


MEMORANDUM

TO: Teton County Planning and Zoning Commission
FROM: Gary G. Allen 
RE: Review of PUD applications
DATE: August 12, 2008

This memorandum summarizes the role of the Teton County Planning and Zoning Commission ("P&Z") in reviewing planned unit developments ("PUDs"), with an emphasis on the discretion inherent in this process.¹

I. QUESTIONS PRESENTED

- A. What authorizes the County to process PUD applications?
- B. On what grounds should the P&Z recommend an application for approval or denial?
- C. What role does the comprehensive plan play in evaluating a PUD application?
- D. How should conflicting evidence be weighed?
- E. What conditions of approval may the P&Z recommend?
- F. May the proposed density be reduced?
- G. Are there any examples applying these principles in real-life situations?

¹ Although we focus our analysis on the P&Z, the same principles will apply to the Teton County Board of County Commissioners ("BOCC").

II. SHORT ANSWERS

A. Idaho Code § 67-6515 authorizes counties to enact their own ordinances for the processing of PUD applications. Teton County has accordingly enacted several provisions in Titles 8 and 9 of the Teton County Code (“County Code”).

B. Section 9-3-4-D of the County Code lists the following criteria for approval of a preliminary or final plat:

1. Each exception to otherwise applicable restrictions shall be identified and the reasons supporting the exceptions stated.
2. The subdivision or PUD is consistent with the public health, safety and welfare of the county.
3. The information required in the application has been verified and is correct.
4. The PUD contains the minimum of open space required by this title or amount of open space agreed to in the plans and plat.

An additional set of approval criteria are incorporated by County Code Sections 9-3-3 and 9-3-4, which require submission of preliminary and final plat applications that address the following criteria:

1. The conformance of the subdivision/PUD with the comprehensive plan.
2. The availability of public services to accommodate the proposed development.
3. The conformity of the proposed development with the capital improvements plan.
4. The public financial capability of supporting services for the proposed development.
5. Other health, safety or general welfare concerns that may be brought to the commission’s attention.

C. A PUD application cannot be denied solely due to its nonconformance with the comprehensive plan. Nevertheless, the P&Z can consider whether the application is consistent with the overall goals of the Teton County Comprehensive Plan (“Comprehensive Plan”). As the P&Z considers the zoning elements of a PUD application—including appropriate densities and lot sizes—it may look to the Comprehensive Plan for guidance in exercising its discretion.

D. A permit applicant bears the burden of proving compliance with the required criteria, and the P&Z must recommend denial if the applicant cannot meet this burden for each and every criterion. The factual determinations of the P&Z will be upheld as long as there is relevant evidence which a reasonable mind might accept to support such determinations, even if there is conflicting evidence in the record and the majority of the evidence is to the contrary.

E. The County Code enables the P&Z to recommend conditional approval of a PUD. A valid condition must bear a reasonable relation to the public health, safety and welfare and be directly related to the proposed project.

F. Yes. The County Code clearly contemplates that the BOCC has the right to determine what lot sizes and density are appropriate in a given PUD. The P&Z may therefore recommend approval of a PUD subject to a condition reducing the density.

G. Four hypothetical examples are provided in Section III.G. below.

III. ANALYSIS

A. Authority to Process PUD Applications

Idaho is a so-called "Dillon's Rule" state, which means that units of local government may only exercise powers which have been granted by the Idaho Constitution or Idaho Legislature.² In other words, a county does not possess any authority simply because it is a county; if it wishes to take a certain action, there must be authorization for that action in the Idaho Constitution or Idaho Code. (It is important to note, however, that such authorization need not be expressly stated. It may be implied by constitutional or statutory language.³)

² *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 443-44, 708 P.2d 147, 166-67 (1985) (overruled on other grounds); *Caesar v. State*, 101 Idaho 158, 160-61, 610 P.2d 517, 519-20 (1980).

³ *Id.*

In the case of PUDs, the relevant authorization is found in Idaho Code § 67-6515, which states:

As part of or separate from the zoning ordinance, each governing board may provide, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, for the processing of applications for planned unit development permits.

A planned unit development may be defined in a local ordinance as an area of land in which a variety of residential, commercial, industrial, and other land uses are provided for under single ownership or control. *Planned unit development ordinances may include, but are not limited to, requirements for minimum area, permitted uses, ownership, common open space, utilities, density, arrangements of land uses on a site, and permit processing.* Planned unit developments may be permitted pursuant to the procedures for processing applications for special use permits following the notice and hearing procedures provided in section 67-6512, Idaho Code. Denial of a planned unit development permit or approval of a planned unit development permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code, consistent with the requirements established thereby.

