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Minimizing Reliance on Discretionary Approvals

By Lane Kendig

Why is minimizing the reliance on discretionary approvals a critical goal in ordinance writing?

The primary reasons are that discretionary approvals are time-consuming and costly, and discretionary review processes often culminate in uncertain, inconsistent, and unpredictable decisions. Elected officials want zoning to achieve specific goals. Citizens want to know what can happen next to their home. Developers want to read the zoning code and prepare a plan that meets the standards and can be approved. Discretionary approvals fail all these desires, and it stands to reason that a failed zoning tool should be abandoned.

This article explains how communities can use existing zoning tools to minimize reliance on discretionary approvals. The following sections explain how discretionary approvals came to be widespread in zoning codes before unpacking specific alternatives to variances, conditional use approvals, and discretionary planned unit development (PUD) processes.

THE DEVELOPMENT OF DISCRETIONARY APPROVALS

The first zoning ordinances were Euclidian, in reference to the *Euclid v. Ambler Realty* case in which the U.S. Supreme Court upheld zoning. A key virtue of Euclidian zoning was its predictability. Uses were either permitted by right or not permitted in a district. The intensity of development was locked in by a minimum lot area and minimum frontage. A property owner could look at the zoning map and be certain what would happen on the adjoining property. A developer wanting to build a specific use could determine if it was permitted on a property and the standards that must be met.

Although they are certain, lot area, frontage, and setback standards also create rigidity problems. If a physical feature like a creek is present, the setbacks might make it impossible to build a reasonable dwelling. The drafters recognized that unbuildable lots were a potentially fatal legal issue. The variance was introduced to address the issue of the unbuildable lot before it reached the courts. The variance spelled out a procedure that allowed the zoning board to vary standards to make a property buildable. The variance procedure was the first discretionary approval.

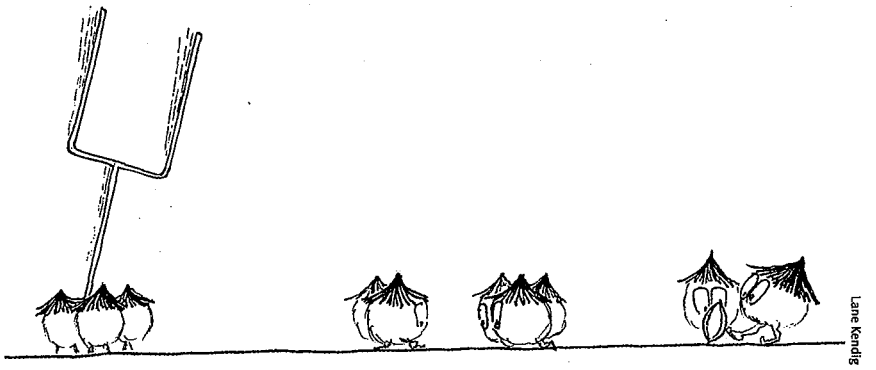
> The failure of conditional approval is caused by subjective decision making and public hearings. Everybody benefits if regulations are predictable.

Conditional Uses

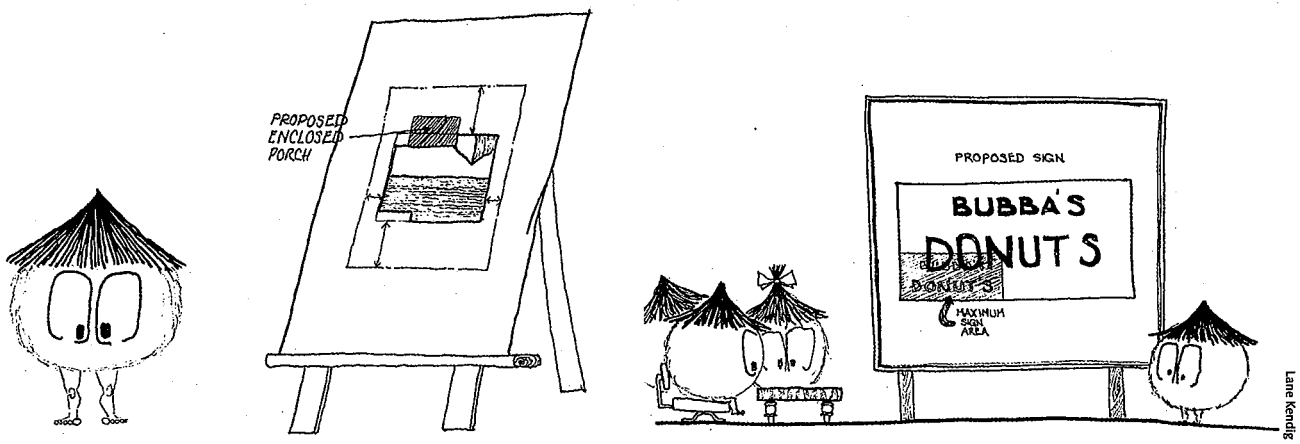
As zoning spread it was found that some uses presented classification problems. Emergency services, sewer plants, and electrical substations are examples of essential uses in the community that have high nuisance potential. Logically these uses would be permitted in industrial or commercial districts. Nevertheless, the service characteristics of these uses occasionally required them to be located in residential areas, despite their nuisance potential. Another characteristic is that these uses were rare and not frequently proposed.

