

From: Robert Lichtwardt [mailto:licht@ku.edu]
Sent: Friday, May 09, 2008 1:08 PM
To: Paul Patterson
Cc: David L. Corliss; Scott McCullough
Subject: Conditions needed on the University Park development

Mr. Paul Patterson, AICP
Current Planner
Lawrence-Douglas County Planning Office

Dear Paul,

This attached paper is a revised version of the Attachment to the one-page list of needed conditions that we are requesting be placed on the RS7-PD District and Preliminary and Final Development Plan for the University Park development. We hope that this explains more clearly than the original draft of the Attachment we left with you why we need these conditions to be placed both on the zoning as well as the plan, and why the waiver to the open space has created so much concern with us. Not only are we concerned about the development in our neighborhood and hope that it will be predictable as well as successful, but we are also concerned that how the process and interpretation of our new Land Development Code, if not done according to the Code, will negatively affect future planned development.

Thank you for your careful consideration of these issues.

Sincerely,

Bob and Betty Lichtwardt

NEEDED CONDITIONS TO BE WRITTEN AND RECORDED ON THE FINAL PLAN, FINAL PLAT AND PD
OVERLAY DISTRICT ORDINANCE FOR THE UNIVERSITY PARK ADDITION PLANNED
DEVELOPMENT
May 8, 2008

BACKGROUND: The most important aspect of a planned development is the plan, not the zoning. This is the reason the code has been written to describe the process of the rezoning map amendment as interchangeable and inseparable from the plan. (See attachment: " PD zoning map amendments shall only be processed concurrently with a Preliminary Development Plan application.")

The rezoning to the RS7-PD Overlay District for University Park was approved by the Planning Commission (PC) without their having reviewed the Preliminary Plan. At staff's recommendation, the rezoning was not sent to the City Commission for approval, so it is not too late to recommend the same conditions on both the map amendment and the preliminary plan for the City Commission to apply to them as binding conditions. This is a requirement written into the Lawrence Land Development Code.

NEEDED CONDITIONS TO BE ATTACHED TO THE PRELIMINARY PLAN, FINAL PLAN, FINAL PLAT
AND PLANNED DEVELOPMENT ZONING DISTRICT ORDINANCE FOR UNIVERSITY PARK:

1. The provisions of the Restrictive Covenant for Rockledge Addition as amended and recorded October 25, 2007, must be incorporated into the plan as required conditions and referenced on the face of the plat and in the zoning map amendment ordinance.
2. The uses and building types shall be all single family detached dwellings, each on its own platted lot and fronting on a dedicated public street. The definition of "family" shall be that of our current Land Development Code which includes that there shall be no more than three unrelated adults living in the single family dwelling on each lot.
3. Each building structure shall be no closer than five feet to each lot line. This dimension includes overhangs and other structures except boundary fences.
4. Each single family dwelling shall be no more than two stories in height from the ground level.
5. The amount of open space of this development shall conform to that required by the current Lawrence Land Development Code with no waivers or variances allowed. Individually owned private land shall not be included in the calculated open space, nor shall any portion of existing parkland be included in the calculation of required open space.
6. A homeowners' association shall be formed and recorded to provide maintenance of all open space and commonly-owned land not dedicated to the City.
7. The space between Quarry Lane and the lot line of the Kitos' property shall have a view blocking screen treatment; i.e., a landscaped fence, a berm or some other form of landscaping.
8. Appropriate street and traffic reorientation on Terrace Road must be a condition as approved by the Kansas Department of Transportation. Terrace Road must not connect with Iowa Street, but shall connect to the University Park development to allow access to the residences on Terrace Road. This must be part of the total Preliminary Plan. Traffic to and from Quarry Lane shall have appropriate traffic flow protection to avoid queuing.
9. The existing historic stone weigh station and its lot shall be preserved on its original site in its original condition and dedicated to the City of Lawrence as a portion of the required open space.
10. The stormwater runoff problems shall be resolved in a manner that does not increase or redirect stormwater runoff onto the existing properties on Terrace Road or the undeveloped lots in Rockledge Addition beyond the University Park development or otherwise increase storm drainage problems.

