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CAB COUNTY ADVISORY BULLETIN

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OPTIONAL APPROACHES TO PLANNED UNIT DEVELOPMENT ZONING

INTRODUCTION

On October 21, 1997, [Amended Substitute House Bill 280 \(HB 280\)](#) sponsored by Rep. Robert Schuler (R-Cincinnati) will become effective. Rep. Schuler introduced HB 280 at the request of the Hamilton County Commissioners and the Hamilton County Regional Planning Commission in an effort to refine, clarify, and provide options when adopting planned unit development regulations under county or township zoning.

The purpose of this CAB is to explain the statutory changes and suggest actions that may need to be taken by counties and townships to comply with the new law. The CAB also will suggest some techniques and approaches that may be used to comply with the revised law.

BACKGROUND

In 1972, HB 1016 was enacted that gave counties and townships basic authority to establish planned unit development (PUD) regulations. The law specifically provided that PUD regulations did not have to be uniform, the normal legal requirement for property located within any particular zoning district. A PUD was defined as a development that would integrate residential development with "collateral uses" and in which lot sizes, setbacks and dwelling types could be varied in order to achieve design objectives and to make provision for open spaces, common areas, utilities, public improvements and collateral non-residential uses.

The law was amended in 1989 with the enactment of SB 164. The amendments were initiated as a result of a Court of Appeals ruling in the case *American Aggregates v. Warren County Commissioners* (39 OApp 3d 5). Under *American Aggregates* the use of a PUD primarily for commercial or industrial uses was essentially eliminated. The court ruled that PUD's were authorized primarily for residential development. While "collateral non-residential uses" were authorized under law, the primary use of a PUD could not be for commercial or industrial developments.

During legislative hearing on SB 164, the Ohio Home Builders Association requested two changes in the PUD law:

1. Language that would assure that the PUD approach to development was an option for the developer; and

2. As a result of a ruling by the Ohio Supreme Court in 1981 in the case *Peachtree Development Co v. Paul* (67 OS 2d 345), language to specify that the approval of PUD's were administrative, not legislative acts. In *Peachtree* the Court ruled that approval of a PUD by the commissioners is a legislative act subject to referendum if the effect of the approval contains departures from existing zoning, irrespective of the approval process specified in the resolution. The Ohio Home Builders Association wanted all PUD's to be administrative actions, approved pursuant to standards contained in the zoning resolution. If this were the case then the approval would be subject solely to an administrative appeal to Common Pleas Court, not subject to a referendum petition.

As enacted, SB 164 specified that PUD's were optional. No property owner could be required by a county or township to develop under PUD regulations only. As was stated in the law, PUD's "...shall only apply to property at the election of the property owner...." The bill also authorized, but did not require, PUD regulations to include standards on which to determine compliance. Yet, the bill was still not clear in distinguishing administrative versus legislative approval of PUD's given the various ways that county and township PUD zoning regulations had been written. Furthermore, SB 164 overturned *American Aggregates* by declaring that a "planned-unit development' means a development which is planned to integrate residential, commercial, industrial or any other use." (ORC 303.022)

In 1994 the issue again rose to the level of the Ohio Supreme Court. In *State ex rel. Zonders v. Delaware County Board of Elections* (69 OS 3d 5), the Court summarized standards that determine when an action regarding a PUD is considered a legislative act (subject to referendum) or an administrative act (subject to appeal to Common Pleas Court) as follows:

1. The adoption of a zoning amendment, like the enactment of the original zoning resolution, is a legislative act subject to referendum.

2. Both the creation and the implementation of a PUD are legislative acts subject to referendum, whether this occurs as a single act or as separate acts. Thus, the enactment of a new PUD classification not tied to any specific piece of property is a legislative act subject to referendum, and the application of preexisting PUD regulations to a specific piece of property which is zoned under a non-PUD classification (a rezoning) is a legislative act subject to referendum.

3. Where specific property is already zoned as a PUD area, approval of subsequent development as being in compliance with the existing PUD standards is an administrative act and not subject to referendum.

Still, there was considerable confusion over the issue. It was in the wake of this confusion that HB 280 was proposed and enacted.