There needed to be a classification between permitted or prohibited. Variances were not an appropriate mechanism because allowing a prohibited use to be built in a district totally destroyed the certainty of uses in the district. Nearly all states prohibit use variances. The procedure worked well for variances, so a new procedural solution for difficult uses was developed. The use table was modified so there were three types of uses: permitted, conditional, and prohibited.

Conditional uses are different from variances. Variances changed or relaxed the regulations to allow a permitted use to be built on the site. Conditional uses are associated with potential nuisances, so the conditional use approval process allows the zoning board to impose conditions that add standards to



Developers describe the conditional use process as trying to kick a field goal while the goal posts are being moved.



Enclosed porches, like the one in the illustration on the left, commonly trigger variance requests. If most of these requests are granted, it makes sense to modify the setbacks in the code. However, if a sign like the one in the illustration on the right were granted a variance, this may indicate that zoning board members don't understand the purpose of variances.

mitigate the impact of potential nuisances on neighbors. The zoning board also considers whether the site is suitable for the use and essential to the use's operation.

Conditional uses expand the degree of control by imposing conditions rather than relaxing standards. Both variances and conditional uses required public hearings and a finding to be made in a quasi-judicial decision as to whether the subjective standards were met. The conditional use, and in some cases special uses, became authorized processes in state statutes. In fact, there are three types of conditional approvals found in statutes: conditional uses, special uses, and special exceptions. While there are subtle differences in purpose, they all suffer similar problems.

Planned Unit Development

The PUD concept was developed to address the rigidity of Euclidian zoning, which did not permit a whole range of designs (e.g., cluster developments, greenbelt communities, mixed use developments, or traditional neighborhood development). The process of rezoning land into a number of districts to match the proposed uses did not make sense. A different procedure was needed because heterogeneous developments are very different from site development of a single use. PUDs required the submission of plans that presented alternative standards, and approval bound the developer to follow the approved plan. In essence a PUD approval has its own zoning that differs from the code. This complicates enforcement in future years. Like variances and conditional uses, public hearings are required.

