LM224

BROWN, WILLBRAND & SIMON, P.C.
ATTORNEYS AT LAW
SUITE 203 EXECUTIVE BUILDING
601 EAST BROADWAY
P.O. BOX 1304
COLUMBIA, MISSOURI
ZIP CODE 65205

TELEPHONE (314) 442-3181
TELECOPIER (314) 874-3796

ED. M. BROWN (1926-1980)
H.C. WILLBRAND
B. DANIEL SIMON

ROSS STROUPE
JAMES M. POWELL

October 3, 1990

Mr. Fred Boeckmann
City Counselor
P.O. Box N
Columbia, MO 65205

Re: Owners: Pat Kelly and Mollie Kelly, husband and wife and Larry Kelly and Dorothy Kelly, husband and wife
Project: Katy Place, formerly known as "The Falls"; and

Re: Pending final Planned Unit Development Plan for Katy Place, formerly known as "The Falls"

Dear Mr. Boeckmann:

We represent the above-referenced owners, Pat Kelly and Mollie Kelly, husband and wife, and Larry Kelly and Dorothy Kelly, husband and wife. Such owners may hereinafter be referred to as "the Kellys". The Kellys are the developer of that project formerly known as "The Falls", and now referred to as "Katy Place". Such development may hereinafter be referred to as "the Development" or "the Project". The Development is to be placed on a tract of real estate acquired by the Kellys from Mr. and Mrs. Tom Mills ("Mills"). The parcel acquired by the Kellys from Mr. and Mrs. Mills may hereinafter be referred to as "the Parcel" or "the Real Estate". The Real Estate is located on the east side of Forum Boulevard. It is bordered as follows:

1. On the west by the east right-of-way line of Forum Boulevard;

2. On the north by the property owned by Forum Shopping Center, Ltd., a Missouri limited partnership;

3. On the east by property also owned by Forum Shopping Center, Ltd., and formerly referred to as the "Sunoo" property;

4. On the south by property owned by J & W Land Company, which was acquired by J & W Land Company from the City of Columbia.

The Real Estate, which consists of 26.47 acres, more or less, is currently zoned R-3/PUD, and is the subject matter of a preliminary PUD plan approved by the City Council of the City of Columbia ("the City Council") on December 4, 1989, by ordinance number 012436. Since the approval of the preliminary PUD plan ("the Preliminary PUD Plan") the Kellys have presented several versions of a proposed final PUD plan ("the Final PUD Plan"), each of which has been

rejected by the City Council. The Kellys have now presented a new proposed Final PUD Plan, which will be presented to the Planning and Zoning Commission ("the Planning and Zoning Commission") on Thursday, October 4, 1990, and which will be subsequently considered by the City Council.

In my opinion, the City of Columbia is required by law to approve the presently presented Final PUD Plan of the Kellys (i.e., the plan which will be presented to the Planning and Zoning Commission on Thursday, October 4). The purpose of this letter is to explain to you my reasoning for such assertion that approval of the Final PUD Plan, as presented, is required by law.

I had previously thought that I would simply make the arguments set forth herein as follows:

1. To the City Councilpersons and the Commissioners of the Planning and Zoning Commission, individually (i.e., by lobbying); and

2. By making arguments at the Planning and Zoning Commission hearing and the City Council hearing.

However, I note that under the Planned Unit Development Ordinance, Section 29-10 of the Revised Ordinances of the City of Columbia ("the Ordinance"), the hearings with respect to the Final Plan are not considered to be "public hearings". I further note that the arguments set forth herein are, generally, of a purely legal nature. Therefore, it would seem to me that you might appropriately contend that I am ethically required to communicate these arguments to you, as the City Counselor and as the attorney for the City Council, as opposed to communicating same directly to the City Council. I, therefore, am taking the liberty of communicating to you, by way of this letter, the legal position of the Kellys, in order that you may be properly apprised of same and may discuss same with the City Manager, and the members of the City Council. I would also hope that you would communicate the positions set forth herein to the Planning and Zoning Commission.

Suffice it to say that the Kellys feel that they have, in the past, been improperly denied approval of their Final PUD Plan. Although they are certainly willing to work with the City, and don't want to etch hard and fast positions in stone, the Kellys have, as a practical matter, reached the end of their rope. An unreasonable denial of the Kellys' proposed Final PUD Plan (and, in my opinion, any denial would be unreasonable) will not be accepted, voluntarily. If necessary, the Kellys do intend to pursue this matter, legally. While the Kellys sincerely hope that it will not be necessary that they pursue the matter by litigation, they are prepared to do so, if necessary. They would note, respectfully:

1. The ordinance which provided for the approval of their Preliminary PUD Plan, ordinance number 012436, dated December 4, 1989, imposed certain "conditions" for approval of the Final Plan.

2. Each of those conditions has been satisfied, and, in fact, the Kellys have done more than to simply "satisfy" such conditions. They have bent over backwards to satisfy such conditions.

3. The Kellys have subsequently been denied approval of their Final PUD Plan because of purported additional "conditions" or concerns, which were not listed in ordinance number 012436 (and were neither mentioned nor discussed when the Preliminary Plan was approved), including a requirement that they build a public street across the north side of their property and vague requirements that they satisfy certain "aesthetic" considerations, such as forestation/ deforestation concerns.

4. The Kellys have since agreed to build the public street, and to satisfy such aesthetic considerations, but, nevertheless, approval of their plan has been denied, or at best delayed.

Suffice it to say, that the Kellys feel that they have bent over backwards to be accommodating. Further accommodations would seem to neither be appropriate nor required. The Kellys respectfully ask that their Final PUD Plan be approved.

The Kellys are extremely serious about this matter. They have, therefore, engaged the St. Louis law firm of Thompson & Mitchell as co-counsel. As you know, that firm has an excellent reputation. At my request, Thompson & Mitchell has researched the law applicable to this situation. I enclose a legal memorandum to me from Mr. Michael Lazaroff of Thompson & Mitchell. I am going to take the liberty of plagiarising a portion of that memorandum in this letter, but did not want to do so without giving credit where credit is due. I would respectfully refer you to such memorandum, as well as the following portions of this letter.

STATEMENT

I believe the relevant historical information is as follows:

The property in question, which is referred to herein as "the Parcel" or "the Real Estate" consists of 26.47 acres, more or less. It is located on the east side of Forum Boulevard in Columbia, Missouri. It is bounded on the north by the property owned by Forum Shopping Center, on the south by a tract of land formerly owned by the City of Columbia and now owned by J & W Land Company, and on the east by the so-called "Sunoo Parcel", now owned by Form Shopping Center, and on the west by the east right-of-way line of Forum Boulevard. Forum Boulevard is a high density road, carrying substantial traffic.

Although the City's former master plan projected real estate along Forum as "low intensity residential" or "medium density residential", a number of rezoning requests for property on both the east and west sides of Forum Boulevard were presented to the City, and were approved by the City Council.

For example, the so-called Finley property, commonly known as "Victoria Park", which is also located on the east side of Forum Boulevard and which is approximately 3/4 of a mile south of the subject tract, was zoned O-1. A portion of the "Colonies", also located to the south of the subject property, and on the east side of Forum Boulevard, was zoned O-P, C-P, and O-P. The southwest corner of Forum Boulevard and Chapel Hill Road, projected, was zoned C-1. The Forum Shopping Center itself, which is a high intensity shopping center use, and which is located immediately to the north of the subject property, is zoned C-3.

The Parcel in question was owned by Thomas L. Mills and Pansy B. Mills. Pat and Larry Kelly began negotiations with the Mills to acquire this Parcel. At or about the time these negotiations were underway the City began to consider the so-called "Southwest Area Guide Plan", a revision to the master land use plan for the southwest portion of the City of Columbia. This plan underwent a number of revisions. The Staff first recommended that the Parcel in question be zoned medium density residential, or "R-3". However, substantial concerns were raised by persons concerning the "intense development" along Forum Boulevard, and the recommendation was subsequently amended to provide for "low density residential" development on the subject Parcel. At or about this point in time the City of Columbia entered into negotiations with J & W Land Company for a "land swap", under the terms of which J & W Land Company would convey to the City a portion of the Sunoo Property, and the City would convey to J & W Land Company a tract of land owned by the City, and abutting on Forum Boulevard, which borders the subject Parcel on the south. The "land swap" was negotiated, but the contract contained a zoning contingency, under the terms of which O-P rezoning or similar rezoning would have to be provided for the city-owned property, which would then be conveyed to J & W Land Company.

The City Planning and Zoning Commission recommended to the City Council that the subject property, the Parcel, be placed in a "low density residential" category, and that the city-owned property located immediately to the south of the subject parcel be placed in a similar zoning category. The Kellys' initial R-3/PUD rezoning request came before the Planning and Zoning Commission and the City Council at the same time when the master plan was being considered. The Planning and Zoning Commission initially recommended denial of the Kelly's rezoning request.

At the hearing before the City Council with respect to the master plan and the Kellys' rezoning request, it was pointed out to the City Council that the subject Parcel was virtually surrounded by more intense uses. Forum Boulevard is obviously a very high density, high use roadway. The Forum Shopping Center, which bears a C-3 zoning (the highest commercial zoning), is an intense use. It borders the subject property on the north. Virtually all of the property along Forum Boulevard, on the east side, had been previously placed in a commercial zoning category or an office zoning category, with the exception of the subject Parcel and the city-owned parcel. It appeared possible, if not in fact probable, that the city-owned property would also be placed in some sort of

office zoning category. Property located on the west side of Forum Boulevard, in the immediate vicinity of the subject parcel, had been previously zoned C-1 (southwest corner of Forum Boulevard and Chapel Hill Road). There is also C-3 zoning on the west side of Forum Boulevard, immediately to the north of the subject Parcel. The subject Parcel, therefore, was virtually surrounded by more intense uses, making it unsuitable for any sort of high quality, low density residential type development. The City Council apparently accepted these arguments and adopted the master plan, with a modification providing that the subject Parcel would be placed within a "medium density residential" classification under the terms of the plan. The parcel itself, however, continued to bear an A-1 zoning (agricultural). The master plan was passed on a 6 to 1 vote. The master plan, as passed, provided for a medium density residential classification for the subject Parcel.

Thereafter, the Kellys submitted their first preliminary planned unit development plan for "The Falls". Such plan was submitted on or about July 10, 1989, while the master plan continued to be considered by the Planning and Zoning Commission. This first preliminary plan, dated July 10, 1989 solicited some substantial adverse comments from the City's Planning and Zoning Department. Such plan was then withdrawn, primarily because of the Staff's comments about the high density character of the proposed development. The plan was revised and a revised plan was submitted October 9, 1989. There were a number of "intense" discussions between and among the Kellys and the City Staff concerning the second preliminary plan, the October 9, 1989 plan. It was there pointed out that the Planning and Zoning Commission had recommended "low density residential" (0 to 6 dwelling units per acre) on this site as a part of its master plan consideration. The City Staff, therefore, recommended denial of the plan. There were other adverse comments about the plan. It was there indicated that the "staff would support a revised version of the plan which does not exceed six dwelling units per acre". The matter was presented to the Planning and Zoning Commission at its meeting on November 9, 1989. The Commission voted 6 to 2 to recommend denial. The matter then came before the City Council on December 4, 1989, at which time the City Council considered both the southwest area guide plan and the Kellys' Preliminary PUD Plan. The council passed an ordinance adopting a master plan, which recommended that the subject property be used for medium density residential development. The vote was 6 to 1 in favor of this revised master plan. The City Council then immediately passed an ordinance approving the Kellys' October 9, 1989 Preliminary PUD Plan on a 5 to 2 vote. The ordinance dated December 4, 1989, Ordinance No. 012436, Council Bill No. B 352-89A (a copy of which is annexed hereto as Exhibit 1), provided that the City Council "hereby approves the preliminary planned unit development plan of The Falls . . . subject to the following conditions:

1. That additional parking be provided on the Final PUD Plan;

2. That turn lanes be provided on Forum Boulevard to the satisfaction of the Public Works Department;

3. That a storm water management plan be submitted with the Final PUD Plan;

4. That an additional point of ingress/egress be provided, and

5. That the disposition of the possible use of the sewer access road be worked out with the Public Works Department prior to approval of the Final PUD Plan."

This ordinance placed the property within Zoning District R-3/PUD, meaning that the preliminary plan constitutes an "overlay" on the zoning for the subject property. During the City Council arguments Councilman Rex Campbell, who subsequently became a major opponent, stated that "they were all in agreement that we should have something different than R-1". Councilpersons Loveless, Hutton, Campbell, Lynch, McCollum and Scheurich voted "yes" on the revised master plan, whereas Councilman Edwards voted no. With respect to the Preliminary PUD Plan Councilpersons Loveless, Hutton, Lynch, McCollum and Scheurich voted yes, whereas Councilmen Campbell and Edwards voted no. An ordinance was then adopted approving the land swap with J & W Land Company.

Thereafter the J & W Land Company tract (the former city-owned tract located to the south of the subject Parcel) was placed by the City Council within Zoning District O-P. At that time a requirement was imposed that a road be built, connecting Forum Boulevard to property to the east. It should be noted that, because of substantial opposition among the so-called "Katy Trail Advocates", the plans for this road had been subsequently revised so as to permit the road to be terminated well west of the trail.

At or about this point in time issues began to come up concerning the "landlocked property to the east, the so-called Sunoo Tract". It had initially been intended that this property would be accessed across the former City tract, which was swapped to J & W Land Company. However, the City Staff and the owners of Forum Shopping Center began to push for access to the east across the northern portion of the subject Parcel. It should be noted that Forum Shopping Center, which is pushing for this access, owns both the Sunoo Tract and the Forum Shopping Center Tract. It could access the Sunoo Property from Forum across its own land. Certainly, the Sunoo Property is not, as some have called it, "landlocked". The proposed access would require the construction of a street along the northern boundary line of the subject Parcel, which would connect property to the east of the subject parcel with Forum Boulevard. The Forum Shopping Center wanted this second access in order to provide additional access to the Forum Shopping Center property, and also to provide access to the "Sunoo Tract" to the east, which Forum Shopping Center was acquiring from J & W Land Company. Although the City Staff was requiring a second means of access to and egress from the subject parcel in connection with approval of the Preliminary PUD Plan, the Kellys did not want to build this street across their northern boundary, as it would, essentially, be of no use to the Kellys. The Kellys felt a second access could be placed onto Forum. Unfortunately, this street became a big issue.

The Kellys submitted their proposed Final PUD Plan for The Falls on or about December 14, 1989. At this point in time the Staff recommended that a "public street along the northernmost property line" be required, in order to provide for a second point of access to The Falls and in order to afford access to the "landlocked parcel" located directly east of The Falls, also known as the Sunoo Tract. The Staff report pointed out:

1. The requirement for this public street.

2. That the additional parking required by the Council's ordinance had been provided.

3. That the applicant had proposed a hiking trail surrounding the complex.

4. That the Staff recommended approval subject to:

a. Final platting of the property;

b. Submission of construction plans for off-site improvements;

c. That the applicant be responsible for providing left turn bays on Forum Boulevard;

d. That the street problem described above be resolved;

e. That a storm water management plan be submitted to the Public Works Department prior to the February 8 Planning and Zoning Commission meeting;

f. That a storm water management detention facility be constructed;

g. That certain other minimal requirements be satisfied.

Certain requirements for providing additional information were imposed and were satisfied. The matter first came before the City Council at the meeting of March 5, 1990, and the ordinance for the approval of the Final Plan was denied. The approved Preliminary Plan provided for 312 proposed units, or a gross density of 11.79 units per acre with on-site parking of 624 spaces, or two per unit. The proposed Final Plan provided for 312 units, or 11.79 units per acre, and 690 parking spaces, or 2.21 parking spaces per unit. Otherwise the proposed Final Plan conformed, substantially, to the approved Preliminary Plan. During the Council discussion on Council Bill 68-90, which occurred March 5, 1990 (virtually all of the discussions centered around "the street" (the street running along the north boundary line)). The Kellys were arguing that they should not be required to construct this street to serve someone else, when they didn't need the street. It appeared the street would only benefit the Forum

Shopping Center owners. The City Staff and the Forum Shopping Center representatives argued to the contrary. Discussion centered around requirements that the Forum Shopping Center and the Kellys cooperate in the construction of this street. A motion was first made to table the ordinance. It seems to me that about the only issue discussed was the street. The bill was defeated on a tie vote, with Councilpersons Scheurich, Hutton and Edwards voting yes and Councilpersons Loveless, Campbell and Lynch voting no. The Mayor, Ms. McCollum, was absent. The Kellys were left (as I would have been) with the distinct impression that the plan would be approved if the issue about the street could be resolved. Thereafter, the Kellys went ahead and purchased the Mills' property. They then entered into an agreement with the Forum Shopping Center people for the construction of the street and submitted a revised plan, accordingly. The revised plan came before the City Council on April 16, 1990. It was pointed out that it seemed that all of the requirements of the City Council had been satisfied, even the requirement for the street. It was further pointed out before a final plat could be approved an adequate erosion control program and storm water management plan and construction plan for the new road would have to be submitted. At this point in time the entire discussion seemed to center around:

A. The grading plan;

B. Concerns about erosion;

C. Concerns about the cutting down of trees;

D. Storm water management concerns;

E. Soil loss concerns;

F. Concerns about ecology/aesthetics, etc.;

G. Issues about "defoliation". [You will note the very negative comments by Councilman Schuster, all of which dealt with density issues (which seemed to have been dealt with before), beautification issues, etc.]

For some unknown reason this bill was defeated 7 to 0, even though the staff recommendation was for approval, subject to dedication of the right-of-way for the street along the north, and the submitting of a storm water management plan, erosion control measures, a site grading plan, and plans for off-site developments. The matter was defeated on April 16, 1990. Thereafter yet another proposed revised plan, the fourth plan, was submitted. This plan has never been submitted to the Planning and Zoning Commission or the City Council. This plan provided for 290 units, or 10.96 units per acre, with 621 parking spaces or 2.14 parking spaces per unit, and dealt with the future public street, second means of access and egress, and other issues. The plan also substantially conformed with the approved Preliminary Plan. The Staff made some comments, one of which was about the "trees" to be cut down. This plan has been placed on "hold".

The Kellys have now presented yet another Final PUD Plan. The original version of this Final Plan was dated August 9, 1990. This plan is substantially more specific and detailed than the other plans previously submitted. It includes not only a Final PUD Plan, but a grading plan, a storm water management and erosion control plan, and a landscape plan. It provides for a substantial planting of trees to replace trees which would be removed. Substantial forestation would be left on the site, undisturbed, and substantial reforestation would be provided. The revised plan provided for substantially less earth moving and site disturbance than did the earlier versions of the plan. The topography of the site will be substantially less affected by the proposed Final PUD Plan than had been the case with the earlier versions of the Final Plan. The plan provides for the granting of an easement for the road across the north edge of the property.

The August 9, 1990 version of the Final PUD Plan was submitted by the Kellys, and the City Staff recommended denial of that plan for (apparently) two reasons:

1. The proposed plan purportedly did not address the issue of access to the Sunoo property, even though, in the proposed plan, the Kellys did propose to dedicate right-of-way for the street to the Sunoo property and have proposed a willingness to pay for one-half the cost of construction of that street (provided only that the property owner to the north would be required to dedicate half of the right-of-way and to pay the balance of the cost of construction); and

2. Issues as to a permanent second access for the development had not been adequately addressed, even though the plan did show a proposed, permanent, second access, with a third access constructed to the public street (if the public street was built).

Apparently there were some misunderstandings, and we subsequently engaged in additional discussions with the City Staff in an effort to resolve the remaining issues. I believed that an agreement had been reached as to the manner in which these remaining issues should be resolved. I attach hereto, as Exhibit 2, a copy of my letter to Mr. Chuck Bondera of the Planning Department concerning the resolution of the issues.

Since the September 6 letter, Mr. Lowell Patterson, Director of Public Works, has dealt with the representatives of Forum Shopping Center, Ltd., which owns the property to the north, and it would appear that it is possible that the remaining issues with respect to the construction of the east and west running street, along the north boundary line of the Kelly property, can be resolved. Even though the street was not mentioned in the original ordinance which approved the Preliminary PUD Plan, the Kellys are willing to:

1. Dedicate right-of-way for the street, as a part of their plan;

2. Agree to contribute one-half the cost of construction of the street;

3. Agree to provide suitable letters of credit which will assure that they will pay their share of the cost of construction of the street;

4. Connect the Project to the street, as a second permanent access to and egress from the Project, when the street is built;

5. Eliminate from their plan (as they have done) the originally proposed second access and egress, which would be onto Forum Boulevard.

[The Kellys only want to be certain that they cannot be required to pay for more than one-half the cost of any part of the street, and that permits for their Development will not be held hostage to the street if Forum Shopping Center does not want or choose at the appropriate time to pay the remaining one-half of the cost. After all, Forum Shopping Center wants the street, not the Kellys. Its Sunoo Property will be accessed from their street. The Kellys don't need the street, and, at most, will use only the west 100 feet of the street.]

A revised Final PUD Plan, to such effect, has been presented to the City, and it is my understanding that this revised plan meets the requirements of the City Staff. It is my understanding that the City Staff endorses approval of the revised plan, subject, however, to a reservation expressed by it that the Commission might "determine that a revised preliminary plan and public hearing . . . are required." This caveat is not acceptable.

SUMMARY

In summary, the Kellys have presented, on at least four occasions, Final PUD Plans which satisfied all of the "conditions" for approval, as imposed by the ordinance which approved the Preliminary PUD Plan. With respect to later versions of the Final PUD Plan, the Kellys have satisfied additional requirements which were not imposed by such ordinance, including the requirement for the construction of a street along the north/south boundary line between the Kellys real estate and the Forum Shopping Center property, which will afford access to the Sunoo Tract. In addition, the Kellys have submitted landscaping plans, storm water management plans and erosion control plans, which, as I understand it, have all been reviewed and approved by the City Staff. It would seem, therefore, that every single requirement/condition which has even been mentioned by the City Council to date has been satisfied as follows:

1. All of the "conditions" for approval, as set forth in the original ordinance for approval of the Preliminary Plan have been satisfied;

2. The additional requirement/condition dealing with the public street has been satisfied;

3. The second access/egress for the project off of Forum Boulevard has been eliminated, and has been replaced by a second entrance, which will lead to the new east-west running public street, once that street is built;

4. The Kellys have dealt with the "aesthetic" requirements, which were last mentioned at the last City Council hearing, by revising the plan in order to minimize "site disturbance" and excavation, and in order to minimize the deforestation effects of the Project, and in order to provide for:

a. Storm water/erosion control and management; and

b. Reforestation by planting additional trees, as described in the landscaping plan.

