2008

Breaking Ground: Planning and Building in Priority Growth Districts

John R. Nolon
Elisabeth Haub School of Law at Pace University

Jessica A. Bacher
Elisabeth Haub School of Law at Pace University

Zoning and Land Use Planning

JOHN R. NOLON AND JESSICA BACHER*

Breaking Ground Planning and Building in Priority Growth Districts

Compact Development, Climate Change, Sprawl, and Priority Growth Districts

It is now understood that compact, mixed use development prevents the ill effects of sprawl and can mitigate climate change significantly. There is an innovative land use technique that can be used by communities to manage and define future growth in a way that provides for such developments and creates more livable places, places that are environmentally, socially, and fiscally sound. Specifically, a community may create Priority Growth Districts, or PGDs, and thereby direct development to selected locations and also specify design standards that meet the needs of the community's current and future residents.

Priority Growth Districts are called Planned Unit Developments, Planned Residential Developments, Traditional Neighborhood Developments, and a variety of other terms in local zoning codes. The authors prefer the term ''Priority Growth District'' to support compact, mixed use developments at moderate densities because it expresses an underlying policy of critical importance in our time. The policy is that land use planning and regulation need not support development in all parts of the community but can and should designate *priority* zoning districts for the absorption of most of the organic population and economic growth. Local land use law should make it clear what type of development is needed and the community should then support and assist developers

*John R. Nolon is a Professor at Pace University School of Law, Counsel to its Land Use Law Center, and Visiting Professor at Yale's School of Forestry and Environmental Studies. Jessica Bacher is an Adjunct Professor at Pace University School of Law and a Staff Attorney for the Land Use Law Center.

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 90

who wish to build in those districts under the design standards contained in the Priority Growth District law. This article describes the available legal tools and describes the steps that a community may take to designate Priority Growth Districts and reap their many benefits.

Priority Growth Districts (PGDs) are areas where growth is desirable, is compatible with existing uses, and where development can enhance the larger community by providing needed housing, retail, services, and civic amenities while preserving open space and supporting the tax base. PGDs should be served by existing community water and sewer facilities or located where such facilities can be readily provided. They should incorporate traditional neighborhood design in a cohesive, pedestrian friendly environment, include services and employment opportunities within walking distance from homes, and be designed to respect the district's natural features. In sum, PGDs can accommodate a community's future growth in a manner that minimizes sprawl and creates an opportunity to maximize the preservation of open space both within the district and in other areas of the community.

According to the U.S. Census Bureau the nation's population will grow by 100 million by the year 2043.[1] With a projected household size of 2.6 persons, this equals 40 million new households. This new population, and the need to replace aging homes and buildings will cause the private sector to build 70 million new homes and 100 billion square feet of nonresidential space.[2] About two-thirds of the development on the ground by 2050 will be built between now and then. By accommodating a significant percentage of that growth in PGDs, local land use officials can contribute significantly to mitigating climate change.

In the past decade approximately 60 percent of households have chosen to live in single-family homes on individual lots. For a variety of reasons, the projected 40 million new households will be more urban oriented and willing to live in dynamic, walkable neighborhoods in cities and urban suburbs. Market projections indicate that urban housing located in compact developments will increase in price more rapidly than single-family, suburban homes.[3] It is

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 91

quite possible that the market demand will support land use decisions that attract new households to more compact and mixed-use communities. This envisions a shift in the dominant pattern of development from single-family, single-use neighborhoods to neighborhoods characterized by smaller homes, clustered and stacked, mixed with service and retail uses reachable by foot or on bicycle, with nearby schools and recreation, served by transit stops, now or in the future.

The movement of vehicles is responsible for about one-third of U.S. CO2 emission and that number is growing. ''Single family homes use more energy per person than multifamily homes. Large homes use more energy than smaller homes. The farther new homes are from existing population centers, from work and shopping, the greater the additional energy use in transportation per home and per person.''[4] A little over one-third of the increase in driving is associated with demographic change; the rest is attributed to ''land use patterns that have led to increases in average trip distances (38 percent) and in the number of trips made (25 percent).''[5]

According to the Urban Land Institute's *Growing Cooler* report, ''much of the rise in vehicle emissions can be curbed simply by growing in a way that will make it easier for Americans to drive less. In fact, the weight of the evidence shows that, with more compact development, people drive 20 to 40 percent less, at minimum or reduced cost, while reaping other fiscal and health benefits. ''[6] Compact development, as defined in the *Growing Cooler* report ''does not imply high-rise or even uniformly high density development . . . that will result in the ''Manhattanization'' of America.''[7] It refers to development at about 12-14 dwelling units per acre, which is 75 percent above the 2003 national average density for all housing development. The report concludes that ''shifting 60 percent of new growth to compact patterns would save 85 million metric tons of CO2 annually by 2030.'' This is aimed at abating the alarming increase in driving caused by the dominant single-family growth pattern. If unabated, this pattern will increase driving by 59 percent by 2030 while the population increases by 23 percent, according to the U.S. Department of Energy's forecasts.

