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June 29, 1984

ATTORNEY GENERAL OPINION NO. 84- 61

John Dekker
Director of Law
City Hall, Thirteenth Floor
455 North Main Street
Wichita, Kansas 67202

Re: Cities and Municipalities--Planning and Zoning--
Planned Unit Development in Cities and Counties

Synopsis: In the absence of a charter ordinance providing otherwise, a city which had not adopted a planned unit development ordinance prior to the enactment of K.S.A. 12-725 et seq. may exercise the powers enumerated in the aforesaid statutes only upon complying with the requirements and controls prescribed therein. However, the Wichita Community Unit Plan Ordinance, which was adopted prior to the enactment of K.S.A. 12-725 et seq., is a valid exercise of the city's general zoning powers prescribed by K.S.A. 12-707 et seq., and does not conflict with the provisions of K.S.A. 12-725 et seq. Cited herein: K.S.A. 12-707, 12-708, 12-725.

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Dear Mr. Dekker:

You request our opinion as to whether the city of Wichita's Community Unit Plan (C.U.P.) Ordinance, a copy of which is attached hereto as Exhibit "A," is "legal," or whether it is in conflict with the Kansas Planned Unit Development (P.U.D.) statutes, K.S.A. 12-725 et seq.

The Wichita C.U.P. Ordinance, like zoning regulations adopted pursuant to the P.U.D. statutes, offers more flexibility in land use regulation than do conventional zoning techniques. You advise that the C.U.P. ordinance was adopted in 1946 (and last amended in 1964) as part of a comprehensive zoning code of the city, and that the city has consistently followed the procedural requirements of K.S.A. 12-708 where a change of zoning was required as to all or part of a community unit plan. Further, you express the opinion that the enactment of the P.U.D. law in 1969 was not intended to supersede or render inoperative a city C.U.P. ordinance which had been adopted prior to 1969.

The Kansas Planned Unit Development Act of 1969, K.S.A. 12-725 to 12-733, roughly follows a model act found at 114 U.Pa.L.Rev. 140 (1965). The model act was construed with regard to municipal power over land use regulation in Niccolai v. Planning Bd. of Tp. of Wayne, 372 A.2d 352 (Superior Ct. N.J. 1977). In that case, the Appellate Division of the Superior Court of New Jersey ruled that all ordinances adopted after enactment of the P.U.D. law had to comply with its provisions. However, it was noted that New Jersey cities had adopted P.U.D. (cluster zoning) ordinances prior to enactment of the P.U.D. law, and that New Jersey courts had never ruled upon the validity of such ordinances. Id. at 355.

We find the Niccolai case to be well-reasoned and persuasive with regard to the authority of cities which had not adopted a P.U.D. ordinance prior to enactment of K.S.A. 12-725 et seq. to exercise P.U.D. powers. In our judgment, such cities (in the absence of a charter ordinance providing otherwise) may exercise the powers enumerated in K.S.A. 12-725 et seq. only upon complying with the requirements and controls prescribed therein. However, the question remains whether the Wichita C.U.P. ordinance, which was adopted prior to enactment of the P.U.D. law, is valid under the city's general zoning powers (K.S.A. 12-707 et seq.) A general statement of these powers appears at K.S.A. 12-707, which states in part:

"The governing body of any city is hereby authorized by ordinance to divide such city into zones or districts, and regulate and restrict the location and use of buildings and the uses of the land within each district or zone. Such zones or districts may be created for the purpose of restricting the use of buildings and land located within the same for dwellings, business, industry, conservation, floodplain or for other purposes deemed necessary. The use of buildings and

John Dekker
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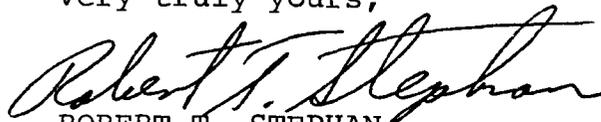
land and the regulations and restrictions upon the use of the same shall be uniform as to each zone or district but the uses and regulations and restrictions in any one zone or district may differ from those in other zones or districts."

We are unaware of any Kansas case which has considered the validity of the Wichita C.U.P. ordinance, or any ordinance similar thereto. However, the author of the annotation at 43 A.L.R.3d 888 indicates that such ordinances have generally been held valid, and states as follows:

"In the few cases where the validity of ordinances permitting the creation of planned development sites was questioned on the ground that they were in conflict with applicable state zoning statutes, it has been held that these ordinances promoted the broad policies of the statutes to encourage harmonious land use and, generally, to enhance the public welfare." (Emphasis added.) 43 A.L.R.3d at 897.

