# ENVIRONMENTAL NOTE

## A PROPOSAL FOR IMPROVING VERMONT'S STATUTORY REQUIREMENTS FOR PLANNED UNIT DEVELOPMENT

### INTRODUCTION

The power to regulate the use of land is within a state's power to ensure the general health, safety, and welfare of its people.[1] The state's power to regulate land use is usually delegated to local municipalities through enabling legislation.[2] Throughout the United States, the most common form of land use control is some form of traditional Euclidean zoning.[3]

Traditional Euclidean zoning divides the municipality into separate and distinct zones; each of these zones has specific enumerated uses, such as residential, commercial, or industrial uses.[4] Zoning regulations permit certain uses and prohibit others. Other zoning regulations control how development may occur. In some cases, divergence from these regulations is permitted through a variance.[5] Variances are granted only if certain statutory requirements are met.[6]

Euclidean zoning has many advantages.[7] Primarily, it provides

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1. The state's power to protect its people is known as a state's "police power," and is usually established in the individual state's constitution. R. ANDERSON, AMERICAN LAW OF ZONING § 2.02 (3d ed. 1986). *See also* City of Rutland v. Keiffer, 124 Vt. 357, 359, 205 A.2d 400, 402 (1964) ("The law is well settled that municipal zoning ordinances are constitutional in principle as a valid exercise of the police power when reasonably related to public health, safety, morals, or general welfare."). *See generally* R. ANDERSON, *supra* at §§ 7.01-7.03; N. WILLIAMS & J. TAYLOR, AMERICAN PLANNING LAW §§ 8.01-8.03 (1987) [hereinafter N. WILLIAMS].

2. *See infra* notes 18-34 and accompanying text.

3. *See generally* R. ANDERSON, *supra* note 1, §§ 3.06-3.09, 7.01-7.03; N. WILLIAMS, *supra* note 1, §§ 83.01-83.03. The term "Euclidean zoning" was derived from Euclid v. Amber Realty, 272 U.S. 365 (1926). In that case, the town of Euclid had established a zoning scheme which divided the town into sections. Each section permitted certain land uses and prohibited others. The United States Supreme Court upheld Euclid's zoning ordinance as constitutional. *See infra* note 63 and accompanying text.

4. *See infra* notes 19-42 and accompanying text.

5. *See infra* notes 104-24 and accompanying text.

6. *See infra* notes 112-22 and accompanying text.

7. *See infra* notes 64-68 and accompanying text.

predictability, which assures the orderly development of land and the protection of property values.[8] Although Euclidean zoning has met with some success in accomplishing its goals, many land use planners and legal commentators have criticized it as outdated and unresponsive to modern needs.[9] In the continuing debate, some of these critics have offered recommendations that seek to remedy these perceived shortcomings of Euclidean zoning. One such recommendation is the planned unit development.[10] Advocates of the planned unit development concept claim that better land development will result if large tracts of land are considered as one entity rather than as individual building lots. Under the planned unit development concept, the normal requirements of building size, building placement, and uses in zones are set aside. Often, uses not normally permitted in a zone are nonetheless allowed in a planned unit development. Many states, including Vermont,[11] have enacted statutes that enable municipalities to approve applications for planned unit developments.

Planned unit development has advantages that include the possibility of more affordable housing, better protection of the environment, and more efficient use of land.[12] It provides possibilities for greater flexibility in land development, which can result in a more aesthetically pleasing environment. However, there exists the potential for abuse of planned unit development. In order to provide guidance to the municipal bodies that approve land development, proper statutory safeguards must exist. Without these safeguards, developers would be able to employ the provisions for planned unit developments solely to circumvent other zoning regulations. Such abuse can result in unsatisfactory land development and can lead to the evisceration of zoning and planning. One particularly effective safeguard is the requirement for a minimum acreage for planned unit developments.

Vermont does not require a minimum acreage for a planned unit development.[13] Consequently, a developer can obtain approval for a project under the less stringent requirements of the planned

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8. *See infra* note 68 and accompanying text.

9. *See infra* notes 69-88 and accompanying text.

10. For definitions of planned unit development, see *infra* note 129 and accompanying text. For a history of planned unit development, see R. BURCHELL & J. HUGHES, PLANNED UNIT DEVELOPMENT: NEW COMMUNITIES AMERICAN STYLE 6-13, 41-43 (1972).

11. VT. STAT. ANN. tit. 24, § 4407(3), (12) (1975).

12. *See infra* notes 154-58 and accompanying text.

13. VT. STAT. ANN. tit. 24, § 4407(3), (12) (1975).

unit development ordinances, when that particular development should be considered under the more stringent requirements of a variance.

The first section of this note provides an overview of traditional zoning and planning. Section two explains the concept of planned unit development. The final section discusses the minimum acreage requirement for planned unit developments, and concludes with a recommendation that Vermont adopt such a requirement.

## I. Zoning and Planning

### *A. Zoning and Planning in General*

Zoning[14] and land use planning[15] are distinct but interrelated concepts. States and municipalities employ zoning as a means to obtain the results of land use planning.[16] As a tool of land use planning, zoning is used to promote the purposes of planning, which is primarily the general welfare of the public.[17] Land use planning involves the process of determining the interrelationship between the indefinite principle of the general welfare and the tangible entity of land. Zoning is the application of those determinations to the body of land comprising the municipality. One court articulated this interrelationship in another way: "zoning is concerned with whether a certain area of a community may be used for a particular purpose, while planning involves how that use is undertaken."[18]

In every state, much of the state's power to zone is delegated by the state legislature to local municipalities[19] through a zoning

14. Zoning is "[t]he division of a city by legislative regulation into districts and the prescription and application in each district of regulations having to do with structural and architectural designs of buildings and of regulations prescribing use to which buildings within designated districts may be put." Blacks Law Dictionary 1450 (5th ed. 1979).

15. Land use planning is a "[g]eneric term used to describe activities such as zoning, control of real estate developments and use, environmental impact studies and the like. Many states have land use planning laws which are implemented by local zoning and land use laws and ordinances." *Id.* at 792.

16. *See generally* R. Anderson, *supra* note 1, § 1.13.

17. *See id.* § 7.02.

18. Kaufman v. Planning & Zoning Comm'n, 298 S.E.2d 148, 153 (W. Va. 1982) (citing Singer v. Davenport, 264 S.E.2d 637, 640 (W. Va. 1980)).

19. In the Vermont enabling act, a municipality is defined as "a town, a city, or an incorporated village or an unorganized town or gore." Vt. Stat. Ann. tit. 24, § 4303(4) (1975 & Supp. 1989).

enabling act.[20] The zoning enabling act grants municipalities the authority to plan the development of the town and the power to enact and enforce regulations designed to accomplish the goals of zoning and planning.[21] Finally, the enabling act provides the municipality with the framework it needs to implement land use planning.

When a state legislature grants zoning powers to municipalities, it provides various standards and guidelines to the local governing bodies. Some sections of the enabling act allow discretion on the part of the municipality, while other sections mandate that the municipality follow specific provisions. For example, Vermont's enabling act allows a municipality to establish a planning commission if the municipality so chooses,[22] but the enabling act dictates the number of people who can be members of that planning commission.[23] Likewise, Vermont's enabling act allows a municipality to decide what uses are permitted in each zone,[24] but nonetheless dictates that a municipality cannot preclude altogether certain enumerated uses.[25]

Typically, the enabling act provides for a planning commis-

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State delegation of planning and zoning powers to local municipalities does not foreclose a state government from exercising its powers. For example, under its Land Use and Development Act (Act 250), Vermont exerts considerable power over land development. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1989). *See infra* note 227 and accompanying text. Also, *see generally* Reis, *Vermont's Act 250*, 1 ENVTL. L. CENTER, VT. L. SCH. PUBLICATION SERIES, (1980); Roberts, *The New Frontier*, 31 SYRACUSE L. REV. 685 (1980); Note, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467 (1981); Note, *Vagueness and Overbreadth: The Constitutional Challenges to Vermont's Land Use and Development Law (Act 250)*, 5 VT. L. REV. 329 (1980); Note, *Leaving the Scene: Aesthetic Considerations in Act 250*, 4 VT. L. REV. 163 (1979); Note, *Party Status and Standing Under Vermont's Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163 (1977).

20. Most enabling acts are based in some form on the model ordinance drafted by the United States Department of Commerce in 1926. R. ANDERSON, *supra* note 1, § 2.21. It is unquestioned that the state legislature has the power to delegate its zoning power to local municipalities. *See* R. ANDERSON, *supra* note 1, § 2.19. For a history of the Standard State Zoning Enabling Act, see *id. See generally* D. MANDELKER, LAND USE LAW, § 4.16 (2d ed. 1988); N. WILLIAMS, *supra* note 1, §18.01-18.03.

21. Vermont's enabling act states that the general purpose of zoning and planning is "to encourage the appropriate development of all lands . . . in a manner which will promote the public health . . . prosperity, comfort, access to adequate light and air, convenience, efficiency, economy and general welfare." VT. STAT. ANN. tit. 24, § 4302(a) (Supp. 1989).

22. VT. STAT. ANN. tit. 24, § 4321 (1975).

23. *Id.* § 4322 (Supp. 1989).

24. *Id.* § 4401(b)(1)(A) (Supp. 1989).

25. For example, in Vermont mobile homes must be permitted in any zone that permits conventional housing. *Id.* § 4406(4)(A) (Supp. 1989). Because every zoned municipality permits conventional housing, mobile homes cannot be precluded in any town.

sion,[26] a zoning board of adjustment,[27] and how each is created and operates.[28] The members of both of these boards are chosen by the municipality's legislative body,[29] and the relationship of the municipal legislative body with each of these boards is addressed throughout the act. Generally, the enabling act allows the planning commission to conduct the work necessary to develop a town plan and a zoning scheme.[30] Recommendations for adoption of and changes to the zoning scheme are made by the planning commission to the municipal legislative body, which makes the final decision on the location of different land use zones.[31] The planning commission also reviews most of the applications for land development that do not require divergence from the zoning regulations, and can approve or deny those applications.[32] On the other hand, the zoning board of adjustment considers most of the land development applications that require deviation from the zoning regulations.[33] This board also considers appeals of interpretive decisions made by the zoning administrator.[34]

### *B. Euclidean Zoning*

Most states, including Vermont,[35] employ standard Euclidean zoning. Under a typical Euclidean zoning scheme, a municipality is divided into regions, or zones, each with enumerated permitted land uses.[36] Commercial uses might be permitted in one zone,[37] in-

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26. R. ANDERSON, *supra* note 1, § 23.18. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4321(a) (1975). *See infra* notes 89-98 and accompanying text.