(Emphasis added.) Please note that this statute is not self-executing; that is, a county may not accept applications for PUDs merely by virtue of the statute. Rather, a county must first enact its own ordinance(s) consistent with Idaho Code § 67-6515 before it may accept PUD applications. In recognition of this fact, Tetón County has enacted several provisions in Titles 8 and 9 of the County Code.

Thus, the ability of the P&Z to recommend approval or denial of a PUD application is subject to the authority granted by Idaho Code § 67-6515 and codified in the County Code. As long as the P&Z operates within the bounds of this authority, its actions will be valid.

B. Grounds for Approval or Denial

“[Idaho Code] § 67-6519 gives counties the discretion to grant or deny an application for a permit authorized or mandated by [the Local Land Use Planning Act (LLUPA)].”⁴ This discretion is limited, however, by the requirement that approval or denial “shall be based upon

⁴ *McCuskey v. Canyon County*, 123 Idaho 657, 663 (1993).

standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the city or county.”⁵

The substantive review of a PUD in Teton County is a two-step process. First, the P&Z reviews a preliminary plat and decides whether “to recommend approval, to recommend approval with conditions, or to deny the application.”⁶ Second, the developer must file a final plat application, and the BOCC must decide whether “to approve, deny, amend or remand this application back to the Planning Commission for further review.”⁷

Preliminary Plat. The best reading of the County’s somewhat confusing preliminary plat requirements for a PUD is that two sets of approval criteria apply. First, County Code Section 9-3-4-D states as follows: “In conjunction with the decision for approval, approval with conditions, or rejection of an application for a subdivision or PUD, both the Planning Commission and the Board of County Commissioners shall make, where necessary, written findings with respect to the items required with the submission of the application as listed below.” The listed criteria are:

1. Each exception to otherwise applicable restrictions shall be identified and the reasons supporting the exceptions stated.
2. The subdivision or PUD is consistent with the public health, safety and welfare of the county.
3. The information required in the application has been verified and is correct.
4. The PUD contains the minimum of open space required by this title or amount of open space agreed to in the plans and plat.

The County Code indicates that an additional set of approval criteria apply to the preliminary plat review. Section 9-3-3 requires submission of a Preliminary Plat Subdivision Application (“Preliminary Plat Application,” attached as Exhibit A). The Preliminary Plat

⁵ Idaho Code § 67-6535(a).

⁶ County Code § 9-3-3.C.

⁷ County Code § 9-3-4.

Application requires that the developer provide a narrative statement addressing the following “evaluation criteria” (“Evaluation Criteria”):

1. The conformance of the subdivision/PUD with the comprehensive plan.
2. The availability of public services to accommodate the proposed development.
3. The conformity of the proposed development with the capital improvements plan.
4. The public financial capability of supporting services for the proposed development.
5. Other health, safety or general welfare concerns that may be brought to the commission’s attention.⁸

The Evaluation Criteria are identical to the criteria the administrator addresses in a concept plan review regarding whether to accept a subdivision or PUD application.⁹ The location of the Evaluation Criteria in the review criteria for a concept plan strongly indicates the County’s intent that the Evaluation Criteria are in fact approval criteria for a preliminary plat.

This conclusion is reinforced by County Code Section 9-3-3-B, which states as follows: “The purpose of the [preliminary plat] hearing, or series of hearings, is to continue discussing the proposed subdivision plan, the development agreement, and the Preliminary Plat for conformity with the Comprehensive Plan, the development’s relationship to surrounding development, any site conditions that may require special consideration or treatment, and to discuss and review the requirements of this Title, Title 8, and Title 6, chapter 6 of this code.” The narrative in Section 9-3-3-B seems to capture almost exactly the content of the Evaluation Criteria, therefore indicating that the preliminary plat recommendation needs to incorporate an analysis of those criteria.

⁸ Exhibit A, Section II.

⁹ County Code § 9-3-2-C.

Further, in our experience the Evaluation Criteria are very common approval criteria for PUDs and other similar development approvals in jurisdictions around the state. It should come as no surprise to a developer that approval criteria of this kind would be applied.

The nature of the Evaluation Criteria is that the P&Z must recommend denial of a PUD application if it determines that any one of these criteria (except conformance with the comprehensive plan, for reasons discussed below) has not been satisfied. Obviously, it would be inconsistent with the County's land use obligations if the P&Z recommended approval of a development not in conformance with the Comprehensive Plan, without adequate services or out of compliance with the capital improvements plan.