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 92

The additional benefits of concentrating a larger percentage of households in compact, mixed use neighborhoods, implemented by adopting PGD land use laws, include:

- PGDs meet the housing demands of current and future residents, thereby reducing the overall demand for new sprawl development. As empty nester and elderly households are offered suitable housing opportunities in the form of condominium or rental apartments or townhomes in a PGD that is located within their community, not only can they remain in their community, but their former housing accommodations, typically single-family detached residences, become available to serve the needs of growing families from within or outside the community. Similarly, the smaller housing types in PGDs will enable young people from the community to remain there.

- PGDs protect natural resources by designating areas to be preserved within the districts as well as relieving development pressures on outlying open space areas in other portions of the community which can be rezoned for lower density.

- Mixed uses can reduce traffic generation beyond the district by ''capturing'' trips between uses within the district. It can also provide alternative transportation modes such as walking, bicycling, jitneys, and the like.

- PGDs promote walkable neighborhoods or centers, which encourage healthier levels of activity, social interaction, and an awareness of community identity.

- PGDs facilitate efficient and predictable capital planning for infrastructure such as roads, utilities, transit facilities, and schools, replacing the customary case-by-case, problem-solving approach of constructing highway intersection improvements and other capital improvements to mitigate individual project impacts.

- More compact development with shorter, narrower roads and shorter utility distribution systems reduces infrastructure costs. PGDs support centralized facilities that allow economies of scale and more efficient and effective technology, such as central water and sewage treatment plants and community stormwater management and water quality facilities, rather than relying upon individual septic and stormwater systems that may not be properly or regularly maintained. The more effective central systems have positive environmental and economic benefits.

- Using new technology and legal arrangements, PGDs can accommodate the common ownership of solar and wind generated power facilities that can be built into the infrastructure and legal structure of new communities, further mitigating climate change.

- PGDs bring a mix of land uses that enhance and diversify the local tax base, generating additional revenues to meet the costs of municipal and educational services while also creating a diversity that can be less susceptible to market and economic cycles.

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 93

Implementing the PGD Program: Ten Steps for Local Land Use Officials

In order for the PGD concept to be effective, it must be applied in a flexible manner, but with adherence to certain fundamental principles. This article suggests ten steps that may be taken to plan, provide for, and implement PGD projects while building community support for shifting a community's emphasis from single-family to compact development land use policies. These steps can be further organized into four phases, as follows:

Planning and policy points:

1. Conduct a build-out analysis of the current zoning using professional planners with extensive citizen participation, including landowners and developers.

2. Inventory the availability of sites conducive to PGD development.

3. Amend the comprehensive plan to include a PGD component along with the strategies used to implement a compact development policy.

Lawmaking: setting standards and providing legal framework.

4. Amend the zoning to include PGD Districts.

5. Adopt a local PGD Design Standards Law.

Public Actions:

6. Include needed public infrastructure in local capital budgets or require PGDs to provide such services.

7. Leverage local capital expenditures with financial assistance from state and federal agencies.

Project Planning, Submission, and Approval:

8. Select sites for development.

9. Carefully plan each development in conformance with adopted design standards.

10. Streamline the approval of each conforming project.

1. Conduct a build-out analysis of the current zoning using professional planners with extensive citizen participation, including landowners and developers

''A build-out analysis allows a community to test out its existing regulations — to glimpse at its possible future when all land is developed to the maximum extent allowed under law. Build-out is a tool that shows the consequences of not revising existing land-use regulations. This may result in a call

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 94

to action. In any case, it helps officials make better decisions in planning the future.''[8] By involving citizens and stakeholders in conducting such studies, citizen and political support can be built for a more fiscally efficient and appropriate development pattern than that provided in the current zoning law.

Most local residents have no idea what local zoning provides. They are aware of some aspects of current developments that they like and dislike and watch, often with wonder, as new developments appear on the landscape. They are not familiar with the ''zoning map,'' tucked inside the zoning law or ordinance, whose use, bulk, and area standards are also unknown. Citizens who become engaged in projecting the development that is codified in their local law are routinely surprised and often chagrined to learn what their community will look like a decade or two at current rates of development.