27. R. ANDERSON, *supra* note 1, § 19.07. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4461 (1975). *See infra* notes 99-125 and accompanying text.

28. These bodies are often informally referred to by various names; this occasionally causes confusion. For example, it is not uncommon for people to call a planning commission a "planning board." Zoning boards of adjustments are sometimes simply called "zoning boards."

29. R. ANDERSON, *supra* note 1, §§ 19.16, 23.18. *See, e.g.*, VT. STAT. ANN. tit. 24, §§ 4323, 4461(a) (1975).

30. R. ANDERSON, *supra* note 1, § 23.26. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4325 (1975 & Supp. 1989). *See infra* notes 91-94 and accompanying text.

31. R. ANDERSON, *supra* note 1, § 23.28. *See, e.g.*, VT. STAT. ANN. tit. 24, §§ 4325, 4385 (1975 & Supp. 1989).

32. R. ANDERSON, *supra* note 1, § 23.29. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4401 (b)(2) (Supp. 1989). *See infra* notes 95-98 and accompanying text.

33. R. ANDERSON, *supra* note 1, § 20.08. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4468 (Supp. 1989). *See infra* notes 104-24 and accompanying text.

34. R. ANDERSON, *supra* note 1, § 19.26. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4464(c)(1) (1975). *See infra* notes 101-02 and accompanying text.

35. VT. STAT. ANN. tit. 24, §§ 4302-4495 (1975 & Supp. 1989).

36. R. ANDERSON, *supra* note 1, § 2.23. *See, e.g.*, VT. STAT. ANN. tit. 24, §§ 4401, 4405

dustrial uses in another zone,[38] and still other zones might allow for residential development.[39] More than one type of use might be allowed in a particular zone, so long as those uses are similar.[40] Each of the zones is depicted on an official zoning map of the municipality,[41] which is incorporated into the zoning regulations.[42]

In addition to the ordinances that regulate permitted uses in each zone, there are often additional ordinances that regulate the development of land. Municipalities often adopt standards prescribing height,[43] bulk,[44] and area[45] restrictions on the development of property.[46] Population density and intensity of use may also be regulated.[47] Any proposed new land development must conform to the requirements of the zone.[48]

Municipalities employ height, bulk, and area restrictions in a variety of ways. For example, the zoning regulations of Hartford, Vermont,[49] prohibit any building over forty feet high,[50] with the

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(1975 & Supp. 1989); HARTFORD, VT., ZONING REG. § 4-2-1 (1988) (available in the Town of Hartford Municipal Offices, 15 Bridge Street, White River Junction, VT 05001).

37. *See, e.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, § 4-2-9.2.

38. *See, e.g., id.* § 4-2-9.1.

39. *See, e.g., id.* §§ 4-2-9.5—4-2-9.11.

40. For example, offices are often permitted in industrial areas. R. ANDERSON, *supra* note 1, § 9.44; *see, e.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, § 4-2-9.1. Conversely, heavy industrial uses are considered incompatible with residential development. R. ANDERSON, *supra*, § 9.25.

41. R. ANDERSON, *supra* note 1, § 9.03; N. WILLIAMS, *supra* note 1, §§ 155.01-155.04.

42. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4405 (1975).

43. *See, e.g., id.* § 4401(b)(1)(B) (Supp. 1989).

44. *See, e.g., id.*

45. *See, e.g., id.* § 4401(b)(1)(C).

46. *See generally* R. ANDERSON, *supra* note 1, §§ 9.54-9.71.

47. *See, e.g.*, VT. STAT. ANN. tit. 24, § 4401(b)(1)(D) (Supp. 1989).

48. Height, area, and bulk ordinances are not entirely inflexible. If a proposed development meets the requirements for a variance, the zoning board of adjustment can make an exception to the regulations. *See infra* notes 111-24 and accompanying text.

49. The examples of zoning regulations used throughout this section are from the town of Hartford, Vermont. HARTFORD, VT., ZONING REG., (1988), *supra* note 36. Although no single town is truly representative of every other town, Hartford (population of approximately 8,000) serves the purposes of this discussion well because it covers a fairly large area (38.83 square miles) and contains examples of every popular kind of land use, including residential, commercial, industrial, agricultural, and planned unit development. *See generally* TOWN OF HARTFORD MASTER PLAN—1987 (available in the town offices, *supra* note 36). A master plan is a document, authorized by and adopted under VT. STAT. ANN. tit. 24, §§ 4325, 4382, 4385 (1975 & Supp. 1989), that serves as a blueprint for the future of a municipality. It reflects the planning commission's study of the town's existing development, housing, industry, recreation, and transportation facilities, and recommends future legislative and administrative actions. *Id.*

The officials of the town of Hartford have been extremely helpful with the preparation

exception of antennas, rooftop solar collectors, and farming uses.[51] In this manner, the regulations reflect Hartford's desire to prevent what it believes are the adverse consequences of tall buildings, while still permitting those tall structures which the municipality considers necessary.[52]

Similarly, Hartford has a restriction on land located on a corner of two intersecting streets.[53] In any area within twenty-five feet of an intersection, obstructions of vision between thirty inches and ten feet above the ground are prohibited.[54] This would preclude a landowner from lawfully placing a five-foot tall sign within twenty-five feet of an intersection.[55] The ordinance protects the safety of motorists, who need a clear line of sight at an intersection.

Although the height, bulk, and area restrictions are important, the use restrictions normally receive the most attention of municipalities and developers.[56] Most municipal zoning ordinances create a hierarchy of uses, and treat the single-family residential use as the "highest" use of land.[57] Most drafters and proponents of zoning ordinances give priority to the single-family residential use, believing that it deserves the most stringent protection from the adverse consequences of incompatible uses.[58]

Moving down the scale, another residential zone allows for multi-family dwellings,[59] while also allowing single-family dwellings. Because multi-family residential uses bring more automobile traffic and require a greater bulk of the land, they are considered a

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of this note. The author is grateful.

50. HARTFORD, VT., ZONING REG., *supra* note 36, § 4-3-2.1.

51. *Id.*

52. People often consider tall buildings to be unsightly, at least in areas other than major cities. The town of Hartford has stated as one of its goals the protection of the visual environment, and this ordinance seeks to achieve this goal. TOWN OF HARTFORD MASTER PLAN—1987, *supra* note 36, at I-22.

53. HARTFORD, VT., ZONING REG., *supra* note 36, § 4-3-3.3.

54. *Id.*

55. Other ordinances may also regulate the size and placement of signs. *See, e.g., id.* § 4-3-4.

56. Generally, restrictions concerning building placement are easier to conform with than restrictions on what the land may be used for. *See* R. ANDERSON, *supra* note 1, § 20.07. Moreover, deviations from area, height, and bulk requirements are commonly viewed as much less drastic than deviations from use requirements. *Id.* § 20.48.

57. R. ANDERSON, *supra* note 1, § 9.14; N. WILLIAMS, *supra* note 1, § 82.01. *See also* Aloi, *Legal Problems in Planned Unit Development: Uniformity, Comprehensive Planning, Conditions, and the Floating Zone*, 1 REAL EST. L. J. 5, 9 (1972).

58. R. ANDERSON, *supra* note 1, § 9.14.

59. Multi-family dwellings include duplexes, apartment complexes, and town homes.

"lower" form of land use.[60] Next on the scale are commercial and office uses. Industrial uses are the "lowest" on the scale because they typically entail the most intensive land use, characterized by high levels of vehicular traffic, massive buildings, and environmental pollution. Although commercial and industrial uses are generally not permitted in residential zones,[61] residential uses are often allowed in commercial and industrial zones, largely because the higher use is not considered injurious to the lower use.[62]

In the years since the United States Supreme Court declared Euclidean zoning constitutional,[63] its use by municipalities has in-

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60. R. ANDERSON, *supra* note 1, § 9.14.

61. This is because commercial and industrial uses are considered "injurious" to residential uses. Aloi, *supra* note 57, at 9. The Vermont Supreme Court also recognized this principle: "It is a fundamental theory of a zoning scheme that it shall be for the general good, to secure reasonable neighborhood conformity, and to exclude structures and occupations which clash therewith." DeWitt v. Town of Brattleboro Zoning Bd. of Adjustment, 128 Vt. 313, 319, 262 A.2d 472, 476 (1970) (citation omitted).

62. Aloi, *supra* note 57, at 9. Aloi sees this as an inconsistency within the theory of "higher" and "lower" uses. He argues that just as a lower use can be injurious to a higher use, so can the existence of a higher use be injurious to a lower use:

> [T]he location of residences in industrial zones may subject an industrial owner to restrictions upon normal industrial activity and expansion of his use; further, this kind of development may remove invaluable industrial land in economically depressed areas where such land is scarce. Likewise, commercial use may be incompatible with nearby residences by reason of pedestrian and vehicle traffic hazards, the inevitable drain on municipal services, and considerations of aesthetics and amenities in commercial use development.

*Id.*

63. Euclid v. Amber Realty, 272 U.S. 365 (1926). In *Euclid*, the United States Supreme Court upheld the constitutionality of comprehensive zoning. The town of Euclid, Ohio, had established a zoning scheme that divided the municipality into different zones. *Id.* at 379-80. Certain uses, including "trades, industries, apartment houses, two-family houses, [and] single-family houses" were restricted to certain locations. *Id.*

The plaintiff was the owner of a sixty-eight acre parcel located in several zones. Some uses were permitted on the parcel, while others were not. The plaintiff argued that the effect of the ordinance was to reduce greatly the value and marketability of the parcel, because industry was not permitted on the property. *Id.* at 384. The plaintiff further claimed that the town's zoning ordinance was unconstitutional because it deprived him "of liberty and property without due process of law and denie[d] [him] the equal protection of the law." *Id.* at 384. He sued "for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain as to [his] property any of the restrictions, limitations or conditions [of the ordinance]." *Id.*

The Court found that the segregation of land uses would promote fire safety, the safety of residents, the peace and quiet of neighborhoods, and contribute to the general health and peace of mind of home dwellers. *Id.* at 394. For these reasons, the Court found that the practice of zoning as an exercise of the state's police power is not arbitrary and unreasonable, and has a "substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395 (citations omitted). The Court upheld the zoning ordinance and held that the interests of the town in protecting the health and safety of its people outweighed the coun-

creased. In support of the use of Euclidean zoning, its proponents claim that it prevents high population density,[64] ensures adequate light and air,[65] decreases automobile congestion,[66] and preserves property values.[67]

Additionally, Euclidean zoning provides a definite and predictable pattern for developers and purchasers of land. Residents of an area zoned for single-family residential use can then anticipate that any other development in that zone will be similar and thus the intensity of surrounding land use will be consistent. This reduces the potential for greater levels of automobile traffic, environmental pollution, and other similar impediments to the use and enjoyment of land. Moreover, this consistency ensures that property values are not diminished by adjoining properties of more intensive uses.[68] In this manner, Euclidean zoning seeks to protect the property values of less intensive uses.

