

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
SECTION OF STATE AND LOCAL GOVERNMENT
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

- 1 **RESOLVED**, That the American Bar Association adopts the American Bar Association Model
- 2 Statute on Local Land Use Planning Procedures, dated August 2008, and urges its enactment by
- 3 states, territories, and local legislative bodies.

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45 **VI. JUDICIAL REVIEW OF LAND-USE DECISIONS**

46

47 **601 Purposes**

48 **602 Method of Judicial Review Exclusive**

49 **603 Judicial Review of Final Land-Use Decisions**

50 **604 Exhaustion of Remedies**

51 **605 Federal Claims**

52 **606 Filing and Service of Land-Use Petition**

53 **607 Standing and Intervention**

54 **608 Required Elements in Land-Use Petition**

55 **609 Preliminary Hearing**

56 **610 Expedited Judicial Review**

57 **611 Stay of Action Pending Judicial Review**

58 **612 Submittal of Record for Judicial Review**

59 **613 Review and Supplementation of Record**

60 **614 Standards for Granting Relief**

61 **615 Decision of the Court**

62 **616 Definitive Relief**

63 **617 Compensation and Damages Disclaimer**

64

65 **GENERAL PROVISIONS**

66

67 **101 Definitions**

68

69 As used in this Chapter:

70

71 **“Administrative Review”** means a review of an application for a development permit based on
72 documents, materials and reports, with no testimony or submission of evidence as would be
73 allowed at a record hearing.

74

75 **“Aggrieved”** means that a land-use decision has caused, or is expected to cause, [special] harm
76 or injury to a person, neighborhood planning council, neighborhood or community organization,
77 or governmental unit, [distinct from any harm or injury caused to the public generally]; and that
78 the asserted interests of the person, council, organization, or unit are among those the local
79 government is required to consider when it makes the land-use decision.

80

81 Comment: The definition of “aggrieved” determines who can be party to a hearing, who can
82 submit information in an administrative review, who has standing in an appeal, who can appeal
83 decisions to hearing officers, and who can bring judicial appeals. The aggrievement test has two
84 elements: harm or injury, and an interest that the local government was required to consider in
85 making its decision. Inclusion of the bracketed language requires persons claiming standing to
86 demonstrate that they have suffered harm distinct from the harm to the general public. Removing
87 the bracketed language still requires a showing of harm or injury but not a demonstration that the
88 harm is in some way special or unique.

89 **“Appeals Board”** means any officer or body designated by the legislative body or by state law
90 to hear appeals from land-use decisions, including but not limited to the Land-Use Review
91 Board, the local planning agency, local planning commission, a hearing examiner, or any other
92 official or agency that makes a land-use decision on a development permit.

93
94 **“Certificate of Appropriateness”** means the written decision by a local historic preservation or
95 design review board that a proposed development is in compliance with a historic preservation or
96 design review ordinance.

97
98 **“Certificate of Compliance”** means the written determination by a local government that a
99 completed development complies with the terms and conditions of a development permit and
100 that authorizes the initial or changed occupancy and use of the building, structure, or land to
101 which it applies. A “Certificate of compliance” may also include a temporary certificate to be
102 issued by the local government, during the completion of development, that allows partial use or
103 occupancy for a period not to exceed [2] years and under such conditions and restrictions that
104 will adequately assure safety of the occupants and substantial compliance with the terms of the
105 development permit.

106
107 **“Conditional Use”** means a use or category of uses authorized to be considered for approval, but
108 not permitted as of right, by a local government’s land development regulations in designated
109 zoning districts pursuant to Section 502.

110
111 **“Consistent with the Comprehensive Plan”** means that development regulations, a proposed
112 amendment to existing land development regulations, or a proposed land-use action is consistent
113 with the local comprehensive plan when the regulations, amendment, or action:

114
115 (a) furthers, or at least does not interfere with, the goals and policies contained in the
116 local comprehensive plan;

117
118 (b) is compatible with the proposed future land uses and densities and/or intensities
119 contained in the local comprehensive plan; and

120
121 (c) carries out, as applicable, any specific proposals for community facilities, including
122 transportation facilities, other specific public actions, or actions proposed by nonprofit and for-
123 profit organizations that are contained in the local comprehensive plan.

124
125 In determining whether the regulations, amendment, or action satisfies the requirements of
126 subparagraph (a) above, the local planning agency may take into account any relevant
127 guidelines contained in the local comprehensive plan.

128
129 **“Comprehensive Plan”** means the comprehensive plan required by [cite section of law].

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130 **“Confronting”** means across a street, highway or other public right-of-way from a property on
131 which an application for a development permit has been submitted.
132

133 **“Development”** means any building, construction, renovation, mining, extraction, dredging,
134 filling, excavation, or drilling activity or operation; any material change in the use or appearance
135 of any structure or in the land itself; the division of land into parcels; any change in the intensity
136 or use of land, such as an increase in the number of dwelling units in a structure or a change to a
137 commercial or industrial use from a less intensive use; any activity that alters a shore, beach,
138 [seacoast,] river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered
139 species habitat, aquifer or other resource area, including [coastal construction or] other activity.
140

141 **“Development Permit”** means any written approval or decision by a local government under its
142 land development regulations that gives authorization to undertake some category of
143 development. A “development permit includes but is not limited to, a building permit, zoning
144 permit, development agreement, final subdivision plat, minor subdivision, resubdivision,
145 conditional use, variance, appeal decision, planned unit development, site plan, [and] certificate
146 of appropriateness[.] [, and zoning map amendment(s) by the legislative body]. “Development
147 permit” does not mean the adoption or amendment of a local comprehensive plan or any subplan,
148 the adoption or amendment of the text of land development regulations, or a liquor license or
149 other type of business license.
150

151 Comment: This paragraph defines the land-use approvals that are to be considered a
152 development permit. Note that a development permit is any “written approval or decision” that
153 authorizes development. This term includes written approvals or decisions that are made
154 following administrative reviews, record hearings, and record appeals. A “master permit” is
155 defined later in this Section as a development permit.
156

157 The procedures for hearings on the record apply only to development permits. The adoption and
158 amendment of comprehensive plans is usually considered a legislative act. This definition means
159 that plan adoption and amendment are not covered by the administrative review provisions of
160 this Chapter. States in which a zoning map amendment is a quasi-judicial decision may want to
161 include optional bracketed language that makes such amendments a development permit. See
162 Section 201(5)
163

164 **“Enforcement Action”** means an action pursuant to [cite law].
165

166 **“Hearing”** means a hearing held pursuant to this Chapter.
167

168 **“Issued” or “Issuance”** means: (a) [3] days after a written decision on a development permit is
169 mailed by the local government or, if not mailed, the date on which the local government
170 provides notice that the written decision is publicly available; or (b) if the land-use decision is
171 made by ordinance or resolution of the legislative body, the date the legislative body adopts the
172 ordinance or resolution, or the date on which the ordinance or resolution is to become effective.
173

174 **“Land Development Regulation”** means any zoning, subdivision, impact fee, site plan, corridor
 175 map, affordable housing, hillside floodplain, wetland, stormwater, resource extraction or historic
 176 preservation regulation, and any other governmental regulations that affect the use, density, or
 177 intensity of land.

178
 179 **“Land Use”** means the conduct of any activity on land, including, but not limited to, the
 180 continuation of any activity, the commencement of which is defined herein as “development.”

181
 182 **“Land-Use Decision”** means a decision made by a local government officer or body, including
 183 the legislative body, on a development permit application, an application for a conditional use,
 184 variance, or mediation, or a formal complaint pursuant to [cite law] and includes decisions made
 185 following a record hearing or record appeal. It also means an enforcement order and/or
 186 supplemental enforcement order pursuant to [cite law], but only for purposes of judicial review
 187 pursuant to Section 601 *et seq.*. A “completeness decision,” “development permit,” and “master
 188 permit” are “land-use decisions” for purposes of this Chapter.

189
 190 Comment: The definition of a “land-use decision” is based in part on the Washington State
 191 Project Review Act, Wash. Rev. Code §§36.70B.010 *et seq.*

192
 193 **“Master Permit”** means the development permit issued by a local government under its land
 194 development regulations and any other applicable ordinances, rules, and statutes that
 195 incorporates all development permits together as a single permit and that allows development to
 196 commence.

197
 198 Comment: The master permit is the unification of all development permits necessary for a land
 199 development. For example, in order to build a single-family home in a subdivision that has been
 200 platted, it may only be necessary to obtain a building permit (approving the plans for the
 201 residence itself) and a zoning permit (indicating that the use is allowed and the structure meets
 202 all applicable zoning requirements). Once the requirements for the two permits are met, and the
 203 two permits are granted, the master permit would automatically be issued, allowing development
 204 to commence. The master permit is authorized under Section 208, Consolidated Permit Review
 205 Process.

206
 207 **“Owner”** means any legal or beneficial owner or owners of land, including the holder of an
 208 option or a contract to purchase, whether or not such option or contract is subject to any
 209 condition.

210
 211 **“Record”** means the written decision on a development permit application, and any documents
 212 identified in the written decision as having been considered as the basis for the decision.

213
 214 **“Record Appeal”** means an appeal to a local government officer or body from a record hearing
 215 on a development permit application.

