

Legislation for Planned Unit Developments and Master-Planned Communities

Daniel R. Mandelker*

PLANNED UNIT DEVELOPMENTS AND MASTER-PLANNED COMMUNITIES are a major component of suburban and infill development in many metropolitan areas. They are a complex form of land development that requires statutory authority for sophisticated regulation, but in many states that authority is missing or inadequate. This statutory failure raises a serious problem that weakens the legality of planned unit development regulation in many jurisdictions.

This article discusses the legislation that is needed to authorize planned unit development regulation by local governments, and the requirements such legislation must contain. It first discusses the planned unit development concept and the statutory authority problem created when zoning statutes do not authorize their regulation. It finds that case authority upholding planned unit development regulation when there is no statutory authority is limited. The article then reviews examples of proposed model legislation¹ that authorize regulation and finds it does not resolve the statutory authority problem. It then considers state legislation for planned unit developments, concludes that statutory authority is nowhere complete, and that legislation is needed that can successfully authorize the regulation of planned unit development projects.

*Stamper Professor of Law, Washington University in St. Louis. B.A. 1947, LL.B. 1949, University of Wisconsin; J.S.D. 1956, Yale University. The author would like to thank Josh Gammon, J.D. Washington University 2008, and Kathie C. Molyneaux, Washington University Law School Library, for their research assistance. The author has submitted a Proposal for a Uniform Act Authorizing Local Regulation of Planned Unit Developments (Sept. 15, 2007), to the Real Estate Advisory Board of the National Conference of Commissioners on Uniform State Laws. The author's report, *Planned Unit Developments*, Planning Advisory Report No. 545 (American Planning Association, 2007) [hereinafter Mandelker, *Planned Unit Developments*], discusses local land use ordinances that regulate planned unit developments and includes a chapter summarizing some of the legislation that authorizes planned unit development regulation. I would like to thank John Delaney and Ed Sullivan for their suggestions for this article.

1. Model legislation for planning and zoning has a long history, detailed in Stuart Meck, *Modern Planning and Zoning Legislation: A Short History in Modernizing State Planning Statutes*; The Growing Smart Working Paper, Vol. 1, at 1 (American Planning Association, Planning Advisory Service, Report Nos. 462/463 (1996). Two of the

I. The Planned Unit Development Concept

Planned unit development as a land use concept began in the 1950s and 1960s. Simply put, it is an integrated land development project that local governments review and approve comprehensively at one time, usually under the zoning ordinance. This is a two-step procedure when rezoning is required. The legislative body first adopts a planned unit development zoning district in the text of its zoning ordinance² and then approves a zoning map amendment to create a planned unit development district. Legislative approval is needed for decisions about use and density.³ A development plan is approved next. It includes a map and the regulations under which the project will be built. There are two plan approval alternatives. In one alternative the legislative body approves a generalized concept plan for the planned unit development that shows uses, densities and intensities.⁴ The planning commission then approves a development plan that contains the detail needed to regulate project development, including land use regulations, open space, and circulation systems. A concept plan is not submitted under the second alternative and the legislative body instead approves the detailed site plan. Under either alternative a planned unit development review is a discretionary process that is a substitute for the traditional zoning system, under which the zoning ordinance specifies permitted uses as-of-right. Subdivision approval is necessary if subdivision of the project is required.

Planned unit developments first became popular as a development option for residential development because of gaps and flaws in land use ordinances. The principal ordinance is the zoning ordinance, which is authorized by legislation based on a Standard State Zoning Enabling Act, published in 1926 by the United States Department of Commerce.⁵

model statutes proposed for planned unit developments that are discussed here were prepared as part of major efforts at a comprehensive revision of all land use legislation.

2. This may be a new zoning district or a zoning district that overlays the existing zoning district.

3. Density of use refers to the number of housing units allowed in a residential project. Intensity of use is defined as "The number of dwelling units per acre for residential development and the floor area ratio (FAR) for nonresidential development, such as commercial, office and industrial," or "[t]he number of square feet of development per acre by land use type with respect to non-residential land uses." Michael Davidson & Faye Dolnick, eds., *A Planners Dictionary* 234, Planning Advisory Report Nos. 521/522 (American Planning Association, 2004). When the term "density" is used alone it is also meant to refer to intensity of use.

4. A master-planned community may require the approval of a master plan for the entire community followed by the approval of individual subarea plans.

5. The Standard Zoning Enabling Act can be viewed at <http://law.wustl.edu/landuse> law, in the "Statutes" section.

The zoning ordinance authorizes the adoption of zoning districts in which designated land uses are permitted and contains site development regulations that regulate lot size and frontage, yards, height, and site coverage. The other principal land use regulation that applies to residential development is the subdivision control ordinance,⁶ authorized by legislation based on a Standard Planning Enabling Act published by the United States Department of Commerce in 1928.⁷ This Act authorizes regulations for the review of subdivisions that regulate lot and block layouts, including requirements for infrastructure, such as streets and other public facilities.

Both regulations worked reasonably well when homes were built one at a time, on single lots, and a uniform lot development pattern was expected. They do not work well when development occurs in residential projects. There is no opportunity under the zoning ordinance to vary its preset requirements, so residential developments built under these restrictions tend to be uniform and monotonous. Subdivision regulations cannot regulate design. Open space is another problem. Building lots at the time subdivision and zoning legislation was adopted were small and located in built-up urban areas where local governments provided public parks. Lots became bigger as development moved to the suburbs, but much of the open space surrounding single family homes on large lots is wasted. Subdivision and zoning regulations cannot address this open space problem.

Planned unit development regulations for residential development can overcome these shortcomings through a discretionary review process that can produce good project design and provide usable open space by requiring common open space in return for “clustering” housing elsewhere in the project. Common open space is privately held or conveyed to the local government and is available only to project residents. Total project density is not increased.⁸ This form of planned

6. Extensive discussion of land use regulations and how they are implemented is contained in commentary to the model legislation in American Planning Association, *Growing Smart Legislative Guidebook: Model Statutes for Planning and Management of Change* (S. Meck ed. 2002) [hereinafter Legislative Guidebook]. Zoning is discussed in commentary for Section 8-201 at p. 8-45, subdivision control in commentary for Section 8-301 at p. 8-68. Growing Smart was the legislative revision project lasting over several years that produced the Legislative Guidebook. Stuart Meck was its Executive Director.

7. The Standard Planning Enabling Act can be viewed at <http://law.wustl.edu/landuse> law, in the “Statutes” section.

8. Density is increased in the area of the project in which housing was clustered, however, which can trigger objections by neighbors in lower-density housing.

unit development is usually called “cluster” development or “cluster” housing. Subdivision regulations can be used to approve this type of development if there is no change in use or density requiring legislative approval, though it can also be approved under zoning regulations.⁹

Even more flexibility and creativity is possible with residential planned unit developments that include multifamily housing, with projects that include only commercial or industrial uses, and with mixed-used projects that include a variety of uses. Planned unit developments known as master-planned communities can cover several square miles and include town centers as well as residential neighborhoods and other nonresidential development.¹⁰ Whether limited to residential or applied to other projects, planned unit development regulations can create statutory authority problems under the typical zoning statute. These problems are discussed next.

II. Zoning Problems Under the Standard Zoning Enabling Act

Planned unit development regulations are usually included in zoning rather than subdivision ordinances because a discretionary approval process that can consider the requirements contained in zoning ordinances is necessary. The zoning ordinance cannot begin to handle the discretionary review process required by planned unit developments, however. The difficulty comes from the zoning structure legislated by the Standard Zoning Act. Its central feature is legislative authority to divide a community into mapped zoning districts, for which the zoning ordinance provides the land uses that are permitted as-of-right without discretionary review.

There is considerable strain on the conventional zoning system because of the way in which planned unit developments are approved. A zoning ordinance based on this statutory structure does not allow the review of a planned unit development in a discretionary process where development and design details can be adopted for the entire development.¹¹

9. Developments would have to be approved as a conditional use, which is not advisable because the board of adjustment authorized to approve these uses does not have the expertise to review them.

10. For discussion of planned communities, see Great Planned Communities (Jo Ellen Gause, ed. 2002) (planned communities in Europe and America); Ann Forsyth, *Reforming Suburbia: The Planned Communities of Irvine, Columbia and The Woodlands* (2005).

11. For discussion of procedures for approving planned unit developments, see Mandelker, *Planned Unit Developments*, *supra* note * (note containing author's biographical information), Ch. 3.