A build-out analysis can be as simple as a drawing that shows the houses and other development allowed in parts of the community that are undeveloped or just beginning to develop. This drawing can be supplemented with a chart that identifies the impacts of that development: impervious coverage, linear miles of roads, number of schoolchildren, types of housing provided, costs of housing produced, etc. Projecting the costs and consequences associated with the current codified land use pattern can be eye opening. What are the impacts of the current development pattern contained in the zoning law? Does it meet local housing needs? What impact on the environment will it have? Does it cause more traffic congestion? Is there a demand for the housing it provides? What is its fiscal impact? Will it foul the air and water and result in the consumption of more fossil fuel and the emission of more carbon dioxide?

The surprising results of a build-out analysis typically gives rise to additional questions. Is there a better way of absorbing the future population than that contained in our zoning? If the build-out analysis shows that current zoning provides for 3000 more homes and around 9000 more residents, is there a more effective way of accommodating that number of people on the land? Can we reduce the traffic generated, ac-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 95

commodate a more diverse population, lower infrastructure and operational costs, and reduce the fossil fuel consumed in building, operating, and driving to and from our future development? Most often the answer is yes to each of these queries. By increasing densities in accessible locations, providing for diverse, mixed uses, and ensuring appropriate design of buildings and amenities, the community can reverse and improve projected land use patterns and their adverse impacts. When coupled with strengthened environmental protection laws regulating development outside Priority Growth Districts, the result can be to accommodate the same projected population as the current zoning map but with much better consequences.

One of the more illusive calculations in development economics is to compute the fiscal impact of proposed developments on the community. There are numerous methodologies and complex formulae for analyzing the costs to the municipality of a particular proposed development. This is an illusive process because such calculations are dependent on the context of each development and each community. In some contexts, a single development can cause a community to buy a new fire truck or establish a new fire house while in others there may be excess capacity in the existing fire stations and equipment. Schools may be at or near capacity, or not. Police departments may be equipped and staffed to spread existing resources across a larger population or challenged to serve current residents and businesses. So it goes through a long list of municipal cost impacts of each development.

An important perspective on fiscal impact analysis emerges in doing build-out analyses for the current zoning and comparing those results with the fiscal impact of an amended zoning code that concentrates new population in PGDs and lessens densities in outlying areas. Relative to a single-family predominant land use pattern, where nearly all of the future population will be housed in relatively large residences on single lots, does the PGD pattern cost the community more or less? Will the diverse housing types and mixed uses attract more or fewer schoolchildren, create more or less stormwater runoff, involve more or fewer linear miles of roads to maintain in summer

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 96

and winter, require building more schools or transporting school children over longer or shorter distances, effect better use of existing library services or require new library branches, etc. In most cases, this kind of macro comparative fiscal analysis will lead the community to conclude that the PGD-oriented land use pattern is more positive, fiscally, on the community.

2. Inventory the availability of sites conducive to PGD development

Before PGD areas can be designated by amended zoning, standards for identifying appropriate sites must be developed. In each Priority Growth District, there must be sufficient buildable acreage to achieve adequate density in order to support needed infrastructure improvements, amenities, landscaping, and design elements for a successful compact development. Buildable acreage is established by determining the areas targeted for preservation, acreage of unusable or inaccessible lands, and exterior project setbacks or buffers. These constrained acres are then subtracted from the gross project acreage to create the net buildable acreage.

One guideline for evaluating potential PGD sites is to think of a walkable community as one that involves a 5-10 minute walk from its edge to its center. If a PGD has a radius of ¼ to ½ mile, it can be considered walkable. These distances encompass a land mass of from 150 to 300 acres. If densities provided for in Priority Growth Districts average eight units per acre, for example, a PGD can accommodate from 1,200 to 2,400 homes. Fewer homes will be provided where net buildable acreage is less because of environmental constraints within the district or where lower densities are desired. Similarly, a larger number of homes can be accommodated by using density calculations of over eight units per acre, perhaps up to 15. Depending on the future population projected to be accommodated in the community, planners can readily calculate how many PGDs must be provided to achieve that population goal once this inventory of available sites is completed.

The inventory must consider land uses in the vicinity of the prospective PGD. Any adverse impacts on adjacent lands and land uses must be considered. Similarly, planners must deter-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 97

mine whether potential sites can be served by needed infrastructure such as roads, parking, water, sewer, storm sewer systems, lighting, sidewalks, etc. These costs must be paid for either by the private sector developer or the municipality with any available state or federal assistance. These calculations help determine the desirable or needed density of development and the size of the PGD itself. It is important to have a critical mass of residents and businesses to support the capital and operational costs of needed capital improvements.

One can conceive of each PGD as a capital improvement district and the future residents and businesses as those who have to pay the costs of infrastructure and any future costs of operating facilities such as water and sewer plants. Municipalities may be authorized to create discrete capital improvement districts and those districts may be able to float bonds to pay the cost of needed infrastructure and to charge those served by the infrastructure the annual costs of operation. The costs to the municipality or the rate for payers within the PGD can be calculated by subtracting any available state or federal financial assistance and developer provided infrastructure from the total infrastructure expenditures. These costs can be covered by the municipality itself and recouped through future property taxes or by creating some form of infrastructure district.