216
 217 **“Record Hearing”** means a hearing, conducted by a hearing officer or body authorized by the
 218 local government to conduct such hearings, that creates the local government’s record through

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219 testimony and submission of evidence and information, under procedures required by this
220 Chapter. “Record hearing” also means a record hearing held in an appeal, when no record
221 hearing was held on the development permit application.
222

223 Comment: The definitions for hearings and appeals are critical. One important reform contained
224 in this Chapter is to clarify the types of hearings and appeals authorized for land-use decisions at
225 the local level, and how they should be held. The Sections on the development permit review
226 process specify what kinds of hearings can be held at different stages of the development permit
227 review process.
228

229 **102 Purposes**

230
231 The purposes of this Chapter are to:

- 232
233 (1) provide for the timely consideration of development permit applications.
234
235 (2) provide a development permit review process for land-use decisions by local governments;
236
237 (3) authorize a consolidated development permit review process for land-use decisions by local
238 governments;
239
240 (4) provide for the appointment of hearing examiners;
241
242 (5) provide for a Land-Use Review Board;
243
244 (6) authorize conditional uses, variances, and mediation in land development regulations; and
245
246 (7) provide a judicial review process for land-use decisions.
247

248 **103 Exemptions for Corridor Maps**

249 **See Appendix of Optional Sections**

250 **201 Development Permit; Development Permit Review Process**

251
252 Comment: The following Sections provide a development permit review process for all decisions
253 on development permits that, at some point, are subject to an administrative review or record
254 hearing. The permits may be considered separately, or consolidated into a single permit process,
255 but all permits are treated under the various types of permits provided for under this code. These
256 Sections also provide procedures for appeals on development permits. The development permit
257 review process applies to all land-use decisions, whether by the legislative body, the planning
258 commission, a hearing officer, or land-use review board authorized by this Chapter. The Chapter
259 adopts the Washington reform that allows only one hearing that produces a record and one
260 appeal from a record hearing on a development permit. Limiting the number of hearings in this
261 way should minimize the confusion and expense that often accompany the present system.
262

263 However, as the brackets indicate, it is optional when adopting this Section to provide for more
 264 than one of each type of hearing.

265

266 In addition, a local government has the option of establishing a development permit review
 267 process in which it does not require a record hearing. This option is available because Section
 268 204 authorizes administrative reviews on development applications without the benefit of a
 269 hearing. However, the law of a particular state may require a record hearing on some types of
 270 land-use decisions, such as variances and other land-use decisions held to be quasi-judicial.

271

272 The review process for development permit applications contemplated by this Chapter is simple.
 273 Applications for development permits can be considered either in an administrative review or a
 274 record hearing. An appeal following a record hearing is on the record, while an appeal following
 275 an administrative review requires a record hearing. A decision following a record appeal is
 276 appealable to a court. A decision following an administrative review can be appealed to a court,
 277 but this is unlikely because of the exhaustion of remedies requirement for judicial review, which
 278 requires an appeal to a local officer or body before judicial review can be obtained.

279

280 This part of the Chapter does not assign substantive responsibilities to any of the boards or
 281 commissions in local governments or to the legislative body. Neither does it dictate any one
 282 inflexible form of organization for these bodies. The *Standard State Zoning Enabling Act*
 283 provided for an inflexible assignment of responsibilities to the legislative body, the planning
 284 commission and the board of adjustment. Several states, such as California, now allow the
 285 legislative body to determine how hearing responsibilities are assigned, and this part of the
 286 Chapter adopts that approach.

287

288 The local government may choose any structure it prefers. It can, for example, assign rezonings
 289 to the legislative body, conditional uses and other initial approvals to the planning commission,
 290 and appeals and variances to the Land-Use Review Board, which may also be named as the
 291 Board of Zoning Adjustment or Appeals. This is the traditional structure. The local government
 292 can then decide what kinds of hearings should be held at each decision level. For example, the
 293 Land-Use Review Board can be authorized to hear record appeals on development permits
 294 reviewed by other bodies, and record hearings on variances it has the authority to issue. An
 295 ordinance may defer a record hearing to the appeal stage. For example, the ordinance could
 296 allow the planning commission to make its decision without a record hearing, but then provide
 297 for a record hearing by the land-use review board.

298

299 (1) The legislative body of each local government shall adopt, as part of its land development
 300 regulations, an ordinance that establishes a development permit review process for applications
 301 for development permits. The ordinance may require or authorize a pre-application conference
 302 on a proposed development permit application, and may specify the responsibilities of the local
 303 government and the applicant in the pre-application conference.

304

305 (2) The ordinance establishing a development permit review process shall contain a list of all
 306 development permits required by the local government. [Additional language for this paragraph
 307 has been moved to the Appendix.]

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308 (3) The ordinance establishing a development permit review process may provide for no more
309 than [1] record hearing for each development permit and [1] record appeal. The ordinance may
310 also authorize the administrative review of development permit applications without a hearing,
311 as provided by Section 204, and [1] appeal for each development permit, in the form of a record
312 hearing. The ordinance may assign the responsibility for record hearings, record appeals and
313 administrative reviews to the legislative body, the local planning commission, or such other
314 officers or bodies as the legislative body shall determine.

315
316 (4) The ordinance establishing a development permit review process shall establish reasonable
317 time limits on the validity of development permits. A reasonable time limit is one that provides
318 adequate time to complete the development authorized, based upon a good faith effort towards
319 completion.

320
321 (5) For the purposes of this Chapter, the ordinance establishing the development permit review
322 process may define the amendment of the zoning map by the legislative body as a development
323 permit.

324
325 (6) Within a local government's jurisdiction, no building or structure for which a valid building
326 permit has been issued may be denied permission, upon payment of a reasonable fee and
327 compliance with any standards required for connection to existing lines of a local government-
328 owned utility at the permit applicant's expense.

329 330 **202 Development Permit Applications**

331
332 (1) As part of the ordinance establishing the development permit review process, the legislative
333 body shall specify in detail the information required in every application for a development
334 permit and the criteria it will apply to determine the completeness of any such application. The
335 ordinance shall require the local government to notify applicants for development permits, at the
336 time they make application, of the completeness determination, notice, and time-limit
337 requirements required by this Chapter for the review and approval of development permits.

338
339 (2) No local government may require a waiver of the time limits on a completeness
340 determination or a decision on a development permit as a condition of accepting or processing an
341 application for a development permit, nor shall a local government find an application
342 incomplete because it does not include a waiver of these time limits.

343
344 Comment: Without this provision, a local government could effectively negate the time limits of
345 this law by routinely requiring waiver of time limits as a condition to the approval of
346 development permits.

347 348 **203 Completeness Determination**

349
350 Comment: This Section provides a process under which a local government must make a
351 completeness decision on a development application. It is based on Cal. Gov't Code §65943 et
352 seq. and on Wash. Rev. Code §36.70B.070. The application requirements the local government

353 includes in its ordinance will determine the basis on which the completeness decision is made.
354 The brackets indicate that time limits for decisions can be modified by the state legislature. The
355 legislative body may want to direct administrative bodies and officers to propose requirements
356 for development permits to it for its approval by ordinance.

357
358 Because local governments differ in what they may require, the Section does not specify the
359 kinds of information that applications must contain. However, the ordinance required by this
360 Section is expected to specify in detail the information required from applicants. The Section is
361 based on Calif. Gov't Code §65940 et seq.

362
363 The completeness determination need not be difficult or time-consuming. The period of time
364 specified for the determination is a maximum, so that a local government can make a
365 completeness determination in less time. A completeness determination may be possible for
366 simple applications almost immediately, with no need to specify the submission of additional
367 information.

368
369 This Section gives the local government an opportunity to require additional information from an
370 applicant if it finds that an application is incomplete. A local government should be able to
371 specify what additional information is necessary in order to make an application complete, so
372 that one additional submission should be adequate.

373
374 Paragraph (5) provides an opportunity to the local government to request additional information
375 when necessary after a completeness decision, but also makes it clear that an application is
376 complete when it meets the completeness requirements of this Section. A completeness
377 determination, or a deemed-completeness requirement under paragraph (4), starts the time limits
378 running on when a decision on the application must be made under Section 210. A completeness
379 decision is a "land use decision," which means it is an interlocutory decision that is appealable
380 under the judicial review provisions of this Chapter.

381
382 The Section prohibits a waiver of the time limits for making a completeness determination.
383 Without this provision, applicants for development permits may agree to a waiver in order to
384 avoid antagonizing the local government that will make the decision on its application.

385
386 (1) Within [30] days after receiving a development permit application, the local government shall
387 mail or provide in person a written determination to the applicant, stating either that the
388 application is complete, or that the application is incomplete..

389
390 (2) If the local government determines that the application is incomplete, it shall identify in its
391 determination the parts of the application which are incomplete, and shall indicate the manner in
392 which they can be made complete, including a list and specific description of the additional
393 information needed to complete the application. The applicant shall then submit this additional
394 information to the local government within [30] days of the determination pursuant to paragraph
395 (1), unless the local government agrees in writing to a longer period.

