2010-CA-01733 E

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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SO CERTIFIED, this the 9th day of May, 2011.

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STATEMENT OF THE CASE

Pursuant to MISS. CODE ANN. § 11-51-75, Appellant Thomas Gardner ("Gardner") appealed a decision of the governing authorities of the City of Tupelo, Mississippi ("the City") to approve a Planned Unit Development ("PUD") based on a Master Land Use Plan submitted by Wilson Coleman ("Coleman"). Gardner filed a Bill of Exceptions in the Circuit Court of Lee County, Mississippi. The Circuit Court received briefing from the parties, heard oral argument, and affirmed the City's decision. Gardner appeals to this Court from that decision.

STATEMENT OF RELEVANT FACTS

Coleman submitted an application to the City's Department of Planning and Community Development ("the Department") seeking approval of a Planned Unit Development, or "PUD" ("the Coleman PUD"). (R. 7). The City's Development Code ("the Code") required Coleman, as an applicant seeking approval of a PUD, to submit a master land use plan and thirteen discrete categories of information, which Coleman submitted for the City's review. Tupelo Dev. Code § 5.5.5. (R. 20 - 103).[1]

The steps in the disposition of a PUD application are also contained in Chapter 5 of the Code: (1) the prospective applicant meets with the Department, (2) the application is submitted, (3) the Department reviews and comments upon the application, (4) a public hearing is held before the Planning Committee, (5) the Department issues a recommendation, (6) the Planning Committee issues a recommendation, and (7) the City Council issues a decision. Tupelo Dev. Code § 5.5.1. The City followed these procedures in reaching a decision on Coleman's application, and, based on the recommendations of the Department and the Planning Committee, the City approved the PUD application on April 15, 2008. (R. 2-3, 152-161).

Before approving the Coleman PUD application, the City considered the surveys, master land use plan, traffic study, conceptual plan, proposed covenants, and other material presented by Coleman and his representative, as well as the following specific facts, all of which were memorialized either by specific documents, or are included in the transcript of the hearing before the City Council:

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[1]A copy of the pertinent sections of the City's Development Code is attached to this Brief as Appendix "1."

(1) Construction and operation of the new Toyota plant will stimulate development of the area in which the property sits (Planning Department Staff Analysis, R. 11-13; R. 20-22; Transcript of April 12, 2008 City Council meeting, R. 165 ("We've traveled to other cities . . . to look at . . . their new developments to see how these successfully build with rapid growth, which Tupelo is going to experience due to Toyota. That's the biggest thing Tupelo is going to experience due to Toyota. . .)

(2) The property is near the recently-constructed Tupelo Christian Preparatory School (R. 10, 12, 77, 166 ("Tupelo Christian Preparatory School was placed out there recently. I believe that's a pretty big change. It would be close to schools for their children to attend. . . . We need to be prepared for all the people that will come into town."));

(3) The property is close to a through connection between State Highway 9 in Pontotoc County and the City (R. 9-12);

(4) The property has convenient access to the City's thoroughfare system and provides easy access to the Mall at Barnes Crossing, the Tupelo Country Club, the Tupelo Furniture Market, the Tupelo Regional Airport, Tupelo High School, and all of West Tupelo (R. 9-12, 20);

(5) Because of changes in the area, the area around the property is changing from a rural character to a more suburban character (R. 9 - 12);

(6) Transition to a more suburban character is expected to have a positive effect on most property values in the area (*Id.*);

(7) The Coleman PUD will utilize rear access for lots, lessening the necessary lot width by eliminating the need for front driveways (R. 13);

(8) The Coleman PUD will have access from two streets, helping to diffuse the impact of traffic on adjacent roads (R. 9-13, 22);

(9) The Coleman PUD will include 21.7% open space (R. 12);

(10) The Coleman PUD will have the positive effect of increasing the number of units that the property can support (R.12-13);

(11) The Coleman PUD will include a well-defined buffer separating it from other properties with the R-1L district at issue (R.77);

(12) Of the land within the City zoned for residential development, more than eighty-seven percent (87%) is zoned for large- or medium-lot residential development (R. 163);

(13) In the near future, the City's increasing housing needs will require the construction of about 450 housing units a year. Currently, between 120 and 130 housing units per year are being developed (R. 167);

(14) Allowing a greater density of development on the property will allow for more affordable housing opportunities and help avoid a potential housing shortage in the future. (R. 167, 171-72).

The Circuit Court, after hearing the Bill of Exceptions and arguments of the parties, adopted these facts *in toto* in its Findings of Fact and Conclusions of Law. (R. 230-243).

SUMMARY OF THE ARGUMENT

Fundamentally, Gardner disagrees with the determination of both the City of Tupelo, and with the Circuit Court on review, that voluminous evidence provided more-than-adequate support for the City's decision to grant the PUD application. Gardner essentially asks this Court to re-evaluate the evidence as if it were the municipal governing board, arguing that the "clear and convincing evidence" standard was not met, when his brief reveals only that he disagrees with the conclusions reached by the City of Tupelo and Circuit Court as to the import and relevance of the evidence that the City of Tupelo did, indisputably, consider. That evidence, substantial in its scope and relevance, fully established the need for the designation of the subject PUD.

The Mississippi Supreme Court has emphasized that appellate courts are not to assume the role of weighing the evidence, and has reiterated that in the absence of arbitrary and capricious decision-making, the municipal decision should stand. Here, the Circuit Court properly determined that the City of Tupelo had evidence of the current use of the property and need for additional housing, the ongoing changes in the area, and the high percentage of low-density zoned property in the area where a need for greater density existed, all of which, in combination with the extensive, record testimony before the City Council, justified the rezoning decision. At the very least, the decision was fairly debatable and should not be disturbed by this Court on appeal.

Further, while the Circuit Court correctly found sufficient evidence of change and need to justify the grant of the PUD application under the traditional test, the City's approval of the PUD did not, in fact, constitute rezoning of property as the term has traditionally been understood. The Mississippi Supreme Court previously has applied zoning standards to PUD cases, but has never

been called upon to consider directly whether a Planned Unit Development should entail the same legal requirements as a zoning change. The City's consideration and approval of the PUD application in accordance with its zoning ordinances was not arbitrary and capricious, and the Court should afford due deference to the City's valid legislative enactments. The City of Tupelo emphasizes, however, that resolution of this issue is not necessary in order for the decision of the Circuit Court to be affirmed.

I. Standard of review

The Mississippi Supreme Court very recently restated, and discussed at some length, the standard of review in zoning cases in *Thomas v. Board of Sup'rs of Panola County*, 45 So. 3d 1173, 1180-81 (Miss. 2010). A lengthy citation to this case is instructive:

> Issues of zoning are not judicial, but rather, legislative in nature. *Luter v. Hammon,* 529 So. 2d 625, 628 (Miss. 1988). "Upon reviewing zoning cases the cause is not tried de novo but the circuit court acts as an appellate court only." *Broadacres, Inc. v. City of Hattiesburg,* 489 So. 2d 501, 503 (Miss. 1986). *See also Perez v. Garden Isle Cmty. Assoc.,* 882 So. 2d 217, 219 (Miss. 2004) ("This Court has also held that the circuit court acts as an appellate court in reviewing zoning cases and not as the trier of fact."); *City of Jackson v. Sheppard Inv. Co.,* 185 So. 2d 675,676 (Miss. 1966) ("the cause is not tried de novo in the circuit court" and the circuit court "was not the trier of facts and, in accordance with the statute, acted as an appellate court only").
>
> In *Mississippi Department of Corrections v. Harris,* 831 So. 2d 1190, 1192 (Miss. Ct. App. 2002), the Court of Appeals, in an Employee Appeals Board case, set forth the appropriate standard of review by the appellate court when an agency's decision has been reviewed by the circuit court:
>
> > The circuit court as the first-level appeals court affirmed the decision of the Employee Appeals Board. Even so, this Court again looks at the same record that was made at the agency whose decision is the subject of this appeal, and applies the same review

> standard to it regardless of whether the circuit court affirmed or reversed that decision.

Harris, 831 So. 2d at 1192. *See also Bynum v. Miss. Dep't ofEduc.,* 906 So. 2d 81, 91 (Miss. Ct. App. 2004) (citing *Harris,* 831 So. 2d at 1192) (In an Employment Appeals Board case, the Court of Appeals stated that "[r]egardless of the conclusion of the circuit court, our review focuses on the agency decision"). In *Childs v. Hancock County Board of Supervisors,* 1 So. 3d 855,861 (Miss. 2009), this Court stated:

> If the Board's decision is founded upon substantial evidence, then it is binding upon an appellate court, *i.e.,* the Circuit Court, the Court of Appeals and this Court. This is the same standard of review which applies in appeals from decisions of other administrative agencies and boards.

Childs, 1 So. 3d at 861 (quoting *Perez,* 882 So. 2d at 220).

In matters involving zoning decisions by boards of supervisors, the order of the governing body will "not be set aside unless it is clearly shown to be arbitrary, capricious, discriminatory, or is illegal, or without a substantial evidentiary basis." *Faircloth v. Lyles,* 592 So. 2d 941, 943 (Miss. 1991). In *Gentry v. City of Baldwyn,* our appellate courts defined the term "arbitrary" as an act that "is not done according to reason or judgment, but depending on the will alone." *Gentry v. City ofBaldwyn,* 821 So. 2d 870, 873 (Miss. Ct. App. 2002) (citing *Burks v. Amite County Sch. Dist.,* 708 So. 2d 1366, 1370 (Miss. 1998)).

On the other hand, the term "'capricious' is defined as any act done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles." *Id.* This Court has defined substantial evidence to mean "more than a mere scintilla of evidence" or "something less than a preponderance of the evidence but more than a scintilla or glimmer." *Miss. Dep't of Envtl Quality v. Weems,* 653 So. 2d 266, 280-81 (Miss. 1995) (quoting 2 Am. Jur. 2d Administrative Law § 537 *Substantial Evidence Standard (1994)).*

The burden of proof on issues of enacting or amending ordinances or rezoning rests on the party asserting the invalidity of the board's actions, while the board's actions have a presumption of validity. *Childs,* 1 So. 3d at 859. An appellate court cannot substitute its judgment for actions taken by the board. *Id.* The action of the zoning

> authority must not be disturbed where the issue is "fairly debatable." *Id.* "Where ... there is substantial evidence supporting both sides of a rezoning application, it is hard to see how the ultimate decision could be anything but 'fairly debatable,' not 'arbitrary and capricious,' and therefore beyond our authority to overturn." *Edwards v. Harrison County Bd. of Supervisors,* 22 So. 3d 268, 274, Miss. 2009) (quoting *Saunders v. City of Jackson*, 511 So. 2d 902, 907 (Miss. 1987)). However, "[e]very zoning case must be decided on the basis of all the circumstances of the particular case." *Id.* (quoting *Howie v. Autrey,* 209 So. 2d 904,905 (Miss. 1968)).

Even before *Thomas*, the Supreme Court emphasized that there is a presumption of validity in municipal zoning decisions and the challenging party bears the burden to demonstrate their invalidity. *Perez v. Garden Isle Community Ass'n*, 882 So. 2d 217, 219 (Miss. 2004). The Court may not substitute its judgment for that of the City, as "the judicial department of the government of this state has no authority to interdict either zoning or rezoning decisions which may be said '***fairly debatable***'". *Luter v. Hammon*, 529 So. 2d 625, 628 (Miss. 1988) (emphasis added).

Furthermore, municipalities' zoning decisions are presumed to have been made on the basis of requisite factual findings, even when the record does not contain a specific recitation of such findings. *See Beasley v. Neelly*, 911 So. 2d 603, 608-09 (Miss. Ct. App. 2005). In other words, as long as the reviewing court can find from the record sufficient information upon which the City could have relied in reaching the necessary factual conclusions, the City's decision may not be disturbed. Under this standard, the decision by the Circuit Court in this case should be affirmed.

II. Assuming the designation of a PUD constitutes a change in zoning, the record supported findings of change in character and public need for reclassification

The standard for rezoning in Mississippi has been clearly set out: "[T]o reclassify property, an applicant must show by clear and convincing evidence that (1) a mistake in the original zoning occurred; or (2) a change in the character of the neighborhood occurred that justified rezoning, and

a public need existed for the rezoning." *Thomas* at 11 (citing *Edwards,* 22 So. 3d at 274). *See also Childs,* 1 So. 3d at 859-60; *Town of Florence v. Sea Lands, Ltd.,* 759 So. 2d 1221, 1224 (Miss. 2000); *Old Canton Hills Homeowners Ass'n v. Mayor and City Council of City of Jackson,* 749 So. 2d 54, 62 (Miss. 1999).) Gardner argues that the Circuit Court erroneously affirmed the City's grant of the PUD application (which Gardner contends is a rezoning), because no substantial evidence supported the Board's actions. Mistake is not at issue in this case. The Court's analysis, therefore, focuses on the two part "change and need" test. Under this test the Circuit Court correctly concluded that the City had provided far more substantial evidence than that which has warranted affirmance under analogous, recent Mississippi Supreme Court case law.

Gardner asks the Court to re-weigh the evidence presented at the City Council hearing and to reach a different conclusion than did the City. As the Supreme Court has repeatedly held and recently affirmed, the appellate courts of this State lack the authority to take such actions:

> The appellate courts are not "super-zoning commission[s]" and should not consider themselves to be zoning boards for governing bodies. *McWaters v. City of Biloxi,* 591 So. 2d 824,828 (Miss. 1991). "Whatever may be the personal opinion of the judges of an appeal court on zoning, the court cannot substitute its own judgment as to the wisdom or soundness of the municipality's action." *Barnes v. Bd. of Supervisors, DeSoto County,* 553 So. 2d 508, 510 (Miss. 1989). A board may draw from its own common knowledge and its own familiarity with the area when making zoning decisions. *Faircloth,* 592 So. 2d at 943; *Childs,* 1 So. 3d at 860. This Court cannot overturn a zoning decision when substantial evidence supports both sides of a rezoning application, because it would be difficult to determine that the decision was not fairly debatable. *Edwards,* 22 So. 3d at 274.

Thomas, 45 So. 3d at 1181. With these principles in mind, the City turns to the evidence considered and found to be sufficient by both the City and Circuit Court.

1. Change in the character of the neighborhood

Gardner asserts that the City failed to prove by clear and convincing evidence that the character of the neighborhood had changed to an extent to justify rezoning. Gardner places great emphasis on two short statements found in the staff analysis of the PUD application, that indicated, consistent with Tupelo's policies for consideration of a PUD application, that proof of change was not a required element of the application. From this premise Gardner concludes that "The Staff Analyses' admission that changes in the area were not considered, . . . makes it indisputable that there was no clear and convincing evidence to meet this criteria." This Court, however, has expressed a fuller understanding of the difficult role a non-lawyer, municipal governing board faces when it considers land-use (and particularly rezoning) issues. Again, *Thomas* is instructive:

> Rezoning hearings are informal in nature. *Woodland Hills Conservation Ass'n, Inc.v. City of Jackson,* 443 So. 2d 1173,1180 (Miss. 1983). To determine the factual issues in rezoning requests, a board may consider information provided at the rezoning hearing, its own common knowledge, and its own familiarity with the area. *Faircloth,* 592 So. 2d at 943; *see also Childs,* 1 So. 3d at 860. The rules of evidence are misplaced in rezoning matters. *Woodland Hills,* 443 So. 2d at 1180. The board also may consider any hearsay evidence that is admitted when it makes its decision. *Id. at* 943-44. "It is both proper and desirable that rezoning decision makers consider information they have acquired outside the hearing room." *Id.* In *Board of Aldermen of Town of Bay Springs v. Jenkins,* 423 So. 2d 1323 (Miss. 1982), this Court stated that "[t]he hearing should be an informal, non-adversary proceeding in which the rules of evidence are not applicable" and reaffirmed that the mayor and board of aldermen were permitted to consider both sworn and unsworn statements at the hearing and their common knowledge and familiarity with the area. *Id.* (quoting R. Khayat and D. Reynolds, *Zoning Law in Mississippi,* 45 MISS. L.J. 365, 372-73 (1974)). Notwithstanding that informality is acceptable in rezoning proceedings, the governing body still must "find the necessary criteria for rezoning by clear and convincing evidence[,]" and that the evidence is contained in the record. *Bd. of Aldermen, City of Clinton v. Conerly,* 509 So. 2d at 885.
>
> This Court has provided some guidance to determine what constitutes substantial evidence. In *Board of Aldermen, City of Clinton,* this Court held that a governing board needs a minimum of evidence, such as a map, changes in the area, statistics demonstrating a public need, and other evidence to make an informed judgment. *Bd.*

of Aldermen, City of Clinton, 509 So. 2d at 886. Subsequently, in *Sea Lands,* this Court stated that "it is impossible to articulate or design a particular test for determining what is sufficient evidence to show a material change and a public need to support rezoning." *Sea Lands,* 759 So. 2d at 1227-28. As stated in *Sea Lands,* while there is no test to determine what constitutes sufficient evidence to prove a substantial change in the character of the neighborhood and public need, without comparable evidence, such as maps showing a change or recent rezoning in the area, statistics or other evidence of growth in the neighborhood, and charts showing the quantity of construction, the record lacks comparable evidence to show a material change in the neighborhood or a public need. *Id.; Bd. of Aldermen, City of Clinton,*

509 So. 2d at 886.

However, this Court also recognizes that zoning is not stagnant. "Because communities grow and changes occur, municipal officials possess the power to rezone." *Woodland Hills,* 443 So. 2d at 1180. A good comprehensive plan "contemplates a dynamic community" and recognizes change that balances growth with individual property interests. *Id.* at 1179. The Court has held:

> [A]ll presumptions must be indulged in favor of the validity of zoning ordinances. It is presumed to be reasonable and for the public good. It is presumed that the legislative body investigated it and found conditions such that the action which it took was appropriate. The one assailing the validity has the burden of proof to establish that the ordinance is invalid or arbitrary or unreasonable as to his property, and this must be by clear and convincing evidence.

Edwards v. Harrison County Bd. of Supervisors, 22 So. 3d 268, 279 (Miss. 2009) (quoting *Childs,* 1 So. 3d at 861). "Again Rhyne also points out: 'Zoning is not static, and zoning restrictions are subject to change. Thus, a municipality may amend its zoning ordinance whenever it deems conditions warrant such change.'" *Edwards,* 22 So. 3d at 275 (citing *City of Jackson v. Bridges,* 243 Miss. 646, 654,139 So. 2d 660, 663 (1962)). Mississippi Code Section 11-1-17(1)(a) states, in part:

> The governing authority of each municipality and county may provide for the preparation, adoption, amendment, extension and carrying out of a comprehensive plan for the purpose of bringing about coordinated physical development in accordance with present and future needs....

Miss. Code Ann. § 11-1-17 (1){a) (Rev. 2002).

Thomas, 45 So. 3d at 1182-83.

Despite Gardner's contrary argument, the City's consideration went much further than a short entry on a staff analysis report. The City was provided and considered substantial evidence to support the change in character of the neighborhood in which the subject property was located. Among other facts considered by the City were the effect of the development and execution of the Toyota Wellspring Project north of the property[2]; construction of Tupelo Christian Preparatory School;[3] through access from Pontotoc County to the City via Belden-Endville Road; and specific changes in the area around the property from a rural character to a more suburban character.[4] All these factors

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[2]The Circuit Court correctly found that location of the facility presented contemporaneous and pertinent planning issues affecting housing needs of northern Tupelo. *See, e.g., Edwards v. Harrison County Board of Supervisors*, 22 So. 3d 268, 277 (Miss. 2009) (accepting planner's generalized statement as evidence to support changing need that included, "Also, we had another reason, the growth of the county is due north. I think that's been sped up a little bit because of Katrina. . . . Obviously, the Saucier Community is working on a master plan to try to handle this growth in the future . . . Because this is where the population is heading we think. And of course, with the growth to the north, jobs are going to be necessary in that location. And we feel this would be an asset to that growth").