To determine the cost effectiveness of a proposed PGD, these calculations are helpful and lead to refinements in density and land use calculations. They also lead to conclusions about whether developers should be provided density bonuses to compensate them for installing on-site and off-site capital improvements and, if so, at what level of bonus density. Where local governments are shifting land use patterns to mitigate climate change, provide affordable housing, and create more cost-effective developments, they may become more competitive for limited capital grants for infrastructure from state and federal agencies. They may also be more eligible for open space and recreational dollars so that they can purchase development rights to environmentally constrained land outside the PGD or provide needed recreation within the District.

Sites targeted for PGD development must have good ac-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 98

cess to a regional collector or arterial roadway. Good access can be defined as the ability to enter and exit from the project area in a location where sight distance is not compromised, and traffic flows allow for adequate gaps. Two or more such access roads are necessary to disperse traffic onto the surrounding roadway network and to provide adequate access for emergency vehicles. Existing crossroads provide established transportation routes within a community; therefore, they do not introduce traffic into new areas. In addition, easy access to major transportation routes in the region and mass transit should be considered.

PGD development should be planned with longer-term transportation and transit needs in mind. Local land use plans and zoning determine how much population can increase over time and where it is to be located, and this, in turn, determines demand for various types of transportation services. Transit lines for rail and Bus Rapid Transit (BRT) services cannot be planned in isolation, station by station. The economics of transit station development and rail and bus lines are dependent upon land use densities; there must be a sufficient number of commuters in a relevant group of adjacent communities to provide a minimal level of ridership throughout the area served by the transit system. Where transit service is not feasible because of insufficient land uses and densities, other modes of transportation must be planned.

Compact developments may not be intense enough to support ridership at various locations in a transportation region. In the near term, they may have to be developed as ''transportation efficient'' communities that are ready to receive transit services in the future as the region grows. Compact developments not near existing transit services can incorporate a variety of land use and transportation features that reduce vehicle miles and trips. Land use plans can allow for mixed uses, a variety of housing types and sizes, parking and bicycle facilities, and transportation-related improvements. These can be coordinated with planned capital improvements such as interconnected sidewalks and trails, bike paths, and jitney service from moderate density hamlets to regional transit stations. Together these initiatives can reduce congestion, car dependency, and pro-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 99

vide for transit stops in the future.

The Town of Malta, just outside Albany, New York, used an innovative land use technique that can be employed by communities to manage and define future growth in a way that creates more livable places that are transportation efficient and transit ready. It adopted a central business district overlay zone that is transit ready. The Malta zoning law provides densities at the compact development level and contains a number of standards that will create a typical mixed-use and walkable neighborhood. Currently, the town is not served by transit, but the Capital District Transportation Plan calls for BRT service in the future. In anticipation, the overlay zone provides mass transit. It states that ''to promote pedestrian activity and multimodal transportation, developments should be located within 1,320 feet of an existing or future transit stop as approved by the Planning Board.''[9]

3. Amend the comprehensive plan to include a PGD component along with the strategies used to implement a compact development policy

Prior to incorporating Priority Growth Districts into the local zoning code, the community's comprehensive plan should be amended. The benefits of PGDs should be recited and criteria established for their location, such as proximity to highways, present or future transit facilities, existing development centers, existing neighborhoods, the availability of needed infrastructure, etc. The plan should compare the costs and consequences of the current land use pattern and the PGD pattern and establish a policy favoring the shift of a larger percentage of future population into the new districts. The comprehensive plan should also define the tools and techniques that can be used by the community to advance PGD development. These could include zoning incen-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 100

tives to achieve desired community objectives, such as affordable housing, open space preservation, and the like, or possibly the transfer of development rights to send development rights from outlying areas deemed worthy of preservation into the PGDs, as receiving districts.

There are two basic ways of directing development to appropriate sites. The first is to recommend precisely where PGDs should exist. The plan can designate specific areas eligible for the new zoning district as appropriate for more intense future growth and call for the rezoning of those sites as PGDs. The second method is to define what an appropriate development site is without identifying exactly where it is located. Characteristics of such sites may include lack of environmental constraints, presence of county and state roads, availability of central water or sewer, and the other factors considered in conducting an inventory of potential PGD sites.

Where the plan lists the desirable characteristics for growth areas, it can specify that flexible zoning techniques such as an overlay zone, floating zone, or planned unit development device be used to enable development in such areas. Rezoning immediately raises land values in the identified district, while the flexibility techniques allow developers to enter into contracts to purchase or assemble parcels they think are eligible for PGD use at existing prices based on the zoning. By using more flexible techniques, the community can increase densities upon the developer's application for PGD eligibility and characterize the density increase as a bonus density, where state law allows. The bonus can then be provided to the developer in exchange for benefits such as off-site infrastructure improvements, affordable housing, other public amenities, or cash.

