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Ryan M. Jennings

Introduction

A common approach in categorizing one’s property starts, at the most basic of levels by classifying such as either real or personal property. It is widely known and accepted that ‘real property’ is “land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.”¹ Essentially what this translates to is simply, “land and things fixed to land.” Real property is easily distinguishable from personal property, which is “any movable or intangible thing that is subject to ownership and not classified as real property;” basically everything capable of retaining a right of ownership in, aside from land itself.² For purposes of this exploratory investigation, this paper will primarily focus on the complex and evolving concepts and regulations of real property.

However, the inquiry will not end there. Instead, an added dimension of property will be carefully considered, intellectual property. In combining these two vastly different, yet revealing legal concepts, we will have had the opportunity to more fully identify, analyze and resolve not only the evolution of real property in an intellectual property-sense, but more importantly, the future of these two, seemingly competing types of property ownership.

¹ Black’s Law Dictionary 1254 (8th ed. 2010).

² Black’s Law Dictionary 1254 (8th ed. 2010).

Such a challenge can be achieved through an examination of the Planned Unit Development scheme (real property aspect), coupled with Linden Lab's creation of a fascinating, internet-based virtual world, better known as "Second Life" (intellectual property aspect). Prior to examining the intricacies of real-world land regulation and its comparisons and contrasts to those existing in the virtual world, it is imperative to fully understand a number of key concepts, legal doctrines and technological advancements to gain a complete understanding of this very focused and elaborate task.

I.) Understanding the Distinctions:

A. *Real Property Ownership and the Guiding Philosophies of Government Regulation*

The constitutional text, American constitutional theorists, case law, the common law and theories of classical liberalism, among others, have shaped our understanding of private property ownership for centuries now.³ In all of the progress concerning private property and the rights commonly associated with it, it remains clear that *complete*, unfettered control of one's real property has, over time, become more of an idealistic aspiration than it has a reality. While purchase of a parcel of land in fee simple with clean title presumably entitles the purchaser to all of the proverbial 'sticks in the bundle' associated with that particular parcel, there remains a necessary discord between theory and practice. While ideally one would hope that "no residual sticks in the bundle...move between the private and public domain at legislative whim," it is inevitable in this day and age that with "every economic regulation, every tax," comes "a stick out of the bundle of original ownership rights."⁴

³ Thomas C. Grey, *Private Property and the Power of Eminent Domain: The Malthusian Constitution*, 41 U. Miami L. Rev. 21, 48 (1986).

⁴ *Id.* at 30.

This, in large part, is attributable to elaborate governmental regulation and involvement in shaping the design, structural and useful aspects of particular parcels of land. Use of the word ‘elaborate’ in such a description is intentional, but used to merely signify an intricate and detailed system of land governance, as opposed to suggesting that governmental regulation is excessive or unnecessary.

In fact, just the opposite is true. In a world of rapidly changing building materials, proposed land uses and technology, a need for continual government develops, requiring oversight and involvement to maintain an efficient system for all individuals, to not only enjoy their land, but to furthermore protect both its structural soundness and its economic worth.

While on a broader scale, the rights one possesses in a piece of real property are relatively standard across the country, the legal options one has regarding exclusions, changes to, and uses of a particular parcel vary tremendously.⁵ For that reason, this paper does not attempt to trace the history of zoning and land use of the past century, especially considering the variations from region to region, state to state, and municipality to municipality.

This is not to suggest that the history of land use law is insignificant. History is oftentimes the best indication of what the future holds. With that in mind, this paper instead, strives to analyze both the rich historical underpinnings of zoning and land use law, as well as its current model of implementation, to determine and help shape its future; from both a real property viewpoint (what I will term ‘first-life’), in addition to an intellectual property perspective (by use of Linden Lab’s “Second Life” virtual community).

⁵ Ben Pollitzer, *Serious Business: When Virtual Items Gain Real World Value*, Law and Internet, 3 (Fall 2007).

B. *Real-World Zoning and Land Development Models and Schemes*

The use of an individual's land is a unique consideration given the involvement of government actors at all levels. The federal government remains involved through its constitutional guarantees, yet the state government plays an active role in taxation and supervision of property and land use. Even further down the chain, exists the local governing municipalities, which are at the forefront of the battlefield when home or property owners are at odds with a governing body (or one another) concerning zoning or land use issues.

The Village of Euclid, for example, was at the forefront of the most popular zoning decision by the United States Supreme Court in the twentieth century, *Village of Euclid et al. v. Ambler Realty Company*. Here, a realty company (Ambler), brought suit, alleging a deprivation of liberty and property without due process of law, under the 14th Amendment, because the proposed zoning ordinance, as drafted by the village, reduced the normal value of the property in question.⁶ It was in 1922 that the Village of Euclid attempted to adopt an ordinance that would establish “a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family house, single family houses, etc.”⁷

The Supreme Court addressed that in order for a zoning ordinance to be declared unconstitutional, “it must be said that its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”⁸ It was in 1926 that this Court acknowledged that “building zone laws are of modern origin,” and were at the time, critical to combat the constant development and occupation of lands.⁹ The Court held

⁶ *Village of Euclid et al. v. Ambler Realty Company*, 272 U.S. 365, 384 (1926)

⁷ *Id.* at 379-380.

⁸ *Id.* at 395.

⁹ *Id.* at 397.

that the ordinance (as proposed), was “a valid exercise of authority;” this was a significant turning point in the execution and prominence of zoning schemes by municipalities nationwide.

Unfortunately, local governments are often an overlooked, underfunded, yet over-utilized entity that remains directly responsible for ensuring an equitable, safe and uniform implementation of both state and federal property guarantees. Two prominent local government models exist, which shed light on our initial investigation; that is, what current practices are implemented to most effectively and efficiently protect the numerous rights associated with individual property ownership, while at the very same time, providing for a coherently safe, effective and functional community.¹⁰

The first model, termed the “*Public Choice Model*,” proposes that substantive values or ends are regarded as strictly private and subjective.¹¹ This calls for a disregard of the public’s general interest, whereas there are only particular interests or private preferences. This model presupposes that voters, politicians, bureaucrats, and interest groups, all tend to be self-interested.¹² It is hard to conceive a sound argument to show that individuals are not self-interested in their own possessions, especially in dealing with something as significant as a piece of land or a dwelling that sits upon a particular parcel. I would suggest however that this model is no way to plan a community with the aforementioned goals of safety, effectiveness and functionality in mind.