GENERAL SUMMARY OF THE NEW LAW

HB 280 amends ORC Sections 303.022 and 519.021 relating to PUD's under both county and township zoning. A copy of new ORC Section 303.022 is included at the end of this CAB. It should be noted that ORC 519.021, the township equivalent to the county zoning section, is essentially identical to the county section. Generally, the Act allows county commissioners and township trustees to establish PUD's in three ways that will be detailed later in this CAB. The Act also includes language stating that nothing in the Act prohibits a county or township from authorizing a PUD as a conditional use although there may be some practical and legal problems with utilizing this methodology. A table comparing these methods is also included at the end of this CAB which was prepared by Ron Miller, Director of the Hamilton County Regional Planning Commission. Counties are urged to review this new law with the County Prosecutor to determine if the zoning resolution needs to be amended to conform with HB 280. It is the feeling of CCAO that, in many cases, county or township resolutions will need to be amended to comply with the new law.

WHAT HAS AND HAS NOT CHANGED?

1. OPTIONAL NATURE OF PUD'S - Current law has not changed in that PUD regulations may apply to property "only at the election of the property owners." However, the authority for the commissioners or trustees to initiate a PUD district on the zoning map as an optional overlay district is now explicitly authorized in PUD Option C. This option also provides the owner with an administrative application of pre-established PUD regulations to the property. Previously, the courts have interpreted the statute to require a legislative process (i.e., a zone amendment) whenever pre-established PUD regulations were applied to a particular piece of property.

2. AUTHORITY TO DELEGATE APPROVAL TO ZONING COMMISSION - The authority to delegate final approval authority of a PUD to the zoning commission is retained. The authority to delegate, however, is limited to approval or disapproval of a PUD pursuant to standards or regulations which now must be specified in the resolution. Commissioners or trustees cannot delegate to the zoning commission the determination of which zoning districts a PUD is permitted or whether a PUD district is included on the zoning map. Administrative authority is limited to determining compliance with legislatively approved standards.

While the law may authorize the commissioners or trustees to selectively delegate approval authority to the zoning commission on a case-by-case basis, this approach is discouraged. Instead, delegation of administrative authority for all or selected types of PUD's should be clearly stated in the text of the zoning resolution.

3. PUD PLAN APPROVAL STANDARDS - Whereas former law authorized, but did not require standards for PUD's, HB 280 requires that standards (or regulations) be included in the resolution or an amendment. These standards would then be used by the commissioners, trustees or zoning commission in approving or disapproving a PUD plan.

The required standards for determining whether to approve or disapprove the PUD plan should include clear decision factors or criteria such as the desired level of consistency with adopted plans, demonstrated innovation, or availability of adequate public facilities. The standards may also provide limits to the flexibility of traditional zoning provisions for lot area, bulk, height and yard requirements. The limits may define the degree to which a traditional standard may be relaxed or further restricted. We recommend that the zoning resolution include a provision for requiring the administrative decision (i.e., the approval or disapproval of a PUD plan) to be based on specific findings of fact related to each of the decision factors or standards specified in the zoning resolution. We also recommend that the text of the zoning resolution should clearly state the procedures that will be used to approve all PUD's.

4. UNIFORMITY OF REGULATIONS - Current law is retained that exempts PUD districts from the general requirement that the zoning regulations be uniform within any particular zoning district. Uniformity of regulations is not required in PUD districts established in accordance with Options A, B and C as provided in the new law. However, the approval of developments with integrated land uses (i.e., PUD type uses) through a conditional use procedure does not enable any district standards to be relaxed. Conditional use procedures only allow approval with conditions that are more restrictive than the district standards.

5. MIXTURE OF USES - Current law is retained as it relates to the fact that a PUD is a development "which is planned to integrate residential, commercial, industrial, or any other uses." Planned unit developments continue to "...further the purpose ofencouraging innovation in planning and building of all types of development."

6. REFERENDUM - Under Option A, the establishment of PUD districts and the establishment of standards (for administrative approval of PUD plans) in the text of the zoning resolution remain as legislative acts subject to referendum. Once the PUD districts are established in the resolution, their placement on the map is at the election of the property owner, follows the regular zoning amendment process, and is also subject to referendum. Once the PUD district is placed on the zoning map, however, approval or disapproval of the PUD plan (a detailed plan for development of the site) pursuant to the standards included in the resolution for all PUD's is an administrative act. The administrative approval of the PUD plan (by a legislative or an administrative board) is only appealable to Common Pleas Court pursuant to ORC Chapter 2506.

