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December 12, 1979

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ATTORNEY GENERAL OPINION NO. 79- 291

Mr. Neil Shortlidge
Assistant City Attorney
City Hall
8500 Antioch
Overland Park, Kansas 66212

Re: Cities and Municipalities--Planning and Zoning--
Modification of Planned Unit Development Plan

Synopsis: A municipality's board of zoning appeals has no authority to grant a variance by which a planned unit development (PUD) plan would be modified. Provisions of such plans may be modified by either the municipality or the residents and owners of the PUD pursuant to K.S.A. 1978 Supp. 12-732 and the provisions of the particular PUD plans.

* * *

Dear Mr. Shortlidge:

You have asked two questions pertaining to the modification of plans establishing planned unit developments (PUD's) pursuant to K.S.A. 12-725 et seq.

You first inquire whether an owner-developer whose development plan has been reviewed and approved under the above-referenced statutes may later seek to modify the plan by requesting a variance therefrom before the city's board of zoning appeals under K.S.A. 12-715. You advise that it is your opinion that a board of zoning appeals has no jurisdiction to grant a variance to the terms of a PUD plan, and that K.S.A. 1978 Supp. 12-732 establishes the only procedure by which such plans may be modified. We agree.

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As you have correctly noted, the PUD statutes provide a distinct alternative means by which cities and counties may regulate and control the orderly growth and development of their respective territories. The PUD concept offers local governments more flexibility in land use regulation than do conventional zoning techniques, as one noted authority on the subject explains:

"The planned unit development technique is a legislative response to changing patterns of land development and the demonstrated shortcomings of orthodox zoning regulations. When zoning began, improvement of land was accomplished largely through the purchase of a lot or parcel by a private owner who developed it himself to supply his own need. Zoning ordinances were constructed to control this kind of activity largely to minimize conflicts between incompatible uses. Currently, the improvement of land is in the control of developers who assemble large tracts and improve the land for resale or rental. Given this modern pattern of land development, planners and legislators conceived a technique of land-use control which was better adapted to the realities of the marketplace. Dealing with large tracts and a single or few developers, it became possible to insure against conflicts in the use of land while permitting a mix of uses in a single district. It was practical to take a flexible approach to the regulation of land use without sacrificing the values which zoning was intended to preserve."
Anderson, American Law of Zoning (2nd Edition, 1976) §11.12. (Footnotes omitted.)

You also correctly note that K.S.A. 12-725 expressly states that the conventional zoning statutes (K.S.A. 12-701 et seq.) "shall not be applied to the improvements of land by other than lot-by-lot development" which statement further indicates that the legislature intended that the latter statutes should have no application to the PUD planning process or the resulting PUD districts created pursuant to K.S.A. 12-725 et seq.

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In our opinion, K.S.A. 1978 Supp. 12-732 provides the sole means by which the PUD plan, once finally approved pursuant to K.S.A. 12-729, may be modified. The former section specifically provides that the plan may be modified by the municipality, after a public hearing called for that purpose, and only after a determination by the designated administrative authority (in Overland Park, the city planning commission)

"that the same is consistent with the efficient development and preservation of the entire planned unit development, does not adversely affect either the enjoyment of land abutting upon or across a street from the planned unit development or the public interest, and is not granted solely to confer a special benefit upon any person."

Accordingly, we conclude, in answer to your first question, that the city's board of zoning appeals has no authority to grant a variance by which a PUD plan would be modified.

You next inquire as to how proposed modifications of a PUD plan which relate to provisions of the plan other than those listed in K.S.A. 1978 Supp. 12-732(a) may be made. You cite, for example, provisions relating to the regulation of signs. Specifically, you inquire: "If a plan is proposed to be modified to allow signs in excess of the sign regulations, may such modifications be made? If so, who approves such modification?" In consideration of this question, you advise that sign regulations and other land use regulations of general application are incorporated into the final development plan, or "site plan," devised for a particular PUD district or site. Thus, such regulations may appropriately be labelled "provisions of the plan" as defined by K.S.A. 12-726(d).

"Provisions of the plan" may be modified by either the municipality or the residents and owners of the PUD, as provided by K.S.A. 1978 Supp. 12-732. As you have correctly noted, K.S.A. 1978 Supp. 12-732(c) empowers the municipality to modify only those provisions of PUD plans which it is authorized to enforce under subsection (a) of that statute. That subsection authorizes the municipality to enforce provisions of the plan relating to "(1) the use of land and the use, bulk and location of buildings and structures, (2) the quality and location of common open space . . . and (3) the intensity of use or the density of residential units." Subsection (a) further states that such provisions "shall run in favor of the municipality." Arguably, provisions of the plan relating to signs may be modified by the municipality under subsection (c)(1) as "provisions . . . relating to . . . the use, bulk and location of . . . structures."

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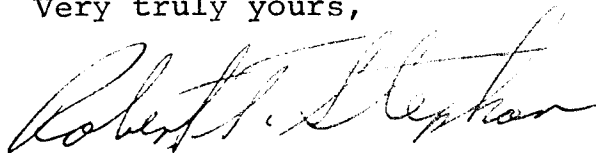
Additionally, or alternatively, residents and owners are empowered to "modify, remove or release their rights to enforce the provisions of the plan" [rights granted pursuant to K.S.A. 1978 Supp. 12-732(b)]. It is important to note, however, that the residents and owners are empowered to enforce and/or to modify the provisions of the PUD plan only "to the extent and in the manner expressly authorized by the provisions of the plan." K.S.A. 1978 Supp. 12-732(d). (Emphasis added.)

You inquire as to what alternative means are available for modifications of the plan if the situation arises such that neither the municipality nor the residents have authority to make proposed modifications under the above-quoted statute. You suggest as one such means the rezoning process authorized by K.S.A. 12-708. This question is difficult to answer in the absence of a factual context. However, we cannot agree that the rezoning process provided by K.S.A. 12-708 is an available alternative in such situations.

As we have stated previously, the legislature has manifested its intention that the conventional zoning statutes (including K.S.A. 12-701 et seq.) should have no application to the PUD planning process or to PUD districts created thereby. Further, we reiterate our opinion that K.S.A. 1978 Supp. 12-732 establishes the exclusive means by which a PUD plan, once finally approved, may be modified, for the reasons stated at length in the foregoing. Thus, the conventional rezoning process would not be a proper method for modification of an established PUD plan or PUD district.

In summary, it is our opinion that a municipality's board of zoning appeals has no authority to grant a variance by which a planned unit development (PUD) plan would be modified. Provisions of such plans may be modified by either the municipality or the residents and owners of the PUD pursuant to K.S.A. 1978 Supp. 12-732 and the provisions of the particular PUD plans.

Very truly yours,



ROBERT T. STEPHAN
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Steven Carr
Assistant Attorney General