A second, more practical model that mirrors and seemingly implements this country’s notions of democracy is best known as the “*Public Interest Model*.”¹³ This model acknowledges and advocates a belief in the reality, or possibility of public values as ends for human action. The

¹⁰Robert C. Ellickson, ET. AL. *Land Use Controls: Cases and Materials* 52-53 (3d ed. 2005).

¹¹ *Id.* at 48-49.

¹² *Id.* at 48-49.

¹³ *Id.* at 47.

Public Interest Models promotes joint deliberations, where citizens are able to find values in the public sphere. The touchstone of democracy, a majority rule, is experienced as the natural way of taking action, emphasizing understanding, insight and goodwill.¹⁴

Zoning and land use planning, whether analyzed from a traditional real property perspective or an on-line, virtual reality simulation, is a system in which to promote the common good of society. Planning, in its simplest form, is “a comprehensive, coordinated and continuing process, the purpose of which is to help public and private decision makers arrive at decisions.”¹⁵

Numerous functions of planning exist, including:¹⁶

- a. The identification of problems or issues;
- b. Research and analysis to provide definitive understanding of such problems or issues;
- c. Formulation of goals and objectives to be attained in alleviating problems or resolving issues;
- d. Development and evaluation of alternative methods to attain agreed upon objectives;
- e. Recommendation of appropriate courses of action from among the alternatives;
- f. Assistance in implementation of approved plans and programs;
- g. Evaluation of actions taken to implement approved plans and programs in terms of progress towards agreed upon goals and objectives; and
- h. A continuing process of adjusting plans and programs in light of the results of such evaluation or to take into account changed circumstances

As you will soon realize upon becoming more familiar with Linden Lab’s “Second Life” software, the non-exhaustive list above is just as applicable to the online, virtual world as it is to our traditional first-life, real world practices. While proper land use planning undoubtedly alleviates unforeseen circumstances and outcomes, those responsible for planning bear the burden of significant responsibility and hardship. For example, the mere articulation of goals is seldom a simple task. Furthermore, public planning efforts usually pose intractable problems in goal setting, mindful that constituents of political systems often sharply disagree on goals.¹⁷ It

¹⁴ *Id.* at 47.

¹⁵ *Id.* at 51.

¹⁶ *Id.* at 53.

¹⁷ *Id.* at 54.

isn't hard to realize that planning efforts have not only posed problems for real-world local governments nationwide, but have also challenged and continue to perplex those responsible for the development and governance of "Second Life."

C. *Introduction into the World of "Second Life"*

"Second Life" is a "three-dimensional representation of an entire virtual world."¹⁸ The software program allows users to login in and create a virtual being in this "alternative Earth" atmosphere. "Second Life" and other online gaming and interactive communities are created most often in what the industry calls "massively multi-player online role playing games, or 'MMORPGs' (pronounced "Morpegs")."¹⁹ These massive online communities "employ 'avatars' – cartoon-like representations of the person participating in the game."²⁰

The software program and online universe is owned and run by the American company, Linden Research, Inc., also known as Linden Labs, "but its topography, buildings and streets are designed by its...residents."²¹ In fact, "nearly all content within the 'Second Life' Universe is user created."²² It is common for online hosts, such as Linden Labs, to require all eligible users to agree to its specified End User License Agreement (EULA) and its Terms of Service (ToS), "which severely limit the alienability and transferability of things acquired in-world."²³ Given Linden's established economy, individuals are permitted to maintain "Second Life" currency (also known as 'Linden Dollars') for creation and purchase of 'virtual real and personal

¹⁸ Maxim Kelly, Get a Second Life, ENN, Jan. 12, 2006, <http://enn.ie/article/9853686.html>.

¹⁹ *Virtual Worlds Alongside the Real World: Do You Know Where Your Clients Are?* D. Benjamin Beard and Christina L. Kunz, American Bar Association, Vol. 17, No. 2, November/December 2007, <http://abanet.org/buslaw/blt/2007-11-12/kunz.shtml>.

²⁰ *Id.*

²¹ Kelly, *supra* note 18.

²² Pollitzer, *supra* note 5, at 18.

²³ Beard and Kunz, *supra* note 19.

property.’ These points remain pertinent to this topic given a user’s potential for purchase, manipulation and transfer of ‘virtual real property’ within the “Second Life” Universe through various means which will be identified and described at a later point.

The online world is available to anyone 13 years of age and older with access to the internet. Unlike most other online virtual experiences, “Second Life is quite arguably not a game at all. It retains the perception of being a game only due to its visual similarity to other computer games,” yet garners the attention and participation of teenagers and adults alike.²⁴ In fact, the online experience most recently garnered the attention of 1,484,334 “Second Life” users, which represents the amount of individual avatars logged into the virtual world in the two month span preceding this publication.²⁵ The concept of navigating through a virtual community has had this degree of success, primarily because it is able to offer “the chance to pursue happiness and wealth through the accumulation of property, the running of a successful business or the provision of a desirable service.”²⁶

Linden employs a similar concept of property (whether personal or real) ownership as the Lockean concept of property, with which we have been accustomed to in first-life.²⁷ Meaning, “an individual owns their own labor, and when an individual uses that labor to create something from the commons, the property right extends to what the individual created.”²⁸ “Second Life” explicitly states within its Terms of Service that users are given the privilege of retaining copyright and other intellectual property rights associated with user-created content within the “Second Life” Universe.²⁹

²⁴ Pollitzer, *supra* note 5, at 17.

²⁵ Logged onto Second Life – March 22, 2010

²⁶ Leonard T. Nuara, ET AL. *No Man is an island, not even in a virtual world*, Thacher Profitt & Wood, LLP. 3, 2008.