Under PUD Option B the zoning resolution can be amended to establish a provision allowing the property owner to propose a PUD at a particular location through a subsequent zoning amendment. The text amendment enabling future PUD's is subject

to referendum. The owner's subsequent submittal of a proposed PUD district boundary and simultaneous submission of standards (for administrative approval of only that particular PUD) is also subject to referendum if the rezoning is approved. Once the PUD district is placed on the zoning map, however, approval or disapproval of an Option B PUD plan (a detailed development plan) pursuant to the legislatively established standards (for that particular PUD) is an administrative act. The administrative approval of the PUD plan (by a legislative or administrative board) is not subject to referendum and only appealable to Common Pleas Court pursuant to ORC Chapter 2506.

In addition, PUD Option C explicitly authorizes the enactment of a new PUD classification as an overlay district (i.e., an alternative to the base district rather than a replacement or amendment of the base district). The simultaneous establishment of the overlay district and standards (for administrative approval of all PUD's in the overlay district) in the zoning resolution are subject to referendum. However, under Option C, the owner's election to apply the legislatively established PUD standards to a specific piece of property is an administrative act. The administrative approval of the PUD plan is not subject to referendum and only appealable to Common Pleas Court pursuant to ORC Chapter 2506.

Finally, the authority to approve a PUD type of land use as a conditional use if authorized by a local zoning resolution is retained. The PUD land use category that is listed as a conditional use should be defined more precisely in the local resolution since the ORC definition ("a development which is planned to integrate residential, commercial, industrial, or any other use") is quite broad. The conditional use procedure allows for the application of established conditions to a specific piece of property as an administrative act. The conditions are required in addition to compliance with the uniform standards of the existing non-PUD district. Special conditions to achieve compliance with the intent of the non-PUD district can also be required. The administrative approval of the PUD plan by the Board of Zoning Appeals, as being in compliance with all district standards and supplemental conditions, is not subject to referendum and only appealable to the Common Pleas Court pursuant to ORC Chapter 2506.

THE FOUR PUD OPTIONS

This section will discuss the three options that counties and townships may use in establishing PUD's under HB 280 and comment on how PUD's may be established as conditional uses. It will also provide narrative comments on how a zoning resolution could be structured to comply with the revised statute.

1. Option A (ORC 303.022 (A) and 519.021 (A))

Under Option A, commissioners or trustees amend the text of the zoning resolution to provide for one or more types of PUD's. Specifically, this could mean that the amendment would establish in the text of the resolution one or more PUD zoning districts. For example, there could be a PUD-residential, a PUD-commercial, a PUD-

industrial, a PUD-office, and/or a PUD-mixed use district. Each district would be established as part of the zoning resolution but none of the districts established would be automatically placed on the zoning map. In this way the requirement that the PUD regulations "...do not automatically apply to any property..." is met.

At the same time, and as a part of the text of the zoning resolution, standards must be established for guiding subsequent administrative approval of PUD plans. The standards should be included for each type of PUD district that is established in the text of the zoning resolution. Remember that the resolution does not have to allow for multiple districts, but if it does, there must be standards for each type of PUD district. If the resolution does provide for multiple PUD districts, there might be a general set of standards applicable to all PUD districts, but there should also be separate standards that apply to each PUD district. The amendment to establish PUD districts and standards would be subject to referendum.

Essentially what is suggested is the establishment of one or more "floating" PUD districts and standards for approval of all PUD plans as a part of the text of the zoning resolution. The zoning map, however, will not delineate any property in any PUD district unless and until a property owner requests a rezoning to one of the PUD districts contained in the text of the zoning resolution. Commissioners and trustees would follow the regular zoning amendment procedure (ORC 303.12 or 519.12) to rezone the specified property to the particular PUD district. This rezoning action also would be subject to a referendum.

