.23.⁸ Therefore, municipal PUD zoning power must be exercised in accordance with sec. 62.23.

Our zoning enabling law contains a general authorization for creating zoning districts and a specific authorization for creating PUD zoning districts in sec. 62.23(7)(b). The specific authorization for PUD zoning districts probably precludes an interpretation of the general municipal zoning authority in sec. 62.23 to also include PUD zoning.⁹ Therefore, PUD zoning in Wisconsin is likely limited to the specific authority and standards provided in sec. 62.23(7)(b).

Section 62.23(7)(b) specifies that local regulations for each PUD district "will over a period of time tend to promote the maximum benefit from coordinated area planning, diversified location of structures and mixed compatible uses." It further states that "[s]uch regulations shall provide for a safe and efficient system for pedestrian and vehicular traffic, attractive recreation and landscaped open spaces, economic design and location of public and private utilities and community facilities and insure adequate standards of construction and planning."

One issue presented by these standards is whether the regulations of every PUD zoning district must promote all three PUD purposes, "coordinated area planning, diversified location of structures and mixed compatible uses." This issue has not been resolved by any Wisconsin court.¹⁰

The plain language of the statute suggests that the answer is yes. The use of "and" to link the three purposes to be promoted by PUD regulations in a PUD district precludes a plain language interpretation that PUD districts which only promote one of them are consistent with this statutory standard.

Moreover, it must be recognized that the PUD enabling provisions evidence a clear legislative intent to create a type of zoning regulation that is different from traditional zoning. If PUD zoning district regulations need only promote "coordinated area planning" or only "diversified

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location of structures" there is little to distinguish such PUD zoning from traditional zoning which could also accomplish such goals. Arguably, it is the combination of these three purposes of PUD zoning that makes PUD zoning different from traditional zoning. Therefore, reading the PUD zoning enabling law in a way that eliminates that distinction would be inconsistent with that legislative intent.

Admittedly, the answer to whether a PUD zoning district that does not promote "coordinated area planning, diversified location of structures and mixed compatible uses" is valid is not wholly clear. However, a PUD zoning district that does not presently promote or have any reasonable probability of promoting these three purposes does run counter to the general principles for PUD zoning and does present a current increased risk that a court will find it invalid.

The other above-referenced statutory PUD standard requires the PUD regulations in each PUD district to "provide for a safe and efficient system for pedestrian and vehicular traffic, attractive recreation and landscaped open spaces, economic design and location of public and private utilities and community facilities and insure adequate standards of construction and planning." The most interesting item in this list is "attractive recreation and landscaped open spaces" because, unlike the others, the plain language imposes a requirement for dedicated physical space in a PUD for two particular types of land use, recreational space and open space. Such a reading is certainly consistent with the traditional PUD idea which offered developers the opportunity for more flexible location of structures and the attendant cost savings in exchange for the public benefit of larger open spaces for multiple uses.¹¹

CONCLUSION

In 1926, the U.S. Supreme Court validated Euclidean zoning, along with its advantages and disadvantages. PUD is an important tool for eliminating the disadvantages that occur under the rigid structure of traditional zoning. However, the exercise of PUD authority in Wisconsin must be consistent with the limitations imposed by the state legislature to ensure its proper use. Within those limits, PUDs can continue to provide local officials with tremendous opportunity for encouraging creative approaches to land development, efficient use of open space, and a greater variety in the physical development patterns of municipalities.

Endnotes

1. See generally Patrick J. Rohan, *Zoning and Land Use Controls, Cluster Zoning and Planned Unit Developments*, sec. 12.01(2) (1999).
2. See *Orinda Homeowners Comm. v. Board of Supervisors*, 11 Cal. App. 3d 768, 90 Cal. Rptr.

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88 (1970).

3. Planned development district zoning and planned unit development (PUD) zoning is the same thing. See Brian W. Ohm, *Guide to Community Planning in Wisconsin*, sec. 3.1.1: "Cities, villages, and towns exercising zoning authority under village powers have the authority under Wisconsin law to establish 'planned development districts' which are the same as PUDs." See also Michael J. Meshenberg, *The Language of Zoning: A Glossary of Words and Phrases*, American Society of Planning Officials, Planning Advisory Service, p. 25, (1976): "Other terms for PUD include planned development, unitary development, or community unit plan." This comment uses the more familiar term planned unit development or PUD rather than planned development.

4. See *City of Waukesha v. Town of Waukesha*, 198 Wis. 2d 592, 543 N.W.2d 515, rev. den'd, 201 Wis. 2d 436, 549 N.W.2d 732 (Ct. App. 1995).

5. See Patrick J. Rohan, *Zoning and Land Use Controls*, sec. 12.04(6) (2002): "Although zoning legislation may not necessarily preclude the creation of a PUD by a conditional use permit granted through an administrative act, the legitimacy of this procedure is dubious."

6. It should be noted that the Bell decision did not declare that sec. 62.23 does not mandate a comprehensive plan. Rather, Bell simply found that the comprehensive plan requirement of sec. 62.23 does not mandate a particular form for a comprehensive plan. It would seem likely that even under Bell, a zoning ordinance comprised of a haphazard and random set of regulations that lacked any reasonably discernable plan for a community could fail to satisfy the "comprehensive plan" requirement.

7. See e.g., *Cushman v. City of Racine*, 39 Wis. 2d 303, 159 N.W.2d 67 (1968).

8. See *Heitman v. City of Mauston Common Council*, 226 Wis. 2d 542, 595 N.W.2d 450 (Ct. App. 1999).

9. See *State v. Washburn Water Works Co.*, 182 Wis. 287, 196 N.W. 537 (1924) (Specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.)

10. The Wisconsin court of appeals did address whether a local ordinance imposed a requirement for mixed uses in a PUD in an unpublished decision. *Solochek v. S & L Developers*, 109 Wis. 2d 687 325 N.W.2d 738 Ct. App. 1982). However, as an unpublished decision, it carries no legal weight. Moreover, it focused entirely on the local ordinance in question and did not examine

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whether 62.23(7)(b) imposes such a requirement.

11. Patrick J. Rohan, Zoning and Land Use Controls, sec. 12.01(2):

One of the techniques advanced as a solution to the problems that resulted from use of the traditional approach to zoning regulation was the idea of concentrating development on smaller lots so that larger open spaces could be preserved. While this approach would allow larger-scale, higher-density development in some areas than would the traditional approach, this result was seen as an acceptable trade-off for the concomitant allocation of open space and dedicated land for recreational and other purposes.