²⁷ *Id.* at 5.

²⁸ John, Locke, *Two Treatises of Government* bk. II, para27 (Legal Classics Library 1994) (1648).

²⁹ Section 3.2 of the Second Life TOS.

Much like real-world land use regulation and government oversight, legal standards apply and work to heavily shape just how many and what type of ‘sticks’ remain in the real-world and in the “Second Life” user’s bundle of real property and ‘virtual real property.’ With the background key concepts and legal standards now established, analyzing the interplay between first life practice and “Second Life’s” theoretical application becomes possible. By use of New Jersey’s Planned Unit Development planning scheme and Linden’s “Second Life” Universe, we will succeed in identifying and scrutinizing the effectiveness of real property regulation and its application in the virtual landscape.

II.) The Practice of Planned Unit Development:

A. *General Concept*

In its broadest sense, “Planned Unit Development (PUD) is...a type of development and the regulatory process that permits a developer to meet overall community density and land use goals without being bound by existing zoning requirements.”³⁰ Usually, “common areas are shared and maintained by an owner's association or other entity,” creating “a special type of subdivision that doesn’t have to comply with all standard zoning and subdivision regulations.”³¹

Essentially it is one of many real property planning tools seeking to provide for a cohesive layout of the land. With conformity to pre-existing land types, uses and formations in mind, PUDs attempt to coexist among, and sometimes provide an escape from already-implemented zoning practices, land use regulations and comprehensive planning models. PUDs are especially helpful when a particular need for a given community is identified, but such a use cannot be administered due to current zoning. Post-Euclidian zoning practices (non-cumulative

³⁰ *Planned Unit Development*, Center for Land Use Education, Nov. 2005. <http://www.uwsp.edu/cnr/landcenter>.

³¹ See “Planned Unit Development”, Wikipedia, http://en.wikipedia.org/wiki/Planned_unit_development.

zoning) allow local governments to control building bulks, sizes and shapes of lots, the placement of buildings, and the uses to which the land and buildings may be put.³² For example, “traditional zoning does not have the flexibility to address the need for mixed uses for buildings, changes in building setbacks,” nor is it easily changed given the common bureaucracies and legal proceedings often associated with local Planning Commissions and Zoning Boards of Adjustment.³³ However, “using a PUD allows for innovative uses of spaces and structures to achieve planning goals.³⁴

Many planning goals exist depending on the municipality involved. For instance, planning goals include: Growth Management, Housing and community development, Economic development, Environmental quality, Energy & other natural resource conservation & development, Aesthetics and historic preservation, Transportation, Health, education and welfare, Public safety, as well as Leisure, recreation and cultural opportunities.³⁵ A PUD can accommodate these goals by its very nature of flexibility and efficiency.³⁶

While most are at the very least vaguely familiar with zoning and land use regulations, the same is unlikely when speaking of comprehensive planning models. Comprehensive Plans (called “Master Plans” in New Jersey) are utilized by municipalities as an instrumentality toward “recognizing both the limits of rationality and the unpredictability of modern civilization.”³⁷ These plans are developed by engineers skilled at evaluating current municipal practices and designs, but more importantly striving to predict the future of land use and development over the

³² Ellickson, *supra* note 10, at 76.

³³ *Planned Unit Development*, *supra* note 30.

³⁴ *Id.*

³⁵ Ellickson, *supra* note 10, at 77.

³⁶ *Planned Unit Development*, *supra* note 30.

³⁷ Ellickson, *supra* note 10, at 78.

next 5-25 years.³⁸ Despite recognizing that policies are usually slowly developed and implemented as municipalities see fit in a piecemeal-fashion, it is ideal to participate in a more rationalized approach. Such an ideal approach contains a two-step process in which first, the ends are identified and isolated, followed by the means to achieve them are developed before it is too late.³⁹ This approach is heavily reliant upon theory and proactive participation at the local levels; something not always achievable given routine manpower or budgetary limitations.

B. *Uses and Effects of the PUD System*

Planned Unit Developments create a number of flexible options for planning agencies. PUDs allow planners to take advantage of less stringent design regulations and by combining unique, yet functional mixtures of land uses. These advantages are most noticeably served when involving: traditional neighborhood design, the preservation of open space, urban redevelopment and mixed use development.⁴⁰ Not only do PUDs provide flexibility in planning and implementation of ideas, but they also protect public health and safety, by assuring design quality and conformance to a given municipality's Master Plan.⁴¹

This concept is initially difficult to grasp considering the inherent contradiction that exists between the approaches of zoning and this contemporary approach to community planning. While the ends are essentially identical, the means to arrive at the ends are starkly different in that PUDs feature the mixing of land uses and zoning districts to achieve its ultimate planning objectives.⁴² This mixed zoning integration challenges and calls into question the separation of land uses as this country has become accustomed to over decades of real property

³⁸ Ellickson, *supra* note 10, at 78.

³⁹ *Id.* at 79.

⁴⁰ *Planned Unit Development*, *supra* note 30.

⁴¹ *Id.*

⁴² *Id.*

ownership. This combining of land uses creates a diversification of not only land uses and types, but structures, individuals and income streams.⁴³ With the development and integration of PUDs into neighborhoods throughout many states, like New Jersey, commercialized and public service facilities have found their way into residential districts, creating convenience and for residents, but at what cost to individuals, their property values and the aesthetic and structural integrity of the land? This concern will be addressed in subsequent sections.

This integration, if regulated and executed properly, does not allow for immediate or even eventual urban sprawl of heavy commercial or industrial uses.⁴⁴ This is not to suggest that mixing and matching of land uses under the PUD scheme is not taking place.⁴⁵ In fact, New Jersey, as well as numerous other states, who have followed the advancements of the PUD system mix different housing types.⁴⁶ This again is a deviation from the conventional neighborhood development method that has existed for as long as you can likely remember.