After the zoning map amendment becomes effective, the former zoning district designation is changed on the map to the new PUD district designation. After the map is amended, the property owner would apply for approval of a PUD plan pursuant to the standards and regulations contained in the zoning resolution. Approval or disapproval pursuant to the standards would be the responsibility of the commissioners or trustees unless they have delegated this responsibility to the zoning commission. Approval or disapproval of a PUD plan pursuant to the standards, however, is an administrative act even if the action is taken by the commissioners or trustees. As such, the action is not an amendment and is thus not subject to referendum, but may be appealed to Common Pleas Court pursuant to ORC Chapter 2506.

2. Option B (ORC 303.022 (B) or 519.021 (B))

Under Option B a property owner may apply to establish a PUD district for particular property that they own. An amendment to the text of the zoning resolution is proposed at the same time that the change to the zoning map is proposed. The designation of the property on the zoning map as a PUD and the adoption of regulations that will apply only to that particular planned unit development would follow the regular zoning amendment procedure (ORC 303.12 or 519.12). The zoning map and text amendment would be subject to referendum.

Once the zoning map amendment becomes effective, the former zoning district designation is changed on the map to a PUD designation. It is suggested that the property rezoned to a PUD should contain a numerical PUD designation (PUD-97-1, PUD-97-2, etc.), and the regulations that are adopted which will apply to the particular PUD in question should be similarly numbered.

After the map and text are amended, the property owner would apply for approval of a PUD plan pursuant to the standards and the regulations that were adopted for that particular PUD. The commissioners or trustees would approve or disapprove the PUD pursuant to these regulations; however, this responsibility could be delegated to the zoning commission.

Approval pursuant to the adopted regulations would be considered an administrative act even if the approval or disapproval was done by the commissioners or trustees. As such, the action is not an amendment and is thus not subject to referendum. It may, however, be appealed to Common Pleas Court pursuant to ORC Chapter 2506.

If a county or township wishes to use Option B, an amendment to the current zoning resolution may be needed. Under Option B the text of the zoning resolution would be amended to allow property owners to apply for PUD designation as an amendment to the zoning map at any location. The applicant should also submit the regulations by which the property owner proposes the particular PUD would be governed. Unlike Option A, there would be no "floating" PUD districts or standards established in the text of the zoning resolution. The text of the zoning resolution might be limited to rather broad authority for property owners to apply for a PUD under such terms and conditions (regulations) as the property owner desires. This approach is beneficial because of its flexibility. It allows developers and design professionals to be creative and unhindered by regulations. At the same time, the procedure requires a detailed disclosure of the nature and type of development that is proposed. The procedure also assures maximum public scrutiny, including a right to referendum on both the particular property and the unique regulations that will apply to the particular development.

3. OPTION C (ORC 303.022 (C) AND 519.021 (C))

Under Option C commissioners or trustees may establish PUD regulations and may rezone land for PUD's. Option C is similar to Option A with several major differences. One difference is that Option C enables commissioners or trustees to rezone land in a township for PUD's or as one or more PUD districts upon its own initiative. Another difference is evident when comparing Option C with Option A. Under Option A when land is rezoned on application of a property owner, the previous zoning district and regulations no longer apply to the property. Under Option C if the property is rezoned for PUD's or as a PUD district in the absence of an application (for approval of a PUD plan) from a property owner, the existing non-PUD zoning and regulations continue to apply unless or until the owner exercises the option to develop under PUD regulations.

Under Option C the property owner essentially has two options:

1. To develop the property in compliance with the regular non-PUD zoning that was in place prior to the establishment of the PUD regulations; or
2. To develop the property in compliance with the PUD regulations.

Under Option C both types of regulations are now available to the property at the same time. Another way of looking at this procedure is that the old zoning district still exists as the "base zoning" and at the same time the PUD zoning designation or district "overlays" the old "base zoning."

The PUD zoning thus becomes an additional option for the property owner. The county or township cannot force the owner to use the PUD approach for development. The owner has the right to develop pursuant to the "base zoning" even when a PUD "overlay" has been established on the owner's property.

The establishment of the PUD designation or districts in the text of the resolution, the specific rezoning as an "overlay district," and the adoption of PUD regulations would all follow the zoning amendment procedure (ORC 303.12 or 519.12). As such, it would be subject to referendum.

