legal memorandum

New York State
Office of Planning Services
488 Broadway
Albany, New York 12207

13

April, 1971

Innovative Zoning

Planned Unit Development and Cluster Design

Visualize, if you will, a 100-acre tract of vacant land in your community. Possibly it is forested, or pasture land, or just plain wide open spaces. Perhaps it contains a building or a site of historical importance, or a particularly fine stand of oak. All well and good. But now let's look at the practical side – let's say that land is zoned for half-acre lots. That means 200 houses, minus the space taken up by roads and community facilities. The question is: is there a conflict between 200 houses and that stand of oak or that wide open space? Can that hundred acres be developed in such a way as to preserve a large portion of it as open space and to conserve that historic building and those fine old oaks **and** still have the 200 houses? The question is more than academic – many communities across the state are asking it as they face conflicts of the type described above. The answer is that communities **can** preserve the open space and the other amenities and have the same amount of development as they would have without such preservation. This memorandum will describe three methods to accomplish this.

Traditional zoning is characterized by pre-set regulations, applicable to whole districts (uniform within the districts, pursuant to the enabling laws). This type of zoning is called "Euclidean" zoning because it was this type of zoning that was involved in **Village of Euclid v. Ambler Realty Co.**, 272 U.S. 365 (1926), the case in which the concept of municipal regulation of land use through zoning was found by the Supreme Court to be constitutional. Most zoning ordinances of today are similar to that approved in **Euclid**; most zoning today is "Euclidean." Typically, such zoning informs a property owner more or less precisely how he can use his land. It assumes that development will occur on a lot-by-lot scale, and regulates accordingly. Thus, we have setback, yard size, percentage of lot that may be occupied and minimum lot area regulations applicable within entire districts. Anyone who can meet the specifications listed in the ordinance is entitled as a matter of right to a building permit.

The simple and direct character of this type of zoning clearly informs the landowner as to what he can do with his property. Such an ordinance is very effective in regulating development activity to achieve a pattern of planned municipal growth.

There is an important element of certainty under such an ordinance concerning the use to which an owner may put his land, but the other side of the coin is marked "inflexibility."

Recognizing that all situations are not equal, two devices have developed to handle circumstances requiring some flexibility: the variance and the special permit. But neither is meant to regulate development that goes beyond a lot-by-lot situation.

The variance is essentially a form of administrative relief available from the pre-set regulations when they become too harsh. It has a limited "safety valve" purpose, ideally – to spare unnecessary hardship to people whose land is classified by the rigid, pre-set zoning district regulations in such a way that they cannot realize a reasonable return from it. The subject of variances is treated at length in another of the Office of Planning Services' legal memoranda. The special permit device is used to allow certain types of uses only after administrative decision based on conditions stated in the ordinance to insure that they will properly relate to the surrounding area. Uses for which special permits are required are generally different from surrounding uses (because of their type of operation, traffic generation, lighting, etc.) and so need additional standards plus design review. Thus, an ordinance might permit gasoline stations anywhere in a commercial district, but only by special permit – which is available only (as an example), if the plans show that X curb-cuts will be made, the sign is of Y size, lighting is kept to a specified minimum and screening is provided – to stated special permit standards established in the ordinance. The subject of special permits is covered in another legal memorandum.

Both the variance and the special permit are limited in their scope. Whenever pre-set regulations are applied uniformly to a district, there are bound to be "loose ends" – hardships and problem uses – and the purpose of these devices is simply to manage these. Their very names imply their role as extremely limited departures from the standard zoning ordinance. In the case of variances, they are departures which are not only almost negative in nature, but whose continued use may very well weaken the zoning ordinance as it becomes shot through with exceptions.

In recent years, in response to the need for added flexibility – while still observing the purpose and intent of the zoning enabling legislation – three basic devices have developed and are being utilized to an increasing degree.

This memorandum discusses and clarifies the legal aspects of these three control devices: **cluster development**, the so-called **"floating zone"** and **planned unit development.**

All three are departures from traditional zoning regulations. They attempt to provide for imaginative development on other than a lot-by-lot basis, and they do so without having to weaken the zoning ordinance by constant exceptions. Rather, they are flexible devices for the implementation of a community's plans. This flexibility – the distinguishing characteristic of this type of regulation – stems from the fact that the developer is given a choice as to how to develop his land, in the hopes of getting a better development.