Many commentators have criticized Euclidean zoning as being outdated,[69] inflexible,[70] oversimplified,[71] and unresponsive to modern housing needs.[72] Those claiming that Euclidean zoning is outdated point out that land use planners have traditionally focused on the relationship between the individual building lot and the lots that surround it, while examining potential development of the individual lot in light of its effect on surrounding lots.[73] Permitted uses of each lot were then determined by their compatibility with the land uses of neighboring lots. This generally led to the decision that development in a given area should be limited to certain com-

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tervailing interests of the plaintiff. *Id.*

64. R. ANDERSON, *supra* note 1, § 7.06.

65. *Id.* § 7.05.

66. *Id.* § 7.09.

67. *Id.* § 7.12.

68. The diminution in property values occurs because more intensive uses of land usually bring increased traffic, noise, and unsightly views; this in turn can negatively affect the property value of abutting land.

69. Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241, 243-44 (1959).

70. Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15, 16 (1965).

71. Mandelker, *Reflections on the American System of Planning Controls: A Response to Professor Krasnowiecki*, 114 U. PA. L. REV. 98, 98 (1965).

72. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 47 (1965). *See also* Lloyd, *A Developer Looks at Planned Unit Development*, 114 U. PA. L. REV. 3, 3 (1965).

73. *See generally* Goldston & Scheuer, *supra* note 69, at 244.

patible uses.[74]

According to some critics, Euclidean zoning is unrealistic and too narrow in scope.[75] These critics argue that individual cities and towns, or at least large portions of them, are a collection of many different interrelated uses. Each should therefore be considered as an entirety rather than as many individual and unrelated uses. Consequently, these writers encourage municipalities to exercise a broader and more modern approach in their planning processes. Therefore, large areas should be planned as a whole, with interrelated uses, rather than as similar-use zones within the confines of Euclidean zoning.[76]

Other commentators argue that Euclidean zoning is an oversimplified approach to land use planning that leads to unimaginative results.[77] They claim, for example, that because many large residential areas are divided into individual lots, each with a single-family house, the result is the monotonous "cookie cutter" appearance of housing developments.[78] They further assert that by abandoning some traditional zoning principles, more interesting and pleasing results could be obtained.[79] Moreover, if the notion that commercial and residential uses are *per se* incompatible[80] is abandoned, a residential neighborhood could include commercial uses, and the overall visual appearance of the area would be more appealing.[81]

It has also been observed that Euclidean zoning leads to residential zones that are located some distance from commercial centers.[82] Separating different uses into distinct zones often results in the residents of a town living far removed from necessary commercial services. Further, when commercial centers are located far

74. Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.F. 186, 204-06.

75. Goldston & Scheuer, *supra* note 69, at 242.

76. *Id.* at 244.

77. *See, e.g.*, Krasnowiecki, *supra* note 72, at 47.

78. *See, e.g., id.*

79. *See, e.g., id.* at 48.

80. For a discussion of the incompatibility of different uses, see *infra* notes 134-42 and accompanying text.

81. Krasnowiecki, *supra* note 72, at 48. This argument is not unassailable. Although some critics find the typical single-family residential development to be boring, the exclusively residential neighborhood is nonetheless favored by many, particularly by those who purchase homes in such neighborhoods. The overwhelming popularity of these developments across the country attests to this.

82. Goldston & Scheuer, *supra* note 69, at 246.

from residential zones, rather than integrated with them, individuals lack greater opportunity for social interaction; this leads to "social deadness."[83] This effect destroys the notion of a central town nucleus and diminishes the feeling of a town identity.[84]

Still another criticism of Euclidean zoning is that it is inflexible[85] and unresponsive to modern housing needs.[86] In a typical Euclidean zoning scheme, single-family residential units are often on lots of one acre or more. The units are spread apart by the characteristically large green lawns of American suburbia. Building a single-family residence on a large lot makes the home more expensive.[87] Because Euclidean zoning has the effect of precluding many individuals from purchasing homes, including first-time home buyers and senior citizens, it is seen as inflexible and unresponsive to modern housing needs.[88]

### *C. Zoning in Vermont*

#### *1. Planning Commissions*

In Vermont, municipal planning commissions play a major role in local zoning. The Vermont zoning enabling act allows the legislative body of a municipality to create a planning commission.[89] The act specifies qualifications for membership, terms of appointment, and allows the planning commission to adopt regulations it deems necessary to perform its permitted functions.[90] The planning commission is granted several powers, including the power to establish a comprehensive planning program[91] of the municipality, and the power to establish and implement a land use plan.[92] While the planning commission may recommend both new

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83. *See id.*

84. *See id.*

85. *See* Hanke, *supra* note 70, at 16.

86. Scattergood, *Planned Unit Development: A New Tool for Achieving a More Desirable Environment*, 4 FED. PLAN. INFO. REP. 1, 1 (N.J. Fed. of Plan. Officials 1969).

87. Lloyd, *supra* note 72, at 3-4. In addition, spacing single-family homes on one acre lots increases the expense of providing streets and utilities to those homes. These costs are passed on by the developer to the consumer, adding to the cost of the home. Scattergood, *supra* note 86, at 1.

88. Scattergood, *supra* note 86, at 1. *See also* Lloyd, *supra* note 72, at 3-4.

89. VT. STAT. ANN. tit. 24, § 4321(a) (1975).

90. *Id.* § 4323 (1975).

91. For a discussion of comprehensive planning and its relationship to planned unit developments, see Aloi, *supra* note 57, at 16-18.

92. VT. STAT. ANN. tit. 24, §§ 4325, 4382 (1975 & Supp. 1989).

zoning regulations and changes in existing regulations to the local legislative body,[93] it is the legislative body that enacts the regulations into law.[94]

The Vermont enabling act permits a municipality's legislative body to authorize the planning commission to "approve, modify . . . or disapprove"[95] the land development subdivision[96] plans of developers. The legislative body may also require approval by the planning commission of a developer's site plan;[97] the planning commission can then review the developer's plans concerning landscaping, automobile traffic, and parking.[98] The decision to approve or deny the plans of a developer must conform with the municipality's subdivision regulations, the municipal zoning scheme, and Vermont law. Thus, the planning commission has the power to approve or disapprove plans submitted by persons who wish to develop a parcel of property.

### 2. *Zoning Boards of Adjustment*

The Vermont enabling act also allows a municipality to establish a zoning board of adjustment.[99] The act provides qualifications for membership and terms of appointment.[100] The board of adjustment is empowered to hear appeals from the decisions of its administrative officer,[101] to grant or deny requests for zoning permits,[102] and to hear and rule upon applications for deviations from

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93. *Id.* § 4325(2) (1975).

94. *Id.* § 4401(b)(1) (Supp. 1989).

95. *Id.* § 4415 (1975).

96. A "subdivision" is "[t]he division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development." BLACK'S LAW DICTIONARY 1277 (5th ed. 1979).

97. A site plan is "[a]n accurately scaled development plan that illustrates the existing conditions on a land parcel as well as depicting details of a proposed development." D. LISTOKIN & C. WALKER, THE SUBDIVISION AND SITE PLAN HANDBOOK 8 (1989).

98. VT. STAT. ANN. tit. 24, § 4407(5) (Supp. 1989).

99. *Id.* § 4461 (1975).

100. *Id.*

101. *Id.* § 4464(c)(1). The zoning administrator is appointed by the planning commission and is empowered to administer the zoning bylaws of the municipality. *Id.* § 4442(a) (Supp. 1989).

102. *Id.* § 4464(c)(3). A zoning permit is first issued by the administrative officer to a prospective developer. *Id.* § 4443(a)(1). In simple terms, it is a determination by the zoning officer that all of the zoning regulations have been satisfied by the developer. *Id.* The zoning officer issues the permit after making this determination, posts the determination "in at least one public place in the municipality," and publishes the determination "in a newspaper of general publication in the municipality." *Id.* §§ 4443(b)(2), 4447(a)(1) (1975 & Supp.

the zoning regulations.[103] Permission for these deviations, called "variances,"[104] act as a "safety valve"[105] which alleviates the effects of zoning ordinances when they are unduly harsh or unfair to a particular landowner.[106]

The concept of the variance originated when drafters of zoning ordinances realized that no comprehensive zoning ordinance, regardless of how thorough and complete it might be, could possibly address fairly each and every situation it affects.[107] As pointed out above, Euclidean zoning treats entire sections of a municipality with uniformity,[108] with regulations that bear upon all of the affected properties equally. In reality, all property is not the same, and while the overall effects of the zoning regulations might be good for the properties affected, there may be situations in which the regulations are unduly harsh on particular properties, either due to irregularities of the individual property or to surrounding conditions.[109]

There are two kinds of variances: a "use" variance[110] and an "area" variance.[111] A use variance allows deviation from the regulations that limit a zone's permitted uses. For example, approval of plans to build an apartment building in an area zoned for single-

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1989). At least fifteen days must pass before the zoning board can hold a public hearing on the application, so that any interested person (as defined by the statute) can contest the issuance of the permit. *Id.* §§ 4447(a), 4464. The zoning board of adjustment then holds a hearing on the permit, and grants or denies the application based on its determination of whether all of the regulations have been complied with. *Id.* § 4464.

103. *Id.* § 4464(c)(2) (1975). *See generally* R. ANDERSON, *supra* note 1, § 19.08; N. WILLIAMS, *supra* note 1, § 128.01.