The Standard Zoning Act does not authorize anything like this discretionary approval process because the administrative review authority it provides for zoning ordinances is limited. It provides for a board of zoning adjustment¹² authorized to grant hardship variances and conditional uses. Variances from zoning regulations must be based on a showing of hardship as defined by the statute. Special exceptions, also known as conditional uses, can be allowed only for uses listed in the ordinance and only if they meet criteria for their approval that are included in the ordinance. Both the variance and special exception were clearly intended for single uses on single tracts of land and cannot be used to make legislative decisions.¹³

Another problem is the delegation of decision making authority to the planning commission. Statutory authority for the creation of a planning commission is found in the Standard Planning Enabling Act.¹⁴ Neither this Act nor the Standard Zoning Act gives it the authority to make adjudicative decisions.¹⁵

The uniformity requirement is another potential bar. Zoning statutes include a provision in the Standard Zoning Act that requires zoning regulations to be uniform within each zoning district.¹⁶ This requirement prevents the mixing of uses within zoning districts. It also prevents variations in site development standards within zoning districts, such as lot size and yard requirements. Planned unit developments that include more than one use and vary lot sizes and yards could conceivably violate this requirement.

12. This body is sometimes called the zoning board of appeals or board of appeals. It is also delegated the authority to interpret the zoning ordinance.

13. Though the special exception, or conditional use, would not seem appropriate for the review of planned unit developments, its use has been recommended by some model legislation and it has been authorized by some statutes. A special exception can be used only for planned unit developments where no legislative change is required and where the board of adjustment approves the special exception. Special exceptions could be used for planned unit developments that require a legislative change in jurisdictions that confer the power to approve them on the governing body. The special exception process is still not an appropriate process in which to review the many complex development problems raised by planned unit developments.

14. United States Dep't of Commerce, 1928.

15. For a discussion of the various bodies involved in the administration of zoning ordinances and their shortcomings in the regulation of planned unit developments, see *Cheney v. Village 2 at New Hope, Inc.*, 241 A.2d 81 (Pa. 1968).

16. United States Dep't of Commerce, Standard State Zoning Enabling Act § 2 (rev. ed. 1926): "All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts." State zoning statutes are based on the Standard Act and include this provision.

Other important issues that arise in the regulation of planned unit developments are simply not covered by zoning statutes based on the Standard Act. There is no provision for establishing vested rights in zoning regulations that protect planned unit development projects from zoning changes that can prevent or limit the completion of a project.¹⁷ Neither is there any provision for the dedication and maintenance of common open space, which is a common feature of many planned unit developments. They may also include natural resource and other areas requiring preservation, and statutory authority is needed for the preservation and maintenance of these areas as well.

In summary, the zoning ordinance is the preferred place for most planned unit development regulations, but zoning statutes do not provide the necessary authority for these regulations. The discretionary process required in planned unit development regulations is not authorized. The uniformity requirement may prevent planned unit developments with mixed uses and variable site development standards. The statutes do not provide authority for vested rights protection, nor the designation and preservation of common open space and natural resource areas. Some courts have approved the regulation of planned unit developments under zoning statutes based on the Standard Act, but these cases do not provide the comprehensive basis for their regulation that these developments require. The section that follows considers this problem.

III. Statutory Authority to Review and Approve Planned Unit Developments Under Statutes Based on the Standard Zoning Enabling Act

A. The Statutory Authority Problem

The problem of statutory authority for planned unit development regulations is critical because local governments do not enjoy inherent powers. They must get their powers from the state, either by statute or through home rule, which usually requires a charter.¹⁸ Local governments that rely on statutes must also overcome Dillon's Rule, a strict construction rule that severely limits local government authority.¹⁹ Some states have

17. For discussion of vested rights, see *infra* text accompanying notes 119–126.

18. For discussion of statutory and home rule authority, see DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM*, Ch. 3 (6th ed. 2005).

19. "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." JOHN F. DILLON, *MUNICIPAL CORPORATIONS* § 55 (1st ed. 1872).

repealed Dillon's Rule,²⁰ but even in these states the statutory authority problem can be troublesome.

Home rule authority, which is based on the state constitution, can be more helpful. There are two types. One type of constitutional provision specifies the powers home rule governments can exercise and usually requires the adoption of a charter to exercise these powers, though this is not universal. Under the second type, the home rule provision authorizes home rule governments to exercise any power that can be exercised by the state legislature unless a state statute denies that power. Denial can be authorized as either explicit or implicit. Under either of these types the exercise of home rule power by a local government is subject to and must not be in conflict with state laws of general application.²¹

Planned unit development regulations present an authority problem in both home rule and statutory authority states because they include procedures and requirements that are not authorized under zoning statutes based on the Standard Zoning Act. The question in statutory authority states is whether a court will find implied authority to adopt planned unit development regulations when the statute is silent on this authority. The first question in home rule states is whether zoning is authorized as a home rule power. This question does not seem troublesome.²² Conflict with state legislation presents a more difficult problem. A court may hold a planned unit development ordinance that adds procedures for project approval not included in the zoning statute conflicts with the statute, or that the statute denies local governments the authority to add these procedures in legislative home rule states.

Locally-adopted voting and other requirements for zoning decisions that add to or change the voting requirements contained in zoning statutes provide an example of how courts may treat planned unit development regulations that also add to or change statutory requirements without statutory authority. Supermajority voting requirements

20. E.g., Alaska Const. art. X, § 1 ("The purpose of this article is to provide for maximum local self-government. . . . A liberal construction shall be given to the powers of local government"); *see Liberati v. Bristol Bay Borough*, 584 P.2d 1115 (Alaska 1978) (reading provision as a repeal of Dillon's Rule).

21. For discussion, see DANIEL R. MANDELKER, LAND USE LAW § 4.25 (5th ed. 2003), hereinafter LAND USE LAW. The first type of home rule is called *imperium in imperio* or a state within a state. The second type is called legislative home rule. A lack of conflict with state legislation is required under either type of home rule, but there is a tendency to find conflict less often under legislative home rule because it is a plenary delegation of legislative power.

22. *Board of Appeals of Hanover v. Housing Appeals Comm.*, 294 N.E.2d 393 (Mass. 1973) (zoning power within inherent constitutional home rule power).

for zoning decisions illustrate this problem. Zoning amendments are an example. They require only a simple majority vote by the legislative body, but section five of the Standard Zoning Act requires a three-fourths majority vote when there is a protest by twenty percent or more of nearby property owners. State statutes picked up this provision,²³ but municipalities have added to or changed it and have argued they have statutory authority to make the change even though the zoning statute is silent on whether they may do so.

The judicial view in statutory authority states is that ordinances adding supervoting requirements not authorized by statute are invalid. In a Nevada case,²⁴ for example, a county adopted a supermajority voting requirement for nonconforming land use changes. The court refused to find implied authority for this requirement when the statute did not authorize it and when the legislature had authorized supermajority requirements for other land use actions. It did not cite Dillon's Rule, but was unimpressed by statutes giving counties broad zoning powers over zoning matters. Other cases are in accord.²⁵ The presence of other supermajority requirements in the statutes influenced these cases to hold that supermajority requirements added by ordinance were unauthorized. Zoning statutes similarly authorize specified administrative procedures for zoning ordinances and the procedures authorized by planned unit development are additional to those procedures.

In home rule states, where zoning falls within the home rule power, the question is whether supermajority or similar requirements not authorized by statute are in conflict with or denied by state statute. The cases are mixed. A Florida case upheld a proposed charter amendment requiring unanimous city commission approval for comprehensive land

23. E.g., Mo. Rev. Stat. § 89.060 (2000) (30% protest required).

24. S. Nev. Homebuilders Ass'n v. Clark County, 117 P.3d 171 (Nev. 2005).

25. *Accord Mossburg v. Montgomery County*, 620 A.2d 886 (Md. 1993) (authority granted elsewhere in statutes precluded implied authority, and also holding requirement not authorized because denial was for lack of supermajority without findings, and failure to make findings precluded judicial review); *Benderon Dev. Co. v. City of Utica*, 781 N.Y. Supp. 2d 880 (N.Y. Misc. 2004) (statute authorizing supermajority vote to amend zoning ordinance only when there is neighbor protest and requiring only simple majority for amendment preempts local ordinance authorizing supermajority); *Development Indus. v. City of Norman*, 412 P.2d 953 (Okla. 1966) (quoting text of Dillon's Rule). *But see Pan Am Health Org. v. Montgomery County*, 657 A.2d 1163 (Md. 1995) (distinguishing *Mossburg* and holding county had implied authority to zone international organizations because *Mossburg* dealt with procedures and not scope of the zoning power). Some of these cases involved home rule governments for which the state statute supplied zoning authority.

use plans or plan amendments affecting five or fewer parcels.²⁶ The court said simply that it would “establish only an internal operating or procedural rule.”²⁷ It also upheld mandatory referendum requirements for various land use actions. The Missouri court, however, held a decrease from the statutory percentage of the landowners required to protest rezonings was invalid when not authorized by statute.²⁸ It held the zoning statutes were the sole source of zoning authority and that a city must conform to the statutes when exercising zoning power.