SOME PROBLEMS WITH THE APPROVAL PROCESS OF THE UNIVERSITY PARK DEVELOPMENT

May 7, 2008

A VERY SERIOUS PROBLEM: The rezoning was approved for University Park by the Planning Commission before the Preliminary Plan was conditioned as a part of the approval process for both the rezoning and the Preliminary Plan. This is contrary to the Lawrence Land Development Code prescribed process. Both the zoning district and the Preliminary Plan must be conditioned before they are finally approved. Below are the important excerpts from the Code indicating this process, which has been ignored.

BACKGROUND: THE LAWRENCE LAND DEVELOPMENT CODE

1. The most important aspect of a planned development is the plan, not the zoning. This is the reason the code has been written to describe the process for the rezoning of the Planned Development Overlay District (PD) map amendment as interchangeable and inseparable from the Preliminary and Final Development Plans (PDP and FDP).
2. The rezoning to the RS7-PD Overlay District for University Park was approved by the Planning Commission (PC) without having reviewed the Preliminary Plan and without having applied the needed conditions to both at the same time. At the staff's recommendation, the rezoning was not sent to the City Commission for approval, so it is not too late to condition both.
3. The new Land Development Code (LDC) does not separate the rezoning from the plan, but considers them jointly. The reason is because the Plan usually requires conditions that are exclusive to the plan, but is made permanent only when they are a part of the zoning ordinance that creates the Zoning District Map amendment.
4. In the past, when the planned unit development district zoning ordinance for the map amendment was adopted, if the conditions were not also applied to the zoning ordinance, the conditions on the accompanying preliminary plan were exclusive only to that specific plan. The plan could be abandoned and a new completely different plan adopted without any needed conditions.

Land Development Code pertinent sections are: 20-701(b)and (f), 20-1304(a), 20-1304((d)(1), 20-1304(d)(7)(i), 20-1304(d)(8)(ii)b. and 20-1304(d)(12)(iv).

[COMMENT: The LDC prescribed procedure (see next page) requires concurrent review and approval of the zoning (map amendment) and the Preliminary Plan (plan).]

20-701 PD, Planned Development Overlay District

(b) Procedure

PDs shall be reviewed and approved in accordance with the procedures of Sec. **20-1304**.

[COMMENT: The LDC requires that the plan and zoning concurrently be conditioned to list the approved uses.]

(f) Standards Eligible for Modification

As a condition of approval, the Planning Commission or City Commission may designate by ordinance or as a note on the face of the development plan, any specific use, structure or building type which shall be restricted and excluded as part of the Planned Development Overlay District. The City Commission may modify the following standards during the PD approval process. Standards not listed are not eligible for modification. (Ord. 8039).

(1) Allowed Uses

The Planning Commission shall recommend, and the City Commission shall approve, a list of uses allowed in a PD at the time of PD preliminary approval. Regardless of the fact that the approved uses may be determined by reference to a Base District, **the list of approved uses shall be incorporated into and made a condition of the PD approval.** The City Commission may approve only uses that are allowed in the Base District, provided that...

[COMMENT: The LDC prescribed procedure below requires concurrent review and approval of the zoning (map amendment) and the Preliminary Plan (plan).]

20-1304 Planned Developments

(a) Description

PD, **Planned Development Overlay Districts** are established through the approval of zoning map amendments. in accordance with the hearing and notice requirements of Sec. 20-1303. **PD zoning map amendments shall only be processed concurrently with a Preliminary Development Plan application.** Final Development Plan approval is required after approval of the zoning map amendment and Preliminary Development Plan. This section sets forth the required review and approval procedures for PD Preliminary and Final Development Plans.

(d) Preliminary Development Plans

(1) Application Filing

Preliminary Development Plan applications shall be filed with the Planning Director at the same time as a PD zoning map amendment application. The application shall be accompanied by required fees.

(7) Planning Commission's Review/Recommendation

- (i) The **Planning Commission** shall hold a public hearing on the proposed **amendment/plan**, review the proposed **amendment/plan** in accordance with the review and decision-making criteria of Sec. (9) and recommend that the City Commission approve, approve with conditions or deny the proposed **amendment/plan**. The **Planning Commission** is also authorized to forward the proposed **amendment/plan** to the City Commission with no recommendation.