104. A variance grants "[p]ermission to depart from the literal requirements of a zoning ordinance." BLACK'S LAW DICTIONARY 1392-93 (5th ed. 1979).

105. R. ANDERSON, *supra* note 1, § 19.09 (quoting New York City Housing Authority v. Foley, 32 Misc. 2d 41, 47, 223 N.Y.S.2d 621, 627 (N.Y. Sup. Ct. 1961)).

106. R. ANDERSON, *supra* note 1, § 19.09.

107. *Id.* § 19.10.

108. *See supra* text accompanying notes 35-42.

109. These include "narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property." VT. STAT. ANN. tit. 24, § 4468(a)(1) (1975 & Supp. 1989).

110. A use variance permits the applicant to use the land for something other than that specifically allowed in the zone. *See* BLACK'S LAW DICTIONARY 1392-93 (5th ed. 1979). *See also* R. ANDERSON, *supra* note 1, § 20.06.

111. An area variance allows "deviations from restrictions upon construction and placement of buildings and structures which are employed to serve permitted statutory use." BLACK'S LAW DICTIONARY 97 (5th ed. 1979). *See also* R. ANDERSON, *supra* note 1, § 20.07. An area variance is sometimes referred to as a "bulk" variance. It is unlike a use variance insofar as the intended use of the land is one which is allowed in the zone.

family residential homes would require a use variance. On the other hand, an area variance allows deviation from those regulations that prescribe building sizes and location on a lot. For example, an area variance would be required in order to construct a building larger than is permitted under the regulations, or one closer to the property border than would normally be allowed in the zone. After the zoning board of adjustment receives an application for either a use or area variance, it decides whether to grant the variance based upon certain statutory provisions.[112]

In order to receive a variance, the developer's property must be beset with unusual physical conditions peculiar to that property.[113] The Vermont enabling act provides that such a condition exists when the lot is extremely narrow, or if it contains topographical conditions that preclude any development of the property in compliance with the regulations.[114] This "hardship" will not be found where simple adherence to the regulations would make

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112. The statutory criteria are enumerated in the enabling act. VT. STAT. ANN. tit. 24, § 4468 (1975 & Supp. 1989) reads:

> (a) On an appeal under section 4464 or section 4471 of this title wherein a variance from the provisions of a zoning regulation is requested for a structure that is not primarily a renewable energy resource structure, the board of adjustment or superior court may grant variances, and render a decision in favor of the appellant, if all the following facts are found and the finding is specified in its decision.
>
> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning regulation in the neighborhood or district in which the property is located;
>
> (2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning regulation and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;
>
> (3) That the unnecessary hardship has not been created by the appellant;
>
> (4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare; and
>
> (5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the plan.

*Id.*

113. *Id.* § 4468(a)(1) (Supp. 1989).

114. *Id.*

development difficult.[115] Rather, the impediments to development must be such that no other possible means exist for developing the property if the regulations are strictly followed.[116] Further, the person applying for the variance cannot have caused the hardship.[117]

When granting a variance, the zoning board of adjustment may not permit development that "alter[s] the essential character of the neighborhood,"[118] affects the ability of the surrounding property owners to develop their land,[119] or hampers the accessibility of renewable energy resources.[120] Moreover, granting the variance cannot be "detrimental to the public welfare."[121] Finally, whatever relief is granted to the developer must be that which results in the least possible divergence from the regulations.[122]

Although Vermont law clearly allows for area variances,[123] there is a continuing debate in Vermont whether its enabling act actually allows a use variance.[124] The courts have yet to decide this

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115. *Id.*
116. *Id.* § 4468(a)(2).
117. *Id.* § 4468(a)(3).
118. *Id.* § 4468(a)(4).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* § 4468(a)(5). One Vermont Supreme Court case illustrates how this criterion can cause difficulty for an applicant. *In re* Maurice Memorials, 142 Vt. 532, 458 A.2d 1093 (1983). The applicant sought a variance to build a new roof on his granite shed that would have been six feet higher than the original roof. *Id.* at 534, 458 A.2d at 1094-95. The trial court granted the variance, finding that the increased height would have benefitted the surrounding neighborhood insofar as it was to include soundproofing insulation. *Id.* Nonetheless, the Vermont Supreme Court reversed, and denied the variance because the new roof could have been built at the original level and thus with less deviation from the zoning regulations. *Id.* at 537, 458 A.2d at 1096.
123. VT. STAT. ANN. tit. 24, § 4468 (1975 & Supp. 1989).
124. Section 4473 of the Vermont enabling act reads as follows:

> It is the purpose of this chapter to provide for review of all questions arising out of or with respect to the implementation by a municipality of this chapter. Except as specifically provided herein, no board of adjustment may amend, alter, invalidate or affect any development plan or bylaw of any municipality or the implementation or enforcement thereof, or allow any use not permitted by any zoning regulations or other bylaw.

VT. STAT. ANN. tit. 24, § 4473 (1975). One commentator addressed the question of the availability of use variances in Vermont with an interesting analysis. Note, *Zoning Variance Administration in Vermont*, 8 VT. L. REV. 371, 389 n.136 (1983) (authored by Michael D. Donovan). Donovan points out that section 4473 does not specifically refer to use variances, and thus could be read as not prohibiting them. Thus interpreted, section 4473 would implicitly allow boards of adjustment to grant use variances; this section could be read simply as a limitation "in the context of a board of adjustment's enforcement of the bylaw provisions." *Id.* "[B]ecause the Vermont Supreme Court failed to rule in two cases which alluded to the

issue that title 24, chapter 117 prohibits use variances, (*see* Gadhue v. Marcotte, 141 Vt. 238, 241, 446 A.2d 375, 377 (1982); *In re* Ray Reilly Tire Mart, Inc., 141 Vt. 330, 332, 449 A.2d 910, 911 (1982)), the court tacitly acknowledged the availability of such variances." *Id.* Donovan noted, however, that further analysis of the enabling act reveals that these arguments are far from conclusive. *Id.*

The Vermont enabling act states that a board may not "allow any use not permitted by any zoning regulations or other bylaw." VT. STAT. ANN. tit. 24, § 4473 (1975). Donovan observes that this section "neither refers to the statutory variance criteria of title 24, section 4468(a) of the Vermont Statutes Annotated, nor specifically mentions use variances." 8 VT. L. REV. 371, 390 n.136 (1983). "If a board granted a use variance," Donovan continues, "it would thereby allow a use not permitted by a zoning bylaw. It follows, therefore, that a board cannot grant use variances. . . ." *Id.* "The '[e]xcept as specifically provided' language of section 4473 instructs that a board is prohibited from allowing uses that are not specifically provided for under a zoning regulation or bylaw." *Id.*

According to Donovan, the *Gadhue* and *Tire Mart* decisions of the Vermont Supreme Court do not contradict this analysis. *Id.* In both cases the court examined section 4468 of the enabling act, which provides the standards under which a variance can be granted, and held that section 4468 made no distinction between use variances and area variances. *Gadhue*, 141 Vt. at 241, 446 A2d. at 377; *Tire Mart*, 141 Vt. at 332, 449 A.2d at 911. However, the question of whether the Vermont enabling act permits a use variance was not specifically before the court. 8 VT. L. REV. 371, 390 n.136 (1983).

This question has yet to come before the Vermont Supreme Court. Courts in other states have faced this issue, with differing results. For example, a Kansas statute allows a board of adjustment to grant a variance, provided that "such variance shall not permit any use not permitted by the zoning ordinance in such district." KAN. STAT. ANN. § 12-715 (1982). In a recent case, the Kansas Supreme Court looked to the plain meaning of the statute and held that the statute specifically denies boards of adjustment the power to grant use variances. City of Merriam v. Bd. of Zoning Appeals, 242 Kan. 532, 537-38, 748 P.2d 883, 888 (1988).

In *In re* Appeal of Kenney, 374 N.W.2d 271 (Minn. 1985), the Supreme Court of Minnesota interpreted a Minnesota statute which provides that "[n]o variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located." MINN. STAT. ANN. § 394.27(7) (Supp. 1989). However, the court emphasized a provision in the statute: " 'The board of adjustment shall have the exclusive power to order the issuance of variances from the terms of any official control *including restrictions placed on nonconformities.*' " *Kenney*, 374 N.W.2d 271, 273 (quoting MINN. STAT. ANN. § 394.27(7) (Supp. 1989)). The defendant county board of adjustment argued that the statute allows only for area variances and does not permit use variances; it interpreted the statute as prohibiting a variance for any use prohibited in the zoning district. *Id.* at 273-74. The court disagreed, holding that the statute must be read as a whole. *Id.* at 274. Although the structure at issue in the case was a nonconforming use (*i.e.*, a use not permitted in a zone, but existing before the zoning ordinance was adopted), the court found the defendant county's interpretation of the statute too narrow: "Indeed, given that the statutory definition of nonconformity clearly includes nonconforming uses, it seems to violate the clear meaning of the statute to interpret the board's variance power for restrictions upon nonconformities as limited to area variances." *Id.* In other words, a use variance could be granted for a nonconforming use in spite of the statute's prohibition of a variance for any use that is prohibited in the zoning district.

In Vermont, variances may be issued for nonconforming uses. VT. STAT. ANN. tit. 24, § 4468 (Supp. 1989). The Vermont Supreme Court has held that the standards for such a variance are to be applied strictly. DeWitt v. Town of Brattleboro Bd. of Adjustment, 128 Vt. 313, 319, 262 A.2d 472, 476 (1970). Throughout the Vermont enabling act, the term "use" is never actually used to modify the word "variance." VT. STAT. ANN. tit. 24, §§ 4302-

issue.[125]

## II. PLANNED UNIT DEVELOPMENTS

### *A. Planned Unit Developments in General*

Critics of Euclidean zoning[126] offer the planned unit development[127] concept[128] as an alternative. Because this planning device continuously undergoes criticism, analysis, and revision, a precise definition of planned unit development is difficult to formulate.[129]

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4495 (1975 & Supp. 1989). However, section 4473 of the enabling act states that a board may not "allow any use not permitted by any zoning regulations or other bylaw." VT. STAT. ANN. tit. 24, § 4473 (1975). If the logic the Minnesota Supreme Court applied in *Kenney, supra*, is applied here, the enabling act could be construed as permitting a use variance, at least in the case of nonconforming uses. This unsettled state of the law regarding use variances in Vermont requires a definitive response by the legislature or the courts.