Why use them? Several important advantages will accrue to the community choosing to regulate development in this fashion. The densities, and, in some cases, even the uses, may be mixed within a single development. Greater attention may be paid to good design, and to the preservation and imaginative use of open space. Opportunity is present for the preservation of environmental and historical amenity. The mixture of uses and the mixture of development intensity may be controlled as appropriate in light of the community's comprehensive plan. The appropriate regulations may be established in advance as a general framework, but flexible enough to allow the developer considerable leeway in his design. Developers, too, find advantages in the use of planned unit development and cluster techniques, since their costs of providing required services are generally much lower than is the case for conventional grid-type subdivisions. Frontages are shorter, the improvements are more concentrated, and thus the investment in streets, sewers and utilities is less.

I. CLUSTER DEVELOPMENT

Background. Every standard zoning district has a pre-set density at which development will be permitted. For example, a standard district might require one-acre lots for single family dwellings. This density, then, is set forth in the text and on the map of the zoning ordinance, and may not be ignored. Cluster development is a means to permit, in conjunction with the approval of a subdivision plat, a transfer of this density, by grouping the development which is permitted under the standard zoning provisions within the tract of land. For example, if a given tract of land of 100 acres is zoned in such a way that 100 dwellings could be built on individual lots of one acre apiece, cluster development would permit these 100 dwellings to be grouped on, say, twenty acres, while the 80 acres remaining could be devoted to open space or recreational use.

Although we have been using the term "cluster development" for the type of development just described, the proper term should perhaps be "average density development," since it is more general, and since cluster development is a fairly narrow term used by planners and architects to describe a design technique. Nevertheless, we have chosen to use "cluster development" since it is perhaps commonly used to describe the legal device we are talking about.

The Statutory Authority. The enabling statutes permitting clustering are General City Law §37, Village Law §179-p and Town Law §281. The three sections are dissimilar, and it will be helpful to examine the Town Law provision in some detail and then point out the differences among the three statutes.

The Town Law section empowers a town board to authorize the planning board to modify the provisions of the town zoning ordinance simultaneously with its approval of a subdivision plat. The end sought is a reduction in minimum lot sizes while retaining the density required by the zoning ordinance. It is important to note that while the section would permit density transfer within a given tract, it does not permit a violation of the average density ceiling otherwise applicable for that particular tract under the zoning ordinance. Thus, the permitted number of dwelling units must remain the same as the number that would be permitted under the zoning ordinance if the land were subdivided in accordance with the minimum lot requirements thereof. If the land could be used for 100 homes on one-acre plots, the clustered development on the same tract could not exceed 100 homes.

The Town Law section is not limited to residential development; it may be used for clustering any type of

development permitted for that tract by the zoning ordinance. If the underlying zoning for the district in which the subdivision is to be located permits more than one type of use, all such permitted uses may be clustered under Section 281. In the case of residential development, the dwelling units clustered may be in the form of detached single-family units, semi-detached, attached or multi-story structures; the decision is discretionary with the planning board, subject to conditions set forth by the town board.

The Village Law provision differs from the Town Law section in that it is specifically limited to residential developments. The General City Law provision appears to contain limited authority for mixing uses in a clustered development. It reads in part:

> "The owner of the land shown on the plat may submit with the plat a proposed building plan indicating lots where group houses for residences or apartment houses or local stores and shops are to be built built."

Whether this language is authority for city planning boards to permit these mixed uses in a development located in a district that otherwise permits residential uses only is unclear. General City Law §37 permits the body creating the planning board to authorize it:

> " . . .either to confirm the zoning regulations of the land so platted as shown on the official zoning maps of the city or to make any **reasonable change therein** and such board is hereby empowered to make such change." (emphasis supplied)

It should be noted that the Town Law and Village Law provisions permit modification, and not "any reasonable change" of the zoning. When originally enacted in 1927, all three laws read as the General City Law now reads. The Town Law and Village Law provisions were amended after the **Hiscox** case, discussed below; the General City Law retains its original form.