Although the proposed Final PUD Plan does differ from the Preliminary Plan, as approved by the ordinance, the changes have been made to accommodate the requirements of the City Council and/or the City Staff and have not been changes initiated by the Kellys. The number of parking spaces has been substantially increased. The number of apartment units has been substantially reduced. The number of buildings has been reduced. There has been no increase in the number of buildings. Although the general locations of certain of the buildings have been moved, in order to accommodate the City Council's expressed concerns about site disturbance, excavation, deforestation, etc., there has been no increase in the number of buildings, and the Project certainly retains all of its substantial characteristics, as described in the Preliminary PUD Plan. The changes in the Preliminary Plan have been made to accommodate the City Council and the City Staff, not to accommodate the Kellys. Any changes would reasonably have to be considered as improvements. None of the changes affect the essential character of the Development.

CONTENTIONS

The Kellys contend:

1. To now require that they go back and subject themselves to two additional public hearings, in order to present a revised Preliminary PUD Plan, would be an absurd, arbitrary and capricious requirement, in view of the fact that the presented Final PUD Plan conforms, substantially, to the approved Preliminary PUD Plan, and in view of the fact that all of the changes made in the Final Plan, as compared to the Preliminary Plan, would certainly have to be considered to be improvements in the Preliminary Plan and have been made solely to accommodate the City Council's directions and the City Staff's directions, and not to accommodate the Kellys' desires; and

2. The Kellys have complied with all of the conditions for approval of the Final Plan, as described in the original ordinance, and have then complied with all additional requirements expressed by the City Council to date.

For each of the reasons hereinabove set forth the Kellys respectfully submit that the City is required as a matter of law to approve this proposed Final PUD Plan.

OUR CONCERNS

We are very concerned about the progress of the Kellys' Project and in the manner in which we perceive that the Kellys have been treated. We view, with alarm, some recent statements made by the Planning and Zoning Commission and/or various members of the City Council as follows:

1. Any change or deviation between a final plan and a preliminary plan is going to be viewed as a new "preliminary" plan, requiring that the developer go back through the public hearing procedures for the approval of a preliminary PUD plan, even though the changes may have been required by the City and would be considered by any reasonable person to represent substantial improvements in the preliminary plan; and

2. "PUD's are killing us" [one of the City Councilpersons recently made a statement to the effect that "this is just another example as to how PUD's are killing us"].

We have viewed, with alarm, the actions of the City Council in refusing to approve final PUD plans, which conform to the approved preliminary plan and which satisfy all expressed requirements for approval of the final plan. It appears to us that, in the Kellys' case (as well as certain other instances), the developer is presented with a situation as follows:

1. The developer has a preliminary plan approved, with certain conditions being announced in the approving ordinance for the approval of the final plan;

2. The developer then satisfies such conditions;

3. The proposed final plan is denied approval, nevertheless, and "additional requirements" (previously unstated) are stated;

4. The developer then meets these additional requirements;

5. The revised final plan is still not approved.

In other words, it seems that the developer is always confronted with "one more question", "one more requirement" and/or "one more problem". The developer can never "do enough" to get its final plan approved. The "one more problem" in the Kellys' case, may well be that they have made the changes in the Final Plan requested by the City Staff and the City Council, only to be confronted with an assertion that since the Final Plan has been revised it must now go back through the "preliminary plan" procedures. Whether the City Council, the City Staff or

anyone else likes the existing PUD ordinance, the Kellys and other persons are entitled to have that ordinance followed as it is written, and as it would be construed and enforced by Missouri courts. The Kellys simply request that they be held to the requirements of the existing ordinance, and not to the requirements of some ordinance as persons would like it to be.

I would also respectfully point out that on May 7, 1990 Mr. Beck agreed that the then effective Final PUD Plan (the one which provided for the street) could be presented without the necessity for going back through the preliminary plan procedures. I enclose a copy of Mr. Beck's letter to Pat Kelly of May 7, 1990 to such effect. Same is attached as Exhibit 3.

DISCUSSION AND ARGUMENT

A. General Statement of Facts. Pat and Larry Kelly ("Kelly") are seeking final approval of a revised PUD plan for the planned unit development, formerly known as "The Falls", and now known as "Katy Place", located on a tract of land located on the east side of Forum Boulevard in Columbia, Missouri. The parcel in question is bounded on the west by Forum Boulevard, a major public thoroughfare, on the north by the Forum Shopping Center, a heavy commercial development located within Zoning District C-3, on the east by generally undeveloped real estate known as the Sunoo Tract, which is currently zoned residential, and on the south by commercial and office developments. The property located on the west side of Forum Boulevard is currently zoned agricultural. Immediately to the south of the agricultural property is a commercial tract. Immediately to the north of the agricultural property is a tract that is commercially zoned real estate. The subject parcel is, therefore, bounded by a high traffic roadway, and by commercial and office development, and thus unsuitable for any sort of high quality, low-density residential type development.

The parcel in question is currently located within zoning district "R-3 Medium Density Multiple Family Dwelling" district. The zoning district is subject, however, to an "overlay" of a preliminary planned unit development plan for The Falls. Pursuant to ordinance number 012436, the City Council approved the Preliminary Plan subject to certain conditions. The Planning and Zoning Staff for the City of Columbia has recommended approval of the Final PUD Plan. Kelly has substantially complied with the requirements contained in the ordinance and has tried, on two separate occasions, to obtain the approval of the Final PUD Plan for The Falls. In each case, however, Kelly encountered objections from various interest groups and the City Council. The City Council has imposed additional requirements on Kelly as conditions to granting final approval, which additional conditions are not contained in Ordinance No. 012436. These conditions include the requirement that Kelly contribute a right-of-way for, and the cost of construction of, a public street to run along the north boundary line of the parcel. In addition, the City Council has objected to the "aesthetics" of the project, including the number of trees to be removed, the

amount of earth to be moved, and the alteration of the topography of the subject parcel.

Kelly has attempted to satisfy all requirements imposed by Ordinance No. 012436 and those subsequently discussed by the City Council. However, the City Council has continued to deny approval of Kelly's Final PUD Plan, despite the recommendation of the Planning and Zoning Commission that the plan be approved.

B. Discussion.

I. The City Council may not impose new conditions or amend the conditions of preliminary approval of the PUD plan so as to impose additional requirements on Kelly.

When Kelly submitted the revised Final PUD Plan to the City Council in April, 1990, Kelly had satisfied all requirements enumerated in Ordinance No. 012436 as conditions to approval of the Final PUD Plan. The City Council nevertheless denied approval of the Final PUD Plan and has imposed additional requirements not contained in Ordinance No. 012436.

Courts in other jurisdictions have held that municipalities have no power when reviewing PUD plans for final approval either to impose new conditions or to amend conditions of tentative approval so as to cast additional burdens on the developer. E.g., Hakim v. Board of Commissioners of the Township of O'Hara, 336 A.2d 1036 (Pa. Comm. Ct. 1976). In Hakim, the city council granted tentative approval of the developer's plan for an apartment house development subject to the developer's compliance with certain requirements, including a determination that the public sanitary sewer line on the tract would adequately serve the proposed apartment project. When the developer submitted the development plan for final approval, the city amended this condition to require that the developer install adequate sewer lines, despite testimony that the existing system was adequate.

The court construed the Pennsylvania Municipal Planning Code pertaining to tentative and final approval of development plans, and determined that the city, after consideration of the plan offered for tentative approval, could grant tentative approval outright, grant tentative approval subject to specified conditions, or could deny tentative approval. If the application for final approval included the drawings and other required materials and satisfied any conditions set forth in the official written communication at the time of tentative approval, it was the duty of the the municipality to grant final approval if the plan conformed to the ordinance and any conditions to tentative approval. Id. at 1311. The court concluded that the statute did not empower the municipality, without the agreement of the developer, to impose conditions to final approval additional to, different from or amendatory of conditions imposed upon tentative approval. See also, El Patio v. Permanent Rent Control Board of the City of Santa Monica, 168 Cal. Rptr. 276 (Cal. App. 1980), in which the court held that, pursuant to the California Subdivision Map Act, the city

could not impose additional conditions on the developer for final approval after conditional approval of a tentative subdivision map.

The facts of the present case are strikingly similar to those of Hakim. The City Council approved the Preliminary PUD Plan submitted by Kelly, subject to the satisfaction of certain requirements recommended by the Planning and Zoning Commission. The conditions to final approval enumerated in Ordinance No. 012436, however, did not include the requirements that the City Council now seeks to impose, specifically, that Kelly dedicate a street across the northern boundary of the subject parcel, propose a landscaping "beautification" scheme, implement an erosion control/stormwater management plan, or propose a plan for the reduction in site and topography disturbance and tree removal. Kelly has satisfied the requirements contained in Ordinance No. 012436 and the City Council cannot impose new conditions to final approval.

As in Hakim, Section 29-10 of the Columbia zoning code provides that the council, after a public hearing, "may approve, approve conditionally, or deny the preliminary PUD plan". The City Council should have determined whether and upon what specific conditions to approve the proposed PUD plan at the time the City Council acted on the Preliminary Plan and cannot continue to impose new conditions on Kelly. Section 29-10 does not empower the City Council to impose additional burdens on the developer once the Preliminary PUD Plan has been approved.

The City Council may point to Section 29-107(p) of the zoning code, which provides that "the commission and/or council may require other plans or data as it deems necessary to review a site". This provision, however, does not grant the City Council the right to impose additional requirements on the developer subsequent to preliminary approval of the plan, but only permits the City Council to review the developer's specific plans for landscaping and the location of sewers as approved in the Preliminary Plan.

II. The City Council has limited powers when reviewing the recommendations of the Planning and Zoning Commission to determine that the Final PUD Plan complies with the requirements contained in Ordinance No. 012436 granting preliminary approval of the PUD plan.

Generally, zoning ordinances creating a planned unit development enjoy the same presumption of validity as is generally accorded to zoning amendments. Sausalito v. County of Marin, 90 Cal. Rptr. 843 (Cal. App. 1970). However, the legislative body may not act in an arbitrary manner. Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970); Moore v. Boulder, 484 P.2d 134 (Colo. App. 1971). In granting a permit for a planned unit development, the legislative body must determine whether specified conditions have been satisfied by the landowner. If the determination of the municipality is classified as a legislative determination, the court will not interfere with the judgment of the legislative body absent a clear showing that the decision was arbitrary, capricious, unreasonable or involved an abuse of discretion. State ex rel Kolb v. County

Court of St. Charles County, 683 S.W.2d 318 (Mo. App. 1984). If, however, the determination of the municipality is characterized as administrative, a more exacting judicial inquiry is permitted to determine whether the decision is supported by competent and substantial evidence on the record. Aubuchon v. Gasconade County R-1 School District, 541 S.W.2d 322 (Mo. App. 1976).

The Colorado Supreme Court has held that where a city council reviews a planned unit development plan to determine whether the applicant has complied with the procedures specified by the applicable ordinance, the city council acts in the capacity of an adjudicative body and thus the reviewing powers of the city council are limited. Therefore, the court may review the record before the city council to determine whether evidence has been presented justifying the decision to deny the application. Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627 (Colo. 1973).

Missouri courts have not specifically addressed the city council's standard of review for a final PUD plan. However, Missouri courts have held that any reasonable doubt concerning the existence of a municipal power is construed against the city. Lancaster v. Atchison County, 180 S.W.2d 706 (Mo. 1944). A crucial test in distinguishing legislative acts from administrative acts is whether the action taken by the municipality (whether by resolution or ordinance) makes new law or executes a law already in existence. E. McQuillin, The Law of Municipal Corporations, Section 10.06 at 995 (3rd ed. 1986). A municipality's review of a final PUD plan is similar to the approval by a municipality of a subdivision plat, in which case the city acts in an administrative or ministerial capacity, as opposed to a discretionary legislative capacity. See Baynes v. Bank of Caruthersville, 185 S.W.2d 1051 (Mo. App. 1938); Better Built Homes & Mortgage Co. v. Nolte, 249 S.W. 743 (Mo. App. 1923).

It appears that a municipality acts in a ministerial capacity when reviewing a final PUD plan, particularly since the city council does not hold a public hearing at the time of such review, and the municipality's review is limited to determining whether the requirements enumerated in the ordinance approving the preliminary plan have been satisfied. If the final PUD plan conforms to the conditions contained in the ordinance granting preliminary approval, the city council has no discretion to deny approval of the plan or to impose new restrictions.

Whether the municipality acts in an administrative or legislative capacity, the municipality cannot act arbitrarily in denying a final PUD plan if the developer complies with all requirements of the zoning ordinances. Mullins v. City of Knoxville, 665 S.W.2d 393 (Tenn. App. 1983). In Mullins, the developer submitted plans for a PUD. The planning commission approved the PUD subject to the developer's compliance with certain conditions. When the developer submitted the revised PUD plan, the planning commission approved the plan. A community association that opposed the commercial development appealed the

decision of the planning commission to the city council. Following a hearing, the city council reversed the action of the planning commission.

The court of appeals noted that in reviewing the developer's application for approval of the commercial development the council does not act in a legislative capacity; rather, the council exercised its legislative function when it passed the ordinance. When determining whether the developer's PUD plan meets the standards of the ordinance the council exercises its administrative function. As an administrative body, the council's decision must be based on material evidence. Id. at 396.

The court stated that in order to sustain the action of an administrative tribunal, more than a glimmer of evidence is required, and the evidence must be of a substantial, material nature. Because the court found a commercial use would not have an adverse impact on the character of the surrounding neighborhood, and found that the developer had complied with all the requirements of the zoning ordinance, the court concluded that the city council had acted arbitrarily in denying approval of the developer's plan.

Similarly, in the present case, Kelly has complied with all of the requirements of the ordinance passed by the City granting approval of the Preliminary PUD Plan. In addition, the Planning Staff has recommended approval of the Final PUD Plan. Because the City Council, in reviewing the Final PUD Plan, will be acting n an administrative capacity, the City Council's review is limited to determining whether Kelly has satisfied the conditions of the ordinance approving the Preliminary Plan. The City Council will not make a new law, but will simply execute the existing ordinance in which the Preliminary Plan was approved subject to the satisfaction of certain requirements. However, even if the City Council were deemed to be acting in its legislative capacity, the City Council cannot act arbitrarily in denying approval of the plan since the Final Plan conforms with the conditions enumerated in Ordinance No. 012436.

III. The City's continued denial of approval of Kelly's Final PUD Plan unreasonably restricts the use of subject property so as to prevent any effective use of the property, and thus constitutes an invasion of Kelly's property rights under the due process provisions of the federal and state constitutions.

Missouri courts have consistently held that zoning which restricts property to a use for which it is not adapted is unreasonable and constitutes an invasion of the owner's property rights. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. 1981); Ewing v. City of Springfield, 449 S.W.2d 681 (Mo. App. 1970). In addition, property may not be zoned so as to prevent any effective use, as such a regulation becomes an unlawful confiscation. Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. App. 1977); Ogawa v. City of Des Peres, 745 S.W.2d 238 (Mo. App. 1988). Finally, a refusal to rezone based upon a desire to benefit or refrain from injuring a few adjacent landowners is not

substantially related to the public interest and cannot be justified on that bases. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963).

In Despotis v. City of Sunset Hills, supra, a landowner brought an action challenging the city's refusal to rezone property from residential to commercial. The owner showed that development of her property under continued residential zoning was not economically feasible, that the property fronted on a heavily trafficked, commercial thoroughfare, and that the owner's adjacent parcel was used for commercial purposes. Expert testimony also established that the commercial value of the property would far exceed the residential value.

The court found that the owner had rebutted the presumption that the continuation of the residential zoning was reasonable, and that the clear detriment to the owner's private interest by the continued residential zoning of the property outweighed the public interest served by maintaining the residential zoning. The court concluded that to continue the residential zoning for the tract in question would be unreasonable, arbitrary and a violation of the owner's constitutional rights.

In the present case, the approved Preliminary PUD Plan imposes an "overlay district" on the subject parcel. Therefore, the parcel is located within a "PUD Zoning District", with an underlying R-3 zoning classification, and subject to the Preliminary PUD Plan. The parcel in question cannot be developed in any manner whatsoever without either a change in zoning or the approval of the Final PUD Plan. In addition, the parcel is located within a heavily trafficked, commercial area. There would be no adverse impact on adjacent landowners upon the development of the subject parcel. While the adjacent parcel to the east, the Sunoo Tract, may be landlocked upon the development of the Kelly parcel, the Sunoo Tract has been projected as a buffer zone for the Katy Trail and may never be developed. Moreover, the owner of the Forum Shopping Center tract that abuts the subject parcel to the north, also owns the Sunoo Tract, and thus can provide alternative access to the Sunoo Tract through the Forum Shopping Center Tract. By continuing to deny approval of the Final PUD Plan even though the Final PUD Plan submitted by Kelly conforms with all requirements contained in Ordinance No. 012436 approving the Preliminary PUD Plan, the City Council will be denying Kelly the right to use the subject property in any effective manner in violation of the state and federal constitutions.

IV. The Kellys had a reasonable expectation, once their Preliminary PUD Plan was approved, that a Final PUD Plan which comported with such Preliminary Plan and which satisfied the expressed requirements for the approval of the Final Plan would be approved, and acted, accordingly, in purchasing the Parcel.

Missouri law provides that once a zoning ordinance has been enacted, those purchasing property affected by such ordinance have the right to rely on the belief that the ordinance will not be changed unless required for the public good. Allen v. Coffel, 488 S.W.2d 671 (Mo. Ct. App. 1972). Furthermore, a

refusal to rezone property simply to benefit a few adjacent property owners is not related to the public interest and such refusal cannot be justified on that basis. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. Ct. App. 1981). We would further point out that here, the City has required that the Kellys dedicate a road and contribute to the cost of construction of that road, even though that road has no relationship whatsoever to the Kellys' Project. That road is being required by the City to serve property to the east of the Kellys' property, not to serve the Kellys' property. In other words, the requirement for the road is being imposed on the Kellys, not because of any additional burden imposed on the City by the Kellys' Project, but rather because of the desire to serve the property to the east. The proposed road does not benefit the Kelly tract, but benefits only the property located to the north (the Forum Shopping Center property), and the property located to the east, the Sunoo property, which is also owned by the Forum Shopping Center people. In other words, the Kellys are being required to contribute (without compensation), right-of-way for a road, and to pay one-half the cost of construction of that road, even though that road benefits, in its entirety, property located to the north and east of the Kelly real estate, all of which such property is owned by another single owner, the Forum Shopping Center. The Kellys are, nevertheless, willing to contribute one-half the right-of-way for the road and to pay one-half the cost of construction of the road, even though they do not believe they can be legally required to do so. Missouri courts generally hold that where a proposed development increases the needs of the county or the municipality, the cost of meeting those needs may reasonably be required of the developer. Home Builders Assn. of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832 (Mo. banc. 1977). However, such costs must bear a reasonable relationship to the activities of the developer. State of Missouri ex rel Noland v. St. Louis County, 478 S.W.2d 368 (Mo. 1972).

In Noland, a developer sought a writ of mandamus compelling the county to approve a preliminary plat of a proposed subdivision. The county required that, as a condition to the approval of the landowner's preliminary plat, the developer provide a sixty foot right-of-way running diagonally through the subdivision tract, that the developer widen and pave another road, and that the developer install street lights along both roads. The landowners claimed that the conditions violated the constitutional prohibition against the taking of private property without payment of just compensation. The court noted that the county possess the constitutional authority to exercise legislative power pertaining to the planning and zoning. However, the court found no authority requiring the relocation of the road under the zoning ordinance. The court concluded that the requirements imposed by the court were not reasonably related to the activity of the developer and that if such improvements were needed, the need was not generated by the creation of the proposed subdivision. See, also, Home Builders Assn. of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977).

Recently, the United States Supreme Court considered an issue similar to that presented in the present case in Nollan v. California Coastal Commission,

107 S.Ct. 3141 (1987). In Nollan, the California Coastal Commission granted a building permit to a landowner for purposes of constructing a larger home upon the landowner's beachfront property, upon the condition that the landowner allow the public an easement to pass across the landowner's beach. The Coastal Commission claimed that the new house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would create a "psychological barrier" to the public's access to the beach. The landowners claimed that the imposition of the condition violated the takings clause of the Fifth Amendment.

The Court stated that the government's power to forbid particular land uses in order to advance some legitimate police power purpose includes the power to condition such use upon some concession by the landowner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced by the governing body as the justification for prohibiting the use. The Court reasoned that had the Coastal Commission attached to the building permit some condition that would have protected the public's ability to see the beach, notwithstanding the construction of a new home, so long as the Coastal Commission could have exercised its police power to forbid construction of the house altogether, the imposition of the condition would be constitutional. The court concluded that, unless the permit condition serves the same governmental purpose as would a development ban, the building restriction is not a valid regulation of land use. The Court held that the Coastal Commission could advance its interest in providing public access to the beach pursuant to its power of eminent domain and that if the Coastal Commission wanted an easement across the landowner's property, the Coastal Commission must pay for it.

In the present case, the City has required that, as a condition to the approval of the Kellys' Final PUD Plan, that a public street along the northernmost property line of the parcel in question be constructed in order to provide for a second point of access to The Falls, and to afford access to the landlocked parcel located directly east of The Falls, which parcel, known as the Sunoo Tract, is now owned by Forum Shopping Center. The Kellys' contend that this second point of access is not necessary for the use of The Falls/Katy Place. The Forum Shopping Center and The Falls/Katy Place already has adequate means of ingress and egress. Moreover, there is some question as to whether the Sunoo Tract will ever be developed, as it has been proposed that the Sunoo Tract be used as a buffer for the Katy Recreational Trail. If the Sunoo Tract is ultimately required as a buffer by the City or the Missouri Conservation Commission, then the Sunoo Tract will never be developed and thus the road now required by the City would serve no purpose. The condition that the Kellys dedicate and/or construct such a road does not appear to advance any governmental purpose whatsoever. The City's requirement that such a road be constructed bears no reasonable relationship to the use of The Falls/Katy Place, and consequently, the Kellys should be compensated for a roadway easement granted by them or any road construction performed by them.