396

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397 (3) The local government shall determine in writing that an application is complete within [30]
398 days after receipt of the additional information indicated in the list and description provided to
399 the applicant under paragraph (2).
400

401 (4) A development permit application is deemed complete under this Section if the local
402 government does not provide a written determination to the applicant that the application is
403 incomplete within [30] days of the receipt of an application under paragraph (1) or within [30]
404 days of the receipt of any additional information submitted under paragraph (2).
405

406 (5) A development permit application is complete for purposes of this Section when it meets the
407 completeness requirements of, or is deemed complete under, this Section.
408

409 (6) After a development application is complete or deemed complete, the local government may
410 request additional information or studies if new information is required or a substantial change in
411 the proposed development occurs. It shall make a completeness determination as required by this
412 section for any additional information or studies submitted.
413

414 **204 Administrative Review**

415
416 Comment: This Section authorizes administrative reviews of development permit applications
417 without a record hearing. There is no hearing, but paragraph (2) broadly authorizes persons,
418 organizations and government units to submit materials concerning the application. The term
419 “aggrieved” is defined in Section 101 above. The officer or body that makes the decision must
420 provide a written decision and give notice. The time limits for decisions on development permits
421 required by Section 210 apply to administrative reviews. The protections provided for record
422 hearings through the ban on *ex parte* communications does not apply to administrative reviews.
423 Communication with the applicant and others interested in the application is expected during an
424 administrative review.
425

426 Land-use decisions made following an administrative review are subject to an appeal under
427 Section 209, but a record hearing will then be held by the officer or body that conducts the
428 appeal. Under the exhaustion of remedies doctrine, codified at Section 604 below, this means
429 that, before any appeal may be made to a court, an appeal pursuant to Section 209 must be taken
430 if it is not futile.
431

432 (1) **When required.** The ordinance establishing the development permit review process may
433 authorize local government officers and bodies to conduct an administrative review of
434 development permit applications without a record hearing. The ordinance shall designate the
435 development permits that are subject to an administrative review.
436

437 (2) **Participation.** Documents and materials concerning a development permit application may
438 be submitted to the officer or body that will conduct the administrative review by:
439

440 (a) The applicant;
441

442 (b) Any person or entity supporting or opposing the application; and

443

444 (c) any person, neighborhood planning council, neighborhood or community organization, or
445 governmental unit, if it would be aggrieved by a decision on the development permit application.

446

447 (3) **Conflicts.** Any decision-making officer or member of a decision-making body having a
448 direct or indirect financial interest in property that is the subject of an administrative review,
449 [who is related by blood, adoption, or marriage to the owner of property that is the subject of an
450 administrative review or to a person who has submitted documents and materials concerning an
451 application,] or who resides or owns property within [500] feet of property that is the subject of
452 an administrative review, shall recuse him- or herself from the matter and shall state in writing
453 the reasons for such recusal.

454

455 (4) **Findings, decision, and notice.**

456

457 (a) A local government may approve or deny a development permit application, or may approve
458 an application subject to conditions. Any approval, denial, or conditions attached to a
459 development permit approval shall be based on and implement the land development regulations,
460 and goals, policies, and guidelines of the local comprehensive plan.

461

462 (b) Any decision on a development permit application shall be based upon and accompanied by a
463 written statement that:

464

465 1. states the land development regulations and goals, policies, and guidelines of the local
466 comprehensive plan relevant to the decision;

467

468 2. states the facts relied upon in making the decision;

469

470 3. is consistent with the land development regulations, the goals, policies, and guidelines of the
471 local comprehensive plan.

472

473 4. responds to all relevant issues raised by documents and materials submitted

474

475 5. states the conditions that apply to the development permit, the conditions that must be satisfied
476 before a certificate of compliance can issue, and the conditions that are continuing requirements
477 and apply after a certificate of compliance is issued.

478

479 (c) A local government shall give written notice of its decision to the applicant and to all other
480 persons, neighborhood planning councils, neighborhood or community organizations, or
481 governmental units that submitted documents and materials [and shall publish a summary of its
482 decision in a newspaper of general circulation and may *[or shall]* publish the decision on a
483 computer-accessible information network].

484

485 Comment: To avoid confusion about what has been decided, a reasoned decision based on
486 findings of fact is an essential conclusion to the permit review process. This Section also

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487 authorizes conditions on approved applications, which often are necessary to meet problems
488 discovered about the application during the process. This authority is intended to be flexible, as
489 conditions can implement any of the regulations or planning policies on which the decision is
490 based. Subparagraph (c) makes newspaper and electronic publication of a decision optional. This
491 Section is based on Idaho Code §67-6519, N.J. Stat. Ann. §40:55D-10, and Ore. Rev. Stat.
492 §§227.173(3) and 227.175(3).

493
494 (5) **Determination of compliance.** The officer or body that grants a development permit shall
495 issue a determination of compliance if the completed development is in accordance with the
496 conditions of the development permit that must be satisfied before a determination of compliance
497 can issue. The officer or body may delegate the responsibility of issuing the determination of
498 compliance to another officer. [Additional provisions are included in the Appendix.]
499

500 **205 Notice of Record Hearing**

501
502 Comment: This paragraph is based on Ore. Rev. Stat. §197.763. The hearing notice is extremely
503 important. Many unnecessary hearing difficulties and unnecessary appeals can be avoided if the
504 hearing notice must provide all the information that is needed to form an opinion about the
505 application. An extension of time limits for a hearing is authorized when state agencies or other
506 local governments must approve or review a development application, as this additional process
507 may take longer than 30 days.
508

509 (1) **Notice required.** If a local government holds a record hearing on a development permit
510 application, it shall provide notice of the date of the record hearing within [15] days of a
511 completeness determination on the application under Section 203, or within [15] days from the
512 date an application is deemed complete under Section 203(5). Notice of the record hearing shall
513 be mailed at least [20] days before the record hearing, and the record hearing must be held no
514 longer than [30] days following the date that notice of the record hearing is mailed. A local
515 government may hold a record hearing at a later date, but no more than [60] days following the
516 date that notice of the record hearing was mailed, if state agencies or other local governments
517 must approve or review the development application, or if the applicant for a development
518 permit requests an extension of the time at which the record hearing will be held.
519

520 (2) **Contents of notice.** The notice of the record hearing shall:

- 521
522 (a) state the date, time, and location of the record hearing;
523
524 (b) explain the nature of the application and the proposed use or uses which could be authorized;
525
526 (c) list the land development regulations and any goals, policies, and guidelines of the local
527 comprehensive plan that apply to the application;
528

529 Comment: This is a very important paragraph, because the land regulations and comprehensive
530 plan goals, policies and guidelines listed in the notice will determine the issues on which the
531 hearing will be held. Of course, it is open to any party to challenge this part of the notice as

532 legally incomplete if it omits regulations or plan goals, and policies and guidelines that apply to
 533 the application.

534

535 (d) set forth the street address or other easily understood geographical reference to the subject
 536 property;

537

538 (e) state in person, or by letter or email, that a failure to raise an issue that could have been
 539 known by those parties affected by the issue at a record hearing, or the failure to provide
 540 statements or evidence sufficient to afford the local government an opportunity to respond to the
 541 issue, precludes an appeal to the appeals board based on that issue, unless the issue could not
 542 have been reasonably known by any party to the record hearing at the time of the record hearing;

543

544 (f) state that a copy of the application, all documents and evidence submitted by or on behalf of
 545 the applicant, and any applicable land development regulations or goals, policies, and guidelines
 546 of the local comprehensive plan, are available for inspection at no cost and that copies will be
 547 provided at reasonable printing, mailing and related costs;

548

549 (g) state that a copy of any staff reports on the application will be available for inspection at no
 550 cost at least [7] days prior to the record hearing, and that copies will be provided at actual
 551 printing, mailing and related costs;

552

553 (h) state that a record hearing will be held and include a general explanation of the requirements
 554 for the conduct of the record hearing; and

555

556 (i) identify, to the extent known by the local government, any other governmental units that may
 557 have jurisdiction over some aspect of the application.

558

559

560 **206 Methods of Notice**

561

562 Comment: Land-use statutes typically specify in detail how notice must be given by local
 563 governments. These statutes may either require too much notice or not enough, and often create
 564 technical compliance problems that can lead to litigation. This Section allows local governments
 565 to determine what type of notice they want to give, subject to a requirement that notice by
 566 posting and publication be given as a minimum. Inclusion of notice requirements in the
 567 development permit review ordinance required by Section 201 is mandated, because it is
 568 essential that the ground rules for giving notice be known. This Section is based on Wash. Rev.
 569 Code §36.70B.110.

570

571 (1) A local government shall use reasonable methods to give notice of a development permit
 572 application to the public, including [neighborhood planning councils established pursuant to law,
 573 neighborhood or community organizations recognized pursuant to law, and to] local
 574 governments or state agencies with jurisdiction. A local government shall specify the methods of
 575 public notice it will use in its development permit review ordinance, and may specify different

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576 types of notice for different categories of development permits. However, any ordinance adopted
577 under this paragraph shall at least specify all of the following methods:

578

579 (a) conspicuous posting of the notice on the property, for site-specific development proposals;

580
581 (b) publishing the development location, description, type of permit(s) required, and location
582 where the complete application may be reviewed, as included in the notice, in a newspaper of
583 general circulation in the jurisdiction of the local government [and giving notice by publication
584 on a computer-accessible information network];

585
586 (c) posting the notice on a bulletin board in a conspicuous location in the principal offices of the
587 local government; and

588
589 (d) mailing of notice to all adjacent local governments within [1000] feet of the land on which an
590 application for a development permit has been submitted, and to all state agencies that have
591 jurisdiction over the development application.

592
593 (2) Other examples of reasonable methods to inform the public that a local government may
594 include in its development permit review ordinance are:

595
596 (a) notifying public or private groups that have registered with the local government and have
597 indicated they want to receive notification of any application for a development permit within
598 their area of interest, as state in the registration;

599
600 (b) notifying the news media;

601
602 (c) publishing notices in appropriate regional or neighborhood newspapers or trade journals;

603
604 (d) publishing notice in local government agency newsletters or sending notice to agency mailing
605 lists, either general lists or lists for specific proposals or subject areas;

606
607 (e) mailing notice to abutting and confronting property owners; and

608
609 (f) publication on a government-maintained website.