[3]The Planning Department Staff Analysis specifically determined that the area under consideration for the PUD was "also expected to see more residential development due to the construction of Tupelo Christian Preparatory School and to the access to McCullough Drive, Coley Road, and the rest of the thoroughfare system." (See R. 12 (the very Staff Analysis which Gardner presents as proof of no consideration of change), and R. 166 (transcript of hearing in which the Council considered testimony as to changes in the area, that "Tupelo Christian Preparatory School was placed out there recently. I believe that's a pretty big change. It would be close to schools for their children to attend.")).

[4]The Circuit Court also correctly noted that the Council heard testimony, and have appreciated from its common knowledge and familiarity with the area, that the proposed location was "close to the mall, easy access to the mall and easy access to all of West Tupelo, churches,

support a finding of change in the character of the area for which the PUD application was sought. *See, e.g., Fondren N. Renaissance v. Mayor of Jackson*, 749 So. 2d 974, 978 (Miss. 1999) (finding that "construction of apartments, condominiums, offices and schools in the area clearly indicate that the question of change in the neighborhood was at the very least 'fairly debatable'"); *Northwest Builders, Inc. v. Moore*, 475 So. 2d 153, 154 (Miss. 1985) (changes in nearby road conditions and capacity supported finding of change in character).

This was not insubstantial evidence considered first by the City, and then by the Circuit Court. To the contrary, it constituted the sort of specific, substantial evidence which this Court has, in the past, stated is necessary to support the zoning body's decision-making process. At a minimum, the question of whether there was a change in character in the subject area, in view of all of the facts in the record, was fairly debatable.

In support of his argument that the record does not contain sufficient evidence of change in character, Gardner relies heavily upon the Court of Appeals' decision in *Cockrell v. Panola County Bd. of Sup'rs*, 950 So. 2d 1086 (Miss. Ct. App. 2007). The facts presented in the *Cockrell* opinion are not, as Gardner suggests, "markedly similar" to the record at issue in this matter. Appellant's Brf., at 14. In *Cockrell*, the Court of Appeals concluded that "previous attempts by the county's industrial development authority ... to market and develop the area ... as a major industrial site" did not constitute substantial evidence of change in character and rejected the contention that "future potential for industrial development can be an indication of change in the character of this area to warrant rezoning." *Cockrell*, 950 So. 2d at 1093, 1095. In this case, the record does not reflect that the City

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schools – and keep in mind, it's only seven miles from the Toyota site. So that area is going to develop quickly." (R. 165).

merely *wished* for the character of the area to change or had *attempted* to change the character of the area, without any actual change of which to speak. Instead, the record demonstrates that the area was *actually* changing due to Toyota project and Tupelo Christian Preparatory. The City's finding of change in character was fairly debatable, and not arbitrary and capricious.

2. Public need

The Circuit Court was also correct in finding that substantial evidence exists to support the City's finding of public need. Certain of the changes discussed above (including, for example, the through-access of the area and the newly-formed school) indicated a need to increase available residential housing in the area. The Council heard specific evidence that the City's housing needs would require construction of about 450 housing units per year, rather than the current housing units numbering between 120 and 130 per year. Gardner claims such evidence was "speculative," or not in a statistical format that, but the Circuit Court correctly noted that this information was provided to the City Council by its Planner, Mr. Pat Falkner, whose very job it is to develop and analyze such information. When asked directly about the public need for the PUD, Mr. Falkner responded:

> The Comprehensive Plan we are now working on has already made an assessment of the demand, population growth, household growth, housing needs and their projection is going to be that we will need somewhere in the neighborhood of 450 houses a year, housing units a year. To put that in perspective, we've been building 120, 130 so we have nearly triple the production in housing units.

(R.p. 167). There is nothing in Gardner's appeal, or in the larger record, even to create factual issues as to the veracity of this information provided by the City Planner, and the Circuit Court correctly determined that a decision by the City, based on such information, could not be found to be arbitrary

or capricious. The information provided by the Planner was substantial, and at the very least it was fairly debatable – if one can find record evidence to dispute the Planner's information.

The Circuit Court also found the testimony of Mr. Hill, the Council member assigned to the affected ward, relevant as to need. The Circuit Court noted Mr. Hill's testimony at the subject hearing, as follows:

> I'll just add this. The Belden area is in my Ward. I've been trying to make things look better and demolishing five homes out there that were actually drug dens, overlay Abby Lane, which was nothing but a rutted dirt road. I think we've made significant improvements in the Belden area. I think this is a wonderful addition to Belden based on what I've seen . . . and I think it is definitely a trend in the future where you have more higher density homes. We can't all have $60,000 lots and build homes on them. There's got to be more room for more affordable housing. We addressed that problem. We recognize we have one, and I think [the project] is another example of where you blend small homes into large homes, and I think they have been very well done. And I have full confidence this will be a high quality development and a compliment to the Belden area of Tupelo.

(R. 171-72). The Circuit Court also noted evidence, presented to the City, that of 17,280 acres of land in Tupelo zoned in various residential classifications, 15,000 acres (roughly 87 percent of all residential land), was zoned either large lot residential or medium lot residential. (R. 163). Similarly, the Council heard testimony that the City's 2025 comprehensive plan was under development, "and current demographic trends nationally indicate that people now prefer to live in denser neighborhoods and that higher density actually creates better, stronger, and more stable neighborhoods. The Planned Unit Development section of Tupelo's current zoning code actually encourages this type of development and the density that it allows." *Id.* The Circuit Court further noted that the Council heard testimony, and likely would have had familiarity and common knowledge as council members, that "Tupelo promotes itself as a certified retirement community. And [84 homes designated as senior

housing units] will assist in attracting retirees to our city. In fact, The Meeting Place in the Villages, a seniors only section of another Planned Unit Development, was the first to sell out and be completed." *Id.*

Finally, the Circuit Court found significant to its consideration of the PUD application that the use of PUDs is encouraged under the City's Development Code because of the extensive planning required prior to development, and because PUDs allow the City to manage growth on a large and more controlled scale. Tupelo Dev. Code § 9.2.1(2). The City's Code defines a PUD as a "tract of land under single ownership, or under common control, evidenced by duly recorded contracts or agreements approved by the City Council, that is ***planned and developed*** as an integral unit in a single development operation or in a programmed series of development operations ***in accordance with a master land use plan and detailed engineering and architectural plans as approved by the City Council.***" Tupelo Dev. Code § 2.1.4 (emphasis added). PUDs are allowed as "overlays" in all zoning districts within the City. Tupelo Dev. Code § 9.2.2; *see also* Tupelo Dev. Code 8.1.2 (contemplating that property may be "classified in an overlay district as well *as* zoning district").

Having concluded that the "change and need" requirements were met by the City, the Circuit Court determined that it did not need to address the City's argument that PUD "overlay districts" do not, in fact, effect a change in zoning sufficient to trigger tests for rezoning. However, the Court found that the more specific considerations inherent in the PUD application, including (for example) lot and road placement, traffic studies, type of housing to be placed in the PUD, restrictive covenants, and extensive pre-development and post-development conditions and analysis all contributed to the Council's findings of the change in the area, and need for the PUD for which the application was

sought. Having considered the evidence placed before and considered by the City, the Circuit Court ultimately, and correctly, could not conclude that there was not a substantial basis for the City's decision, or that the decision was arbitrary, capricious, discriminatory, or otherwise illegal. This Court should affirm that finding, as well as the Circuit Court's conclusion that, at a minimum, the substantial evidence that the City considered and acted upon was fairly debatable. The Circuit Court was correct in its ultimate determination that, under such circumstances, a Court may not reverse the legislative action of the municipal governing body.

III. The City's approval of a PUD did not "rezone" property

Gardner incorrectly assumes that the City's decision to approve the Coleman PUD was a "rezoning" decision that must be supported by evidence of a mistake in the original zoning or by findings of change in character and public need for a rezoning. Appellant's Brief, at 6. In fact, the decision to approve a PUD is different than a traditional rezoning and is governed by the standards set forth in the Code.

The planned unit development is a relatively modern planning and zoning device that provides a greater degree of flexibility than traditional zoning, which typically relies on the establishment of rigid districts. *See Tri-State Generation & Transmission Co. v. Thornton*, 647 P.2d 670, 677-78 (Colo. 1982) (PUD ordinances provide "flexibility necessary to permit adjustment to changing needs, and the ability to provide for more compatible and effective development patterns within a city"); *Levitt Homes Inc. v. Old Farm Homeowner's Ass'n*, 444 N.E.2d 194, 202 (App. Ct. Ill. 2d Dist. 1982) (holding that the "intent of the planned unit development provisions is to allow more flexibility in development than is available under the general zoning ordinance provisions while continuing to allow

the city to protect the interests it normally protects through general zoning provisions."); *Rudderow v. Township Committee of Mount Laurel Tp.*, 297 A.2d 583, 585 (N.J. Super. Ct. App. Div. 1972) (PUD ordinance "enables municipalities to negotiate with developer concerning proposed uses, bulk, density and set back zoning provisions, which may be contrary to existing ordinances if the planned project is determined to be in the public and individual homeowner's interest"). The use of PUDs is encouraged within the City because of the extensive planning required prior to development and because PUDs allow the City to manage growth on a large and more controlled scale. Tupelo Dev. Code § 9.2.1(2).

The City's Code defines a PUD as a "tract of land under single ownership, or under common control, evidenced by duly recorded contracts or agreements approved by the City Council, that is ***planned and developed*** as an integral unit in a single development operation or in a programmed series of development operations ***in accordance with a master land use plan and detailed engineering and architectural plans as approved by the City Council.***" Tupelo Dev. Code § 2.1.4 (emphasis added). PUDs are allowed as "overlays" in all zoning districts within the City. Tupelo Dev. Code § 9.2.2. In other words, approval of a PUD does not *eliminate* the underlying zoning; rather, it supplements it with additional regulations and development restrictions. *See* Tupelo Dev. Code 8.1.2 (contemplating that property may be "classified in an overlay district *as well as* zoning district") (emphasis added).

Gardner ignores the City's PUD ordinance, arguing instead that the City should be held to standards for rezoning because its staff documents colloquially referred to the PUD application as a "rezoning." As discussed above, though, the City's ordinances specifically provide that a PUD

overlay does not eliminate the underlying zoning district. Tupelo Dev. Code 8.1.2 ("regulations governing development in the overlay district shall apply *in addition to* the regulations governing development in the underlying district") (emphasis added). The PUD application at issue here complied in all respects with the City's PUD ordinance and provided all information required by the City's for its consideration of a PUD overlay. R.20-103.

It is significant that PUD status can only be granted to a *single tract of property* at a time and not – as is the case with traditional zoning districts – to large areas of land with typically diverse ownership. In contrast to traditional zoning districts, PUDs are relatively small areas of property, often characterized by unity of ownership. If traditional rezoning standards were applied to PUD designations, all PUDs could be argued to constitute impermissible "spot zoning".

Gardner correctly notes that the form Coleman filled out to seek review of his proposed PUD was titled "Request for Rezoning" and that the Department and the City Council stated that Coleman was seeking a "rezoning" of the property. However, the standards contained in the Code make clear that a PUD designation is not the same type of zoning action as a traditional rezoning and that the same standards should not apply to both types of actions. To apply an incorrect standard of review based on the colloquial use of the word "rezoning" would elevate form over substance and severely limit the City's ability to maintain a degree of flexibility in its zoning regulations.

While Mississippi courts generally require a showing of change or mistake to justify a rezoning, certain learned treatises conclude that "[i]n a state which customarily applies the change or mistake rule to zoning amendments, an amendment which creates a planned development district will not be disapproved for failure to demonstrate change or mistake." 3 Am. Law. Zoning § 24:6 (5th ed.)

As part of a PUD approval, the City may authorize deviations from the development standards of a PUD's underlying districts with respect to lot dimensions, setbacks, design standards, required improvements, parking, interior landscaping, and buffering if it determines that such deviations "***will perform as well as or better***" than the default regulation. Tupelo Dev. Code § 9.29.2.7(2) (emphasis added).[5]

Gardner apparently does not challenge the validity of the City's applicable ordinances. Even if he did, however, the City's legislative acts should be afforded great deference, as "all presumptions must be indulged in favor of the validity of zoning ordinances." *Childs v. Hancock County Bd. of Sup'rs*, 1 So. 3d 855, 861 (Miss. 2009) (*quoting Ballard v. Smith*, 107 So. 2d 580, 586 (Miss. 1958)). Because Gardner has not demonstrated by clear and convincing evidence that the City's PUD ordinances are arbitrary and capricious, the PUD application was not unlawfully approved. *Id. See also Hall v. City of Ridgeland*, 37 So. 3d 25, 41 (Miss. 2010) (holding that "local authority's reasonable interpretation of a zoning ordinance should be afforded great deference"). In any event, Gardner could not now challenge the validity of the PUD ordinance because he did not perfect a timely appeal of the City's adoption of its PUD ordinance. *See* MISS. CODE ANN. § 11-51-75 ("Any person aggrieved by a judgment or decision of the ... municipal authorities of a city, town, or village, may appeal within ten (10) days from the date of adjournment at which session the board of supervisors or municipal authorities rendered such judgment or decision...."); *Newell v. Jones County*,

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[5]The City recognizes that the Mississippi Supreme Court previously has upheld a PUD designation using the traditional "change and need" test. *See Fondren N. Renaissance v. Mayor of Jackson*, 749 So. 2d 974, 977-80 (Miss. 1999). However, neither of Mississippi's appellate courts has ever directly considered the issue before this Court (if this Court chooses to address it in this case): whether a PUD designation constitutes a "rezoning" under the City's Development Code.

731 So. 2d 580 (Miss. 1999) (holding that the "ten (10) day time limit in which to appeal the decision of a Board is both mandatory and jurisdictional").

To the extent that the Coleman PUD deviates from the Code's general development standards for an R-1L district, then, the record need only contain evidence to support a conclusion that the standards reflected in the PUD's master land use plan "will perform as well as or better" than the standard R-1L regulations. As noted in the Statement of Facts, the record is replete with information to support a conclusion that the standards set forth in the Coleman PUD are as good or better than the general R-1L standards. To be precise, as pointed out in the Statement of Relevant Facts and the section that follows, the record actually would satisfy the traditional standard for rezoning, if that higher standard applied.

As noted in the Staff Analysis, narrower lots (and the accompanying higher density) will be offset by the use of rear driveways. Also, the PUD's master land use plan – compliance with which is mandatory – includes a buffer between the development and the surrounding R-1L property to minimize any impact on the neighboring property, and more than twenty percent of the property is reserved for open and green space. Because the issue of whether the standards established by the Coleman PUD's master land use plan are as good or better than the R-1L development regulations is at least ***fairly debatable***, the City's decision must stand.

CONCLUSION

For these reasons and the reasons contained in the written findings of the Circuit Court below, the Court should affirm the decision of Appellee, the City of Tupelo, Mississippi, and dismiss this appeal with prejudice.

THIS, the 16th day of May, 2011.

Respectfully submitted,

THE CITY OF TUPELO, MISSISSIPPI

POPE S. MALLETTE (MB NO. [redacted]

PAUL B. WATKINS (MB NO. [redacted]

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CERTIFICATE OF SERVICE

I, Pope S. Mallette, attorney for Appellee the City of Tupelo, Mississippi, do certify that I have this date delivered, by United States mail, postage pre-paid, a true and correct copy of the above and foregoing document to the following:

R. Shane McLaughlin, Esq.
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338 North Spring Street, Suite 2
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ATTORNEY FOR APPELLANT

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B. Bronson Tabler, P.A.
P.O. Box 7116
Tupelo, Mississippi 38802-7116

ATTORNEY FOR APPELLEE WILSON COLEMAN

THIS, the 9th day of May, 2011.

POPE S. MALLETTE

CERTIFICATE OF SERVICE

I, Pope S. Mallette, attorney for Appellee the City of Tupelo, Mississippi, do certify that I have this date delivered, by United States mail, postage pre-paid, a true and correct copy of Brief of Appellees to the following:

Honorable Billy G. Bridges
520 Chuck Wagon Drive
Brandon, Mississippi 39042

Lee County Circuit Court (No. CV08-059-PL-L)

THIS, the 25th day of May, 2011.

POPE S. MALLETTE

CERTIFICATE OF FILING

I, Pope S. Mallette, attorney for the Appellees, do hereby certify that I have this day filed the Brief of Appellee by mailing the original of said document and three (3) copies thereof, via Federal Express, to the following:

Hon. Kathy Gillis
Supreme Court Clerk
450 High Street
Carroll Gartin Justice Building
Jackson, MS 38295

This the 19th day of May, 2011.

POPE S. MALLETTE

APPENDIX 1

Excerpts, City of Tupelo Development Code

lesser number of stories, or a greater percentage of lot to be left unoccupied, or impose other standards which are higher than those set forth in this Ordinance, then the provisions of such statute, ordinance, or regulation shall govern.

(2) This Ordinance is not intended to abrogate any easement, covenant, or other private agreement, however, where the regulations of this Ordinance are more restrictive or impose higher standards or requirements than such easement, covenant, or other private agreement then the requirements of this Ordinance shall govern. Nothing in this Ordinance shall modify or repeal any private covenant or deed restriction, but such covenant or restriction shall not excuse any failure to comply with this Ordinance.

2.1.4. Definitions

When used in this Ordinance, the following words and terms shall have the meaning set forth in this Section, unless other provisions of this Ordinance specifically indicate otherwise:

ACCELERATED EROSION: Any increase over the rate of natural erosion as a result of land-disturbing activities.

ACCESSORY BUILDING OR STRUCTURE: A building or structure which is on the same lot as, and of a nature customarily incidental and subordinate to, another building or structure, and the use of which is clearly incidental and subordinate to that of the other building or structure

ACCESSORY USE: A use which is on the same lot as, and of a nature customarily incidental and subordinate to the principal use, structure, or building on the property.

ACTIVE CONSTRUCTION: Activities that contribute directly to the completion of facilities contemplated or shown on the construction plans.

ADDITION (TO AN EXISTING BUILDING): Any walled and roofed expansion to the perimeter of a building in which the addition is connected by a common load-bearing wall other than a firewall.

ADEQUATE EROSION CONTROL MEASURE, STRUCTURE, OR DEVICE: A measure, structure, or device that controls the soil material within the land area under responsible control of the person conducting the land-disturbing activity.

ADULT ARCADE: An establishment where, for any form of consideration, one or more motion picture projectors, slide projectors, or similar machines for viewing by five (5) or fewer persons each are used to show films, motion pictures, video cassettes, slides or other photographic reproductions that are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT BOOKSTORE: A commercial establishment that, as one of its principal business purposes, offers for sale or lease for any form of consideration, any one (1) or more of the following:

(1) books, magazines, periodicals, or other printed matter, or photographs, films, motions pictures, video cassettes, slides or other visual representations that are characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas"; or,

(2) instruments, devices or paraphernalia that are designed for use in connection with "specified sexual activities".

ADULT CABARET: An establishment that regularly features live performances that are characterized by the exposure of specified anatomical areas or by specified sexual activities, or films, motion pictures, video cassettes, slides, or other photographic reproductions in which a substantial portion of the total presentation time is devoted to the showing of material that is characterized by an emphasis upon the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT ENTERTAINMENT ESTABLISHMENTS: Any adult arcade, adult bookstore, adult cabaret, adult motel, adult motion picture theater, adult video store, or similar establishment which regularly features or depicts behavior which is characterized by the exposure of "specified anatomical areas", or where any employee, operator or owner exposes his/her "specified anatomical areas" for viewing by patrons.

ADULT MOTEL: An establishment which includes the word "adult" in any name it uses or otherwise advertises the presentation of adult material offering public accommodation for any form of consideration, which provides patrons with closed-circuit televised transmissions, films, motion pictures, video

government, which is used or intended to be used for public recreation, including, both active or passive recreation.

PARKING SPACE, OFF-STREET: A space designed for the parking or temporary storage of one automobile, and is located outside of a dedicated street right-of-way.

PEAK HOUR TRIPS: The greatest number of vehicle trips generated by a unit of new development during any sixty (60) minute period in a given day.

PENNANT: Any lightweight plastic, fabric, or other material, whether or not containing a message of any kind, which is suspended from a rope, wire, string, or pole, usually in series, and which is designed to move in the wind.

PERMITTED USE: A land use listed in Chapter 8 or 9 of this Ordinance as a "permitted use" in the zoning district in which it is located, and which is subject to the approval procedures set forth in Chapter 5, Part 2 of this Ordinance.