(8) City Commission Decision

After receiving the **Planning Commission's** recommendation, the City Commission shall take one of the following actions on the proposed **amendment/plan**:

- (i) approve, approve with conditions or modifications, or deny; or
 - (ii) return the application to the **Planning Commission** for further consideration, together with a written explanation of the reasons for the City Commission's failure to approve or disapprove....etc.
- b. Upon the receipt of such recommendation, the City Commission may, by a simple majority vote, approve the proposed **amendment/plan**, approve it with conditions or modifications, or deny it.

DISCUSSION: NEED FOR CONDITIONING BOTH THE ZONING (PD) AND THE PLAN (FDP).

[COMMENT: Because the LDC allows the zoning (PD) to remain on the land after the expiration of the Preliminary Development Plan (PDP), if the zoning has not been conditioned to list permitted uses, any uses permitted by the base district would be permitted. This creates a site with unpredictable uses. The neighborhood and City have no protection against unexpected changes in use because only the zoning can be protested.. This is contrary to the intention of the PD district to create more flexibility in development but with predictability in permitted uses. These provisions below explain the reason that the LDC requires the PD to be conditioned initially. Unless the PD is conditioned, nothing following expiration of a Preliminary or Final Plan will be binding on the site.]

(12) Expiration of Approval

- (iv) After expiration of a Preliminary Development Plan, or any portion thereof, the PD Overlay zoning shall remain in effect for the affected property, but further development on the property shall require the approval of a new Preliminary Development Plan, in accordance with the procedures and standards in effect at the time of the new application. If a Preliminary Development Plan has expired for any part of a phased development, consistency with the developed parts of the Preliminary Development Plan shall be an additional criterion for consideration of a new proposed Preliminary Development Plan.

(e) Final Development Plans

c. After expiration of a Final Development Plan and related portions of the Preliminary Development Plan, the PD Overlay zoning shall remain in effect. but further development on the property shall require the approval of a new Preliminary Development Plan and Final Development Plan, in accordance with the procedures and standards in effect at the time of the new application.

REGARDING CONFORMANCE WITH THE ROCKLEDGE ADDITION COVENANT

[COMMENT: A question came up at the first public hearing as to whether the RS7-PD had to abide by the provisions of the Rockledge Addition Covenant. The LDC accounts for conflicting provisions in Section 20-109, and with covenants in Section 20-109(c). Because the LDC, according to this provision, is not intended to “abrogate,” meaning void, rescind, repeal, etc. covenants (see below), this means that the provisions of the Rockledge Addition Covenant must be included as a condition on the zoning for this site.]

20-109 Conflicting Provisions

(c) Conflict with Private Agreements and Covenants

This Development Code is not intended to abrogate, annul, or otherwise interfere with any Easement, covenant, or other private agreement or legal relationship otherwise in conformance with the Development Code.

REGARDING METHOD FOR DEDICATION TO A PUBLIC ENTITY OF OPEN SPACE FOR ITS PRESERVATION AND ALLOWANCE FOR IT'S LOSS IN DEVELOPMENT PLANS

[COMMENT: The question came up at a meeting with Planner Paul Patterson on how to prevent the amount of dedicated open space to the City for the University Park development from reducing the amount of area available to a developer to develop, should he have to change his development plans in the future. Paul stated that there isn't any provision for protecting the developer from losing his open space calculation following dedication of the open space to the city.

ANSWER: This is not a problem. The LDC (Section 20-703(a)(3) below) allows the required open space to be dedicated and still count toward the PD required open space.

20-703 Open Space Standards in Cluster and Planned Developments

(a) Preservation Required

The Open Space land shall be preserved and maintained solely for the purposes specified in this Section and in such a manner as may be acceptable to the City Commission. The method for accomplishing such preservation and maintenance of Open Space land shall be limited to one of the following:

(3) dedication of the land to the City with executed deed restrictions that the City is party to, which ensure the land shall remain as dedicated open space, subject to City Commission acceptance of such dedication.

PROBLEMS FOR THE DEVELOPER

[The developer is arguing that once dedicated,, this land could no longer count as open space in any future plan should the original plan not be developed.. The solution promoted in the current plan by the developer is to provide a waiver, allowing the developer to reduce the amount of required open space in this plan to that used for the sidewalks not located in dedicated right-of-way, which is 0.14 acres. However, that is assuming that this plan isn't developed and a modified one would be approved, and the waivers granted under this plan would still apply to any future plan.]