In accordance with the above-quoted authority, it is our opinion that the Wichita C.U.P. ordinance, which was adopted prior to the enactment of K.S.A. 12-725 et seq., is a valid exercise of the city's general zoning powers prescribed by K.S.A. 12-707 et seq., and does not conflict with the provisions of K.S.A. 12-725 et seq.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:JSS:TRH:jm

Exhibit "A"

GENERALLY 28.04.190

3. Eaves may project not more than two feet six inches into any yard without being considered as an encroachment in the yard area.

4. Open outside stairways, entrance hoods, terraces, canopies and balconies may project into a required front or rear yard not more than five feet and may project into a required side yard not more than two feet.

5. Chimneys, flues and ventilating ducts may be permitted by the central inspection superintendent to project into the required yards not to exceed two feet when placed so as not to obstruct light and ventilation.

6. An open unenclosed porch may project into a required front yard for a distance not exceeding eight feet, and may project into a required rear yard for a distance not exceeding five feet.

7. A modified front yard line shall be established in all districts requiring a setback for residential or commercial purposes in any block having lots platted of record with a reversal of frontage. Such modified front yard line shall extend from the rear corner of the principal building next to the street on the corner lot, or if the corner lot is vacant, from a point at the intersection of the side yard and rear yard restrictions in effect on such premises, to a point on the established front yard line of such street nor more than one hundred fifty feet from the rear of such corner lot measured along the street line away from the intersecting street. No building or accessory building or any part thereof, excepting open porches, shall be built in front of such modified front yard line.

8. Detached unenclosed canopy structures over service station gasoline pump islands may be erected in front of platted building setback lines, provided the supports for the structures shall not be located closer than ten feet to the public right-of-way; and provided further, no portion of the canopy shall project over the public right-of-way, utility easements, or closer to any adjacent property than five feet. Whenever the property is abandoned as a service station, all canopies shall be removed within ninety days or prior to conversion of the property to another use, whichever occurs first. (Ord. No. 37-915; Ord. No. 36-313.)

28.04.190 Community unit plan regulations. A. RESIDENTIAL. The owner or owners of any tract of land comprising an area of not less than twenty acres may submit to the superintendent of central inspection of the city a plan for the use and development of all such tracts of land for residential purposes. Such development plan shall be referred to the planning commission for study, public hearing and report to the board of commissioners, and the board of commissioners may approve or disapprove the development plan. If the board of commissioners approves the development plan, the board of commissioners may authorize the issuance of building permits and certificates of occupancy therefor even though the use of the land and the use and location of the structures, including the yards and open spaces required by this chapter do not conform in all respects to the regulations contained in other sections of this chapter. The planning commission shall make a report to the board of com-

missioners setting forth its reasons for approval of the application and specific evidence and facts showing that the proposed community unit plan meets the following conditions:

1. That the values of buildings and the character of the property adjoining the area included in such plan will not be adversely affected.
2. That such plan is consistent with the intent and purpose of this chapter to promote public health, safety, morals and general welfare.
3. That the buildings shall be used only for residential purposes and the usual accessory uses such as automobile parking areas, garages and community activities, including churches; and provided, that an "LC" district can be established through the regular channels.
4. That the average lot area per family contained in the site, exclusive of the area occupied by streets, shall be not less than the lot area per family required for the district in which the development is located.

B. PLANNED COMMERCIAL DEVELOPMENT

The intent and purpose of this section is to provide well planned and well organized developments of commercial areas which are held in single ownership or under public control and which are six acres or more in size; to protect the public safety, convenience, health and general welfare through standards and provisions which establish requirements as to lot coverage, height, setback and screening which permit review of the size, shape and location of such facilities with due regard to the tract as a whole so as to ensure the development of commercial facilities with proper ingress and egress, parking, drainage facilities, screening, sign control, environmental control and other requirements and amenities. The character of the commercial development should be appropriate to the neighborhood and conditions and safeguards should be provided to ensure that the development will minimize any diminution, if any, in value of surrounding residential property.

1. Planned Commercial Development Provision to be Applied to Certain Lands.

The regulations of this section shall apply to development or construction on those contiguous lands held in a single ownership by one firm, company, individual, partnership, joint venture or corporation or under single control, which are six acres or more in size, and which are now or hereafter zoned either "LC" light commercial or "C" commercial, or a combination thereof.

2. Materials to be Submitted with Zoning Applications.

a. When "LC" or "C" commercial district zoning is requested which meets the criteria in B.1 above, the applicants shall submit to the planning commission, with their zoning application, a preliminary development plan covering the entire tract proposed for development, indicating existing conditions, existing and proposed development. The actual form of proposed buildings need not be shown; however, it shall be necessary to

show through use of setback lines or other means of delineation, that area within which the buildings will be located, the maximum ground coverage area, maximum gross floor area, maximum height, the location and means of ingress and egress to streets and public ways, drainage facilities and intended general use (i.e., offices, shopping center, recreation center, motel and highway uses, etc.) for the development.

b. The preliminary development plan shall be drawn to scale of not less than one hundred feet to the inch, shall indicate topography at two foot contour intervals, and shall show existing streams or other significant natural features.