PERSON: Any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution utility cooperative interstate body, or other legal entity.

PERSONAL CARE HOME: A home or institution that gives personal care to aged or infirm, ambulant persons who are not in need of nursing care.

PERSONAL COMMUNICATION SERVICE (PCS): Digital or analog wireless telecommunications technology such as portable telephones, pagers, faxes and computers; also known as Personal Communication Network (PCN).

PERSONAL SERVICE ESTABLISHMENTS: A business which provides personal services directly to customers at the site of the business, or which receives goods from or returns goods to the customer which have been treated or processed at that location or another location. This includes, but is not limited to, travel agencies, dry-cleaners, laundries, tailors, hair stylists, cosmeticians, toning or tanning salons, banks, postal stations, package delivery drop-off and pick-up stations, photocopy centers, shoe repair shops, appliance repair shops, interior design studios, dance and martial arts studios, and domestic pet services. This shall not include automobile service stations.

PHASE OF GRADING: One (1) of two (2) types of grading: rough or fine.

PLANNED UNIT DEVELOPMENT: A tract of land under single ownership, or under common control, evidenced by duly recorded contracts or agreements approved by the City Council, that is planned and developed as an integral unit in a single development operation or in a programmed series of development operations in accordance with a master land use plan and detailed engineering and architectural plans as approved by the City Council.

PORCH: A projection from an outside wall of a dwelling which is covered by a roof and/or sidewalls (other than the sides of the building to which the porch is attached) and which is no more than two (2) feet in height. A porch which projects beyond a required yard, setback, or building restriction line may be screened, but may not be enclosed with glass, jalousies, canvas, plastic, or any solid material to a height greater than two (2) feet.

POROUS PAVEMENT: A pavement surface used for vehicular use areas that are privately maintained, in which water can penetrate the surface so as to percolate to the soil beneath.

PORTICO: A porch or walkway, open to the outside air that is covered by a roof which is supported by columns or pillars, typically leading to the entrance of a building.

PROPERTY: All real property, subject to the provisions of this Ordinance.

PROTECTIVE COVER: See GROUND COVER.

PROTOTYPE PROCESS AND PRODUCTION PLANTS: A building or operation in which processes planned for use in production elsewhere can be tested, or in which goods are produced only in a quantity necessary for full investigation of the merits of a product, but not including the production of any goods on the premises primarily or customarily for sale or for use in production operations off the premises.

PUBLIC SAFETY STATION: A police, fire, or paramedic station operated, franchised, or regulated by a government agency.

PUBLIC UTILITIES: Any City approved water and/or sanitary sewer system, including collection and distribution lines, which is constructed to City standards, sizes, and specifications, conforms to the requirements of this Ordinance, and has been dedicated to and accepted by the City for operation and maintenance. For the purpose of this Ordinance, commercial wireless telecommunication services shall not be

5.4.8. Effect of Approval or Denial

(1) SUBSEQUENT PERMITS AND APPROVALS. Approval of the application for minor conditional use approval authorizes the applicant to obtain minor site plan approval from the Director of Planning and Development (see Section 5.7.6) and such other permits or approvals which the City Council may require for the proposed development. If the major conditional use included a major site plan, then approval of the conditional use also constitutes approval of the site plan. The Planning and Development Department shall review applications for these permits for compliance with the terms of the conditional use approval. A permit, certificate, or other approval shall be issued and valid only for work that complies with the terms of the conditional use approval.

(2) TRANSFERABILITY OF APPROVAL. A conditional use approval is not transferable from one property to another, but may be transferred to a successor-in-interest to the property, unless specifically prohibited.

(3) RESUBMISSION OF DENIED APPLICATIONS. No application for approval of a Conditional Use shall be filed with or accepted by the Planning and Development Department which is identical or substantially similar to an application which has been denied within the previous 365 days. This waiting period requirement may be waived in an individual case, for good cause shown, by the affirmative vote of three-fourths (¾) of the members of the City Council after recommendation from the Planning Committee.

5.4.9. Changes to Terms and Conditions of Approval

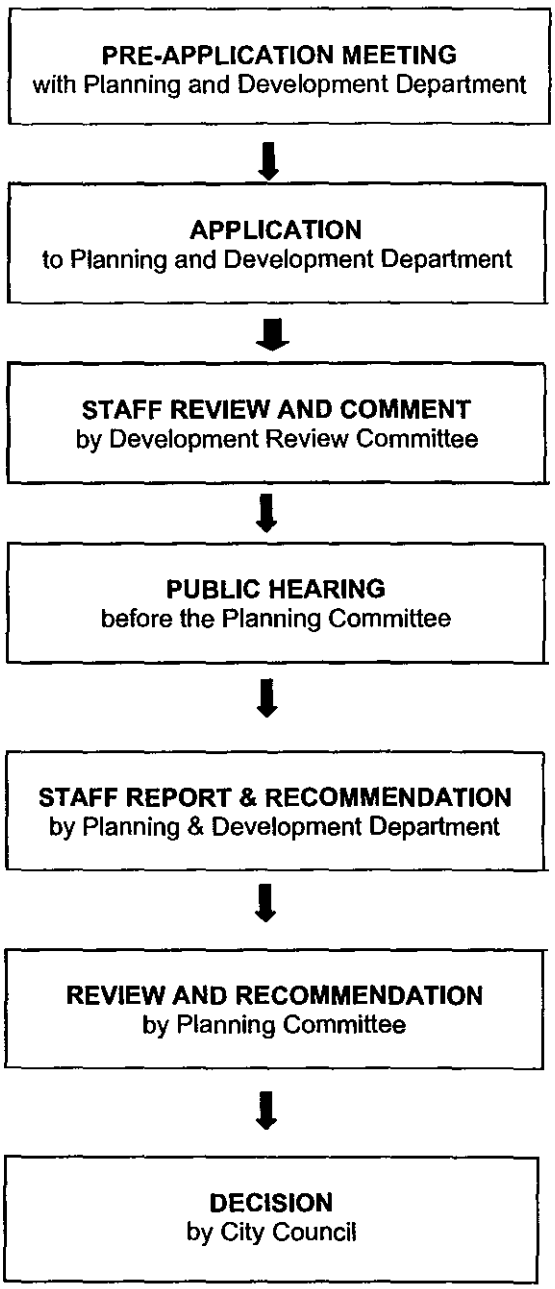
Any changes to the terms or conditions of approval of the conditional use shall require separate review and approval by the Director of Planning and Development, the Planning Committee or the City Council (whichever approved the conditional use). Any application for approval of such a change shall be filed, processed, reviewed, and approved or denied in the manner set forth in the Part for an original application for conditional use approval. This section shall not apply, however, to modifications to the approved site plan for the conditional use, which are governed by Section 5.7.14 of this Ordinance.

PART 5. PLANNED UNIT DEVELOPMENTS

5.5.1. Purpose and Scope

No approval for construction of any on-site or off-site improvements for a planned unit development shall be granted until a master land use plan for the planned unit development is approved in accordance with the procedures and requirements of this Part. Figure 5.5.1 graphically describes the process for approval of master land-use plans for planned unit developments.

Process for Planned Unit Developments
Figure 5.5.1.



5.5.2. Coordination with Review of Subdivision Plats and Site Plans

(1) The review and approval of planned unit developments may be coordinated with the review and approval of any preliminary subdivision plat and/or site plan required by Part 6 and/or Part 7 of this Chapter.

(2) An application for planned unit development approval and any required application for preliminary subdivision plat and/or site plan approval may be filed simultaneously. The review and processing of these applications shall be coordinated and consolidated as much as possible. The Planning and Development Department, the Planning Committee and the City Council, however, shall render separate reports, recommendations and decisions on each application based on the specific standards applicable to each approval.

5.5.3. Application by Owner or Authorized Representative

An application for approval of a planned unit development may be initiated only by all of the owners of the parcel proposed for development as a planned unit development or by any person specifically authorized by all of the owners to file such application.

5.5.4. Pre-filing Meeting

Before filing an application for a planned development approval, the applicant shall meet with the Planning and Development Department in a pre-filing meeting to discuss the proposed planned unit development and to become more familiar with the applicable requirements and approval procedures of the City. The applicant shall provide the Planning and Development Department with the following information at the pre-filing conference:

(1) Size and location of the parcel proposed for development as a planned unit development;

(2) Proposed gross density of the proposed planned unit development and net density of individual parcels within the planned unit development;

(3) A concept plan showing general land uses proposed for the planned unit development including location and acreage;

(4) A schematic description of utility and circulation improvements for the planned unit development.

5.5.5. Application for a Planned Unit Development Approval

(1) An application for a planned unit development approval shall be filed with the Planning and Development Department on a form prescribed by the Department, along with a fee prescribed by the City Council.

(2) The application shall be accompanied by a master land use plan and the following items of information:

(a) A complete boundary survey showing the total acreage of the planned unit development, present zoning classification(s), date and north arrow;

(b) Planned primary and secondary traffic circulation patterns, including an analysis of anticipated traffic volumes using current Institute of Traffic Engineers' Trip Generation manual methodology and showing calculations, and all planned street connections.

(c) Planned means of providing for the organization, arrangements for the ownership maintenance, and preservation of common open space.

(d) Draft of covenants which create a homeowners association for the maintenance of all privately owned common areas, including, but not limited to, streets, parking areas, easements, and the like.

(e) Planned buffers around the perimeter of the proposed planned unit development and adjacent to proposed streets and between proposed parcels. Proposed building setbacks (residential and nonresidential).

(f) A description of the relationship of the planned unit development to the surrounding land uses and the uses within the development to each other.

(g) Conceptual plans for water and waste water systems to be constructed in accordance with City standards.

(h) Preliminary drafts of any proposed declarations to be recorded pursuant to Mississippi Code 1972 Ann. Section 89 Chapter 9.

(i) A statement of intent regarding access of fire fighting and refuse disposal equipment and including the method of refuse disposal, such as compactors, dumpsters, etc.

(j) Conceptual plans for all utilities to be installed underground, except for City Council approved electric feeder lines.

(k) Conceptual plans for an adequate storm drainage system to be constructed in accordance with City standards.

(l) The conceptual delineation of areas to be constructed in phases or sections and the sequential order that will be followed in development including a written statement from the applicant indicating the date for beginning each

phase of construction and the estimated date of completion.

(m) Site analysis:
  (i) On-site soils analysis/map.
  (ii) Slope analysis/map.
  (iii) Vegetation analysis/map.
  (iv) Floodplain analysis/map.
  (v) Development suitability analysis/map.

(3) In considering the master land use plan, the Planning Committee or the City Council may request such additional information as it deems necessary to review the application.

5.5.6. Determination of Completeness

The Planning and Development Department shall determine whether an application for a planned unit development is complete. If the Director determines that the application is not complete, then he or she shall notify the applicant in writing of any deficiencies and shall take no further steps to process the application until the deficiencies are satisfied.

5.5.7. Scheduling of Public Hearing

Once the Director determines that the application of planned unit development is complete, then he or she shall establish a schedule for consideration of the application for a planned unit development approval and for a public hearing before the Planning Committee.

5.5.8. Public Hearing

A planned unit development may be approved only after the Planning Committee has conducted a public hearing on the application for a planned unit development approval and the proposed master land use plan. Notice of the hearing shall be provided according to Section 5.15.1.(4), and the public hearing shall be conducted in accordance with Section 5.15.2 of this Ordinance.

5.5.9. Staff Review

(1) After determining that an application for a planned unit development approval is complete, the Planning and Development Department shall transmit the application and proposed master land use plan to the Public Works Department and the Water and Light Department.

(2) The Planning and Development Department shall review the application and the proposed master land use plan for compliance with the requirements of this Ordinance including the impact of the proposed planned unit development on adjacent lands and on the City's ability to provide adequate public services to the proposed planned unit development. The Planning and Development Department may transmit the proposed master land use plan to the Parks and Recreation Department and/or any other board or commission deemed appropriate by the Planning and Development Department or the City Council for review and comment.

(3) Prior to the public hearing, in regard to an application for a planned unit development approval, the Planning and Development Department shall transmit a staff report on the proposed planned unit development and master land use plan to the Planning Committee along with the comments of the Departments of Planning and Development, Public Works, and Water and Light and any comments submitted by any other board or commission.

5.5.10. Review and Recommendation by the Planning Committee

(1) The Planning Committee shall consider an application for a planned unit development approval and proposed master land use plan and shall make recommendations to the City Council regarding whether to approve or deny each plan.

(2) The Planning Committee may consider the proposed master land use plan at its meeting after the public hearing, and shall make its recommendation to the City Council within thirty (30) days after the public hearing. If no recommendation is made within that time, then the Planning Committee may request an extension of time from the City Council of not more than thirty (30) additional days. If the Planning Committee makes no recommendation within the required or extended time period, then the City Council may act on the proposed planned unit development without a recommendation from the Planning Committee.

(3) In forming its recommendation to the City Council, the Planning Committee may consult with and consider the recommendations of the Parks and Recreation Department the Planning and Development Department, and any other board, commission or department which has considered the proposed planned unit development.

5.5.11. Action by the City Council

(1) Before acting on an application for planned unit development and master land use plan approval, the City Council shall consider the recommendations of the Planning Committee, the other boards and

CHAPTER 8. ZONING USE DISTRICTS

PART 1. ESTABLISHMENT OF DISTRICTS AND ALLOWABLE USES

8.1.1. Districts Established

In order to carry out the purposes of this Ordinance and to allow a variety of uses in different districts which are appropriate to the character of the individual district, the City shall be divided into the following zoning districts, the boundaries of which shall be shown on the Official Map of Zoning Districts.

(1) A-O Agricultural-Open District
(2) R-1E Residential Estate District
(3) R-1L Large Lot Residential District
(4) R-1M Medium Lot Residential District
(5) R-1S Small Lot Residential District
(6) R-2 Two Family Residential District
(7) R-3 Multi-Family Residential District
(8) R-O Residential/Office Mixed District
(9) O Office District
(10) C-1 Light Commercial District
(11) C-2 General Commercial District
(12) C-3 Heavy Commercial District
(13) CBD Central Business District
(14) M-1 Medical
(15) I-1 Light Industrial District
(16) I-2 Heavy Industrial District

8.1.2. Relationship to Overlay Districts

Lands within the City also may be classified into one of the "overlay districts" set forth in Chapter 9 of this Ordinance. Where the property is classified in an overlay district as well as zoning district, then the regulations governing development in the overlay district shall apply in addition to the regulations governing development in the underlying district. In the event of an express conflict between the standards set forth in this Chapter and the standards set forth in Chapter 9, the standards in Chapter 9 shall control.

8.1.3. Allowable Uses, Conditional Uses and Prohibition of Uses not Expressly Listed

No use shall be established in any zoning district unless it is expressly designated by this Ordinance as a "permitted use," "conditional use," or "temporary use" or is allowable as a "permitted use" or "conditional use" in a "flex space development" in the district in which the use is to be located. The range of uses allowed as "permitted uses" and "conditional uses" in each zoning district is summarized in Table 8.1.3. In the event of a conflict between Table 8.1.3 and the test of this Ordinance, the text shall control.

8.1.4. Annexed Lands

The zoning district designation for areas added to the City's jurisdiction through annexation beyond the City's existing jurisdiction shall be determined as follows:

(1) If the property annexed is not subject to any zoning regulations, the property shall not be subject to any use restrictions imposed by this Ordinance until such time as the City has properly zoned the property at which time all restrictions and regulations contained in this Ordinance shall apply. Prior to such zoning becoming effective, all other regulations contained in this Ordinance other than use restrictions shall apply.
(2) If the property annexed is subject to zoning regulations, the property shall be designated by the City Council after recommendation by the Planning Committee, as the Tupelo Zoning District most closely resembling its classification at the time of annexation. All regulations of this Ordinance for said zoning classification shall apply to this annexed property immediately upon said annexation and zoning district designation by the City Council.

PART 2. PLANNED UNIT DEVELOPMENTS

9.2.1. Purpose and Intent

(1) The purpose and intent of these planned unit development regulations is to promote innovative design in development by providing flexibility in regard to permitted uses and bulk regulations. These regulations are designed to promote the development of attractive, desirable communities of place, where residents and visitors can work and live in a development pattern that integrates residential and non-residential uses in a design that is accessible to pedestrians and encourages the use of alternative modes of transportation and shared parking and offers greater convenience to the residents of the City.

(2) It is in the intent and policy of the City to encourage planned unit developments because of the extensive planning that is required prior to development. Planned unit developments allow the City to plan for large areas and to manage the impacts of growth on the provision of City services and infrastructure.

9.2.2. Districts in Which Allowed

Planned unit developments shall function as "overlay" districts in all districts, provided that an application for planned unit development and master land use plan is submitted, reviewed and approved in accordance with Chapter 5, Part 5 of this Ordinance

9.2.3. Allowable Uses

(1) All parcels proposed for development as a planned unit development must be used for the creation of residential dwelling units and/or any related accessory buildigs.

(2) All uses that are set out in an approved master land use plan shall thereafter be treated as permitted uses within the planned unit development.

9.2.4. Minimum Area of Development

There will be no minimum size requirement for planned unit developments.

9.2.5. Density of Development

There will be no maximum density restrictions for planned unit developments. Approval of planned unit developments shall be left to the discretion of the Planning Committee.

9.29.2.6. Residential Density Bonuses

9.29.2.7. Development Standards and Im Improvement Requirements

(1) Unless approved as a deviation by the City Council as a part of the approval of a planned unit development, all development within a planned unit development shall conform to the applicable standards and requirements of this Ordinance for underlying zoning district and any applicable overlay district in which the planned unit development is located.

(2) The City Council may, as a part of the approval of a planned unit development, approve the following deviations to development standards, provided that the City Council determines that other proposed improvements and buffers will perform as well as or better than those required by minimum standards set out in this Ordinance:
   (a) Lot dimensions;
   (b) Setbacks;
   (c) Design standards and required improvements for subdivisions;
   (d) Parking;
   (e) Interior landscaping;
   (f) Buffering.

9.29.2.8. Additional Standards for Planned Unit

for Planned Unit Developments Containing both Residential and Non-Residential Uses

9.29.2.9 Recreational and Open Space Requirements

(1) Planned unit developments located within the City of Tupelo are not required to provide any percentage of the parcel(s) for passive or active recreational purposes. Any open space provided as part of the development shall be conveyed to a homeowners' or property owners' association or shall be subject to an agreement between the applicant and the City for maintenance and operation of the required open space, with appropriate restrictions recorded in the deed to the property which restrict the perpetuity the use of such land and facilities to open space and recreational sues, as shown on the master land use plan. Upon approval by the City Council as part of its approval of the master land use plan, any or all of the required open space reserved under Subsection (a) above may be dedicated to the City for recreational or open space

APPENDIX 2

Authorities or Treatises from Foreign Jurisdictions

647 P.2d 670
(Cite as: 647 P.2d 670)

Supreme Court of Colorado, En Banc.
TRI-STATE GENERATION AND TRANSMISSION COMPANY, Gerico, Inc., and Frostline, Inc., Plaintiffs-Appellants,
v.
The CITY OF THORNTON, a municipality, and the Mountain States Telephone andTelegraph Company, a Colorado corporation, Defendants-Appellees.

No. 81SA269.
July 6, 1982.

Corporations occupying office buildings in business park sought review of judgment of the District Court, Adams County, Dorothy E. Binder, J., dismissing their complaint, which sought review of action of city council in granting application for rezoning of parcel of land in business park as planned unit development district, challenged constitutionality of planned unit development ordinance, and requested injunctive relief prohibiting construction of building on rezoned parcel in alleged violation of protective covenants applicable to site. The Supreme Court, Lohr, J., held that: (1) failure to join city council, as indispensable party, to action for review of city council's grant of application warranted dismissal; (2) planned unit development ordinance contained sufficient criteria to satisfy due process; and (3) proposed building construction did not violate protective covenants applicable to business park because of building height and number of off-street parking spaces.

Affirmed.