610 **207 Record Hearings**

611
612
613 (1) **When required.** This Section applies when a local government holds a record hearing on a
614 development permit application.

615
616 (2) **Availability of materials.** The applicant, or any person who will be a party to, or who will
617 testify or would like to testify in any record hearing, shall submit all documents or evidence on
618 which he or she intends to rely and testify to the local government, which shall make them
619 available to the public at least [7] days prior to the record hearing.

620 (3) **Availability of staff reports.** The local government shall make any staff report it intends to
 621 use at the record hearing available to the public at least [7] days prior to the record hearing.
 622

623 Comment: Paragraphs (2) and (3) require full disclosure of applicant materials and local
 624 government reports prior to a hearing. Failure to disclose these materials creates fairness
 625 problems that frustrate all parties to a hearing and that can lead to litigation. These paragraphs
 626 mean that parties to a hearing must submit materials for witnesses they intend to call, and
 627 materials must also be submitted by persons who would like to testify though they are not
 628 parties. See Section 207(6)(b).
 629

630 (4) **Record hearing rules.** As part of its development permit review process, the legislative body
 631 of each local government shall specify rules for the conduct of record hearings. The rules, as a
 632 minimum, shall include the requirements for record hearings contained in this Section, and may
 633 supplement, but may not conflict with, these requirements.
 634

635 (5) **Parties.** Any person who supports or opposes the development application, and any
 636 governmental unit that has jurisdiction over the development application, and any abutting or
 637 confronting owner or occupant, may be a party to a record hearing held under this Section. Any
 638 other person or governmental unit, including a neighborhood planning council or neighborhood
 639 or community organization, may be a party to any record hearing held under this Section, if it
 640 would be aggrieved by a land-use decision on the development permit application.
 641

642 Comment: The first sentence states who may be parties as of right. All other persons and
 643 agencies must be “aggrieved” to have standing, the term “aggrieved” as defined in Section 101.
 644

645 (6) **Conduct of record hearing.**
 646

647 (a) The officer presiding at a record hearing, or such person as he or she may designate, [shall or
 648 may] have the power to conduct discovery and to administer oaths and issue subpoenas to
 649 compel the attendance of witnesses and the production of relevant evidence, including witnesses
 650 and documents presented by the parties. The presiding officer may call any person as a witness
 651 whether or not he or she is a party.
 652

653 (b) The presiding officer shall take the testimony of all witnesses relating to a development
 654 permit application under oath or affirmation, and shall permit the right of cross-examination to
 655 all parties through their attorneys, if represented, or directly, if not represented, subject to the
 656 discretion of the presiding officer and to reasonable limitations on the time and number of
 657 witnesses.
 658

659 (c) Technical rules of evidence do not apply to the record hearing, but the presiding officer may
 660 exclude irrelevant, immaterial or unduly repetitious evidence.
 661

662 (d) If a party to the first record hearing provides additional documents or evidence, the presiding
 663 officer may [*or shall*] allow a continuance of the record hearing or leave the record open to allow
 664 other parties a reasonable opportunity to respond.

111A

665 (e) The local government shall provide for the verbatim recording of the record hearing, and
666 shall furnish a copy of the recording, on request, to any interested person at its expense.
667

668 Comment: Subparagraph (e) is based on N.J. Stat. Ann. §40:55D-10, which prescribes detailed
669 procedures for public hearings that develop a record. See also Ore. Rev. Stat. §197.763(5). A
670 local government may want to include provisions in their hearing rules for procedures not
671 covered by this section. For example, the rules can provide procedures under which presiding
672 officers can call witnesses other than witnesses called by parties. See paragraph (6)(b), above.
673 They can also provide procedures for site visits, which are common in some jurisdictions. A site
674 visit is acceptable if all parties are given personal notice of the visit, and if all decision makers
675 are present at the site at the time of the visit. In addition, any information obtained during the site
676 visit must be made part of the record and an opportunity provided for rebuttal.
677

678 This paragraph does not deal with the problem of “judicial notice,” which is the reliance on
679 materials outside the formal record. However, it is clear that decision makers can rely on
680 materials of this kind under the doctrine of “Official Notice” if they are openly disclosed and
681 subject to rebuttal. See Ronald M. Levin, “Scope-of-Review Doctrine Restated: An
682 Administrative Law Section Report,” 38 *Admin. L. Rev.* 239, 279-282 (1986). Nothing in this
683 paragraph prevents decision makers from relying on their own judgment in making decisions.
684

685 (7) **Ex parte communications.**

686
687 (a) A land-use decision based on a record hearing may be voided if a decision-making officer, or
688 a member of a decision-making body, engages in a substantial ex parte communication
689 concerning issues related to the development permit application with a party to the record
690 hearing, or a person who has a direct or indirect interest in any issue in the record hearing, unless
691 the official or member who engages in the ex parte communication provides an opportunity to
692 rebut the substance of any written or oral ex parte communication by promptly putting it on the
693 record and promptly notifying all parties to the record hearing of the contents of the
694 communication.
695

696 (b) An oral communication between local government staff and the decision-making officer or a
697 member of a decision-making body is not a substantial ex parte communication under this
698 paragraph.
699

700
701 Comment: This subparagraph deals with ex-parte communications. Exparte communications are
702 described as “substantial”, excluding unintentional, *de minimis*, contacts from the purview of this
703 paragraph. (Also, since Section 615 authorizes reversal of a land-use decision only if there was
704 prejudicial error, a court can reverse on the grounds of substantial ex-parte communication only
705 if the communication was prejudicial.) The subparagraph allows them if they are disclosed on
706 the record, and exempts verbal communications by staff from the ex-parte communications bar,
707 but written staff reports must be placed on the record as required by Section 207(3). This
708 subparagraph is based on Ore. Rev. Stat. §§215.422 and 227.180, and Wash. Rev. Code §

709 42.36.060. For more detailed regulation of ex-parte communications see Fla. Stat. Ann.
710 §268.0115.

711
712 (8) **Conflicts.** Any decision-making officer or member of a decision-making body having a
713 direct or indirect financial interest in property that is the subject of a record hearing, who is
714 related by blood, adoption, or marriage to the owner of property that is the subject of a record
715 hearing or to a party to the record hearing, or who resides or owns property within [500] feet of
716 property that is the subject of a record hearing, shall recuse him- or herself from the matter
717 before the commencement of the record hearing and shall state the reasons for such recusal.

718

719 (9) **Findings, decision, and notice.**

720

721 (a) A local government may approve or deny a development permit application, or may approve
722 an application subject to conditions. Any approval, denial, or conditions attached to a
723 development permit approval shall be based on and implement the land development regulations,
724 and goals, policies, and guidelines of the local comprehensive plan.

725

726 (b) Any decision on a development permit application shall be based upon and accompanied by a
727 written statement that:

728

729 1. states the land development regulations and goals, policies, and guidelines of the local
730 comprehensive plan relevant to the decision;

731 2. states the facts relied upon in making the decision;

732

733 3. is consistent with the land development regulations, the goals, policies, and guidelines of the
734 local comprehensive plan (including the future land-use plan map).

735

736 4. responds to all relevant issues raised by the parties to the record hearing;

737 and

738

739 5. states the conditions that apply to the development permit, the conditions that must be satisfied
740 before a certificate of compliance can issue, and the conditions that are continuing requirements
741 and apply after a certificate of compliance is issued.

742

743 (c) A local government may give written notice of its decision to all parties to the proceeding
744 [and shall publish a summary of its decision in a newspaper of general circulation and may [*or*
745 shall] publish the decision on a computer-accessible information network].

746

747 Comment: To avoid confusion about what has been decided, a reasoned decision based on
748 findings of fact is an essential conclusion to the permit review process. This paragraph also
749 authorizes conditions on approved applications, which are often necessary to meet problems
750 about the application discovered during the process. This authority is intended to be flexible;
751 conditions can implement any of the regulations or planning policies on which the decision is
752 based. Subparagraph (c) makes newspaper and electronic publication of a decision an option.

111A

753 This paragraph is based on Idaho Code §67-6519, N.J. Stat. Ann. §40:55D-10, and Ore. Rev.
754 Stat. §§227.173(2) and 215.416(9).

755

756 (10) **Certificate of compliance.** The officer or body that grants a development permit shall issue
757 a certificate of compliance if the completed development is in accordance with the conditions of
758 the development permit that must be satisfied before a certificate of compliance can issue. The
759 officer or body may delegate the responsibility of issuing the certificate of compliance to another
760 officer. [Optional provisions are included in the Appendix.]

761

762 **208 Consolidated Permit Review Process**

763

764 **See Appendix of Optional Sections**

765

766 **209 Appeals**

767

768 (1) An appeal of a land-use decision may be taken to an appeals board within [30] days after the
769 decision is issued.

770

771 (a) by the applicant for the development permit or land-use decision, by the holder of a
772 development permit, and by any party to the record hearing, if there has been a record hearing; or

773

774 (b) if there has been an administrative review:

775

776 1. by the applicant for the development permit; or

777

778 2. by any person, including a person supporting the application; neighborhood planning council;
779 neighborhood or community organization; or governmental unit, if he, she, or it is aggrieved by
780 the land-use decision.

781

782 (2) (a) The party appealing must file a notice of appeal specifying the grounds for the appeal
783 with the officer or body from whom the appeal is taken, and with the appeals board. The officer
784 or body from whom the appeal is taken shall transmit to the appeals board the record upon which
785 the land-use decision appealed from was taken.