3. On lands already zoned "LC" or "C", or a combination thereof, meeting the conditions and criteria of Subsection B.1 of this section, there shall be submitted for approval by the planning commission a preliminary development plan as required in Subsection 2 prior to any building permit being issued and no building permit shall be issued until a preliminary development plan has been approved.

4. Permitted Principal Uses and Structures.

a. All uses permitted in the commercial zoning classification in which the development is proposed shall be permitted.

b. Advertising signs, relating to the proposed development, the stores and shops and products sold therein are permitted. No billboards shall be permitted.

c. Uses and structures which are customarily accessory and clearly incidental and subordinate to permitted principal uses and structures and which do not involve operations or structures not in keeping with the character of the district.

d. In cases where community unit plan development proposes a mixture of commercial uses and more restrictive uses, such as multiple family dwellings, offices and other uses permitted in "AA", "A", "RB", "B", and "BB" zones, the development plan shall indicate the proposed areas and their proposed general type of use (four-plex, garden apartments, care home, etc.) and the provisions made for screening and buffering to protect these areas from adverse affects, if any, from commercial areas. The requirements such as lot area, setbacks, uses and height for uses not first permitted in "LC" or "C" shall be the same as the district in which such use is first permitted.

5. Minimum Yard Requirements.

The grouping of building and parking areas shall be designed to protect residential areas, and screening from noise and light shall be provided where necessary: provided, however, that in no case shall the proposed design provide less than the following standards:

a. All main buildings or structures shall set back from all street right-of-way lines a distance of not less than thirty-five feet.

b. Where the proposed development abuts a residential district, no

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building shall be constructed less than thirty-five feet from such district line.

c. There shall be a rear yard, alley, service drive or combination thereof of not less than thirty feet.

6. Maximum Lot Coverage.

Buildings shall cover not more than thirty percent of the site on which the development is proposed.

7. Height Regulations.

As regulated in "LC" or "C" commercial district except as provided in Sub-item 4.

8. Screening and Landscaping.

a. A solid or semi-solid wall to prevent the passage of debris or light constructed of brick, stone, masonry, architectural tile or other similar material (not including wood, woven wire) at least five feet but not more than eight feet high shall be constructed:

1) Along the property line when an "AA", "A", "RB" or "B" district abuts the planned development area and is not separated by any public way, alley or street. Such wall shall be reduced to three feet in height from the side yard or front yard setback line of said abutting property to the property line adjoining any public street (see Fig. 1).

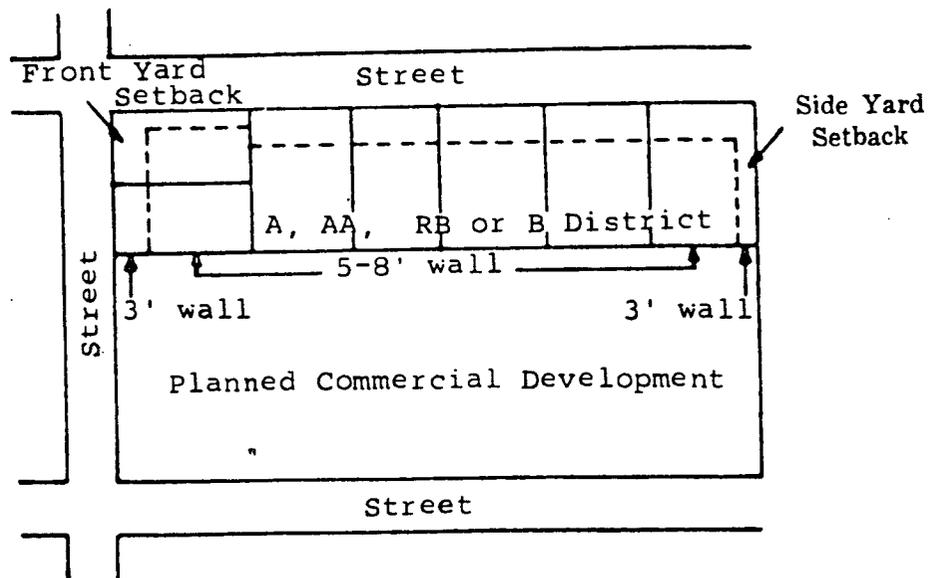


Figure 1

2) Along the property line when adjacent to a residential district and separated by a public way, street or alley if the storage area, service area or rear of the building(s) face directly such "AA", "A", "RB" or "B" district.