The only case interpreting any of these sections is **Hiscox v. Levine**, 31 Misc. 2d 151, decided by the Suffolk County Supreme Court in 1961. In this case, the developer submitted a plan covering a 100.8 acre tract to the town planning board. The tract was partly within a one-acre residential zone and partly within a one-half acre residential zone. The developer proposed to dedicate 37.4 acres as a public park and divide the remaining acre requirements. Six years previously, the town board had adopted a resolution under Town Law §281 which then authorized the planning board to make **reasonable changes** in the zoning regulations of platted land. The planning board approved the developer's proposal and passed a resolution which applied the one-half acre zone restrictions to the land remaining after dedication. The court disapproved the planning board's action as an encroachment on the town board's legislative authority to zone. The court in **Hiscox** did uphold the power of a planning board to make reasonable changes in the zoning through approval of a plat pursuant to Town Law §281. However, it stressed that it felt this power was not unlimited: ". . .the power to make reasonable changes in the zoning ordinance does not confer the power to amend the zoning ordinance by rezoning large tract of land." (31 Misc. 2d at 154) The court seemed disturbed by the large size of the tract rather than the fact that the planning board had such power. The court cited language from an earlier case, **Matter of Hess v. Bates**, 17 Misc. 2d 22 (1955), which held a board of zoning appeals to be without power to grant a variance for a 40-acre tract. The court in **Hess** thought such an action to be legislative in nature and beyond a board of zoning appeals power.

It would appear that the **Hiscox** court reached its result through rather narrow reasoning. Certainly, to compare a planning board's power to "cluster" development with a board of appeals power to grant a variance is to confuse two unrelated issues. The board of appeals power is a negative one: to relieve individual hardship. As previously noted, it provides a safety valve for relief from rigidities of Euclidean zoning when they become oppressive. The planning board power authorized to be granted by Town Law §281 is, instead, a positive power to guide community development. Whereas the variance is the antithesis of planned development, cluster development is the very essence of planned development.

As has already been pointed out, the Legislature amended the Town Law and Village Law after **Hiscox** to permit the respective governing bodies to authorize **modification** of the zoning by planning boards.

Clearly, under these statutes, planning boards can be given a great deal of discretion on all facets of a proposed development project. This discretion could be given with regard to the location of buildings, the types of dwellings used, the design of the project and, where permitted, the location of mixed uses. This seemingly broad authority of the planning board is limited by two basic factors: first, the statutory prohibition against exceeding the density permitted by the zoning, and second, the local legislative body must authorize the planning board to exercise clustering powers, and it may impose conditions on such exercise of power.

Open Space. The treatment of the open space area or areas gained by the use of the cluster technique is of major importance, since the primary purpose of clustering is to create this space. Town Law §281 and the Village Law §179-p specifically provide that the planning board may, as a condition of plat approval, establish conditions on the ownership, use and maintenance of these lands in order to assure their preservation for their intended use.

This language raises the question – as yet unanswered by the courts – whether a planning board may require

dedication of the open space to the municipality as a condition to plat approval in cluster development. Clearly, planning boards may not so require as a condition to plat approval if no clustering is involved in a subdivision. In such cases, Town Law §§ 277 and 278, and Village Law §§ 179-l and 179-m would apply, and these sections do not permit planning boards to require developers to dedicate lands for parks or recreational facilities. They merely authorize the requirement that developers "show" such lands on plats submitted for approval. A developer may, if he desires, offer to dedicate such lands to the municipality – indeed, his filing of a plat would constitute such an offer unless a notation was made that the lands were not offered for dedication – but a requirement that dedication occur is not permitted. It may be argued that since the language in the cluster provisions specifically authorized the imposition of conditions on the ownership of open space lands as a prerequisite to plat approval under these sections, dedication may be required in cluster situations. As noted above, there are no court decisions which would either support or destroy this view.

An alternative to dedication of open space to the municipality is the establishment by the subdivider of a homeowners' association to manage the open space, which would remain in private ownership. This could be established privately, possibly through deed restrictions or covenants to insure that ownership of a dwelling in the clustered development would require membership in the association. These restrictions should prohibit any development other than for open space uses on the specified land. Both the general requirements for and the standards for establishment of such associations could be established by the planning board pursuant to its powers under Town Law § 281 and Village Law § 179-p to establish conditions on the ownership and maintenance of open space in cluster developments.