786

787 (b) The appeals board may dismiss an appeal if it determines that the notice of appeal is legally
788 insufficient on its face.

789

790 **Comment:** If a record hearing has been held on the development permit application, any person
791 who could be aggrieved has had the opportunity to become a party to the hearing, so this section
792 limits appeals to persons who became parties. If there has been an administrative review without
793 a hearing there has been no opportunity to establish party status, so appeals may be taken by the
794 applicant and by any person aggrieved.

795

796 (3) An appeal that is not dismissed shall stay any and all proceedings to enforce, execute, or
797 implement the land-use decision being appealed, and any development authorized by the land-

798 use decision. If the party appealing is not the applicant, a stay shall be granted unless the officer
 799 or body from whom the appeal is taken certifies in writing to the appeals board that a stay in the
 800 decision or development thereunder would cause immediate and irreparable harm to the
 801 appellant with no comparable immediate and irreparable harm to the applicant or imminent peril
 802 to life or property. If such a certification is filed, there shall be no stay other than by a restraining
 803 order, which may be granted by the [*name of court*] on due cause shown and with notice to the
 804 officer or body from whom the appeal is taken.

805
 806 Comment: A stay of proceedings to carry out a land-use decision pending an appeal maintains
 807 the status quo while a land-use decision is appealed, but also creates delays for a permit applicant
 808 if the decision stayed is a favorable decision on the permit. This paragraph authorizes a
 809 procedure that prohibits a stay order only if it would cause harm or a peril to life or property. The
 810 officer or body must present a certification that these circumstances exist, and it is then up to a
 811 court to decide whether it should grant a stay. The assumption is that a court can consider the
 812 probability of success on the merits or the appeal when it decides whether to grant a stay, and so
 813 may refuse a stay if it believes the appeal is wholly without merit. In addition, if it has the
 814 authority, a court can also order the posting of a bond as a condition to a stay order.

815
 816 (4) The appeals board shall set the time and place at which it will consider the appeal, which
 817 shall be no more than [20, 30 *or* 40] days from the time the appeal was filed. The appeals board
 818 shall give at least [10] days notice of the appeal hearing to the officer or body from which the
 819 appeal was taken and to the parties to the appeal.

820
 821 (5) (a) The appeals board shall hold a hearing on the record in a record appeal unless it decides
 822 that additional evidence is necessary to supplement the record. As part of its development permit
 823 review process, the legislative body shall adopt rules under which the appeals board may hear
 824 arguments on the record by the parties to the record appeal. The appeal proceeding shall be
 825 limited to the grounds raised in the notice of appeal.

826
 827 Comment: This paragraph is based on R.I. Gen Laws §§45-24-64 and 45-24-66, and Wash. Rev.
 828 Code § 36.70.830.

829
 830 (b) 1. An appeals board shall issue a written decision after the record hearing in which it may
 831 remand, reverse or affirm, wholly or in part, or may modify a land-use decision from which an
 832 appeal is taken, and shall have the authority in making such decision to exercise all the powers of
 833 the officer or body from which the appeal is taken, insofar as they concern the issues on appeal.
 834 A tie vote is an affirmation of the decision from which the appeal was taken.

835
 836 2. The appeals board shall not make findings of fact, unless the board has taken evidence
 837 supplementing the record on appeal, in which case it shall make findings of fact based on this
 838 evidence and shall make a decision based on such findings as required by Section 207(9).

839
 840 Comment: This paragraph is standard. See, e.g., Rhode Island Gen. Laws § 45-24-67.

841

111A

842 (6) In an appeal from an administrative review, the appeals board shall hold a record hearing and
843 make a decision as provided in Section 207.

844

845 (7) The appeals board shall mail a notice of any decision to the parties to the appeal and to the
846 [local planning agency *or* code enforcement officer] of the local government within [30] days of
847 the commencement of the hearing.

848

849 (8) The appeals board shall keep written minutes of its proceedings, showing the vote of each
850 member upon each appeal or, if absent or failing to vote, indicating that fact, and shall keep
851 records of its official actions in its office.

852

853 Comment: These provisions are standard. See R.I. Gen. Laws §45-24-61.

854

855 **210 Time Limits on Land-Use Decisions**

856

857 Comment: It is one of the fundamental elements of due process that a decision maker must come
858 to a final decision within a reasonable period of time. Certainty is one of the goals of the land-
859 use decision making process established in this Chapter, and a failure by a local government to
860 decide either way on a development permit application destroys certainty. Therefore, this Section
861 establishes an overall time limit for the development permit review process, and alternatively
862 requires local governments to fix time limits under Section 201. The applicant and the local
863 government may mutually consent to an extension of that time limit. It should be noted that a
864 local government cannot demand a waiver of time limits in an application for a development
865 permit. See Section 202(4). The Section provides that the time limits do not apply when the local
866 government identifies a specific land development regulation that prohibits the development and
867 with which the application does not comply. This exception, which is based on N.H. Rev. Stat.
868 §676:4, is intended to cover nondiscretionary requirements not considered in the decision
869 making process, such as a restriction on development in floodplains. There is also an exception
870 to the time limit for periods when the local government cannot process permit applications due to
871 circumstances beyond its control. This is meant to cover disasters and similar events that disrupt
872 normal operations of the local government.

873

874 The section requires the local government to refund the development permit application fee and
875 gives the applicant a cause of action to compel the local government to make a decision on the
876 development permit application. This is the approach taken in the Oregon land development
877 statutes.³⁹ The application fee refund is an incentive to the local government to make a decision
878 on the application without a court order. If the only consequence of not making a decision on a
879 development permit application were a court order to make a decision, a dilatory local
880 government would have a strong incentive to do nothing with a controversial permit application.
881 If it held out until a writ of mandamus were issued, the applicant may give up or the local
882 government may prevail in court. If they are eventually ordered to issue a development permit,
883 they can plausibly deflect criticism of the permit approval by pointing to the court order
884 compelling them to act.

885

886 (1) If a local government fails to approve, conditionally approve, or disapprove a development
 887 permit application within [*Option A*: 90, 120, or 180] days from the time it makes a written
 888 determination that a development permit application is complete] [*Option B*: the time period
 889 specified for that development permit under Section 201(2)(d)]; then

890
 891 (a) the local government shall refund to the applicant any development permit application fee
 892 paid to the local government pursuant to Section 211; and

893
 894 (b) the applicant shall have a cause of action, in the nature of mandamus, in the [*name of court*]
 895 in order to compel the local government to approve, approve with conditions, or disapprove the
 896 development permit application; unless within that period the local government has identified in
 897 writing some specific land development regulation provision with which the application does not
 898 comply, and that prohibits the development of the property.

899
 900 (2) The local government, and the applicant for a development permit, may mutually agree to an
 901 extension of the time limits for a decision specified in paragraph (1).

902
 903 (3) The time limits for decision specified in this Section do not run during any period:

904
 905 (a) not to exceed [30] days, in which a local government requests additional studies or
 906 information concerning a development permit application; or

907
 908 (b) in which the local government is unable to act upon development permit applications due to
 909 circumstances beyond the local government's control, including a reasonable period for
 910 resubmission of development permit applications and related materials destroyed, damaged, or
 911 otherwise rendered unusable.

912

913 **211 Fees**

914

915 A local government may charge such fees as are necessary to carry out the responsibilities
 916 imposed by Sections 201 through 210. It shall base such fees on the actual or average costs of
 917 review and processing of development permit applications and appeals from decisions on
 918 development permit applications, and may adopt different schedules of fees for different
 919 categories of development reviews and appeals.

920

921 **HEARING EXAMINERS**

922

923 **This part is in the Appendix of Optional Sections.**

924

925 **LAND-USE REVIEW BOARD**

926

927 Comment: Sections 401 *et seq.* provide for the creation and organization of a Land-Use Review
 928 Board. In most zoning enabling legislation, this board is called a Zoning Board of Adjustment or
 929 Zoning Board of Appeals, as opposed to the Planning Commission in most eastern states. These

111A

930 Sections adopt a different name because a local government’s land development regulations will
931 probably contain more than zoning regulations. However, a state may use another name if it
932 prefers.

933
934 These Sections differ from the traditional zoning enabling act because they do not mandate a
935 fixed and inflexible structure for the Board. Smaller communities, especially, may need the
936 flexibility to create smaller Boards, and the Section does not prohibit the creation of a Board
937 with only one member. Communities may also need flexibility in setting the terms of office for
938 board members. For example, some communities may prefer longer terms in order to reduce
939 turnover and to keep Board members in office once they gain experience.

940
941 Moreover, a local government may decide not to create a Land-Use Review Board. This Chapter
942 allows a local government to assign functions traditionally exercised by a zoning board of
943 adjustment or appeals to another officer or body, such as the local planning commission or a
944 hearing examiner. Sections 401 et seq. are based in part on R.I. Gen. Laws §45-24-56.

945

946 **401 Land-Use Review Board Authorized**

947

948 The legislative body of each local government [shall *or* may] adopt an ordinance, as part of its
949 land development regulations, which provides for the creation of a Land-Use Review Board.

950

951 **402 Organization and Procedures**

952

953 An ordinance creating a Land-Use Review Board shall:

954

955 (1) specify the number of members who shall serve on the Board, including alternate members;

956

957 (2) provide for the appointment of Board members, including alternate members, and for the
958 organization of the board;

959

960 (3) specify the terms of members of the Board, which may be staggered;

961

962 (4) specify the requirements for voting on matters heard by the Board, and specify the
963 circumstances in which alternate members may vote instead of regular members; and

964

965 (5) specify procedures for filling vacancies in unexpired terms of Board members, including
966 alternate members, and for the removal of members, including alternate members for due cause.