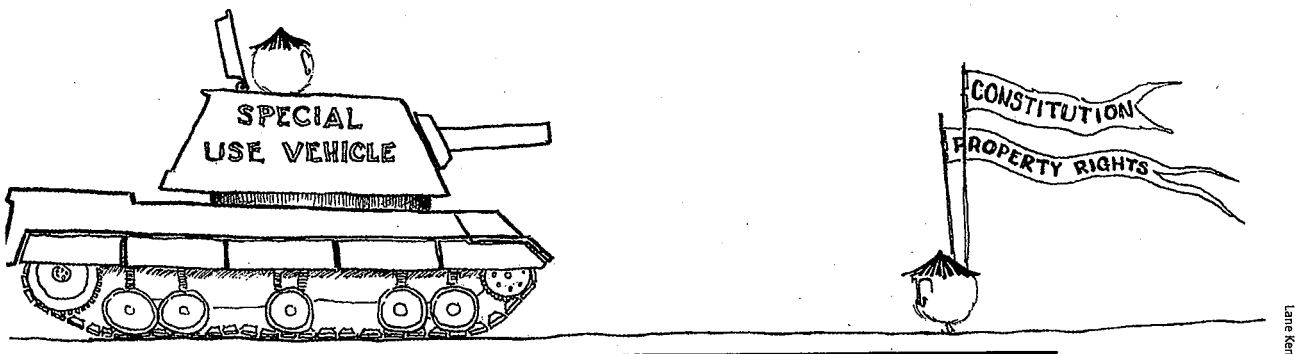
WHY CONDITIONAL APPROVALS FAIL

The original idea of a conditional use was that an application would be denied only when the site was inappropriate, other sites could better provide for the use, or nuisance mitigation was not feasible. Initially there were very few uses designated as conditional uses. Over time the number of uses designated conditional was greatly expanded. In some zoning codes nearly half the uses were designated as conditional. It was applied to many common uses that lacked a high nuisance potential. These included gas stations, fast food restaurants, banks with drive-through facilities, automobile dealers, multifamily residences, and large uses like discount stores. While citizens were often concerned about unsightly appearance, traffic, signs, or lighting, these problems were not significantly different from permitted uses. Instead of fitting difficult uses into residential districts, the conditional use distinguished between commercial uses. Often the result was an existing commercial district being divided into two districts, with the conditional use permitted in one but not the other. This forced landowners to request both a rezoning and a conditional approval. Instead of a process where the major focus was protecting neighbors, it became a process subjecting uses to a special process that was not based nuisance mitigation but control.

The failure of conditional approval is caused by subjective decision making and public hearings. Everybody benefits if regulations are predictable. This requires objective standards that are either met or not. Maximums or minimums fit this; a developer, citizen, or staff person can determine whether they are met. Variances, conditional uses, and PUDs do not use objective standards but subjective determinations and public hearings that make the process adversarial. There is no way subjective decisions can produce predictability. For example, variances are supposed to be quasi-judicial, but often boards focus on solving the landowner's problem rather than determining whether the regulations impose a severe burden. There are communities where 90 percent of variances are approved when approval should be between one and five percent.

A major factor for conditional uses and PUDs is that the public hearings took on a life of their own, adding greatly to unpredictability. Citizens come to hearings to prevent change in their backyards. Commercial land often abuts residential, so citizens come to oppose any commercial use that is conditional even though other commercial uses are permitted. Developers end up in an adversarial hearing with citizens seeking denial or a reduction in intensity.

These adversarial hearings often are a vehicle for negotiation. The first rule of negotiation is to have a position from which one can retreat to the desired result. Often the best plan is not submitted from the start because attorneys want room to negotiate. Decision



Citizens sometimes claim that conditional approvals are needed to offset the rights of developers.

makers cannot help but count the number of citizens objecting at hearings, introducing politics into the process. While citizens have legitimate concerns about aesthetics, traffic, or other elements, the subjective nature of the standards for approval can bias results. At hearings citizens often make declaratory statements such as that the use will create severe congestion or danger. This is a factual issue and the quantity of objections does not address facts or objective measures.

For example, in one hearing citizens claimed that heavy truck traffic on their road would affect safety and property value. The developer proposed building a new three-mile road with an underpass under the local road so there would be no truck traffic, but this was ignored. Furthermore, comprehensive plans can be adversely affected. In one case a county plan sought to preserve rural areas by increasing density of infill development. Infill development generally required a PUD, and after the hearings, nearly every proposal had its density reduced, eroding the strategy's effectiveness. At a different zoning ordinance hearing, a citizen advocated for more conditional uses because it offset the rights of developers. The cartoon above was inspired by citizen testimony on the need for conditional approvals.

MINIMIZING DISCRETIONARY APPROVALS

Variances and conditional uses can be dramatically reduced. PUDs may be eliminated entirely. A great number of variances relate to changes in zoning. Neighborhood conservation districts that retain the standards a subdivision was built under can eliminate a whole range of variance requests. If there is a high percentage of variance approvals, change the zoning to eliminate the requests.

Limited Uses

To reduce conditional uses, add a new category of approval, a "limited use," to the table of use permissions. Limited-use standards can address design, location, spacing, intensity, sign, or other standards. The limited use standard, such as minimum lot area, may not be met on every property in the district. The standards are objective. A professional staff reviewer can look at the plan and determine whether the standards are met.