Promoting PGDs should be based upon a well-planned public/private partnering program designed to facilitate development as envisioned in the comprehensive plan. If properly drawn, the comprehensive plan will establish a consensus for a future development pattern within the PGDs. A consensus should extend throughout the various boards of the locality, including those that adopt, apply, and interpret the community's plan and land use laws. Through citizen partici-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 101

pation, community consensus-building, creating fine-grained details for selecting PGDs, and examining the environmental impacts and community benefits of PGDs, an atmosphere is created that should lead to the speedy review and approval of applications to build projects that conform to the plan.

4. Amend the zoning to include PGD districts

The most direct method of implementation is to locate the PGD on the adopted zoning map with boundaries following property lines to the extent possible. This method works best when the community has a clear idea of the location for the PGD and thinks that parcel-specific rezoning is the best method of proceeding. The alternative to discrete rezoning is to choose one of several flexibility techniques.

A floating zone simply defines a land use that the community wants to encourage and adds that land use (PGD) to the list of permitted uses in the zoning ordinance. By referencing that section of the zoning law, developers are guided in selecting sites that conform to its details. Once they contract for the right to purchase conforming land, they can apply for rezoning of their site under the floating zone. By amending the zoning map, the local legislative body attaches the floating zone to the applicant's land. Floating zones allow developers flexibility in locating sites and determining how new land uses can be designed and buffered to fit into their surroundings. At the same time, they allow the local legislative body to determine at the point of application whether a proposal dovetails with the provisions in the floating zone amendment and the policies in the comprehensive plan.

An overlay district is created by the local legislature by identifying a large potential area for development and creating standards for future developments such as PGDs. Current landowners retain the right to develop their land as zoned, but the new standards and incentives associated with it are designed to motivate developers to acquire property in the overlay zone and design projects that conform to the overlay district's standards. The term ''overlay district'' refers to the superimposition of the overlay zone and its standards on the existing zoning districts. The provisions of an overlay district can be more restrictive or more

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 102

permissive than those contained in the underlying districts and send signals to developers that guide their investment and design decisions.

Development in floating zones and overlay zones can be promoted through the use of incentive zoning where allowed by state law. Such statutes permit local legislatures to permit more intensive development of the land in exchange for certain community benefits. Developers can receive density bonuses and additional incentives, including adjustments to the height, open space, use, or other requirements of the underlying zoning law on the condition that they provide or pay for the services and facilities needed in the area or in the community as a whole. Such services may include off-site infrastructure, open space or parks, affordable housing,[10] day care or elder care, or other physical, social, or cultural amenities of benefit to the residents of the community.

Additional community benefits that may be attractive to existing community residents could include street and sidewalk improvements to existing streets in the district, which would be designed to achieve PGD objectives such as enhanced pedestrian or bicycle access or to create pedestrian trails or links between nearby neighborhoods and the proposed centers being created in the PGD.

Once sites for PGDs have been identified, zoning to protect essential environmental lands outside the PGD should be adopted.[11] This can be done by lowering densities, requiring cluster development, and prohibiting development on environmentally constrained portions of parcels. Rezoning landowners' properties in this way can be controversial and politically treacherous. One alternative is to create zoning overlay districts, such as an Environmental Protection Overlay District (EPOD). These leave existing zoning in place but impose stricter development standards within an overlay zone, which may overlap several existing zoning districts in order to create a large contiguous protected landscape. Only the lands that lie within the overlay district are more heavily regulated to achieve the community's environmental goals; lands within the overlay district are subjected to a variety of additional standards that are needed to

protect the identified landscape from the adverse impacts of land development. Another way of accomplishing this result is to designate the PGDs as receiving districts under a locally adopted Transfer of Development Rights law and designating these large outlying landscape areas as sending districts.

In developing suburban areas, there are often significant land areas that have been undeveloped for some time that contain undisturbed vegetated areas. The preservation of such resources within or around a PGD will provide valuable environmental benefits such as carbon sequestration, wetlands and habitat preservation, stormwater management and flood prevention, watershed protection, and the prevention of erosion and sedimentation.[12] Soil organic carbon accumulates in undisturbed naturally vegetated areas.[13] By promoting open space and farmland protection outside PGD areas, carbon stabilization occurs where food products can be produced closer to population centers thereby reducing transportation costs. Wetlands preservation, seen through the lens of climate change mitigation, offers the additional benefit of carbon sequestration since most wetlands have been undisturbed by previous development.[14]

5. Adopt a local PGD design standards law

Either as part of the zoning technique adopted or as a separate set of site plan approval standards, the community should adopt standards that guide the development of projects in PGDs. These standards can promote walkability, a traditional neighborhood design, low impact site development, and green building and site standards. They can also promote the use of community facilities that generate power using renewable resources such as wind turbines and solar collectors.