125. *Supra* note 124.

126. *See supra* notes 69-88 and accompanying text.

127. Although most commonly referred to as "planned unit development," the labels "planned residential development" and "planned development," among others, are frequently used. While there are sometimes significant differences between these concepts, the differences are not important for the purposes of this note; accordingly, the term "planned unit development" is used throughout. As a general rule, planned residential developments do not include commercial or industrial uses, although sometimes the term "planned residential development" is used for projects that in fact contain these uses (probably for the developer's public relations purposes). *See generally* N. WILLIAMS, *supra* note 1, § 48.01.

128. Planned unit development is best understood as a concept or as an *approach* to zoning, rather than as the *result* of an approach to zoning. For convenience, or because of a lack of terminology, planners often refer to the result of the approach by the same name as the approach itself, even though such a designation is not entirely accurate.

An analogy illustrates this point. If a developer were to obtain a use variance in order to build a duplex apartment in a zone that did not permit duplex apartments, the resulting building would not be called a use variance but rather a duplex apartment. Likewise, a developer might secure permission to build a project under a planned unit development ordinance. Technically, the resulting project would not be a planned unit development. Nonetheless, the result is often characterized as such for lack of a better term. This note follows that convention.

129. Although defining planned unit development is difficult, many commentators and courts have made efforts to achieve a working definition. Two writers have presented perhaps the most complete definition. R. BURCHELL & J. HUGHES, PLANNED UNIT DEVELOPMENT: NEW COMMUNITIES AMERICAN STYLE 34 (1972). The authors review the history of the research and development of the concept and criticize as incomplete most earlier definitions. They then offer their own definition:

> Planned unit development is a means of land regulation which promotes large scale, unified land development via mid-range, realizable programs in pursuit of physically-curable, social and economic deficiencies in peripheral land and cityscapes. Where appropriate this development control advocates: (1) A mixture of both land uses and dwelling types, one or more of the non-residential land uses being regional in nature. (2) The clustering of residential land uses providing public and common open space, the latter to be maintained for and by the residents of the development. (3) Increased ad-

A planned unit development results from the application of certain principles to the planning and subsequent development of land, while, at the same time, allowing the abandonment of certain other long-held zoning and planning principles.

Planned unit development is best understood when contrasted with the application and results of typical Euclidean zoning. As already discussed, Euclidean zoning divides a municipality into zones,[130] each zone having certain permitted uses. In addition, each zone has regulations detailing both the permitted sizes of the buildings in the zone, as well as regulations for building placement. Finally, Euclidean zoning treats building lots individually—that is, as separate entities. In contrast, planned unit development does not focus on each individual building lot. Rather, a parcel of land is "developed as a single entity according to a plan,"[131] regardless of how many individual building lots are on the property. The usual requirements for "lot size, setback lines, yard areas, and dwelling types may be varied and modified to achieve particular design objectives and make provisions for open spaces, common areas, utilities, public improvements, and collateral nonresidential

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> ministrative discretion to a local professional planning staff while setting aside preset land use regulations and rigid plat approval processes, and finally, (4) The enhancement of the bargaining process between developer and municipality thereby strengthening the municipality's site plan review function and control over tempo and sequence of development in return for potentially increased profits available to the developer as a result of land efficiency, the employment of multiple land uses, and increased residential densities.

*Id.* at 37-38 (footnote omitted). Most courts use the objectives of the concept to define planned unit development. *E.g.*, Frankland v. City of Lake Oswego, 267 Or. 452, 461-62, 517 P.2d 1042, 1047 (1973); Lutz v. City of Longview, 83 Wash. 2d 566, 568, 520 P.2d 1374, 1376 (1974). Black's Law Dictionary provides the following:

> An area with a specified minimum contiguous acreage to be developed as a single entity according to a plan, containing one or more residential clusters or planned unit residential developments and one or more public, quasi-public, commercial or industrial areas in such ranges of ratios of nonresidential uses to residential uses as shall be specified in the zoning ordinance.
>
> Area of land controlled by landowner to be developed as a single entity for a number of dwelling units, and commercial and industrial uses, if any, the plan for which does not correspond in lot size, bulk or type of dwelling or commercial or industrial use, density, lot coverage and required open space to the regulations established in any one or more districts, created from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state.

BLACK'S LAW DICTIONARY 1036 (5th ed. 1979).

130. *See supra* notes 35-62 and accompanying text.

131. BLACK'S LAW DICTIONARY 1036 (5th ed. 1979).

uses."[132] This approach allows a developer to cluster the residential units close together to provide room for recreational areas and open spaces.[133]

Notably, many planned unit development ordinances specifically allow for nonresidential uses,[134] including commercial and industrial uses,[135] to be integrated with residential uses. Critics argue that this practice is irreconcilable with sound land use planning and zoning insofar as planned unit development permits incompatible uses in the same zone.[136] Since commercial and industrial uses have been traditionally viewed as incompatible with residential uses, permitting their coexistence on the same parcel of land would violate an essential tenet of zoning, and lead to unsatisfactory land development.[137]

Proponents of planned unit development argue that many

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132. OHIO REV. CODE ANN. § 519.021 (Anderson 1987). Setback is "[a] distance from a curb, property line, or structure, within which building is prohibited." BLACK'S LAW DICTIONARY 1230 (5th ed. 1979).

133. For instance, under Euclidean zoning, if a developer owned a one hundred acre parcel of land in an area zoned for single-family one acre lots, the developer could expect to obtain approval for approximately eighty homes with some land set aside for roads and topographical irregularities. Some might view this outcome as aesthetically boring and unpleasing. Moreover, if forty acres of the parcel were environmentally sensitive wetlands, the developer would be faced with a significant loss of profit, unless a way could be found to circumvent any laws designed to protect the wetlands. In this scenario, planned unit development would allow the developer to realize a greater profit while still protecting the environmentally fragile land. Permitting the builder to condense the development by building on half-acre lots would result in eighty homes built on a total of forty acres. With twenty acres set aside for roads, the forty acres of wetlands could therefore be preserved. These forty acres could then be given to the town or their development could be precluded by restrictive covenant. Vermont statutes allow for these possibilities. VT. STAT. ANN. tit. 24, § 4407(12) (1975). *See generally* Annotation, *Zoning: Planned Unit, Cluster, or Greenbelt Zoning*, 43 A.L.R.3rd 888 (1972).

134. *E.g.*, MASS. GEN. L. ch. 40A § 9 (1987); N.J. STAT. ANN. § 40:55D-6 (West 1988); OHIO REV. CODE ANN. § 519.021 (Anderson 1987); VT. STAT. ANN. tit. 24, § 4407(12)(A) (1975).

135. For example, a cluster of homes may be abutted on one side with open recreational space, while facing a commercial center on another side. This commercial center may include convenience stores, restaurants, or other services. Residents of the homes would thus have many of their amenities within walking distance. As such, in reducing the residents' need to use their automobiles, a planned unit development of this nature is particularly attractive to municipalities that suffer from automobile congestion.

136. *See supra* notes 56-62 and accompanying text.

137. Goldston & Scheuer, *supra* note 69, at 245-46. "In Mr. Justice Sutherland's famous phrase in the landmark zoning case, use zoning assures us that we will not have 'a right thing in the wrong place, —like a pig in the parlor instead of the barnyard.' Until recently, no better example of a pig in a parlor could be cited by courts or planners than a commercial enterprise in an exclusively residential neighborhood." *Id.* (footnotes omitted) (quoting Euclid v. Amber Realty, 272 U.S. 365, 388 (1926)).

zoning regulations often allow nonresidential uses in residential zones, including, for example, schools, churches, and hospitals.[138] Because these uses are considered not necessarily incompatible with residential uses, certain commercial or industrial uses could also be considered compatible with residential uses, provided the intensity of the use fell within certain limitations.[139] Thus the inquiry shifts from how these uses are labeled to whether the use is in fact compatible with residential use.

At least one state has required that the commercial and industrial uses be designed to serve only the residents of the planned unit development,[140] while other states do not impose this restriction.[141] This requirement can reduce the impact of the commercial and industrial uses,[142] thereby possibly increasing their compatibility with residential uses.

Critics of planned unit development also argue that under traditional zoning, commercial and industrial zones are clearly depicted on the municipality's zoning map, effectively giving notice to any person that those uses are permitted only in those zones.[143] That person could then avoid the commercial and industrial zones by purchasing property elsewhere. Normally, however, areas zoned for planned unit developments do not appear on the zoning map, but "only on papers on file in municipal offices."[144] Or, as occurs more frequently, planned unit developments may be built anywhere in the municipality;[145] hence, for all practical purposes, indicating them on a zoning map would be a useless protection for the individual who wishes to avoid buying property adjacent to possible commercial or industrial uses. Accordingly, any residential property owner could one day find commercial and industrial uses adjacent to his or her home. In this scenario, many of the protections promised by zoning[146] are lost.

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138. *Id.* at 247. *See also* Burchell & Hughes, *Issues in Planned Unit Development*, 9 FED. PLAN. INFO. REP. 4 (N.J. Fed. of Plan. Officials 1974).

139. Goldston & Scheuer, *supra* note 69, at 247.

140. *See, e.g.*, N.J. STAT. ANN. § 40:55-57(a) (West 1967) (repealed 1976).

141. Vermont does not have this requirement. VT. STAT. ANN. tit. 24, § 4407(12) (1975).

142. This is so at least in theory, because the commercial and industrial uses would not be as sizable as they would be if they served areas outside of the planned unit development. Moreover, if these uses were designed to serve only the residential units within the development, the vehicular traffic would be less than if they also served outside areas.

143. N. WILLIAMS, *supra* note 1, § 48.03.

144. *Id.*

145. *See, e.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, §§ 4-2-9.1—4-2-9.11 (1988).

146. *See supra* notes 64-68 and accompanying text.

The proponents of planned unit development rely upon protections inherent in the planning process to rebut these criticisms. These protections include mechanisms contained in the ordinances[147] and the discretion exercised by the planning commission when approving a planned unit development.[148] One common protective mechanism is the requirement for buffering[149] between parcels of land so as to protect neighboring properties.[150] The planning commission may also exercise its discretion in requiring that the developer adequately screen the use from neighboring residential properties.[151] In this manner, these surrounding properties gain protection.[152] Finally, these proponents note that courts have uniformly upheld properly enacted planned unit development ordinances as a valid exercise of zoning power.[153]

The proponents of planned unit development list numerous advantages that they claim answer the shortcomings of Euclidean zoning.[154] Primarily, the device promotes improved construction

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147. *See, e.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, § 4-4-3.6.2 (1988).