There is a simple approach to writing limited-use standards that is not an overwhelming burden for local staff. The record of approved conditional uses will contain the conditions attached to each. Communities repeatedly use a small number of conditions for each use. Some conditions are attached to nearly every use. These conditions have been proven and can be made into standards. The initial work can be done by clerical staff. For each use a spreadsheet can be used to document the conditions and the number of times it has been used. There may be several wordings of the same condition, so some professional effort is required.

A more comprehensive and demanding approach is a review of each conditional use. The review would analyze the use and identify the problems, such as unsightly buildings, oversized signs, light, glare, access problems, exterior storage, noise, odor, dirt, loading areas, garbage, or traffic. This effort should involve the citizens to get their input. A list of attendees at a hearing provides an excellent mailing list to get participation. This approach is more challenging because it requires the development of a standard that addresses each of the listed problems.

The conversion of most conditional uses to limited uses with specific standards should make it possible to nearly eliminate conditional uses. Only a few complex uses like airports, incinerators, or landfills have massive impacts and may require significant on-site expert testimony to determine if health and safety can be protected. Here are some relatively common issues that limited-use standards can address:

Signs

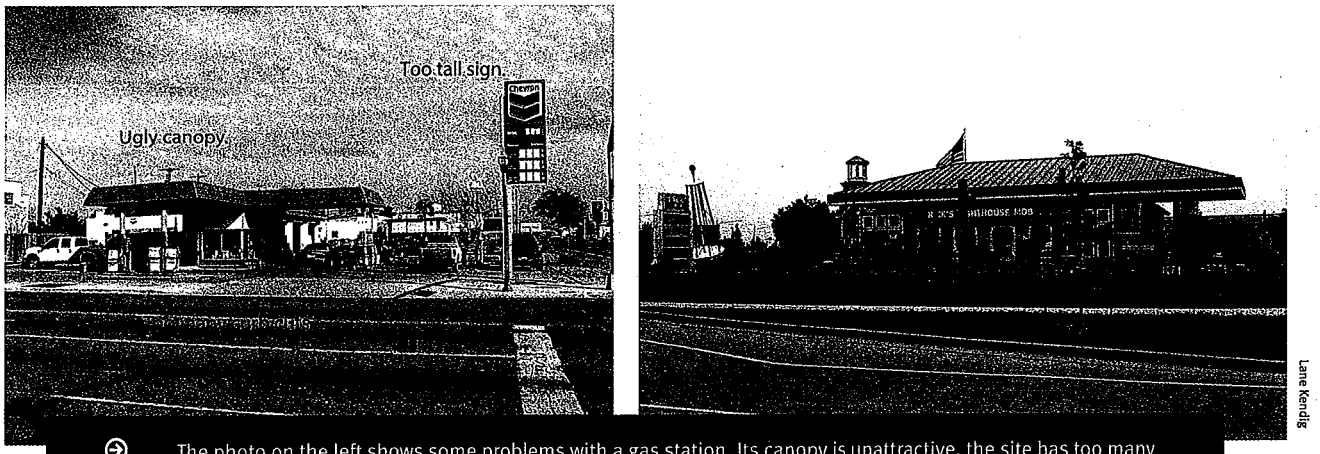
Having too many signs, or signs that are too large or too tall, is a problem. Sign regulation is a common zoning tool. The height can be restricted to promote shorter, more attractive ground signs. It is legitimate to control the total number and size (or area of sign or total sign area) of signs on the property. Specific uses like gas stations and fast food restaurants can have their own sign standards.

Access

It is easy to address the number and frequency of curb cuts. Limited-use standards can stipulate the minimum distance between a curb cut and an intersection as well as the maximum number of curb cuts for a use. For example, there is no reason a gas station needs four access drives at an intersection.

Design

A number of uses have design features that are undesirable. Examples are gas stations with ugly canopies, fast food restaurants with outdoor play structures, and pole-barn style buildings used for industrial or commercial activities. For gas stations, the limited use standards could require all canopies to have pitched roofs and prohibit the entire canopy face from being used as a sign. For fast food restaurants, require the play structures to be indoors with glass that obscures them. Requir-



Lane Kendig

The photo on the left shows some problems with a gas station. Its canopy is unattractive, the site has too many curb cuts, and its sign is too tall. The photo on the right shows a similar gas station with a pitched canopy, fewer curb cuts, and a shorter sign.

ing certain materials can eliminate unsightly pole barns.