PGDs should have defined residential neighborhood and commercial center components. Standards that allocate land for residential uses, mixed-uses, retail and office uses, recreational uses, and other amenities such as open space should be developed. Local design standards regulations can include specifications or performance objectives for sidewalks, street trees, special streetlights, attractive signage, special pavement and curbs,

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 104

stonewalls, fences, and park benches. Standards for vehicular movement and parking are key. Streets should be connected to one another, sized and designed to slow cars down where appropriate, and garages designed to allow attractive development facades on streets.

Communities can mitigate carbon emissions and promote energy efficiency by adopting building design and location standards, such as those promoted by the Leadership in Energy and Environmental Design (LEED) criteria promulgated by the U.S. Green Building Council.[15] This they can do by requiring buildings in PGDs to meet LEED standards or by adopting standards similar to those contained in the Council's evolving Neighborhood Development Rating System.

The U.S. Green Building Council adopted the LEED-ND program as a pilot. At the end of 2008, the early results will be evaluated and a revised rating system will be instituted. Among the standards contained at the pilot stage are reduced automobile dependence, creation of a bicycle network, compact development, diversity of uses and housing types, affordability of housing, the proximity of housing and job sites, reduction of parking footprint, proximity to transit facilities, and transportation demand management. These are matters that go to the heart of traditional local land use regulation and are at the forefront of integrating transportation and land use planning. Communities can incorporate the lessons of the LEED-ND program in their land use plans, regulatory standards, and development approval processes.

In local zoning and subdivision regulations, standards that prevent the disturbance of soils and vegetation on development sites have similar effects. The emerging field of ''low impact development'' experiments with pervious alleys and green roofs in urban projects and, in compact developments, vegetated swales that replace curbs and gutters for stormwater control, cluster development, tree retention, and retaining permeable topsoil on site during and after construction.[16]

Current zoning provisions are generally ignorant of the benefits and consequences of individual renewable energy facilities such as wind turbines and solar panels. The use of these facilities can be discour-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 105

aged by height, bulk, and use restrictions that prevent or inhibit their use. The advent of PGD zoning provides an opportunity to not only allow such facilities on individual properties, but to consider allowing the construction and operation of generation operations that serve multiple buildings or the entire PGD community. By providing for their installation, offering developers incentives to build them, and tying their operation into the requirements of a Homeowners Association or Condominium Association, the PGD zoning can add another cost and climate benefit to its compact development policy.

6. Include needed public infrastructure in local capital budgets or require PGDs to provide such services

In step two, we discuss the importance of determining whether potential sites can be served by needed infrastructure such as roads, parking, water, sewer, storm sewer systems, lighting, sidewalks, transportation improvements, and transit. The traditional method of paying for some on-site and all off-site infrastructure was through property tax revenues. Conventionally, local zoning provided for land uses, state law allowed local governments to impose property taxes on the assessed value of the land as zoned, and local governments were expected to provide the services and infrastructure needed by the development allowed by their zoning laws.

As local property taxes increased, opposition to this conventional approach became intense and local land use laws and approval processes began to impose on-site and even some off-site services on developers. In some communities, local tax districts for infrastructure were created and property owners within those districts were charged with the capital and operating costs of needed capital improvements. In limited situations, county, state and federal grants are available for regionally needed road, water, or sewer improvements. Where these techniques are insufficient, localities in some states are permitted to provide developers with valuable density bonuses in exchange for providing public infrastructure, services, and amenities.

In the context of a PGD, capital improvements take on heightened meaning. People who live in denser neighbor-

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 106

hoods need amenities to soften the glare and grayness of the hardened landscape. The public realm, community gathering points, amenable architecture, and nature must be considered in planning PGD developments. The benefits of greater density, when incentive zoning is used, become even more apparent in this context. Where local tax revenues and grants from other levels of government are insufficient, these essential features of compact, mixed-use developments must be provided by the developer. That developer, in turn, needs sufficient scale of operation, a predictable and low-cost development process, and flexibility in project design and construction to be able to afford these amenities.

These considerations illustrate that PGD developments require an intense and creative public/private partnership. The development must be designed to meet the specifications of the design standards law, provide infrastructure, and create an amenable public realm. A single budget for providing all of the development and amenities should be created, and the partners should collaborate to find sources of funds and mechanism for paying for a community that will attract residents, stimulate mixed-uses, and be an endurable source of pride and a model for future developments.