148. So, Mosena & Bangs, *Planned Unit Development Ordinances*, 291 AM. SOC'Y OF PLAN. OFFICIALS, PLAN. ADVISORY SERVICE 40 (1973).

149. "Buffering" is a device whereby land uses are shielded from one another. It may be as simple as a row of trees on the edge of a development. In other instances, entire zones may be used as buffers. For example, a heavy industrial use zone may be separated from a residential use zone by a buffer zone containing low-impact commercial uses. *See generally* R. ANDERSON, *supra* note 1, § 9.11.

150. VT. STAT. ANN. tit. 24, § 4407(12) (1975). *See, e.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, § 4-4-3.6.2 (1988).

151. *See, e.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, § 4-4-3.6.2 (1988).

152. This argument is not unassailable. The buffering required by the planning commission may have been made in good faith, yet may turn out to be grossly inadequate. The only recourse for the neighboring residential property owners would be litigation, something that may well be prohibitively expensive. In addition, the buffering required by the planning commission may be adequate at the present time, but may prove inadequate in the future when neighboring property owners develop their land. Again, the only recourse would be expensive litigation. In either case the protective mechanisms of land use zoning would have failed. Consequently, the protection of the neighboring properties is dependant on the discretion of the planning commission rather than on strict guidelines established by the legislature.

153. *E.g.*, Tri-State Generation and Transmission Co., v. City of Thornton, 647 P.2d 670 (Colo. 1982); Best v. La Plata Planning Comm'n, 701 P.2d 91 (Colo. Ct. App. 1984); Cetrulo v. City of Park Hills, 524 S.W.2d 628 (Ky. 1975); Round Valley, Inc., v. Township of Clinton, 173 N.J. Super. 45, 413 A.2d 356 (1980); Cheney v. Village 2 at New Hope, Inc., 429 Pa. 626, 241 A.2d 81 (1968); Doran Investments v. Muhlenberg Township, 10 Pa. Commw. 143, 309 A.2d 450 (1973); Lutz v. City of Longview, 83 Wash. 2d. 566, 520 P.2d 1374 (1974). Only two cases concerning planned unit development in Vermont have reached the Vermont Supreme Court; both were decided on grounds other than the validity of the ordinances. Stevens v. Essex Junction Zoning Bd. of Adjustment, 139 Vt. 297, 428 A.2d 1100 (1981); *In re* Appeal of Farrell & Desautels, Inc., 135 Vt. 614, 383 A.2d 619 (1978).

154. One commentator has compiled five distinct benefits inherent in planned unit de-

and development design, with more flexibility and variety than that allowed by Euclidean zoning.[155] Planned unit development allows buildings to be placed closer together than that typically allowed under Euclidean zoning, which results in more open space for recreational purposes.[156] When a planned unit development ordinance permits commercial and industrial uses, the residents of the development have convenient access to services and employment.[157] Significantly, planned unit development presents greater possibilities for low cost and senior citizen housing, for two reasons. The increased design flexibility allows for housing which directly addresses the needs of these groups, and the purchase cost per residential unit in a planned unit development is generally lower than those of other land use planning schemes.[158]

Planned unit development has been employed successfully by many developers throughout the United States, and indications are that the use of the approach is on the rise.[159]

### *B. Planned Unit Development in Vermont*

The Vermont enabling act[160] allows Vermont municipalities to provide for planned unit development.[161] The enumerated statu-

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velopment. Scattergood, *supra* note 86, at 3. These are:

> (1) Because the lot size and setback requirements of a particular zone are relaxed, there is greater opportunity for flexibility and variety in the design and layout of a development, which can result in an improved design;
> (2) By providing the developer with greater design flexibility, planned unit development can offer a wider choice of housing possibilities, including low cost and senior citizen housing;
> (3) By allowing the developer to cluster buildings closely together, there is a greater availability of open space of more usable dimensions, for possible use as playgrounds and parks;
> (4) Planned unit development permits the integration of commercial and industrial uses with residential units, which provides easier access to shopping and employment;
> (5) By clustering units in the development, the cost of providing streets, utilities, water, and sewerage is lower, which in turn lowers the cost per unit.

*Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id. See also* Krasnowiecki, *supra* note 72, at 47-55.

159. R. BURCHELL & J. HUGHES, PLANNED UNIT DEVELOPMENT: NEW COMMUNITIES AMERICAN STYLE 48-49 (1972).

160. VT. STAT. ANN. tit. 24, §§ 4302-4495 (1975 & Supp. 1989).

161. VT. STAT. ANN. tit. 24, § 4407(12) (1975). Vermont law also provides for planned residential developments. *Id.* § 4407(3) (1975). The differences between these two are not

tory purposes include the encouragement of "new communities, innovation in design and layout, and [the] more efficient use of land."[162] The act allows municipalities to establish standards and conditions to guide the planning commission in evaluating a planned unit development proposal.[163]

Significantly, the act gives the planning commission the power to modify zoning regulations when approving a planned unit development application.[164] The planning commission may also supplement the standards and conditions set forth in the zoning regulations with rules and regulations, provided these rules and regulations "are not inconsistent with the zoning regulations."[165] While a zoning board of adjustment must conform to strict statutory criteria when considering an application for a variance,[166] a planning commission need not conform to any such strict criteria when establishing the standards for approval of a planned unit development.[167] In this regard, no specific guidance is given to planning commissions by the state legislature. Some argue that this lack of guidance is advantageous because it offers broad latitude to local municipalities, thus allowing them to tailor an ordinance to meet local needs.[168]

In its current form, the Vermont enabling act contains an inherent ambiguity. Under the section permitting planned unit development, a planning commission is allowed to adopt regulations to augment the standards and conditions provided in the zoning regulations, so long as those rules and regulations are "not inconsistent with the zoning regulations."[169] Nonetheless, the act allows

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significant for the purposes of this note.

162. *Id.* § 4407(12) (1975).

163. *Id.* Curiously, the purposes given for planned *residential* development include the preservation of "the natural and scenic qualities of the open lands of the state," *id.* § 4407(3), while the purposes given for planned *unit* development do not. *Id.* § 4407(12). This can only be attributed to legislative oversight, for it is unlikely that the Vermont legislature would only want "the natural and scenic qualities of the open lands of this state" to be protected in the development of planned residential developments but not in the development of planned unit developments.

164. *Id.* § 4407(12) (1975).

165. *Id.*

166. *See* notes 107-22 and accompanying text.

167. VT. STAT. ANN. tit. 24, § 4407(12) (1975).

168. These proponents point out that the standards for the approval of planned unit development might need to be different in a heavily developed or populated municipality, rather than in a small town. Each municipality can then determine its own needs and tailor the standards for its purposes. So, Mosena & Bangs, *supra* note 148, at 29-30.

169. VT. STAT. ANN. tit. 24, § 4407(12) (1975).

a municipal planning commission to permit planned unit developments that include residential units,[170] "*any* nonresidential use,"[171] "public and private educational facilities,"[172] and "industrial uses and buildings."[173] The act permits municipalities to allow these multi-use planned unit developments wherever it chooses, even in zones that do not allow for these uses. By thus allowing the commingling of incompatible uses within a planned unit development, the act is inconsistent with its simultaneous requirement that the rules and regulations regarding planned unit development be "not inconsistent" with other zoning regulations.

Despite this ambiguity, some Vermont municipalities have adopted ordinances that permit planned unit development in any zone, and allow any use in a planned unit development permitted under the Vermont enabling act.[174] Without any other restrictions, this means that any use can be permitted in any zone.[175] As pointed out above, a zoning board of adjustment must act within the stringent statutory requirements of the enabling act when considering a variance application.[176] Conversely, regardless of the uses included in the developer's proposal, the planning commission is not restricted by any statutory constraints when considering an application for a planned unit development. The planning commission is not restricted by any regulations unless they exist elsewhere in the local zoning regulations. The only constraint is the providence of the members of the planning commission.

This discrepancy can lead to two significant results. Where a municipality has not provided guidelines and standards for a planning commission to follow when considering an application for a planned unit development, and where any use is permitted in planned unit development, a landowner whose property abuts a parcel on which a planned unit development is proposed faces the possibility of neighboring any use of land, including those which

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170. *Id.* § 4407(12)(A).

171. *Id.* § 4407(12)(B) (emphasis added).

172. *Id.* § 4407(12)(C).

173. *Id.* § 4407(12)(D).

174. *E.g.*, HARTFORD, VT., ZONING REG., *supra* note 36, §§ 4-2-9.1—4-2-9.11 (1988); CITY OF MONTPELIER, VT., ZONING REG., § 15-402 (1988). Some municipalities that permit planned unit development limit the uses to those already permitted in the zone. *E.g.*, VILLAGE OF WOODSTOCK, VT., ZONING REG., § 6.54(b) (1980).

175. This is unless the planning commission finds that a particular application has not met the subdivision requirements. *See supra* notes 95-98 and accompanying text.

176. *See supra* notes 104-24 and accompanying text.

may be detrimental to his or her property.[177] As such, the property owner can be denied the protection of zoning.

Another possible circumvention of the zoning regulations exists. If a developer wants to build a project which requires either a use or an area variance, the developer may find that the proposal will not meet the strict statutory criteria for such a variance.[178] In a municipality that lacks guidelines for the planning commission to follow when considering proposed planned unit development, and that permits any use in a planned unit development, this developer could request and receive approval for the project as a planned unit development. In this scenario, the developer sidesteps the process by effectively receiving a variance without meeting the criteria for one.

Unless corrected by state legislative action, this loophole in the Vermont enabling act could lead to these unfortunate results. The possibilities for abuse, either intentional or unintentional, should be prevented by constraints mandated by the legislature. One possible method for addressing this problem would be to amend the Vermont enabling act so as to require a minimum acreage for planned unit development.