The town board and the village board of trustees may retain control over these conditions on open space by requiring their own approval of the conditions established by the planning board to govern the ownership, use and maintenance of open spaces. It may require such approval of the arrangement made for each plat.

The subdivision enabling statutes permit municipalities to require developers to pay money in lieu of showing land for parks on their plats, if the planning board determines that a park or parks of adequate size cannot be properly located in the plat or is otherwise not practical (General City Law § 33, Town Law § 277, Village Law § 179-l). Can this procedure be used with cluster development? It would appear that the reason for permitting a municipality to require money in the circumstances described above disappears where clustering is permitted, because it is one of the very purposes of clustering to gain such land. There is one State Comptroller's Opinion which supports this conclusion that no money in lieu of land may be required in cluster situations (Op. St. Compt. 67-713). On the other hand, it could be argued that the intent of the sections cited above is to insure the provision of park and recreational land, while the intent of the clustering sections is to insure the provision of open spaces. If the two purposes could be distinguished it would appear that money could be required even in cluster situations.

Finally, no discussion of open space is complete without a discussion of General Municipal Law §247. This section grants to all municipalities the power to acquire open space. It is a broad power, and includes authority to acquire fee or less than fee interests by purchase, gift, grant, bequest, devise, lease or otherwise. The section is an eminent domain power, and thus contemplates payment, unless the land is given as a gift. The cluster provisions are police power authorizations, and merely serve to set aside land for open space. Thus, the two types of provisions can be used together to acquire land, or an interest in land, through clustering. For example, if clustering is used to achieve an open area, the municipality could use General Municipal Law § 247 to acquire it outright, or to acquire any lesser interest – such as a scenic easement, for example. The issues involved in dedication have already been discussed, but it should be noted here that a developer could dedicate less than the fee interest in open space lands, and under General Municipal Law § 247, the municipality could accept such an interest.

II. THE "FLOATING ZONE"

The so-called "floating zone" derives its name from the establishment of a district in the zoning ordinance which will later be placed on the zoning map. In the interim, it "floats" without regulating the use of any specific land. The case of **Rodgers v. Village of Tarrytown**, 302 NY 115 (1951), in which the Court of Appeals approved such an arrangement, illustrates how such a device works. Two amendments to the Tarrytown ordinance were involved. The first established a "Residence B-B" district, not located on the zoning map, but requiring a second amendment to specifically so locate it. Standards were established for approval of any such second amendment – the land had to be at least ten acres in size, buildings were to be of not more than three stories, setbacks were prescribed, and a maximum of 15% of the land could be occupied by buildings. Provision was made authorizing the location of a Residence B-B district anywhere in the village, as long as the standards were met, a plan for the development of the parcel approved by the planning board and an amendment adopted by the Village Board. The second amendment specifically located such a district, and was challenged as spot-zoning.

The Court of Appeals upheld the technique. It found that the technique of the "floating zone" was not **per se**

illegal as spot zoning and that the second rezoning was in accordance with the village comprehensive plan.

Because the standards governing the development within land designated as a Residence B-B zone were established in detail in advance, the floating zone in the **Rodgers** case was not as flexible a device to regulate development as is the planned unit development. Nevertheless, it does recognize the need for a departure from lot-by-lot zoning, and acts as an incentive for imaginative development by setting forth detailed rules in advance. This is the legal distinction between the "Floating Zone" and the planned unit development – the former has standards set forth in detail while the latter has general standards set forth in advance. Because the floating zone is finally fixed on the zoning map by a process of amendment to the xoning ordinance, there are no restrictions on the uses which may be permitted in such a zone. However, it is important to insure that such an amendment is in accordance with the comprehensive plan of the municipality, to protect against possible charges of spot zoning. In this regard, the procedures outlined in the following discussion of planned unit developments are recommended, since they provide a means to insure that when the floating zone is specifically located for a tract of land, spot zoning will not occur, and the comprehensive plan for the community will be furthered.