7. Leverage local capital expenditures with financial assistance from state and federal agencies

In the previous steps, the importance of leveraging municipal capital funds with state and federal agency capital assistance is mentioned several times. To this should be added the opportunity to receive planning grants and technical assistance from governmental agencies and some non-governmental agencies. Often, developing communities do not have experienced development and planning staffs or consultants or the experience to do the kind of planning and site analysis called for in this article. Although outside resources for such work, and the capital help needed, are limited, governmental agencies and NGOs make funding decisions based on their perception of the potential value of each application for assistance. By agreeing to involve citizens and stakeholders in build-out analyses, inventorying potential PGD

sites, amending their comprehensive plans and zoning, and adopting design standards, municipalities greatly enhance their eligibility for outside grants and assistance and the competitiveness of their applications.

8. Select sites for development

By following the previous seven steps, the community has made it possible for the private sector to select sites for PGD development. By involving developers in the earliest stages of this process, municipalities get the benefit of their knowledge of the market and the prerequisites of equity and debt investors. The mixed-use, higher intensity development envisioned must conform to market realities. Whether they do or how they can should be part of the early conversation about the PGD concept, the amendment of the plan, and the adoption of zoning and design standards.

Potential developers will need help in meeting design standards and receiving adequate incentives to provide the features and amenities desired by the newly amended plan and local law. There are varieties of target homebuyers and renters that can be attracted to a neighborhood based on several criteria. First-time buyers, move-up buyers, empty nesters, and age-restricted buyers are usually attracted to different factors, and projects can be designed with ample variation in the product to attract various types of consumers. Priority Growth District developments can provide housing for a variety of residents by offering multiple housing types and conditions. The developer will need flexibility in presenting a project to the community that works given these market opportunities.

The developer will also need a critical mass of units and uses in order to have a project that is economically realistic, particularly if developer-provided benefits such as affordable housing or site amenities are expected. Developers tend to have a primary market of buyers in mind when designing their projects. Where land is expensive and density kept low, they may market to more affluent families, typically with school-aged children. With PGD developments and an appropriate density, developers can design projects to attract younger families, less wealthy households, or seniors.

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 108

Additionally, an appropriate density serves the function of more broadly distributing the costs of community amenities, sewer treatment facilities, and water supply systems that are required. When densities are appropriate, even below-market housing to meet the needs of the entire community and retail components can be included, if the local zoning permits. Developers are also concerned with what is known as the absorption rate—the number of units that will be sold each year and the total number of years that they will stay on the market. An appropriate density that allows developers to sell to two or three housing markets also creates a more favorable absorption rate and less exposure to market risks. The PGD also provides the best possible base plan for multiple product types that can be targeted to different age groups and incomes as well as providing for the ability to include community, retail, and commercial components. This diversification of components and uses strengthens the tax base of the community.

By providing services, shops, and offices, the neighborhood takes on an inherent unity, as it has more than its homes and streets to make it unique. The convenience factor draws out members of the neighborhood and the surrounding community. The overriding benefit for the neighborhood is the resulting interaction between neighbors at these village centers. The size of the retail component can be limited to 5,000 to 10,000 square feet, depending on the size of the neighborhood, but not to the extent that it loses its viability.

Sometimes it is necessary to increase the range of the amenities to address the needs of the diverse market by including a gymnasium, meeting house, and/or a computer lounge. Prospective buyers and community residents will sense a greater value in their community with these additional project features. The building scales for retail and recreational uses can be enlarged, providing diversity in the streetscape. They can be combined effectively to create a ''village center'' when mixed with residential buildings. The massing created allows for a more traditional feel to the community.

According to market projections housing in higher density developments will increase in

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 109

value at higher rates than single family suburban homes.[17] This is due, in part, to the cleverness of municipalities and developers, as partners, in creating quality developments with diverse housing types, served by desired retail and personal services, and with characteristics such as walkability and excellent design that residents appreciate.

9. Carefully plan each development in conformance with adopted design standards

Under the PGD law, the developer must submit enough information about the intended development to convince the legislative body to rezone the property for PGD use, either as a discrete rezoning or under one of the flexibility techniques. If the information about the project submitted to get the property zoned PGD is highly specific, the subsequent application for subdivision or site plan approval by the planning board can proceed more quickly and with more certainty. If there are few details about the actual project in the rezoning record, the planning board proceeding will take more effort and, possibly, more time. At some point in the process, the developer will have to show that the proposal meets the PGD zoning standards and the requirements of the design standards law.

Site planning is the process of designing a PGD so that it will look and work the way the municipality intends. Site planning in a PGD has three aspects. These are layout and design; roadway design for pedestrians, bicyclists, and motor vehicles; and land conservation. Layout and design standards should be divided into standards for (1) overall site layout and design and (2) individual lot design. In addition, different standards apply to the residential and the neighborhood commercial center components of PGD developments.