Once the "overlay district" and regulations have been legislatively established, a property owner may apply for administrative approval of a PUD plan in the "overlay district." The commissioners or trustees must approve or disapprove the proposal in compliance with the established PUD regulations. This action is not an amendment and is thus not subject to referendum. The action, however, would be subject to appeal to Common Pleas Court pursuant to ORC Chapter 2506.

After final approval of the PUD as being in conformance with the regulations or after a final non-appealable court order approving the PUD, the zoning map is then changed. The change to the zoning map would be the removal of the old "base zoning" district designation. The new statute declares that the removal of the old "base zoning" district designation is neither a legislative or administrative act, but solely a "ministerial" act. As such, it is subject to neither referendum or administrative appeal pursuant to ORC Chapter 2506.

4. PUD's AS CONDITIONALLY PERMITTED USES (ORC 303.14 AND 519.14)

During legislative hearings on HB 280 some townships voiced concern that Options A, B, and C would disrupt current PUD approval processes. Specifically, some townships are allowing PUD's as conditionally permitted uses.

As a result of this concern, the statute now includes a provision stating that nothing in ORC 303.022 or 519.021 prevents a county or township "...from authorizing a planned unit development as a conditional use in the zoning resolution pursuant to Section 303.14 [and 519.14] of the Revised Code."

Conditional uses are uses that may have a significant impact and thus require an administrative hearing for approval. Under this approach the text of the zoning resolution must authorize one or more types of PUD's within specific zoning districts as conditional uses. Such listing of PUD's as a conditional use means that the board of zoning appeals (BZA) may approve "a development which is planned to integrate residential, commercial, industrial, or any other use." There would be no change in the zoning map associated with this option. While the requirement for standards in ORC 303.022 or 519.021 does not apply to conditional uses, under ORC 303.14 or 519.14, a conditional use is essentially a permitted use IF specified conditions included in the zoning resolution are met. Thus, whereas Options A, B, and C require approval or disapproval to be based on standards or regulations, under Option D approval or disapproval must be based on specific conditions or criteria included in the text of the zoning resolution. While the terminology is different, the result is similar.

The establishment of various types of PUD's as conditionally permitted uses in particular zoning districts and the adoption of conditions or criteria for their approval as a part of the text of the zoning resolution would have to follow the amendment process in ORC 303.12 or 519.12. As such, they would be subject to referendum.

Once the text of the zoning resolution has been amended, a property owner may apply for a conditional use permit for the PUD if it is a conditionally permitted use in the zoning district where the property is located.

Under the conditional use approach, however, the application goes to the board of zoning appeals for approval or disapproval. Ohio law gives the BZA original jurisdiction for conditional uses. The BZA would then proceed as required by law and would grant or deny the application on the basis of the conditions or criteria included in the text of the zoning resolution. Approval or disapproval by the BZA is clearly an administrative, not a legislative, act. As such, a referendum is not permitted; however, an appeal to Common Pleas Court under ORC Chapter 2506 is allowed.

This option simply authorizes the listing of "planned-unit development" (i.e., integrated residential, commercial, industrial, or other uses) as a conditional use in a particular zoning district. The conditional use approach, however, does not enable the flexibility of the other options since district standards cannot be relaxed through conditional use approval. ORC 303.14(C) authorizes the BZA to grant conditional zoning certificates only for the specific uses mentioned in the zoning resolution. An administrative hearing is required to assure that the use will not have a significant impact in the existing zoning district. The administrative body is authorized to place conditions on the use to mitigate such impacts. However, the BZA is not authorized to issue such a permit if a specific requirement of the zoning resolution will be violated. The conditional use procedure only allows conditions that are more restrictive than the district standards applicable to the conditional use and does not allow the district standards to be relaxed.

Conversely, Options A, B and C, as enabled by ORC 303.022 and 519.021, authorize PUD's to be approved without compliance with base district regulations. That is, the

zoning and subdivisions regulations need not be uniform, but may vary in order to achieve innovative development, efficient use of land and resources, and efficient provision of public utility services.

CONCLUSION

Counties and townships that currently authorize planned unit developments under zoning should review their zoning resolutions with counsel to see if changes are needed to conform with HB 280. The law provides three primary procedural options under which county or township zoning resolutions may authorize planned unit developments. The new law is more clear than in the past on which PUD actions are legislative and which are administrative. The right to referendum is preserved, but only as it relates to major changes in land use and not over every design and engineering detail in a planned unit development plan. This CAB has also attempted to provide practical suggestions on how to implement the new law and develop practical zoning approaches. These are only suggestions, and other approaches are also possible.