A recommendation for approval granted in violation of the applicable zoning ordinance is invalid.¹⁰ The P&Z's decision to recommend approval or denial of an application, including its interpretation and application of the County Code, is entitled to a strong presumption of validity.¹¹

Final Plat. The best read of the final plat approval criteria is that they are similar or identical to the preliminary plat criteria. The four approval criteria in Section 9-3-4-D expressly apply. In addition, the ordinance requires the submission of a final plat application that includes Evaluation Criteria identical to the preliminary plat.¹² Furthermore, Section 9-3-4 states as follows: "[The final plat] phase of the subdivision/PUD process is to present the Board of County Commissioners the completed documentation as required by this ordinance for a final review before rendering a decision to approve, deny, amend or remand this application." The

¹⁰ *Fisher v. City of Ketchum*, 141 Idaho 349, 355 (2005).

¹¹ *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 176 P.3d 126, 131 (2007); *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501, 508 (2006); *Sanders Orchard v. Gem County*, 137 Idaho 695, 698 (2002).

¹² Teton County Master Plan/Final Plat Subdivision Application, Section II (attached as Exhibit B).

“completed documentation” plainly includes the P&Z’s recommendation, which includes an assessment of the Evaluation Criteria. We see no reasonable reading of these provisions except that the County Commission is required to undertake a review of the Evaluation Criteria in addressing a final plat. Even if no express review is required, the County Commission should review the Evaluation Criteria and the P&Z’s recommendations in conjunction with Sections 9-3-4-D-2 and -3, which require that the PUD be “consistent with the public health, safety and welfare of the county” and that “[t]he information required in the application has been verified and is correct.”

C. Conformance with the Comprehensive Plan

The Idaho Supreme Court has repeatedly held that a subdivision application cannot be denied solely due to its nonconformance with the comprehensive plan.¹³ Accordingly, it would be unwise to recommend denial of a PUD application solely on this basis.

Nevertheless, “the governing board can consider whether the application is consistent with the overall goals of the comprehensive plan.”¹⁴ The Comprehensive Plan may be especially useful as a guide in interpreting and applying the zoning regulations applicable to a PUD.¹⁵ Unlike a standard subdivision, a PUD as contemplated by Teton County essentially rezones the affected parcel.¹⁶ Whereas the zoning decisions pertaining to a standard subdivision “have already been made,”¹⁷ this is not true of a Teton County PUD, especially as it pertains to matters

¹³ *Sanders*, 137 Idaho at 699; *Urrutia v. Blaine Bountv Bd. of Comm'rs*, 134 Idaho 353, 359 (2000).

¹⁴ *Sanders*, 137 Idaho at 699.

¹⁵ See *Urrutia*, 134 Idaho at 359 (a comprehensive plan is “a guideline whose primary use is in guiding zoning decisions”).

¹⁶ *South Creek Assoc. v. Bixby & Assoc., Inc.*, 781 P.2d 1027, 1032 (Colo. 1989) (planned unit development constitutes a form of rezoning for the area included within the development); *Lutz v. City of Longview*, 83 Wash.2d 566, 568 (1974) (act of imposing a planned unit development upon a specific parcel is an act of rezoning).

¹⁷ *Urrutia*, 134 Idaho at 359.

such as density and lot sizes. Therefore, as the P&Z considers the zoning elements of a PUD application—including appropriate densities and lot sizes¹⁸—it may look to the Comprehensive Plan for guidance in exercising its discretion.

D. Weighing the Evidence

A permit applicant bears the burden of proving compliance with the required criteria, and the P&Z must recommend denial if the applicant cannot meet this burden for each and every criterion¹⁹ (except conformance with the comprehensive plan, as discussed above). It is not assumed that an applicant is entitled to develop a PUD; rather, the applicant must provide sufficient evidence to demonstrate that the PUD is eligible for approval.

The P&Z enjoys a tremendous degree of discretion as it weighs evidence to reach its decision. On review, a court is forbidden to “substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.”²⁰ Consequently, the factual determinations of the P&Z will be upheld as long as there is “relevant evidence which a reasonable mind *might* accept to support a conclusion.”²¹ If this standard is met, a decision will not be overturned even if there is conflicting evidence in the record²² and the majority of the evidence is to the contrary.²³

¹⁸ County Code § 8-4-4.

¹⁹ See *Fisher*, 141 Idaho at 354; *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 482 (1996).

²⁰ Idaho Code § 67-5279(1).

²¹ *Lane Ranch P'ship v. City of Sun Valley*, 144 Idaho 584, 166 P.3d 374, 380 (2007) (emphasis added); *Lamar Corp. v. City of Twin Falls*, 133 Idaho 36, 43 (1999) (emphasis added).