New Jersey's Municipal Land Use Law, specifically Article Six, addresses "Findings for planned developments." The statute formulates a number of strict requirements for municipalities and planners alike to carefully abide by when planning and implementing such development. Specifically, it is required that "departures by the proposed development from zoning regulations...conform to [other] zoning ordinance standards."⁴⁷ Moreover, maintenance and conservation of common open space must be reliable, and "the amount, location, and purpose of the common open space" must be adequate."⁴⁸ Section D of the statute expressly requires the proposed planned unit development must not "have an unreasonably adverse impact upon the

⁴³ Robert W. Burchell, *Frontiers of Planned Unit Development: A Synthesis of Expert Opinion* 8-9 (1973).

⁴⁴ *A Guide to Planned Unit Development*, NYS Legislative Commission on Rural Resources (2005).

⁴⁵ *Planned Unit Development*, *supra* note 30.

⁴⁶ Burchell, *supra* note 43, at 12-15.

⁴⁷ N.J. Stat. § 40:55D-45, a-d (2010)

⁴⁸ *Id.*

area in which it is proposed to be established;” a touchstone feature of the planning device.⁴⁹

We are able to consider this specific requirement a touchstone feature of PUDs because it is one of the major advantages to this more elastic land use planning technique. PUDs excel when used to restore, rejuvenate and/or expand upon areas which require attention for whatever reason a municipality sees fit. *Citizens United v. City of Millville Planning Board*, recently considered this statutory obligation in New Jersey during 2007. This case was momentous in establishing the standard for ensuring that no unreasonably adverse impact on the area of proposal was experienced. That standard revealed that “a planning board’s consideration should be from the standpoint of probably feasibility,” with more consideration to be made following subsequent applications for approval.⁵⁰

It is critical to consider that an engineer’s ability to design each and every component of a PUD simultaneously that renders this contemporary method of land use planning efficient and effective.⁵¹ Unlike the establishment of a large zoning district, squarely drawn next to another inconsistent zoning district, PUDs embrace this diversification of real property usage. PUDs function to have all individual elements concurrently interact with what traditionalists would consider incongruous land uses. This enhanced style of sorts, works together to enhance the whole, which is difficult to do in the 21st century.⁵² Conforming to traditional zoning practices becomes an inopportune hardship after municipalities have, for decades, established zoning ordinances, subdivision and land development ordinances and master plans which attempt to forecast and prepare for a functional community as many as 25 years down the road; such a task is not easy, nor is it desirable. That is why, as previously mentioned, Planned Unit Developments

⁴⁹ *Id.*

⁵⁰ *Citizens United v. City of Millville Planning Board*, 395 N.J. Super. 434, 438 (2007).

⁵¹ *Id.* at 15.

⁵² *Id.* at 15.

are just one of many real property planning tools that seek to provide for a cohesive layout of the land.

C. Idealistic Implementation and Exercise of Regulation

Recognizing that residential areas are the most numerous and fill the most physical space, housing usually dictates the initial planning phases of a PUD.⁵³ As housing options expand in a given residential area as far as two-family units, multi-family dwellings, and the like, public service-type entities soon follow.⁵⁴ For example, hospitals and healthcare facilities, schools, recreational facilities for young and old, and churches quickly make their way into the design and development brainstorming.⁵⁵

Implementing this “cost-effective planning and zoning measure” is not easy, however PUDs have nonetheless enjoyed great success. Municipalities nationwide are recognizing the beneficial nature of the planning tool and working with engineers and adjacent government bodies to draft PUD legislation.⁵⁶ The New York State legislature acknowledges the anticipation and recommendation of projects utilizing PUD on generally large tracts of land, representing a unified tract.⁵⁷ Local law dictates the provisional aspects of PUDs, allowing this planning and execution leverage for larger-scaled projects.⁵⁸ In attempting to draft local law for PUD achievement, municipalities are advised to first determine its purpose, draft standards for site and building development (as they are already accustomed to doing), and to “describe a process for

⁵³ *Id.* at 62.

⁵⁴ *Planned Unit Development, supra* note 27.

⁵⁵ *Id.*

⁵⁶ *A Guide to Planned Unit Development, supra* note 40.

⁵⁷ *Id.*

⁵⁸ *Id.*

reviewing and approving individual project.”⁵⁹ Describing such a process is by no means an easy task and is of grave importance when considering potential legal implications of flawed or unconstitutional review criteria. The process is not easily identifiable, simply because individual project size in a PUD is usually done on a very large scale when compared and contrasted to a tradition land development application.

For example, the New York State Legislature acknowledges an option of review and approval involving a “three-step process where responsibility is shared by the local legislature, planning or zoning board.”⁶⁰ This approach is relatively safe given each board’s particular familiarity and level of expertise concerning land development standards, already employed by the governing bodies of a given municipality. As we will see a bit later, ‘virtual real property’ governed by Linden within “Second Life,” is not privy to a multi-step, multifaceted group of governing actors. Whether or not they even need to be is a question that will soon be considered when this PUD system is theoretically applied and considered specifically within the modern “Second Life” virtual universe.

Like all land development proposals, the project is broken into and approved at various stages or phases of planning and approval.⁶¹ As municipalities are presumably already aware, legal complications can arise for any reason at any stage of the game. For that reason, establishing and/or implementing PUD provisions into already existing local zoning law and ordinances require meticulous attention and detail to ensure conformity throughout.⁶² One inconsistency or loophole in municipal law can inflict great harm to not only the budgetary concerns of a municipality, but the cohesiveness and characterization of a given community.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

D. *Planned Unit Development Tradeoffs: Evaluating the PUD System*

By now, it should be clear what advantages and shortcomings exist following the implementation of Planned Unit Development. Like any approach to planning, criteria for evaluating the effectiveness and practicability should be used to determine the weaknesses and strengths. In this arena some of those criteria include: cost, public acceptance, political acceptance, equity and administration.⁶³

As far as cost is concerned, with developers usually fronting the bill for all project costs, budgetary concerns are minimal at best.⁶⁴ The biggest concern regarding cost is in the initial phases of municipal creation of a PUD ordinance or amendment to current zoning practices. Attorneys, consultants and other engineering figures will undoubtedly be required to assure compliance and conformity with existing legislation.⁶⁵

Public acceptance criteria focuses on the public's positive or negative perception of the planning tool.⁶⁶ Generally, PUDs are accepted with little public outcry. This is usually the case because the public has the ability to share ideas and input to design and shape the ordinance, addressing any shortcomings they can perceive from a homeowners or community dwelling perspective. The public is given the opportunity to attend informational meetings and have their concerns addressed by the governing bodies from the earliest stages of PUD implementation.⁶⁷ When these requirements have been satisfied, board approval is required and often granted, barring any unforeseen confusion.