An Ohio case holding invalid a zoning ordinance that contained mandatory referenda and ward veto requirements not authorized by statute illustrates the reason why courts hold additional voting and similar requirements not authorized by statute invalid.²⁹ State statutes provided notice, hearing, voting, and optional referendum requirements for zoning ordinances. The court held the ordinance conflicted with these statutes because a zoning ordinance became effective under state law after adoption by the legislative body under the statutory voting rules. Additional burdens were imposed by the ordinance that went “far beyond” the statutory scheme.³⁰

B. *The Floating Zone Analogy*

The supermajority voting and similar cases raise questions about the validity of zoning ordinances, like planned unit development regulations, that add new procedures and requirements not authorized by statute. Similar questions are raised by a zoning procedure known as a “floating zone,” which is not usually authorized. Under a floating zoning procedure a local government first adds a new zone to the text of

26. *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144 (Fla. Ct. App. 2006); *see also A.C.E. Equip. Co. v. Erickson*, 152 N.W.2d 739 (Minn. 1967) (charter requirement of two-thirds vote to override mayor’s veto takes precedence over state law).

27. 940 So. 2d at 1149.

28. *City of Springfield v. Goff*, 918 S.W.2d 786 (Mo. 1996); *see also Gumprecht v. City of Coeur D’Alene*, 661 P.2d 1214 (Idaho 1983) (comprehensiveness of zoning legislation leaves no room for direct legislation by electors through an initiative election).

29. *Rispo Realty & Dev. Co. v. Parma*, 564 N.E.2d 425 (Ohio 1990). The Ohio constitution gives noncharter municipalities the “authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Ohio Const. Art. XVIII, § 3.

30. The court also held that by making referenda mandatory the ordinance also avoided the statutory requirements for referenda, which required a petition by at least ten percent of the electorate and contained mandatory time frames. The ordinance was also invalid because voters in one ward could veto an ordinance approved by the legislative body and the electorate.

the ordinance and then designates it later on the zoning map as a map amendment.³¹ Usually the floating zone map amendment is to a zoning district more intense than the district that existed before, such as an amendment from single-family to multi-family housing.³² Planned unit development regulations are similar. They require the adoption of a planned unit development zone in the text of the ordinance and a later rezoning for that zone on the zoning map in response to a planned unit development application. They differ from the floating zone because they also require the approval of a development plan for the planned unit development in addition to the rezoning.

A floating zone procedure can create statutory authority problems because the zoning statute does not explicitly authorize a two-step amendment procedure of this type. It does authorize amendments to the zoning ordinance, however, so courts may find statutory authority for the floating zone as an acceptable way of carrying out the amendment process authorized by statute. This makes it easier to support statutory authority for a floating zone than for planned unit development regulations because these regulations also require approval of a development plan as a second step in the approval process. The courts have been receptive to the use of floating zones, even when there is no statutory authority to adopt them.

*Rodgers v. Village of Tarrytown*³³ is an early leading New York case finding statutory authority for floating zones when none existed in the statute. A new zoning district adopted in the text of the zoning ordinance permitted buildings for multiple occupancy of fifteen or fewer

31. "A floating zone is a special detailed use district of undetermined location in which the proposed kind, size and form of structures must be preapproved. It is legislatively predeemed compatible with the area in which it eventually locates if specified criteria are met and the particular application is not unreasonable. . . . It differs from the traditional Euclidean zone in that it has no defined boundaries and is said to float over the entire area where it may eventually be established. . . . The legality of this type of zoning, when properly applied, has been recognized by this court." (citations omitted; internal quotation marks omitted.) *Schwartz v. Plan & Zoning Commission*, 357 A.2d 495, 496 (Conn. 1975).

32. For discussion, see LAND USE LAW § 6.61. This technique is helpful because it allows municipalities to decide on a case-by-case basis whether a proposed zoning amendment is consistent with planning and zoning policy, and avoids prezoning of land that may stand idle because it does not meet market needs.

33. 96 N.E.2d 731 (N.Y. 1951). The court rejected other objections to the floating zone procedure. It did not deprive the village of the power to adopt zoning in the future because the village had the discretion to decide when to map a floating zone. It was not spot zoning because it applied to the entire village and not a single landowner. The ordinance did not have to set boundaries for the floating zone because the ordinance prescribed specifications for the new zoning district.

families, contained detailed site and density standards, and required a ten-acre site. Later the village approved and mapped a floating zone for the authorized use to replace a residential district. The court approved the floating zone procedure though not authorized by the statute because it held the village had a “choice of methods” for amending the ordinance. It could adopt a two-stage process in which it first added a zoning district to the text of the ordinance and then make a map amendment to that district on application by a landowner. One factor that might have encouraged the court to uphold the floating zone process was the limited change in use and density the ordinance allowed and the tightly-drawn standards for the development that was permitted. Other courts have approved floating zones when more intensive changes in use were allowed,³⁴ and in some of these cases the ordinance did not have the detailed site development standards contained in the Tarrytown ordinance.³⁵

The use of discretion authorized by floating zones has drawn criticism, however. A recent Maryland case upheld a floating zone ordinance but expressed concern about the flexibility inherent in floating zone procedures. It required measures in these ordinances to protect adjacent neighborhoods to address this concern.³⁶ Planned unit development regulations should require similar safeguards.

C. *Validity of Planned Unit Development Regulations When There is No Statutory Authority*³⁷

There has always been concern that courts may invalidate planned unit development regulations when there is no statutory authority. There are

34. *Sheridan v. Planning Bd.*, 266 A.2d 396 (Conn. 1969); *Pleasant Valley Neighborhood Ass'n v. Planning & Zoning Com.*, 543 A.2d 296 (Conn. App. Ct. 1988); *Bellemeade Co. v. Priddle*, 503 S.W.2d 734 (Ky. 1974); *Huff v. Board of Zoning Appeals*, 133 A.2d 83 (Md. 1957) (light manufacturing zone).

35. *Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. App. 1980) (approving general standards and noting that zoning requires flexibility).

36. *Mayor & Council v. Rylyns Enters.*, 814 A.2d 469, 484 (Md. 2002) (“[W]e consistently have held that the floating zone is subject to the same conditions that apply to safeguard the granting of special exceptions, i.e., the use must be compatible with the surrounding neighborhood, it must further the purposes of the proposed reclassification, and special precautions are to be applied to insure that there will be no discordance with existing uses”); *see also Campion v. Board of Aldermen*, 859 A.2d 586, 601 (Conn. Ct. App. 2004) (planned unit development ordinance held unauthorized because it gave the municipality “nearly unlimited discretion if the site meets minimum size requirements”), rev’d, 899 A.2d 542 (Conn. 2006); *Brunswick Smart Growth, Inc. v. Town Bd. of Town of Brunswick*, 2008 WL 1902089 (N.Y.A.D. 3 Dept. May 1, 2008) (noting that the floating zone is the “common and preferred” way to create planned unit development districts).

37. For discussion, see BRIAN W. BLAESER, *DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION* § 6.6 (10th ed. 2007).

other problems. Without statutory direction it is not clear which agency at the local level should be responsible for administering the planned unit development regulation. Statutory requirements for uniformity in zoning districts create a problem when planned unit developments contain more than one use and variable development standards. The discretionary and negotiated process leading up to the approval of a development plan is inconsistent with a zoning system in which local governments create zoning districts where uses are permitted as-of-right.³⁸

Cluster housing for residential development where there is no change in use has not presented problems because a legislative rezoning is not needed. Courts have upheld the delegation of authority to approve these developments to planning commissions.³⁹ Authority to grant special exceptions by the board of adjustment for a planned unit development that may contain nonresidential uses, but is primarily residential, has also been upheld when the ordinance provided adequate standards for the decision. A legislative decision was not needed.⁴⁰ An Illinois court upheld the negotiation process required in planned unit development regulation.⁴¹ The statutory authority problem becomes more complicated when a planned unit development requires a legislative rezoning followed by a review and approval of a development plan by the legislative body or planning commission. This two-step process, and the inclusion of more than one agency in that process, is not authorized by zoning statutes that follow the Standard Act.

The floating zone cases are helpful here, but only on the initial decision to adopt a zoning map amendment for a planned unit development district. Floating zones do not require the approval of a development plan once the floating zone is adopted. The Connecticut Supreme Court relied on cases upholding floating zones to uphold a planned unit development ordinance that required the approval of a development plan when there was no statutory authority for this procedure. It held the creation of a planned unit development district was comparable to the creation of a floating zone because it was no different from the creation

38. Planned unit development regulations are also subject to challenge as invalid contract zoning, a process in which municipalities and developers agree to conditions to be attached to legislative rezonings. See LAND USE LAW §§ 6.62-6.65.

39. Prince George's County v. M & B Constr. Corp., 297 A.2d 683 (Md. 1972) (approval under subdivision ordinance); Chrinko v. South Brunswick Twp. Planning Bd., 187 A.2d 221 (N.J.L. Div. 1963).