High Nuisance Potential
This occurs primarily when commercial or industrial uses abut residential uses and residents are impacted. The solution is buffer yards. The buffer yard provides greater separation and provides a visual barrier with vegetation, berms, or walls. Larger nuisance potentials require wider buffers with more intense plantings and the use of structures such as walls or berms. Buffer yards also mitigate noise, glare, odor, and blowing materials.

Lighting and Glare
Bright lighting from nonresidential uses can be a nuisance for residential neighbors or drivers. Lighting can be controlled as to maximum illumination, height of the luminaires, and design. All fixtures should be designed to cut off illumination above the light source. These cut-off fixtures can also be designed to prevent illuminating adjoining property. In general, though, ordinance-wide lighting standards are preferable because all nonresidential uses share this problem.

Noise
Noise is more annoying at night, but maximum levels are needed throughout the day. An ordinance-wide approach is recommended as it covers all uses. A maximum noise level at residential boundaries is desired.

Higher levels of noise might be permitted in commercial or industrial districts. Some uses like restaurants have night noise associated with outdoor dining, and the location of outdoor seating with respect to neighbors can address this.

Hours of Operation
Few uses are open all the time. Limit noise and lighting, or very intense uses like temporary asphalt plants, to selected hours of operation.

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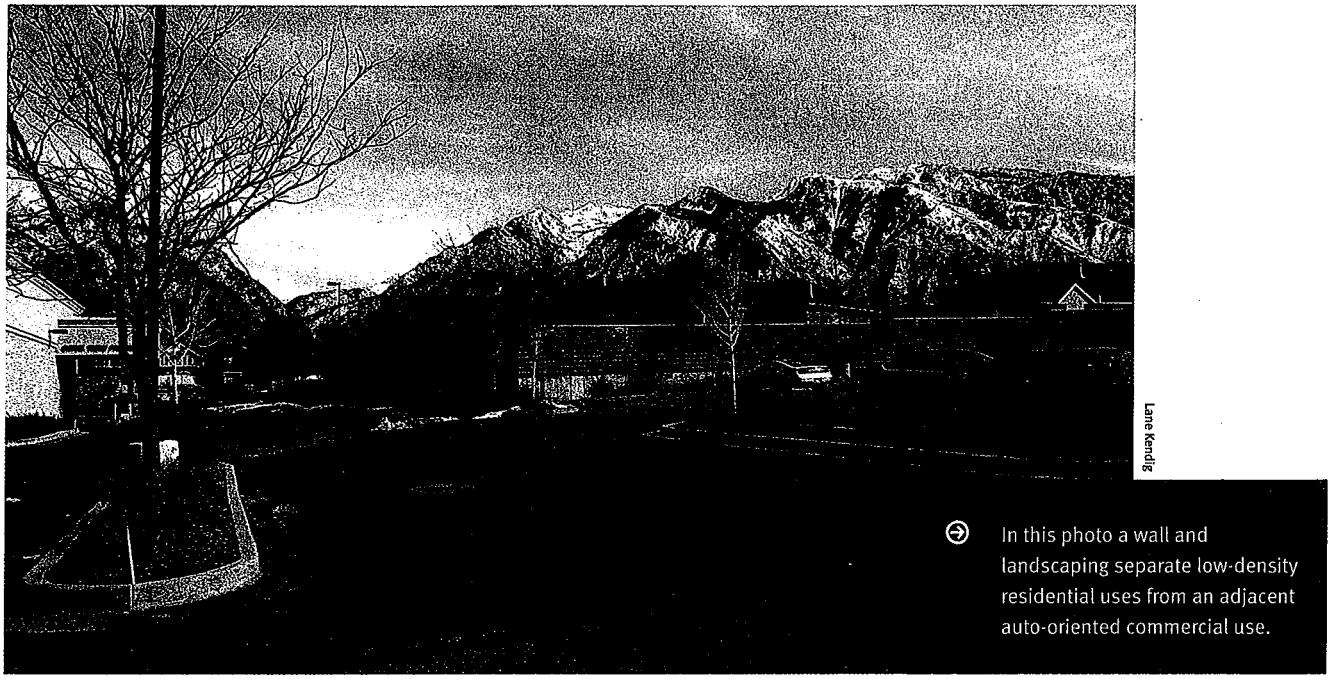
Scale
A single use, a food store for example, can range from a 2,000-square-foot corner store to a 150,000-square-foot supermarket. Uses can be designated as neighborhood, community, subregional, or regional scale and limited by scale to the type of road or lanes of traffic.