967

968 **403 Compensation, Expenses and Assistance**

969

970 The ordinance creating the Land-Use Review Board may provide for the compensation of board
971 members and for reimbursement for expenses incurred in the performance of official duties, and
972 may authorize the board to engage legal, technical, or clerical assistance to aid in the discharge
973 of its duties.

974

975 **404 Training**

976

977 Within [6] months of assuming office for the first time, any member of the Land-Use Review
 978 Board, including alternate members, [shall *or* may] complete at least [6] hours of training in his
 979 or her duties as a member of the Board. The local planning agency shall design and provide the
 980 training.

981

982 Comment: This Section authorizes training for new board members, and a local government can
 983 make this training mandatory. It is based on N.H. Rev. Stat. Ann. §673:3-a.

984

985 **405 Powers**

986

987 The ordinance creating a Land-Use Review Board shall specify the powers the Board may
 988 exercise. The ordinance may provide that the Board shall serve as the local government's appeals
 989 board. The ordinance shall provide for expedited rulings with regard to those matters over which
 990 the Board does not have jurisdiction.

991

992 **ADMINISTRATIVE ACTIONS AND REMEDIES**

993

994 Comment: The model act does not include substantive provisions for variances, conditional uses
 995 and other possible administrative remedies, as authority for these remedies will vary among the
 996 states. The act does include provisions allowing the Land-Use Review Board or other designated
 997 body to authorize whatever remedies are provided by statute.

998

999 **501 Authority to Approve.**

1000

1001 Each local government's land development regulations [shall *or* may] authorize the Land-Use
 1002 Review Board, the planning commission, the legislative body, or such other officer or body as
 1003 the land development regulations shall designate, to approve the administrative actions,
 1004 remedies, and procedures authorized by law.

1005

1006 **502 Conditional Uses**

1007

1008 This authority will be provided by state law.

1009

1010 **503 Variances**

1011

1012 This authority will be provided by state law.

1013

1014 **504 Referral to Planning Commission**

1015

1016 Comment: This provision provides a procedure for referral to the planning commission for
 1017 conditional uses and variances. The authority for conditional uses and variances will be provided
 1018 by state law. See the Note above for § 501.

1019

111A

1020 (1) If the land development regulations designate an officer or body other than the planning
1021 commission to hear an application for a conditional use or variance, such officer or body may
1022 request a recommendation from the local planning commission or local planning agency. It shall
1023 report its recommendations within [30] days of the receipt of the application by such officer or
1024 body.

1025
1026 (2) If the local planning commission or local planning agency makes a recommendation, the
1027 officer or body shall give it [due regard *or* substantial weight] and make it a part of the record.
1028

1029 Comment: A local government may appoint its planning commission to hear applications for the
1030 administrative remedies authorized by this Chapter. If it appoints another officer or body, this
1031 Section authorizes a referral to the planning commission or the land planning agency for a
1032 recommendation. This Section is based in part on R.I. Gen. Laws §45-24-41(B).
1033

1034 **505 Procedures**

1035
1036 Comment: This section specifies the procedures required for all of the remedies and
1037 administrative actions authorized by this law. It integrates applications for development permits
1038 with applications for these remedies and actions: the application procedures for these remedies
1039 must be the same as the local government's development permit review process. As such, the
1040 decision on the requested remedy or action is also a final and appealable decision under this
1041 Chapter.
1042

1043 An application for one of these remedies and actions can be considered independently of an
1044 application for development. However, it must be included in a development application when
1045 one is made. Also, a local government must make a decision on the application for a remedy or
1046 action before it considers the development permit. For example, if application is made for a
1047 variance in the form of a decreased setback requirement, a decision on that application must be
1048 made before a zoning permit can be issued. This decision becomes part of the application for
1049 development, and the local government must consider the decision as it reviews the development
1050 permit application.
1051

1052 Paragraph (2)(a) requires the local government to specify which officers and bodies review
1053 applications for remedies and actions. It is possible that a request for an administrative remedy or
1054 action may not be heard by the same officer or body that hears the application for a development
1055 permit that accompanies the application for an administrative remedy. The consolidated review
1056 process authorized by Section 208 can provide for joint hearings on applications for a
1057 development permit and an administrative remedy when the same officer or body reviews both
1058 applications. Record hearings on applications for a remedy or action are mandated by paragraph
1059 (2)(b). Paragraph (2)(c) requires development permits to include any approved administrative
1060 action or remedy.
1061

1062 (1) (a) Each local government shall adopt an application procedure for conditional uses and
1063 variances. This procedure must incorporate the procedures of the development permit review

1064 process, and a decision on an application for a conditional use or variance is a final appealable
1065 decision under this Chapter.

1066
1067 (b) Applications for conditional uses and variances must be included as part of a development
1068 permit application if a development permit application is submitted. A decision on an application
1069 for a conditional use or variance must be made before a development permit may be issued, and
1070 such a decision shall become part of the application for a development permit.

1071
1072 (2) The application procedure required by paragraph (1) shall:

1073
1074 (a) specify which officers and bodies shall review applications for conditional uses and
1075 variances;

1076
1077 (b) require that the review of such applications be conducted by record hearing; and

1078
1079 (c) require any development permit for such development to incorporate any conditional use or
1080 variance that has been approved for such development.

1081

1082 **JUDICIAL REVIEW OF LAND-USE DECISIONS**

1083

1084 **601 Purposes**

1085

1086 The purpose of Sections [601 to 618] is to provide for the judicial review of land-use decisions
1087 by local governments by establishing uniform, expedited appeal procedures and uniform criteria
1088 for reviewing such decisions, in order to provide consistent, predictable, and timely judicial
1089 review.

1090

1091 Comment: This Section states the purpose of the judicial review provisions, which are based to a
1092 considerable extent on the Washington Land-use Petition Act, Wash. Rev. Code Ann.
1093 §§36.70C.010 et seq. The judicial review provisions in this Chapter replace the limited judicial
1094 review provisions in the *Standard State Zoning Enabling Act*, and apply to land-use decisions by
1095 local governments on development permit applications.

1096

1097 **602 Method of Judicial Review Exclusive**

1098

1099 Comment: The *Standard State Zoning Enabling Act* authorized the use of the judicial writ of
1100 certiorari to review decisions of the board of zoning adjustment. This writ is available to review
1101 decisions made on a record. The judicial review remedy provided by this Chapter replaces the
1102 writ of certiorari and is the exclusive method of judicial review for land-use decisions.

1103

1104 A writ of mandamus, which seeks to compel an action by a local government, and a writ of
1105 prohibition, seeking to prohibit action by a local government, are exempt from judicial review
1106 under this Chapter. For example, an applicant who believes that a local government has
1107 improperly refused to find her development application complete can bring an action in
1108 mandamus to compel the local government to accept the application, on the theory that there is a

111A

1109 duty to accept an application that complies with the legal requirements for applications. See
1110 Sections 202, -203.

1111
1112 Neither does the Section prohibit an application for an injunction or declaratory judgment where
1113 the claim is that a land development regulation or comprehensive plan is invalid or
1114 unconstitutional. Section 602 also exempts claims for damages or compensation, which may be
1115 brought in state court under the state constitution or under the federal constitution, and claims
1116 brought in state court under Section 1983 of the Federal Civil Rights Act. While a petitioner may
1117 join these claims with a petition for judicial review under this Chapter, they do not have to do so
1118 in order to preserve the claims, and the filing of a petition for review does not bar the later filing
1119 of an action for damages or compensation. This Section is based on Wash. Rev. Code Ann.
1120 §36.70C.030.

1121
1122 (1) The judicial review provided by this Chapter replaces the writ of certiorari for the review of
1123 land-use decisions and is the exclusive means for the judicial review of land-use decisions.

1124
1125 (2) The judicial review provided by this Chapter does not replace or apply to judicial review of
1126 applications for:

1127
1128 (a) a writ of mandamus or prohibition;

1129
1130 (b) an injunction or declaratory judgment claiming that the adoption or amendment of land
1131 development regulations or local comprehensive plan is invalid or unconstitutional; and

1132
1133 (c) claims for monetary damages or compensation.

1134
1135 (3) Any person filing a petition for judicial review under this Chapter may join with that petition
1136 any claim excluded from this Chapter by paragraph (2) above and/or a claim under Section 1983
1137 of the Federal Civil Rights Act, 42 U.S.C. §1983.

1138
1139 (4) The rules for civil actions in the [*name of court*] govern procedural matters under this
1140 Chapter to the extent that these rules are consistent with this Chapter.

1141 1142 **603 Judicial Review of Final Land-Use Decisions**

1143
1144 Comment: This section makes it clear that judicial review of land-use decisions is available by
1145 filing a land-use petition, which is equivalent to a complaint or petition in a civil action. A state
1146 may want to add a provision on joinder of parties, if this problem is not covered by court rules or
1147 another statute. See Wash. Rev. Code §36.70C.050.

1148
1149 The Section, in paragraph (1), requires a final land-use decision before judicial review is
1150 available. Paragraph (2) defines finality. The definition of finality is written so that an appeal of a
1151 land-use decision to a court is not necessary to make a decision final. However, under Section
1152 604, a final decision is not appealable if administrative remedies have not been exhausted, unless

1153 seeking those remedies would be futile. Neither is an application for a zoning map amendment
 1154 necessary.