## III. Planned Unit Development and the Minimum Acreage Requirement

### *A. The Minimum Acreage Requirement in General*

The question of exactly how large or small a planned unit development should be has long been debated by commentators.[179] Considering the basic objectives of planned unit development,[180] some feel that zoning enabling acts should permit a planned unit development of any size.[181] Others argue that unless these acts dictate a minimum size for planned unit development, the possibili-

177. The objecting landowner does have several avenues of recourse. He or she may participate in the public hearing of the application and voice objections. Vt. Stat. Ann. tit. 24, §§ 4407(12), 4447 (1975 & Supp. 1989). He or she may also bring a civil action for nuisance once the project has begun. *See, e.g.*, Coty v. Ramsey Assoc., Inc., 149 Vt. 451, 457, 546 A.2d 196, 201 (1988).

178. *See supra* notes 107-22 and accompanying text.

179. Burchell & Hughes, *Issues in Planned Unit Development*, 9 Fed. Plan. Info. Rep. 3 (N.J. Fed. of Plan. Officials 1974).

180. *See supra* notes 154-58 and accompanying text.

181. *See supra* notes 189-92 and accompanying text.

ties for abuse of the device are too great.[182] An overview of some of the suggested model ordinances for planned unit development can serve to explicate the essential elements of this debate.

Several legal scholars have proposed model ordinances which address the issue of minimum acreage for planned unit development.[183] Some recommend a model ordinance with a two acre minimum for planned unit developments.[184] Although they allow for some exceptions,[185] they advocate this minimum "in order to set the threshold for qualification low enough so that the whole of a typical city block would qualify."[186] A parcel smaller than two acres "could not ordinarily be the type of self-sustaining neighborhood which can justifiably be given special treatment."[187] They contend that the absence of a two acre minimum requirement would invite abuse of planned unit development, insofar as the aims and purposes of planned unit development could not be met in an area smaller than two acres. It is argued that allowing planned unit developments in an area smaller than two acres would circumvent the zoning process; what is in reality a variance application would slip through as a planned unit development application.[188]

Some other commentators who recognize these problems have

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182. *See infra* notes 183-88 and accompanying text.

183. *E.g.*, Goldston & Scheuer, *supra* note 69, at 267; Babcock, *An Introduction to the Model Enabling Act for Planned Residential Development*, 114 U. PA. L. REV. 136, 151 (1965).

184. Goldston & Scheuer, *supra* note 69, at 267.

185. *Id.* One exception is made for parcels "bounded on all sides by streets, public open spaces, or the boundary lines of less restrictive use districts." *Id.* This exception is not significant for the purposes of this note.

186. *Id.* at 259.

187. *Id.* The authors argue that it would be "hard to justify" including lots smaller than two acres "as being 'in accordance with a comprehensive plan.' " *Id.* (footnote omitted).

188. "It seems desirable to have some minimum [acreage] in order to discourage use of the exception for planned [unit] developments as a substitute for a hardship variance for odd-shaped areas or as just another device to reduce the effectiveness of zoning through leakage." *Id.* (footnote omitted). *See generally* N. WILLIAMS, *supra* note 1, §§ 48.01-.02. Professor Williams does not admire the planned unit development concept, and warns against its possible abuse. *Id.* Although he does not specifically address the issue of minimum acreage, his comments concerning the possibilities for the abuse of the planned unit development are pertinent.

Another commentator argues that, for practical reasons, a planned unit development cannot be too small. Hanke, *supra* note 70, at 20-21. "Due to limiting factors, such as minimum facilities and organizational realities, a planned unit [development] of less than fifty living units may not be practical except at relatively high costs per family." *Id.* at 21.

offered a different solution.[189] They find merit in using the planned unit development concept for the development of "small 'bypassed' areas that can best be treated as a [planned unit development] but which would not qualify under the minimum land acreages typical of current ordinances that deal with the problem."[190] They feel, however, that municipalities should require some minimum size so that the ordinance is not used as a loophole for a development application that would be better handled as a use variance.[191] While recognizing the need for a minimum acreage requirement, these commentators maintain that a specific minimum acreage requirement does not belong in an enabling act.[192]

The legislatures of other states have faced this minimum acreage question. Unlike Vermont, some states require a minimum acreage for a planned unit development in their zoning enabling acts.[193] For example, New Jersey requires a "specified minimum contiguous acreage of 10 acres or more" for planned unit developments,[194] and a "specified minimum contiguous acreage of 5 acres or more" for planned unit residential developments.[195] Although not quite as stringent, Massachusetts requires as its minimum "the lesser of sixty thousand square feet or five times the minimum lot size of the zoning district."[196] New York requires that the planned unit development result in no greater number of dwelling units than would be permitted if the parcel were developed in conformance with the requirements of the zoning district.[197]

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189. Babcock, Krasnowiecki & McBride, *The Model State Statute*, 114 U. PA. L. REV. 140, 150-51 (1965).

190. *Id.* at 151.

191. *Id.*

192. *Id.*

193. Vermont does have a limitation on the maximum number of units allowed in planned residential developments (VT. STAT. ANN. tit. 24, § 4407(3)(b) (1975)), yet it provides no similar restriction for planned unit developments.

194. N.J. STAT. ANN. § 40:55D-6 (West 1988). In New Jersey, municipalities are free to impose minimum acreage requirements that exceed the state mandated ten acres requirement. In one case, a municipality with a fifty acre minimum requirement for planned unit developments had its ordinance upheld. Round Valley, Inc. v. Township of Clinton, 173 N.J. Super. 45, 413 A.2d 356 (1980).

195. N.J. STAT. ANN. § 40:55D-6 (West 1988). In New Jersey, a planned unit development may include residential, commercial, and industrial uses. On the other hand, planned unit *residential* development includes residential uses together with commercial uses which are "primarily for the benefit of the residential development," but not industrial uses. *Id.* This is the reason for the difference in minimum acreage requirements.

196. MASS. GEN. L. ch. 40A, § 9 (1987). Sixty thousand square feet equals approximately 1.4 acres.

197. N.Y. TOWN LAW § 281(b) (1987 and Supp. 1989).

Like Vermont, some other states do not have a minimum acreage requirement in their zoning enabling acts. Idaho explicitly allows the municipality to establish a minimum acreage requirement, but it does not prescribe one.[198] Similarly, Pennsylvania does not require a minimum acreage or a minimum number of units, but it does allow a municipality to require a "minimum number of dwelling units."[199] Minnesota[200] and Indiana[201] do not have any such requirements, nor do they suggest that municipalities adopt them.

There is little case law on the issue of a minimum acreage requirement for planned unit development. In the only reported decision handed down by a higher court on this question, the Arkansas Supreme Court upheld a local municipality's approval of a planned unit development of .16 acre.[202] Without discussing the nature of planned unit development and minimum acreage, the court rejected the plaintiff's argument that the applicant's lot was too small to qualify for a planned unit development.[203] In a brief opinion, the court simply analyzed the applicable zoning ordinance and held that it permitted planned unit developments of any size; it thus concluded that the approval was valid.[204]

Although the Vermont Supreme Court has never reviewed planned unit development minimum acreage requirements, one opinion provides useful dicta. In *Stevens v. Essex Junction Zoning Board of Adjustment*,[205] the court observed that "[a] planned unit development is usually thought of as involving development of a large tract of land, frequently large enough to constitute a new community."[206] Although the case was decided on other grounds,[207] the court here revealed its understanding of the proper function of planned unit development.

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198. IDAHO CODE § 67-6515 (1980).

199. 53 PA. CONS. STAT. ANN § 10705(g) (Purdon 1972).

200. MINN. STAT. ANN. § 394.301 (West 1989).

201. IND. CODE ANN. § 36-7-4-713 (Burns 1989).

202. Tackett v. Hess, 291 Ark. 239, 723 S.W.2d 833 (1987).

203. *Id.* at 243, 723 S.W.2d at 835.

204. *Id.* at 241-43, 723 S.W.2d at 834-35.

205. 139 Vt. 297, 428 A.2d 1100 (1981).

206. *Id.* at 302, 428 A.2d at 1103 (citing R. ANDERSON, AMERICAN LAW OF ZONING §§ 11.12, 11.13 (2d ed. 1976)).

207. *Id.* at 303, 428 A.2d at 1103.

### *B. The Need for a Minimum Acreage Requirement in Vermont*

While planned unit development might effectively meet various land use planning needs,[208] distinct possibilities for abuse of this device exist.[209] Amending the current statutory provisions governing planned unit development in order to reduce the possibility for abuse would serve two purposes. It would encourage proper use of the device so as to enhance the benefits it can contribute to a municipality. Additionally, it would reduce the possibility of adverse effects on neighboring lands and the municipality in general.

Several avenues can be taken in an effort to improve the statutory requirements for planned unit development. For instance, the uses permitted in a planned unit development could be limited to those already allowed in the applicable zone.[210] This would protect the neighboring landowner from being subjected to the adverse consequences of uses that might not be expected to be found on adjacent land.[211] It would also prevent the developer from using the planned unit development provisions in an attempt to avoid the stringent requirements of a use variance.[212]

This approach has several shortcomings. By restricting the commercial and industrial uses within planned unit development to those zones which already permit these uses, the usefulness of planned unit development would be reduced. Consequently, both developers and planning commissions would be left with fewer choices. On the other hand, allowing such commercial and industrial uses can serve to reduce the overall traffic generated by the housing within the planned unit development, in turn reducing it within the municipality on the whole.[213] By prohibiting commercial and industrial uses in a planned unit development, municipalities would be denied this benefit of reduced traffic.

More importantly, the existence of commercial and industrial uses in a planned unit development usually increases the devel-

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208. *See supra* notes 154-58 and accompanying text.

209. *See supra* notes 143-46 and accompanying text.

210. *See, e.g.*, VILLAGE OF WOODSTOCK, VT., ZONING REG., § 6.54(b)(2) (1980).

211. *See supra* notes 57-68 and accompanying text.

212. *See supra* notes 107-22 and accompanying text.

213. There is a reduction in traffic where services and employment are close to residences for the simple reason that the residents do not have to drive far—perhaps can even walk—to these uses. The reduction of traffic is one of the goals of land use planning. *See supra* notes 57-63 and accompanying text.

oper's economic return from the project; conversely, the elimination of commercial and industrial uses would decrease this prospective return.[214] This leads to several considerations. When commercial and industrial uses increase the developer's return, the market price of the residential units decreases; this in turn increases availability of low-cost and senior citizen housing. When the economic return from planned unit developments is greater, developers are encouraged to employ the device, resulting in the benefits to the municipality mentioned above.[215] Conversely, if other avenues of development are more lucrative, developers will abandon the planned unit development device, and its benefits will be lost.