West Headnotes

[1] Certiorari 73 ⚿39

73 Certiorari
73II Proceedings and Determination
73k38 Time of Taking Proceedings
73k39 k. In general. Most Cited Cases

Action brought for review of actions of inferior tribunal must be "perfected" as well as filed within 30-day time limit provided by rule. Rules Civ.Proc., Rules 106, 106(a)(4), (b); C.R.S.1973, 13-4-102(1)(b).

[2] Certiorari 73 ⚿39

73 Certiorari
73II Proceedings and Determination
73k38 Time of Taking Proceedings
73k39 k. In general. Most Cited Cases

"Perfection" of action brought for review of actions of inferior tribunal includes joinder of all indispensable parties. Rules Civ.Proc., Rules 106, 106(a)(4), (b); C.R.S.1973, 13-4-102(1)(b).

[3] Zoning and Planning 414 ⚿1602

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1600 Parties
414k1602 k. Necessary and indispensable parties. Most Cited Cases
(Formerly 414k582.1, 414k582)

City council was indispensable party to action for review of city council's rezoning decision for abuse of discretion, notwithstanding joinder of city. Rules Civ.Proc., Rule 106(a)(4).

[4] Zoning and Planning 414 ⚿1602

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1600 Parties
414k1602 k. Necessary and indispensable parties. Most Cited Cases
(Formerly 414k582.1, 414k582)

Zoning and Planning 414 ⚿1607

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1604 Time for Proceedings

APPENDIX "2"

414k1607 k. Commencement of limitation period. Most Cited Cases
(Formerly 414k586)

Failing to join city council, as indispensable party, within 30-day time limitation for perfecting action for review of city council's rezoning decision was jurisdictional defect not subject to remedy by amendment. Rules Civ.Proc., Rule 106(a)(4).

[5] Zoning and Planning 414 ⚷1602

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1600 Parties
414k1602 k. Necessary and indispensable parties. Most Cited Cases
(Formerly 414k582.1, 414k582)

To extent that complainants asserted constitutional challenge to municipal ordinance rezoning parcel of land as planned unit development district as applied to construction site, their claim for relief was cognizable under rule governing action for review of inferior tribunal and had to fall along with other claims under such rule for failure to join city council as indispensable party. Rules Civ.Proc., Rule 106(a)(4).

[6] Certiorari 73 ⚷1

73 Certiorari
73I Nature and Grounds
73k1 k. Nature and scope of remedy in general. Most Cited Cases

Fact that constitutional issue is raised does not preclude certiorari review but, rather, question is whether act that aggrieved party seeks to have reviewed is legislative or quasi-judicial. Rules Civ.Proc., Rule 106(a)(4).

[7] Municipal Corporations 268 ⚷121

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k121 k. Proceedings to determine validity of ordinances. Most Cited Cases

Constitutional challenge to ordinance as applied is concerned with application of general rule or policy to specific individuals, interests, or situations and is generally quasi-judicial act subject only to review authorized by rule for acts of inferior tribunal exercising judicial or quasi-judicial functions. Rules Civ.Proc., Rule 106(a)(4).

[8] Declaratory Judgment 118A ⚷128

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(F) Ordinances
118Ak128 k. Ordinances in general. Most Cited Cases

Municipal Corporations 268 ⚷121

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k121 k. Proceedings to determine validity of ordinances. Most Cited Cases

Facial constitutional challenge to ordinance concerns general rule or policy applicable to open class of individuals and, as such, is generally legislative act subject to review under declaratory judgment rule rather than rule authorizing review of acts of inferior tribunal in exercise of its judicial or quasi-judicial functions. Rules Civ.Proc., Rules 57, 106(a)(4).

[9] Declaratory Judgment 118A ⚷1

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(A) In General
118Ak1 k. Nature and scope of remedy. Most Cited Cases

Party may not seek to accomplish by declaratory judgment what it can no longer accomplish directly under rule authorizing review of acts of inferior tribunal in exercise of its judicial or quasi-judicial functions. Rules Civ.Proc., Rules 57, 106(a)(4).

[10] Zoning and Planning 414 ⚿1602

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1600 Parties
414k1602 k. Necessary and indispensable parties. Most Cited Cases
(Formerly 414k582.1, 414k582)

Challenge to rezoning ordinance on basis that it failed to describe site accurately and did not set out conditions of development plan sought review of quasi-judicial act of city council and therefore was subject to dismissal for failure to join city council as indispensable party. Rules Civ.Proc., Rule 106(a)(4).

[11] Zoning and Planning 414 ⚿1573

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1572 Nature and Form of Remedy
414k1573 k. In general. Most Cited Cases
(Formerly 414k563.1, 414k563)

Challenge to constitutionality of general planned unit development ordinance implicated city's actions in legislative rather than judicial capacity and was therefore not subject to attack under rule authorizing review of acts of inferior tribunal in exercise of its judicial or quasi-judicial functions for failure to join city council as indispensable party. Rules Civ.Proc., Rule 106(a)(4).

[12] Injunction 212 ⚿62(3)

212 Injunction
212II Subjects of Protection and Relief
212II(C) Contracts
212k62 Covenants as to Use of Premises
212k62(3) k. Erection of buildings. Most Cited Cases

Injunction 212 ⚿114(1)

212 Injunction
212III Actions for Injunctions
212k114 Parties
212k114(1) k. In general. Most Cited Cases

Action for injunctive relief prohibiting construction of building, for which construction site had been rezoned, on ground it allegedly would violate protective covenants applicable to construction site could be asserted independent of any proceeding for review of city council's rezoning action and therefore was not subject to dismissal under rule authorizing review of acts of inferior tribunal in exercise of judicial or quasi-judicial functions for failure to join city council as indispensable party. Rules Civ.Proc., Rule 106(a)(4).

[13] Zoning and Planning 414 ⚿1676

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions and Burdens
414k1676 k. Validity of regulations in general. Most Cited Cases
(Formerly 414k672)

Planned unit development ordinance was legislative enactment and presumed valid.

[14] Zoning and Planning 414 ⚿1686

414 Zoning and Planning
414X Judicial Review or Relief
414X(C) Scope of Review
414X(C)3 Presumptions and Burdens
414k1684 Burden of Showing Grounds for Review
414k1686 k. Regulations in general. Most Cited Cases
(Formerly 414k681)

Party assailing constitutionality of planned unit development ordinance had burden of proving its invalidity beyond reasonable doubt.

[15] Zoning and Planning 414 ⚿1057

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1057 k. Standards governing conduct

of administrative officials. Most Cited Cases
(Formerly 414k42)

Planned development ordinance must contain sufficient standards to insure that city council's enhanced discretion under ordinance will be guided by proper considerations and that benchmark for measuring council's action will be available in case of subsequent judicial review. U.S.C.A.Const.Amend. 14.

[16] Constitutional Law 92 ⚿3512

92 Constitutional Law
92XXVI Equal Protection
92XXVI(E) Particular Issues and Applications
92XXVI(E)3 Property in General
92k3511 Zoning and Land Use
92k3512 k. In general. Most Cited Cases
(Formerly 92k228.2)

Constitutional Law 92 ⚿4096

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4091 Zoning and Land Use
92k4096 k. Proceedings and review. Most Cited Cases
(Formerly 92k278.2(1))

Zoning and Planning 414 ⚿1057

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1057 k. Standards governing conduct of administrative officials. Most Cited Cases
(Formerly 414k42)

City's planned unit development ordinance contained sufficient criteria to provide adequate constraints on discretion of city council and to establish set of standards facilitating meaningful judicial review of council's action and thus did not violate due process and equal protection rights of corporations occupying buildings in business park rezoned by ordinance. U.S.C.A.Const.Amend. 14.

[17] Covenants 108 ⚿51(2)

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k51 Buildings or Other Structures or Improvements
108k51(2) k. Buildings in general. Most Cited Cases

Article of protective covenant requiring building sites in appropriate areas to be used only as permitted by existing or amended city ordinances concerned only types of permissible activities and was inapplicable to issue of structure's permissible height.

[18] Covenants 108 ⚿49

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k49 k. Nature and operation in general. Most Cited Cases

Under article of protective covenant giving controlling effect to city's parking requirements, city's zoning requirements regulating parking were to control where zoning regulations prescribed permitted uses which did not correspond to "office use," "warehouse use," or "light industrial use" categories which were bases upon which minimum parking spaces were to be computed under protective covenants.

[19] Zoning and Planning 414 ⚿1262

414 Zoning and Planning
414V Construction, Operation, and Effect
414V(C) Uses and Use Districts
414V(C)1 In General
414k1262 k. Maps, plats, and plans; subdivision regulations. Most Cited Cases
(Formerly 414k245)

Parking requirements associated with planned unit development must be considered as part of use of

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property in a PUD district.

[20] **Covenants 108 ⚷49**

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k49 k. Nature and operation in general. Most Cited Cases

Where parking requirements associated with planned unit development district differed from ones that would be required under protective covenants, there existed conflict in requirements contemplated by covenants, which expressly provided that, in such event, city's requirements were to govern.

[21] **Evidence 157 ⚷508**

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k508 k. Matters involving scientific or other special knowledge in general. Most Cited Cases

Where trial court is sitting as finder of fact and is capable of drawing its own inferences from facts in record, it need not admit expert testimony on matter that it is capable of resolving without such testimony. Rules of Evid., Rule 702.

***672** David Berger, Kent Denzel, Commerce City, for plaintiffs-appellants.

Katherine T. Coolidge, City Atty., Thornton, Leonard McCain, Brighton, for The City of Thornton.

Cheryl T. Flanagan, Bruce Smith, Mountain Bell Law Dept., Denver, for Mountain States Tel. and Tel. Co.

LOHR, Justice.

Tri-State Generation and Transmission Company; Gerico, Inc.; and Frostline, Inc., seek review of a judgment of the Adams County District Court dismissing their complaint, brought after the City of Thornton (Thornton) granted the application of The Mountain States Telephone and Telegraph Company (Mountain Bell) for rezoning of a parcel of land as a Planned Unit Development (PUD) district. The complaint sought review of the action of the Thornton City Council, challenged the constitutionality of the Thornton PUD ordinance, and requested injunctive relief prohibiting construction of the Mountain Bell building because it allegedly would violate protective covenants applicable to the site. We affirm the judgment of the trial court.

In early 1979 Mountain Bell applied to the Thornton City Council for rezoning of approximately twelve acres of land located in the Washington Square Business Park. At the time of the application most of the subject property was zoned as Industrial District 1 (I-1); the remainder was in a Restricted Service District (C-4) zone. Mountain Bell sought reclassification of the entire parcel as a PUD district.

Mountain Bell proposed to use the site for construction of a corporate processing center. The Mountain Bell PUD application reflects that the center was to be a seven-story structure approximately 120 feet in height, and was to have 505 parking spaces and employ 884 people. The proposed Mountain Bell facility would have conflicted with the height limitations and parking requirements applicable to the C-4 and I-1 zones. In a C-4 zone the height limitation is 60 feet and in an I-1 zone the maximum permissible height is 40 feet. Under the applicable zoning regulations, a structure of the size and type proposed by Mountain Bell also would have been required to include 735 parking spaces rather than the 505 spaces proposed by Mountain Bell.[FN1] However, Mountain Bell's PUD plan also provided for a greater setback of the structure from the site's property lines than that specified in C-4 and I-1 zones, and included design amenities not required by Thornton's zoning regulations.

> FN1. The 735 spaces requirement is based on computations by Thornton's Planning Department staff. The record establishes that by any method of calculation Thornton's zoning regulations require substantially more than 505 spaces for a structure of the size and type proposed by Mountain Bell.

The Thornton Planning Commission held a hearing on Mountain Bell's PUD application. Tri-State Generation and Transmission Company, which occupied a three-story office building located in the busi-

ness park, *673 appeared at the Thornton Planning Commission hearing and objected to the proposed PUD plan. It argued that the planned Mountain Bell building was incompatible with existing development of the surrounding area and that the building would violate protective covenants applicable to the site. Those covenants allegedly limited the permissible height of any structure and prescribed certain requirements to avoid noise, glare and traffic problems. A planner for the City of Thornton responded that use of the site as a commercial office building was consistent with applicable zoning regulations and the Thornton comprehensive plan. He also stated that the height of the building was necessary to achieve the economies that can be realized by "stacking" of the computers to be installed in the Mountain Bell structure, and that the proposed use of the site would not create a traffic congestion problem. At the conclusion of the hearing the Planning Commission recommended approval of Mountain Bell's application.

Hearings were then held before the Thornton City Council. Tri-State Generation and Transmission Company was again represented at these hearings and was joined by Gerico, Inc., and Frostline, Inc., which also occupied buildings in the Washington Square Business Park. The objectors centered their opposition on the height of the Mountain Bell building, but also argued that adoption of the Mountain Bell PUD proposal would constitute illegal spot zoning. After the hearings the City Council adopted Ordinance No. 887, approving Mountain Bell's application.

Within thirty days from adoption of the rezoning ordinance, Tri-State, Gerico and Frostline (collectively referred to as Tri-State) filed a complaint in district court attacking the validity of the City Council's approval of the Mountain Bell PUD application. Named as defendants were the City of Thornton, Mountain Bell and Washington Square Development Company.[FN2] The complaint contained three claims for relief, seeking C.R.C.P. 106 review of the City Council's action, a declaratory judgment, and injunctive relief. In its first claim, Tri-State alleged that the City Council's action was arbitrary, capricious, and an abuse of discretion; that the adoption of the rezoning ordinance constituted spot zoning; and that the Council's action effected the grant of a variance, which was beyond its jurisdiction. In the second claim for relief Tri-State alleged that the Thornton PUD ordinance is unconstitutional because it lacks sufficient standards to guide and constrain the Council's review of PUD applications. The third claim for relief alleged that the height of the proposed Mountain Bell building and the provision of only 505 parking spaces in connection with that structure would violate the protective covenants applicable to the site, and requested an injunction to prohibit these violations.

> FN2. At the time of Mountain Bell's PUD application, the subject property was owned by the Washington Square Development Company. Mountain Bell had contracted with the owner to purchase the site, but that contract was contingent upon approval of Mountain Bell's PUD application. On September 24, 1979, Mountain Bell consummated the transaction by purchasing the property. Washington Square Development Company subsequently requested that it be dismissed from the action and the request was granted.

The defendants moved to dismiss Tri-State's complaint, asserting that the City Council and its individual members were indispensable parties, and that the failure to join them within 30 days of the Council's final action as mandated by C.R.C.P. 106(b) required dismissal of the complaint. The trial court denied the motions.

After a hearing on the first two claims for relief, the district court vacated its earlier order denying the defendants' motions to dismiss and entered an order of dismissal.[FN3] The court found that Dahman v. City of Lakewood, Colo.App., 610 P.2d 1357 (1980), a case decided by the Colorado Court of Appeals subsequent to the denial of Tri-State's motions to dismiss, was controlling. *674 Relying on that case, the trial court concluded that the Thornton City Council was an indispensable party and that the failure to join the Council was a jurisdictional defect requiring dismissal.

> FN3. Although the order of dismissal purports to dismiss "this case," when read in its entirety it appears that the trial court intended to dismiss only Tri-State's first two claims for relief.

Thereafter, Tri-State attempted to amend its

complaint to include a fourth claim for relief requesting a declaratory judgment that the Council's Ordinance No. 887 was invalid because the legal description contained in the ordinance failed to describe the subject property accurately and the ordinance did not adequately detail the nature of the PUD project. Tri-State also attempted to add the City Council as a defendant and filed a motion for new trial which asserted various errors including the trial court's dismissal of its action for failure to join an indispensable party.

On July 10, 1980, the trial court conducted a hearing on the plaintiffs' pending motions and took evidence on the breach of protective covenants issue, the third claim for relief in the plaintiffs' complaint. As a result of that hearing, the trial court entered an order rejecting the plaintiffs' argument that the court had erred in dismissing their C.R.C.P. 106(a)(4) claims for failure to join an indispensable party. However, it indicated that the plaintiffs' second claim for relief, which challenged the constitutionality of the Thornton PUD ordinance on its face, might be properly before the court as an independent declaratory judgment action. Consequently, it reserved judgment on the propriety of its earlier dismissal of that claim. The court also reserved judgment on the fourth claim for relief asserted in the plaintiffs' amended complaint. Finally, the court concluded that the proposed Mountain Bell building was not in violation of the protective covenants applicable to the property. The court held that the covenants required only that the proposed development comply with currently applicable city zoning ordinances and receive prior approval by the Washington Square Business Park Architectural Control Committee. Since these requirements had been met, it dismissed the plaintiffs' third claim for relief.

On September 16, 1980, the trial court entered an additional order. With respect to the plaintiffs' fourth claim for relief, the court held that the motion to amend the complaint should be denied as untimely, and that, in any case, the legal description contained in Ordinance No. 887 was adequate. The court next held that the plaintiffs' second claim for relief, challenging the constitutionality of the Thornton PUD ordinance, had been improperly dismissed in its earlier order. It concluded that such a challenge was properly brought pursuant to C.R.C.P. 57 and was not governed by the requirements of C.R.C.P. 106. Although the court believed that there were a number of procedural irregularities as to the plaintiffs' second claim for relief, it elected to deal with the merits of the issue and held that the PUD ordinance was constitutional.

In summary, as a result of its July 21 and September 16 orders, the trial court held: (1) that the plaintiffs' C.R.C.P. 106 claims contained in their first claim for relief were properly dismissed for failure to join an indispensable party; (2) that Tri-State's second claim, requesting a declaratory judgment that the Thornton PUD ordinance was unconstitutional, should be denied; (3) that the plaintiffs' third claim for relief should be dismissed because the Mountain Bell building would not violate the protective covenants applicable to the property; and (4) that the fourth claim for relief should be denied because it was not asserted in a timely fashion and because, in the alternative, it was not a meritorious claim.

The plaintiffs then appealed to this court, challenging each of the conclusions reached by the trial court.[FN4] We first address the question of whether the district court properly dismissed the plaintiffs' C.R.C.P. 106 claims because of failure to join an indispensable party. We then turn to Tri-State's challenge to the constitutionality of ***675** the Thornton PUD ordinance. Finally, we consider Tri-State's contention that the proposed Mountain Bell building violates protective covenants applicable to the site.

> FN4. The appeal was initially filed in the Colorado Court of Appeals, but was transferred to this court because of the constitutional issue raised by this case. See section 13-4-102(1)(b), C.R.S.1973.

I.

Because the City Council was not named as a defendant within 30 days of the Council's final action on Ordinance No. 887, the trial court concluded that the plaintiffs' C.R.C.P. 106 claims must be dismissed. We agree.

[1][2] The general principles of procedure applicable to an action for C.R.C.P. 106(a)(4) review are well established. Unless another period is provided by statute, a proceeding under C.R.C.P. 106(a)(4) to review the actions of an inferior tribunal must be filed not later than 30 days after final action by that

tribunal. C.R.C.P. 106(b). In the present case there is no applicable statute specifying a different period of review, so the 30 day time limit is controlling. An action brought under C.R.C.P. 106(a)(4) must be "perfected" as well as filed within this time. E.g., Westlund v. Carter, 193 Colo. 129, 565 P.2d 920 (1977); Board of County Commissioners v. Carter, 193 Colo. 225, 564 P.2d 421 (1977); City and County of Denver v. District Court, 189 Colo. 342, 540 P.2d 1088 (1975). Perfection includes the joinder of all indispensable parties. E.g., Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978); Westlund v. Carter, supra; City and County of Denver v. District Court, supra. It is uncontested that the City Council was not joined in the plaintiffs' action within 30 days after the Council adopted Ordinance No. 887. Consequently, if the Council was an indispensable party to a C.R.C.P. 106(a)(4) action seeking review of its decision to grant a PUD application, the trial court was correct in dismissing the plaintiffs' C.R.C.P. 106 claims.

In concluding that the Council was an indispensable party, the trial court relied on Dahman v. City of Lakewood, supra (Dahman). In that case Dahman applied to the Lakewood City Council for a rezoning of his land, and his application was denied. Dahman brought an action for review of the Council's decision in which he named the individual Council members and the City of Lakewood as defendants, but failed to join the Lakewood City Council as a party within 30 days. The district court denied Dahman relief and he appealed to the Colorado Court of Appeals. That court held that the City Council was an indispensable party to a C.R.C.P. 106(a)(4) action seeking review of its rezoning determination and that the failure to join the Council was not excused by joinder of either the City of Lakewood or the individual members of the Council. It concluded that failure to join the Council was a jurisdictional defect and affirmed the trial court's judgment dismissing the action.