The above statements notwithstanding, the Kellys have agreed and do agree to provide the right-of-way for the road and to pay one-half the cost of construction of the road, even though they view the requirement for this road as being a requirement not properly imposed upon them and as being an arbitrary and capricious requirement.

I would also respectfully call your attention to the decision in William Jack Jones v. City of Fort Smith, 731 F.Supp. 912. There, the plaintiff, who owned a gas station on a city street, applied for a building permit to construct a convenience grocery store on his property. As a condition of granting the building permit the city insisted that the plaintiff grant an easement to the city for widening the street. The plaintiff refused, arguing that this was an unlawful taking of private property, without payment by the city. The city attorney replied that the easement was necessary to widen the street because the plaintiff's proposed new building and business would attract more traffic. The plaintiff sued the city for a mandatory injunction requiring the granting of the building permit, without requiring that he give to the city a free easement to widen the street. The federal district court sided with the property owner, the plaintiff. The court concluded that under the Fifth Amendment to the United States Constitution a governmental agency cannot take property for public use without payment. The court further concluded that the easement demanded by the city in return for the building permit was a public use that required payment. The court additionally concluded that while the city could tax the plaintiff to recoup cost of the city of any extra traffic generated by the plaintiff's business activities, the city had not proved any added net traffic. In our opinion, the 1990 decision in William Jack Jones v. City of Fort Smith, supra, stands for the proposition that the City, in this instance, cannot reasonably require that the Kellys provide the right-of-way for this public street or contribute to the cost of construction of this street. Nevertheless, the Kellys are willing to do so and hereby agree to do so (and have by their plan agreed to do so). If, however, this plan is not approved, then the Kellys would reserve the right (and do reserve the right) to litigate the requirement that they provide and pay for this public street, which will benefit only the owners of the Forum Shopping Center property located to the north and east of the Kellys property.

V. Approving Final PUD Plan is akin to approval of subdivision plat, which is an administrative/ministerial function as opposed to a discretionary/ legislative function.

We note that public hearings for approval of the Final PUD Plan are not required. The PUD ordinance, therefore, strongly implies that the functions of the Planning and Zoning Commission and City Council in the approval of the Final PUD Plan are ministerial/administrative, as opposed to discretionary/legislative functions. As you well know, the authority of a city to deny approval of a subdivision plat which complies with all applicable legal requirements is limited. As a rule, the review of subdivision plats constitutes a ministerial action enforceable through mandamus actions.

VI. Kellys' plan is simply being held hostage to City Council's concerns about planned unit developments generally.

I would respectfully point out that, in this case, the Kellys property is being "held hostage", in that it cannot, under the PUD ordinance, be used at all, for any purpose whatsoever, until the Final PUD Plan is approved. The Preliminary PUD Plan constitutes an "overlay" on the Kelly property. The terms of this overlay are such that the property cannot be used until the Final Plan is approved or the Preliminary Plan is vacated. The Kellys' Property, therefore, in its present state (without the approval of a final plan) is unusable. To deny the Kellys the use of their property by continually imposing additional, previously unstated requirements for approval of the Final Plan, would (in our opinion), on its face, be arbitrary and capricious and an unreasonable denial of zoning. In zoning the City Council is exercising a legislative power, but such power is not unlimited. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. E.D. 1981). The City cannot act "unreasonably" in denying zoning. State Ex Rel Kolb v. County Court of St. Charles County, 683 S.W.2d 318 (Mo. App. E.D. 1984). While in reviewing a zoning decision the court may be required to presume that the zoning decision is valid (State Ex Rel Kolb v. County Court of St. Charles County, supra), and, generally, courts, in reviewing zoning decisions, are limited to determining whether the decision is supported by competent and substantial evidence and is not unreasonable (State Ex Rel Kolb v. County Court of St. Charles County, supra, and Westlake Quarry and Material Co. v. City of Bridgeton, 761 S.W.2d 749, App. after remand 776 S.W.2d 904 (Mo. App. 1988)), it would seem that, in this case, a continued failure to deny approval of a final PUD plan would be unreasonable, or would be arbitrary and capricious and would be an unconstitutional taking of the Kellys' property, without compensation. Please note:

1. The fact the property cannot be used at all unless a final PUD plan is approved;

2. The City's master plan, which was recently amended and updated, projects this use for medium density residential use (and the underlying R-3 zoning conforms with this plan);

3. The property is so situated as to make it ill suited for other, "lighter" uses, by virtue of its proximity to the heavily traveled public road, and surrounding zoning and uses;

4. A preliminary plan for the intended use has been approved.

As noted above, once a zoning ordinance is enacted (and in this case a zoning ordinance was enacted placing the Kellys' property in the R-3, PUD zone) the property owners have the right to rely on the belief that the ordinance will not be changed. Allen v. Coffel, supra. A refusal to rezone simply to benefit a few adjacent property owners is not related to the public interest and cannot be justified on that basis. Despotis v. City of Sunset Hills, supra. A

continued denial to the Kellys of a right to use their property by continuing to arbitrarily and capriciously deny them approval of the Final PUD Plan which is required for their use of the property would constitute an unconstitutional taking of the Kellys property, without compensation. In this respect we respectfully call your attention to the decision of the United States Supreme Court in Nollan v. California Coastal Commission, supra.

SUMMARY

In summary, we respectfully suggest to you (and through, you to the City Council and City Planning and Zoning Commission) that the Kellys have a right to have their proposed Final PUD Plan approved as a matter of law, and that a continued denial of such approval would constitute an arbitrary and capricious action on the part of the City Council, and the failure by the City Council to perform a ministerial/administrative act which the City Council has a legal obligation to perform, and an unconstitutional taking of the Kellys' property without compensation, as prohibited by the Constitutions of the United States and the State of Missouri and the applicable amendments thereto.

We would respectfully ask that you discuss this matter with the City Council and City Planning and Zoning Commission and advise them of their obligations.

Thank you for your courteous attention to this matter.

Sincerely yours,

B. Daniel Simon

BDS/bjh
Enclosures

cc: Mr. Pat Kelly
Mr. James W. Brush

Attachments:
Memorandum from Michael Lazaroff
Exhibit 1 - Ordinance No. 012436 of 12/4/89
Exhibit 2 - Letter to Chuck Bondera of 9/6/90
Exhibit 3 - Letter from Mr. Beck to Pat Kelly of 5/7/90

THOMPSON & MITCHELL

MEMORANDUM

TO: B. Daniel Simon

FROM: Michael Lazaroff

DATE: September 25, 1990

RE: Kelly Real Estate/The Falls

FACTS

The purpose of this memorandum is to present additional arguments to be made to the City Council of the City of Columbia ("City Council") at the October 1, 1990 meeting, at which Pat and Larry Kelly will submit the final planned unit development ("PUD") for The Falls for approval. This memorandum supplements my letter dated September 6, 1990.

Pat and Larry Kelly ("Kelly") are seeking final approval of a revised PUD plan for the planned unit development, formerly known as "The Falls", and now known as "Katy Place," located on a tract of land located on the east side of Forum Boulevard in Columbia, Missouri. The parcel in question is bounded on the west by Forum Boulevard, a major public thoroughfare, on the north by the Forum Shopping Center, a heavy commercial development located within Zoning District C-3, on the east by generally undeveloped real estate known as the Sunoo Tract, which is currently zoned residential, and on the south by commercial and office developments. The property located on the west side of Forum Boulevard is currently zoned agricultural. Immediately to the south of the agricultural property is a commercial tract. Immediately to the north of the agricultural property is a tract that is commercially zoned real estate. The subject parcel is,

therefore, bounded by a high traffic roadway, and by commercial and office development, and thus unsuitable for any sort of high quality, low-density residential type development.

The parcel in question is currently located within zoning district "R-3 Medium Density Multiple Family Dwelling" district. The zoning district is subject, however, to an "overlay" of a preliminary planned unit development plan for The Falls. Pursuant to ordinance No. 012436, the City Council approved the preliminary plan subject to certain conditions. The Planning and Zoning Commission for the City of Columbia ("Planning and Zoning Commission") has recommended approval of the final PUD plan. Kelly has substantially complied with the requirements contained in the ordinance and has tried, on two separate occasions, to obtain the approval of the final PUD plan for The Falls. In each case, however, Kelly encountered objections from various interest groups and the City Council. The City Council has imposed additional requirements on Kelly as conditions to granting final approval, which additional conditions are not contained in Ordinance No. 012436. These conditions include the requirement that Kelly contribute a right-of-way for, and the cost of construction of, a public street to run along the north boundary line of the parcel. In addition, the City Council has objected to the "aesthetics" of the project, including the number of trees to be removed, the amount of earth to be moved, and the alteration of the topography of the subject parcel.

Kelly has attempted to satisfy all requirements imposed by Ordinance No. 012436 and those subsequently discussed by the

City Council. However, the City Council has continued to deny approval of Kelly's final PUD plan, despite the recommendation of the Planning and Zoning Commission that the plan be approved.

DISCUSSION

I. The City Council may not impose new conditions or amend the conditions of preliminary approval of the PUD plan so as to impose additional requirements on Kelly.

When Kelly submitted the revised final PUD plan to the City Council in April, 1990, the Planning and Zoning Commission recommended approval of the plan, since Kelly had satisfied all requirements enumerated in Ordinance No. 012436 as conditions to approval of the final PUD plan. The City Council nevertheless denied approval of the final PUD plan and has imposed additional requirements not contained in Ordinance No. 012436.

Courts in other jurisdictions have held that municipalities have no power when reviewing PUD plans for final approval either to impose new conditions or to amend conditions of tentative approval so as to cast additional burdens on the developer. E.g., Hakim v. Board of Commissioners of the Township of O'Hara, 336 A.2d 1036 (Pa. Comm. Ct. 1976). In Hakim, the city council granted tentative approval of the developer's plan for an apartment house development subject to the developer's compliance with certain requirements, including a determination that the public sanitary sewer line on the tract would adequately serve the proposed apartment project. When the developer submitted the development plan for final approval, the city amended this

condition to require that the developer install adequate sewer lines, despite testimony that the existing system was adequate.

The court construed the Pennsylvania Municipal Planning Code pertaining to tentative and final approval of development plans, and determined that the city, after consideration of the plan offered for tentative approval, could grant tentative approval outright, grant tentative approval subject to specified conditions, or could deny tentative approval. If the application for final approval included the drawings and other required materials and satisfied any conditions set forth in the official written communication at the time of tentative approval, it was the duty of the municipality to grant final approval if the plan conformed to the ordinance and any conditions to tentative approval. Id. at 1311. The court concluded that the statute did not empower the municipality, without the agreement of the developer, to impose conditions to final approval additional to, different from or amendatory of conditions imposed upon tentative approval. See also, El Patio v. Permanent Rent Control Board of the City of Santa Monica, 168 Cal. Rptr. 276 (Cal. App. 1980), in which the court held that, pursuant to the California Subdivision Map Act, the city could not impose additional conditions on the developer for final approval after conditional approval of a tentative subdivision map.

The facts of the present case are strikingly similar to those of Hakim. The City Council approved the preliminary PUD plan submitted by Kelly, subject to the satisfaction of certain requirements recommended by the Planning and Zoning Commission. The conditions to final approval enumerated in Ordinance No.

012436, however, did not include the requirements that the City Council now seeks to impose, specifically, that Kelly dedicate a street across the northern boundary of the subject parcel, propose a landscaping "beautification" scheme, implement an erosion control/stormwater management plan, or propose a plan for the reduction in site and topography disturbance and tree removal. Kelly has satisfied the requirements contained in Ordinance No. 012436 and the City Council cannot impose new conditions to final approval.

As in Hakim, Section 29-10 of the Columbia zoning code provides that the council, after, a public hearing, may approve, approve conditionally, or deny the preliminary PUD plan". The City Council should have determined whether and upon what specific conditions to approve the proposed PUD plan at the time the City Council acted on the preliminary plan and cannot continue to impose new conditions on Kelly. Section 29-10 does not empower the City Council to impose additional burdens on the developer once the preliminary PUD plan has been approved.

The City Council may point to Section 29-107(p) of the zoning code, which provides that "the commission and/or council may require other plans or data as it deems necessary to review a site." This provision, however, does not grant the City Council the right to impose additional requirements on the developer subsequent to preliminary approval of the plan, but only permits the City Council to review the developer's specific plans for landscaping and the location of sewers as approved in the preliminary plan.

II. The City Council has limited powers when reviewing the recommendations of the Planning and Zoning Commission to determine that the final PUD plan complies with the requirements contained in Ordinance No. 92436 granting preliminary approval of the PUD plan.

Generally, zoning ordinances creating a planned unit development enjoy the same presumption of validity as is generally accorded to zoning amendments. Sausalito v. County of Marin, 90 Cal. Rptr. 843 (Cal. App. 1970). However, the legislative body may not act in an arbitrary manner. Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970); Moore v. Boulder, 484 P.2d 134 (Colo. App. 1971). In granting a permit for a planned unit development, the legislative body must determine whether specified conditions have been satisfied by the landowner. If the determination of the municipality is classified as a legislative determination, the court will not interfere with the judgment of the legislative body absent a clear showing that the decision was arbitrary, capricious, unreasonable or involved an abuse of discretion. State ex rel Kolb v. County Court of St. Charles County, 683 S.W.2d 318 (Mo. App. 1984). If, however, the determination of the municipality is characterized as administrative, a more exacting judicial inquiry is permitted to determine whether the decision is supported by competent and substantial evidence on the record. Aubuchon v. Gasconade County R-1 School District, 541 S.W.2d 322 (Mo. App. 1976).

The Colorado Supreme Court has held that where a city council reviews a planned unit development plan to determine whether the applicant has complied with the procedures specified by the applicable ordinance, the city council acts in the capacity of

an adjudicative body and thus the reviewing powers of the city council are limited. Therefore, the court may review the record before the city council to determine whether evidence has been presented justifying the decision to deny the application. Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627 (Colo. 1973).

Missouri courts have not specifically addressed the city council's standard of review for a final PUD plan. However, Missouri courts have held that any reasonable doubt concerning the existence of a municipal power is construed against the city. Lancaster v. Atchison County, 180 S.W.2d 706 (Mo. 1944). A crucial test in distinguishing legislative acts from administrative acts is whether the action taken by the municipality (whether by resolution or ordinance) makes new law or executes a law already in existence. E. McQuillin, The Law of Municipal Corporations, § 10.06 at 995 (3rd ed. 1986). A municipality's review of a final PUD plan is similar to the approval by a municipality of a subdivision plat, in which case the city acts in an administrative or ministerial capacity, as opposed to a discretionary legislative capacity. See Baynes v. Bank of Caruthersville, 1185 S.W.2d 1051 (Mo. App. 1938); Better Built Homes & Mortgage Co. v. Nolte, 249 S.W. 743 (Mo. App. 1923).

Arguably, a municipality acts in a ministerial capacity when reviewing a final PUD plan, particularly since the city council does not hold a public hearing at the time of such review, and the municipality's review is limited to determining whether the requirements enumerated in the ordinance approving the preliminary plan have been satisfied. If the final PUD plan conforms to the

conditions contained in the ordinance granting preliminary approval, the city council has no discretion to deny approval of the plan or to impose new restrictions.

Whether the municipality acts in an administrative or legislative capacity, the municipality cannot act arbitrarily in denying a final PUD plan if the developer complies with all requirements of the zoning ordinance. Mullins v. City Of Knoxville, 665 S.W.2d 393 (Tenn. App. 1983). In Mullins, the developer submitted plans for a PUD. The planning commission approved the PUD subject to the developer's compliance with certain conditions. When the developer submitted the revised PUD plan, the planning commission approved the plan. A community association that opposed the commercial development appealed the decision of the planning commission to the city council. Following a hearing, the city council reversed the action of the planning commission.

The court of appeals noted that in reviewing the developer's application for approval of the commercial development the council does not act in a legislative capacity; rather, the council exercised its legislative function when it passed the ordinance. When determining whether the developer's PUD plan meets the standards of the ordinance the council exercises its administrative function. As an administrative body, the council's decision must be based on material evidence. Id. at 396.

The court stated that in order to sustain the action of an administrative tribunal, more than a glimmer of evidence is required, and the evidence must be of a substantial, material nature. Because the court found a commercial use would not have an

adverse impact on the character of the surrounding neighborhood, and found that the developer had complied with all the requirements of the zoning ordinance, the court concluded that the city council had acted arbitrarily in denying approval of the developer's plan.

Similarly, in the present case, Kelly has complied with all of the requirements of the ordinance passed by the City granting approval of the preliminary PUD plan. In addition, the Planning and Zoning Commission has recommended approval of the final PUD plan. Because the City Council, in reviewing the final PUD plan, will be acting in an administrative capacity, the City Council's review is limited to determining whether Kelly has satisfied the conditions of the ordinance approving the preliminary plan. The City Council will not make a new law, but will simply execute the existing ordinance in which the preliminary plan was approved subject to the satisfaction of certain requirements. However, even if the City Council were deemed to be acting in its legislative capacity, the City Council cannot act arbitrarily in denying approval of the plan since the final plan conforms with the conditions enumerated in Ordinance No. 012436.

III. The city's continued denial of approval of Kelly's final PUD plan unreasonably restricts the use of subject property so as to prevent any effective use of the property, and thus constitutes an invasion of Kelly's property rights under the due process provisions of the federal and state constitutions.

Missouri courts have consistently held that zoning which restricts property to a use for which it is not adapted is unreasonable and constitutes an invasion of the owner's property rights. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. 1981); Ewing v. City of Springfield, 449 S.W.2d 681 (Mo. App.

1970). In addition, property may not be zoned so as to prevent any effective use, as such a regulation becomes an unlawful confiscation. Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. App. 1977); Ogawa v. City of Des Peres, 745 S.W.2d 238 (Mo. App. 1988). Finally, a refusal to rezone based upon a desire to benefit or refrain from injuring a few adjacent landowners is not substantially related to the public interest and cannot be justified on that basis. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963).

In Despotis v. City of Sunset Hills, supra, a landowner brought an action challenging the city's refusal to rezone property from residential to commercial. The owner showed that development of her property under continued residential zoning was not economically feasible, that the property fronted on a heavily trafficked, commercial thoroughfare, and that the owner's adjacent parcel was used for commercial purposes. Expert testimony also established that the commercial value of the property would far exceed the residential value.

The court found that the owner had rebutted the presumption that the continuation of the residential zoning was reasonable, and that the clear detriment to the owner's private interest by the continued residential zoning of the property outweighed the public interest served by maintaining the residential zoning. The court concluded that to continue the residential zoning for the tract in question would be unreasonable, arbitrary and a violation of the owner's constitutional rights.

In the present case, the approved preliminary PUD plan imposes an "overlay district" on the subject parcel. Therefore, the parcel is located within a "PUD Zoning District", with an underlying R-3 zoning classification, and subject to the preliminary PUD plan. The parcel in question cannot be developed in any manner whatsoever without either a change in zoning or the approval of the final PUD plan. In addition, the parcel is located within a heavily trafficked, commercial area. There would be no adverse impact on adjacent landowners upon the development of the subject parcel. While the adjacent parcel to the east, the Sunoo Tract, may be landlocked upon the development of the Kelly parcel, the Sunoo Tract has been projected as a buffer zone for the Katy Trail and may never be developed. Moreover, the owner of the Forum Shopping Center tract that abuts the subject parcel to the north, also owns the Sunoo Tract, and thus can provide alternative access to the Sunoo tract through the Forum Shopping Center Tract. By continuing to deny approval of the final PUD plan even though the final PUD plan submitted by Kelly conforms with all requirements contained in Ordinance No. 012436 approving the preliminary PUD plan, the City Council will be denying Kelly the right to use the subject property in any effective manner in violation of the state and federal constitutions.

hm124

MEMORANDUM

TO: File
FROM: Dan Simon
RE: J & W Land Company/Executive Committee Trust/Harris Bank Trust No. 5384
Highpointe Phase III, Planned Unit Development, Approval of Final Plat
DATE: 7-12-91

STATEMENT

Executive Committee Trust, Harris Bank Trust No. 5384 is the contract purchaser of a tract of real estate ("the Parcel"), which it has contracted to purchase from present owner, J & W Land Company, a Missouri corporation ("the Owner"). The Parcel is located in Columbia, Boone County, Missouri, and constitutes part of that larger tract of land ("the Tract") which was the subject matter of the preliminary planned unit development plan ("the Preliminary Plan" or "the Preliminary PUD Plan") for that development originally known as "The Meadows" hereinafter described. The Tract and the Parcel are located within the boundaries of the City of Columbia, Missouri, a municipal corporation of the State of Missouri ("the City"), and are subject to the requirements of the zoning codes and ordinances ("the Zoning Code") and the subdivision code and ordinances ("the Subdivision Code") of the City.

The City, as a part of the Zoning Code, has adopted an ordinance permitting the development of so-called "Planned Unit Developments" ("PUDs"). The original PUD ordinance was adopted sometime in the earlier 1970's. The original PUD ordinance, and all revisions thereof and the current PUD ordinance, have each provided that the PUD zoning district is an "overlay district", which "is intended to provide innovative housing developments", by promoting flexibility in the design and location of structures, the efficient use of land, and the preservation of existing landscaping features and amenities. Each of the versions of the PUD ordinances has, therefore, permitted deviations from the normal development standards and criteria otherwise imposed by the Zoning Code and the Subdivision Code upon conventional developments. For example, in a PUD, single family dwellings can be attached to each other, without side yard separation; whereas in a conventional single family residential development side yard separations are required. Deviations from development standards and criteria are customarily permitted in PUDs.