40. In re Moreland, 497 P.2d 1287 (Okla. 1972).

41. Rutland Environmental Protection Assoc. v. Kane County, 334 N.E.2d 215 (Ill. App. Ct. 1975) (planned unit development zoning cannot be accomplished without negotiation).

of any other zoning district.⁴² Like the floating zone, the planned unit development district was a “legitimate legislative act by the city to regulate growth and meet the ‘need for flexibility in modern zoning ordinances.’”⁴³ Planned unit development ordinances, unlike floating zones, did “not contain particular types of uses, with identified specifications, that have been preapproved for placement on particular properties at a later date.”⁴⁴ This difference did not bother the court, but the court did note that a planned unit development ordinance, like a floating zone, had the potential for meeting individual preferences and responding to development pressures rather than selecting the best area for development. The court found the broad zoning authority conferred by statute was sufficient to support planned unit development ordinances because of the need to provide flexibility in zoning practice.⁴⁵ The difficulty with this decision is that it considered only the rezoning issue and did not consider, or at least was not concerned about, the statutory authority issue presented by development plan review and approval. Nevertheless, the floating zone cases provide support for the validity of planned unit development ordinances even when there is no statutory authority for them.

*Cheney v. Village 2 at New Hope, Inc.*⁴⁶ is an early leading case that upheld the validity of a planned unit development regulation where there was no statutory authority, and where the court had not previously approved the use of floating zones. The legislative body adopted a planned unit development district and on the same day rezoned a large tract of land from low density residential to planned unit development.⁴⁷ The planning commission then approved a plan for the development and the village issued building permits. Uses, densities, heights and distances between structures were all detailed in the planned unit development ordinance, which is not typical, and the court noted the

42. *Campion v. Board of Aldermen*, 899 A.2d 542 (Conn. 2006) (planned unit development on small tract of land to expand a catering business); *see also Cere v. Natick*, 309 N.E.2d 893 (Mass. App. Ct. 1974) (ordinance authorized cluster development as floating zone; court held it did not mandate zoning; validity not considered).

43. 899 A.2d at 552.

44. *Id.* at 555.

45. Neither was the court concerned that a floating zone is approved in two steps while the adoption of the zone and development plan was approved in one step under the planned unit development ordinance. 899 A.2d at 555. This is not always the case with planned unit development ordinances.

46. 241 A.2d 81 (Pa. 1968).

47. This is a typical procedure. Adoption of a planned unit development district and a rezone for the district are often done in response to a request from a developer who has a project she wants approved as a planned unit development. This happens frequently.

planning commission could only approve developments that met the requirements in the ordinance. When that is not the case, which is typical, any administrative decision by the planning commission or other administrative body must be guided by adequate ordinance standards.

Addressing next what amounted to the uniformity issue,⁴⁸ the court first held there was “nothing” in the statute that prevented the creation of a zone with many uses as the statute did not contain this limitation. It then held the planning commission had implied statutory authority to review planned unit developments. The statute only gave the commission the authority to approve subdivisions, but the court noted nothing in the statute prohibited it from approving development plans. Planned unit developments are also mapped and submitted to the administrative agency for review at the same time and include specific structures so that the review process also combines the authority of the planning commission with that of the building inspector. After considering the legislative body or the board of adjustment as alternatives, the court decided that the planning commission was the only logical body to have this authority.⁴⁹

The court also held the planning commission would not be rezoning because any planned unit development it approved would have to conform to detailed requirements contained in the ordinance.⁵⁰ This is an important holding, because it establishes a rule that major development decisions for these developments must be made by the legislative body. The Washington Supreme Court recognized this limitation in the *Cheney* case and invalidated an ordinance that gave the planning commission the authority to approve a planned unit development as a floating zone.⁵¹ It distinguished *Cheney* because there the legislative

48. *Accord* on the uniformity issue *Orinda Homeowners Comm. v. Board of Supervisors*, 90 Cal. Rptr. 88 (Cal. Ct. App. 1970) (character of units need not be alike); *Chrinko v. South Brunswick Twp. Planning Bd.*, 187 A.2d 221 (N.J.L. Div. 1963) (planned unit development option open to all developers).

49. The court noted that giving the authority to the legislative body would reduce flexibility because it would have to specify development details. The limited authority of the board of adjustment did not include planned unit developments, and it was not intended to handle large-scale planning and development decisions. Note, however, that much of the development detail was specified by ordinance in this case. *Cheney*, 247 A.2d at 87–88.

50. *Sheridan Planning Ass'n v. Board of Sheridan County Comm'rs*, 924 P.2d 988 (Wyo. 1996), holding that delegation of approval of a final planned unit development plan to the planning commission was not an improper delegation, when the plan could be approved only if it complied with a concept plan previously approved by the legislative body. A concept plan is a generalized plan that specifies the uses and densities allowable in the project.

51. *Lutz v. City of Longview*, 520 P.2d 1374, 1379 (Wash. 1974).

body rezoned the land; the planning commission only reviewed project details.⁵²

These cases provide some but not complete authority for the validity of planned unit development ordinances when they are not supported by statutory authority. The Connecticut case upheld a planned unit development ordinance on analogy to a floating zone, and other courts may follow this decision in states that have upheld the floating zone procedure. The *Cheney* case upheld a planned unit development ordinance where development standards were provided by the ordinance. Courts have also approved ordinances that gave the board of zoning adjustment or the planning commission the authority to approve planned unit developments when they are predominantly residential. They would not approve a delegation to these agencies when a major legislative change is required, which is usually needed for any development that includes mixed uses or increases densities.

IV. Model Laws for Planned Unit Development

The concern about statutory authority for planned unit developments has produced proposals for model legislation since land use legislation was first considered. Even if courts will uphold planned unit development ordinances when there is no statutory authority, a model law is needed to specify when and how a local government can approve this type of development.

An early law proposed in 1925 by a New York regional planning agency authorized the planning board to approve subdivision plans that included residential, apartment, and retail uses. The approved plan could modify zoning regulations, but the law provided the average density authorized by the zoning district could not be exceeded. The plan must also provide that “the appropriate use of adjoining land is reasonably safeguarded and [that] such plan is consistent with the public welfare.”⁵³ This was an early attempt to authorize what is now known as cluster housing and was enacted into law in New York and two other states.⁵⁴

52. *Id.* at 1377.

53. The proposal, which was Section 12 of a proposed enabling act, was published in EDWARD M. BASSETT, LAWS OF PLANNING UNBUILT AREAS IN VII REGIONAL PLAN OF NEW YORK AND ITS ENVIRONS 309–316 (1929). Bassett was assisted by attorney Frank B. Williams. Bassett later served on the committees that drafted the standard planning and zoning enabling acts and was a prominent land use attorney and author.

54. Richard F. Babcock, David N. McBride & Jan Krasnowiecki, Legal Aspects of Planned Unit Residential Development 11 (National Ass’n of Homebuilders & Urban Land Inst., 1965).

A modern version of this law survives in New York as statutory authority to approve cluster development.⁵⁵

Later attempts at drafting model laws have produced three different legislative models, one of them recently. The first was written in 1965 by the late Dick Babcock, a prominent Chicago land use lawyer, for the Urban Land Institute, a respected real estate research organization and the National Association of Home Builders.⁵⁶ It was titled a model act for Planned Unit Residential Development and was intended for residential development⁵⁷ and nonresidential development that served project residents.⁵⁸ The act did not explicitly allow multi-family development, but the permitted uses included “dwelling units in detached, semi-detached or multi-storied structures.”⁵⁹ It was adopted almost in its entirety in New Jersey and Pennsylvania.⁶⁰ Connecticut adopted but then repealed the model law because it was too detailed.⁶¹

55. N.Y. Gen. City Law § 37 (McKinney 2003 & Supp. 2008); N.Y. Town Law § 278 (McKinney 2004); N.Y. Village Law § 7-738 (McKinney Supp. 2008). New Jersey and Indiana later repealed their version of the model law. Hiscox v. Levine, 216 N.Y.S.2d 801, 806 (N.Y. Misc. 1961) held the statute was not an unconstitutional delegation of power but that “the power to make reasonable changes in the zoning ordinance does not confer the power to amend the zoning ordinance by rezoning large tracts of land.” *Id.* at 806. For a discussion of changes in the law made by the legislature in 1963 to tighten its authority see Rouse v. O’Connell, 353 N.Y.S.2d 124 (N.Y. Misc. 1974).

56. Richard F. Babcock, David N. McBride & Jan Krasnowiecki, Legal Aspects of Planned Unit Residential Development 57 (National Ass’n of Homebuilders & Urban Land Inst., 1965) [hereinafter Babcock Model]. The publication included an illustrative ordinance based on the model law. For discussion of the model law by its authors, see Richard F. Babcock, Jan Z. Krasnowiecki & David N. McBride, A Model State Statute, 114 U. PA. L. REV. 149 (1965); *see also* Jan Z. Krasnowiecki, Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control, 114 U. PA. L. REV. 47 (1965); Daniel R. Mandelker, Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki, 114 U. PA. L. REV. 98 (1965). The model act is summarized in Legislative Guidebook, *supra* note 6, at 8-76.