DISCUSSION: PROTECTION OF THE DEVELOPER'S PROPERTY RIGHTS

ISSUE: *There is a need to protect the developer from permanently losing the portion of his land intended for dedication should his current development plans fail. A developer is justified in being*

concerned. However, the problem is actually one of timing. The solution is to find a method that will guarantee continued ownership of his property until his development is underway and in the process of being built.

BACKGROUND: Generally dedication is finalized with recordation of the Final Plat and Final Development Plan before issuance of a building permit. In the case of open space it can be dedicated by separate deed (see above: (20-703(a)(3))). However, this system still poses a threat to a developer because not until construction is underway is there a guarantee that his development will actually occur. Two solutions have been suggested.

(1) Solution one, the developer's request: A waiver be granted absolving the developer from a requirement for more than the non-dedicated open space. The problem here with the waiver is that the timing is wrong. It absolves the developer in the preliminary documents of the planned development from the responsibility of providing any open space other than that minimum amount designated in the waiver, but at the same time does not guarantee—there is no condition written into the Conditions section of the Preliminary Plan nor applied to the PD district as a condition—that the larger amount of open space proposed for dedication to the City will actually be dedicated. There is no counter balancing condition to dedicate the larger amount of open space. A WAIVER REDUCING THE AMOUNT OF REQUIRED OPEN SPACE IS NOT NECESSARY AND SHOULD NOT BE GRANTED.

(2) Solution two: A condition be placed on the Final Plan and Final Plat that X tracts with X acreage will be dedicated to the city. Problem: This still leaves the developer permanently with less land if his documents (Final Plat, Final Plan) are recorded but his development fails to materialize. As an answer to this second problem see Solution three.

(3) Solution three: The Final Plat and Final Plan be conditioned to dedicate X tracts to the City, provided the dedication be by separate deed held in escrow which shall be recorded when the first building permit is granted. This would absolve the developer from dedicating land that would be lost should the development fail. This seems to be the intention of 20-703(a)(3).

RONALD SCHNEIDER
ATTORNEY AT LAW
900 MASSACHUSETTS, SUITE 600
LAWRENCE, KANSAS 66044
OFFICE: (785) 841-2040
FAX: (785) 856-0243

May 14, 2008

Grant Eichhorn
Chair
Lawrence/Douglas County Metropolitan Planning Commission
City Hall
Lawrence, Kansas 66044
HAND DELIVERED

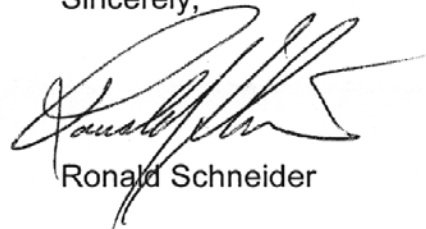
RE: Proposed Final Plat and PD
Overlay District Ordinance for the
University Park Addition Planned
Development

Dear Mr. Eichhorn:

On behalf of my clients, Robert and Betty Lichtwardt, I request that the proposed hearing on the PDP in the above matter be continued sometime after June 5, 2008. This continuance is requested for the reasons set forth in the attached letter to Mr. McCullough, which is being delivered on this date.

I await your response.

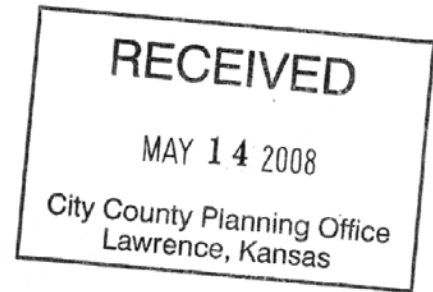
Sincerely,



Ronald Schneider

RS:cw
attachments
cc: Robert and Betty Lichtwardt
Scott McCullough

RONALD SCHNEIDER
ATTORNEY AT LAW
900 MASSACHUSETTS, SUITE 600
LAWRENCE, KANSAS 66044
OFFICE: (785) 841-2040
FAX: (785) 856-0243



May 14, 2008

Scott McCullough
Director of Planning
Lawrence-Douglas County Planning Commission
City Hall
Lawrence, Kansas 66044
HAND DELIVERED

RE: Proposed Final Plat and PD
Overlay District Ordinance for the
University Park Addition Planned
Development

Dear Mr. McCullough:

As you know, I represent Robert and Betty Lichtwardt concerning the above referenced matter.