The PUD ordinance has required and requires that the developer submit plans to the City for review and approval by the City. The approval process has involved and involves three stages, which have been and are as follows:

i. A concept review stage, during which the developer meets with representatives of the City's professional zoning staff and other representatives of the City's professional staff ("the City Staff"), to discuss the proposed development, the intended land uses, the development concepts, the regulations applicable to the proposed land use, and any other concerns which might be raised by the developer or the City Staff;

ii. A preliminary PUD plan stage ("the Preliminary PUD Plan"), where the developer submits a Preliminary Plan ("the Preliminary PUD Plan") which shows, among other things, the existing topography of the site, the approximate size, location and arrangement of proposed buildings, proposed location of parking areas, streets and drives and the approximate location of any existing or proposed rights-of-way, the location, size and types of various utilities, the types of dwelling units and other uses and proposed density of the development, the existing and proposed pedestrian circulation, a general description of proposed landscaping areas, and other features of the development. [Approval of the PUD Plan is required, before the development can go forward. The Preliminary PUD Plan is first submitted to the Planning and Zoning Commission ("the Commission") for its review and recommendation. The Commission is required to hold a public hearing, and after hearing, is required to forward to the City Council of the City ("the City Council") its recommendation for the granting or withholding of approval of the Preliminary PUD Plan, together with any recommended conditions for such approval. After receiving such recommendation the City Council is required to hold a public hearing, and to then approve, approve conditionally or deny approval of the Preliminary PUD Plan.]

iii. Assuming the Preliminary PUD Plan is approved, the developer is then required to submit a Final PUD Plan, which comports, substantially, with the Preliminary Plan, but which shows, in greater detail and precision, among other things, the location of the boundary lines of the site, the specific location of buildings, the specific location and number of parking spaces, drives, walkways and parking ratios, the location and width of existing and proposed streets rights-of-way, alleys, etc.; the location, size and type of sewers and utilities; the dwelling types, other uses and proposed density of the development, and other information pertaining to the proposed development. [This Plan must be submitted to the Commission for recommendation to the Council. The City Council then grants or withholds approval of same.]

Under the PUD ordinance, therefore, the stages for approval are, have been and continue to be the concept review stage, the Preliminary PUD Plan stage, and the Final PUD Plan ("the Final PUD Plan") stage. The PUD ordinance has at all times provided, and provides, that a "Preliminary PUD Plan shall be binding upon the owners, their heirs and assigns until such time as the Council (the City Council) may release such limitations on the use of the subject property . . ." under the procedures provided in the PUD ordinance; meaning that, once a Preliminary PUD Plan is approved the property which is the subject matter of such Plan can be used only in the manner provided for by such Plan, until such time as the property is released from such Plan. The PUD Plan ("the Plan") therefor, becomes an "overlay" on the property, which dictates the use of the property, and which describes the only use which may be made of the property until the Plan is revised or the property is released from the Plan by the City Council.

The land use regulations of the City have at all relevant times contained two primary components, the Zoning Code referred to above (of which the PUD ordinance is a part), and the Subdivision Code. The stated purpose of the Subdivision Code, as adopted by the City, is to regulate and control the subdivision (the division) of land within the corporate limits of the City in order to provide for the safe, orderly and economic use of transportation, the

facilitation of orderly layout and use of land, the insuring of proper legal description and monumenting of subdivided land, and other desirable public purposes. Generally, before any building or structure can be placed on any land within the City, a building permit must issue from the City, and for such building permit to issue, a number of requirements must be met. The two requirements which are essential to these discussions are:

a. That the building be a use (or for a proposed use) which is a permitted use in that zoning district established under the Zoning Code, within which the land lies; and

b. That the land has been properly subdivided by an approved and recorded (in the real estate records) subdivision plat, which has been approved by the City in accordance with the Subdivision Code.

For purposes of these discussions, there are, therefore, two relevant components of the City's ordinances, the Zoning Code (which establishes the use to which the land may be devoted); and the Subdivision Code, which imposes requirements for the subdivision of the land, including requirements for the placement, size, type and location of streets, the location, size and types of lots or other parcels; the location of sewers and other utilities; and the establishment of easements for such utilities.

Generally, therefore, a developer of land within the City must fulfill two important requirements. He must obtain a zoning for his land, which will permit his proposed use of the land, and he must obtain approval of a subdivision plat for the land.

At all times relevant hereto, the Subdivision Code has contained three general stages for the approval of a subdivision plat, such stages being as follows:

a. A concept review stage, where the development is generally discussed with the City Staff;

b. The preliminary subdivision plat stage ("the Preliminary Plat"), during which the developer presents a preliminary subdivision plat and applies for approval of that plat. [The Preliminary Plat must fulfill certain requirements. It must show all land which the subdivider proposes to subdivide, and must show all land which is immediately adjacent to such land proposed for subdivision. It must show the location of existing property lines, buildings and structures, streets, rights-of-way and easements; the size of the proposed subdivision in acres; the proposed location and grades for all streets and names for all streets; and the proposed location, dimension and use of all lots into which the land is proposed to be subdivided. The Preliminary Plat is submitted by the developer to the City, where it is first reviewed by the Director of Planning and Development ("the Director"). The Director is to request that the developer make any changes in the Plat required to cause the Plat to be in conformance with the Subdivision Code, and is then to forward the Plat to the Planning and Zoning Commission ("the Commission") with the Director's advice as to whether the Preliminary Plat conforms or does not conform with the regulations. The Commission (without any requirement for public hearing) is to then approve, approve conditionally or disapprove the Preliminary Plat. The

Plat is then to be forwarded to the City Council with the recommendation for approval or disapproval of the Commission, and the Council is to take action on the Plat, either approving it or disapproving it by resolution (without public hearing).]

c. The final subdivision plat stage ("the Final Plat"), during which the developer submits a Final Plat, conforming, substantially, to the Preliminary Plat, but containing the information shown on the Preliminary Plat (which must be displayed with greater precision) and certain additional information. [The Final Plat is submitted first to the Director, who reviews the Plat to determine whether it conforms with the Zoning Code. The Plat is then submitted directly to the City Council (without involvement with the Commission), with "certification by the City Manager of the City" ("the City Manager"), as to whether the Plat conforms or does not conform with the Subdivision Code. Having received the Final Plat and such certification the City Council is to then take action on the Final Plat, without public hearing.]

As a general rule, approval of a Final Plat is required for any development.

The Tract and the Parcel are, and were at all times relevant to these proceedings, subject to a Preliminary PUD Plan for a development originally named "The Meadows". The Tract and the Parcel, therefore, are located within a PUD zoning district, and were and are subject to the PUD ordinance. The Tract and the Parcel are also subject to the Subdivision Code. The PUD zoning district, together with certain other zoning districts established by the City's Zoning Code, are what are known as "Planned Districts", in as much as the submission of a plan for the proposed development is required of the developer for proceeding forward with development in such districts. The Subdivision Code and the Zoning Code have provided, at all times relevant to these proceedings, for coordination of the "plans" required for such planned zoning districts with the subdivision plats, which are also required for such districts under the Subdivision Code. Such coordination is provided for, in as much as many of the requirements imposed by the Zoning Code for approval of the Plan are generally the same requirements as are imposed by the Subdivision Code for the approval of a Plat. The Subdivision Code has, therefore, provided, at all times relevant hereto, that review under the Subdivision Code of plats submitted for Planned Zoning Districts is to be carried out simultaneously with the review of the Plans submitted under the Zoning Code. The Subdivision Code has further provided that an application for approval of a Final Plan for a Planned Zoning District shall include all information normally required for approval of a Preliminary Plat under the Zoning Code, and that:

i. Review and recommendation of the Preliminary Plat shall be accomplished at the time of, and as a part of, the review and recommendation of the Final Plan; and

ii. "Approval of the Final . . . Plan for a Planned District shall constitute approval of the Preliminary Plat . . ." required by the Subdivision Code.

Therefore, at all times relevant hereto, the Final PUD Plan also constituted the Preliminary Subdivision Plat, and approval of the Final PUD Plan constituted approval of the Preliminary Plat.

The Subdivision Code has further provided, at all times relevant hereto, that "approval of a Preliminary Plat by the Council shall confer upon the applicant for a period of seven (7) years, beginning at the effective date of Council approval . . ." certain rights, including the right that "the terms and conditions under which the Preliminary Plat was given approval shall not be changed". In other words, the Subdivision Code has at all times relevant hereto provided that the procuring by a developer of approval of a Preliminary Subdivision Plat gives to that developer a vested right, for a period of seven years, to have the City Council approve, without change of conditions, a Final Plat which conforms with such approved Preliminary Plat and which also conforms with any conditions for approval imposed at the time of approval of such Preliminary Plat.

There are also two other requirements of the Subdivision Code, which, for purposes of these proceedings, need to be mentioned. One of those requirements deals with the length of so-called "terminal streets". Terminal streets are defined as "streets ending at a cul-de-sac", as opposed to being streets which connect with other through city streets. At the present time the Subdivision Code provides that "permanent terminal streets shall not be longer than seven hundred fifty (750) feet, measured from the center of any cul-de-sac to the right-of-way line of the nearest through street from which it derives"; meaning that no street ending in a cul-de-sac may, without waiver of such requirement, be longer than 750 feet measured from the center of the terminating cul-de-sac to the right-of-way line of the nearest through street. There is some evidence in these proceedings that, at some point in time, this requirement of the Subdivision Code was amended. There is some vague indication in the evidence, that, at some point in time, the required 750 feet was measured from the center of the cul-de-sac to "any connecting street", as opposed to the currently required "nearest through street" from which the terminal street derives. The term "through street" is not defined in the Subdivision Code.

Another relevant requirement of the Subdivision Code, which must be mentioned, is the requirement for variances from or waiver of development standards otherwise imposed by the Subdivision Code. The Subdivision Code now provides, and has at all times provided, that there may, under certain circumstances, be "variances and exceptions" from strict compliance with the Subdivision Code. Where the Commission finds that "undue hardships or practical difficulties may result from strict compliance with . . ." the Subdivision Code, it may recommend and the Council may approve variances from the requirements of the Subdivision Code. A petition for any such variance from the Subdivision Code is to be submitted in writing at the time the Preliminary Plat is filed for consideration by the Commission. The "conditions upon which the request for a variance is based . . ." must be "unique to the property for which the variance is sought . . .", generally "because of the particular physical surroundings, shape or topographical conditions of the specific property involved . . ."

Summarizing, the relevant requirements of the Zoning Code and Subdivision Code, as applicable to these proceedings, are as follows:

1. The Tract in question is located within a PUD zoning district;

2. In a PUD, a Preliminary PUD Plan must first be approved, and a Final PUD Plan which generally conforms with that Preliminary PUD Plan must then be approved;

3. For any land, the land must also be subdivided by an approved subdivision plat approved under the Subdivision Code, and such approval provides first, for approval of a Preliminary Plat and then for approval of a Final Plat which conforms with the Preliminary Plat;

4. In a Planned District, such as a PUD district, approval of the Final PUD Plan constitutes approval of the Preliminary Plat, meaning that the Final PUD Plan replaces (and is) the Preliminary Subdivision Plat;

5. Under the Subdivision Code, approval of a Preliminary Subdivision Plat gives the developer a vested right, for term of 7 years, to have approved by the City Council, without change of conditions, a Final Plat which conforms with the Preliminary Plat;

6. Terminal streets, which end in cul-de-sacs as opposed to connecting with other through streets, must not exceed 750 feet in length, unless the length is varied by the Commission and Council;

7. The Subdivision Code permits variances from the requirements of the Subdivision Code, when there are circumstances unique to the property. Such variances are a part of the Preliminary Plat proceeding.

The Tract of which the Parcel is a part is located on the east side of Providence Road in the City. It consists of a long, east-west running ridge line, which is bounded on the north, south and east by gullies. The Tract was initially acquired by Ozark Transland Development Company ("Ozark"). In 1977 Ozark submitted to the City for consideration under the PUD ordinance, a proposed Preliminary PUD Plan for the Tract. Such Preliminary PUD Plan provided for the development of the Tract as a residential development to be known as "The Meadows". The Preliminary PUD Plan depicted an east-west running "terminal street", then known and now known as "Huntridge Drive", which extended from the nearest "through street" (now Carter Lane), eastwardly, roughly to the east terminus of the ridge line. Huntridge Drive, the terminal street, ran along (and now runs along) the top of the ridge. The Preliminary Plan showed the location, proposed length and size of Huntridge Drive, the terminal street, and provided for the development of a number of subdevelopments, on the north and south sides of Huntridge Drive, which would be served by cul-de-sac streets connecting to and leading from Huntridge Drive. The only entrance/exitway for The Meadows development, as shown by the 1977 Preliminary PUD Plan, was Huntridge Drive. The 1977 Preliminary PUD Plan further provided that the front part of the development would consist of single family, attached dwelling structures (meaning single family homes not separated from each other by side yard separations), and would be developed at the rear (the east end) with single family, detached dwelling structures. The Preliminary Plan provided for the placement of 187 units within The Meadows development, to be served by Huntridge Drive, and provided that Huntridge Drive would have a length in excess of 1,500 feet. Ozark's 1977 Preliminary Plan for The Meadows was approved by the City Council by ordinance adopted April 4, 1977, and is, therefore, referred to herein as the "Approved Preliminary PUD Plan". During the review by the City Staff of the Approved Preliminary Plan, the Preliminary Plan passed through all departments of the City Staff without comment about the cul-de-sac length of Huntridge Drive. The only comments about Huntridge Drive concerned the width and paving standards for the street, with the City Staff objecting to the

proposed width of the street, 28 feet, as opposed to the normally required 32 foot wide public street. The City Staff further encouraged that design of the cul-de-sac be amended. The Staff's report to the Council and the Commission noted that the topography of the Tract consisted of a long east-ridge, with several short promontories branching to the north and south, and contained a "large amount of land which would be very difficult to utilize for conventional residential development due to its extreme slope". Such Staff report further noted that a maximum of 307 units could be placed on the Tract if it were developed, conventionally (that is not as a Planned District under the PUD ordinance), and that the maximum number of units allowable under the PUD ordinance would be 260; whereas the Approved Preliminary PUD Plan proposed only 187 units. The Staff report further noted that the single family detached dwelling units would be located at the eastern end of the development, and that the Plan seemed to provide perhaps the only realistic plan for use of the land in that "perhaps the only realistic plan to access the ridges in this proposed development is a main trunk street running along the general east-west ridge with short cul-de-sac branches extending onto the north and south promontories . . ." which was "the type of plan offered as a part of this Preliminary Plan".

There were, therefore, numerous references in the Staff report to Huntridge Drive. There were discussions about Huntridge Drive in the proceedings before the Commission. There were no adverse comments about the terminal street length of Huntridge Drive, which was proposed to exceed 1,500 feet, or more than double the 750 foot terminal street length requirement mentioned above.

Following approval of the Approved Preliminary PUD Plan Ozark submitted a proposed Final PUD Plan for a portion of the Tract. This initial Final PUD Plan dealt with the "Meadows Phase I", and provided for the development of a portion of the Tract as single family, attached (without side yards) dwellings on the west portion of the Tract, with some single family detached dwellings located on smaller than regulation sized lots to be placed, roughly, in the center of the Tract, along a cul-de-sac street, known as "Bluegrass Court", extending south from Huntridge Drive. At this point (where Huntridge Drive connected to Bluegrass Court) Huntridge Drive was already in excess of 750 feet in length. Ozark's Final PUD Plan for Meadows Phase I was approved in 1977. Thereafter, there was a minor amendment to the Approved Preliminary PUD Plan, which occurred in 1980. This amended Preliminary PUD Plan (which became the "Approved Preliminary PUD Plan"), was essentially identical to the original 1977 Approved Preliminary PUD Plan, and, again, showed the same location and length for Huntridge Drive, and the same type of development. Subsequently, another developer acquired a portion of the Tract, and presented a proposed Final PUD Plan for what is known as "Huntridge Place", or "The Meadows Phase II". Huntridge Place is, essentially, a condominium development, consisting of multi-dwelling unit, apartment type buildings, which have been subdivided into individually owned condominium units. The Final PUD Plan and Plat for Huntridge Place were approved by the City in 1986, and Huntridge Drive, as it passed a portion of this development was in excess of 750 feet in length.

Subsequently, the present Owner, J & W Land Company, acquired a portion of the balance of the Tract. Such portion of the balance of the Tract may be referred to herein as "Highpointe". The Owner acquired such Highpointe portion of the Tract in 1988. A substantial part of the Highpointe portion of the Tract is located at the eastern terminus, or end (the cul-de-sac) of Huntridge Drive.

The Owner submitted a Final PUD Plan for Highpointe Phase I, which was approved in 1988, and thereafter submitted and obtained approval of a Final Plat for Highpointe Phase I. Highpointe Phase I consists of single family, detached homes, located on smaller than regulation size lots, located along a cul-de-sac street which extends south from the terminal street, Huntridge Drive. Subsequently, in 1988, the Owner submitted a proposed modification of the Approved Preliminary PUD Plan (the Approved Preliminary PUD Plan being the one for the Meadows approved in 1977, and amended in 1980) for Highpointe Phase II and Highpointe Phase III. Highpointe Phase II is a part of the Highpointe portion of the Tract, and is located at the eastern terminus (on the cul-de-sac end) for Huntridge Drive. Highpointe Phase II, which is also known as "Foxpointe", also consists of single family, detached dwelling structures, which, however, are used for rental purposes by the Owner. Foxpointe has attracted a tremendous amount of controversy in the Meadows/Huntridge Drive area, because college students occupy the single family, Foxpointe dwellings. The modification of the Preliminary PUD Plan for the Highpointe Phase II and Phase III portion of the Tract was approved in 1988, and subsequently a Final PUD Plan was approved for Highpointe Phase II and Phase III. Thereafter, a Final Plat was pparoved for Highpointe Phase II. Such Final Plan and Plat show the easternmost extension of Huntridge Drive. Thereafter, a construction permit was issued by the City for the construction of the balance of Huntridge Drive. Huntridge Drive, as shown by the original 1977 Approved Preliminary PUD Plan, is now in place, for its entire length. Huntridge Drive has been accepted by the City as a City street, and now constitutes a constructed and accepted public street of the City, and is owned and maintained by the City.

The City has, therefore, consistently since 1977, approved preliminary and final PUD plans, and final subdivision plats, for the developments located along Huntridge Drive, each of which such plans and plats have shown Huntridge Drive at its presently existing length. The City has further approved the construction of, and has accepted as a public street Huntridge Drive, which now exists, for its entire length, from its origination on Carter Lane to its termination at the cul-de-sac on its east end, as an existing, accepted public City street.

All of the Tract has been platted and developed, with the exception of the Parcel which is the subject matter of these proceedings. That is to say that the entire Tract which was the subject matter of the 1977 Approved PUD Plan has been planned, platted and developed, with the exception of the Parcel. The Parcel is known as "Highpointe Phase III. The Owner submitted a proposed Final PUD Plan for Highpointe Phase II and III in March, 1988. The Final PUD Plan for Highpointe Phase III was incorporated with the Final PUD Plan for Highpointe Phase II (Foxpointe), and was titled "Final PUD Plan - Highpointe Phase II and III, Planned Unit Development". As noted above, such Final PUD Plan for Highpointe Phase II and III was approved first by the Commission and then by the City Council. The Final PUD Plan for Highpointe Phase II and III was approved by the City Council on May 2, 1988. Thereafter, the Final Plat for Highpointe Phase II was submitted and approved by the City Council on May 21, 1990.

During the proceedings before the City Council with respect to the Final Plat for Highpointe Phase II hereinabove described (the development with respect to which was controversial for the reason mentioned above), the City Staff raised, for the first time, the question as to whether there should be a "waiver

of the cul-de-sac length" (i.e., the terminal street length) for Huntridge Drive. It was noted that there had been no "express waivers" of the terminal street length of Huntridge Drive, even though the length of that street had been shown upon and was a part of the subject matter of all of the plans and plats approved, continuously, without comment about the street length, since 1977. There was some discussion about requiring that the developer go back to the Commission, and file a formal petition for a variance of the terminal street length for Huntridge Drive. The City Council, however, determined that such requirement would not be imposed and approved the Final Plat for Highpointe Phase II, and Huntridge Drive was then constructed and accepted by the City as a public street, and it now exists.

The Owner's engineer, Allstate Consultants ("the Engineer") then prepared a Final Plat under the Subdivision Code for Highpointe Phase III. That Final Plat ("the Proposed Final Plat") is the subject matter of these proceedings. The Engineer, represented by Richard Barb, an engineer who prepared the Plat ("Barb") has stated that the proposed Final Plat comports, substantially, with the approved Final PUD Plan for Highpointe Phase III (and is essentially identical to said Plan), and that it comports more closely with such approved Final PUD Plan for Highpointe Phase III he found to be the case in most comparisons of Preliminary and Final Plats. The Director has stated that the proposed Final Plat complies with all requirements of the Subdivision Code. However, the Director, Mr. John Hancock, recommended to the City that the Owner be required to go back to the Commission to seek a formal variance of the Subdivision Code requirement for the terminal street length.

The proposed Final Plat, therefore:

a. Satisfies all requirements of the Subdivision Code, as the Director has stated to the City Council; and

b. Comports with the Approved Final PUD Plan which, under the City's ordinances referred to above, constitutes and replaces, and is deemed to be, and Approved Preliminary Plat.

Furthermore, the Approved Final PUD Plan for Highpointe Phase III comports with the Approved Preliminary PUD Plan, as amended.