Ten years later the now-defunct Advisory Commission on Intergovernmental Relations published a model planned unit development law as part of its series of model laws for state legislatures. ACIR State Legislative Program, Vol.5: Environment, Land Use and Growth Policy 120 (1975). It was based principally on the Babcock model law. The Advisory Commission was a federally-supported agency that carried out research projects and provided statistical information for state and local governments.

57. *See* Section 1, the purpose clause, which noted the growing demand for housing with “greater variety in type, design and layout” and for the “conservation and more efficient use of open space ancillary to said dwellings.”

58. Section 3(a) limited the ordinance to authorizing these uses. Authorization of nonresidential uses in a residential development by ordinance avoided the objection that approval of a planned unit development by a nonlegislative body would be an improper delegation of power.

59. § 3(a)(1).

60. Legislative Guidebook, *supra* note 6, at 8-76.

61. Interview with Mario Zaveralla, former planning director, Windsor, Connecticut, April 19, 2006; *see* Conn. Gen. Stat. § 8-2d (West 2001) (savings clause for planned unit developments approved under prior statute).

The amount of discretion conferred on local governments to decide on the contents of an ordinance authorized by statute is an important issue and presents a difficult problem for legislative drafters. Granting considerable discretion allows local governments to respond to local needs, but some elements of an ordinance may need to be defined by the legislature. The Babcock model law gave local governments some discretion to decide on the content of a planned unit development ordinance. It authorized them, for example, to select the “local agency” to administer the ordinance.⁶² It provided for a consolidated hearing on an application to avoid multiple hearings under different regulations,⁶³ and authorized the local government to appoint the legislative body or an appointed body as the body designated to decide on applications.⁶⁴ It also gave local governments the authority to decide on the standards that applied to planned unit developments.⁶⁵

The act also included a substantial amount of detail that restricted local government discretion.⁶⁶ It stated, for example, that densities in planned unit developments must be based on factors detailed in the statute, including the physical characteristics of the site and the location, type and design of dwelling units.⁶⁷ It required the approval of a plan for a planned unit development, specified the type of information to be included in applications for approval,⁶⁸ and provided the criteria under which applications were to be evaluated.⁶⁹ The model law

62. § 2(c).

63. § 5(c).

64. §§ 5(c), 5(11) (definition of “municipal authority” authorized to make decisions on planned unit developments). The simplified residential nature of the planned unit development contemplated by the model act made a two-stage approval process, in which the approval of a development plan follows a rezoning for a planned unit development district.

65. § 3.

66. The drafters acknowledged the act contained more detail than was usual on procedures, but stated that “[i]f it is the wish of developers to have greater flexibility in substantive standards, the only method for insuring against discrimination is detailed and mandatory procedure.” Babcock Model, *supra* note 56, at 79.

67. § 3(b)(2).

68. § 5(d). Not all of this information, such as the location and size of common open space, would necessarily be needed for every planned unit development. Other information that might be necessary, such as information about traffic circulation and pedestrian systems, was not required, probably because the act expected development to occur in relatively small residential communities.

69. § 7(a). These criteria require consideration of whether the plan is consistent with the statement of objectives of a planned unit development; the extent to which the plan departs from existing zoning and subdivision regulations; the purpose, location and amount of common open space; physical design and an adequate provision for public services, control over traffic, furtherance of amenities such as light and air; relationship to its neighborhood; and provisions to protect the integrity of the public if the plan is to be carried out over a period of time.

contained requirements for the phasing of projects to be developed in phases⁷⁰ and extensive detail on the provision of common open space, the creation of a private organization to manage and maintain it, and enforcement of maintenance requirements as an alternative to municipal management.⁷¹

A second but limited model law was proposed as part of the major revision of land use legislation adopted by the American Law Institute in 1976.⁷² The Code proposed that planned unit developments be approved through a special development permit procedure, which is similar to a conditional use, and which it recommended as a substitute for existing administrative remedies and approvals in zoning ordinances. The Code provision was quite brief and allowed local governments to adopt their own planned unit development regulations based on local need. One innovation was the requirement that the development plan for a planned unit development must be consistent with the local comprehensive plan. The model code's revision of zoning enabling legislation had no takers, largely because its structural revision of the zoning system departed too radically from existing practice.

A third model law was proposed in 2004 as part of the comprehensive modernization of land use legislation adopted by the American Planning Association (APA).⁷³ This law generally includes only the requirements a planned unit development ordinance must contain.⁷⁴ It does not contain detailed requirements that planned unit developments must satisfy so they can be approved, except for common open space.⁷⁵ The definition of planned unit development contemplates mixed uses

70. §§ 3(b)(3), 7(a)(6).

71. § 3(c). A municipality could accept conveyance of the common open space, but an ordinance could not provide that it would be dedicated to public use. Creation of a private organization was optional. This type of organization is known today as a homeowners' association.

72. A Model Land Development Code, § 2-210, at 60–61. The model act is summarized in Legislative Guidebook, *supra* note 6, at 8-77. For discussion of the Code see Meck, Modern Planning and Zoning Legislation, *supra* note 1, at 7–8.

73. Legislative Guidebook, *supra* note 6, § 8-303. The Guidebook contains legislative proposals for planning at all government levels and for statutes authorizing all types of land use regulation. Commentary to the planned unit development model law discusses earlier proposed model laws for planned unit development and state legislation that presently authorizes its regulation. For discussion of the Growing Smart legislative project by its director see Stuart Meck, Present at the Creation: A Personal Account of the APA Growing Smart Project, 54 Land Use Law & Zoning Digest 3 (2002) [hereinafter Creation].

74. § 8-303(6). The purpose clause, however, includes a number of detailed development objectives that planned unit developments must meet. § 8-303(1).

75. § 8-303(10). Some of this paragraph is borrowed from the Babcock model law.

and density and intensity increases,⁷⁶ but the model law authorizes their approval “in the manner of a preliminary plan and final plat of a subdivision” or as a conditional use,⁷⁷ but there is no specific provision for development plans and their approval. The selection of the conditional use procedure limits the usefulness of this model law because conditional use approvals are not designed for large-scale developments such as planned unit developments. Approval of a planned unit development as a subdivision is possible only for residential cluster housing when there is no increase in density. Legislative approval by the legislative body is optional for mixed-use projects and when there is an increase in density or intensity,⁷⁸ but this approval is not coordinated with approval as a subdivision or conditional use.⁷⁹

V. Issues in Drafting Legislation for Planned Unit Developments

The model laws proposed by Dick Babcock and the APA resolve some, but not all, of the statutory authority problems presented by planned unit development regulation. They authorize their regulation and approval, the selection of an approval body, the adoption of approval standards, project phasing and the type of planned unit developments that can be approved. They eliminate the uniformity problem by authorizing more than one use in a project. They do not deal as well with the staged approval process in which the legislative body first rezones for a planned unit development district and the planning commission then approves the development plan. Nor do these model laws deal successfully with planned unit developments that require changes in use, density, or intensity.

Should legislation specify the type of planned unit development a local government can authorize, for example, or should it leave this

76. § 8-303(3).

77. § 8-303(12). Projects over ten acres would go through subdivision review. Another problem with the selection of conditional uses to approve planned unit developments is that the authority to approve these uses is given to the board of zoning adjustment, a lay board that does not have the expertise to review these projects. This is less of a problem when, as in some jurisdictions, the authority to approve conditional uses is given to the legislative body following a recommendation by the planning commission.

78. § 8-303(7).

79. The model law authorizes the approval of planned unit developments as a “development permit,” § 8-303(11), which triggers procedures recommended for administrative review in Chapter 10. This is helpful, but the two-step approval required for planned unit developments requires some modification of these procedures. Approval criteria are generally limited to compatibility with the surrounding area.

choice to local governments? Planned unit developments are complex development projects. A statute cannot mirror the content an ordinance should include, but it should not provide minimal authority either. A balance must be achieved. This is not easy, but it is easier to identify the issues a comprehensive statute should cover than to decide how they should be legislating.⁸⁰ A statute should include a definition of the planned unit developments local governments can approve. It should require criteria for review and approval procedures. Provision should be made for the dedication and maintenance of common open space. Finally, attention should be given to the vested rights issue. These are the principal regulatory issues. They are discussed here except for the common open space problem. This problem can be resolved through statutory provisions for dedication of open space and its management and maintenance by local governments or homeowners' associations. The Babcock model law includes extensive provisions that deal with this problem,⁸¹ and other statutes have adopted these or similar requirements.⁸²

80. A statute can have a statement of purpose, though this kind of provision may create ambiguity because it may not be clear whether the purpose clause provides substantive standards local governments must consider. This problem occurs at the local level in the administration of planned unit development ordinances. *See DuPont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 426 A.2d 327 (D.C. App. 1981) (purpose clause treated as approval criteria). Some statutes have purpose clauses that serve the function of defining a planned unit development. Nev. Rev. Stat. Ann. § 278A.020 (LexisNexis 2000) (gives the reasons for approving planned unit developments, such as a demand for housing, a more efficient use of land, and greater flexibility in regulation). Neb. Rev. Stat. § 19-4401 (2007) and Mich. Comp. L. § 3503(1) (West 2006), are similar.