1155
 1156 (1) Any person with standing pursuant to Section 607 may obtain judicial review of a final land-
 1157 use decision under this Chapter by filing a land-use petition with the [*name of court*].

1158
 1159 (2) A land-use decision is a “final land-use decision” if:

1160
 1161 (a) an application for a development permit is complete or deemed complete pursuant to Section
 1162 203; and

1163
 1164 (b) the local government has approved the application, has approved the application with
 1165 conditions, or has denied the application.

1166
 1167 (3) The issuance or denial of a certificate of nonconforming use is a final land-use decision.

1168
 1169 (4) A decision arising from an appeal pursuant to Section 209 is a final land-use decision.

1170

1171 **604 Exhaustion of Remedies**

1172

1173 Comment: State courts require that petitioners for judicial review must exhaust administrative
 1174 remedies and appeals before judicial review is available. Courts may impose this requirement in
 1175 addition to or instead of the ripeness requirement. This section codifies this requirement. It
 1176 clarifies its meaning by only requiring exhaustion of administrative appeals and the conditional
 1177 use and variance remedies available in this Chapter.

1178

1179 A land-use decision is appealable under Section 603. However, since land development
 1180 regulations must include an appeal to a local officer or body under Section 209, it will be
 1181 necessary to first make such an appeal, with limited exceptions. State courts have adopted a
 1182 futility exception to exhaustion, and exhaustion is not required if remedies are inadequate. This
 1183 section is intended to include these exceptions in paragraph (2) by making case law interpretation
 1184 of terms applicable.

1185

1186 (1) The [*name of court*] shall have jurisdiction over a land-use petition if and when the petitioner
 1187 has exhausted the appeal procedures provided under Section 209 and any other applicable
 1188 remedies available by law.

1189

1190 (2) The terms and provisions of this Section shall be given the meanings assigned to them by [the
 1191 common law *or* case law *or* precedent].

1192

1193 **605 Federal Claims**

1194

1195 Any person who files a land-use petition under this Chapter may include in the petition a
 1196 statement reserving any federal claim arising out of the land-use decision that is the basis for the
 1197 petition, and a prayer that the court should reserve these claims in its decision under Section 615.

111A

1198 Comment: Federal courts require persons who bring takings claims to begin their lawsuit in state
1199 courts by seeking compensation when a state compensation remedy is available. The reservation
1200 of the federal claim in state court may determine whether a petitioner can return to federal court
1201 once the state lawsuit is terminated. This Section gives the petitioner for judicial review in state
1202 court the option to reserve a federal claim.

1203

1204 **606 Filing and Service of Land-Use Petition**

1205

1206 (1) A land-use petition is barred, and a court may not grant review, unless the petitioner has
1207 timely filed the petition with the court and has served the petition by registered or certified mail
1208 within [21] days of filing the petition [*or* has timely served the petition by summons] on the
1209 following persons, who shall be parties to the review of the land-use petition:

1210

1211 (a) the local government, which for purposes of the petition is the local government entity and
1212 not an individual decision maker or officer or body;

1213

1214 (b) the applicant for the development permit and the owner of the property at issue, if the owner
1215 was not the applicant; and

1216

1217 (c) all parties to a record hearing or record appeal on the land-use decision at issue.

1218

1219 (2) The petition is timely filed if it is filed and served on all parties listed in paragraph (1) of this
1220 Section within [21] days of the issuance of the land-use decision by the local government.

1221

1222 Comment: These provisions are standard, and are based on Wash. Rev. Code Ann. §36.70C.040.
1223 See also Conn. Gen. Stat. §8-8(c). A state may wish to add provisions on how service is to be
1224 made if this requirement is not covered by the rules of court or another statute.

1225

1226 **607 Standing and Intervention**

1227

1228 The following persons have standing to bring a land-use petition under Section 603, and to
1229 intervene in a proceeding for judicial review brought under that Section:

1230

1231 [(1) the applicant or the owner of property to which the land-use decision is directed, if the
1232 applicant is not the owner;

1233

1234 (2) the local government to which the application for the land-use decision was made;

1235

1236 (3) any person owning or legally occupying property abutting or confronting a property which is
1237 the subject of the land-use decision;

1238

1239 (4) all other persons who participated in an administrative review by right, or who were parties to
1240 a record hearing, on a development permit application that was the subject of the land-use
1241 decision; and

1242

1243 (5) any other person, neighborhood planning council, neighborhood or community organization,
 1244 or governmental unit, if it is aggrieved by the land-use decision, or if it would be aggrieved by a
 1245 reversal or modification of the land-use decision.]

1246
 1247 Comment: State courts require petitioners for judicial review of land-use decisions to have
 1248 standing to sue, and many state land-use statutes define standing. In addition to mandatory
 1249 standing for the applicant or owner of property that is the subject of the land-use decision, parties
 1250 to a hearing, and neighbors, this Section grants standing to persons and organizations aggrieved
 1251 by the land-use decision. This is the usual basis for standing in state courts. The Section also
 1252 extends standing to organizations, and uses the tests for standing to control intervention in
 1253 judicial review proceedings. The Section is based on Wash. Rev. Code §36.70C.060, with the
 1254 addition of mandatory standing for neighbors, as provided by Vt. Stat. Ann. tit. 23, §4464(b).

1255
 1256 The Section adapts language from the Washington statute that defines when a person or
 1257 organization is aggrieved. The purpose of this definition is to require that parties seeking
 1258 standing to challenge a land-use decision have a sufficient interest to create an actual
 1259 controversy. This requirement makes it unnecessary to place additional limitations on appeals by
 1260 organizations, such as a requirement that a neighborhood or community organization show that it
 1261 represents a certain percentage of residents in a neighborhood it purports to represent. It is the
 1262 intention of this Section that aggrieved persons and organizations have standing without
 1263 necessarily having participated in a hearing on the development permit application that was the
 1264 subject of the land-use decision. This Section applies to administrative reviews on development
 1265 permit applications as authorized by Section 204. A state may decide not to define when a party
 1266 seeking standing is aggrieved. That decision will then be left to the courts. And because a state
 1267 may have a clear standing rule from case law or statute that it wishes to use in place of the model
 1268 provided, the entire substantive portion of the Section has been placed in brackets. The drafters
 1269 were aware of the “zone of interests protected or regulated” by a statute standard often used in
 1270 federal courts but settled upon a test more appropriate for resolution under state law and policy.

1271

1272 **608 Required Elements in Land-Use Petition**

1273

1274 A land-use petition must set forth:

1275

1276 (1) the name and mailing address of the petitioner;

1277

1278 (2) the name and mailing address of the petitioner’s attorney, if any;

1279

1280 (3) the names and mailing addresses of the applicant for the land-use decision, and of the owners
 1281 of the property that is the subject of the decision, if the petitioner is not the applicant and sole
 1282 owner of the property;

1283

1284 (4) the name and mailing address of the local government whose land-use decision is at issue, if
 1285 the petitioner is not the local government;

1286

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- 1287 (5) identification of the decision-making officer or body, together with a duplicate copy of the
1288 written decision;
1289
1290 (6) identification of each person whom the petitioner knows or reasonably should know is
1291 eligible to become a party under Section 606(1);
1292 (7) facts demonstrating that the petitioner has standing to seek judicial review under Section 607;
1293
1294 (8) a separate and concise statement of each error alleged to have been committed in an
1295 administrative review, record hearing, or record appeal.
1296
1297 (9) a concise statement of facts upon which the petitioner relies to sustain the statement of error;
1298 and
1299
1300 (10) a request for relief, specifying the type and extent of relief requested.

1301
1302 Comment: This Section is based on Wash. Rev. Code §36.70C.080 and contains standard
1303 language specifying the contents of a petition.

1304 **609 Preliminary Hearing**

- 1305
1306
1307 (1) When appropriate, in the petition served on the parties identified in Section 07(1)], the
1308 petitioner shall note, according to the rules of the [*name of court*], a preliminary hearing on
1309 jurisdictional and preliminary matters, including standing. The court shall set the preliminary
1310 hearing no sooner than [35] days and no later than [50] days after the petition is served on the
1311 parties identified in Section 606(1).
1312
1313 (2) The parties shall settle the record and raise all motions on jurisdictional and procedural issues
1314 for resolution at the preliminary hearing, except that a motion to allow discovery may be brought
1315 sooner
1316
1317 (3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join
1318 persons needed for just adjudication are waived if not raised by timely motion noted to be heard
1319 at the preliminary hearing, unless the court allows discovery on such issues. These defenses, as
1320 well as bias or ex parte contacts not disclosed in the hearing, and unconstitutionality, are the only
1321 matters that may be the subject of further discovery.
1322
1323 (4) The petitioner shall move the court for an order at the preliminary hearing that sets the date
1324 on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if
1325 discovery is to be allowed, and sets a date for the hearing or trial on the merits.
1326
1327 (5) The parties may waive the preliminary hearing by scheduling with the court a date for the
1328 hearing or trial on the merits, and by filing a stipulated order that resolves the jurisdictional and
1329 procedural issues raised by the petition, including the issues identified in paragraphs (3) and (4)
1330 of this Section.
1331

1332 (6) A party need not file an answer to the petition.
1333

1334 (7) Unless the Court determines by order that the complexity of the case, resolution of discovery
1335 issues, or other reason in the interests of justice is present, the review proceeding shall be
1336 concluded within 150 days of the settlement of the record.
1337