3) When a part of the property on which there is a planned commercial development includes "B" or "BB" district as a buffer between adjacent "AA", "A" or "RB" district and the commercial development, then the wall shall be constructed at the boundary between the buffer and said "AA", "A", or "RB" district. (See Figure 2)

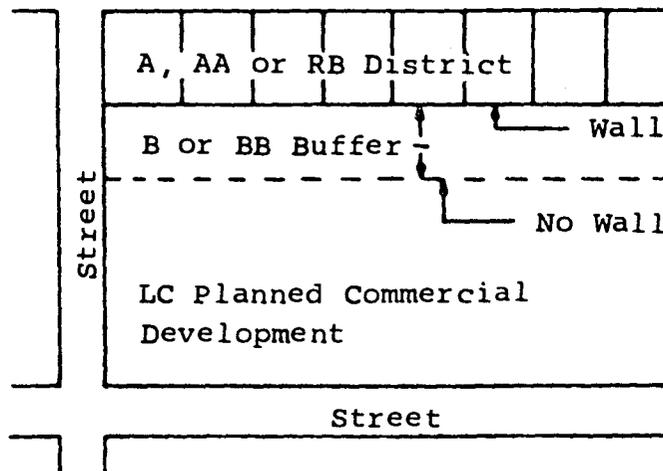


Figure 2

b. Low shrubbery not less than ten feet in width shall be provided on the perimeter of the planned commercial development when such area is adjacent to an "AA", "A", "RB" or "B" district and separated by a street and not under the provision of 8.a above. Said shrubbery shall be a type and maintained in such manner as to not constitute a traffic hazard.

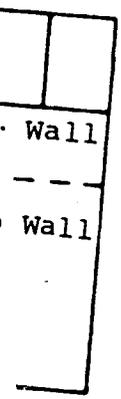
9. The commission or governing body may, in unusual situations where the objectives of the master plan and good planning practices are furthered, alter the foregoing requirements, including the modification of all or any part of the foregoing requirements; provided, however, that the commission must set forth specific reasons in writing as to the manner in which such modification meets the above criteria.

10. Administration.

a. The commission, in a public hearing, shall review the preliminary development plan for compliance with the requirements of this section. In the course of such review, the commission or governing body may require changes in the preliminary development plan as a condition for approval of zoning. The commission may, but shall not be required to secure initial review and recommendation of said plan by its subdivision committee.

b. If the commission shall approve said plan, it shall cause said plan

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to be filed with the director of planning and with the official charged with the enforcement of zoning. After receiving the recommendation of the commission, the governing body may approve, disapprove or amend, by motion, the plan subject to changes, special conditions and safeguards as may be deemed by either the commission or governing body to be in the public interest.

c. All amendments to any plan approved hereunder or under previous procedures shall follow the same procedure as for the hearing and approval of an original development plan.

d. No building permit shall be issued on lands meeting the conditions and criteria under B.1.a of this section unless a development plan shall have been approved in accordance with provisions herein.

e. After a plan has been submitted and approved for tracts as one unit, development in compliance with the plan may proceed on parts of a unit.

f. Any substantial deviation as determined by the superintendent of central inspection from the plans submitted shall constitute a violation of the building permit authorizing construction of the proposed development. No building permit shall be issued for any construction which is not in conformity with an approved development plan.

g. Notice of hearing of the plan shall be given by publication in a newspaper of general circulation in the city for one publication not less than twenty days in advance of hearing, and by notice by mail to adjoining property owners as may be determined necessary under adopted policies of the commission. (Ord. No. 28-670, § 1; Ord. No. 27-712, § 1.)

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28.04.195 Historic landmark designation. The purpose and intent of this section is to provide means of designating on the official zoning map of the city of Wichita those properties determined to be historic landmarks by the board of city commissioners of the city of Wichita. The determination of eligibility for designation as a historic landmark shall be based on the conclusions and findings of fact of the historic landmark preservation committee as created and directed by Sections 2.12.1015 through 2.12.1025 inclusive of the code of the city of Wichita and upon the recommendations of the metropolitan area planning commission following public hearing as hereinafter provided.

Upon recommendation of the historic landmark preservation committee, an application may be initiated for the designation of a historic landmark on legally described property or properties which have been incorporated into the historic landmark preservation plan of the city of Wichita.

The applicant shall provide the names of the owner(s) of record, together with an accurate legal description of the property proposed to be designated, and from and after December 31, 1980, shall accompany the application with a fee of two hundred dollars when the application encompasses a single zoning lot as defined in Section 28.04.020 of the zoning ordinance. An application for the designation of a historic landmark district, comprised

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