III. PLANNED UNIT DEVELOPMENT

Background. A planned unit development is a diversified development project which does not fit the standard zoning regulations of a municipality, and which is developed as an entity in such manner as to promote a municipality's comprehensive plan. It is truly "planned" as a "unit." It does not fit the standard zoning regulations governing its district because it may provide for increased density and for uses not otherwise allowed in the district. For example, a single project might contain dwellings of several types, shopping facilities, office space, possibly even light industrial facilities, open areas, recreational areas – the possibilities are endless. It differs from the cluster development concept in that it is easily amenable to any mixture of uses and is not subject to any of the underlying zoning for the land involved. The concept of planned unit development, if extended sufficiently, would embrace new towns, although it is flexible enough to be used in regulating development on any size parcel of land. Most planners feel that for a **minimum** level of effectiveness, the PUD technique should be utilized with tracts that are upwards of 25 to 30 acres in size, although this figure would necessarily vary from community to community.

The "Floating Zone" described above is in reality a type of planned unit development. The specific ordinance in the **Rodgers** case did not provide for mixed uses and it was a detailed zone set forth in advance to govern development, but procedurally and in intent it was a planned unit development ordinance.

Because there is no specific enabling legislation in New York for planned unit development, resort must be had to the rezoning procedure; in this respect, the **Rodgers** procedure and the Court of Appeals decision approving that procedure are relevant.

Planned Unit Development Procedures. The New York State enabling legislation contains a statutory procedure for cluster development; it has been outlined previously. Because there is no specific enabling authority for planned unit developments, this discussion will attempt to suggest general procedures for their accomplishment.

As has already been noted, planned unit developments (and "floating zones") must be accomplished, in the absence of specific enabling legislation, through an amendment to an existing zoning ordinance for each specific project. Obviously, all procedural requirements regarding notice and hearing, county planning board referral, protests and the comprehensive plan would apply to a planned unit development amendment just as they would to any other.

To insure that a specific project rezoning will not be attacked on grounds that it constitutes spot zoning, two steps should be taken. First, standards should be set forth governing approval of future projects, and, second, adequate provision for planning board review of proposed projects should be required. The logical means of accomplishing both steps would be to enact a planned unit development section in the municipality's zoning ordinance, containing both general standards for such developments and the procedures for project review.

It is suggested that the following sequence of events be instituted in any planned unit development article of a zoning ordinance.

1. The article should set forth general standards for future rezonings to accommodate specific proposals. These might include, for example, minimum size requirements, density ranges, and ranges for mixtures of uses (e.g. 10-20% commercial, 50-70% residential, 10-40% office buildings). These standards need not be excessively detailed; they should, however, relate to the community's comprehensive plan. The article should also specify the districts in which planned unit developments will be considered, and it should state the procedure for approval of the project.

2. Preliminary planning board review of an application for a planned unit development rezoning should be provided for prior to the rezoning. This will help guard against possible charges of spot zoning. While the subject of spot zoning is discussed fully in another Office of Planning Services legal memorandum, in general, spot zoning will not

be found to have occurred where the contested zoning is shown to be in accordance with a comprehensive plan. In **Rodgers v. Tarrytown** (cited above), strong objection was made to the rezoning of land (the "locating" of the "floating zone") on grounds of spot zoning. The Court of Appeals stated the rule as follows:

> "Defined as the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners, 'spot zoning' is the very antithesis of planned zoning. If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not 'spot zoning' even though it (1) singles out and affects but one small plot (see, e.g. **Shepard v. Village of Skaneateles, supra**, 300 N.Y. 115) or (2) creates in the center of a large zone small areas or districts devoted to a different use."

It applied the rule in that case to find no evidence that the rezoning was accomplished for the benefit of any single individual or group.

As pointed out earlier, the requirement that a rezoning to accommodate a new project be in accordance with a comprehensive plan is mandatory. Even if there are detailed standards in an ordinance governing project approval by the legislative body, and even if these are met, if the rezoning to accomplish the project is not in accordance with the comprehensive plan, it will be open to attack as spot zoning.

If the planned unit development article of the zoning ordinance requires a report and recommendation of the planning board to be submitted to the governing body before the latter acts to rezone, its chances of acting within the context of the comprehensive plan will be much improved.

3. The amendment itself would have to follow all procedural requirements applicable to any zoning amendment. The effect of the amendment would be to change the district classification to accommodate the planned unit development proposal. The uses should be described, as well as densities, height and setback requirements, just as in any other district regulations.