ACKNOWLEDGMENT

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COMPARISON OF METHODS OF ESTABLISHING PLANNED UNIT DEVELOPMENTS

(Summary of HB 280 - ORC 303.022 and 519.021)

Effective October 21, 1997

	PUD DISTRICT TYPE A	PUD DISTRICT TYPE B	PUD DISTRICT TYPE C	CONDITIONAL USE PUD's
	(A FLOATING DISTRICT ENABLING LEGISLATIVE APPROVAL OF PUD'S IN COMPLIANCE WITH PRE-ESTABLISHED	(A DISTRICT ENABLING LEGISLATIVE APPROVAL OF PUD'S WITH UNIQUE REGULATIONS FOR EACH PUD)	(AN OVERLAY DISTRICT ENABLING ADMINISTRATIVE APPROVAL OF PUD'S IN COMPLIANCE WITH PRE-ESTABLISHED REGULATIONS)	(A CONDITIONAL USE LISTING IN SPECIFIC DISTRICTS ENABLING ADMINISTRATIVE APPROVAL OF LAND USES IDENTIFIED AS

	REGULATIONS)			PUD'S) (PER ORC 303.14 AND 519.14)
How are PUD's enabled in a zoning resolution?	By Text Amendment (LEGISLATIVE ACTION SUBJECT TO REFERENDUM)	By Text Amendment (LEGISLATIVE ACTION SUBJECT TO REFERENDUM)	By Text Supplement and Map Supplement (i.e., optional overlay district) (LEGISLATIVE ACTION SUBJECT TO REFERENDUM)	By Text Amendment (LEGISLATIVE ACTION SUBJECT TO REFERENDUM)
How are PUD's initiated on specific property? (I.E., HOW A PROPERTY OWNER ELECTS TO USE PUD STANDARDS)	<i>Owner submits application for:</i> Map Amendment (LEGISLATIVE ACTION SUBJECT TO REFERENDUM)	<i>Owner submits application for:</i> Text Amendment and Map Amendment (LEGISLATIVE ACTION SUBJECT TO REFERENDUM)	<i>Owner submits application for:</i> PUD Plan Approval (ADMINISTRATIVE ACTION - BY LEGISLATIVE BODY OR BY THE ZONING COMMISSION IF DELEGATED -- NOT SUBJECT TO REFERENDUM)	<i>Owner submits application for:</i> Conditional Use Approval (ADMINISTRATIVE ACTION - BY THE BOARD OF ZONING APPEALS -- NOT SUBJECT TO REFERENDUM)
What is the effect of approval of a property owner's request?	Development of the property must comply with PUD requirements legislatively approved <i>for all PUD districts</i> (including conditions of approval to assure compliance with pre-established standards)	Development of the property must comply with PUD requirements legislatively approved <i>for the applicant's property</i> (including conditions of approval to assure compliance with pre-established standards)	Development of the property must comply with PUD requirements legislatively approved <i>for all PUD districts</i> (including conditions of approval to assure compliance with pre-established standards)	Development of the property must comply with the general criteria <i>for all conditional uses</i> and specific standards legislatively approved <i>for the PUD land use</i> listed in the code as a conditional use (including conditions of approval to assure compliance with pre-established standards) <i>in addition to the uniform standards in the non-PUD zoning district</i>
Must zoning standards be uniform for each class or kind of building or use within an approved PUD?	No	No	No	Yes - except where conditions result in standards more restrictive than the existing district regulations (i.e., the <i>minimum</i> requirements of the non-PUD zoning district remain effective)
Who is authorized to certify compliance of a PUD Plan with	County Commissioners / Township Trustees or Zoning Commission if delegated	County Commissioners / Township Trustees or Zoning Commission if delegated	County Commissioners / Township Trustees or Zoning Commission if delegated	Board of Zoning Appeals

pre-established PUD zoning standards?				
How long is the typical review and approval process? (I.E., AFTER INITIATION BY THE PROPERTY OWNER)	4 to 7 months	4 to 7 months	1 to 2 months	2 months

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