10. Streamline the approval of each conforming project

In some communities, community resistance and the lack of explicit development standards can cost the developer time in getting final approval to build. This is adverse to the interest of both the developer and community when the development is a project that the community has planned and zoned to include. In the context of the previous steps, the stage

is set for rapid approval of proposed PGD projects. The policies in the plan are clear and supportive, the zoning is in hand, and the standards that must be met are both specific and flexible. The development community has ensured that the legal requirements mesh with private market realities and the citizens have vetted and approved the PGD plan, zoning, and design standards.

The point that this illustrates is that the development community is essential to the success of a well considered and properly created land use plan. Because the PGD provisions were developed with all the stakeholders involved and include standards that are amenable to the community and buildable by developers, the final project approval process should take a minimal amount of time and cost the developer relatively little money. At the meeting of the planning board when the project is approved, there should be few concerned citizens in attendance and those present should applaud the project since it meets local policies, carries considerable benefits for the community, and meets carefully considered standards.

---

[1]U.S. Census Bureau, U.S. Interim Projections by Age, Sex, Race, and Hispanic Origins, *at* http://www.census.gov/ipc/www/usinterimproj/.

[2]The new development forecast by 2043 includes homes and nonresidential buildings needed to replace obsolete buildings that exceed their useful lives. *See* Arthur C. Nelson and Robert E. Lang, ''The Next 100 Million,'' *Planning*, The American Planning Association, Vol. 73. No. 1, January 2007, at 4-6.

[3]*See generally*, CHRISTOPHER B. LEINBERGER, THE OPTION OF URBANISM (2008), describing the reemergence of walkable urban development as the ''next American dream.''

[4]Consortium for Atlantic Regional Assessment, Land Use Primer: How Does Land Use/Land Cover Affect Global Climate?, *at* http://www.cara.psu.edu/land/lu-primer/luprimer14.asp.

[5]U.S. Environmental Protection Agency, *Our Built and Natural Environments: A Technical Review of the Interactions between Land Use, Transportation, and Environmental Quality* (2001) at 21, *available at* http://www.epa.gov/smartgrowth/pdf/built.pdf.

[6]Reid Ewing, et al., Growing Cooler: The Evidence on Urban Development and Climate Change (Urban Land Institute 2007)

[7]*Growing Cooler* at § 1.2.

[8]*See* U.S. Environmental Protection Agency, Green Communities, How To Do A Build-Out Analysis, http://www.epa.gov/greenkit/build-__out.htm.

[9]Code of the Town of Malta, NY, Chapter 167, Article XIV, §§ 167-60 and 167-61.

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 111

[10]Nolon and Bacher, Local Inclusionary Housing Programs: Meeting Housing Needs, RELJ, Vol. 36, No. 1, 73 (2007).

[11]Nolon, Creating a Local Environmental Law Program, RELJ, Vol. 36, No. 3, 350 (2007).

[12]Permit conditions can be imposed to protect the environment, which can include curbing greenhouse gas emissions. In *Konicelik v. Planning Board of the Town of East Hampton*, the court upheld a planning board's conditional approval of subdivision plat that imposed several conditions designed to protect ''the extensive area of undisturbed forest, and the presence of numerous important plant species throughout the site.'' Koncelik v. Planning Bd. of Town of East Hampton, 188 A.D.2d 469, 590 N.Y. S.2d 900, 901-02 (2d Dep't 1992).

[13]Wilfred M. Post and K.C. Kwon, ''Soil Carbon Sequestration and Land-Use Change: Processes and Potential,'' *Global Change Biology* 6:317-327 (2000), *available at* http://cdiac.ornl.gov/programs/CSEQ/terrestrial/postkwon2000/postkwon2000.html.

[14]US Department of Energy, Office of Science, ''Enhancing the Natural Terrestrial Cycle,'' *available at* http://cdiac2.esd.ornl.gov/scienceman.html#enchancing. www.science.doe.gov.

[15]LEED for Neighborhood Development Rating System (June 2007), *available at* http://www.usgbc.org/DisplayPage.aspx?CategoryID&=;19.

[16]P.M. Condon and K. Isaac, ''Green Municipal Engineering for Sustainable Communities,'' *Municipal Engineer 156* (March 2003) at 3-10.

[17]*See generally*, CHRISTOPHER B. LEINBERGER, THE OPTION OF URBANISM (2008), describing the re-emergence of walkable urban development as the ''next American dream.''

@DOMINO/VENUS/SUPP04/REALESTATE/LAWJOURNAL/SUMMER08 SESS: 1 COMP: 05/20/08 PG. POS: 112