81. Babcock Model, *supra* note 56, § 3(c). The statute requires an ordinance to set aside common open space for project residents, decide on its amount and location, and provide for improvement and maintenance. It may require the establishment of a homeowner's association for management and maintenance. It must authorize the local government to require maintenance and to assess the cost of maintenance against properties in the development.

82. Colo. Rev. Stat. § 24-67-105(b) (1999) (authorizing inclusion of common open space, formation of organization to own and maintain common open space and requiring maintenance); Nev. Rev. Stat. Ann. §§ 278A.040, 273A.130, 278A.170-278A.190 (LexisNexis 2000) (based on Babcock model law); N.J. Stat. Ann. §§ 40:55D-45.2(c) (West 1991) ("An open space plan showing the proposed land area and general location of parks and any other land area to be set aside for conservation and recreational purposes and a general description of improvements proposed to be made thereon, including a plan for the operation and maintenance of parks and recreational lands"); Pa. Stat. Ann., tit. 53 §§ 10705(f) (West 1997) (based on Babcock model law). Some statutes authorize but do not specify requirements for common open space. E.g., Idaho Code Ann. § 67-6515 (2006). Laws authorizing cluster development provide for the designation and maintenance of common open space. E.g., N.Y. Town Law § 278 (McKinney 2004); *see also* R.I. Gen. Laws § 45-24-47 (1999) (requires restrictions against development and management plan).

The APA's Legislative Guidebook adopted a tight-loose philosophy on the statutory detail issue.⁸³ It provides detailed statutory guidance on critical issues, such as decision making procedures and the content of the comprehensive plan, but gives local governments autonomy to decide the administrative structure for land use regulation. The question is whether this approach is correct for planned unit development legislation. Both the Babcock and APA model planned unit development laws generally adopt the APA approach, though some flexibility is allowed on substantive issues.

Whether detailed direction should be provided on the substantive requirements for planned unit developments, including the criteria under which they must be approved, will depend on how much flexibility a legislature wants to give local governments. A legislature may also want to provide detailed substantive requirements for planned unit developments if it wants to encourage a particular kind of development or limit the planned unit developments local governments can authorize. A compromise approach would give local governments more flexibility by requiring them to specify the type of planned unit development they can authorize and the standards for their approval in their local ordinances. This approach leaves it to local governments to decide what kind of planned unit development they want to allow and what criteria they want to apply to their approval. Whether detailed statutory guidance is needed on procedures for review depends on whether the state believes that procedures should be detailed so that decision making will be fair and uniform throughout the state.

VI. State Legislation for Planned Development

A number of states have adopted statutes authorizing the regulation of planned unit development.⁸⁴ They vary considerably, and there is no uniform pattern. Some statutes simply contain a one-line provision authorizing local government to regulate planned unit development.⁸⁵

83. Stuart Meck, Highlights of the American Planning Association's Growing Smart Project: New Tools for Planning and Management of Development, 25 Zoning & Plan. Rep. 49, 50–51 (2002).

84. Summaries of many of these state statutes are in Chapter 6 of Mandelker, *Planned Unit Developments*, *supra* note * (note containing author's biographical information).

85. Ark. Code Ann. § 14-56-416 (1998); Fla. Stat. Ann. § 163.3202 (West 2006); 65 Ill. Comp. Stat. 5/11-13-1.1 (2006) (authorizes approval of planned unit development as special use); Kan. Stat. Ann. § 12-755 (2001); Ky. Rev. Stat. Ann. § 100.203(1)(e) (Lexis-Nexis 2004) (authorizes planned business, industrial, neighborhood and group housing districts); Mass. Gen. Laws ch. 40A, § 9 (2006) (zoning ordinances can authorize

A few authorize cluster development.⁸⁶ Other statutes contain more statutory detail but provide only limited authority for the regulation of planned unit development. They usually list but do not detail the elements of a planned unit development ordinance.⁸⁷ Another group provides more comprehensive statutory authority for regulation at the local level. These statutes are examined here.

A. Defining Planned Unit Development

A statute should include a definition of planned unit development, as the statutory definition will bind local governments because they cannot modify it.

A preferable definition should define the process through which a planned unit development is approved, as well as the type of project that qualifies as a planned unit development, without limiting local governments to projects with certain uses or with certain specified features. The Colorado statute is one example. In addition to allowing development for any use, it defines a planned unit development as land to be “developed under unified control or unified plan of development.”⁸⁸ The

cluster and planned unit developments as special uses); Minn. Stat. Ann. § 394.301 (West Supp. 2008) (as conditional use); N.H. Rev. Stat. Ann. §§ 674:21, 674:21-a (Supp. 2007); Va. Code Ann. §§ 15.2-2201, 2286 (Supp. 2008); W.Va. Code Ann. §§ 8A-3-1(a) (comprehensive plan may provide for planned unit developments), 8A-7-2(e)(14) (LexisNexis 2007) Wis. Stat. §§ 59.69(2)(bm) (2000) (zoning ordinance may authorize planned unit developments to achieve more efficient use of land and may set standards and regulations for these developments).

86. 3-509 (2007) (authorizing subdivision regulations that promote cluster development); Va. Code Ann. § 15.2-2286.1 (Supp. 2007) (limited to certain counties). An identical group of New York laws authorizing cluster development are based on an early 1925 proposed act. N.Y. Gen. City Law § 37 (McKinney 2003 & Supp. 2008); N.Y. Town Law § 278 (McKinney 2004); N.Y. Village Law § 7-738 (McKinney Supp. 2008). See text accompanying notes 52, *supra*.

87. Idaho Code Ann. § 67-6515 (2006) (requires procedures and authorizes regulation of “requirements for minimum area, permitted uses, ownership, common open space, utilities, density, arrangements of land uses on a site, and permit processing”); Miss. Code Ann. § 19-5-10 (2003) (authorizes development agreements to carry out master-planned communities); Ohio Rev. Code Ann. §§ 303.022, 303.023; 519.021, 529.022 (LexisNexis 2003) (authorizes approval of planned unit developments as conditional uses, adoption of individual regulations or rezoning, which may replace existing zoning or be an overlay zone); R.I. Gen. Laws § 45-24-47 (1999) (authorizes regulation of planned unit developments; ordinance must specify uses, ratio of residential to non-residential use, densities, required public facilities and buffer areas); S.C. Code Ann. §§ 6-29-720 (Supp. 2007), 6-29-740 (2004); Vt. Stat. Ann. tit. 24, § 4417 (2007) (lists very specific purposes for planned unit developments but is unclear about approval process); Wis. Stat. § 62.23(7)(b) (2000) (“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”).

88. Colo. Rev. Stat. § 24-67-107(3) (1999). Development for any use is authorized under a plan that does not correspond to existing land use regulations.

Michigan statute authorizes development “through a land development project review process based on the application of site planning criteria to achieve integration of the proposed land development project with the characteristics of the project area.”⁸⁹ The Nevada statute provides a simple definition that only requires ownership of land as a single entity and authorizes development for any use.⁹⁰

It is also possible, as in the Vermont statute, to closely define the planned unit developments a local government can approve.⁹¹ Compact, pedestrian-oriented is one type of development that is authorized. Pennsylvania, whose statute is based on the early Babcock model law, limits planned unit developments to planned residential development.⁹² A definition that does not limit the type of planned unit development a local government can authorize is preferable, unless the state has certain development objectives it wants to achieve by authorizing these projects.

B. Approval Standards

Statutes must provide the authority to adopt the standards local governments will apply in the review of planned unit developments. This authority should be open-ended. The Nevada statute is an example. Local governments are required to “set forth the standards and conditions by which a proposed planned unit development is evaluated.”⁹³ They must include the uses permitted,⁹⁴ the density and intensity of land use, and

89. Mich. Comp. L. § 3503(1) (West 2006).

90. Nev. Rev. Stat. § 278A.065(1) (LexisNexis 2000): “Planned unit development” means an area of land controlled by a landowner, which is to be developed as a single entity for one or more planned unit residential developments, one or more public, quasi-public, commercial or industrial areas, or both. This definition would include a single lot and raises the question whether a local government could impose a minimum tract size; *see also* Colo. Rev. Stat. § 24-67-105 (ordinance may specify “minimum number of units or acres which may constitute a planned unit development”).

The definition of “Planned Residential Unit Development” requires development of a number of dwelling units under a plan that does not correspond to the regulations for the residential zoning district. Nev. Rev. Stat. § 278A.070 (2000).

91. Vt. Stat. Ann. tit. 24, § 4417(a) (2007). This paragraph lists the purposes for which a planned unit development can be approved, which include “[t]o encourage compact, pedestrian-oriented development and redevelopment, and to promote a mix of residential uses or nonresidential uses, or both, especially in downtowns, village centers, new town centers, and associated neighborhoods,” to implement the policies of the comprehensive plan, to encourage compatible development in the countryside, to allow flexibility in development, to provide for the conservation of open space features, to provide for the efficient use of public facilities, and to encourage energy-efficient development.