²² *Friends of Farm to Market v. Valley County*, 137 Idaho 192, 196 (2002); *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429 (1998).

²³ *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 112 (2002); *Boley v. State, Indus. Special Indem. Fund*, 130 Idaho 278, 280 (1997).

The BOCC must approve or deny the PUD application in writing.²⁴ The approval or denial must also be “accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and explains the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.”²⁵ Insufficient findings are grounds for reversal of the decision.²⁶ These requirements do not apply to the P&Z because, as an advisory body, it does not approve or deny plat applications.²⁷ However, we highly recommend that the P&Z make written findings to clarify its recommendation and help build the record for the BOCC. Examples of findings adopted in other jurisdictions are attached as Exhibits C and D.

E. Conditions of Approval

Although Idaho Code § 67-6515 does not expressly authorize the approval of a PUD subject to appropriate conditions, it clearly contemplates such a course of action by providing that “approval of a planned unit development permit with conditions unacceptable to the landowner may be subject to the regulatory taking analysis provided for by section 67-8003, Idaho Code.” Consistent with this implied grant of authority, the County Code enables the P&Z to recommend conditional approval of a PUD.²⁸

Of course, the P&Z is not free to recommend any conditions it wishes. A valid condition must (1) bear a reasonable relation to the public health, safety and welfare and (2) be directly

²⁴ Idaho Code § 67-6535(b).

²⁵ *Id.*

²⁶ *Workman Family P'ship v. City of Twin Falls*, 104 Idaho 32, 38 (1982).

²⁷ *Cowan*, 143 Idaho at 511-512.

²⁸ County Code §§ 9-3-3-C, 9-3-4-D.

related to the proposed project.²⁹ These requirements are satisfied by several conditions commonly imposed on approvals, including:

- Adherence to approved plans, plats, studies, surveys and other documents;
- Aesthetic guidelines and regulations;
- Compliance with recommendations submitted by service providers and other public agencies;
- Environmental protection provisions;
- Mitigation of impacts to vegetation, wildlife and other natural features; and
- Roadway and other improvements attributable to the proposed project.

Because the imposition of conditions is not required by statute or the County Code, the decision to do so is discretionary. If a legal challenge is brought, a discretionary decision cannot be overturned unless “substantial rights of the appellant have been prejudiced”³⁰ and the decision is found to be:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion.³¹

As long as the P&Z complies with applicable constitutional and statutory law and follows proper procedure, its discretionary decisions will be only vulnerable to challenges alleging a lack of substantial evidence or an abuse of discretion. As discussed previously, the substantial

²⁹ *Stephen C. Glenn, Inc. v. Sussex County Council*, 532 A.2d 80, 82-83 (Del. Ch. 1987) (citing 2 ANDERSON, *American Law of Zoning*, 3rd Ed. § 14.10; 2 RATHKOPF, *The Law of Zoning and Planning* § 19.04; *Borger v. Towamensing Township Bd. of Adjustment*, 39 Pa.Cmwlth. 361 (1978); *Montgomery County v. Mossburg*, 228 Md. 555 (Md. Ct. App. 1962); *Nathanson v. D.C. Board of Zoning Adjustment*, 289 A.2d 881 (D.C. Ct. App. 1972)). Although these treatises and cases pertain to conditional approval of a conditional use permit (CUP), the principles announced therein should be applicable to any permit in which the zoning authority is permitted to impose conditions.

³⁰ Idaho Code § 67-5279(4).

³¹ *Id.* at (3).

evidence standard is very deferential. Although the Idaho Supreme Court has not interpreted the abuse of discretion standard in the land use context, it is universally very deferential; a court will uphold a discretionary decision as long as it was reasonable in light of the relevant facts and circumstances.³² “Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.”³³

F. Reducing Density

The County Code’s definition of a “planned unit development (PUD)” indicates that “conventional setbacks, lot sizes or density *may* be varied,”³⁴ and every other reference to lot sizes or density in a PUD application uses this same permissive language.³⁵ The term “may” is inherently discretionary; thus, it cannot be said that a PUD applicant is automatically entitled to the maximum permissible density. Instead, the County Code clearly contemplates that the BOCC has the right to determine what lot sizes and density are appropriate in a given PUD. The P&Z may therefore recommend approval of a PUD subject to a condition reducing the density.

A condition reducing density will be subject to the same standard of review as all other discretionary decisions. Evidence supporting a reduction in density may include impacts to wildlife or other natural resources, incompatibility with neighboring land uses or inconsistency

³² Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 365 (1993).

³³ *Enterprise v. Nampa City*, 96 Idaho 734, 739 (1975).