The proposed Final Plat was submitted to the City Council for its consideration under the Subdivision Code. Such plat came up for consideration at the Council meeting on June 17, 1991. Although some testimony was heard and received by the Council, the procedure was not, as such, a public hearing, because the Subdivision Code does not require public hearings for approval of a final plat. During the proceedings, the Director stated that "The Plat meets all subdivision regulations that are found in our current code". However, the Director recommended that the developer (the Owner) be required to process a variance for the terminal street length of (apparently) the already existing public street, Huntridge Drive, which he testified to be in the order of length of 1,400 to 1,500 feet. He pointed out that there were 180 units which could be developed in total, whereas the original Approved Plan provided for 187 units on the cul-de-sac. Substantial discussion ensued, all of which centered around the dissatisfaction of the neighbors. The Owner and the contract purchaser presented, in support of the application for approval of the Plat, all of the

relevant plans, plats, ordinances and documents (including those dealing with concept review) pertaining to the entire development, from the concept review of the original 1977 Approved Preliminary Plan, through the approval of the Final PUD Plan for Highpointe Phase III, and the actual construction of the street. During the proceedings, the City's attorney, the City Counselor, Mr. Fred Boeckmann ("Boeckmann") stated to the City Council that it was "just a little bit late", to be requiring that the developer go back and seek a waiver of the cul-de-sac length, and that even if the City Council would require that the developer go back to the Commission to seek a waiver of the cul-de-sac length there would be no "latitude really to deny it." Mr. Boeckmann further pointed out to the Council that the plans and plats had been approved at every stage. It was further pointed out that the entire PUD process contemplated waivers from general development standards, many of which, as a general rule (in the normal processing of PUDs by the City [including numerous PUDs referred to at the June 17, 1991 proceedings] are never expressly mentioned, but are implicit in the approval of the plans which provide for developments which do not conform with the required development standards of the Subdivision Code and the Zoning Code.

The City Council denied approval of the Plat by 5 to 1 vote. Although certain of the Council members gave lengthy speeches about the matter, they cited no express findings in support of their vote to deny approval, with the possible exception of expressed concerns about the cul-de-sac length (the terminal street length). In most cases, the Council members voted without indication as to the reason for their vote. One of the members, Councilman Schuster, stated that he felt that a vote against the Plat "truly would be capricious and arbitrary . . .", even though he subsequently voted against approval.

The City Council, therefore, has denied approval of a proposed final subdivision plat, which comports with all applicable regulations of the Subdivision Code, and which comports with an Approved Final PUD Plan/Preliminary Plat (since the Final PUD Plan replaces and becomes the Preliminary Plat). No true basis or grounds for denial of the Plat had been cited, other than, possibly, the cul-de-sac length of an already existing City street (no portion of which is located within the boundary of the Parcel, as the Parcel is served by a short cul-de-sac, leading from the existing terminal street, Huntridge Drive, as was shown to be the case from the very beginning, on the 1977 Approved Preliminary Plan).

The Approved Final PUD Plan for Highpointe Phase III, the Parcel in question, comports, substantially, with the 1977 Approved Preliminary PUD Plan for the Meadows, as amended. The proposed Final Plat comports with all requirements of the Subdivision Code and with the Approved Final PUD Plan for Highpointe Phase III, which is the Preliminary Plat for Highpointe Phase III. The proposed Final Plat, therefore, comports with the Approved Preliminary Plat. Under the PUD ordinance, the Parcel cannot be used other than for development which comports with the Approved PUD Plan. It cannot be developed for any other use or purpose until it is released from the Plan. The Owner, therefore, is now faced with a situation where it owns a Parcel, which it can use only in accordance with an Approved PUD Plan, but which it cannot use in accordance with such Plan because of the denial of approval of its proposed Final Plat, which comports with such Plan.

QUESTION

Under the circumstances, as referred to above, could the City Council lawfully deny approval of the proposed Final Plat, or, in the alternative, can it be compelled to approve the Final Plat? Assuming the Council's action in denying approval of the Final Plat was unlawful, what remedies for such unlawful action are available to the Owner? Can the Owner seek to have approval of the Final Plat compelled by the court by way of mandamus? Can the Owner seek damages from the City Council person? Can the Owner seek to compel the City to condemn and pay for the fair market value of the Parcel in an action in inverse condemnation?

SUMMARY OF OPINION

In summary, our opinion is as follows:

A. The City Council could not lawfully deny approval of the Final Plat.

B. The City Council can be compelled, in a proceedings in mandamus, to approve the Final Plat.

C. The City Council, in denying approval of the Plat, may well have subjected the members of the Council to an action in damages under 42 U.S.C. Section 1983.

D. Ultimately, if the Owner is prevented from use of this property by actions of the Council, it would seem appropriate that the Owner seek compensation in an action for inverse condemnation.

DISCUSSION

A review of the PUD Ordinance indicates that such ordinance has always provided (as it now provides) that approval of a Final PUD Plan shall be deemed to constitute approval of a Preliminary Plat under the Subdivision Code. In other words, the Approved Final PUD Plan, as approved under the PUD Ordinance (the Zoning Code) replaces the need for a Preliminary Plat under the Subdivision Code, with the Approved Final PUD Plan constituting a Preliminary Plat. Section 25-22 of the Revised Ordinances of the City of Columbia ("the Revised Ordinances of the City") [which appears in the Subdivision Code and which deals with coordination of those proceedings as to plans (for Planned Zoning Districts) with those proceedings for Plats under the Subdivision Code], and its predecessors, now provides (and such predecessors have always provided) that "approval of the final site development plan for a Planned District shall constitute approval of the Preliminary Plat required herein". Additionally, the Subdivision Code now provides (and at all times relevant hereto has provided) [see Section 25-25, Preliminary Plat Review, of the Revised Ordinances of the City] that approval of a Preliminary Plat gives to the applicant for such approval certain vested rights for a period of 7 years, beginning at the effective date of the Council approval. Existing Code Section 25-25(i) of the Revised Ordinances of the City provides as follows:

"(i) Approval of a Preliminary Plat by the Council shall confer upon the applicant for a period of 7 years, beginning at the effective date of Council approval, the following rights:

(1) The terms and conditions under which a Preliminary Plat was given approval shall not be changed . . ."

The Zoning Code contains a similar provision in the PUD Ordinance. The existing PUD Ordinance is Section 29-10 of the Revised Ordinances of the City. Such Section (and all predecessor PUD ordinances) provides (and have provided) that "approval of the Final PUD Plan shall be deemed to satisfying the requirements of the subdivision regulations for a Preliminary Plat, provided all those requirements have been met." The City's own ordinances, therefore, provide that an approved PUD Final Plan constitutes a Preliminary Subdivision Plat; and that approval of a Preliminary Subdivision Plat confers upon the owner a vested right, for seven years, to have a Final Plat comporting with that Preliminary Plat approved, without a change in the conditions for approval. The City's own ordinances, therefore, clearly establish a vested right in the Owner to have this Proposed Final Plat approved. One need look no further than the City's own ordinances to establish a vested right and basis in the Owner to demand approval of this proposed Final Plat. Refusal to approve the Proposed Final Plat flies in the face of the City's own ordinances and is unlawful, and in the words of Councilman Schuster, is "truly arbitrary and capricious".

A number of courts have held that if a subdivider complies with all of the requirements of the Subdivision Ordinances, approval of a plat becomes a ministerial act, and that the plat may not be disapproved by the City Council. Knutson v. State, 157 N.E.2d 469 (Ind.); Castle Estates, Inc. v. Park & Plan Bd. of Medfield, 182 N.E.2d 540 (Mass.); R.K. Dev. Corp. v. City of Norwalk, 242 A.2d 781 (Conn.); Levitt & Sons, Inc. v. Freehold, 295 A.2d 397 (N.J.); Kling v. City Council of Newport Beach, 317 P.2d 708 (Cal.); El Dorado v. Board of County Commissioners, 551 P.2d 1360 (N.M.); Tippecanoe v. Sheffield Developers, Inc., 394 N.E.2d 176 (Ind.); Interladco, Inc. v. Billings, 538 P.2d 496 (Colo.); Columbia Corp. v. Town Board of Pacific, 286 N.W.2d 130 (Wis.); Sonn v. Planning Com. of Bristol, 374 A.2d 159 (Conn.).

The Court in Knutson v. State, supra, sets out the reason for holding that the approval or disapproval of a subdivision plat is a ministerial act as follows:

> Cities and towns have been granted broad authority by the state which created them to control the development of areas in and adjacent to them. However, public policy requires that this authority be exercised in a standardized and clearly defined manner so as to enable both the landowner and the municipality to act with assurance and authority regarding the development of such areas. It is for this reason that although public policy requires municipal control of such development, nevertheless the authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is by statute made to rest upon specific standards of a statute or implementing ordinance. Thereafter the approval or disapproval of the plat on the basis of the controlling standards is a ministerial act. (Emphasis added.)

The law is clear that an action of mandamus in the local circuit court may be used to compel a city council to perform the ministerial act of approving a subdivision plat which complies with all of the requirements of the Subdivision Ordinances. See above references, and People v. Smuczynski, 102 N.E.2d 168 (Ill.).

Missouri law would seem to comport with the general law, as described above. It is believed that Missouri law compels a municipality to approve a plat which complies with all applicable regulations, and that the City Council would not have discretion to reject such a plat. It is further believed that the approval of a plat is a mere exercise of a ministerial function, and that the City Council has no discretion to reject approval of a plat which conforms with all applicable regulations. See Better Built Homes & Mortgage Co. v. Nolte, 249 S.W. 743 (Mo. App. 1923) and State Ex Rel Strother v. Chase, 42 Mo. App. 343 (1890). The fact that the City Code gives to the City the power to "approve" plats does not embody an element of discretion. The word "approve" does not indicate that discretion is contemplated. In this case, I believe the City's power to "approve" subdivision plats, which conform with all Subdivision Codes and regulations, merely contemplates the doing of a purely ministerial act. Baynes v. Bank of Caruthersville, 118 S.W.2d 1051 (Mo. App. 1938); Better Built Homes & Mortgage Co. v. Nolte, supra and State Ex Rel Strother v. Chase, supra. Also see Downend v. Kansas City, 56 S.W. 902 (Mo. 1899), where the court held that when an owner presents to the city council for approval a plat which conformed with all statutory requirements the council had only a ministerial duty to perform and was bound to approve it. The concept that ministerial acts by subdivisions of state governments, or municipalities, are enforceable through mandamus actions has been upheld. See State Ex Rel Lane v. Kirkpatric, 485 S.W.2d 62 (Mo. 1972); State Ex Rel Igoe v. Bradford, 611 S.W.2d 343 (Mo. App. 1980); Ruddy v. Corning, 501 S.W.2d 537 (Mo. App. 1973).

The general law applicable throughout the United States seems to comport with the provisions of the Revised Ordinances of the City of Columbia, to the effect that when a Preliminary Plat has been approved approval of the Final Plat which conforms with the Preliminary Plat is compelled. See Anderson, American Law of Zoning 3d, Section 25.13 at page 303 where it is stated as follows:

> "Where a preliminary plan has been approved, approval of the final plan has been described as a ministerial act. [Citing Greenlawn Memorial Park v. Neenah Town Bd of Supervisors, 71 N.W.2d 403 (Wis 1955)]. If a final plat is identical to an approved preliminary plat, it must be approved in many jurisdictions. The same is true of a final plat which meets conditions attached to preliminary approval."

Also see Anderson, American Law of Zoning, supra, Section 28.01 at p.605 where it is indicated that ". . . mandamus will lie to require an administrative officer or board to do a ministerial act, but will not lie to require such an officer or board to perform a discretionary act in a particular way." As will be noted below, this statement conforms with Missouri law. The question then is whether approval of a Final Plat which conforms with an Approved Preliminary Plat is a discretionary or ministerial act. That is to say, does the City Council have discretion to deny approval of a Final Plat which conforms with an Approved Preliminary Plat? As stated in Anderson, supra, Section 28.04 at p.612, et seq., mandamus has been successfully employed to require approval of a

subdivision plat by a municipality, where the court determined that when a subdivider has complied with all of the standards for plat approval, such approval is a ministerial act and that approval of a plat by mandamus can be further compelled "where a notice of disapproval failed to specify the grounds for such disapproval . . ." Also see Good Value Homes, Inc. v. Eagan, 410 N.W.2d 345 (Minn. App. 1987) where the court indicated that when a subdivision ordinance specifies standards to which a proposed plat must conform, it is arbitrary as a matter of law to deny approval of a plat which complies in all respects with such ordinance; and Reed v. Planning Bd of Chester, 501 N.Y.S.2d 710 (1986) where it was indicated that an application for approval of a subdivision plat cannot be granted on the grounds that the neighbors have complained; and Akin v. South Middleton Township Zoning Hearing Bd, 547 A.2d 883 (Pa. 1988), where the court indicated that approval of a subdivision plan may not be denied if the plan complies with all applicable regulations. Also see Projects American Court v. Hilliard, 711 S.W.2d 366 (Tex. App. 1986), where the court indicated that the authority of a commissioner to approve plats is not discretionary, and that if a plat meets all statutory requirements the commissioner cannot impose additional requirements but must approve such plat. Further see Knollwood Real Estate Co. v. Planning Bd of Elmsford, 505 N.Y.S.2d 450 (1986), and Stin v. East Town Township Bd. of Supervisors, 532 A.2d 906 (Pa. 1987), in which it was indicated that a board may not deny approval of a subdivision plat without specifying the reasons for such disapproval. To the same effect see Brucia v. Planning Bd of Huntington, 549 N.Y.S.2d 757 (1990), and Viscio v. Guilderland Planning Bd, 525 N.Y.S.2d 439 (1988), in which it is indicated that a board may not deny approval of a plat which conforms with all applicable regulations, simply because the board has formed an opinion that the proposed development is inappropriate for the neighborhood or intended area.

It seems clear, therefore, that under the City's own ordinances, under the general law applicable throughout the United States, and under the law of Missouri, approval of a Final Plat which conforms with an Approved Preliminary Plat is simply a ministerial act; that no discretion exists to deny such approval; and that such approval can (where denied) be compelled by mandamus.

Although the Subdivision Code and Zoning Code of the City are contained in separate sections or chapters of the ordinances, the enabling legislation of the State of Missouri, which enables the City to adopt a subdivision code, appears as a part of the enabling legislation for zoning laws. The applicable section of the Missouri Statute is Section 89.410 RSMo., which provides that the City Council "may by ordinance adopt regulations governing the subdivision of land within its jurisdiction". This section, like other sections dealing with subdivision, appears in Chapter 89 RSMo., titled "Zoning and Planning". Such Chapter 89 confers upon the City the authority to adopt zoning ordinances and subdivision ordinances for the regulation of use of land within their corporate boundaries. The subdivision authority is, therefore, a part of the zoning authority referred to in Chapter 89. The power of planning and zoning is a police power delegated to local political subdivision, and these enabling statutes are the only source of a city's zoning or land use control power. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963). Although home rule cities have the power, under Article VI, Section 19 of the Missouri Constitution, to control land uses to the extent the General Assembly can confer such power upon a city, such power is limited by express constitutional or statutory prohibitions or authorizations. The exercise of land use power must

conform to the terms of applicable enabling statutes. McCarty v. City of Kansas City, 671 S.W.2d 790 (Mo. App. W.D. 1984). Any reasonable doubts as to whether a power has been delegated to a municipality will be resolved in favor of nondelegation. City of Kirkwood v. City of Sunset Hills, 589 S.W.2d 31 (Mo. App. 1979).

Chapter 89 RSMo. does provide that cities may adopt regulations governing the subdivision of land within their jurisdictions. However, the provisions of these statutes do not confer upon the municipality discretion to reject plats which conform with the municipality's own subdivision regulations.

Under Article VI, Section 19(a) of the Missouri Constitution, a city which has adopted a charter for its own government "shall have all powers which the General Assembly of the State of Missouri has authority to confer upon any city . . ." Dillon's Rule of Statutory Interpretation, as originally announced in Merriam v. Moody's Executors, 25 Ia. 163, 170 (1868), has been adopted and followed in Missouri from the very early years. See State Ex Rel Strother v. Chase, 42 Mo. App. 343 (1890). As a general rule, therefore, cities may not include in their subdivision regulations any condition for approval of a subdivision not authorized by enabling statutes. State Ex Rel City of Hannibal v. Smith, 74 S.W.2d 367, 372 (Mo. 1934); Mo. Bar CLE, Mo. Local Government Law, Section 5.24 at page 5-29. Nothing contained in the enabling statutes, Chapter 89 RSMo., would give to the City authority to exercise discretion to reject a plat which conforms with its own regulations. The City's own ordinances require that it approve a Final Plat which conforms with an approved Preliminary Plat. The City's own ordinances give a property owner a vested property right to have approved a Final Plat which conforms with an approved Preliminary Plat. No basis for denying approval of this Proposed Final Plat exists. No basis for conclusion that the City has any discretion in the consideration of this Proposed Final Plat exists.

Chapter 89 RSMo. does provide that cities may adopt regulations governing the subdivision of land within their jurisdictions. However, the provisions of these statutes do not confer upon the municipality discretion to reject plats which conform with the municipality's own subdivision regulations. It is submitted that older Missouri cases, referred to herein, which indicate that approval of a plat which conforms with the original Missouri subdivision statutes is purely a "ministerial action", are still good law. It is, therefore, respectfully submitted that approval of a plat which conforms with all applicable subdivision regulations remains a purely "ministerial function". As stated in City of Bellefontaine Neighbors v. J.J. Kelly Realty and Building Co., 460 S.W.2d (Mo. App., St.L. 1970) "where the legislature has authorized a municipality to exercise a power and prescribe the manner of its exercise, the right to exercise the power in any other manner is necessarily denied".

Older Missouri cases are referred to above. One of such cases is Better Built Homes & Morgage Co. v. Nolte, 249 S.W. 743 (St. Ct. App. 1923), where it was indicated by the court that where a plat of land as a subdivision to a city conforms with all applicable requirements of the then Missouri Statutes dealing with subdivisions, approval of that plat is merely a ministerial act enforceable by mandamus. It is conceded that Better Built Homes was decided before the enactment of the enabling legislation of Chapter 89 RSMo., which authorized cities to adopt subdivision regulations, and that the court was considering the

matter under the then Missouri Statutes dealing with subdivision of land, which such statutes now appear in Chapter 445 RSMo., Sections 445.010, et seq. Nevertheless the holding in Better Built Homes & Mortgage Co. seems to stand, clearly, for the proposition that if a subdivision plat conforms with the applicable regulations it must be approved. In Better Built Homes & Mortgage Co. v. Nolte, supra, the court stated as follows:

> "We should not lose sight of the fact that the councils of American municipalities sometime perform purely administrative functions."
>
> * * *
>
> ". . . we find no escape from the conclusion that, the platter having complied with every requirement of the statute, it becomes the duty of the respondents to approve said plat."

The court, therefore, concluded that approval of a plat which conforms with all applicable requirements is purely a ministerial, nondiscretionary act, and that such approval can be compelled by mandamus. In each of Better Built Homes & Mortgage Co. v. Nolte, and Baynes v. Bank of Caruthersville, 118 S.W.2d 1051 (Mo. App., Spr. 1938), it was indicated that merely because a body has the power to "approve" a specific action, the words "approve" or "approval" may merely contemplate the doing of a purely ministerial act. The City Council may have misconstrued its authority to "approve". Municipalities, in prior cases, as here, have presumed that their power of approval embodies an element of discretion, even where an ordinance conditions approval only upon compliance with the requirements of such ordinance. "The word 'approve' does not necessarily indicate that a discretion is contemplated. The word must be considered in connection with the subject matter to which it is applied, and the connection in which same is found." Albert v. Order of Chosen Friends, 34 Fed. 721.

There are no recent Missouri cases which directly address the issue of whether a municipality may use discretion to disapprove a proposed plat which complies with ordinance requirements. The case most on point is the case of Better Built Homes & Mortgage Co. v. Nolte, supra. There, the court stated that when a platter has complied with every requirement of the statute, it becomes the duty of the municipality to approve the plat. To a large extent, this case based its holding on State Ex Rel Strother v. Chase, supra. In that case the city council made additional demands on a developer after he had complied with the statute. The Court of Appeals held, as previously noted, that such a requirement was clearly outside the authority and power of the Council, because no such requirement was to be found in the statute. That court also pointed out that it is mandatory upon the council to approve a plat when the statutory requirements are fulfilled by the platter, and that the council is powerless to declare other limitations or restrictions than those set out in the statute.

The Missouri Supreme Court affirmed the Strother case in Downend v. Kansas City, 56 S.W. 902 (Mo. 1899). There, the court held that when an owner presented a plat to the council for approval, which conformed to statutory requirements, the council had only a ministerial duty to perform and was bound to approve it.

Interestingly, the Strother case, the Downend case and the Better Built Homes case all came to bar on the issue of whether approval by council in the described situation was ministerial and, as such, could be compelled by mandamus. All three held that mandamus will lie to compel approval in that situation. The concept that ministerial acts by municipalities are enforceable through mandamus actions has been upheld by more recent case law in Missouri. State Ex Rel Lane v. Kirkpatrick, 485 S.W.2d 62 (Mo. 1972); State Ex Rel Igoe v. Bradford, 611 S.W.2d 343 (Mo. App. 1980), Ruddy v. Corning, 501 S.W.2d 537 (Mo. App. 1973).

The specific issue of whether the approval of a subdivision, which meets statutory requirements, can be compelled by mandamus has not come before Missouri courts in recent times. This could be due to the fact that the principle set forth in Strother, Downend and Better Built Homes is so well settled as to never have been subsequently challenged beyond the Circuit Court level. There have been more recent cases which affirm the principle in a tangential sense. For example, cases have held that where dedication of streets within a city complies with statutory provisions of Section 445.010, et seq., that dedication is valid and irrevocable by the city, Ginter v. City of Webster Groves, 349 S.W.2d 895 (Mo. 1961); Moseley v. Searcy, 363 S.W.2d 561 (Mo. 1962).

The above analysis indicates that there is no dispute to the holding that where the platter has done all that the statute demands, the approval of such plat by the city council becomes a ministerial duty, the performance of which may be compelled by mandamus, Better Built Homes & Mortgage Co. v. Nolte, supra.