In support of its holding in Dahman the court of appeals relied on our decision in City and County of Denver v. District Court, supra. There, the Denver City Council, acting as a board of equalization, apportioned the cost of a new special assessment district. Affected property owners brought a declaratory judgment action for review of the Council's action, naming only the City and County of Denver and various of its officers as defendants. In an original proceeding before this court, we held that the action should have been brought under C.R.C.P. 106 rather than as a declaratory judgment action and that the City Council was an indispensable party to such an action. Since a proper action naming the City Council as a defendant had not been brought within the applicable time allowed for certiorari review, we held that these defects required dismissal of the complaint notwithstanding attempts to cure the deficiencies by subsequent amendment.

[3] The plaintiffs recognize that Dahman is directly applicable to the facts of the present case. They contend, however, that Dahman should be overruled. They first assert that City and County of Denver v. District Court, supra, is distinguishable because in that case the Council was performing a state agency function rather than a municipal function. They then assert that where the Council is acting on a zoning matter in its municipal capacity, as in Dahman and the present case, a city and its city ***676** council are alter-egos and that, consequently, joinder of the city is sufficient to perfect an action for certiorari review pursuant to C.R.C.P. 106(a)(4). We find the plaintiffs' arguments unpersuasive.

The plaintiffs read City and County of Denver v. District Court, supra, too narrowly. Although the function of a City Council acting as a board of equalization is arguably distinguishable from its function when acting on a zoning matter, the legally significant fact is that both functions are quasi-judicial in nature and so subject to review under C.R.C.P. 106(a)(4). See Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). Such an action is for the purpose of determining whether the "inferior tribunal ... has exceeded its jurisdiction or abused its discretion." C.R.C.P. 106(a)(4). Consequently, we recognized in City and County of Denver v. District Court, supra, that it is this tribunal which must be joined in a certiorari action, and not some other municipal body. That decision did not imply that it was limited to the situation where the Council is acting as a board of equalization, and the court in Dahman correctly interpreted our decision in that respect.[FN5]

> FN5. Whether naming the individual members of the city council as defendants in a C.R.C.P. 106(a)(4) review proceeding is the functional equivalent of naming the council

> itself is a decision we need not make now. Dahman held that it was not.

Nor do we find the plaintiffs' alter-ego argument persuasive. Although joinder of a city rather than its council may ofttimes achieve a functionally equivalent result, it cannot be assumed that this is always the case. Where review of a city council's quasi-judicial action is sought, it is not unduly burdensome to require that the council be named as a defendant, and it is not an unreasonable or unexpected result in light of the nature of the relief sought and our previous decision in City and County of Denver v. District Court, supra.

[4] The plaintiffs also argue that even if the City Council is an indispensable party they should have been allowed to amend their complaint to join the Council notwithstanding expiration of the 30 day time limitation applicable in their case. However, we have repeatedly held that failure to join an indispensable party within the time period for perfecting a C.R.C.P. 106(a)(4) action is a jurisdictional defect not subject to remedy by amendment, and we adhere to that rule in this case. See, e.g., Westlund v. Carter, supra; Board of County Commissioners v. Carter, supra; Civil Service Commission v. District Court, 186 Colo. 308, 527 P.2d 531 (1974).[FN6]

> FN6. The law in this area has been changed by amendment of C.R.C.P. 106, effective July 1, 1981. C.R.C.P. 106(b) now provides, in pertinent part:
>
> > A timely petition or writ may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties and such amendment shall relate back to the date of filing of the original petition or writ.
> >
> > As a result, the failure to join indispensable parties within the 30 day time limit established by C.R.C.P. 106(b) need no longer result in dismissal.

[5][6][7][8][9][10] Consequently, we conclude that the trial court acted correctly in dismissing the plaintiffs' C.R.C.P. 106(a)(4) claims.[FN7]

> FN7. Those claims include the plaintiffs' first claim for relief, which was correctly characterized in the plaintiffs' complaint as a C.R.C.P. 106(a)(4) action for review of the City Council's rezoning determination. In addition, to the extent the plaintiffs assert a constitutional challenge to the Thornton PUD ordinance as applied to the Mountain Bell site, their claim for relief is cognizable under Rule 106(a)(4) and must fall along with their other 106(a)(4) claims. The fact that a constitutional issue is raised does not preclude certiorari review. See Snyder v. City of Lakewood, supra, 189 Colo. at 427-28, 542 P.2d at 375-376. Rather, the question is whether the act that the aggrieved party seeks to have reviewed is legislative or quasi-judicial. A constitutional challenge to an ordinance as applied is concerned with the application of a general rule or policy "to specific individuals, interests, or situations" and is generally a quasi-judicial act subject only to C.R.C.P. 106(a)(4) review. Snyder v. City of Lakewood, supra, 189 Colo. at 427, 542 P.2d at 375. In contrast, as part II of this opinion notes, a facial constitutional challenge concerns a general rule or policy applicable to an open class of individuals and, as such, is generally a legislative act subject to review under C.R.C.P. 57 rather than C.R.C.P. 106(a)(4). Since a party may not seek to accomplish by a declaratory judgment what it can no longer accomplish directly under C.R.C.P. 106(a)(4), see, Greyhound Racing Association v. Colorado Racing Commission, 41 Colo.App. 319, 589 P.2d 70 (1978); Snyder v. City of Lakewood, supra, the constitutional challenge to the Thornton PUD ordinance as applied in this case must also be dismissed. Finally, the plaintiffs' fourth claim for relief, which was asserted by amended complaint and which challenges Ordinance No. 887 on the basis that it fails to describe the Mountain Bell site accurately and does not set out the conditions of the Mountain Bell PUD development plan, also seeks review of a quasi-judicial act and is not properly before this court because of the defect in the plaintiffs' C.R.C.P. 106(a)(4) action. In addition, the trial court denied Tri-State's attempt to assert this fourth claim for relief on the basis

that the attempted amendment of the complaint was untimely, and Tri-State does not address this alternative ground of the trial court's decision. Because of these procedural deficiencies we do not address the merits of Tri-State's fourth claim for relief.

*677 II.

We next address the defendants' assertion that the plaintiffs' entire complaint should have been dismissed. They argue that, since all of the plaintiffs' claims were for review of the Council's decision to grant Mountain Bell's PUD application, all claims should have been brought under C.R.C.P. 106(a)(4) and should have been dismissed because of the failure to join the City Council. We disagree.

[11] In their second claim for relief the plaintiffs challenged the constitutionality of the entire Thornton PUD ordinance. Such a challenge implicates the city's actions in a legislative rather than a judicial capacity. See Snyder v. City of Lakewood, supra. Therefore, a challenge to the general PUD ordinance is not subject to attack under C.R.C.P. 106(a)(4), and the defendants' contention to the contrary is not well taken. Since the defendants assert no other procedural bar to the plaintiffs' second claim for relief, we will address the merits of that claim in part III of this opinion.

[12] Similarly, the plaintiffs' third claim for relief is not a challenge to the Council's Ordinance No. 887 as such. Rather, it is an assertion that, even assuming Ordinance No. 887 is valid, the plaintiffs have independent grounds for blocking the Mountain Bell building on the basis of the private protective covenants applicable to the site. Such an action can be asserted independent of any proceeding for review of the Council's action and the trial court acted correctly in addressing the merits of this claim. We consider this issue in part IV of this opinion.

III.

The plaintiffs claim that the Thornton PUD ordinance, Ordinance No. 362, denies them their right to due process and equal protection of the laws because it contains no standards constraining the City Council in their review of a PUD application. We disagree.

[13][14] The Thornton PUD ordinance is a legislative enactment and is presumed valid, Sundance Hills Homeowners Association v. Board of County Commissioners, 188 Colo. 321, 534 P.2d 1212 (1975); Ford Leasing Development Co. v. Board of County Commissioners, 186 Colo. 418, 528 P.2d 237 (1974). The party assailing the constitutionality of that ordinance has the burden of proving its invalidity beyond a reasonable doubt. Id.; Board of County Commissioners v. Simmons, 177 Colo. 347, 494 P.2d 85 (1972). Tri-State has not carried that burden.

The rigidity inherent in traditional Euclidian zoning has led to its increasing supplementation with more flexible zoning devices such as the PUD ordinance adopted by Thornton. See generally 2 R. Anderson, American Law of Zoning s 11.01 (2d ed. 1976). While traditional zoning establishes fixed uses and requirements applicable to specified areas of the city, the PUD concept allows the municipality to control the development of individual tracts of land by specifying the permissible form of development in accordance with the city's PUD ordinance. See, Moore v. City of Boulder, 29 Colo.App. 248, 484 P.2d 134 (1971). Some of the benefits perceived to flow from such regulations include the flexibility necessary *678 to permit adjustment to changing needs, and the ability to provide for more compatible and effective development patterns within a city. 2 R. Anderson, American Law of Zoning, supra, ss 11.01, 11.09, 11.14.[FN8] We have previously recognized that planned development ordinances represent a modern concept in progressive municipal planning, Dillon Companies, Inc. v. City of Boulder, 183 Colo. 117, 121, 515 P.2d 627, 629 (1973), and have indicated that a properly drafted planned development ordinance is constitutionally permissible. See Sundance Hills Homeowners Association v. Board of County Commissioners, supra; Ford Leasing Development Co. v. Board of County Commissioners, supra; Dillon Companies, Inc. v. City of Boulder, supra; see also Moore v. City of Boulder, supra.

FN8. This flexibility is evidenced in the present case by the general structure of the Thornton Ordinance. Thus, the ordinance does not provide for a PUD district in any particular area of the city, but merely provides for the creation of such a district where appropriate. Further, it does not establish any limitations on the permitted uses in a PUD or on the height of structures located in a PUD. Nor does it prescribe minimum

> standards concerning off-street parking or property line setbacks. Rather, these matters and other conditions restricting permissible development of the site are determined by the specific provisions of the development plan. This result is accomplished in the Thornton PUD ordinance by proscribing all development in a PUD district except that approved in the development plan.

[15] However, the same flexibility which is the primary virtue of a PUD ordinance also results in a loss of certainty and a concomitant concern with the misuse or abuse of discretionary authority. Consequently, courts have generally required that standards be incorporated into a planned development ordinance in order to protect against arbitrary state action in violation of the right to due process of law. See 2 R. Anderson, American Law of Zoning, supra ss 11.08, 11.10, 11.20. Such a requirement, properly applied, does not undercut a desirable degree of flexibility, but serves to ensure that a City Council's enhanced discretion under a planned development ordinance will be guided by proper considerations, and that a benchmark for measuring the Council's action will be available in case of subsequent judicial review. We conclude that a planned development ordinance must contain sufficient standards to serve these twin goals.

As relevant to this point, the Thornton PUD ordinance provides that:

> The Planning Commission and the City Council shall consider the following in making their determination (whether to grant an application for a PUD):
>
> 1. Compatibility with the surrounding area.
>
> 2. Harmony with the character of the neighborhood.
>
> 3. Need for the proposed development.
>
> 4. The (e)ffect of the proposed Planned Unit Development upon the immediate area.
>
> 5. The (e)ffect of the proposed Planned Unit Development upon the future development of the area.
>
> 6. Whether or not an exception from the zoning ordinance requirements and limitations is warranted by virtue of the design and amenities incorporated in the development plan.
>
> 7. That land surrounding the proposed Planned Unit Development can be planned in coordination with the proposed Planned Unit Development.
>
> 8. That the proposed change to Planned Unit Development District is in conformance with the general intent of the comprehensive master plan and Ordinance # 325 (the general zoning ordinance of Thornton).
>
> 9. That the existing and proposed streets are suitable and adequate to carry anticipated traffic within the proposed district and in the vicinity of the proposed district.
>
> 10. That existing and proposed utility services are adequate for the proposed development.
>
> 11. That the Planned Unit Development creates a desirable and stable environment.
>
> ***679** 12. That the Planned Unit Development makes it possible for the creation of a creative innovation and efficient use of the property.

[16] These criteria provide adequate constraints on the discretion of the City Council and establish a set of standards facilitating meaningful judicial review of the Council's action. The PUD ordinance also requires the submission of extensive materials in connection with the PUD development plan,[FN9] which serves to enhance both the integrity of Council action and the effectiveness of judicial review. We conclude that the plaintiffs' constitutional attack on the Thornton PUD ordinance was properly rejected by the trial court.

> FN9. DEVELOPMENT PLAN. The owner of the land shall submit a development plan to the Planning Commission and when required an application for change of zoning to Planned Unit Development. The development plan shall be prepared by an archi-

tect, registered engineer, land surveyor or planning consultant and shall include the following information:

1. Survey of the property, showing existing features of the property, including contours, buildings, structures, trees, bushes, streets, easements, and rights-of-way.

2. Site plan showing proposed building locations, use to which buildings shall be put, and land use areas and distances.

3. Traffic circulation, parking areas, and pedestrian walks.

4. Landscaping plans, including site grading, landscaping design.

5. Preliminary drawings for buildings to be constructed, including floor plans, exterior elevations, and sections.

6. Preliminary engineering plans including street improvements, drainage system and public and municipal utility extensions (water, sewer, gas and electric and telephone).

7. Construction sequence and time schedule for completion of each phase for buildings, parking spaces and landscaped area.

8. Assurance of conformity to existing Municipal Codes and Regulations.

9. Such other information or requirements imposed by the Planning Commission and/or City Council.

IV.

Tri-State next contends that the proposed Mountain Bell improvements violate the protective covenants applicable to the Washington Square Business Park because of the building height and the inclusion of only 505 off-street parking spaces. We disagree.

A.

In support of its argument that the height of the Mountain Bell building would violate the restrictive covenants, Tri-State points to Article II(b) of the covenants, which provides:

Article II-PERMITTED USES AND PERFORMANCE STANDARDS

(b) Building Sites in the appropriate areas, shall be used only as permitted by the existing or as amended City of Thornton Ordinances. However, the (Architectural Control) Committee shall determine in its sole discretion if such uses are in harmony with the purposes and development of Washington Square.

Tri-State contends that this covenant prohibits the construction of a structure that exceeds the height limitations contained in the applicable Thornton zoning ordinance on February 20, 1974, the date the private protective covenants were created, and that the proposed building would exceed those limitations. Mountain Bell and the City of Thornton answer by arguing that the private covenant contemplates amendment of the Thornton zoning ordinances and provides that any structure permitted under such an amended ordinance is automatically permissible under the protective covenants, regardless of the effective date of the amended ordinance or the date of its application to the property covered by the protective covenants. They argue that, as a result, approval of Mountain Bell's PUD application constitutes compliance with the protective covenant.

[17] We need not address these conflicting interpretations of the covenant at issue since we believe that this covenant is simply inapplicable to the issue of a structure's permissible height. The full text of the covenants contained in Article II is set out ***680** in the margin.[FN10] Subsection (a) of Article II indicates that the Article is concerned with permitted uses in the sense of permissible types of "trade, services or activities" on the land, rather than the permissible design or size of a structure housing a particular use. The correctness of this interpretation is reinforced by reference to Article III of the protective covenants. That Article is concerned with improvements to property and covers such topics as building setbacks, off-street parking, landscaping and illumination. Most importantly, it contains a provision specifically covering the design and specifications of any

structure erected in the Washington Square Business Park. Construing Articles II and III together, we conclude that Article II concerns only the types of permissible activities in the Park, while Article III governs the specific design characteristics of any structure proposed for the Park. Thus, Tri-State can object to the height of the Mountain Bell building only if it violates the provisions of Article III of the protective covenants. As relevant here, those covenants provide:

> FN10. ARTICLE II-PERMITTED USES AND PERFORMANCE STANDARDS
>
> (a) No noxious or offensive trades, services or activities shall be conducted in the Park, nor shall anything be done thereon which may be or become an annoyance or nuisance to the Owners of other Building Sites or their Tenants by reason of unsightliness or the excessive emission of fumes, odors, glare, vibration, gases, radiation, dust, liquid waste, smoke or noise.
>
> (b) Building Sites in the appropriate areas, shall be used only as permitted by the existing or an amended City of Thornton Ordinances. However, the Committee shall determine in its sole discretion if such uses are in harmony with the purposes and development of Washington Square.
>
> Article III-IMPROVEMENTS
>
> (d) Buildings-No building or structure shall be constructed, erected, placed, altered, or permitted on any Building Site until plans and specifications therefore (sic) have been approved in writing by the (Architectural Control) Committee as set forth in Article VII hereof....

Mountain Bell received approval of its proposed structure from the Washington Square Business Park Architectural Control Committee and, consequently, Tri-State's objection to the height of the building on the basis of the protective covenants is not well taken.

B.

Tri-State also asserts that the provision for off-street parking contained in Mountain Bell's PUD plan violates the protective covenants. In support of this contention it relies on Article III(c) of the protective covenants, which provides in pertinent part:

> (c) Parking-... Adequate off-street parking shall be provided by each Owner and Tenant for customers and employees. The location, number and size of parking spaces, driveways, off-street loading, maneuvering space, space for traffic circulation shall be subject to the Committee approval. The minimum standards shall be the total of the following:
>
> (1) One parking space for each 200 square feet of gross floor space in office use.
>
> (2) One parking space for each 1000 square feet of gross floor space in warehouse use.
>
> (3) One parking space for each 600 square feet of gross floor space in light industrial use.
>
> In the event the City of Thornton parking requirements conflict with the uses listed above or any other uses such as, but not limited to commercial, retail and wholesale, which may be permitted in the Park, the City requirements shall govern.

Tri-State asserts that this covenant establishes the standard for minimum permissible off-street parking, and that, pursuant to the formula contained in Article III(c), the Mountain Bell structure requires the creation of 900 parking spaces. It contends that this covenant is violated by the PUD plan that provides for only 505 parking ***681** spaces in connection with Mountain Bell's building.

The trial court apparently concluded that Article III(c) was not violated by the provisions of Mountain Bell's PUD plan because of the covenants' proviso that Thornton parking requirements shall control where they are in conflict with the parking requirements contained in the covenants. We agree.

[18] Although the portion of Article III(c) giving controlling effect to Thornton's parking requirements is not artfully drafted, we believe its central purpose is clear: where the city's zoning regulations prescribe permitted uses which do not correspond to the "office

use," "warehouse use," or "light industrial use" categories which are the bases upon which minimum parking spaces are to be computed under the protective covenants, the city's zoning regulation parking requirements are to control.

Under Thornton's PUD ordinance, which was in effect when the protective covenants were adopted, the only uses permitted in a PUD district are those prescribed in the approved development plan. A development plan is unique for each individual PUD district, and parking spaces are to be prescribed in each plan. At the heart of the PUD concept is the flexible and individualized treatment of all features of a proposed project, including parking, consistent with the specified criteria by which the Planning Commission and City Council are to be guided in considering each plan for approval. All features of the project, including use and parking facilities, are interdependent elements of the development plan.[FN11]

> FN11. The beneficial effects of this flexible approach are illustrated by the parking requirements developed as part of Mountain Bell's proposed project. Because its employees work in shifts, they are not all present at the same time. Therefore, a lesser number of parking spaces will prove adequate than would be the case if all employees worked the same hours. Under the protective covenants, consideration of the reduced parking needs resulting from multiple shifts is not taken into account.

[19][20][21] We conclude that the parking requirements associated with a PUD development must be considered as part of the use of the property in a PUD district and that where, as here, those parking requirements differ from the ones that would be required under the protective covenants there exists the very conflict in requirements contemplated by the covenants. Where such a conflict exists the protective covenants expressly provide that the city's requirements shall govern. The trial court was correct in so holding.[FN12]

> FN12. Tri-State also argues that the trial court erred in refusing to allow expert testimony concerning the number of parking spaces that would be required for the Mountain Bell building under the terms of Article III(c) of the protective covenants. However, computation of the number of required parking spaces under the covenant formula was not a question that could be resolved only with the assistance of expert testimony. Where the trial court is sitting as a finder of fact and is capable of drawing its own inferences from the facts in the record, it need not admit expert testimony on a matter that it is capable of resolving without such testimony. See C.R.E. 702, Millenson v. Department of Highways, 41 Colo.App. 460, 590 P.2d 979 (1978). In any case, Tri-State was not prejudiced by the exclusion of this evidence since, even if more parking spaces were required by the formula contained in Article III(c) than were required by the City of Thornton, the requirements of the City of Thornton are controlling.