My clients have filed an appeal challenging the procedure used by the Planning Commission. Pursuant to our recent discussion, my clients assert that the Planning Commission has improperly and illegally voted to recommend rezoning to the RS7-PD Overlay District for University Park **before** the Preliminary Development Plan was voted upon. The Ordinance, 20-1304, clearly provides that "*PDP zoning map amendments shall only be processed concurrently with a Preliminary Development Plan application.*" The zoning amendment and plan are required by law to be addressed as one application and should not be separated at any time during the process, including the review and recommendations of the Planning Commission. Both the proposed zoning amendment and plan are mutually dependant, and require concurrent discussion and vote by the Planning Commission. The Planning Commission's actions and vote are contrary to the precise language of the ordinance.

My clients assert that the Planning Commission's vote should be vacated, and that the vote on the recommendation be conducted **only** upon consideration of **both** the amendment and plan at the **same time**. I believe the ordinance requires this procedure and voting method.

Page 2
May 14, 2008

Accordingly, my clients' appeal was filed seeking this correction. You have advised that the appeal is set before the BZA on June 5, 2008. The Planning Commission is scheduled to again bifurcate the matter and consider the Preliminary Development Plan on May 19, 2008, which will cause further error. I request that the Planning Commission continue the proposed hearing on the PDP until after the BZA is given the opportunity to review the appeal. Otherwise, the determination by the BZA may cause excessive problems, and may require retroactive application. This can easily be avoided by correcting the action, and continuing the hearing.

I enclose an attachment prepared by my clients which further outlines their concerns on this subject. I will be directing a similar request to Chair Eichhorn. Please call me if you have any questions or comments.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ronald Schneider", with a stylized, sweeping flourish extending from the end of the name.

Ronald Schneider

RS:cw
attachments
cc: Robert and Betty Lichtwardt
Grant Eichhorn

SOME PROBLEMS WITH THE APPROVAL PROCESS OF THE UNIVERSITY PARK DEVELOPMENT
May 7, 2008

A VERY SERIOUS PROBLEM: The rezoning was approved for University Park by the Planning Commission before the Preliminary Plan was conditioned as a part of the approval process for both the rezoning and the Preliminary Plan. This is contrary to the Lawrence Land Development Code prescribed process. Both the zoning district and the Preliminary Plan must be conditioned before they are finally approved. Below are the important excerpts from the Code indicating this process, which has been ignored.

BACKGROUND: THE LAWRENCE LAND DEVELOPMENT CODE

1. The most important aspect of a planned development is the plan, not the zoning. This is the reason the code has been written to describe the process for the rezoning of the Planned Development Overlay District (PD) map amendment as interchangeable and inseparable from the Preliminary and Final Development Plans (PDP and FDP).
2. The rezoning to the RS7-PD Overlay District for University Park was approved by the Planning Commission (PC) without having reviewed the Preliminary Plan and without having applied the needed conditions to both at the same time. At the staff's recommendation, the rezoning was not sent to the City Commission for approval, so it is not too late to condition both.
3. The new Land Development Code (LDC) does not separate the rezoning from the plan, but considers them jointly. The reason is because the Plan usually requires conditions that are exclusive to the plan, but is made permanent only when they are a part of the zoning ordinance that creates the Zoning District Map amendment.
4. In the past, when the planned unit development district zoning ordinance for the map amendment was adopted, if the conditions were not also applied to the zoning ordinance, the conditions on the accompanying preliminary plan were exclusive only to that specific plan. The plan could be abandoned and a new completely different plan adopted without any needed conditions.

Land Development Code pertinent sections are: 20-701(b) and (f), 20-1304(a), 20-1304(d)(1), 20-1304(d)(7)(i), 20-1304(d)(8)(ii)b. and 20-1304(d)(12)(iv).

[COMMENT: The LDC prescribed procedure (see next page) requires concurrent review and approval of the zoning (map amendment) and the Preliminary Plan (plan).]