Because the rezoning of a tract of land to accommodate a specific project must necessarily be accomplished only after a period of negotiation with the developer, and because the rezoning is done as a specific reaction to the project, there would appear at first glance to be a bargaining away of a municipality's legislative power to zone. This is sometimes called "contract zoning" and has been held to be illegal **Levine v. Oyster Bay**, 46 Misc. 2d 247 (1964). The related issue of zoning for individual benefit versus zoning for community benefit (i.e., in accordance with a comprehensive plan) has been examined in the above discussion of spot zoning. In spot zoning cases, the elusive comprehensive plan is the test. Certainly, the requirement that any rezoning must be in accordance with a comprehensive plan, if met, will remove any overtones of a private bargain.

The fact that conditions are imposed for a rezoning does not mean that a municipality has illegally contracted away its zoning power. In the case of **Church v. Town of Islip**, 8 N.Y. 2d 254 (1960) the town board had consented to a change of zone for a piece of property subject to certain conditions concerning percent of the lot to be occupied by a building, screening and fencing. The Court of Appeals, in approving this arrangement, said:

> "Surely these conditions were intended to be and are for the benefit of the neighbors. Since the Town Board could have, presumably, zoned this Bay Shore Road corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation."

The Court also noted that the record showed no "agreement" in the sense of an offer made by the landowner and accepted by the town board.

The case has a number of implications for project approval by rezoning. First, the conditions imposed on the developer must be reasonable, and they must be in the spirit of the municipality's comprehensive plan. Second, there is always the possibility of a specific offer being made by a developer and accepted by a governing body. Exactly what sort of offer and acceptance of this nature would be found to be "contract zoning" is difficult to predict, especially if the developer includes in his offer reasonable conditions as restraints upon himself, which are deemed by the governing body to be sufficient to protect the public interest. The **Church** case noted that:

> "Exactly what 'contract zoning' means is unclear and there is really no New York law on the subject. All legislation 'by contract' is invalid in the sense that a Legislature cannot bargain away or sell its powers."

A possible solution to the problem would be to state in a zoning ordinance in advance the conditions or standards that must be met before a rezoning to accommodate a planned unit development will be considered. These would be the standards referred to in the first "step" described above. The ordinance in **Rodgers v. Tarrytown** (cited above) contained such standards, with so much specificity that an actual "floating zone" was created. Certainly, the standards for consideration by the legislative body in future applications for planned unit development rezonings need not be excessively detailed. The detailed standards of **Rodgers v. Tarrytown** are not necessary; broader statements of policy, goals and objectives for the projects themselves and for the community's development in general are

sufficient. If such standards for project approval are found in an ordinance and are adhered to, the case for a charge of "contract zoning" would be weakened considerably.

4. After the rezoning has occured, provision should be made for a final approval of the developer's detailed site plan. This may legally be accomplished by either the board of zoning appeals or the governing body itself; it is preferable to retain this approval power in the governing body since the board of appeals is essentially an administrative body with little or no expertise in the scheme of the community plan.

The planning board has a major role to play at this step, in advising the governing body as to the acceptability of the site plan. While it has been suggested by some that the final site plan be approved by the planning board alone, there is no authority for such delegation of power to that body.

Section 274 of the Town Law, Section 30 of the General City Law and Section 179-i of the Village Law all contain authority for the respective governing bodies to refer to the planning board certain matters for report and recommendations. The Town Law provision reads as follows:

> "The town board may by general or special rule provide for the reference to any matter or class of matters, other than those referred to in section two hundred seventy-two of this article [i.e., matters over which planning boards may be given direct jurisdiction by state law], to the planning board before the final action thereon with or without provision that final action thereon shall not be taken until said planning board has submitted its report thereon, or has had a reasonable time to be fixed by the town board in said rule to submit the report."

This is a somewhat limited authority, and cannot be used to require planning board approval of a site plan, (**Starner v. Reingold**, Supreme Court, Westchester County, 1970, as yet unreported). A planning board has only those powers conferred on it by State law or by local action pursuant to State enabling authority (Op. St. Compt. 60-870). (If a project is reviewable by the planning board under local subdivision regulations, the above prohibition would, of course, not apply, since subdivision approval by a planning board is specifically authorized in the enabling statutes.)