One should also not overlook that, in this instance, we are not simply dealing with disapproval of a Final Plat which conforms with an Approved Preliminary Plat and all other requirements of the Subdivision Code. Here, we are also dealing with denial of approval by the City of a Final Plat which would enable a developer to go forward with a development in accordance with an Approved Preliminary PUD Plan and an Approved Final PUD Plan. The Parcel in question is located within Zoning District PUD. A Preliminary PUD Plan and a Final PUD Plan for the use of the Parcel have been approved, and the Proposed Final Plat comports with those plans. The first of those plans was approved in 1977, and the final plan which was approved in 1988 comports, substantially, with that Approved Preliminary Plan. Although there are no Missouri cases clearly on point, courts in other jurisdictions have held that municipalities have no power when reviewing PUD plans for final approval either to impose new conditions or to amend conditions of tentative approval so as to cast additional burdens on the developer. E.g., Hakim v. Board of Commissioners of the Township of O'Hara, 336 A.2d 1036 (Pa. Comm. Ct. 1976). In Hakim, the city council granted tentative approval of the developer's plan for an apartment house development subject to the developer's compliance with certain requirements, including a determination that the public sanitary sewer line on the tract would adequately serve the proposed apartment project. When the developer submitted the development plan for final approval, the city amended this condition to require that the developer install adequate sewer lines, despite testimony that the existing system was adequate.

The court construed the Pennsylvania Municipal Planning Code pertaining to tentative and final approval of development plans, and determined that the city, after consideration of the plan offered for tentative approval, could grant

tentative approval outright, grant tentative approval subject to specified conditions, or could deny tentative approval. If the application for final approval included the drawings and other required materials and satisfied any conditions set forth in the official written communication at the time of tentative approval, it was the duty of the municipality to grant final approval if the plan conformed to the ordinance and any conditions to tentative approval. Id. at 1311. The court concluded that the statute did not empower the municipality, without the agreement of the developer, to impose conditions to final approval additional to, different from or amendatory of conditions imposed upon tentative approval. See also, El Patio v. Permanent Rent Control Board of the City of Santa Monica, 168 Cal. Rptr. 276 (Cal. App. 1980), in which the court held that, pursuant to the California Subdivision Map Act, the city could not impose additional conditions on the developer for final approval after conditional approval of a tentative subdivision map.

The facts of the present case are strikingly similar to those of Hakim. The City Council approved the Preliminary Plan submitted by Ozark Trans-Land Development Corp. It then approved numerous final Plans, which conformed, substantially, with that Approved Preliminary, including the Final PUD Plan for the Parcel in question, Highpointe Phase III. The City now seeks to change the requirements/conditions under which that Final PUD Plan (which was also the Preliminary Plat) was approved. None of the conditions to approval of the Preliminary Plan, the numerous Final PUD Plans which have been approved, and the Final PUD Plan (Preliminary Plat) for Highpointe Phase III mentioned any requirement for seeking a waiver of the cul-de-sac/terminal street length. To now require that the Owner "go back to the commission" and seek exemption from the terminal street length requirement for an already existing street imposes an additional requirement upon the Owner, which the City cannot lawfully impose.

Generally, zoning ordinances creating a Planned Unit Development enjoy the same presumption of validity as is generally accorded to zoning amendments. Sausalito v. County of Marin, 90 Cal. Rptr. 843 (Cal. App. 1970). However, the legislative body may not act in an arbitrary manner. Fallon v. Baker, 455 S.W.2d 572 (Ky. 1970); Moore v. Boulder, 484 P.2d 134 (Colo. App. 1971). In granting a permit for a Planned Unit Development, the legislative body must determine whether specified conditions have been satisfied by the landowner. If the determination of the municipality is classified as a legislative determination, the court will not interfere with the judgment of the legislative body absent a clear showing that the decision was arbitary, capricious, unreasonable or involved an abuse of discretion. State ex rel Kolb v. County Court of St. Charles County, 683 S.W.2d 318 (Mo. App. 1984). If, however, the determination of the municipality is characterized as administrative, a more exacting judicial inquiry is permitted to determine whether the decision is supported by competent and substantial evidence on the record. Aubuchon v. Gasconade County R-1 School District, 541 S.W.2d 322 (Mo. App. 1976).

The Colorado Supreme Court has held that where a city council reviews a Planned Unit Development plan to determine whether the applicant has complied with the procedures specified by the applicable ordinance, the city council acts in the capacity of an adjudicative body and thus the reviewing powers of the city council are limited. Therefore, the court may review the record before the city council to determine whether evidence has been presented justifying the decision to deny the application. Dillon Companies, Inc. v. City of Boulder, 515 P.2d 627 (Colo. 1973).

Missouri courts have not specifically addressed the city council's standard of review for a final PUD plan. However, Missouri courts have held that any reasonable doubt concerning the existence of a municipal power is construed against the city. Lancaster v. Atchison County, 180 S.W.2d 706 (Mo. 1944). A crucial test in distinguishing legislative acts from administrative acts is whether the action taken by the municipality (whether by resolution or ordinance) makes new law or executes a law already in existence. E. McQuillin, The Law of Municipal Corporations, Section 10.06 at 995 (3rd ed. 1986). A municipality's review of a final PUD plan is similar to the approval by an administrative or ministerial capacity, as opposed to a discretionary legislative capacity. See Baynes v. Bank of Caruthersville, 185 S.W.2d 1051 (Mo. App. 1938); Better Built Homes & Mortgage Co. v. Nolte, 249 S.W.743 (Mo. App. 1923).

It appears that a municipality acts in a ministerial capacity when reviewing a final PUD plan and/or a final plat, particularly since the city council does not hold a public hearing at the time of such review, and the municipality's review is limited to determining whether the requirements enumerated in the ordinances have been satisfied. If:

a. A final PUD plan conforms to the conditions required in the ordinance granting preliminary plan approval, the city council has no discretion to deny approval of the final plan or to impose new restrictions;

b. If a submitted final plat conforms with the approved preliminary plat, the city council has no discretion to deny approval of the plat or to impose new restrictions (and its own ordinances state such to be the case).

Whether the municipality acts in an administrative or legislative capacity, the municipality cannot act arbitrarily in denying a final PUD plan or a final plat, if the developer complies with all requirements of the ordinances. Mullins v. City of Knoxville, 665 S.W.2d 393 (Tenn. App. 1983). In Mullins, the developer submitted plans for a PUD. The planning commission approved the PUD subject to the developer's compliance with certain conditions. When the developer submitted the revised PUD plan, the planning commission approved the plan. A community association that opposed the commercial development appealed the decision of the planning commission to the city council. Following a hearing, the city council reversed the action of the planning commission. The court of appeals noted that in reviewing the developer's application for approval of the commercial development the council does not act in a legislative capacity; rather, the council exercised its legislative function when it passed the ordinance. When determining whether the developer's PUD plan meets the standards of the ordinance the council exercises its administrative function. As an administrative body, the council's decision must be based on material evidence. Id. at 396.

The court stated that in order to sustain the action of an administrative tribunal, more than a glimmer of evidence is required, and the evidence must be of a substantial, material nature. Because the court found a commercial use would not have an adverse impact on the character of the surrounding neighborhood, and found that the developer had complied with all the requirements of the zoning ordinance, the court concluded that the city council had acted arbitrarily in denying approval of the developer's plan.

Missouri courts have consistently held that zoning which restricts property to a use for which it is not adapted is unreasonable and constitutes an invasion of the owner's property rights. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. 1981); Ewing v. City of Springfield, 449 S.W.2d 681 (Mo. App. 1970). In addition, property may not be zoned so as to prevent any effective use, as such a regulation becomes an unlawful confiscation. Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. App. 1977); Ogawa v. City of Des Peres, 745 S.W.2d 238 (Mo. App. 1988). Finally, a refusal to rezone based upon a desire to benefit or refrain from injuring a few adjacent landowners is not substantially related to the public interest and cannot be justified on that basis. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963).

In Despotis v. City of Sunset Hills, supra, a landowner brought an action challenging the city's refusal to rezone property from residential to commercial. The owner showed that development of her property under continued residential zoning was not economically feasible, that the property fronted on a heavily trafficked, commercial thoroughfare, and that the owner's adjacent parcel was used for commercial purposes. Expert testimony also established that the commercial value of the property would far exceed the residential value.

Missouri law provides that once a zoning ordinance has been enacted, those purchasing property affected by such ordinance have the right to rely on the belief that the ordinance will not be changed unless required for the public good. Allen v. Coffel, 488 S.W.2d 671 (Mo. Ct. App. 1972). Furthermore, a refusal to rezone property simply to benefit a few adjacent property owners is not related to the public interest and such refusal cannot be justified on that basis. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. 1981).

It seems clear, therefore, that approval of the Proposed Final Plat, in this instance, was purely a ministerial act, the doing of which can be compelled by mandamus. Furthermore, it is noted that the City Council cited no basis, grounds or findings for its disapproval, other than (possibly) the cul-de-sac length (terminal street length). Reliance on any perceived need for a waiver or exemption of the terminal street length requirement under the Subdivision Code would seem to be sorely misplaced, and specious at best, in view of the following:

1. The street, at its present length, has been shown on each of (or most of), the Plan approved under the PUD ordinance, and the Plats approved under the Subdivision Code, commencing with the 1977 Approved Preliminary Plan;

2. At the time when the 1977 Plan was approved, Staff comments to the Commission and the City Council reflected the Staff's belief that the only practical way to provide access to the Tract was to provide access by way of the extended cul-de-sac, Huntridge Drive, running along the top of the ridge, with shorter cul-de-sacs extending onto the various promontory;

3. It is clear, therefore, that the street length has been considered, and determined to be appropriate, from the very beginning;

4. The Final Plan and the Final Plat approved for the Meadows Phase I already provided for a terminal street length in excess of 750 feet [does the City now contend that al dwellings placed within that Plat were improperly or unlawfully placed?];

5. The homes of most of the "complaining neighbors" are located more than 750 feet along the terminal street, from the point of origination at Carter Lane;

6. Preliminary plats (and, in fact, a final plat for Highpointe Phase II) have been approved, showing the terminal street, to its terminus, at its presently existing cul-de-sac;

7. The street in question is already in existence, and was built pursuant to construction permits issued by the City, and the street has been accepted as a public street of the City and is now, in actual fact, in existence and in use as a public street of the City;

8. It is clear that although there may have been no expressed mention of a waiver of the terminal street length of 750 feet, such waiver has been implicit in each of the approvals granted by the City, commencing in 1977;

9. Furthermore, any need for waiver of the terminal street length or exemption from the terminal street length requirement has been waived by the City, and the City is barred and estopped from now seeking to compel that a waiver of the terminal street length be sought, and, as stated by Mr. Boeckmann to the City Council at the time of its considerations of the Proposed Final Plat, the City would have no discretion to deny such waiver if it were sought.

It is submitted the Owner has a vested right to have the Proposed Final Plat approved, and that such right cannot now be denied by raising, as to the last area within the Tract to be developed, some specious requirement for a waiver of the length of a street which already exists, and which has been the subject matter of numerous plats and plans, which have already been approved. Missouri recognizes that a developer may acquire "vested rights". As stated in MO Bar, CLE, Local Government Law, Section 6.28 at page 6-22 "the concept of 'vested rights' is that a development in progress qualifies as a substantial investment in an existing use sufficient to constitute a valid nonconforming use when there is a zoning change." Certainly, here, the developer has made a substantial investment in the continuing development, and would seem to have clearly acquired a vested right to pursue that development to completion, without having new, additional requirements thrown up in its face. As further stated in MO Bar, CLE, supra, Section 6.28 at page 6-22 "vested rights issues may arise when a zoning ordinance is amended to prohibit some aspect of a development already underway, or when jurisdiction of the property shifts to another governing body with a substantially different set of zoning regulations. In these circumstances, courts will apply principles of fairness and equity to permit completion of the development even though not technically constituting a lawful preexisting nonconforming use." [Citing Murrell v. Wolff, 408 S.W.2d 842 (Mo. 1986); and Annotation, 89 ALR 3d 1051 (1979)]. The principal issue in vested rights situation is whether there has been a substantial investment by the owner for establishment of a use or development, so that it would be inequitable to now deny that use. MO Bar, CLE, supra, Section 6.28 at 6-22. Also see Casey's General Stores, Inc. v. City of Louisiana, 734 S.W.2d 890 (Mo. App. E.D. 1987) where the court held that the city was estopped to deny a building permit for the construction of a convenience store because the developer had consulted with city officials, who gave assurances that there would be no problems with the project.

Certainly, here, the developer (the Owner) has proceeded forward in substantial reliance upon the Approved Preliminary Plan, and the Approved Final PUD Plan for Highpointe Phase I and Phase II, which gave to the Owner assurance that the Owner would be permitted to proceed forward with a development conforming with such plan. In fact, as hereinabove noted, approval of the Preliminary Plan, in 1977 (which, under the City's ordinances runs with the land) probably gave the Owner a vested right (and assurance) that the Owner be permitted to develop the Parcel in conformity with that Plan (and the proposed development does conform with such Preliminary Plan). The City has, by its own actions, in approving the Plats and Plans, represented to the Owner that the Owner would be permitted to proceed forward with the development provided only that the development would conform with the approved Plats and Plans. The Owner, in reliance upon such assurances, has expended substantial time, money and effort in going forward with the development, including (but not limited to) the investment of time, money and expense in causing to be prepared and submitted for approval the Proposed Final Plat. The City is now barred and estopped from seeking to impose some new or additional requirement on the development; such additional requirement, apparently, to be a second means of access (another connecting street) which cannot even be practicably provided without substantial additional burden and expense (including the expense of revising the present Final PUD Plan, which doesn't permit nor provide for such an additional street). As noted in Casey's General Stores, Inc. v. City of Louisiana, supra, cities can be estopped, under certain circumstances, from enforcing their own development regulations. A classic basis for estoppel exists in this instance. One could even argue that the City, by approving the Final PUD Plan for Highpointe Phase III (and by its own ordinances which state than an Approved Final PUD Plan shall constitute an Approved Preliminary Subdivision Plat, and that an Approved Preliminary Subdivision Plat gives the Owner a vested right to have a Final Plat comporting with that Plat approved, without change of condition) has "promised" that the Final Plat would be approved, and that there is a basis for a "promissory estoppel". Under the Doctrine of Promissory Estoppel, a promise which is made without consideration may be enforced if the elements of estoppel are present. Such doctrine has been adopted in Missouri. Otten v. Otten, 632 S.W.2d 45, 49 (Mo. App. 1982); In Re Jamison's Estate, 202 S.W.2d 879, 886 (Mo. 1947); Mark Twain Plaza Bank v. Lowell H. Listrom, 714 S.W.2d 859, 863 (Mo. App. 1986). Debron Corp. v. National Homes Const. Co., 493 F.2d 354, 356 (8th Cir. 1980).

Under the Doctrine of Promissory Estoppel, Missouri courts have relied upon Section 90 of the Restatement, Law on Contracts, for guidance. See Mark Twain Plaza Bank, supra at 863 and cases cited therein. Such Restatement section states:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

In this particular case, the City has made an obvious representation or promise, under its own ordinances, that a Final Plat comporting with the Approved PUD Plan would be approved, and the Owner has acted in reliance upon that promise or representation. A promise has been made; there has been a

detrimental reliance on such promise; and an injustice can be avoided only by enforcement of such promise. The requirement elements necessary to invoke the Doctrine of Promissory Estoppel are, therefore, present, such elements being: a promise; a detrimental reliance on such promise; and an injustice which can be avoided only by enforcement of the promise. Katz v. Danny Date, Inc., 610 S.W.2d 121, 124 (Mo. App. 1980); Mark Twain Plaza Bank, supra at 863. Promissory Estoppel is not predicated on a statement of fact but rather rests upon a promise on which a party relies. Mark Twain Plaza Bank, supra at 863 citing Corbin, Contracts Section 140 pp. 607-608.

Certainly, assuming the Doctrine of Promissory Estoppel does not apply, the Doctrine of Equitable Estoppel, followed in Missouri, would seem to apply. The Doctrine of Equitable Estoppel, followed in Missouri, has been stated as follows:

> "Equitable Estoppel" or "Estoppel In Pais" is that condition in which justice forbids that one speak the truth in own behalf. It stands simply on a rule of law which forecloses one from denying his own expressed or implied admission which has in good faith and in pursuance of its purpose been accepted and acted upon by another. Miskimen v. Kansas City Star Company, 684 S.W.2d 394, 400 (Mo. App. 1984); citing Brooks v. Cooksey, 427 S.W.2d 498 (Mo. 1968). To constitute Estoppel In Pais, three things must occur: First, an admission, statement or act inconsistent with a claim afterwards asserted insued upon; Second, action by the other party on faith of such admission, statement or act; and Third, injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. Miskimen, supra at 400 and cases cited therein.

The court in Miskimen, supra, stated that an equitable estoppel cannot arise unless justice demands it; it cannot be used as sword to create or work a positive gain for the claimant but can only act as a shield to protect him from a loss which he could not otherwise escape. [Citations omitted]. The purpose of estoppel is to restore the parties to the same relative positions that they would have occupied if the basis for estoppel had not existed. Citing Shaffer v. Hines, 573 S.W.2d 420, 422 (Mo. App. 1978).

As noted, the second element necessary to raise equitable estoppel is reliance. One claiming an estoppel must have acted in reliance and to his detriment upon the admission or conduct of the one estopped. Peerless Supply Co. v. Industrial Plumbing & Heating Co., 460 S.W.2d 651, 666 (Mo. 1970). The party claiming estoppel must have been misled to his prejudice. White v. Smith, 440 S.W.2d 497, 504 (Mo. App. 1969). The party must have changed his position:

> "Finally there must have been some definite act on the part of the party claiming the estoppel, in reliance on the representation of the estopped party, which has changed his condition for the worst. He must have suffered a legal detriment; but the legal detriment must not be merely formal, as it is in the case of a doctrine of consideration in the law of contracts, but actual. His condition must be such that, if the estoppel be not permitted, he will suffer damage." Miskimen, supra at 401 [citations omitted].

It is clear that in order to claim an estoppel there must be something equivalent to a representation. However, an estoppel may arise from mere silence, or passive conduct on the part of one who has knowledge of the facts and whose duty it is to speak, where such silence or conduct is misleading. Palmer v. Welch, 171 Mo. App. 580, 596-597 (1913) and cases cited therein.

A representation may arise not only by way of concealment of part of the truth in regard to the whole fact, but also, from a total but misleading silence with knowledge, or passive conduct joined with a duty to speak. The case must be such that it would be fair to interpret the silence as a declaration of the party that he has no interest in the subject of the transaction. Bigelo on Estoppel (1890), pp. 583, 584. See, Saline County, supra at 185, where it was held that silence with a corresponding duty to speak was the equivalent of fraud. Also, see Kind v. Staton, 409 S.W.2d 253, 259 (K.C. Ct. App. 1966) for additional opinions holding that silence may give rise to an estoppel.

In discussing application of the doctrine of estoppel the court in Kind, citing 31 CJS, Estoppel, pp. 394, 395, stated:

> "As the doctrine, when applied, contravenes the technical, legal rights of the person estopped, stays the operation of the usual machinery employed to adjust the rights of men, and halts proceedings to make certain of justice, and is hence somewhat of a superlaw, arbitrary and penal in nature and character, it should be applied with great care and caution in each case, and only when all elements constituting an estoppel clearly appear."

Equitable estoppel is defined in many cases as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied on such conduct, and has been led thereby to change his position for the worst, and who on his part acquires some corresponding right either of contract or of remedy; and the same definition is given Estoppel in Pais and estoppel by misrepresentation, . . ." 31 CJS Estoppel, page 367.

Certainly, by its approval of the initial Preliminary Plan in 1977, the amendment of that Preliminary Plan in 1980, the approvals of the subsequent Final Plans and Plats, the approval of the revision to the Preliminary Plan for Highpointe Phase I and II, and the approval of the Final PUD Plan for Highpointe Phase II and III, the City has represented that a plat such as the Proposed Final Plat would be approved, and that the development would be permitted to continue. Investments have been made in reliance upon these representations. The City is now barred and estopped from failing to approve the Proposed Final Plan, and from imposing additional requirements for such approval.

It should be additionally noted that to provide a "second access" to the proposed development on the Parcel, would require a deviation from the City's own approved Preliminary and Final PUD Plans. As stated above, the PUD ordinance imposes the Plan as a "overlay" on the Parcel, and the development can proceed forward only in compliance with that overlay, unless the overlay is amended or the Parcel is released from the overlay under the PUD ordinance. See Section 29-10(5) of the Revised Ordinances of the City. As matters now stand,

the Owner is barred by the Approved Final PUD Plan (and the Preliminary) from even seeking to install a second access street to the Parcel. Even assuming such a street could be installed, the only practicable way to install such street (and that would be at great expense) would be to build a new street, to the north, from Huntridge Drive to what is known as Campus View Drive, and the "neighbors" objected to such interconnection during the proceedings with respect to the proposed Final Plat. There, therefore, seems to be no practical way to obtain the connection. The connection would be opposed, if proposed. The connection cannot be provided without amending the Plan or violating the Plan.

Furthermore, it would seem that the City has, by its own actions, waived any necessity for seeking a waiver of the terminal street length. The City has approved, since 1977, plans and plats showing the terminal street at its present length, and has even approved the construction of the street itself, and has accepted that street as a public, City street. It has, therefore, waived any requirement for seeking any sort of waiver or exemption for the length of that already existing street.

For all of the reasons hereinabove set forth, it is submitted that the City cannot now seek to impose some additional requirement (whether that be a second means of access to the Parcel, or a requirement that the Owner seek a waiver of the length of the existing street) for the approval of the Proposed Final Plat. In fact, the record indicates the problem with the street length and second access were raised by the City Staff, only as a matter of after thought, after opposition from the neighbors. The City's own attorney, the City Counselor, Mr. Boeckmann, does not support the need for the waiver of the terminal street length, and has stated to the City Council that even if the waiver was sought it could not be denied, and that, in his view, it is a bit late to be trying to impose upon the Owner a requirement that the waiver be sought. The issues as to the terminal street length and second access are, therefore, simply a red herring, and have no place in consideration of the Proposed Final Plat. Additionally, such issues were not even cited by the City Council as "findings" supporting their position that approval of the Final Plat should be denied. As noted above, if approval of a plat is to be denied, a basis for such denial must be stated so as to clearly apprise the applicant of the reason for such denial. See Knollwood Real Estate Co. v. Planning Bd of Elmsford, 505 N.Y.S.2d 450 (1986), and other cases to a similar affect cited in the foregoing portions of this Memorandum. Certainly an application for approval of a subdivision plat cannot be denied on the ground that neighbors have complained (see Reed v. Planning Bd of Chester, 501 N.Y.S.2d 710 (1986) and Noojin v. Mobile City Planning Com., 480 So.2d 587 (Ala. 1985). A subdivision plan may not be disapproved simply because the commission or council does not approve of the type of the intended development or because it believes the proposed development will not be in keeping with the neighborhood. Brucia v. Planning Bd of Huntington, 549 N.Y.S.2d 757 (1990) and Viscio v. Guilderland Planning Bd, 525 N.Y.S.2d 439 (1988). Simply stated, it is arbitrary as a matter of law to deny approval of a plat which complies in all respects with a subdivision ordinance. Good Value Homes, Inc. v. Eagan, 410 N.W.2d 345 (Minn. 1987).