20-701 PD, Planned Development Overlay District

(b) Procedure

PDs shall be reviewed and approved in accordance with the procedures of Sec. **20-1304**.

[COMMENT: The LDC requires that the plan and zoning concurrently be conditioned to list the approved uses.]

(f) Standards Eligible for Modification

As a condition of approval, the Planning Commission or City Commission may designate by ordinance or as a note on the face of the development plan, any specific use, structure or building type which shall be restricted and excluded as part of the Planned Development Overlay District. The City Commission may modify the following standards during the PD approval process. Standards not listed are not eligible for modification. (Ord. 8039).

(1) Allowed Uses

The Planning Commission shall recommend, and the City Commission shall approve, a list of uses allowed in a PD at the time of PD preliminary approval. Regardless of the fact that the approved uses may be determined by reference to a Base District, the list of approved uses shall be incorporated into and made a condition of the PD approval. The City Commission may approve only uses that are allowed in the Base District, provided that...

[COMMENT: The LDC prescribed procedure below requires concurrent review and approval of the zoning (map amendment) and the Preliminary Plan (plan).]

20-1304 Planned Developments

(a) Description

PD, **Planned Development Overlay Districts** are established through the approval of zoning map amendments, in accordance with the hearing and notice requirements of Sec. **20-1303**. PD zoning map amendments shall only be processed concurrently with a Preliminary Development Plan application. Final Development Plan approval is required after approval of the zoning map amendment and Preliminary Development Plan. This section sets forth the required review and approval procedures for PD Preliminary and Final Development Plans.

(d) Preliminary Development Plans

(1) Application Filing

Preliminary Development Plan applications shall be filed with the **Planning Director** at the same time as a PD zoning map amendment application. The application shall be accompanied by required fees.

(7) Planning Commission's Review/Recommendation

- (i) The **Planning Commission** shall hold a public hearing on the proposed amendment/plan, review the proposed amendment/plan in accordance with the review and decision-making criteria of Sec. (9) and recommend that the City Commission approve, approve with conditions or deny the proposed amendment/plan. The **Planning Commission** is also authorized to forward the proposed amendment/plan to the City Commission with no recommendation.

(8) City Commission Decision

After receiving the **Planning Commission's** recommendation, the City Commission shall take one of the following actions on the proposed amendment/plan:

- (i) approve, approve with conditions or modifications, or deny; or
 - (ii) return the application to the **Planning Commission** for further consideration, together with a written explanation of the reasons for the City Commission's failure to approve or disapprove....etc.
- b. Upon the receipt of such recommendation, the City Commission may, by a simple majority vote, approve the proposed amendment/plan, approve it with conditions or modifications, or deny it.

DISCUSSION: NEED FOR CONDITIONING BOTH THE ZONING (PD) AND THE PLAN (FDP).

[COMMENT: Because the LDC allows the zoning (PD) to remain on the land after the expiration of the Preliminary Development Plan (PDP), if the zoning has not been conditioned to list permitted uses, any uses permitted by the base district would be permitted. This creates a site with unpredictable uses. The neighborhood and City have no protection against unexpected changes in use because only the zoning can be protested. This is contrary to the intention of the PD district to create more flexibility in development but with predictability in permitted uses. These provisions below explain the reason that the LDC requires the PD to be conditioned initially. Unless the PD is conditioned, nothing following expiration of a Preliminary or Final Plan will be binding on the site.]

(12) Expiration of Approval

- (iv) After expiration of a Preliminary Development Plan, or any portion thereof, the PD Overlay zoning shall remain in effect for the affected property, but further development on the property shall require the approval of a new Preliminary Development Plan, in accordance with the procedures and standards in effect at the time of the new application. If a Preliminary Development Plan has expired for any part of a phased development, consistency with the developed parts of the Preliminary Development Plan shall be an additional criterion for consideration of a new proposed Preliminary Development Plan.

(e) Final Development Plans

c. After expiration of a Final Development Plan and related portions of the Preliminary Development Plan, the PD Overlay zoning shall remain in effect, but further development on the property shall require the approval of a new Preliminary Development Plan and Final Development Plan, in accordance with the procedures and standards in effect at the time of the new application.