Location
Location standards limit where—within a specific district—a use can be built. For example, the intensity of uses may be increased at transit stops. Day care centers or home day care might be prohibited on cul-de-sacs where the traffic loads would be a problem. Mining can be required to have access to a road that can withstand heavy truck traffic.

Spacing
Uses may be required to have minimum spacing or be separated from specific uses. Schools, day care centers, and churches are often uses that have a protection zone from uses considered undesirable, such as liquor sales, tattoo parlors, or adult establishments. Minimum spacing of uses can be used to create nodes of commercial rather than strip commercial. Minimum spacing can also be used to avoid concentrating uses like group homes for populations not protected by federal fair housing laws in an area.

Garbage and Loading
These are areas where noise, vermin, and trash are likely to pose a nuisance to neighboring uses. Specific standards to shield the trash containers with walls, landscaping, or roofs can be required. Special buffer yards can be required to protect residential neighbors.

FLEXIBLE DESIGN
PUDs were developed to allow innovative development plans that could not be built under rigid Euclidian zoning. The rigidity of lot size and frontage made clustering, planned



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In this photo a wall and landscaping separate low-density residential uses from an adjacent auto-oriented commercial use.

developments, mixing of uses, and traditional neighborhood design impossible. Most state statutes provide for a PUD process that is a form of conditional approval. Conditional uses addressed a single designated use to which conditions were added. PUDs dealt with developments that required a site plan or plat be approved. The approval of PUDs meant approval of a site plan and a list of variations from the zoning district standards, including lot size requirements, permitted uses, minimum setbacks, or other regulations. The plan thus had a list of standards that differed from the zoning district. Upon approval the parcel was designated on the zoning map as a PUD, and the approved standards were attached.

PUDs were first authorized by the courts, then state statutes and local ordinances were written to accommodate innovative development forms. These statutes and ordinances (not to mention many planners) acknowledge that PUDs produce designs superior to cookie-cutter Euclidian plans. PUDs enabled developers to alter lot sizes in order to work with the unique elements of the site without losing density, as would be the case under Euclidian zoning.

The initial use of discretionary approval for PUDs was understandable. Jurisdictions had never reviewed a PUD, and there were no design standards. While staff members may have read about them, they had no experience upon which to base code standards for such uses. Conditional approval provided a learning curve.

Although open space was a key element in cluster developments and many PUDs, initially few ordinances required a minimum amount of open space. Standards to mix uses either vertically or horizontally were typically not present either, so there was no guidance for traditional neighborhood development. Despite the fact that clustering was supposed to allow developers to protect natural resources, almost no PUD ordinances had any natural resource protection or open space or recreation standards.

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There are several forms of PUD regulations. Some PUDs are floating zones, where the developer proposes a density and mix of uses with no relationship to the underlying zoning district. A smaller group of PUD ordinances have a density standard tied to the underlying zoning district. All PUD ordinances require the plans to be presented at public hearings and for the decision makers to find that the plan meets a set of subjective criteria.

As with conditional uses the process is adversarial, with all the same problems of unpredictability and uncertainty. The problem is far worse because instead of a specific use, a PUD may be a subdivision or a large mixed use development. For the most part, there are only subjective standards, like consistency with the comprehensive plan, protection of natural resources to the maximum extent, no adverse impact on property values, or no degradation of the neighborhood. The developer is left to determine whether a plan meets these subjective criteria. Staff members may provide guidance but have no objective standards to evaluate a plan. At the hearing, proponents and opponents often present totally conflicting opinions on whether the criteria are met.