The judgment of the district court is affirmed.

ROVIRA and QUINN, JJ., do not participate.

Colo., 1982.
Tri-State Generation and Transmission Co. v. City of Thornton
647 P.2d 670

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H

Superior Court of New Jersey,
Appellate Division.
William S. RUDDEROW et al., Plaintiffs-Respondents,
v.
The TOWNSHIP COMMITTEE OF the TOWNSHIP OF MOUNT LAUREL, the Township of Mount Laurel, a municipal corporation, Defendant,
and
Hannah A. Rosing, Defendant-Appellant.

Argued Nov. 20, 1972.
Decided Dec. 4, 1972.

From a final judgment of the Superior Court, Law Division, Martino, A.J.S.C., 274 A.2d 854, 114 N.J.Super. 104, setting aside a tentative approval granted by Mount Laurel Township for a planned unit development project, an appeal was taken. The Superior Court, Appellate Division, Halpern, J.A.D., held that Mount Laurel Township's planned unit development ordinance was not invalid as failing to 'provide for specific districts as required by the statutes and Constitution of this State.' The Court also held that the planned unit development statute and the township's ordinance permitted construction of nonresidential uses beyond those intended to serve the residents of the planned community.

Judgment reversed.

West Headnotes

[1] Zoning and Planning 414 1001

414 Zoning and Planning
414I In General
414k1001 k. Zoning and planning distinguished. Most Cited Cases
(Formerly 414k1.5, 268k41)

Planned Unit Development Law was legislative recognition that "Euclidean," i. e., traditional, zoning approach had outlived usefulness and that new and more creative flexible approaches had to be adopted to overcome "Euclidean" zoning inequities and deficiencies and to enable municipalities to provide for housing and other public needs for present and reasonably foreseeable future. N.J.S.A. 40:55-54 et seq., 55.

[2] Municipal Corporations 268 63.10

268 Municipal Corporations
268II Governmental Powers and Functions in General
268k63 Judicial Supervision
268k63.10 k. Motives, wisdom or propriety of action. Most Cited Cases
(Formerly 268k63.1(3), 268k63(1))

Municipal Corporations 268 122.1(2)

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k122.1 Evidence
268k122.1(2) k. Presumptions and burden of proof. Most Cited Cases
(Formerly 268k122(2))

Court does not judge wisdom of municipal ordinance, but acts only if presumption of its validity is overcome by affirmative showing of unreasonableness or arbitrariness, and if issue is debatable the ordinance must be upheld. N.J.S.A. 40:55-67.

[3] Zoning and Planning 414 1105

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Particular Matters
414k1103 Permits, Certificates, and Approvals
414k1105 k. Maps, plats, and plans; subdivisions. Most Cited Cases
(Formerly 414k29.5, 381k4)

Mount Laurel Township's planned unit development ordinance was not invalid as failing to "provide for specific districts as required by the statutes and

Constitution of this State". N.J.S.A. 40:55-54 et seq., 57(a).

[4] Zoning and Planning 414 ⚿1105

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Particular Matters
414k1103 Permits, Certificates, and Approvals
414k1105 k. Maps, plats, and plans; subdivisions. Most Cited Cases
(Formerly 414k29.5, 381k4)

Mount Laurel Township's 1967 planned unit development ordinance was valid as enacted. N.J.S.A. 40:55-54 et seq., 57(a).

[5] Zoning and Planning 414 ⚿1215

414 Zoning and Planning
414V Construction, Operation, and Effect
414V(A) In General
414k1215 k. Time of taking effect; retroactive operation. Most Cited Cases
(Formerly 414k235, 381k4)

Planned unit development statute and Mount Laurel Township's planned unit development ordinance permitted construction of nonresidential uses beyond those intended to serve residents of planned community. N.J.S.A. 40:55-54 et seq., 57(a).

[6] Zoning and Planning 414 ⚿1043

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1043 k. Comprehensive or general plan, validity. Most Cited Cases
(Formerly 414k30)

Municipalities, as part of their comprehensive zoning plans, may properly anticipate and provide for present needs of public now residing in the areas surrounding planned community, as well as reasonably foreseeable future needs of public they anticipate will move into area and require servicing. N.J.S.A. 40:55-54 et seq., 57(a).

[7] Zoning and Planning 414 ⚿1060

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1060 k. Territorial limitations. Most Cited Cases
(Formerly 414k45, 268k41)

Municipal boundaries should not be considered unscalable walls to prevent planned and reasonable growth of remaining available land areas. N.J.S.A. 40:55-54 et seq., 57(a).

[8] Zoning and Planning 414 ⚿1383(5)

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1379 Maps, Plats, and Plans; Subdivisions
414k1383 Grounds for Grant or Denial; Conformity to Regulations
414k1383(5) k. Other particular considerations. Most Cited Cases
(Formerly 414k435, 381k4)

Under evidence, Mount Laurel Township's authorization to erect commercial area as part of project encompassing five residential villages was reasonable exercise of its delegated power under planned unit development statute and ordinance. N.J.S.A. 40:55-54 et seq., 57(a).

[9] Zoning and Planning 414 ⚿1105

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Particular Matters
414k1103 Permits, Certificates, and Approvals
414k1105 k. Maps, plats, and plans; subdivisions. Most Cited Cases
(Formerly 414k29.5, 381k4)

Township's miscalculation of acreage designed for commercial use was too insignificant to affect legality and adequacy of its planned unit development ordinance. N.J.S.A. 40:55-56(f).

[10] Zoning and Planning 414 ⚿1105

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Particular Matters
414k1103 Permits, Certificates, and Approvals
414k1105 k. Maps, plats, and plans; subdivisions. Most Cited Cases
(Formerly 414k29.5, 381k4)

Township's planned unit development ordinance adequately met requirements on designation of open spaces as required by statute. N.J.S.A. 40:55-57(c).

[11] Zoning and Planning 414 ⚿1056

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(A) In General
414k1056 k. Delegation of power in general. Most Cited Cases
(Formerly 414k41, 268k41)

Legislature by planned unit development statute gave municipalities right to determine extent of open space deemed desirable and necessary. N.J.S.A. 40:55-57(c).

***412 **584** S. David Brandt, Haddonfield, for defendant-appellant Hannah A. Rosing (Farr, Brandt, Haughey & Penberthy, Haddonfield, attorneys; Stanley E. Zuzga, Haddonfield, on the brief).

Malcolm Block, Cherry Hill, for intervenors Goodwin Homes, Inc. and C. G. Associates (Beck & Block, Cherry Hill, attorneys).

William B. Scatchard, Jr., Camden, for plaintiffs-respondents William S. Rudderow, William X. Bonner and Maryanne A. Busha (Capehart & Scatchard, P.A., Camden, attorneys).

John W. Trimble, Turnersville, for Township of Mount Laurel (Higgins, Trimble & Master, P.A., Turnersville, substituted attorneys).

**585 Before Judges COLLESTER, LEONARD and HALPERN.

The opinion of the court was delivered by

HALPERN, J.A.D.

This is an appeal from a final judgment setting aside a tentative approval granted by Mount Laurel Township to appellant for a planned unit development project known as 'Cross Keys.'

[1] Since the opinion of the court below, 114 N.J.Super. 104, 274 A.2d 854, sets forth the legislative history of New Jersey's Municipal Planned Unit Development Act (1967), N.J.S.A. 40:55-54 et seq., hereinafter referred to as P.U.D., it will not be repeated herein. The legislative goals are fully set forth in N.J.S.A. 40:55-55. In summary, P.U.D. is a recognition by the Legislature that the 'Edclidean' (traditional) zoning approach, adopted in New Jersey about 50 ***413** years ago, had outlived its usefulness, and that new and more creative flexible approaches had to be adopted to overcome 'Euclidean' zoning inequities and deficiencies, and enable municipalities to provide for housing and other public needs for the present and reasonably foreseeable future. P.U.D. is the antithesis of the exclusive districting principle which is the mainstay of 'Euclidean' zoning. The latter approach divided a community into districts, and explicitly mandated segregated uses. P.U.D., on the other hand, is an instrument of land use control which augments and supplements existing master plans and zoning ordinances, and permits a mixture of land uses on the same tract (i.e. residential, commercial and industrial). It also enables municipalities to negotiate with developers concerning proposed uses, bulk, density and set back zoning provisions, which may be contrary to existing ordinances if the planned project is determined to be in the public and individual homeowner's interest. It also recognizes the importance of encouraging and making it financially worthwhile for developers and investors to undertake P.U.D. projects by permitting a more intensified utilization of vacant land which is scarce and skyrocketing in price.

The Legislature directed, 'This act shall be construed most favorably to municipalities, its intention being to give all municipalities the fullest and most complete powers possible concerning the subject matter hereof. * * *' N.J.S.A. 40:55-67.

Mount Laurel Township, after extended study,

adopted its comprehensive P.U.D. ordinance in December 1967, and patterned it after N.J.S.A. 40:55-54 et seq. It is apparent that a great deal of planning and thought went into the preparation of the ordinance so that what was primarily a rural farming community could be developed to meet '* * * increasing urbanization and of growing demand for housing of all types and design; to provide for necessary commercial and educational facilities conveniently located to such housing; * * *.' In short, the ordinance sought to ***414** utilize the P.U.D. approach as a zoning tool to accomplish the 'Objectives of Development' more fully described in Article III-A of the ordinance. It is highly significant that N.J.S.A. 40:55-57(a) and Article III-A, par. A(2), of the ordinance go beyond the model statute suggested in the Urban Land Institute Technical Bulletin 52 (1965) which was designed for residential development and other nonresidential uses ancillary to the residential use. The state statute and the ordinance specifically provide:

(a) Permitted Uses. An ordinance adopted pursuant to this act shall set forth the uses permitted in a planned unit development, which uses may include and shall be limited to (1) dwelling units in detached, semidetached, attached, groups of attached or clustered or multistoried structures, or any combination thereof; and (2) any nonresidential use, to the extent such nonresidential use is designed and intended to serve the residents of the ****586** planned unit development, and such other uses as exist or may reasonably be expected to exist in the future, and (3) public and private educational facilities, and (4) industrial uses and buildings. * * *

Appellant made a preliminary application to construct 'Cross Keys' as a P.U.D. project in April 1969. It was not until April 1970 that tentative approval was granted subject to 53 conditions. During that year 'Cross Keys' was intensively discussed and reviewed by the township committee, the township planning board, the county planning board, the State Department of Community Affairs, the Mount Laurel School Board, the Mount Laurel Recreation Commission, the Municipal Utilities Authority, the township engineer, the township planner, and the township solicitor. In addition, five public hearings were held at which interested citizens were heard.

As tentatively approved, 'Cross Keys' involved 162.6 acres of land at the intersection of Route 73 and Church Road, in Mount Laurel. It was designed to encompass five residential villages having a total of 975 individual housing units limited to garden apartments, medium-rise apartments, and town house apartments, occupying about 56.10 acres of the tract. ***415** It also provided for a regional shopping mall to occupy about 45.8 acres; office buildings on about 12.2 acres; athletic fields; an indoor-outdoor swimming pool; controlled play areas; two lakes comprising about eight acres, and a community building. Although 'Cross Keys' was in an area zoned industrial, no industrial use was contemplated as part of the project.

Our study of this voluminous record convinces us that 'Cross Keys' was thoroughly considered by the township committee; it met the stringent standards fixed by the statute and ordinance; the township committee's tentative approval was reasonable and proper, and that the lower court too narrowly construed the underlying statutes and the powers granted the township committee therein.

[2] Before considering the trial court's decision in setting aside the tentative approval granted appellant, it should be emphasized that our role in reviewing zoning ordinances, adopted pursuant to legislative grant, is narrow and limited. We do not judge the wisdom of an ordinance, but act only if the presumption of its validity is overcome by an affirmative showing of unreasonableness or arbitrariness. If the issue is debatable the ordinance must be upheld. Kozesnick v. Montgomery Tp., 24 N.J. 154, 167, 131 A.2d 1 (1957).

[3][4] We turn first to the trial court's conclusion that 'the ordinance is invalid in that it does not provide for specific districts as required by the statutes and Constitution of this State.' We reiterate, one of the prime purposes of N.J.S.A. 40:55-54 et seq. was to get away from the 'Euclidean' principle of blocking out designated districts for specified uses, and instead to permit prohibited uses within already established districts, and to permit deviations from bulk, density and set back requirements, if P.U.D. standards are met. Thus, Article III C-1 provides: 'Any District within the Township may be used as sites for Planned Communities or Planned Unit Development.' The obvious advantage emanating from the use of P.U.D. is its flexibility in enabling a municipality to solve some of its existing zoning prob-

lems, ***416** and meet its future community needs with the land remaining for development. To require P.U.D. ordinances to establish specific districts wherein a P.U.D. may be authorized, would destroy the very purpose and philosophy for its creation. Such was not the legislative intent. We hold Laurel Township's P.U.D. ordinance, as enacted, to be valid.

[5] Concededly, the regional shopping center provided for in 'Cross Keys' was considerably larger than needed to serve the residents in the planned community. ****587** The trial court determined that 'the statute and the ordinance do not permit the construction of nonresidential uses beyond those intended to serve the residents of the planned community.' We disagree. Again, we find the trial court took too narrow a view of the enabling statute. Such construction by the trial court would continue existing, and create additional, 'Euclidean' zoning problems and nullify the legislative intent. New Jersey Builders v. Blair, 60 N.J. 330, 338-339, 288 A.2d 855 (1972).

[6][7] We construe the statute to authorize municipalities, where warranted, to permit commercial uses in a P.U.D. project beyond that needed for the residents within the planned community. Municipalities, as part of their comprehensive zoning plans, may properly anticipate and provide for the present needs of the public now residing in the areas surrounding the planned community, as well as the reasonably foreseeable future needs of the public they anticipate will move into the area and require servicing. Municipal boundaries should not be considered unscalable walls to prevent planned and reasonable growth of remaining available land areas. See Quinton v. Edison Park Development Corp., 59 N.J. 571, 578-579, 285 A.2d 5 (1971).

[8] We adopt this statutory construction with full realization that it places a heavy responsibility upon local municipalities to carefully consider each application for a P.U.D. project on its own merits-always keeping foremost in mind the present and reasonably foreseeable future needs of the public in the complex society in which we presently live. Based upon the facts in this record, Mount Laurel Township's***417** authorization to erect the commercial area in question was a reasonable exercise of its delegated power under the enabling statute and ordinance.

[9] Finally, we have considered the entire record and, contrary to the determination of the trial court, find adequate support therein for the township's findings of fact as required by N.J.S.A. 40:55-56(f). The miscalculation of acreage designed for commercial use is too insignificant to affect the legality and adequacy of the ordinance.

[10][11] So, too, we find the ordinance adequately meets the requirements on designation of open spaces as required by N.J.S.A. 40:55-57(c). Here, again, it is obvious that the Legislature gave municipalities the right to determine the extent of open space deemed desirable and necessary. There is ample support in the record for the township's finding of fact that the open spaces designated in 'Cross Keys' were adequate and reasonable.

The judgment below is reversed.

N.J.Super.A.D. 1972.
Rudderow v. Township Committee of Mount Laurel Tp.
121 N.J.Super. 409, 297 A.2d 583

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C

Appellate Court of Illinois,
Second District.

LEVITT HOMES INCORPORATED, a Delaware corporation, Plaintiff,
v.
OLD FARM HOMEOWNER'S ASSOCIATION, Diane Peterson, Unknown Members of the Old Farm Homeowner's Association, Willowgate Homeowner's Association, Gregory Locke and Unknown Members of the Willowgate Homeowner's Association, Defendants,
Gregory LOCKE, Doug Engebrethson, Charlene Engebrethson, Antoinette Visser, Nancy Kuske, David Kuske, Shannon Brown, Kurt Schmidt, Mary Chiappetta, Tony Chiappetta, Jeanne Noonan, Robert Noonan, Tom Winders, Janice Winders, Jerry Linduall and Barb Linduall, Plaintiffs-Appellants,
v.
LEVITT HOMES, INC. and City of Naperville, Defendants-Appellees.

No. 82-492.
Dec. 22, 1982.

Subdivision developer sued homeowners seeking injunctive and other relief based on tortious interference with prospective contractual relations, libel and slander. Combined therewith was homeowners' suit against developer and city for injunctive and other relief to enforce restrictive covenants and ordinances. The 18th Circuit Court, DuPage County, John F. Teschner, J., denied preliminary injunctive relief, and homeowners appealed. The Appellate Court, Reinhard, J., held that: (1) amendment of declaration to permit smaller houses did not negate general development scheme; (2) ordinances did not require city council approval of the declaration or amendments; (3) there was insufficient evidence to support injunctive relief on theory of promissory estoppel, and (4) adequate remedy at law existed.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⚿954(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(1) k. In general. Most Cited Cases

Determination to issue preliminary injunction will not be overturned absent showing of abuse.

[2] Appeal and Error 30 ⚿954(1)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k950 Provisional Remedies
30k954 Injunction
30k954(1) k. In general. Most Cited Cases

In reviewing a preliminary injunction the appellate court looks to sufficiency of the evidence only for the limited purpose of ascertaining whether trial court's discretion has been abused.

[3] Covenants 108 ⚿103(1)

108 Covenants
108III Performance or Breach
108k103 Covenants as to Use of Property
108k103(1) k. In general. Most Cited Cases

Covenants 108 ⚿106

108 Covenants
108IV Actions for Breach
108k106 k. Grounds of action in general. Most Cited Cases

Generally, restrictive covenants affecting land will be enforced according to their plain unambiguous language and unless against public policy or where the principles of waiver or estoppel operate, their violation will be enjoined.

[4] Covenants 108 ⚿74

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k72 Release or Discharge from Liability on Real Covenants
108k74 k. Acts or omissions of covenantor. Most Cited Cases

A subdivider who expressly reserves the right to revoke restrictions and conditions set forth in a declaration of rights and conditions contained in contracts of sale of lots may later change the covenants and other promises respecting use of the land where the intent and purpose of the reservation to revoke is evident.

[5] Covenants 108 ⚿49

108 Covenants
108II Construction and Operation
108II(C) Covenants as to Use of Real Property
108k49 k. Nature and operation in general. Most Cited Cases

Language of declaration of subdivision covenants, conditions and restrictions was determinative of what rights were reserved by the subdivider and the declaration was construed most strongly against the subdivider, as its author.

[6] Covenants 108 ⚿72.1

108 Covenants
108II Construction and Operation
108II(D) Covenants Running with the Land
108k72 Release or Discharge from Liability on Real Covenants
108k72.1 k. In general. Most Cited Cases
(Formerly 108k72)

Where declaration of covenants stated that property was to be developed as a residential community and that covenants were to preserve general character of the property, amendment to permit smaller houses did not negate the general development scheme where lots were not further subdivided and no commercial or multifamily dwellings were allowed and minimum floor requirements were reduced only 21 square feet and there was no drastic change in construction cost formula, although new homes would be one story and not have two-car garages, with only two types of design initially available.

[7] Zoning and Planning 414 ⚿1381(5)

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1379 Maps, Plats, and Plans; Subdivisions
414k1381 Filing or Approval Requirement
414k1381(5) k. Determination of necessity for approval; classification. Most Cited Cases
(Formerly 414k372.5)

Restrictions as to house size and construction costs or changes in same were not required to be approved by city council as part of planned unit development as they did not constitute "supporting data" within meaning of planned unit development ordinance defining supporting data as including covenants governing use and maintenance development and continued protection of development in its common space, especially as general zoning ordinance contained no such restrictions and planned unit regulations were designed to provide greater flexibility.

[8] Municipal Corporations 268 ⚿120

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(B) Ordinances and By-Laws in General
268k120 k. Construction and operation. Most Cited Cases

An ordinance must be read as a whole to determine its meaning.