While public acceptance of PUDs is strong, political acceptance is even stronger. After clearing the public acceptance hurdle, politicians and those serving other legislative or governing

⁶³ *Planned Unit Development, supra* note 30.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

roles generally will not stand in the way of a widely accepted practice. This rationale can most likely be credited to the idea that PUDs are primarily “market and developer driven,” creating a greater ease on local governmental bodies.⁶⁸

Equity, which in this context concerns “fairness to stakeholders regarding who incurs costs and consequences,” is another slightly favorable criterion when evaluating PUDs. First, as previously mentioned, developers primarily bear most, if not all costs of such development models. The consequences of this consideration are minimal at best. Townships and the like are rarely summoned to fund various associated costs, nor are taxpayers dealt the pricey burden of increased or newly implemented taxes.⁶⁹ Instead, municipalities enjoy more leverage in bargaining powers and hold greater control when reviewing site plans and granting approval. Unexpected revenues can even be raised through PUD’s two presumed advantages: (1) using land more efficiently, and (2) increasing residential densities.

Given such responsibility, including planning and funding, developers do have the potential to negatively affect the equity consideration. For example, the design or uses involved in PUDs sometimes force a situation where the municipality is overburdened with continual maintenance, oversight, or public funding of various land uses.⁷⁰ Examples could include: trash and recycling collection, maintenance associated with public parks, or even an increase in population forcing additional roads and governmental services. Additionally, unless developers plan properly, surrounding development may encounter adverse effects of a poorly designed and implemented planned unit development.⁷¹

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

Lastly, PUDs are relatively useful in terms of government administration. This aspect of evaluating the good and bad of PUDs closely monitors the “level of complexity to manage, maintain, enforce, and monitor the tool.”⁷² As previously mentioned, additional meetings must be held to approve of this non-traditional form of land development. PUDs involve a greater level of planning, coupled with the need for additional resources and manpower when compared to a traditional subdivision project that would traditionally follow the standard procedure of land development, adhering to the widely-accepted and more familiar zoning ordinance.⁷³

All criteria considered, PUDs can be a cost-effective alternative to traditional land development. While PUDs don’t go so far as to turn the practice of zoning upside-down, it does dramatically alter the approach of land development, as any new-age alternative typically would. PUDs can serve as an effective means of development and re-development for rural, suburban, and urban projects.⁷⁴ The question of whether the implementation of a PUD-like system would be an effective land development and regulatory tool in the virtual world of “Second Life” remains to be seen. However, this question will soon be answered following our theoretical implementation and evaluation of planned unit development practice concerning ‘virtual real property.’

III.) “Second Life:” Zoning, Land Development, and Planned Unit Development

A. *Types of Land ‘Ownership’ in Linden’s “Second Life” Virtual Community*

In order to join, participate in and benefit from “Second Life,” one need not own land. In August 2009, only approximately 15% of “Second Life” users owned land, which in actuality is

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

a leased space on Linden Lab's servers.⁷⁵ "Second Life's" Terms of Service (which all users must first agree to accept) further elaborate on this leased-space concept, in classifying owners of 'virtual real property' or "Second Life" land as mere licensees of Linden's server space.⁷⁶ Consequently, despite seemingly paying for the outright ownership of virtual land, users are instead paying for leased server space, which can be easily manipulated by Linden Labs at any given time, for any reason whatsoever.⁷⁷ The remaining portions of this piece will concentrate solely on the land-owning aspects of the "Second Life" software and those who are indeed, 'virtual real property' owners (or Linden Lab server space licensees).

Interestingly enough, "Linden's primary source of revenue is land sales."⁷⁸ Most of "Second Life's" land is classified as 'mainland,' distinguished from the other purchasing option, 'estate land.' Mainland is created and controlled by Linden Labs and sold at Linden-sponsored auctions. These mainland regions usually sell for "a few thousand dollars," and "owners also incur a monthly maintenance fee."⁷⁹ Owners pay a 'tier' cost that is paid monthly and varies in price, depending on size and the Linden-assessed market value. Private estates or islands can be erected, especially by those making major and multiple purchases in hopes of creating larger regions or even what many would regard as small continents.⁸⁰

⁷⁵ *Land Buying Advice for New Residents*, Second Life Wiki.

http://wiki.secondlife.com/wiki/Land_Buying_Advice_For_New_Residents.

⁷⁶ Paul Riley, *Litigating Second Life Land Disputes: A Consumer Protection Approach*, 19 *Fordham Intell. Prop. Media & Ent. L.J.* 877, 877 (2009).

⁷⁷ See "Real Estate (Second Life)", Wikipedia. http://en.wikipedia.org/wiki/Real_estate_%28Second_Life%29.

⁷⁸ Riley, *supra* note 76, at 890.

⁷⁹ *Real Estate (Second Life)*, *supra* note 77.

⁸⁰ *Id.*

B. *Linden's Role in Land Use Regulation*

Mainland “Second Life” property is not zoned. Whether your anticipated use for purchasing land was to “pursue happiness and wealth through the accumulation of property, the running of a successful business or the provisions of a desirable service,” the location you settle upon is of no consequence as far as land use considerations are concerned.⁸¹ Given what we now know about traditional, real-world, real property land usage, it is clear that community functionality and efficiency would be sacrificed if real property were subjected to such liberal oversight by local government.