92. Pa. Stat. Ann. tit. 53, § 10702 (West 1997).

93. Nev. Rev. Stat. § 278A.090 (LexisNexis 2000).

94. *Id.* § 278A.100.

“the design, bulk and location of buildings.”⁹⁵ Other statutes are similar.⁹⁶ They may also require compliance with the comprehensive plan, which is advisable.⁹⁷ Statutes should also contain a requirement that the uniformity requirement does not apply to planned unit development regulations.⁹⁸

Importantly, the Nevada statute requires that the standards for any feature of a planned unit development must contain “sufficient criteria for the evaluation of specific planned unit development proposals.”⁹⁹ This requirement is critical. It not only prevents arbitrary decision making, but the cases are clear that decisions denying or approving applications for planned unit development must be based on standards included in the ordinance.¹⁰⁰

Some statutes go further and require ordinances to include detailed substantive criteria for the review of planned unit developments. Criteria of this kind were included in the Babcock model law¹⁰¹ and are included in legislation based on this model.¹⁰² They require consideration of issues including the extent to which a plan departs from zoning regulations; the purpose, extent and location of common open space; physical design; adequacy of public services, traffic control, and light, air, recreation and visual amenities; the relationship to the neighborhood; and adequate phasing requirements.

Whether substantive review criteria of this kind should be included in a planned unit development law is debatable. Planned unit developments were initially conceived as a way to improve project design and

95. *Id.* § 278A.120.

96. Colo. Rev. Stat. § 24-67-104 (similar to § 2 of the Babcock model law), § 24-67-105 (1999); Burns Ind. Code Ann. § 36-7-4-1503 (West 2006) (planned unit development district ordinance shall specify “range of uses” and “requirements” for development); Neb. Rev. Stat. § 19-4401(3); Vt. Stat. Ann. tit. 24, § 4451(4) (2007) (“The location and physical characteristics of the proposed planned unit development; The location, design, type, and use of the lots and structures proposed; The amount, location, and proposed use of open space”); R.I. Gen. Laws § 45-24-47(c) (1999) (minimum area, uses, densities, buffer areas).

97. Colo. Rev. Stat. § 24-67-104(f) (1999); Neb. Rev. Stat. § 19-4401(2) (1997); Pa. Stat. Ann. tit. 53, § 10709(b)(1) (West Supp. 2007).

98. Neb. Rev. Stat. § 19-4401(3).

99. Nev. Rev. Stat. § 278A.220 (LexisNexis 2000).

100. RK Dev. Corp. v. City of Norwalk, 242 A.2d 781 (Conn. 1968); *see also* Woodhouse v. Board of Comm’rs, 261 S.E.2d 882 (N.C. 1980).

101. Babcock Model, *supra* note 56, § 7(b)(1).

102. N.J. Stat. § 40:55D-45 (West 1991) (model act criteria modified); Pa. Stat. Ann. tit. 53, § 10709(b) (West Supp. 2007); *see also* Neb. Rev. Stat. § 19-4401(2) (1997) (compatibility with adjacent uses; public service capacity; consistent with health, safety and general welfare; in accordance with comprehensive plan); Nev. Rev. Stat. § 278A.500 (LexisNexis 2000) (criteria similar to Babcock model law).

ensure the provision of common open space. Issues such as ensuring the adequacy of public facilities go beyond these initial concerns and invade areas where local programs that apply to the entire community can be adopted that include requirements of this type.¹⁰³ The question becomes whether a statute should require planned unit developments to include these requirements when a local government may not have adopted them for the entire community.

Housing affordability is another issue. Ordinances in some communities require the inclusion of programs that improve housing opportunities in planned unit developments.¹⁰⁴ These include a requirement that planned unit developments achieve a required jobs-to-housing ratio or include an inclusionary zoning program requiring developers to provide a specified percentage of affordable housing in their projects. Local governments may want to include requirements of this type in their planned unit development ordinances, but this should be a local option.

C. Application, Review, and Approval Procedures

Statutes should specify the application, review, and approval procedures required for planned unit developments. These procedures do not necessarily have to be in the planned unit development statute. The APA Legislative Guidebook has a chapter on administrative review that contains detailed statutory guidance on administrative procedures for land use decision making.¹⁰⁵ A local government can select the agency that will conduct administrative reviews and can have more than one hearing if needed. The procedures are quasi-judicial and apply to any application for a development permit, which includes applications for planned unit developments.¹⁰⁶ The development permit concept is new. Most land use ordinances do not require a development permit but provide for a variety of administrative procedures, each of which has its own administrative procedure. The model law authorizes a Consolidated Permit Review Process if a local government wants to avoid multiple permit reviews.¹⁰⁷ It is broad enough to authorize a two-stage

103. Douglas R. Porter, *Managing Growth in America's Communities* Ch. 5 (2d ed. 2008) (discussing programs that support growth by managing infrastructure development).

104. For discussion of these programs, see Mandelker, *Planned Unit Developments*, *supra* note * (note containing author's biographical information), at 5.

105. Legislative Guidebook, *supra* note 6, Chapter 10. The author was the principal consultant in the drafting of this Chapter. For discussion see Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 Urb. Law. 645 (2003).

106. Legislative Guidebook, *supra* note 6, § 10-101.

107. *Id.* § 10-208.

or even a multi-stage approval process for planned unit developments. Most state statutes do not have anything like these unified decision making procedures, however, and will probably need to adopt procedures for considering planned unit developments in their planned unit development statutes.

Planned unit development statutes vary in the detail they provide on required procedures. The Babcock model law specified procedures in detail, and some statutes have adopted these requirements.¹⁰⁸ At the other extreme, the Michigan law simply authorizes local governments to adopt application, review, and approval procedures, and also authorizes preapplication conferences, requires at least one public hearing, and requires a decision to be made within a "reasonable" time.¹⁰⁹

One problem with most of these statutes is that they do not recognize the need to provide for a two-stage approval process in which the legislative body rezones for a planned unit development district, and the council or the planning commission then approves the development plan.¹¹⁰ The Indiana law provides for a two-stage procedure of this kind.¹¹¹ A planned unit development district ordinance must express its requirements in either general or detailed terms. If requirements are specified in general terms, a "secondary review" must be conducted by the legislative body or the "person or body" given the authority to conduct secondary review. Secondary approval must be granted if the requirements expressed in general terms and zoning requirements are satisfied.¹¹² If development requirements are detailed, the zoning ordinance must specify any "plan documentation or supporting information" that must be supplied before a permit can issue.¹¹³

This law requires the ordinance to state detailed requirements that do not require interpretation in a review process, or general requirements

108. Nev. Rev. Stat. §§ 278A.440-278A.590 (LexisNexis 2000); Pa. Stat. Ann. tit. 53, §§ 10707-10711 (West 1997 & Supp. 2007).

109. Mich. Comp. L. § 125.3503(4)(c)(5) (West 2006); *see* Colo. Rev. Stat. § 24-67-105 (ordinance to specify information to be submitted), § 24-67-105.5 (1999) (decision body may request redesign but must provide specific and objective criteria; time limit on hearing, which must be conducted expeditiously; deemed approval requirement); *see also* N.J. Stat. § 40:55D-45.3 (West 1991) (submission and approval of general development plan).

110. A state that adopts the review procedures in the APA model legislation may also need to specify how development plans for planned unit development should be handled under these procedures.

111. Burns Ind. Code Ann. § 36-7-4-1509 (West 2006).

112. Additional development requirements may also be specified and "any plan documentation or supporting information" required before a permit can issue. *Id.* § 36-7-4-1509(d)(4)(5).

113. *Id.* § 36-7-4-1509(d).

that are later interpreted and applied to decide whether a planned unit development can be approved. This is not an entirely clear way to authorize a two-stage procedure which requires the approval of a planned unit development district followed by the approval of a development plan, but does provide the authority for this kind of decision process.

D. *Phasing*

Control over development in phases is required if phased development is allowed and if different phases have different densities and uses. Uses and densities will vary in each phase of the project. If an earlier phase is built with more intensive uses and densities than are allowed in the entire project, there is a danger the project use mix and density level will not be achieved if later phases with less intensive uses and densities are not built. Common open space presents similar problems. It is difficult to require a pro rata provision of common open space in each phase of a project. Design considerations may require the location of all or most of the common open space in one or a limited number of project phases to ensure it is properly located and adequate in size and character. If phases that hold common open space are not built, however, there is a danger the common open space requirement will not be met.

The phasing problem has been recognized since planned unit developments first became popular.¹¹⁴ This is a difficult problem to remedy. A rigid requirement would require each phase to mirror the density and use mix of the entire development and contain its share of common open space. This requirement would seriously impair the flexibility planned unit developments are supposed to provide and make good project design difficult. A less rigid requirement could allow overbuilding and lack of common open space in early phases if protective measures are not adopted to require building at offsetting lower densities later and to ensure that required open space is provided.