[9] Zoning and Planning 414 ⚿1413

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1413 k. Application; plans and specifications. Most Cited Cases
(Formerly 414k432)

Word "area" in provision of planned unit development ordinance requiring a summary of all restrictions including area of buildings for residence use did not mean

square footage of a particular home but, rather, area of the subdivision in which residences would be constructed.

[10] Zoning and Planning 414 ⚿1413

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1413 k. Application; plans and specifications. Most Cited Cases
(Formerly 414k432)

Requirement of planned unit development ordinance that all covenants such as homeowner association covenants be supplied to municipal authorities did not obligate developer to submit covenants concerning square footage of a dwelling or construction costs where the requirement appeared in a list of data dealing with a subdivision and its relationship to city services and referred to covenants dealing with common-area maintenance and other services which the city might otherwise provide.

[11] Estoppel 156 ⚿85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future events; promissory estoppel. Most Cited Cases

To maintain an action for promissory estoppel the law requires that there be a promise which is unambiguous in its terms and reliance by the party to whom the promise is made and the reliance must be expected and foreseeable by the party making the promise and the party to whom the promise is made must rely on the promise to its detriment.

[12] Estoppel 156 ⚿85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future events; promissory estoppel. Most Cited Cases

Fraudulent intent is not essential for recovery under promissory estoppel but if the action is specifically one based on fraud and deceit then fraud must be pleaded.

[13] Injunction 212 ⚿147

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k147 k. Evidence and affidavits. Most Cited Cases

There was insufficient evidence to support preliminary injunctive relief against subdivision developer based on theory of promissory estoppel where statements attributable to developer's sales personnel did not amount to unambiguous promise to build only similar models of houses as opposed to an intention to build similar houses and there was insufficient testimony as to present homeowner's reliance.

[14] Injunction 212 ⚿16

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k15 Inadequacy of Remedy at Law
212k16 k. In general. Most Cited Cases

For there to be an adequate remedy at law which will deprive equity of its power to grant injunctive relief the remedy must be clear, complete and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy.

[15] Injunction 212 ⚿17

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k15 Inadequacy of Remedy at Law
212k17 k. Recovery of damages. Most Cited Cases

Where money damages is an adequate remedy, injunctive relief is not proper.

[16] Injunction 212 ⚿147

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)4 Proceedings
212k147 k. Evidence and affidavits. Most Cited Cases

Preliminary injunction restraining subdivision developer from constructing smaller, less expensive houses, allegedly in violation of declarations and covenants, was inappropriate absent evidence why a remedy at law was inadequate to rectify any damage to property values, especially absent evidence that the proposed homes would be unsightly, of poor construction quality or radically different from existing homes.

***303 **196 ***157** Harlan Heller, Ltd., H. Kent Heller, Jan H. Ramsey, Aurora, for plaintiffs-appellants.

Sonnenschein, Carlin, Nath & Rosenthal, Robert C. Johnson, Richard L. Fenton, Steven B. Isaacson, Ancel, Glink, Diamond, Murphy & Cope, Marvin J. Glink, Peter D. Coblentz, Chicago, for defendants-appellees.

REINHARD, Justice:

In these two actions consolidated in the trial court, Levitt Homes, Inc. (Levitt) filed suit against the Old Farm Homeowners' Association, Willowgate Homeowners' Association, and various known and unknown homeowners (Homeowners) seeking injunctive and other relief based upon tortious interference with prospective contractual relations, libel and slander. Homeowners filed suit against Levitt and the city of Naperville (city) for injunctive and other relief to enforce subdivision restrictive covenants and certain city of Naperville ordinances, and to seek damages based upon several theories of recovery. After an evidentiary hearing on Levitt's and Homeowners' motions for preliminary injunctions, the trial court entered an order denying ***304** both motions. Only Homeowners appeal from that interlocutory order denying their motion for a preliminary injunction. See Supreme Court Rule 307(a)(1) (87 Ill.2d R. 307(a)(1)).

The issues presented for review by Homeowners are: (1) whether Homeowners have established the elements required for the issuance of a preliminary injunction and are ****197 ***158** entitled to a preliminary injunction enjoining Levitt from building or selling certain homes on the theories that (a) Levitt violated certain ordinances of the city, (b) Levitt violated certain restrictive covenants which it could not later amend, and (c) Levitt is estopped by its promises to some of the Homeowners; and (2) whether Homeowners are entitled to a preliminary injunction enjoining the city from issuing building permits to Levitt. While Levitt did not appeal the ruling below against it, Levitt affirmatively asserts in its brief that Homeowners' actions constituted such misconduct that they are precluded from equitable relief under the doctrine of "unclean hands".

In 1978, pursuant to city of Naperville ordinance 78-106 (Naperville, Ill., Ordinance 78-106 (1978)) Levitt began marketing the Willowgate subdivision (Willowgate) as a planned unit development on a parcel of property known as Old Farm Unit 5 in Naperville, Illinois. Between 1978 and 1981 Levitt sold approximately 40 homes, selected from five model types, in Willowgate. The owners took title between 1979 and 1981. Levitt's senior vice-president Harvey Rafofsky testified that these homes ranged in price from "the high 60's to the mid 80's" and in size from 1000 to "16 or 1800 square feet." Thomas Trybus, a homeowner, testified that the smallest model was 1200 square feet while Doug Engebrethson, another homeowner, testified that the largest model was 2200 square feet. All of these homes have two car garages. Rafofsky testified that Levitt failed to complete Willowgate due to market conditions which made selling this type of home difficult.

Levitt then decided to market the new Gingerplace subdivision, (Gingerplace), in the areas of Old Farm Unit 5, Willowgate subdivision, where homes had not been built. Levitt planned to build 82 homes. These homes were to consist of two models of single story homes which would be either a 979 square foot 2-bedroom model selling for $48,990 or a 1,068 square foot 3-bedroom model selling for $50,990. Both models would have one car garages. According to Rafofsky, the Gingerplace homes were to be of comparable quality to the homes in Willowgate except they would be smaller.

Gingerplace would be located in a horseshoe pattern surrounding Willowgate on the east, west and south and across Modaff Road from ***305** the Old Farm subdivision. (Old Farm) Old Farm was also developed by Levitt and consists of approximately 500 homes built between 1975 and 1980. Rafofsky testified that the homes in Old Farm are generally larger than those in Willowgate and were also generally higher in price.

Sales of the Gingerplace homes began May 22, 1982, preceded by a heavy advertising campaign and a salesper-

son training program with combined costs of $50,000. On May 22, 1982, as Levitt was beginning its sales drive at Gingerplace, a group of protestors gathered on the side of the public street leading into Gingerplace near Levitt's sales trailer. Though a great deal of testimony at the hearing below dealt with the protestors' activities, it is unnecessary to discuss these activities since Levitt has not appealed the denial of its motion to preliminarily enjoin the protesters.

Ordinance 78-106 (Naperville, Ill., Ordinance 78-106 (1978)) authorizing Levitt to build a planned unit development on Old Farm Unit 5 was enacted September 5, 1978, by the Naperville city council and recorded with the county recorder September 28, 1978. The document entitled "Declarations of Covenants, Conditions and Restrictions" (declaration) at issue in this case was not before the city council at the time it enacted the ordinance nor was it recorded with this ordinance. Rather, the declaration was filed with the county recorder on July 10, 1979.

According to the declaration all homes built in Old Farm Unit 5 were subject to a 1000 square foot minimum floor space requirement and a minimum cost of construction equal to:

"\$45,000 X [Consumer Price Index (CPI) at commencement of construction] / [CPI as of date hereof]"

****198 ***159** The declaration contained a provision allowing Levitt to amend the minimum floor space and minimum cost restrictions.

Homeowners introduced another document which attorney Charlotte Rubenstein testified was supplied to her by Levitt. She obtained this document in connection with her clients', the Trybuses, purchase of a home in Willowgate. This document was similar to the declaration filed by Levitt except that the minimum floor space requirement was 1200 square feet and the minimum cost formula was:

"\$65,000 X [CPI at commencement of construction] / [CPI as of date hereof]"

***306** The Trybuses purchased their home in May 1980, approximately 10 months after Levitt filed its July 10, 1979 declaration.

On May 6, 1982, Levitt invoked the provision allowing it to amend and filed amendments to the declaration changing the minimum floor space requirement to 900 square feet and the minimum cost of construction to a flat \$44,000. These amendments, like the original declaration, were not submitted to the city council for approval.

Walter Newman, director of community development for the city of Naperville testified that he administers the city's zoning ordinances and that the city does not require developers of planned unit developments to have minimum floor space or minimum cost restrictions in the agreements annexing these developments to the city. He testified further that the city had no interest in whether such restrictions existed in planned unit developments or in any amendments to such restrictions.

Several Willowgate homeowners testified that Levitt sales personnel represented to them, at the time they bought their homes, that all homes built in Willowgate would be carefully controlled to avoid uniformity of model or color and that at least five different models would be interspersed throughout the subdivision. Gregory Locke testified he had been told that Willowgate would consist of "one of the five models." Thomas Trybus testified he had been told that if he wanted to build a home on a lot next to a similar model or similar colored home, the other homeowner's permission would be required. Thomas Clark testified he had been told that sister model homes would be built on the lots behind his home. Jeanne Noonan testified she had been told that Willowgate was going to be comprised of homes that were like

the five models. Mary Chiappetta testified she had been told that Levitt "would be bringing over" to Willowgate two models from Old Farm and would possibly be adding a few more larger models. These homeowners testified that these representations affected their decisions to buy.

Along with the Old Farm Homeowners, the Willowgate Homeowners testified they believed the value of their homes would be lowered by the building of the homes in Gingerplace because of the use of only two models, the lower square footage, and the lower cost. Two real estate appraisers testified. Richard Hauser testified for Homeowners that building the Gingerplace homes would cause a 5-10% depreciation in the value of the existing homes. Ronald Bomba testified for Levitt that the Gingerplace homes would not have a detrimental effect on existing property values.

At the close of all the evidence, the trial court denied all motions ***307** for preliminary injunctions. The court found that Homeowners had an adequate remedy at law "if, in fact, they will suffer any damages to the valuation [sic] of their property by virtue of diminution." The court also found that the restrictions concerning minimum floor space and minimum cost were not a part of the final plat. Therefore, no injunction should issue barring the issuance of building permits by the city to Levitt.

[1][2] In order for a preliminary injunction to issue, a plaintiff must establish (1) ****199 ***160** that he possesses a clearly ascertained right which needs protection, (2) that he will suffer irreparable harm without the injunction, (3) that there is no adequate remedy at law for his injury, and (4) that he is likely to be successful on the merits of his action. (*Cross Wood Products, Inc., v. Suter* (1981), 97 Ill.App.3d 282, 284, 52 Ill.Dec. 744, 422 N.E.2d 953; *Crest Builders, Inc. v. Willow Falls Improvement Association* (1979), 74 Ill.App.3d 420, 422, 30 Ill.Dec. 452, 393 N.E.2d 107.) The issuance of a preliminary injunction is applicable only to situations where an extreme emergency exists and irreparable and serious injury will result in the absence of the injunction. (*Dixon v. Village of Lombard* (1977), 50 Ill.App.3d 590, 593, 8 Ill.Dec. 745, 365 N.E.2d 1131.) The issuance of a preliminary injunction is within the sound discretion of the trial court and is to be used cautiously and only in cases of great necessity. (50 Ill.App.3d 590, 593, 365 N.E.2d 1131.) Its determination will not be overturned absent a showing of the abuse of that discretion. (*Shorr Paper Products, Inc. v. Frary* (1979), 74 Ill.App.3d 498, 502, 30 Ill.Dec. 280, 392 N.E.2d 1148.) As it is not the purpose of the preliminary injunction to determine controverted rights or decide the merits of the case, a court of review looks to the sufficiency of the evidence only for the limited purpose of ascertaining whether the trial court's discretion has been abused. *Baal v. McDonald's Corp.* (1981), 97 Ill.App.3d 495, 500, 52 Ill.Dec. 957, 422 N.E.2d 1166.

Homeowners premise their contention that they possess a clearly ascertained right which needs protection upon three bases: (1) that Levitt improperly amended certain restrictive covenants in the declaration; (2) that Levitt has not complied with certain of the city's zoning ordinances; and (3) that Levitt is estopped by its oral and written promises. The declaration was filed in the office of the DuPage County Recorder of Deeds on July 10, 1979. It contained a recital that it created certain covenants, conditions, restrictions, easements and other reservations "so as to assist in assuring the development of the property, in protecting the value and desirability of the property, and in preserving the general character of the property." The declaration provided in section 5.04 that each owner shall have the right to ***308** enforce the covenants and other rights created therein except against Levitt. Further, in section 5.08 Levitt specifically reserved the right to amend, alter, change, modify, waive, revoke or delete any of the covenants and other rights pertaining to minimum floor area, minimum cost of construction and other rights created, "it being the intent hereof that the right reserved in this section 5.08 shall not negate the existence of a general development scheme with respect to property so as to deprive the owners of the benefit of, or the power to enforce, the covenants, conditions and restrictions contained in this declaration." Homeowners argue that the amendments to the declaration filed May 6, 1982, which reduced the minimum floor space and cost of construction from that in the declaration, are void since they interfere with the covenants and other rights in the declaration enacted for the general development of the subdivision for the Homeowners' benefit as set forth therein. They contend that the right to amend contained in the declaration "may be exercised only to make the covenants amended more restrictive or amend the covenants in a fashion which will not, in fact, interfere with the development of the community as planned." Levitt counters that it specifically reserved the right to make amendments, that the two amendments do not negate the general development scheme, and that the covenants cannot be enforced against Levitt under the express terms of the declaration.

[3][4][5] Generally, restrictive covenants affecting

land will be enforced according to their plain and unambiguous language (*Hawthorne Hills Association v. Lawrence* (1980), 85 Ill.App.3d 377, 381, 40 Ill.Dec. 666, 406 N.E.2d 869), and, unless against public policy, or where the principles of waiver or estoppel operate, their violation will be enjoined by the court. (*Cordogan v. Union National Bank of Elgin* (1978), 64 Ill.App.3d 248, 253, 21 Ill.Dec. 18, 380 N.E.2d 1194.) A ****200 ***161** subdivider who expressly reserves the right to revoke restrictions and conditions set forth in a declaration of rights and conditions contained in contracts of sale of lots may later change the covenants and other promises respecting the use of the land where the intent and purpose of the reservation to revoke is evident. (See *Fox Lake Hills Property Owners Association v. Fox Lake Hills, Inc.* (1970), 120 Ill.App.2d 139, 256 N.E.2d 496.) We must look to the language of the declaration in order to determine what rights were reserved, applying the rule that an instrument is to be construed most strongly against its author. (See *Crest Builders, Inc. v. Willow Falls Improvement Association* (1979), 74 Ill.App.3d 420, 30 Ill.Dec. 452, 393 N.E.2d 107.) Decisions in other jurisdictions generally hold that a grantor may retain the right to make exceptions to or revocation of restrictions contained in a subdivision plat or deed where the intent to ***309** reserve such power is included in the instrument. See *Davis v. Miller* (1957), 212 Ga. 836, 96 S.E.2d 498; *Matthews v. Kernewood, Inc.* (1945), 184 Md. 297, 40 A.2d 522; *Thrasher v. Bear* (1940), 239 Ala. 438, 195 So. 441.

The declaration filed July 10, 1979, expressly provides in section 5.02 that the obligations contained in the declaration, except for section 4.01 and 4.02 pertinent to easements, shall not be applicable to Levitt, and in section 5.04 that each owner shall have the right to enforce the covenants against other owners but not against Levitt. Section 5.08 contains an express reservation by Levitt of the right to amend, modify or otherwise revoke any of the covenants, and, specifically, those pertaining to minimum floor area of a dwelling and construction cost which do not negate the existence of a general development scheme with respect to property. We interpret the declaration, read as a whole, to confer benefits and rights to the homeowners to be enforceable against each other. However, the benefits and rights conferred thereunder are expressly intended not to be enforceable against Levitt with regard to modifications in section 5.08 except that Levitt's reservation of rights to modify in 5.08 shall not negate the existence of a general development scheme.

[6] In the recitals in the declaration it is stated that the property "shall be developed as a planned suburban residential community" with the creation of certain covenants and restrictions upon the property "to assist in assuring the development of the property, in protecting the value and desirability of the property, and in preserving the general character of the property." This recital is consistent with our interpretation that the covenants and restrictions confer benefits and rights to the homeowners against each other in protecting the value of their property, and retain in Levitt the right to modify the covenants and restrictions to develop the property consistent with the general development scheme and character of the property. Levitt's amendment of the declaration to permit smaller houses does not negate the general development scheme. The lots have not been resubdivided, commercial or multi-family dwellings are not allowed, the minimum floor space square foot requirement has been reduced only 21 sq. feet, and the construction cost reduction is not a drastic change. While it is evident from the proofs at the hearing below that the planned construction of homes will be different from existing homes in that they will be slightly smaller, will all be 1-story, will not have 2-car garages, and will initially have available only two types of home design, they will have the same construction quality as the existing homes in Willowgate. We conclude under the facts presented***310** below that the modifications in the amended declaration do not negate the existence of the general development scheme of the subdivision. Accordingly, Homeowners have failed to establish that they possess a clearly ascertained right to be protected.

Alternatively, Homeowners contend that the city has not enforced its ordinances and that they are entitled to injunctive relief against the city and Levitt for Levitt's failure to comply with the zoning and subdivision control ordinances.

****201 ***162** Homeowners argue that Levitt improperly changed its planned unit development (PUD) at Old Farm Unit 5 when it imposed the declaration without having submitted it to the city council as "supporting data" when it sought and obtained city approval for the development. They argue Levitt, again improperly, changed the PUD when it amended the declaration without city council approval. Homeowners contend that section 4.9.2(5) of Ordinance A-139 (Naperville, Ill., Ordinance A-139, section 4.9.2(5) (1977)) establishes the only allowable procedures for changing a PUD. That section provides procedures for major or minor changes both of which require city council approval. Homeowners argue that Levitt's declaration and later amendments thereto

made changes to the PUD without the requisite city council approval and that this lack of approval renders the PUD void. They contend that the declaration is valid, but that no building permits can be issued for Gingerplace unless the city council approves the amended declaration under the section 4.9.2(5) procedures. They maintain section 8.002.7 of Ordinance 76-34 (Naperville, Ill., Ordinance 76-34, section 8.002.7 (1976)) bars the issuance of building permits in this case.

[7][8] Levitt concedes that it never obtained city council approval of the declaration or amendments. However, it contends no such approval is required since the declaration is not a part of the PUD, and, therefore, the imposition or amendment of the declaration is not a change in the PUD.

Section 8.002.7 of Ordinance 76-34 provides that:

"No building permit shall be issued for the construction of any building, structure, or improvement unless the owner of the land upon which said building, structure, or improvement is to be constructed has complied with the requirements of the ordinances of the City."

Ordinance A-139, section 4.9.2(5) provides, in part, that:

"[A] planned unit development project shall be developed only according to the approved and recorded final plat and all *supporting data.*" (emphasis added)

***311** Homeowners maintain that the term "supporting data" includes any restrictive covenant to be applied to property within the planned unit development. Homeowners base their contention on the following language from Ordinance A-139, section 4.9.4:

"The planned unit development plats and supporting data shall include at least the following information: * * * (2) *Preliminary Plat Stage* * * * (e) Covenants-Proposed agreements, provisions, or covenants which will govern the use, maintenance, development and continued protection of the planned development and any of its common open space.

(3) *Final Plat Stage* * * * (f) Covenants-Final agreements, provisions or covenants shall govern the use, maintenance, and continued protection of the planned unit development."

"The primary rule in construing statutes and ordinances is to ascertain and give effect to the intention of the legislative body." (*Village of Schaumberg v. Franberg* (1981), 99 Ill.App.3d 1, 5, 54 Ill.Dec. 336, 424 N.E.2d 1239.) This is done "by concentrating on the terminology, its goals and purposes, 'the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the ordinance.' " (*Palella v. Leyden Family Service & Mental Health Center* (1980), 79 Ill.2d 493, 500, 38 Ill.Dec. 804, 404 N.E.2d 228.) Applying this standard, we hold that the city council in enacting Ordinance A-139 did not intend that restrictions such as the ones in issue here be included in the supporting data submitted with the final plat of a PUD.