Another way to improve the statutory requirements for planned unit development might be to amend the enabling act[216] to require the protection of neighboring properties. Such an amendment might require that all planned unit developments be surrounded with buffers[217] and screening of certain specifications.[218] This would at least partly protect neighboring properties from the ill-effects of adverse uses. However, this approach would severely inhibit the flexibility of design characteristic of planned unit development.[219] For example, in a planned unit development bordering a body of water, open views of the water would improve the quality of the residential units. A requirement that a buffer and screening, such as a row of trees, separate this development from all adjacent properties might prevent the open views of the water. Accordingly, some of the flexibility inherent in planned unit development would be compromised.

In any effort to balance the advantages of planned unit development with the need to protect neighboring properties, some compromise must be made. The requirement of a minimum acreage for planned unit developments offers the best response to the problem.

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214. Interview with John Brighton, Tax Assessor, Hartford, Vt. (Jan. 17, 1990). This is a broad generalization that disregards the infinite variables and economic pressures that always exist in any given real estate market.

215. *See supra* notes 154-58 and accompanying text.

216. *See supra* notes 19-34 and accompanying text.

217. *See supra* note 149 and accompanying text.

218. Under existing statutes, "the planning commission *may* impose appropriate conditions and safeguards . . . of landscaping and screening" as part of the site plan approval process. VT. STAT. ANN. tit. 24, § 4407(5) (Supp. 1989) (emphasis added).

219. *See supra* text accompanying note 158.

With a requirement for a minimum acreage in the Vermont enabling act, the advantages offered by planned unit development would not be lost, particularly when those advantages directly benefit a municipality. For example, in order for planned unit development to provide low-cost and senior citizen housing, generally the project must be large enough to be financially appealing to the developer. While a project of only a few acres would provide some low-cost housing, the number of units the development could offer would be minimal simply because it is on such a small parcel of land.

Because a large minimum acreage requirement for planned unit developments would preclude some small-scale commercial and industrial projects, this requirement would arguably eliminate some potential commercial and industrial development. Accordingly, any benefits afforded to municipalities by such development would be lost.[220] Additionally, the flexibility inherent in planned unit development would be limited, particularly when it could be applied to the development of small parcels.

These arguments do not withstand close scrutiny. While it is true that the application of the planned unit development concept to small parcels of land allows for increased commercial and industrial development as well as greater flexibility, these benefits are largely enjoyed by the landowner of the developed parcel, usually to the detriment of adjacent landowners. Specifically, permitting commercial and industrial uses on a small parcel within a residential zone generally increases the value of the land for that landowner, while decreasing the value of the adjacent residential property. Such a trade-off is unfair to the adjacent property owner, who is denied the protection of zoning.

Some argue that a minimum acreage requirement for planned unit development does not belong in a state zoning enabling act, but should be left to local municipalities.[221] The needs of one town might differ from those of another,[222] and each municipality is in the best position to determine its own needs. Therefore, the argument concludes, the state should not mandate a minimum acreage for planned unit developments. At best, it could suggest that a mu-

220. *See supra* notes 154-58 and accompanying text.

221. *See supra* text accompanying notes 190-92.

222. For example, the development of several acres in a large city is much different, and has different effects, from the development of a parcel of the same size in a rural village.

nicipality adopt such a requirement if the municipality so chooses.

Again, this argument is not persuasive. Because planned unit development can be used to circumvent the strict variance requirements, a closer look at the justification for having state-issued variance requirements demonstrates why planned unit development should be handled similarly. The adverse consequences that can result from the issuance of a variance can be severe. If variances could be easily obtained, the protections of zoning would be quickly lost, and public confidence in zoning would deteriorate. Additionally, property values would likely suffer, and the benefits of zoning would quickly disappear.[223] Implicit in the state legislature's strict variance requirements is the notion that in only those instances in which a variance is truly warranted should one be granted. The state legislature apparently felt that these concerns were so important that the requirements for a variance were incorporated into the state enabling act, instead of leaving each municipality to adopt whatever standards it chose.

The approval of a planned unit development can have the same adverse effects as the granting of a use variance. In enacting strict variance requirements, the Vermont legislature recognized that variances can have undesirable effects. So too should the state legislature recognize that the approval of a planned unit development can also have adverse effects, and it should likewise issue strict requirements. Moreover, just as it is the state—and not the municipality—which establishes the variance requirements, so too should the state legislature mandate a minimum acreage requirement for planned unit developments.

Although most of the arguments favoring a minimum acreage requirement are applicable in any state that provides for planned unit development, there are several reasons why Vermont in particular should adopt this requirement. Vermont is generally considered to have an attractive and picturesque environment. The Vermont legislature recognized this in its declaration that a goal of Vermont's zoning laws is to "protect and preserve [the] important features of the Vermont landscape."[224]

Approximately twenty years ago, the serenity and peacefulness of Vermont was threatened by an unprecedented growth of tour-

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223. *See supra* notes 64-68 and accompanying text.

224. VT. STAT. ANN. tit. 24, § 4302(a)(2)(A) (1975 & Supp. 1989).

ism and the number of second home buyers.[225] The construction of Vermont's interstate highway system brought large numbers of vacationers, and the pressures from land developers grew.[226] Some felt that without stricter environmental controls, the aesthetic qualities of the Vermont landscape might be lost forever.

The legislature reacted to the growth of development with the Vermont Land Use and Development Act (Act 250).[227] Act 250

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225. R. Reis, *Vermont's Act 250*, ENVTL. L. CENTER, VT. L. SCH. PUBLICATION SERIES, 9 (1980).

226. *Id.*

227. VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1989). Act 250 is a system of statewide control on development.

Act 250 creates regional boards that must approve the development plans of certain parcels before construction can begin. *Id.* §§ 6026, 6086. The reviewing board can approve, modify and approve, or disapprove the project, subject to certain enumerated criteria. *Id.* § 6086. An appeals process is established for those dissatisfied with the board's rulings. *Id.* §§ 6021(a), 6089. Several different kinds of development projects are subject to Act 250. Any housing project of more than ten units must be reviewed by the board. *Id.* § 6001(3). Any project proposed for construction at altitudes over 2500 feet must also be reviewed. *Id.* If the local municipality in which the project is planned has not enacted zoning laws, any commercial or industrial project greater than one acre in size is subject to Act 250. *Id.* Where the local municipality has enacted a zoning scheme, any commercial or industrial project larger than ten acres is subject to review. *Id.* In this manner, the legislature invites municipalities to adopt zoning laws, thus encouraging local control over land use. R. HEALY & J. ROSENBERG, LAND USE AND THE STATES 44 (1979).

The reviewing board considers certain standards that must be satisfied before a project can be approved. VT. STAT. ANN. tit. 24 § 6086. The board must determine that the project:

1. will not result in undue water or air pollution;
2. has sufficient water for its reasonably foreseeable needs;
3. will not cause an unreasonable burden on an existing water supply, if one is to be used;
4. will not cause unreasonable erosion or reduction in the ability of the land to hold water;
5. will not cause unreasonable congestion or unsafe conditions on highways or other transportation facilities;
6. will not cause an unreasonable burden on the ability of a municipality to provide education services;
7. will not place an unreasonable burden on the ability of local governments to provide governmental services;
8. will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas;
9. is in conformance with statewide plans required by Act 250; and
10. is in conformance with any duly adopted local or regional plan or capital program.

*Id.*, *summarized in* R. Reis, *supra* note 225, at 10. For further analysis of Act 250 and its impact, see Roberts, *The New Frontier*, 31 SYRACUSE L. REV. 685 (1980); Note, *The Effect of Act 250 on Prime Farmland in Vermont*, 6 VT. L. REV. 467 (1981); Note, *Vagueness and Overbreadth: The Constitutional Challenges to Vermont's Land Use and Development Law (Act 250)*, 5 VT. L. REV. 329 (1980); Note, *Leaving the Scene: Aesthetic Considerations in Act 250*, 4 VT. L. REV. 163 (1979); Note, *Party Status and Standing Under Vermont's*

brought new state-wide development controls so as to better protect the quality of the Vermont environment.[228] Under Act 250, regional boards use enumerated statutory requirements to evaluate development proposals. The regional boards then approve or deny these applications.[229] Notwithstanding more stringent requirements in certain cases,[230] all commercial and industrial projects larger than ten acres are subject to review under Act 250.[231]

Some commentators have resisted a minimum acreage requirement for planned unit developments, arguing that any figure chosen would be arbitrary.[232] However, if the Vermont legislature should elect to require a minimum acreage for planned unit developments, the requirement of ten acres would not be arbitrary for two reasons: it would be consistent with the provisions of Act 250, and it would also avoid an inviting loophole for developers. With a minimum requirement of anything less than ten acres, a developer might still be tempted to use the planned unit development provisions to avoid the need for a use variance; so long as the proposed project were under ten acres, the developer would avoid the requirements of Act 250. Conversely, with a ten acre requirement for planned unit developments, all such projects in Vermont would be greater than ten acres in size, and would thus be subject to an Act 250 review. In this manner, Vermont property owners would not only be protected by Act 250, but they would also be protected from the possible abuses of the planned unit development device.

## CONCLUSION

As an alternative to traditional zoning mechanisms, planned unit development holds promise for new and innovative development. The use of the device offers more flexibility in development and creates new possibilities for affordable housing. Nonetheless, planned unit development can be readily abused if it is used by a developer to avoid the strict statutory requirements governing the granting of a variance. Were Vermont to adopt the minimum acreage requirement of ten acres as proposed in this note, planned unit

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*Land Use and Development Law (Act 250)*, 2 VT. L. REV. 163 (1977).

228. R. Reis, *supra* note 225, at 9-10.

229. *See supra* note 227 and accompanying text.

230. VT. STAT. ANN. tit. 10, § 6001(3) (1975 & Supp. 1989).

231. *Id.*

232. Burchell & Hughes, *Issues in Planned Unit Development*, 9 FED. PLAN. INFO. REP. 3-4 (N.J. Fed. of Plan. Officials 1974).

development would not be as susceptible to abuse. This minimum acreage requirement, coupled with the safeguards of Act 250, would serve to better protect the interests and rights of Vermont's property owners.

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