One way of handling this problem in statutes is to require local governments to address the phasing and to provide guidelines on the type of phasing program a local government must adopt. The Michigan statute contains a requirement of this type. Each phase must contain "the necessary components to insure protection of natural resources and the health, safety, and welfare of the users of the planned unit development and the residents of the surrounding area."¹¹⁵ Pennsylvania has a provision,

114. Local ordinances take a variety of approaches. See Planned Unit Developments, *supra* note * (note containing author's biographical information), at 68.

115. Mich. Comp. L. § 125.3503(9) (West 2006).

adopted from the Babcock model law,¹¹⁶ that requires the decision maker to consider the “sufficiency of the terms and conditions intended to protect the interests of the public and of the residents of the planned residential development in the integrity of the development plan.”¹¹⁷

Another alternative is to require compensating lower density uses in later stages, and protection of the common open space requirement, if an earlier phase has densities higher than the average for the project or does not include common open space. The Babcock model law took this approach by allowing a greater density in any phase of this project if this was offset by a “smaller concentration” in a completed prior phase, or by the reservation of common open space by an easement or covenant in favor of the municipality.¹¹⁸ Nevada adopted this provision.¹¹⁹

E. *Vested Rights*¹²⁰

Vested rights are an important issue in the regulation of planned unit developments, especially for large projects that will be built out over an extended period of time. The problem arises because changes in the political composition of a governing body may result in changes in land use regulations after earlier phases of a planned unit development are built. These changes may make it difficult or impossible to complete a project, unless the developer has secured a vested right to continue under the regulations in place when the development was approved.

The vested rights problem has largely been handled by judicial decisions. Rights vest under the majority rule only when a developer has substantially relied on the issuance of a building permit.¹²¹ Vesting is difficult under this rule because changes in regulations can occur before

116. Babcock Model, *supra* note 56, § 7(b)(6).

117. Pa. Stat. Ann. tit. 53, § 10709(b)(6) (West Supp. 1997); *see also* Colo. Rev. Stat. § 24-67-105(3) (1999) (“Such resolution or ordinance may establish the sequence of development among the various types of uses”).

118. Babcock Model, *supra* note 56, § 3(b)(3). To maintain flexibility in development, the law states that the reservation shall defer the precise location of the common open space as much as possible until an application for final approval is filed.

119. Nev. Rev. Stat. § 278A.110(3) (LexisNexis 2000).

120. For more extensive discussion of this topic, see Mandelker, *Planned Unit Developments*, *supra* note * (note containing author’s biographical information), at 106–109. Zoning estoppel is a related doctrine that provides equivalent protection of a developer’s right to continue when there is a change in land use regulations.

121. Land Use Law, §§ 6.12–6.22. A leading case is *Avco Community Developers, Inc. v. South Coast Regional Comm’n*, 553 P.2d 546 (Cal. 1976). *But see Village of Palatine v. LaSalle Nat’l Bank*, 445 N.E.2d 1277 (Ill. Ct. App. 1983) (“We regard Palatine’s approval of the original site plan, the issuance of building permits for Phase I, and the continuing treatment of [the project] as a PUD ‘in fact’ as the type of affirmative acts of public officials upon which a landowner is entitled to rely”).

building permits issue. The problem is that courts developed this doctrine for individual buildings on individual lots and it does not apply easily to planned unit developments, especially those built in stages. Building permits will issue only as the development proceeds, permits for building in later stages will be delayed, and legislative bodies may make changes in the zoning regulations that apply to a planned unit development before it is finally built out.¹²²

The vesting problem is not treated in the planned unit development statutes that have been discussed,¹²³ but other statutes have dealt with this problem by vesting rights in approved site-specific development plans.¹²⁴ These statutes apply to a variety of land use approvals and their definition of a site-specific development plan applies to plans approved for planned unit developments. They define a site-specific development plan as a plan that defines the “type and intensity” of use for the land.¹²⁵ As applied to planned unit developments, this definition covers only the detailed development plan for project development, not the initial concept plan if one is approved. Time limits for vested rights are also short. They may be valid for only two or three years, though some statutes allow for extensions.¹²⁶

The court in *Rockshire Civic Assn., Inc. v. Mayor and Council of Rockville*, 358 A.2d 570, 579 (Md. 1976), noted the difficulties inherent in applying conventional vested rights law to planned unit developments. *See also* John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U.J.L. & POL'Y 603 (2000).

122. This issue is complicated by the frequent need of larger developments to secure amendments to their development plan as the project progresses because of changed market conditions or changes in project objectives. This would eliminate any early vested rights that might have accrued.

123. The New Jersey statute allows the planning board to set the term of the development plan, not to exceed 20 years from the date the first section of the development was approved. N.J. Stat. Ann. §§ 40:55D-45.1(b) (West 1991).

124. Ariz. Rev. Stat. Ann. §§ 9-1201 to 9-1205 (1996 & Supp. 2007); 11-1201 to 11-1206 (2001 & Supp. 2007) (defining protected development plan for a phased development); Colo. Rev. Stat., §§ 24-68-102 to 24-68-106 (2001); N.C. Gen. Stat. § 153A-344.1 (2007); S.C. Code §§ 6-29-1510 to 6-29-1560 (Supp. 2007). For discussion of these statutes and statutes granting vested rights for other land use approvals, see Legislative Guidebook, *supra* note 6, at 8-98 to 8-106.

125. N.C. Gen. Stat. § 153A-344.1(5): “Site specific development plan” means a plan which has been submitted to a county by a landowner describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property. Such plan may be in the form of, but not be limited to, any of the following plans or approvals: A planned unit development plan . . .”

126. Development agreements between a developer and a local government are another alternative that is available to protect development rights in planned unit developments. They can provide the development will be carried out under regulations in effect when the agreement was signed. Development agreements are used in some areas to protect development rights in planned unit developments. For discussion, see Mandelker, *Planned Unit Developments*, *supra* note * (note containing author's biographical information), at 47–50.

These statutes do not completely solve the vested rights problems for planned unit developments. Time limits are too short, even for smaller developments that do not have several phases. They are especially not helpful for multi-stage developments because changes can be made in land use regulations between stages and before site-specific development plans for later stages are approved.

Vested rights protection for planned unit developments could be improved if the statutes were extended to protect uses, densities, and intensities to the extent shown on a concept plan. Time limits could also be extended for projects expected to take a substantial period of time and vested rights protection could be applied to each project phase as development plans for each phase are approved.¹²⁷ Another alternative is to authorize local governments to decide on some or all of the elements of vested rights protection, which is done to some extent in some existing laws.

F. *Master-Planned Communities*

The Mississippi statute is the only one that authorizes the development of master-planned communities.¹²⁸ It authorizes counties to enter into development agreements for thirty years with developers of master-planned communities to be regulated by a “community self-governing entity.”¹²⁹ The county must review the development plan and find that its provisions are “comparable to, or greater than, similar provisions in the ordinances and regulations of the county.”¹³⁰ There is a minimum acreage requirement of 3,500 acres.¹³¹

This statute contains many of the elements necessary for a statute authorizing master-planned communities. There should be a minimum size requirement and master-planned communities should be defined.

127. If the protected period is lengthened, some authority would be needed to allow local governments to change the regulations if required by changed conditions or health, safety, welfare or similar reasons. Provisions like this are included in statutes authorizing development agreements. *See Fla. Stat. Ann. § 163.3233(2)* (West 2006).

128. Miss. Code Ann. § 19-5-10 (2003). The statute defines master-planned community as “a development by one or more developers of real estate consisting of residential, commercial, educational, health care, open space and recreational components that is developed pursuant to a long range, multi-phase master plan providing comprehensive land use planning and staged implementation and development.” *Id. § 19-5-10(2)*.

129. The original owners may modify the master plan to meet “changing economic and market conditions,” but the county must approve any material changes in regulations and restrictions or that significantly change the “concept” of the master plan. *Id. § 19-5-10(a)(3)*.

130. Miss. Code Ann. § 19-5-10 (2003).

131. *Id. § 19-5-10 (2003)(2)(a)*.

Creation of an entity to develop the community could be made optional. Attention should also be paid to the problems created by development in several stages, and the statute should require local governments to define the concept plan for the community and later area development plans that carry it out.¹³²

VII. Conclusion

Planned unit developments and master-planned communities are the dominant development type in many areas of the country, and their regulation requires a major change in the way in which zoning regulations are structured and administered. It also requires the adoption of statutes that cover the many regulatory problems these developments present. Some states have made progress in enacting such legislation, but many statutes are inadequate. Legislative change is needed to meet the challenge presented by the increasing role of planned unit development in the growth of our communities.

132. For examples of ordinances that implement this concept, see Mandelker, Planned Unit Developments, *supra* note * (note containing author's biographical information), at 38–40.