That the Owner has a right to have this land approved (in fact a vested right under the City's own ordinances) seems to be established, beyond argument. Assuming the Owner has such right, how can the Owner enforce such right? The available alternatives would be as follows:

A. An action in mandamus, seeking to compel the approval of the Plat;

B. An action for declaratory judgment and mandatory injunction, to the same effect;

C. An action for damages against the City Council, for arbitrary and capricious action in denying to the Owner its vested property rights, and/or an action to the same effect under 42 U.S.C. Section 1983;

D. An action in inverse condemnation.

Before dealing with these possible remedies, one should first consider whether the proceedings in question is subject to the Administrative Procedure Act of the State of Missouri, and, therefore, subject to the appeal requirements under that act. The Administrative Procedure Act, Chapter 536 RSMo., has no application to these matters. Section 536.010(2) RSMo. defines the term "contested case", and defines such term to mean "a proceeding before any agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Chapter 536 applies only to such "contested cases", meaning situations where legal rights, duties or privileges are required to be determined after hearing. The Administrative Procedure and Review Law, Chapter 536 RSMo., has no application other than to contested cases, being cases "where a public hearing is required". See Vol. 1, MO Bar CLE, MO Local Government Law, Section 6.33 at p. 6-25. As noted above, no hearing is required for approval of a plat. The plat process is without hearing. There is no hearing. The procedure for approval of the Proposed Final Plat was not, therefore, a "contested case", and is not subject to the Administrative Procedure Act.

A. Mandamus. As noted in the above portions of this Memorandum, mandamus would seem to be clearly available. Mandamus proceedings are dealt with in Rules 94.01, et seq., of the Missouri Rules of Civil Procedure, and Sections 529.010 to 529.100 RSMo. The traditional view is that courts will issue a writ of mandamus to compel a ministerial duty. Vol. II, MO Bar CLE, Appellate Practice and Extraordinary Remedies, Section 12.9. For example, mandamus can clearly issue to compel the issuance of a building permit. Vol. I, MO Bar CLE, MO Local Government Law, Section 6.35 at p. 6-26. As stated above, in this instance, where a Preliminary Plat has been approved and the Final Plat conforms with that Preliminary Plat, approval of the Final Plat is a ministerial act, and the performance of that ministerial act can be compelled by mandamus. Also see 52 Am. Jur. 2d, Mandamus, Sections 221 at page 550, where it is stated that ". . . [T]he writ (mandamus) lies to compel approval of a subdivision map in compliance with a statute and ordinance before recording where the approval was not a discretionary act . . ." (Citing Tuxedo Homes, Inc. v. Green, 258 Ala. 494, 63 So.2d 812). Not only can mandamus issue to force the performance of a ministerial act, it can also lie to force an official to exercise discretion, where there has been an abuse of discretion, 52 Am. Jur.2d, supra, Section 21 at 549. For example, see Hialeah v. State, 97 So.2d 198 (Fla. App.), where it was held that a city council, which was prompted by bias and political reasons to refuse to approve a plat providing for the relocation of an alley, would be compelled by mandamus to approve that plat. To the same effect see Dykes v. Houston, 406 S.W.2d 176 (Tex.).

It is believed, therefore, that mandamus will lie to compel the approval of the Proposed Final Plat.

A ministerial act is an act ". . . that an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of public authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." 52 Am. Jur. 2d, supra, Section 80 at p.402.

"A municipality may be required by mandamus to perform a duty imposed on it by law . . . and it is also firmly established that if the requisite essential to the issuance of the writ are present mandamus is an appropriate remedy to enforce the performance by county, town and municipal officers of ministerial acts that are specifically enjoined by law as duties arising from offices held by them . . ." 52 Am. Jur.2d, Mandamus, Section 160 at 481.

Additional cases indicating that mandamus is available in this instance are as follows:

- People Ex Rel Jackson and Morris, Inc. v. Smuczynski, 102 N.E.2d 168 (Ill. App.), where act of approval by a village board of a plat was held to be ministerial and enforceable by mandamus. To a similar effect see Knutson v. State, 160 N.A.2d 200 (Ind.); and Florham Park Investment Associates v. Planning Bd of Madison, 224 A.2d 352 (N.J.).

- In Kling v. City Council of Newport Beach, 317 P.2d 708 (Cal. App.) the court indicated that a city council is not authorized to deny any subdivision at all on grounds not connected with the map or plan of the subdivision, and consequently cannot deny subdivision on grounds that it was the apparent desire of the majority of people in the tract to have the requested subdivision disallowed.

- In El Dorado at Santa Fe, Inc. v. Bd of County Commissioners, 551 P.2d 1360 (N.M.) it was indicated that a subdivider was entitled to mandamus to compel a board of county commissioners to perform a ministerial act of endorsing approval on plats which complied with all statutory requirements.

- In Whiteland Manor Homes, Inc. v. Downingtown, 378 A.2d 1311 (Pa.) it was indicated that a city council would be directed by mandamus to approve a subdivision plan submitted by a developer where the municipality's decision to reject the plan did not specify the defects or describe the requirements which had not been met as required by the statute.

- In Tippecanoe Community Area Plan Com v. Sheffield Developers, Inc., 394 N.E.2d 176 (Ind. App.) it was indicated that where a developer's preliminary subdivision plat complies with the proper statute and the county subdivision control ordinance the commission must approve that plat.

- In Florida Co. v. Orange County, 411 So.2d 1008 (Fla. App. 1982) the court held that a municipality cannot withhold approval of a subdivision plan where the applicant made substantial expenditures, in good faith reliance upon the preliminary approval.

- In South Central Coast Regional Com v. Charles A. Pratt Construction Co., 128 Cal. App. 3d 830, 180 Cal. Rptr. 555 (5th District 1982) the court indicated that where a developer has relied on a tentative map approval with conditions, and has produced a final tract map which satisfies the conditions, he is entitled to acceptance and approval of that final map without the imposition of new or altered conditions by the local governing agency.

B. Can Damages be Sought as a Part of the Mandamus Proceeding? Perhaps the general rule is that mandamus is exclusive of other remedies, and the election of mandamus eliminates the possibility of seeking other possible remedies. 52 Am. Jur.2d, supra, Section 62 at 386. This general rule, however, does not appear to be applicable in Missouri. One might argue that there must be an "election of remedies" between mandamus and other possibly available remedies, at least before the cause is submitted to the court upon a request for mandamus. Certainly, however, such argument would not prevent the coupling, in a single petition, of a claim for mandamus, with alternative claims for other remedies. Mandamus is a civil proceeding at law. 52 Am. Jur.2d, supra, Section 7 at 2335. It is subject to the Missouri Rules of Civil Procedure, and is specifically provided for by Rules 94.01, et seq., of the Missouri Rules of Civil Procedure. Rule 55.10 permits pleading in the alternative, and states as follows:

> "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds."

It would, therefore, appear that a claim for mandamus could be joined with a claim for any other possibly available remedies.

Mandamus does not seem to preclude damages, and, in fact, damages may be included as a part of a claim for mandamus. See Section 529.060 RSMo., which provides as follows:

> "In case a verdict shall be found for the person suing out such writ, or judgment be given for him on motion to dismiss, or by nihill dicit, or for want of a replication or other pleading, he shall recover his damages and costs, in such manner as he might do in a civil action for a false return, and the same may be levied by execution, as in other cases."

Damages seem to be limited, however, to damages for a false return. Damages can be recovered in an action of mandamus or in a later independent action, but no damages can be had except for a false return to the writ, either at common law or under Section 529.060. Smith v. Berryman, 190 S.W. 165. Under Section 529.060 the damages provided for are not those which the relator has suffered by reason of the official malfeasance or omission which the mandamus is intended to remedy, but are only such as arise from the making of a false return to the writ. Also see State Ex Rel Dallavalle v. Baine, 630 S.W.2d 569 (Mo.

1982). Attorney's fees may be recovered by the relator in a mandamus action if the respondent makes a false return. State Ex Rel Dahl v. Lange, 661 S.W.2d 7 (Mo. 1983). It is believed that the bringing of a proceeding for mandamus does not eliminate the possible seeking of damages for the wrongful act sought to be redressed by such remedy. Gardner v. Springfield Gas and Electric Co., 135 S.W. 1023. Furthermore, denial of a writ of mandamus does not necessarily mean the petitioner cannot establish a right to relief in a subsequent proceeding - a denial, other than on the basis of the merits, is not res judicata in an underlying suit to establish the underlying right. Vol. II, MO Bar CLE, Appellate Practice and Extraordinary Remedies, Section 12.5.

A further indication that a relator in a mandamus action may seek damages for the wrongful act can be found from State Ex Rel Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969), where the court indicated that city employees discharged and demoted for union activities in violation of statutory and constitutional rights were entitled both to a recovery of wages and to mandamus for rescission of the city's action and their reinstatement.

As noted above, mandamus is a legal and not equitable remedy. See Norbal v. Whitesell, 605 S.W.2d 789 (Mo. 1980).

C. Declaratory Judgment. Certainly a declaratory judgment action is available to us. "The declaratory judgment action is that most often used to challenge the validity of zoning amendments or subdivision ordinances." See MO Bar, CLE, Local Government Law, Section 6.32 at 6-24 and Section 527.010 RSMo. Declaratory judgment and mandatory injunction would be available, but would, of course, not be completed as promptly as would mandamus. The disadvantage is largely one of time. However, using declaratory judgment would eliminate any uncertainty as to whether the Owner can also seek damages; assuming damages are available. Clearly an action for declaratory judgment is not inconsistent with (and could be coupled with), a claim for damages against the City Councilpersons.

D. Damages/Official Immunity. It would seem that it is reasonable to believe we could establish that the City Council acted arbitrarily and capriciously [particularly in view of the admission to such effect of one of the Councilpersons who voted "no" on the issue of approval of the Proposed Final Plat - Councilman Schuster]. No basis (or no proper or lawful basis) for denial of approval of the Proposed Final Plat was cited by the Council in its determination. It would seem that the Council's action has denied the Owner (or deprived the Owner) of a "vested" right established by the City's own ordinances, which provide that the Owner has a vested right, for 7 years, to have approved a Final Plat which conforms with an Approved Preliminary Plat. Such vested right is established, not just by the City's own ordinances, but by the common law, as established by the cases and authorities hereinabove cited in this Memorandum. Strong basis exists, therefore, for a belief that it can be established before a court of competent jurisdiction that the City Council, acting arbitrarily and capriciously (or at the very least in disregard of the obligations imposed upon it by its own ordinances), has deprived the Owner of a vested property right, and that, as a result, the Owner has been substantially damaged. For example, the Owner may well have been deprived of the benefit of its contract with the contract purchaser hereinabove first referred to in this Memorandum. Additionally, the Owner has continued to incur substantial interest

charges and carrying costs, and its development and ability to recover those costs has been delayed. Substantial damages would seem, therefore, to be capable of being established. Can those damages be recovered in personal actions against the Councilpersons for damages? It is believed that they can be so recovered. The City Council may claim that their failure to approve the Plat constituted an "official act", and that they are protected by the doctrine of "official immunity" from suit for any damages arising from this act. We do not believe such argument can properly be asserted. As noted above, it is believed the act in question was a ministerial act, not a discretionary or official act. A ministerial act is an act ". . . that an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of public authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." 52 Am. Jur. 2d, supra, Section 80 at p.402.

"Official immunity" is not available to public officers when public officers are engaged in performances of ministerial acts, as opposed to discretionary acts or omissions. Kanagawa v. State of Missouri, 685 S.W.2d 831 (Mo. en banc. 1985). There was no discretion involved with respect to approval or disapproval of the Proposed Final Plat. Also see Rustici v. Weidemeyer, 673 S.W.2d 762 (Mo. en banc. 1984), where the court indicated that a public officer has official immunity from liability for discretionary acts or functions performed in the exercise of official duties, but has no such immunity from ministerial acts. It is believed, therefore, that the defense of official immunity would not be available to the City Council in this instance. If they have wrongfully denied the Owner of the Owner's vested right, and damaged the Owner accordingly, to their failure to perform their required ministerial act, then they may be liable in damages for such failure.

E. 42 U.S.C. Section 1983. A "civil rights liability" under 42 U.S.C. Section 1983 may arise out of an allegedly arbitrary zoning decision, or out of actions by a governing body which deny a person a valuable property right. Two Missouri federal court decisions indicate such to be the case. See Shapiro, Damages Under Section 1983 for Adverse Land Use Decisions, Journal of MO Bar, June 1986, at p.263, and the case of Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. Mo. 1986). In Littlefield the city denied a property owner a building permit, and insisted that the property owner agree to dedicate a public right-of-way across the property as a condition to granting the building permit. Since there was little or no discretion as to the issuance of the permit, the court held that the denial on that basis was unreasonable and stated a cause of action for damages under 42 U.S.C. Section 1983. Contrast the decision in Littlefield (where the official had no discretion) with the decision in Hope Baptist Church v. City of Bellefontaine Neighbors, 655 F. Supp. 1216 (E.D. Mo. 1987), where the court dismissed a due process claim, alleging that a refusal by the city to rezone property was arbitrary and capricious, on the basis of the court's conclusion that even if the plaintiff had stated a cause of action the individual board members were immune, since in making their zoning decision they were acting in a strictly legislative capacity. Further see Cunningham v. City of Overland, a decision of the Federal District Court of the Eastern District of Missouri cited in MO Bar, CLE, Local Government Law, Section 6.36 at p.6-37 [a 1986 decision], which also involved an application for a permit where the owner met all requirements. Eventually the action of the board in denying the permit was reversed by the State Circuit Court, but the business opportunity had been

lost to the plaintiff in the interim, and it was held that the owner's 42 U.S.C. Section 1983 action would lie. [Such action, incidentally, resulted in a substantial jury verdict in favor of the owner.] Another Section 1983 action, arising out of land use regulation, is Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1983).

A conclusion that a Section 1983 claim for damages based upon a municipalities arbitrary denial of a land use permit or license will lie, seems to be justified, if the denial was in violation of a ministerial duty. An advantage of a Section 1983 case is that the prevailing party can be granted attorney's fees. See J of MO Bar, supra, at p.266.

F. Inverse Condemnation. Certainly, one could also make a very legitimate argument that, in this instance, the City has "changed the rules". It has "changed its land use regulations", by now seeking to impose upon the Owner an additional requirement for the development of the Parcel, to-wit the installation of a new, second access, which can only be installed if the present Plan is vacated or amended, and can then only be installed at substantial burden and expense. Additionally, the Parcel, as it is now zoned, simply can't be used, as it is subject to a mandatory overlay, and can be used pursuant to that overlay only if the Plat is approved, and approval of the Plat has been denied. The City, by approving the Plan, and then denying approval of the Plat, has, for all intents and purposes "confiscated" the property. Missouri courts have consistently held that zoning which restricts property to a use for which it is not adapted is unreasonable and constitutes an invasion of the owner's property rights. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. 1981); Ewing v. City of Springfield, 449 S.W.2d 681 (Mo. App. 1970). In addition, property may not be zoned so as to prevent any effective use, as such a regulation becomes an unlawful confiscation. Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. App. 1977); Ogawa v. City of Des Peres, 745 S.W.2d 238 (Mo. App. 1988). Finally, a refusal to rezone based upon a desire to benefit or refrain from injuring a few adjacent landowners is not substantially related to the public interest and cannot be justified on that basis. Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963).

In Despotis v. City of Sunset Hills, supra, a landowner brought an action challenging the city's refusal to rezone property from residential to commercial. The owner showed that development of her property under continued residential zoning was not economically feasible, that the property fronted on a heavily trafficked, commercial thoroughfare, and that the owner's adjacent parcel was used for commercial purposes. Expert testimony also established that the commercial value of the property would far exceed the residential value.

Missouri law provides that once a zoning ordinance has been enacted, those purchasing property affected by such ordinance have the right to rely on the belief that the ordinance will not be changed unless required for the public good. Allen v. Coffel, 488 S.W.2d 671 (Mo. Ct. App. 1972). Furthermore, a refusal to rezone property simply to benefit a few adjacent property owners is not related to the public interest and such refusal cannot be justified on that basis. Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. 1981).

In our view, the United States Supreme Court has considered an issue somewhat similar to that presented in then present case. To deny approval of

the proposed Plat (and to propose some requirement that additional access be provided to the property) in our opinion, would deny this Owner any effective use of the Parcel in question. In Nolle v. California Coastal Commission, 107 S.Ct. 3141 (1987), the California Coastal Commission granted a building permit to a landowner for purposes of constructing a larger home upon the landowner's beachfront property, upon the condition that the landowner allow the public an easement to pass across the landowner's beach. The Coastal Commission claimed that the new house would increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would create a "psychological barrier" to the public's access to the beach. The landowners claimed that the imposition of the condition violated the takings clause of the Fifth Amendment.

The Court stated that the government's power to forbid particular land uses in order to advance some legitimate police power purpose includes the power to condition such use upon some concession by the landowner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced by the governing body as the justification for prohibiting the use. The Court reasoned that had the Coastal Commission attached to the building permit some condition that would have protected the public's ability to see the beach, notwithstanding the construction of a new home, so long as the Coastal Commission could have exercised its police power to forbid construction of the house altogether, the imposition of the condition would be constitutional. The court concluded that, unless the permit condition serves the same governmental purpose as would a development ban, the building restriction is not a valid regulation of land use. The Court held that the Coastal Commission could advance its interest in providing public access to the beach pursuant to its power of eminent domain and that if the Coastal Commission wanted an easement across the landowner's property, the Coastal Commission must pay for it. In our view, if, at this late date, and on this last platable area encompassed within the Tract subject to the original 1977 Approved Preliminary PUD Plan for the Meadows, the City elects to impose some additional requirement to build additional access to the Parcel (which cannot be practicably provided), the City will have acted arbitrarily and capriciously, and will have, in effect, denied this property owner the effective use of the property owner's property, and the City will, therefore, have, in effect, condemned the property and must pay for it.

It is respectfully noted that in this case, the Owner's property (the Parcel) is being "held hostage". The Owner cannot, under the PUD ordinance, use the Parcel at all, for any purpose whatsoever, other than the purpose designated by the Approved Final PUD Plan. That Approved Plan does not provide for any additional access. It provides for the terminal street, as platted. The terms and conditions of the PUD overlay are such that the property cannot be used until the Final Plat is approved, and, even then, the property can be used only in conformity with the Approved Plan. [Note: To now require the placement of a new access street would be a modification of (i) the Approved Preliminary Plan for the Meadows; and (ii) one or more of the existing Final PUD Plans.] The property, without approval of the Plat, is essentially unusable, and there is no other realistic, practical way, to use the property, other than as it is now platted (which conforms with the Plan). There is no readily available way to achieve additional access to the property, and even providing such access would require that the existing Approved Final Plans be amended. To deny the Owner

the use of its property by imposing an unreasonable, previously unstated requirement for additional access would be arbitrary and capricious and an unreasonable denial of approval of the subdivision plat. In zoning and subdivision the City Council does not have unlimited powers. See Despotis v. City of Sunset Hills, 619 S.W.2d 814 (Mo. App. E.D. 1981). The City cannot act "unreasonably" in denying zoning. State Ex REl Kolb v. County Court of St. Charles County, 683 S.W.2d 318 (Mo. app. E.D. 1984). While in reviewing a zoning decision the court may be required to presume that the zoning decision is valid (State Ex Rel Kolb v. County Court of St. Charles County, supra), and, generally, courts, in reviewing zoning decisions, are limited to determining whether the decision is supported by competent and substantial evidence and is not unreasonable (Staet Ex Rel Kolb v. County Court of St. Charles County, supra, and Westlake Quarry and Material Co. v. City of Bridgeton, 761 S.W.2d 749, App. after remand 776 S.W.2d 904 (Mo. App. 1988)). It would seem that, in this case, a denial of approval of the Final Plat would be unreasonable, arbitrary and capricious, and would be an unconstitutional taking of my client's property, without just compensation.

It is respectfully submitted that if the City refuses to approve this Proposed Final Plat, or seeks to impose upon the Owner some requirement for approval of that Plat:

a. Which has not been imposed on other developers similarly situated (for instance those in Huntridge Place (the Meadows Phase II), and the original developer, Ozark Trans-Land Development Company), and

b. Which is a new, previously unmentioned, additional condition for approval of the Final Plat, and

c. Seeks to require that the Owner provide additional access to the Parcel, which cannot be practicably provided, and

d. Denies the Owner the vested right to develop the property in conformity with the Approved Final PUD Plan,

then the City, in effect, will have taken the Owner's property and effectively condemned it. Refusal to approve this Plat would deny the Owner the only lawful use of the Parcel, and might well entitle the Owner to claim that the property has been condemned, and to seek payment for the confiscation of its property in an action for inverse condemnation. See Harris v. Missouri Department of Conservation, 755 S.W.2d 726, 729-730 (Mo. App., W.D. 1988), where the court, citing the decision of the United States Supreme Court in First English Evangelical Lutheran Church v. County of Los Angeles, 197 S.C. 2378, 96 L. Ed. 2d 250 (1987), stated that land owners can challenge a land use regulation by way of a suit for inverse condemnation under both the federal and Missouri State Constitutions [i.e., United States Constitution, Articles 5 and 14 of the amendments, and Missouri Constitution, Article 1, Section 26].

In the inverse condemnation action the owner of property files a complaints against an authorized condemning authority, alleging that the condemning authority has, in fact, appropriated or damaged his property, for which such authority has neglected to pay him the just compensation to which he is entitled. Rams, Valuation for Eminent Domain, p.125 (1973). For further

discussion of the action of inverse condemnation see MO Bar CLE, Condemnation Practice, Chapter 10.