Thus, while it does not appear that the planning board may be given the power to approve either conditions imposed for building permits by the rezoning or a final site plan, there would be no objection to such approval being either retained in the legislative body or granted to the board of appeals. In either case, the planning board could be given the power to **review** the site plan, but not the power to **approve**.

5. It is recommended that the planned unit development article provide for possible reconsideration of the zoning for the project if no development does occur within a specified time. In this regard it must be emphasized that provision should **not** be made for automatic reversion of a planned unit development district to its former classification. Such a provision would contravene the provisions of the enabling laws which specify the procedure for rezoning, since it would in effect authorize a rezoning without adherence to the statutory procedure.

Staging of Development. In the larger projects, a developer may wish to complete his project in stages, rather than attempting to work on all phases simultaneously. A number of practicalities tend to make such staged development more attractive to the developer. The community, of course, has an interest in seeing that the developer completes the project as specified, and does not leave the community after he builds the most profitable sections.

There does not appear to be any specific authority under existing enabling legislation for the staging of development, unless the development is in the form of a subdivision. In such instances (and this would include cluster development) town and village planning boards are authorized to permit the filing of approved plats in sections, as they may deem necessary to assure orderly development of the plat. (Town Law, § 276, subdivision 6, Village Law, §179-k, subdivision 3).

Aside from this situation, several cases indicate that staging might be accomplished under the zoning enabling acts and the general police power of a municipality. The case of **Church v. Town of Islip** has already been noted as approving a rezoning which imposed certain conditions on the new use. This power to condition a new use could be used to assure reasonable staging. The recent case of **Westwood Forest Estates v. Village of South Nyack**, 23 N.Y. 2d 424 (1969) dealt with an absolute prohibition of multiple dwellings within a village because of the burden such development would place on the existing sewage treatment plant. The Court of Appeals held such prohibition invalid, as not properly related to the purposes of zoning. But what is important about this decision for the purposes of an examination of the law relating to staging of development is the opinion of the Court that:

> "This is not to say that the village may not, pursuant to its other and general police powers, impose other restrictions or conditions on the granting of a building permit to plaintiff, such as . . . granting of building permits for the planned garden apartments in stages."

Thus it would appear that by a reasonable application of conditions governing development within a project, a municipality could achieve staging. Such conditions might, for example, relate to water and sewer services, roads and

certain utilities. They should bear a reasonable relationship to the goals of the project – these goals, in turn, should reflect the comprehensive plan for the development of the community.

IV. CONCLUSION

Standard zoning regulations are established on the presumption that each lot will be developed separately. They regulate the manner in which each lot may be developed, in the interest of the community. In this, they serve a useful function. But as applied to large-scale development projects, such regulations have many disadvantages. They permit – and require – expensive sprawl-type development patterns which cause higher development prices and higher costs to the community in its provision of services. They encourage repetitive building design. They are wasteful of natural, scenic and historic resources, and offer no opportunity to utilize existing open space and scenic features to complement the development.

Cluster development, planned unit development and "floating zone" techniques represent a means by which a community can guide large scale development in a positive fashion. The same development will occur, but it will be better designed, more livable, more convenient, less expensive, and will make the best possible use of nature.

In the absence of specific enabling legislation for planned unit developments or "floating zones," recourse to the rezoning process seems the only feasible means of accomplishing these worthwhile aims. However, because of the nature of these techniques of zoning as means to react to specific projects with appropriate regulations, considerations which may not be vital in lot-by-lot type zoning become of utmost importance. Because of its nature as a device to approve specific projects, questions of spot zoning and contract zoning may occur. It is thus felt that the best assurance of protection for municipal planned unit development and "floating zone" actions is to emphasize their role as a part of the community's comprehensive plan.

These legal memorandums were prepared and published with federal financial assistance from the U. S. Department of Housing and Urban Development (HUD) under Section 701 of the Housing Act of 1954, as amended.

This paper was researched and written in the Legal Services Bureau of the State Office of Planning Services, Richard A. Persico, Counsel, in charge. The principal author was James A. Coon, attorney.

Legal and technical questions should be directed to the Legal Services Bureau, telephone (518) 474-1338. Additional copies of the memorandum are available from the OPS Communication Bureau, 488 Broadway, Albany, New York 12207, telephone (518) 474-7028.