Recall the goals of planning and zoning practices as discussed above. Without regard to these initiatives, communities would be hard-pressed to feature landscapes that provided economic development, environmental quality, aesthetics, efficient transportation, culture, and most importantly, public safety.⁸² This point is raised to illustrate just how chaotic and inefficient many landmarks within “Second Life” function, given a blatant lack of structured and monitored zoning.

Now, you may be thinking to yourself, “why is public safety a concern in “Second Life,” it’s not like my avatar will be physically or emotionally harmed given a lack of efficient transportation or hazardous pollution.” While this point is valid, “Second Life” is just that, a second life for human users to interact with other humans in a virtual world where well-being and satisfaction remain among user’s top concerns. For example, it is completely inefficient and unflattering for a “Second Life” homeowner to peacefully purchase a virtual parcel of land only to be sandwiched between a noisy nightclub and an erotic novelty superstore soon thereafter; an issue that effective zoning measures grapple with head-on.

⁸¹Nuara, *supra* note 26, at 3.

⁸²Ellickson, *supra* note 10, at 53.

This is just one instance among countless dilemmas where land use issues in “Second Life,” “would be resolved in the real world through the application of local zoning laws and regulations, such as limiting how close a building can be to the edge of a property.”⁸³ With little exception, “Linden Lab does not place any zoning or content restrictions on what land owners can place on their property.”⁸⁴ What this results in is a constant struggle for ‘virtual real property’ owners who now find themselves caught up in an inter-resident dispute, one in which “Second Life” wants no part of.

The consequence of this ‘hands-off’ method of governance is a “wide variety of architectural variations and buildings of different purposes being fitted into nearby spaces, sometimes resulting in conflict.”⁸⁵ Sometimes this happens because online users are trying to get the most for their money by using every virtual square-inch of their parcel, but other times these conflicts arise due to “deliberately placed obstructive or offensive content near to others.”⁸⁶ Such practices, whether practiced in the real-world or a virtual world, have the same diminishing effects, a decrease in land worth given intolerable neighbors, as well as unsightly views.

It is unquestionably debatable whether Linden Labs has taken sufficient steps in governing the very ‘virtual real property’ it creates, maintains and profits from. Linden Labs has to this point, even after continuous complaint, failed to setup a mechanism for resolving inter-resident land disputes. Some, including Linden themselves would unfavorably argue that they have established an equitable system of land development, creating avenues of redress for those looking for escape from its archaic governing practices. Linden allows for large private islands and estates (owned by wealthy ‘virtual real property’ owners), to implement strict zoning

⁸³ *Real Estate (Second Life)*, *supra* note 77.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

practices upon its landmasses. An example of this can be found upon examining Anshe Chung's massive estate, better known as "Dreamland."⁸⁷ In 2006, Chung's "Dreamland" constituted 10% of the land mass and approximately 10% of active residents in "Second Life."⁸⁸ "Dreamland" is looked upon as an entrepreneurial success story, following Chung's effective implementation of strict zoning restrictions. These zoning restrictions go as far as "dictating not only the distance between buildings but even the thematic style of architecture in some regions."⁸⁹ Despite not being able to exile real-world, real property owners from municipalities for non-compliance, big-time virtual players, like Chung, have those capabilities given this effectively organized and executed land use model.

One additional land use tool used in the real-world was recently adapted by "Second Life." Covenants, which "allow an estate owner to specify additional rules and standards that a buyer must adhere to beyond those covered by the 'Second Life' Terms of Service," were put into practice by Linden Labs in 2007.⁹⁰ This useful land use approach serves the function of allowing estate owners (but not mainland 'virtual real property' owners), a right of repossession if a buyer happens to breach the land ownership terms.⁹¹ The utility of covenants in a land use scheme is however limited in that virtual property owners are the final authority of the estate, whereas a larger governing body (like a municipality, in real-world application) is absent from the decision-making process and oversight of the very land it produces.

The fact remains that while some steps by Linden Labs are identifiable, Linden Labs fails to go far enough in ensuring a cohesive virtual world for both the mainland and estates, where

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

the most causal and inexperienced “Second Life” users can happily coexist with the most aggressive of online entrepreneurs.

C. Ramifications of “Second Life’s” Limited Involvement in Mainland Property Regulation

The implementation of a zoning or PUD scheme within “Second Life” is not entirely out of the question. As a matter of fact, “Second Life” has as recently as this past year, considered employing a regulatory land use design.⁹² Although zoning practices exist and are widely practiced throughout the many acres of virtual property within “Second Life,” it is primarily the large estates who voluntarily implement such practices. There is reason to believe however, that Linden Labs has discussed and considered expanding the regulatory land use concept into other regions of the virtual landscape.⁹³

Private, large estate-owners aside, Linden Labs is rumored to be “working with the Lindens to decide zoning practices for the mainland themed estates.”⁹⁴ Apparently, “estate owners were getting together...to discuss zoning practices they would encourage and promote, including on the four themed estates of Bay City, Nautilus, Zindra – and a fourth being planned.”⁹⁵ The referenced themed-based lands in “Second Life” are essentially the real-world equivalent of what we refer to as a ‘continent.’ And, while these online web logs (“blogs”) may not be the most accurate or reliable of sources, at the very least, the blogs are prominently indicative of “Second Life” users’ opinions regarding the online software. It is this very online community who is directly responsible for populating and maintaining this second-life

⁹² *Lindens Secretly Planning Zoning with Big SL Land Barons*, http://secondthoughts.typepad.com/second_thoughts/2009/08/lindens-secretly-planning-zoning-with-big-sl-land-barons.html. (Aug. 9, 2009).

⁹³ *Id.* at 1.

⁹⁴ *Id.* at 1.

⁹⁵ *Id.* at 1.

experience; a role many of the millions of registered users take very seriously.

These apparent discussions were taking place between, who one user, known online as “Prokofy,” generally terms ‘the Lindens,’ and big-time “Second Life” users. Prokofy was able to infiltrate the ‘closed listserve’ after hearing about it from a friend, shared his discontent with the approach “Second Life” was taking in evaluating regulatory ‘virtual real property’ measures.