An ordinance must be read as a whole to determine its meaning. (*Pascal v. Lyons* (1958), 15 Ill.2d 41, 153 N.E.2d 817.) Section 4.9.1 of Ordinance A-139 states that the purposes of allowing planned unit developments are to permit the following:

"(1) A maximum choice in the types of environment available to the public by allowing a development that would not ****202 ***163** be possible under the strict application of the other sections of this Ordinance.

(2) Permanent preservation of common open space and recreation areas and facilities.

(3) A pattern of development to preserve natural vegetation, topographic and geologic features.

(4) A creative approach to the use of land and related physical facilities that results in better development and design and the construction of aesthetic amenities.

(5) An efficient use of the land resulting in more economic ***312** net-works of utilities, streets, schools, public grounds and buildings, and other facilities.

(6) A land use which promotes the public health, safety, comfort, morals and welfare.

(7) Innovations in residential, commercial and industrial development so that growing demands of the population may be met by greater variety in type, design and layout of buildings and by the conservation and more efficient use of open space ancillary to said

buildings.

The planned unit development is intended to provide for developments incorporating a single type or a variety of related uses which are planned and developed as a unit. Such development may consist of conventionally subdivided lots or provide for development by a planned unit development plat in keeping with the purpose of the plan."

This language demonstrates that the intent of the planned unit development provisions is to allow more flexibility in development than is available under the general zoning ordinance provisions while continuing to allow the city to protect the interests it normally protects through general zoning provisions. This intention is reinforced by section 4.9.2 of Ordinance A-139 which provides that a planned unit development may "be granted as a special use" and "may depart from the normal procedures, standards, and requirements of the other sections of this Ordinance." The ordinance then sets forth a procedure for approval of the PUD which ultimately requires approval by the city council. Thus, the ordinance provides for the city council to approve or disapprove individual planned unit developments as special uses in order to protect the interests of the city which are protected by the general zoning ordinance provisions where special uses are not sought.

These city interests are stated in section 1.2 of Ordinance A-139 which details the matters regulated as follows:

"Hereafter in the City of Naperville, Illinois, the erection and use of any new building or structure, or the relocation, enlargement or structural alteration of any existing building or structure, or any change in use, or new or additional use made of any tract of land or of existing building or structure,

(a) Shall be for only those principal uses permitted, including any use or activity customarily incidental or accessory thereto unless otherwise restricted or prohibited;

(b) Shall provide and preserve the required building setback, front yard, side yard, rear yard, lot area per family, lot *313 width, alley setback, corner visibility and automobile parking areas;

(c) Shall not exceed the height limit; and

(d) Shall not encroach upon or reduce the required open spaces surrounding any existing building.

all as specified in this Ordinance."

This provision does not include any reference to minimum square footage or minimum cost of construction. Since the city expressed no interest in minimum square footage or minimum cost of construction in the general zoning provisions, it is unreasonable to hold that the city intended to exert such an interest in its planned unit development provisions since the intention of planned unit developments is greater flexibility in development than is available under the general zoning ordinance.

Reading the ordinance as a whole the language of section 4.9.4 relied on by Homeowners cannot be said to cover the covenants**203 ***164 at issue in this case. Rather, it is more reasonable to read this language to mean proposed and final agreements between the developer and the city such as the "Statement of Intent and Agreement" recorded with Ordinance 78-106 (Naperville, Ill., Ordinance 78-106 (1978)) which authorized the Old Farm Unit 5 PUD.

Homeowners also contend that Ordinance 76-34 (Naperville, Ill., Ordinance 76-34 (1976)) supports their argument. Section 8.003.2I of 76-34 reads:

"*Other Information Required* at time of Preliminary Plat application: * * * (5) Summary of all restrictions intended to be imposed by the Final Plat or by Deeds of conveyance as to the use of all property within the subdivision: including area of buildings for residence use, if any, or other design limitations or planning schedules."

Section 8.003.4B provides:
"*Supporting Documents with Final Plat.* The following supporting documents and data, shall be submitted with said Final Plat: * * * 4. All covenants such as homeowners association covenants and agreements which are to be applied to the property."

Again, reading the ordinance as a whole, we hold that covenants such as the ones in issue here were not required by this ordinance to be submitted at either the preliminary

or final plat stage.

The intent of Ordinance 76-34 is stated in section 8.001 as follows:

"The intent of these regulations is to provide for the orderly ***314** and harmonious development of the City and the surrounding areas within the City's planning jurisdiction."

The ordinance then goes on to detail the information a subdivider must submit for preliminary plat approval and the supporting data required to be submitted with the final plat. These requirements deal with the layout of the subdivision, the specifications for streets, parks and other public use areas, traffic studies, and other factors that concern orderly development of the subdivision and the demands it will make on city services.

[9] In this context, the section 8.003.2I(5) requirement of a summary of restrictions as to "the area of buildings for residence use" must refer to the area of the subdivision in which residences will be constructed. Interpreting "area" to mean square footage of a particular home would be giving subsection 5 an interpretation that is not consonant with the intent of surrounding subsections.

[10] Similarly, the section 8.003.4B4 requirement that "[a]ll covenants such as homeowners association covenants" be supplied does not create an obligation to submit the covenants at issue in this case. This language appears in a list of required data all of which deals with the subdivision and its relationship to city services. Thus, the best interpretation of section 8.003.4B4 is that any covenant of the nature of a homeowners' association covenant must be provided since such a covenant would deal with common area maintenance and other services which the city might otherwise provide.

Homeowners also contend that Levitt should be enjoined, under the theory of promissory estoppel, from denying the promises made to them by Levitt sales personnel. The testimony of various homeowners sought to be construed as promises are that Levitt sales persons indicated that: the remainder of the houses in the area "would be comparable to what we have"; the other homes built would be exactly like the one to be purchased except with a different front or another model exactly as they had now in the area with a different fronting; and the houses in Willowgate were going to be comprised of houses that were like the five models. Furthermore, testimony was adduced that a map was displayed in Levitt's sales office showing the entire subdivision area as being Willowgate, that brochures distributed when Willowgate was being developed showed only the five models presently being built, and representations were made that in future development houses would be bigger.

****204** [11][12] *****165** In order to maintain an action for promissory estoppel, the law requires that there be a promise which is unambiguous in its terms and reliance by the party to whom the promise is made. The ***315** reliance must be expected and foreseeable by the party making the promise and the party to whom the promise is made must rely upon the promise to his detriment. (*Dale v. Groebe & Co., Realtors* (1981), 103 Ill.App.3d 649, 59 Ill.Dec. 350, 431 N.E.2d 1107; *S.M. Wilson & Co. v. Prepakt Concrete Co.* (1974), 23 Ill.App.3d 137, 318 N.E.2d 722.) A fraudulent intent is not essential for recovery under promissory estoppel. (*Lincolnland Properties, Inc. v. Butterworth Apartments, Inc.* (1978), 65 Ill.App.3d 907, 912, 22 Ill.Dec. 552, 382 N.E.2d 1250; *S.M. Wilson & Co. v. Prepakt Concrete Co.* (1974), 23 Ill.App.3d 137, 141, 318 N.E.2d 722; but *cf. Hughes v. Encyclopaedia Britannica, Inc.* (1954), 1 Ill.App.2d 514, 117 N.E.2d 880.) However, if the action is specifically one based upon fraud and deceit, then fraud must be pleaded. (*Zaborowski v. Hoffman Rosner Corp.* (1976), 43 Ill.App.3d 21, 1 Ill.Dec. 465, 356 N.E.2d 653.) Homeowners' count V pleads the elements of promissory estoppel.

[13] Under the record before us at this stage of the proceedings, there is insufficient evidence to support preliminary injunctive relief based upon the theory of promissory estoppel. The statements attributed to Levitt sales personnel relative to future development in the context testified to below by various homeowners do not amount to an unambiguous promise to build *only* similar models of houses in the subdivision. Rather, it appears that the *intention* was to build similar houses. Nor is there sufficient testimony to establish the extent to which the homeowners relied on Levitt's sales personnel's statements of future development in their determination to purchase a home. Moreover, any reliance on these oral statements may have been unreasonable considering a statement in the real estate sales contract signed by several of the purchasers, which provides:

"29. This document contains the entire agreement between the parties. NO REPRESENTATIONS, WARRANTIES, UNDERTAKINGS, AGREEMENTS OR

PROMISES (WHETHER ORAL, WRITTEN, EXPRESS OR IMPLIED), CAN BE MADE OR HAVE BEEN MADE BY EITHER SELLER OR PURCHASER TO THE OTHER, EXCEPT AS EXPRESSLY STATED IN THIS CONTRACT OR IN THE HOME WARRANTY BOOKLET. No amendment, supplement, or rider to this Contract shall be binding unless in writing and executed by both Purchaser and Seller. No employee, agent, broker, salesman, officer or other representative of Seller has authority to make or has made any statement, representation, warranty, undertaking, agreement or promise (either oral, written, express or implied) in connection with this Contract or the Premises, supplementing or amending the provisions of this Contract."

***316** However, we need not ascertain the applicability of this provision to determine the issue before us on this appeal from the denial of a preliminary injunction, for the facts below do not clearly establish an unambiguous promise which Homeowners relied upon in the purchase of their houses.

[14][15] Additionally, we point out that the trial court found that Homeowners have an adequate remedy at law in the form of monetary damages "if, in fact, they will suffer any damages to the valuation of their property by virtue of diminution." For there to be an adequate remedy at law which will deprive equity of its power to grant injunctive relief, the remedy must be clear, complete, and as practical and efficient to the ends of justice, and its prompt administration as the equitable remedy. (*Bio-Medical Laboratories, Inc. v. Trainor* (1977), 68 Ill.2d 540, 12 Ill.Dec. 600, 549, 370 N.E.2d 223; *K.F.K. Corp. v. American Continental Homes, Inc.* (1975), 31 Ill.App.3d 1017, 1021, 335 N.E.2d 156.) Where money damages is an adequate remedy, injunctive relief is not proper. (****205***166***Allstate Amusement Co. of Illinois, Inc. v. Pasinato* (1981), 96 Ill.App.3d 306, 308, 51 Ill.Dec. 866, 421 N.E.2d 374.) We conclude that there is adequate evidence in the record to support the trial judge's finding, and this is an additional basis to deny the preliminary injunction.

[16] It was disputed at the hearing below whether Homeowners would suffer any depreciation in the value of their homes by the future construction of the Gingerplace homes in the subdivision. Homeowners' expert witness, Robert Hauser, a real estate appraiser, testified that in his opinion the construction of the Gingerplace homes would result in a 5 to 10% depreciation in the value of Homeowners' homes. On the other hand, Levitt's real estate appraiser, Ronald Bomba, stated that the development of Gingerplace would not have a detrimental effect on property values in Willowgate. Thus, if there is damage to Homeowners' property values, it appears to be ascertainable in an action at law. While several persons testified to their fears that the Gingerplace homes would all be in a row, looking exactly alike, the proofs at this stage of the proceedings did not establish this contention. The evidence below was that Gingerplace would consist of the same quality home construction as in Willowgate, would initially consist of two types of houses, and would consist of one-story, one-car garage homes, some with two bedrooms, others with three bedrooms. There was no evidence that the homes were unsightly, of poor construction, radically different from the Willowgate homes, or other than single-family dwellings. Thus, there is insufficient evidence to establish any other basis why the remedy at law for these changes ***317** would be inadequate. Accordingly, from the evidence adduced below, we find the trial court did not abuse its discretion in finding an adequate remedy at law existed.

For the foregoing reasons, we find that the trial court properly exercised its discretion in denying a preliminary injunction under the facts presented to it. Therefore, we need not consider any other contentions raised by Homeowners, nor determine whether equitable relief should be denied Homeowners under the doctrine of "unclean hands" as asserted by Levitt.

AFFIRMED.

SEIDENFELD, P.J., and HOPF, J., concur.

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Levitt Homes Inc. v. Old Farm Homeowner's Ass'n
111 Ill.App.3d 300, 444 N.E.2d 194, 67 Ill.Dec. 155

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American Law of Zoning
Database updated May 2011

Patricia E. Salkin

Chapter
24. Planned Development Districts and Planned Unit Development
II. Planned Development Districts

References

§ 24:6. Judicial review of planned development districts

The creation of a planned development district by special permit is subject to judicial review. Failure to comply substantially with the requirements of the ordinance will result in judicial disapproval, notwithstanding the validity of the basic legislation.[1]

As the creation of planned development districts through floating zone procedures includes final action by the legislative body, judicial review might be expected to be more perfunctory than is true in the case of administrative action. Nevertheless, review of zoning amendments which create planned development districts appeared to be more thorough than is common with other zoning amendments. Clearly, judicial review is available where a planned development is created by amendment,[2] and where an amendment is denied.[3]

While an amendment that creates a planned district is entitled to the customary presumption of validity,[4] the Court will examine the record to determine whether there is support for the legislative action and to determine whether the amendment is reasonable.[5] Rezoning for planned development is a modern concept. In granting a development permit, the legislative body must determine whether specified conditions have been met by the landowner. This is an adjudicative decision subject to limited review. Where the planning board approved the plan but was overruled without any supporting evidence, the trial court properly reversed the city council's decision.[6]

An amendment creating a planned development district will not be sustained if it permits a use specifically prohibited throughout the municipality.[7] In a state that customarily applies the change or mistake rule to zoning amendments,[8] an amendment which creates a planned development district will not be disapproved for failure to demonstrate change or mistake.[9]

Where amendment by the legislative authority is preceded by review and recommendation of a planning board,[10] action by the latter to approve or disapprove an application for a planned development district is not reviewable. Such action on the part of the board is not final but only advisory.[11] The Supreme Court of Colorado held that where an ordinance granted a planned development district application if the applicant complied with its standards and procedures, and the city council took upon itself to determine whether the procedures were met, it was acting as an adjudicative body. It was therefore proper for the court to review the record before the city council to determine whether evidence had been presented which would justify the decision to deny the application.[12]

[FN1] Where material facts concerning the proposed planned development district were presented to city council, no more specific evidence of effects of the development on surrounding property was required. Validity of the ordinance changing a residential district into a planned development district was not affected by failure of the application to contain a development plan, as required by the ordinance, because all pertinent information appeared to have been presented. Charlestown Homeowners Ass'n, Inc. v. LaCoke, 507 S.W.2d 876 (Tex. Civ. App. Dallas 1974), writ refused n.r.e., (July 10, 1974).

[FN2] *Maryland:* The Maryland Court of Appeals ruled that a city council's approval of an amendment to a planned unit development (PUD) to allow burgeoning residential dwellings in an area zoned for heavy industrial use constituted a quasi-judicial zoning action, and thus a circuit court had jurisdiction to review the amendment. Maryland Overpak Corp. v. Mayor And City Council Of Baltimore, 395 Md. 16, 909 A.2d 235 (2006).

In 2001, the city council approved and the Mayor signed into law an ordinance granting a developer a PUD for a mixed-use development not ordinarily allowed within a heavy industrial district. The PUD was later amended three times in order to accommodate changes in the plans, with the last amendment authorizing a plan to dramatically increase the number of dwellings and alter the use of retail, restaurant, and office space. Upon the last amendment, several interested parties raised objections, but the circuit court dismissed the petition, citing a lack of jurisdiction because the PUD did not qualify as a zoning action.

Zoning actions taken by the mayor and city council of Baltimore are subject to judicial review under Maryland law. Armstrong v. Mayor and City Council of Baltimore, 169 Md. App. 655, 906 A.2d 415 (2006)), the scope of judicial review is determined by whether the governmental action in question is legislative or quasi-judicial in nature, and by whether the act constitutes a zoning action. In reviewing the governmental process, the court listed several factors for determining whether an action is quasi-judicial, including whether there has been a fact-finding process, a hearing, receipt of testimony and documentary evidence, and whether a particularized conclusion has been reached. In this case, the amendment to the PUD for the development met each element of the test. Following its determination that the process was quasi-judicial in nature, the court discussed whether the amendment met the standards of a zoning action. The court created a new four-prong definition for "zoning action" rather than strictly following the legal interpretation of the term as a "reclassification by the local legislative body." Under the new four-prong definition, a zoning action is defined as any act by the mayor and city council that (1) decides the use of a parcel or parcels; (2) was initiated by the application of a property owner or representative; (3) was based on fact finding through government analysis and a public hearing; and (4) either creates or substantially modifies existing zoning classifications, or exercises discretion in defining permissible uses by considering the unique circumstances of affected structures and properties.

[FN3] Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970).

[FN4] Zoning ordinance which reclassified land from residential to planned development is a legislative act presumed to be valid and reasonable. Moore v. City of Boulder, 29 Colo. App. 248, 484 P.2d 134 (1971).

Where members of the zoning commission, who were charged with the duty of making the legislative

decision, reached their decision after a full hearing and conscientious consideration, courts should be cautious about disturbing the decision of the local authority. ... Courts must not substitute their discretion for the wide and liberal discretion enjoyed by zoning agencies. Summ v. Zoning Commission of Town of Ridgefield, 150 Conn. 79, 186 A.2d 160 (1962).

[FN5] Dooley v. Town Plan and Zoning Commission of Town of Fairfield, 154 Conn. 470, 226 A.2d 509 (1967).

New York: Under an ordinance which authorizes the creation of a Planned Shopping Center District within a C-S District, and specifies a procedure which includes an initial review by the legislative body, a planning review, and a final amendment of the ordinance by the legislative authority, the final step is legislative in character and will be reviewed as such. Todd Mart, Inc. v. Town Bd. of Town of Webster, 49 A.D.2d 12, 370 N.Y.S.2d 683 (4th Dep't 1975).

South Carolina: See Mikell v. County of Charleston, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007), cert. granted, (Aug. 22, 2008). Following a request for a zoning change, the county council rezoned certain land from agricultural residential to a planned development district. Adjoining property owners commenced a lawsuit alleging that the rezoning violated the ZLDR. The appeals court upheld the rezoning, finding that the county's action was not arbitrary, unreasonable or unjust, and that the county council was authorized to adopt the planned development ordinance. The court noted that state statute permitted "the local governing authority [to] provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official map," and that the county ZLDR stated that the county council "shall have final decision-making authority on matters concerning planned developments, including zoning map amendments."

[FN6] Dillon Companies, Inc. v. City of Boulder, 183 Colo. 117, 515 P.2d 627 (1973), citing, Anderson, American Law of Zoning.

Board of Education brought suit to restrain implementation of ordinance rezoning approximately 470 acres of land from industrial to residential. The fact that rezoning would result in an influx of children into the school district did not render the ordinance an unconstitutional burden on the educational system. Board of Ed. of Black Horse Pike Regional School Dist. v. Gloucester Tp., 127 N.J. Super. 97, 316 A.2d 480 (Law Div. 1974).

[FN7] Weigel v. Planning and Zoning Commission of Town of Westport, 160 Conn. 239, 278 A.2d 766 (1971).

[FN8] See § 6:11.

[FN9] Changed conditions are not a prerequisite to the establishment of a planned development district. The prime requisite to such an establishment is that it must be compatible with the existing zones from which it is carved. Moore v. City of Boulder, 29 Colo. App. 248, 484 P.2d 134 (1971).

[FN10] A zoning ordinance which permitted the establishment of planned development districts did not constitute an invalid delegation of the village board's power to the village planning board where the planning board's ultimate decision was a recommendation only to the village board, which retained the power to make the final decision, and the planning board acted in an advisory capacity only. Willey v.

Garnsey, 45 A.D.2d 227, 357 N.Y.S.2d 281 (4th Dep't 1974).

Non-profit association sought to enjoin city council and city and county planning commission from considering and acting upon an application for a planned development housing project. Action was premature in that planning commission's recommended approval of project to council was merely an advisory determination and not a final order which could be appealed. Melemanu Woodlands Community Ass'n, Inc. v. Koga, 56 Haw. 235, 533 P.2d 867 (1975).

[FN11] Saenger v. Planning Commission of Berks County, 9 Pa. Commw. 499, 308 A.2d 175 (1973).

[FN12] Dillon Companies, Inc. v. City of Boulder, 183 Colo. 117, 515 P.2d 627 (1973).

AMLZONING § 24:6

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