ADDITIONAL CONSTITUTIONAL ISSUE

Additionally, one must further consider the possible equal protection problem under the federal and state constitution. The Engineer has indicated (and it is believed the City Staff would indicate), that there are numerous PUDs throughout the City, which have so-called "nonstandard streets" (streets of less than the required width, streets of excessive length, etc.), in which the PUD plan was approved, and the final plat was approved, without any specific mention being made by way of an express waiver, exemption or exception for the nonstandard street. In other words, on no other occasion has some requirement been made so as to impose upon a developer a need to seek a waiver of a nonstandard street in a PUD, when the plan, itself, showed the characteristics of the nonstandard street. [Example: City streets are generally required to be of 32 foot width. A PUD plan might show a 28 foot wide street. If the plan is approved, it has simply been assumed the waiver of the street width has been granted.] Why then, on this single occasion, for an existing, already constructed street, is this developer/owner being subjected to requirements different than those imposed upon others? It is respectfully submitted this developer has been denied equal treatment or protection under the laws, in violation of Section 2, Article 1, of the Constitution of Missouri, and Section 1 of Article XIV of the Amendments to the Constitution of the United States.

RECOMMENDATIONS TO CLIENT

In view of our conclusions set forth above, it is our opinion that the City Council has unlawfully (and probably arbitrarily and capriciously) failed to perform a ministerial, nondiscretionary act, when it failed to approve the Proposed Final Plat. There was no legal basis for denial of such approval. The City Council's actions can certainly be redressed by an action in mandamus. Alternatively, a proceedings for declaratory judgment and mandatory injunction (which would be slower) could be utilized. Certainly, if the disapproval of the Plat can be sustained, it would appear that the City has changed its land use regulations as applicable to this Tract, and that it would be required to pay damages for the value of the Parcel in an action in inverse condemnation. Additionally, it would appear that the arbitrary and capricious actions of the City Council in denying approval of the Plat may well subject the individual Council members to actions for damages, in that the action was ministerial, not discretionary, and would not give rise to the protection of the doctrine of official immunity.

It is, therefore, our recommendation that if time is of the essence, the Owner proceed with an action for mandamus, coupled with actions for damages.

Alternatively, if time is not of the essence, we can proceed more deliberately with an action for declaratory judgment and mandatory injunction, thereby clearly protecting our rights to damages, which may arguably (but not properly we think) be barred by the election of the mandamus remedy, which, arguably is inconsistent with an action for damages. Although we do not believe this argument is properly taken, the more conservative course of action (if damages are desired) would be to proceed by declaratory judgment and mandatory

injunction. If time is of the essence, the action should be for mandamus, with a joined (or separate) claim for damages, and a possible claim in inverse condemnation.

MEMO

TO: David B. Rogers

FROM: Lisa Barton

DATE: January 20, 1993

RE: update of memo from 7/21/92 re discretion of council in approving subdivision plat

QUESTION: Does the recent decision in *State ex rel Schaefer v. Cleveland* 847 SW2d 867 (Mo App ED 1992) change the status of city councils' or county commissions' discretion in approving subdivision plats?

ANSWER: No, the case only narrows the interpretation of RSMo 445.030.

DISCUSSION: The city council and county commission in *Schaefer* tried to cite RSMo 445.030 and the two cases cited in the earlier memo for the proposition that they had discretion to deny the relator's plat because it did not conform to the character of the neighborhood. The court, without overruling the earlier cases, denied their authority to do so and limited the scope of such discretion to the holding of the earlier *Bellefontaine* decision. (*Bellefontaine* held that the city had the authority to enact ordinances for requirements to be met before approving the final plat.)

Consistent with the July memo, the county commission has no discretion because no statute authorizes it. The *Schaefer* court held that the discretion allowed to city councils by RSMo 445.030 is limited. "[T]he exercise of discretion and judgment vested in the administrative body is to determine whether a plan meets the zoning or subdivision requirements.

It is not a discretion to approve or disapprove a plan that does meet the requirements." *Schaefer* at 11-12. To the extent that a plan meets all the requirements of the city ordinances, the city council's role in approving the plat is merely ministerial.

MEMO

TO: David B. Rogers

FROM: Lisa Barton

DATE: July 21, 1992

RE: Discretion of council in approving of subdivided plat

Question: In approving a subdivided plat, is the council's role administrative or legislative?

Answer: The council has some legislative discretion.

Discussion: Prior to 1943, the general rule was that the city council's role in approving plats was only ministerial. Downend v. Kansas City, 56 S.W. 902 (1900) and Better Built Homes & Mortgage Co. v. Nolte, 249 S.W. 743 (1923). In both cases, the plats conformed to statutory requirements so that the council's approval involved no discretion.

After RSMO 445.030 was passed in 1943, some discretion was given to the council: "before approving such plat, the common council may, in its discretion, require such changes or alterations thereon as may be found necessary to make such map or plat conform to any zoning or street development plan which may have been adopted or appear desirable, and to the requirements of the duly enacted ordinances of such city, town or village, appertaining to the laying out and platting of subdivisions of land within their corporate limits." VAMS 445.030 (1986).

In the Missouri Court of Appeals
Eastern District

DIVISION THREE

STATE OF MISSOURI, ex rel. JOHN SCHAEFER,	)	No. 61543
Plaintiff-Appellant,	)	Appeal from the Circuit Court of St. Louis County
vs.	)	Hon. Margaret M. Nolan
EDWARD C. CLEVELAND, et al.,	)	
Defendants-Respondents.	)	OPINION FILED: December 29, 1992

Relator appeals from the action of the trial court in dismissing his petition for a writ of mandamus. We reverse and remand.

Because relator's petition was dismissed for failure to state a cause of action we must consider as true all well pleaded facts. *Davis v. Carmichael*, 755 S.W.2d 679, l.c. 680 (Mo. App. 1988). Relator alleged that he owns a parcel of real estate in the City of Kirkwood. The Subdivision ordinance of Kirkwood requires approval of a subdivision plat prior to development or sale of property. The approval process involves (1) initial approval by the Kirkwood Planning and Zoning Commission of a preliminary plat, (2) Commission approval of the final plat and (3) approval by the City Council of the final plat. Relator submitted a preliminary plat to

the Commission which was denied approval. Relator thereafter submitted a final plat to the Commission which again denied approval. The final plat was then forwarded to the City Council which denied approval. Relator alleged that it was the duty of the Commission and the Council to examine the plats with respect to minimum zoning standards and requirements of the City and to approve the preliminary and final plats if they meet or exceed the standards and requirements. He further alleged that the preliminary and final plats met such standards and requirements of the Subdivision ordinance, and the actions of the Commission and the Council were the arbitrary, capricious, unreasonable and unlawful refusal to carry out a ministerial act under the Subdivision ordinance and therefore an act beyond the powers of the two bodies.

No alternative writ was issued. Instead, the respondents who were the members of the Commission filed a motion to dismiss on the basis that the final determination concerning a plat is vested in the Council and the decisions of the Commission are merely advisory and of no legal effect. Respondents who were the members of the Council filed an answer to the petition. Subsequently, all respondents filed a motion to dismiss on the basis that "the grant or denial of a resubdivision is not a ministerial act as a matter of law, and, thus, there is no claim for mandamus." We requested that the parties address the issue of our jurisdiction and they have done so.

The usual procedure in a mandamus case is for the petition to

be filed, the court to determine whether an alternative writ should issue, denial of the alternative writ or issuance of same, and answer to the alternative writ if issued. It is not the petition for the writ but the alternative writ in mandamus which corresponds to the petition in an ordinary civil action. It is the alternative writ, and not the petition, therefore, to which a respondent makes his return. *State ex rel. Brandon v. Hickey*, 462 S.W.2d 159 (Mo. App. 1970) [4,5]. An order refusing an alternative writ of mandamus is not a final judgment or order and is not appealable. *Id.* The remedy for a refusal to issue a mandamus is by a direct application to the higher court which has original jurisdiction in such matters. *Id.*

Where, however, the respondent appears without service of an alternative writ, and makes his return, the petition stands as and for the alternative writ itself for the purposes of the case and the return. *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854 (Mo. 1971) [1]. Where the court below dismisses the petition following answer or motion directed to the merits of the controversy and in so doing determines a question of fact or law the order is final and appealable. *State ex rel. Stoecker v. Director of Revenue*, 734 S.W.2d 263 (Mo. App. 1987) [2]. Here respondents answered the petition for alternative writ and filed motions to dismiss directed to the sufficiency of the allegations to state a cause of action. The trial court ruled on the sufficiency of the allegations, an issue of law. The order granting the motion to dismiss is final and appealable. We have jurisdiction.

We turn to the merits. A writ of mandamus is appropriate only where it compels ministerial actions; it may not be utilized to compel the performance of a discretionary duty. *Bunker Resource Recycling and Reclamation, Inc. v. Mehan*, 782 S.W.2d 381 (Mo. banc 1990) [17,18]; *State ex rel. Kessler v. Shay*, 820 S.W.2d 311 (Mo. App. 1991) [4-6]. The issue then before us is whether under relator's allegations respondents failed to perform a ministerial act in refusing to approve the plat. We, of course, make no determination of the truth of the facts alleged. As previously indicated we are bound by the facts alleged in relator's petition. The key allegation is that the plats which he submitted met or exceeded the applicable requirements of the City ordinance for subdividing land. The City's motion was premised upon the conclusion that even if the plat met all the regulations of the City's ordinances the Commission and the Council still had a discretionary authority to refuse to approve the plats.[1]

The lot in question is to be subdivided to produce a normal lot and a "flag lot". "Flag lots" are defined in the subdivision ordinance as a residential lot with two discernible portions, one a building site portion not fronting on or abutting a street and the second portion abutting on the street and providing access to

---

[1] The parties have in their memoranda in the trial court and in their briefs here asserted certain factual matters which do not appear in the petition or the motion to dismiss. There does not appear to be any dispute between the parties concerning these facts or certain exhibits, including the Kirkwood Subdivision ordinance attached to the relator's memorandum to the trial court in opposition to the motion to dismiss. We therefore will consider those non-disputed facts and exhibits and treat the motion to dismiss as a motion for summary judgment.

the building site portion. The ordinance further provides specific restrictions on the size of the building site portion which requires it to be larger than the required lot area of the zoning district in which it is located. The ordinance also prescribes the size of the access portion. There seems to be no question at this point that the plats of the relator met the specified restrictions of the subdivision ordinance and the zoning restrictions. The parties also seem to be in agreement that the Commission and the Council refused to approve the plats because they were "out of character" with the neighborhood. Respondents assert in their brief here that the plats did not comply with the Master Plan of the City. No Master Plan was made a part of the record. There seems to be some agreement that less than two years earlier than the rejection of relator's plats the Council approved a flag lot subdivision in the same block.

Respondents contend that §445.030 RSMo 1986 grants to them an unlimited discretion to deny approval of plats. Specifically the pertinent part of that section upon which respondents rely states:

> Provided, however, that if such map or plat be of land situated within the corporate limits of any incorporated city, town or village, it shall not be placed of record until it shall have been submitted to and approved by the common council of such city, town or village, by ordinance, duly passed and approved by the mayor, and such approval endorsed upon such map or plat under the hand of the clerk and the seal of such city, town, or village; nor until all taxes against the same shall have been paid; and before approving such plat, the common council may, in its discretion, require such changes or alterations thereon as may be found necessary to make such map or plat conform to any zoning or street development

> plan which may have been adopted or appear desirable, and to the requirements of the duly enacted ordinances of such city, town or village, appertaining to the laying out and platting of subdivisions of land within their corporate limits.

Section 445.030 RSMo 1986. (Emphasis supplied to indicate amendment of 1943.)

It is also necessary to consider the provisions of §89.410.1 RSMo 1986, enacted in 1963, twenty years after the amendment to §445.030 above emphasized. That section provides:

> 1. The planning commission shall recommend and the council may by ordinance adopt regulations governing the subdivision of land within its jurisdiction. The regulations, in addition to the requirements provided by law for the approval of plats, may provide requirements for the coordinated development of the municipality; for the coordination of streets within subdivisions with other existing or planned streets or with other features of the city plan or official map of the municipality; for adequate open spaces for traffic, recreation, light and air; and for a distribution of population and traffic.

Section 89.410.1 RSMo 1986.

In *City of Bellefontaine Neighbors v. J.J. Kelley Realty and Building Company*, 460 S.W.2d 298 (Mo. App. 1970) [6,7] we addressed the relationship between the two statutes. We stated there:

> The specificity of the 1963 act may be considered to restrict the broad grant of power given by §445.030 and to establish the procedures for carrying out the regulation of subdivisions authorized by §445.030. Where the legislature has authorized a municipality to exercise a power and prescribed the manner of its exercise, the right to exercise the power in any other manner is necessarily denied. Not until the 1963 enactment of §89.410 RSMo 1959, did the legislature purport to limit the manner of the exercise of the

power granted in §445.030.

Id. (citations omitted).

Section 89.410 requires that regulation of subdivision be accomplished in municipalities by ordinance. The Subdivision ordinance of the City, enacted in 1973, was within the authority of §89.410 and was presumably intended to comply with the authority contained in that statute. Nowhere in that ordinance does there exist an authority to base approval or denial of a plat on its compatibility with the character of the neighborhood. The reference to the Master Plan of the City, referred to by the respondents, does not authorize approval or denial of a plat based upon compliance or non-compliance with the Master Plan but simply advises developers to review that plan to determine how the preliminary plat will fit into the comprehensive plan for the development of the city. *Vick v. Board of County Commissioners of County of Laramie*, 689 P.2d 699, l.c. 702 (Colo. App. 1984) addressed the status of a "Master Plan". It stated that conceptually it is a guide to development rather than an instrument to control land use. It is the task of the legislative body charged with zoning to apply the broad planning policies to specific property in enacting zoning regulations. The Master Plan is not itself a zoning document or a subdivision regulation, and cannot be used as such.

One other case in Missouri besides *Bellefontaine Neighbors* addresses the import of the two statutes heretofore cited. In *Basinger v. Boone County*, 783 S.W.2d 496 (Mo. App. 1990) the court

was addressing the authority of a county commission to exercise discretion in the matter of approval of plats. It distinguished the situation of a county, for which there is no counterpart of §445.030, with the situation of the city to which the statute is applicable. *Id.* at l.c. 499. We do not regard *Basinger* as holding that §445.030 confers unlimited discretion upon a city council in its decision to approve or disapprove a subdivision plat. *Basinger* does make clear that in the absence of a statute such as §445.030 no discretion does exist as to approval or disapproval of a plat.

Courts in a number of other states have addressed the issue. In *Richardson v. City of Little Rock Planning Commission*, 295 Ark. 189, 747 S.W.2d 116 (1988) the court held:

> When a subdivision ordinance specifies minimum standards to which a preliminary plat must conform, it is arbitrary as a matter of law to deny approval of a plat that meets those standards. Accordingly, if the plat is within the use permitted by the zoning classification and meets the development regulations set forth in the subdivision ordinance, then the plat by definition is in "harmony" with the existing subdivisions.

Id. at [4]. (citations omitted).

It would also, by definition be in "character".

In *Sowin Associates v. Planning and Zoning Commission of the Town of South Windsor*, 23 Conn. App. 370, 580 A.2d 91 (1990) the court held that "where a commission is weighing the approval or disapproval of a subdivision plan, in a zone that permits the proposed use, the commission may not look beyond the question of whether the plan satisfies the town subdivision regulations." [3,4]. The court further held that subdivision regulations cannot

be too general in their terms and must contain known and fixed standards that apply to all similar cases. *Id.* at [5,6].

In *Kaufman v. Planning and Zoning Comm. of City of Fairmont*, 298 S.E.2d 148 (W.Va. 1982) the court was dealing with a subdivision plat which had been rejected at least in part because it was not a "harmonious development" as set forth in the West Virginia statute. That term was found to lack the specificity necessary to adequately notify persons seeking plat approval of what they must demonstrate before a planning commission. *Id.* at [3,4]. Municipal ordinances relying upon statutory authority to regulate subdivisions must put subdividers on notice of what factors must be satisfied in order to gain commission approval. *Id.* at [6]. Finally the court stated: "Just as the planning commission in *Singer* could not use a planning decision to implement zoning, a planning commission may not use its authority to effectively rezone property by denying approval of a subdivision plat." *Id.* at [14].

Southern Cooperative Development Fund v. Driggers, 696 F.2d 1347 (11th Cir. 1983) was an action alleging a violation of 42 U.S.C. §1983 by the action of the Board of Commissioners in refusing to approve a preliminary subdivision plat. The court affirmed the ruling of the lower court granting an injunction requiring approval of the plat holding the denial by the Board denied plaintiff its constitutional right of due process. The Court addressed the defendants' contention that the language of the preamble to the subdivision regulations reserving discretion to

provide for the general health, safety and welfare was sufficient to justify the Commissioners' decision. *Id.* at [2]. In addressing that issue the Court stated:

> The preamble contains no standards with respect to subdivision approval. It merely sets forth the underlying purpose for enacting the Subdivision Regulations. The language in the preamble cannot serve as an independent source of authority for disapproving plats. This would permit the Commission to hold in reserve unpublished requirements capable of general application for occasional use as the Commission deems desirable.

Id.

We conclude it would be equally improper to utilize the very general language of the "purposes" section of the Kirkwood ordinance mentioning "public health, safety, convenience, and general welfare" as a grant of otherwise unmentioned subjective discretion. *See, Sowin Associates, supra*, [2].

The cases discussed above are consistent with the law of this state. *State ex rel. Ludlow v. Guffey*, 306 S.W.2d 552 (Mo. banc 1957) [4] quoting from the earlier case of *Lux v. Milwaukee Mechanics' Ins. Co.*, 322 Mo. 342, 15 S.W.2d 343 (banc 1929) stated:

> The general rule is that any ordinance which attempts to clothe an administrative officer with arbitrary discretion, without a definite standard or rule for his guidance, is an unwarranted attempt to delegate legislative functions to such officer, and for that reason is unconstitutional. * * * The exceptions to the general rule are in situations and circumstances where necessity would require the vesting of discretion in the officer charged with the enforcement of an ordinance, as where it would be either impracticable or impossible to fix a definite rule or standard, or where the discretion vested in the officer relates to the enforcement of a police

regulation requiring prompt exercise of judgment.

The subdivision ordinance of Kirkwood already vests considerable discretion in the Commission and the Council in determining whether the subdivision plat meets the standards spelled out in the ordinance. For instance, provisions addressing street design, block size, lot shapes, and many other areas set guidelines but authorize variations therefrom in the discretion of the Commission or the Council. A specific section deals exclusively with variations and exceptions based upon hardship. The Commission and the Council, in proceeding under the subdivision ordinance, are acting in an administrative capacity and not in a legislative capacity. *See, State ex rel. Ludlow v. Guffey, supra*, [1-3]. Subdivision regulation is not so difficult as to make it impossible or impracticable to establish sufficient standards to guide the administrative bodies applying the ordinance. We make no suggestion that the standards spelled out in the ordinance lack the requisite specificity. The law does not permit administrative bodies to exercise an arbitrary and subjective authority over the granting or denying of subdivision plats.

Respondents assert that to deny them the discretion to reject relator's plat is to eliminate the need for the Commission or Council altogether because no determinations would be required. That misses the point of the discretion vested in the bodies. As pointed out in the *Southern Cooperative Development Co.* case, *supra*, the exercise of discretion and judgment vested in the administrative body is to determine whether a plan meets the zoning

or subdivision requirements. It is not a discretion to approve or disapprove a plan that does meet the requirements. The statutes and the ordinance do not grant to the Commission or the Council the authority to deny a subdivision plat which complies with the subdivision ordinance. If relator's plat does so comply then it is the ministerial duty of the Commission and the Council to approve it and they have no discretion to deny it. Relator's petition alleges that the plat meets the requirements of the Kirkwood ordinances and that respondents have denied approval of the plat. It therefore states a cause of action in mandamus.

Order dismissing relator's petition is reversed and cause is remanded for further proceedings.

GERALD M. SMITH, Judge

G. Gaertner, P.J. and Blackmar, Sr.J, concur.

Clayton, Mo., for respondent).

Zoning

Subdivision Plat - Denial Of Approval - Mandamus

Where a developer's subdivision plat complied with the requirements of the subdivision ordinance, the Planning and Zoning Commission did not have discretion to deny approval of the plat, but had a ministerial duty to approve it.

Order dismissing relator's petition is reversed and the cause is remanded for further proceedings.

Ministerial Actions

"A writ of mandamus is appropriate only where it compels ministerial actions; it may not be utilized to compel the performance of a discretionary duty. ... The issue then before us is whether under relator's allegations respondents failed to perform a ministerial act in refusing to approve the plat. ...

"The subdivision ordinance of [City] already vests considerable discretion in the Commission and the Council in determining whether the subdivision plat meets the standards spelled out in the ordinance. ... A specific section deals exclusively with variations and exceptions based upon hardship. The Commission and the Council, in proceeding under the subdivision ordinance, are acting in an administrative capacity and not in a legislative capacity. ... Subdivision regulation is not so difficult as to make it impossible or impracticable to establish sufficient standards to guide the administrative bodies applying the ordinance. ... The law does not permit administrative bodies to exercise an arbitrary and subjective authority over the granting or denying of subdivision plats. ...

"The exercise of discretion and judgment vested in the administrative body is to determine whether a plan meets the zoning or subdivision requirements. ... The statutes and the ordinance do not grant to the Commission or the Council the authority to deny a subdivision plat which complies with the subdivision ordinance. If relator's plat does so comply then it is the ministerial duty of the Commission and the Council to approve it and they have no discretion to deny it."

Order dismissing relator's petition is reversed and the cause is remanded.

State ex rel Schaefer v. Cleveland (MLW No. **DE-4852** — 12 pages) (Smith, J.) Appealed from Circuit Court, St. Louis County, Nolan, J. (Robert J. Koster and Elizabeth D. Odell, St. Louis, Mo., for appellant) (John M. Hessel and John D. Husmann, St. Louis, Mo., for respondent).

Per Curiam