Prokofy had this to say in his August 2009 blog entry:

I found it really alarming that some land barons got to decide zoning issues without others, and that the people who live in Bay City, Nautilus, and Zindra didn’t get to democratically participate in that discussion about what their views would look like next to their land they paid for. I wouldn’t care if the Lindens worked with island empires to do something, although I’d snort at one more FIC thing, but I’d definitely care about the Lindens picking only some barons to plan zoning in mainland. That’s just going counter to the entire spirit of the mainland. Jack Linden has betrayed the Mainland.⁹⁶

Prokofy explained his constant support of “Second Life” zoning, undoubtedly has lots of ideas about it, and has “practiced it...in Ravenglass and other groups, and knows what works and doesn’t.”⁹⁷ Upon questioning these sheltered discussions, Prokofy posed a question to “Second Life,” questioning “Second Life’s” approach to mainland governance. In a response from Jack Linden (a member of Linden Labs’ ‘Enterprise Team,’ who encourages and addresses user feedback concerning topics of interest to users), Prokofy was informed that the list was “set up a while ago when we began looking at ways to add value to the Mainland.”⁹⁸ Jack Linden explained the virtual world’s “commitment to providing a mix of areas like the zoned city regions of Nautilus and Bay City.”⁹⁹ He told Prokofy that “Second Life” must “partner with Estates,” and “find ways for the community to partner with us.”¹⁰⁰

⁹⁶ *Id.* at 1.

⁹⁷ *Id.* at 1.

⁹⁸ *Id.* at 2.

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* at 2.

Jack Linden specifically noted in his response to Prokofy's question that "Mainland zoning has pros and cons, but for a lot of people the pros are much more significant."¹⁰¹ Acknowledging this, it was somewhat surprising to read further, when Linden admitted, "I doubt we'll ever move away from having large areas that are un-zoned."¹⁰²

With little rationale available to explain or justify Linden Labs' seemingly 'hands-off' approach to land regulation, an exploratory and theoretical application of planned unit development and other zoning practices may prove beneficial to this inquiry. This piece's last section will attempt to identify and address the pros and cons of mainland zoning, as vaguely-mentioned by Linden Lab executives.

D. *Viability of Implementing a PUD Scheme throughout the "Second Life" Community*

"The difference between virtual property and real property, however, is that in the real world nobody gets to change the way physics works. In virtual worlds, the developers do."¹⁰³ All of the concerns raised by existing zoning and the inconsistencies following issuances of special exceptions and variances are inconsequential in the virtual property sphere. In "Second Life," we don't concern ourselves with real-life objects affixed to real-life land; we also don't become nervous because of overpopulated regions, simply because these problems are easily reconcilable with a few clicks of a computer mouse or an expansion of Linden Lab server space.

"Developers of commercial virtual worlds ultimately use commercial pressures to decide whether something is a good thing or a bad thing. This is how they judge reasonableness."¹⁰⁴ So

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 2.

¹⁰³ Richard A. Bartle, *Pitfalls of Virtual Property*, The Themis Group, 10 (2004).

¹⁰⁴ *Id.* at 12.

far, commercial pressures concerning a more advanced and supervised system of virtual land use has proven immaterial to “Second Life” executives. With that said, we must ask ourselves why is there little to no experimentation as far as land use regulation is concerned, especially considering the ease of implementation when compared to difficulties only associated with real-world, real property regulation. After all, “property law in virtual worlds is a helpful place to ground this rather abstract jurisprudential point because property law in the real world has been a fruitful place for grounding it.”¹⁰⁵

As Jack Linden acknowledged in response to questioning by a loyal “Second Life” user and apparent concerned resident of the virtual community, “for a lot of people the pros [concerning Mainland zoning] are much more significant.”¹⁰⁶ Unfortunately for the masses of people favoring an entirely zoned “Second Life” experience, “virtual worlds are not democratic. It is true that the designers could hold elections among players and promise to be bound by the results, but such promises can always be broken.”¹⁰⁷ With TOS and End User Agreements crafted as meticulously as Linden Labs’, a democratic system, even one attempting to mirror practices of local government zoning and planning commissions, there really are no guarantees in “Second Life” like there are in the real-world.

Furthering this point of digital manipulation and ease of facilitating a zoning scheme, as recommended within the virtual world, “coding” is a significant technical advantage to traditional zoning implementations of the real-world. “‘Code’ is a reference to the set of instructions that tell the computer how the program works.”¹⁰⁸ Such directives “define the limits of all behavior that might occur within a virtual world,” such as “Second Life.”¹⁰⁹ Whether it be

¹⁰⁵ James Grimmelmann, *Virtual Worlds as Comparative Law*, 49 N.Y.L. Sch. L. Rev. 147, 147 (2005).

¹⁰⁶ *Lindens Secretly Planning Zoning with Big SL Land Barons*, *supra* note 84, at 2.

¹⁰⁷ Grimmelmann, *supra* note 105, at 176.

¹⁰⁸ Pollitzer, *supra* note 5, at 20.

possession of an item, or ownership of ‘virtual real property,’ coding can be used to securely govern user behavior. While it may be illegal but not impossible for one to physically trespass in the real world, such intrusion can be digitally manipulated to restrict any attempt to trespass or cause nuisance upon coded land in the virtual community.¹¹⁰ All that is required to certify this restriction is use of programming engineers to code additional aspects of the virtual world, essentially playing a more active and involved role in the digital gameplay within “Second Life.”

This noticeably expansive recommendation directly parallels that of the Supreme Court’s, in their 1926 opinion of *Village of Euclid et al. v. Ambler Realty Company*, as previously discussed. Much like *Euclid*, (where the court identified the constant development and reoccurrence of problems given population increases and technological innovation) “Second Life” has also undergone an indistinguishable phenomenon as the United States had experienced in the early twentieth century. To face these concerns, it was the U.S. Supreme Court that suggested requiring, and continuing to require “additional restrictions in respect of the use and occupation of private lands in urban communities.”¹¹¹ Furthermore, the Court addressed, “such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.”¹¹² It was here where the Court found it necessary to stress the importance of “giving due weight to the new conditions,” a practice that was justified almost a century ago, yet has helped guide today’s constitutionally-based principles of “public health, safety, morals, and general welfare.”¹¹³

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 21.