REGARDING CONFORMANCE WITH THE ROCKLEDGE ADDITION COVENANT

[COMMENT: A question came up at the first public hearing as to whether the RS7-PD had to abide by the provisions of the Rockledge Addition Covenant. The LDC accounts for conflicting provisions in Section 20-109, and with covenants in Section 20-109(c). Because the LDC, according to this provision, is not intended to "abrogate," meaning void, rescind, repeal, etc. covenants (see below), this means that the provisions of the Rockledge Addition Covenant must be included as a condition on the zoning for this site.]

20-109 Conflicting Provisions

(c) Conflict with Private Agreements and Covenants

This Development Code is not intended to abrogate, annul, or otherwise interfere with any Easement, covenant, or other private agreement or legal relationship otherwise in conformance with the Development Code.

REGARDING METHOD FOR DEDICATION TO A PUBLIC ENTITY OF OPEN SPACE FOR ITS PRESERVATION AND ALLOWANCE FOR ITS LOSS IN DEVELOPMENT PLANS

[COMMENT: The question came up at a meeting with Planner Paul Patterson on how to prevent the amount of dedicated open space to the City for the University Park development from reducing the amount of area available to a developer to develop, should he have to change his development plans in the future. Paul stated that there isn't any provision for protecting the developer from losing his open space calculation following dedication of the open space to the city.

ANSWER: This is not a problem. The LDC (Section 20-703(a)(3) below) allows the required open space to be dedicated and still count toward the PD required open space.

20-703 Open Space Standards in Cluster and Planned Developments

(a) Preservation Required

The Open Space land shall be preserved and maintained solely for the purposes specified in this Section and in such a manner as may be acceptable to the City Commission. The method for accomplishing such preservation and maintenance of Open Space land shall be limited to one of the following:

(3) dedication of the land to the City with executed deed restrictions that the City is party to, which ensure the land shall remain as dedicated open space, subject to City Commission acceptance of such dedication.

PROBLEMS FOR THE DEVELOPER

[The developer is arguing that once dedicated, this land could no longer count as open space in any future plan should the original plan not be developed. The solution promoted in the current plan by the developer is to provide a waiver, allowing the developer to reduce the amount of required open space in this plan to that used for the sidewalks not located in dedicated right-of-way, which is 0.14 acres. However, that is assuming that this plan isn't developed and a modified one would be approved, and the waivers granted under this plan would still apply to any future plan.]

DISCUSSION: PROTECTION OF THE DEVELOPER'S PROPERTY RIGHTS

ISSUE: *There is a need to protect the developer from permanently losing the portion of his land intended for dedication should his current development plans fail. A developer is justified in being*

concerned. However, the problem is actually one of timing. The solution is to find a method that will guarantee continued ownership of his property until his development is underway and in the process of being built.

BACKGROUND: Generally dedication is finalized with recordation of the Final Plat and Final Development Plan before issuance of a building permit. In the case of open space it can be dedicated by separate deed (see above: (20-703(a)(3))). However, this system still poses a threat to a developer because not until construction is underway is there a guarantee that his development will actually occur. Two solutions have been suggested.

(1) Solution one, the developer's request: A waiver be granted absolving the developer from a requirement for more than the non-dedicated open space. The problem here with the waiver is that the timing is wrong. It absolves the developer in the preliminary documents of the planned development from the responsibility of providing any open space other than that minimum amount designated in the waiver, but at the same time does not guarantee—there is no condition written into the Conditions section of the Preliminary Plan nor applied to the PD district as a condition—that the larger amount of open space proposed for dedication to the City will actually be dedicated. There is no counter balancing condition to dedicate the larger amount of open space. A WAIVER REDUCING THE AMOUNT OF REQUIRED OPEN SPACE IS NOT NECESSARY AND SHOULD NOT BE GRANTED.

(2) Solution two: A condition be placed on the Final Plan and Final Plat that X tracts with X acreage will be dedicated to the city. Problem: This still leaves the developer permanently with less land if his documents (Final Plat, Final Plan) are recorded but his development fails to materialize. As an answer to this second problem see Solution three.

(3) Solution three: The Final Plat and Final Plan be conditioned to dedicate X tracts to the City, provided the dedication be by separate deed held in escrow which shall be recorded when the first building permit is granted. This would absolve the developer from dedicating land that would be lost should the development fail. This seems to be the intention of 20-703(a)(3).