³⁴ County Code § 8-2-1 (emphasis added).

³⁵ County Code §§ 8-4-4 (“lot sizes in PUD’s may be smaller”), 9-7-3 (“a PUD application may depart from applicable height, setback and lot size restrictions”), 9-7-6(A)(1) (“density of up to 80 to 100 units per 100 acres may be allowed”), 9-7-6(A)(2) (“density of up to 50 to 80 units per 100 acres may be allowed,” “up to 80 units per 100 acres may be allowed”), 9-7-6(A)(3) (“density of up to 40 to 60 units per 100 acres may be allowed,” “up to 60 units per 100 acres may be allowed”).

with the comprehensive plan land use classification. The decision attached hereto as Exhibit C includes a reduction in density that was prompted by evidence regarding traffic impacts.

G. Examples

To help illustrate how these principles apply in real-life situations, we offer the following hypothetical examples:

1. *The developer has presented expert testimony that the proposed PUD will have a positive financial impact on public service providers. The P&Z does not find this testimony to be credible. May it recommend denial?*

Yes, as long as this decision is supported by relevant evidence in the record that a reasonable mind might accept. If the P&Z is concerned that there is insufficient evidence addressing this subject, it may table the application for a subsequent meeting in order to further develop the record. For example, the P&Z may arrange for another qualified professional to review the application and provide an opinion regarding fiscal impacts on public service providers.³⁶

2. *The P&Z received a great deal of conflicting oral and written testimony regarding a PUD application. How should it craft a written decision recommending approval or denial?*

While there is no required format, many cities and counties elect first to set forth the findings of fact, then set forth the conclusions of law derived from the findings. However, the organization of the decision is unimportant, as long as the decision identifies the criteria for approval or denial of a PUD application and discusses how each one has or has not been satisfied. The discussion of each criterion should refer to the evidence relied upon in determining whether or not the criterion was satisfied. It also may be advisable to acknowledge evidence contrary to the determinations of the P&Z and explain why such

³⁶ County Code § 9-3-3-B.

evidence was not relied upon. An example of a particularly thorough decision is attached hereto as Exhibit D.³⁷

3. *The proposed PUD includes commercial incidental uses that are inconsistent with the Comprehensive Plan. May the P&Z use the Comprehensive Plan as justification for a condition rejecting or reducing the commercial uses?*

Yes. It is important to remember that a PUD applicant is not automatically entitled to the inclusion of incidental uses.³⁸ Furthermore, such uses cannot be approved unless they are found to be "necessary or desirable."³⁹ As it considers whether an incidental use is necessary or desirable, the P&Z may look to the Comprehensive Plan for guidance.

4. *The evidence indicates that the proposed PUD will negatively impact wildlife. The developer has outlined a plan to mitigate these impacts, but the P&Z believes the plan is inadequate. What can the P&Z do?*

Harm to wildlife is harm to the general welfare,⁴⁰ so the proposed PUD would not satisfy one of the criteria for approval, and the P&Z would be justified in recommending that the application be denied. Alternatively, the P&Z could recommend approval subject to conditions requiring an acceptable level of mitigation. The conditions of approval attached hereto as Exhibit E impose additional substantive and procedural requirements on a

³⁷ Cartwright Ranch, the planned community that is the subject of this decision, was approved by the Ada County Board of County Commissioners on July 16, 2008. Final approval of the findings, conclusion and order may occur August 12, 2008. It is anticipated that some editorial changes may be made to the document provided.

³⁸ "PUD's may contain incidental components which are inconsistent with the underlying land use zones." County Code § 9-7-5 (emphasis added).

³⁹ County Code § 9-7-5-A.

⁴⁰ *Houck v. Bd. of Comm'rs of the Huron County Park Dist.*, 116 Ohio St.3d 148, 154 (2007) (conservation of natural resources serves health and general welfare of community); *Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs of Gallatin County*, 305 Mont. 232, 239 (2001) (importance of a parcel to wildlife and wildlife habitat is a significant factor to be weighed in evaluating the public welfare).

developer that had already submitted a twenty-page wildlife mitigation plan, supported by a fifty-page wildlife study.

IV. CONCLUSION

The County Code identifies the criteria for recommending approval or denial of a PUD application. The applicant bears the burden of proving compliance with these criteria, and the application must be denied if any one of the criteria has not been met. As the P&Z determines whether the criteria have been met, it may base its decision on relevant evidence that a reasonable mind might accept. The P&Z may recommend approval subject to conditions that bear a reasonable relation to the public health, safety and welfare and are directly related to the proposed project, including a reduction in the proposed density.