¹¹¹ *Village of Euclid et al. v. Ambler Realty Company*, 272 U.S. 365, 386-387 (1926).

¹¹² *Id.* at 387.

¹¹³ *Id.* at 395.

Consequently, with history as an instructive tool, coupled with realizations regarding the ease of implementation compared to real-world land use and development, “Second Life” should not hesitate in expanding its experimental stance from private estates to the mainland, which, after all is the primary site of virtual interaction.

This suggested method of proactive administration is further substantiated given a more closely-tailored analysis of the identical criteria previously discussed when considering the real-world implementation of a PUD scheme. Application of a comparable land use and land development scheme would be just as useful and remarkably easier to facilitate in the “Second Life” virtual community.

For example, cost would undoubtedly have to be allocated to Linden Labs to develop the proper coding to achieve a more structured platform for the mainland users.¹¹⁴ While cost is usually covered by developers looking to gain approval for their project in the real world, this would be a relatively minor concern in the virtual world. Linden Labs would more likely than not be unwilling to require sign-up fees for new users, so this would be a reservation in moving forward with this level of aggressiveness. However, improved cost would be minimal and just as a local government would need to hire consultants to create an ordinance and review potential projects, Linden Labs would be doing the same in securing additional consultants and engineers.

Despite cost being a reason for Linden Labs not to move forward with such an approach, public and political acceptance of the move would be astoundingly positive for the company.¹¹⁵ Jack Linden has admitted to the positive factors at play in establishing a zoning scheme on the mainland. While this paper suggests that a PUD scheme would be more useful, less costly, and more favorable to the virtual community as a whole, at the very least, some sort of land use

¹¹⁴ *Planned Unit Development, supra* note 30.

¹¹⁵ *Id.*

practice would be widely accepted. Users could and should have a say in the development process, as the blogging community has already actively taken a strong stance. Any miscommunications could easily be identified and changed, given the abstract nature of the coding and digital formats at play. With any wide array of public acceptance, comes a greater amount of political acceptance and willingness to adopt such suggestions. While such has not been the case within “Second Life” yet, the many advantages associated with such a consideration has become apparent.

Equity nor Administration should be concerns of Linden Labs in implementing a PUD system in “Second Life.”¹¹⁶ Unlike the real world, PUDs would have no negative impact on surrounding communities, nor would the public be stuck with real-world effects, such as hire taxes, or long-term expenditures by the governing body. From an administrative perspective, PUDs require some attention upfront, yet necessitate little to no concentration following the planning and implementation stages. Administratively, if Linden Labs to this point has been hesitant to implement what they perceive as rigid regulation and oversight in a generally lawless virtual world, Planned Unit Developments seem to be an intermediary step in achieving a flexible sense of structure in an on-line world that is far from predictable.

¹¹⁶ *Id.*

IV.) Conclusion

This paper has narrowly focused on the complex and evolving concepts and regulations associated with real property and ‘virtual real property.’ In combining these two immensely different legal concepts, numerous realizations have been exposed concerning real and virtual governance. A central theme of this exploration has been the progression of land (whether real or virtual) uses and development, given tremendous innovation and technological change. Planned Unit Developments are a more contemporary phenomenon in the land regulation sphere. From what we now know, PUDs are a remarkable flexibility device that do not eradicate traditional zoning practices, but rather, compliment their effectiveness.

“Second Life” is a virtual representation of this real-world that we, as human inhabitants have come to develop and make our own. Without a zoning scheme, nor a flexible land use device (such as PUD implementation), “Second Life” is a civilization structured in such a way that this country was, prior to the advent of zoning. One common use for PUDs that was mentioned in passing is for ‘urban redevelopment;’ a challenge facing countless municipalities nationwide, following effective planning over a course of decades. “Traditional zoning does not have the flexibility to address the need for mixed uses for buildings, changes in building setbacks, non-motorized transportation, environmental protection and possible brownfield regulations all within a confined space.”¹¹⁷ Fortunately, changes by way of zoning, or these critical PUD advantages are an inexpensive, low-risk option for “Second Life.” Linden Labs can very easily re-work its coding and development new mainland regions to attempt “innovative uses of spaces and structures to achieve planning goals,” something they have mistakenly refused to do.¹¹⁸

¹¹⁷ *Planned Unit Development, supra* note 30.

¹¹⁸ *Id.*

“The biggest pitfall of virtual property comes from the fact that the concept is so new.”¹¹⁹

This uncertainty in the law and constant evolution of technology should be embraced with experimentation and regulation, much like zoning and planning boards had stood for in the 1920’s, ultimately leading to landmark, groundbreaking cases that have helped guide real property management for almost a century. Linden Labs must take chances and recognize the growth, as its predecessors had done decades ago, from a real-world point of view. Until then, the virtual community will experience nothing more than lawlessness, complimented by user discontent and piece-meal solutions, which will prove nothing more than costly and temporary.

Lastly, it is imperative to acknowledge that “property law in virtual worlds is a helpful place.” Real-world property laws and practices have had prolific effects on shaping the development and successes of on-line communities. “Second Life” should recognize this historical progression and strive to satisfy the ‘virtual real property’ it sells, as well as the thousands of users virtually habituating its server space. We know that “differences between real-life law and virtual law are instructive. They can teach us something about what is really going on in virtual worlds, and they can teach us something about what is really going on in our world.”¹²⁰ Furthermore, experimenting with virtual models will inevitably contribute to and elaborate on real-world planning, in providing a fairly cheap way to gauge effectiveness of various planning schemes before bring them to fruition. These two worlds (the real one and the virtual one), can teach each other so much about the efficacy and viability, despite catering to different academic and legal ideologies (real property vs. intellectual property).

¹¹⁹ Bartle, *supra* note 103, at 23.

¹²⁰ Grimmelmann, *supra* note 105, at 147-148.