The initial assumption is that PUDs result in better design. But because PUD regulations have no objective standards, developers have no guide as to what better design is. There are lengthy adversarial public hearings, and community boards often grant approval or denial. It should be no surprise that PUDs are good, bad, or indifferent in quality.

It was predictable that some PUD plans would be out of character in the absence of objective standards. For example, clustering could be used to develop higher density town house

projects with little open space in a single-family area because there were no standards about the character to be created. As a result, "cluster" or "PUD" became dirty words in some jurisdictions because the approved plans were considered poor. The decision makers often have their own view of what is good or attractive and imposed these opinions on the plan with unpredictable results. After 50 years of experience with discretionary PUDs, there is no justification for conditional approval of PUDs, cluster development, or traditional neighborhood design. All these development forms have long histories, and it is possible to write a code that permits them as a matter of right.

DESIGN STANDARDS

The first task of objective standards is to identify the desired community character and do away with floating zone PUDs. It is possible to develop zoning districts than have a specific character and adapt the standards so all uses have the same character. The elements that determine community character are well documented in the books *Community Character* and *A Guide for Planning with Community Character,* which provide a guide for setting district character. For those interested in traditional neighborhood development, the transect provides a guide. Zoning districts need to be designed for a specific character, not a group of uses.

Few PUD ordinances provide an objective standard that prevents decision makers from reaching arbitrary and unpopular decisions on density. Cluster developments require open space. A minimum open space standard paired with density is a key to community character. Stormwater management systems, recreation needs, buffer yards, and natural resources are all factors to be considered in setting the minimum open space. In park planning, there are standards relating the need for recreation to population. Objective standards for resource protection have been used in zoning ordinances since 1974, and can be quantified.

CONCLUSIONS

Quality development is poorly served by conditional decision making. Decision makers often seek to impose their values; opponents want to defeat the project. There are no guides to what makes quality. It is possible to eliminate nearly all conditional approvals, variances, conditional uses, and PUDs.

There are a number of common zoning standards that can address quality. Landscaping, sign control, lighting, and bufferyards are elements that promote quality that can easily be adopted.

Community preference surveys support strong landscaping regulation. Too many or too big signs are also given low ratings in these surveys. Residents can see that buffer yards are objective standards that can improve quality. These standards are simpler and less complex than more drastic architectural controls such as materials or architectural style. Architectural regulations are most often discretionary, or in some cases advisory, which again create uncertainty and extend approval time.

Getting on a bus and looking at good and bad developments in the community or area is a good way to establish standards. By reviewing existing landscaping, signs, and lighting, the elements from the highest quality developments provide the standards. Objective standards like buffer yards appeal to citizens because they can see it protects their neighborhood. The planning staff needs to show residents regulations that demonstratively provide improved quality.

There is a long history of such standards in performance zoning. The first performance ordinances were written in 1974. A model code was published by the American Planning Association in 1980, where cluster, planned development, and mixed use development are permitted by right. Some states have amended their statutes to specifically permit performance zoning where innovative development is permitted by right. Form-based codes produce quality traditional neighborhood developments through the use of objective standards.

Objective standards are good for both developer and citizen. Developers can read regulations and have a definitive path to approval. Citizens will support regulations that protect them.

The substitution of objective standards will better protect citizens and achieve planning goals. A major benefit is that it will be a shorter, surer, and less expensive process. Municipalities, developers, and citizens save time and money, and the results of applications become predictable. The money that currently goes to hiring attorneys and expert witnesses and paying interest can reduce the cost of the use or development.

With conditional approvals, citizens who have opposed a project often see bias on the part of staff and decision makers when the decision goes the other way. Objective standards make the decision making transparent because compliance with each standard can be factually documented.

About the Author

Lane Kendig is the founder and former president of Kendig Keast Collaborative. He has been practicing and writing about the relationship between community design planning and regulatory tools for more than 45 years. In addition to the recent books *Community Character* and its companion, *A Guide to Planning with Community Character* (available at islandpress.org/author/lane-h-kendig), Kendig is the author of *Performance Zoning* and the PAS reports *Too Big, Boring, or Ugly; Traffic Sheds, Rural Highway Capacity, and Growth Management;* and *Performance Standards for Non-Residential Uses* (available at planning.org/books).

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