1338 Comment: This Section is based on Wash. Rev. Code §36.70C.080. It authorizes a preliminary
1339 hearing at which the court can deal with motions preliminary to trial that raise standing and other
1340 jurisdictional matters. Because the petitioner may not know at the time of filing the petition
1341 whether a preliminary hearing is necessary, the Section authorizes a motion for preliminary
1342 hearing only where appropriate. A state need not adopt this Section if a preliminary hearing is
1343 authorized by court rules or another statute.
1344

1345 **610 Expedited Judicial Review** 1346

1347 The [*name of court*] shall provide expedited review of petitions filed under this Chapter, and
1348 must set the petition for hearing within [60] days after the date set for submitting the local
1349 government's record. The court may set a later date if it finds good cause based on a showing by
1350 a party or parties, or if all the parties stipulate to a later date.
1351

1352 Comment: Expedited judicial review is essential for land-use decisions because delay is costly
1353 for all parties, and can disrupt local government planning and land development regulation
1354 efforts while an appeal is pending. This Section is based on Wash. Rev. Code §36.70C.090.
1355

1356 **611 Stay of Action Pending Judicial Review** 1357

1358 (1) A party may submit to the presiding officer a petition for stay of effectiveness of an initial or
1359 final order within [7] days after its rendition unless otherwise provided by statute or stated in the
1360 initial or final order. The presiding officer may take action on the petition for stay, either before
1361 or after the effective date of the initial or final order.
1362

1363 (2) A petitioner or other party may move the court to stay or suspend an action by the local
1364 government or another party to implement the decision under review. The motion must set forth
1365 a statement of grounds for the stay and the factual basis for the motion. The court may grant the
1366 motion for a stay upon such terms and conditions, including the filing of security, as it
1367 determines are necessary to prevent the stay from causing harm to other parties.
1368

1369 (3) When a local government has approved a development in a land-use decision, or has
1370 approved a development with conditions, and a petition has been brought for judicial review of
1371 the land-use decision, the owner of the land that is the subject of the petition may move the court
1372 to order the petitioner to post security as a condition to continuing the proceedings before the
1373 court. The question whether or not such motion should be granted and the amount of the security
1374 are within the sound discretion of the court.
1375

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1376 Comment: Whether, and under what circumstances, a court should stay an action by a local
1377 government or another party is an important question. For example, if a development that is
1378 permitted by a landuse decision is not stayed, a developer can moot the case by completing the
1379 development pending the appeal.

1380
1381 This Section authorizes a stay, and is based on the 1981 Model State Administrative Procedures
1382 Act, sec. 4-217 and Rev. Code §36.70C.100. Unlike the Washington law, this Section does not
1383 provide for an evidentiary hearing on the stay order to determine whether the party requesting
1384 the stay is likely to prevail on the merits, whether the stay is necessary to prevent irreparable
1385 injury, and whether will not substantially harm other parties and is timely. An evidentiary
1386 hearing on the need for a stay order is a mini-trial on the merits of the petition, and can create
1387 unnecessary delays before the case goes to trial. It is the intention of this Section, however, that a
1388 court should have the discretion to consider the merits of the case and the other factors noted
1389 above when setting the amount of the bond. See Jan Krasnowiecki and L.B. Kregenow, "Zoning
1390 and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning
1391 Code," 39 Vill. L. Rev. 904-06 (1994).

1392
1393 When a development is approved by a local government in a land-use decision, an opponent of
1394 the development may file a petition for judicial review. Because the filing of petition may delay
1395 the development for a substantial period of time, even if the petitioner does not obtain a stay
1396 order, this Section also authorizes the owner of the land that has been approved for development
1397 to request an order requiring the petitioner to file security. The intent again is to give the court the
1398 discretion to take the merits of the opponent's case and other factors concerning the effect of a
1399 delay on the development into account when deciding whether to require security. See
1400 Krasnowiecki & Kregenow, supra. Section 602(4) makes the rules for civil actions applicable to
1401 appeals under this chapter, and the rules can provide additional guidance on stay orders,
1402 including guidance on the escrow and disposition of security.

1403 1404 **612 Submittal of Record for Judicial Review**

1405
1406 (1) Within [21] days after the filing of the petition for review, or within such further time as the
1407 court allows or as the parties agree, the local government shall submit to the court a certified
1408 copy of the record of the land-use decision for judicial review, except that the petitioner may
1409 prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the
1410 matter. In the absence of a transcript, the minutes of the proceedings may be used and, in any
1411 event, a audiotape or videotape of the proceedings shall be made part of the record.

1412
1413 (2) If the parties voluntarily agree, or upon order of the court, the record shall be shortened or
1414 summarized to avoid reproduction and transcription of portions of the record that are duplicative
1415 or not relevant to the issues to be reviewed by the court.

1416
1417 (3) The petitioner shall pay the local government the cost of preparing the record before the local
1418 government submits the record to the court. Failure by the petitioner to timely pay the local
1419 government relieves the local jurisdiction of responsibility to submit the record and is grounds
1420 for dismissal of the petition.

1421 (4) If the relief sought by the petitioner is granted in whole or in part, the court shall equitably
 1422 assess the cost of preparing the record among the parties. In assessing costs, the court shall take
 1423 into account the extent to which each party prevailed and the reasonableness of the parties'
 1424 conduct in agreeing or not agreeing to shorten or summarize the record, as authorized by
 1425 paragraph (2) of this Section.
 1426

1427 Comment: This Section authorizes the transmittal of the record of the land-use decision to the
 1428 court. It is based on Wash. Rev. Code §36.70C.110. There is no direct sanction to compel
 1429 agreement on shortening or summarizing the record, but there is an indirect sanction in the
 1430 court's authority to make allocation of record preparation costs depend on the willingness of a
 1431 party to make such an agreement.
 1432

1433 **613 Review and Supplementation of Record**

1434
 1435 (1) When the [*name of court*] is reviewing a land-use decision by an officer or body that made
 1436 findings of fact in a record to support its decision, the court shall base its review on the record.
 1437 The record shall include any evidence proffered by any party below, whether or not accepted as
 1438 part of the record. The [*name of court*] may remand the land-use decision for further proceedings
 1439 only if that additional evidence relates to:
 1440

1441 (a) grounds for standing, or for disqualification of a member of the body or the officer that made
 1442 the land-use decision, when such grounds were unknown by the petitioner at the time the record
 1443 was created;
 1444

1445 (b) matters that were improperly excluded from the record after being offered by a party to
 1446 record hearing; or
 1447

1448 (c) correction of ministerial errors or omissions in the preparation of the record.
 1449

1450 Comment: This Section makes it clear that judicial review of factual issues is based on the record
 1451 made before the body or official that made the decision. It provides limited opportunity to
 1452 introduce evidence to supplement the record. It is typical of authority found in other statutes
 1453 allowing the review of land-use decisions. See Utah Code Ann. §10-9-708(5)(a)(i). This narrow
 1454 authority to allow supplementary evidence is intended to allow additional evidence only when
 1455 exclusion of the evidence would be patently unfair. Except in such limited circumstances, the
 1456 remedy for an inadequate record should be a remand to the local government for further
 1457 proceedings. The section reflects the belief that the taking of evidence should occur at the local
 1458 government level in the local hearing process, where it can form the basis for the local
 1459 government's decision. Parties would not be allowed, under this view, to retry a case on the facts
 1460 once it gets into court.
 1461

1462 **614 Standards for Granting Relief**

1463
 1464 (1) The court shall reverse or remand the land-use decision under review if the court finds the
 1465 local government:

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- 1466 (a) Exceeded its jurisdiction;
1467
1468 (b) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced
1469 the substantial rights of the petitioner;
1470
1471 (c) Made a land-use decision based on findings of fact, or an application of law to facts, that is
1472 not supported by substantial evidence in the whole record;
1473
1474 (d) Improperly applied the land development regulations or other applicable laws; or
1475
1476 (e) Made an unconstitutional decision;
1477
1478 [(f) Made a land-use decision that is not consistent with the local comprehensive plan as it
1479 existed at the time of the development application; or
1480
1481 (g) Made a decision that is arbitrary, capricious, an abuse of discretion, or otherwise not in
1482 accordance with law.]

1483
1484 (2) If a petitioner has reserved a federal claim in a petition filed under Section 605, the court
1485 shall note in its decision that these claims are reserved.

1486
1487 Comment: Standards for judicial review must be carefully specified. This section is an adaptation
1488 of Ore. Rev. Stat. §197.835(9)(a), with the addition of a requirement for consistency with the
1489 comprehensive plan as an optional provision and an arbitrary and capricious standard of review
1490 as an optional provision.

1491 1492 **615 Decision of the Court**

1493
1494 (1) The court may dismiss the action for judicial review, in whole or in part, or it may do one or
1495 a combination of the following: affirm, modify, or reverse the land-use decision under review or
1496 remand it for modification or further proceedings.

1497
1498 (2) If the court remands a land-use decision to the officer or body that made the decision, it may
1499 require the officer or body to consider additional plans and materials to be submitted by the
1500 applicant for the development permit, and the adoption of alternative regulations or conditions,
1501 as the court's order on remand shall prescribe.

1502
1503 (3) If the court remands the land-use decision for modification or further proceedings, the court
1504 may make such an order as it finds necessary to preserve the interests of the parties and the
1505 public, pending further proceedings or action by the local government.

1506
1507 Comment: Paragraph (1) is standard language governing the availability of judicial relief. It is
1508 based on Wash. Rev. Code §36.70C.140. See also Idaho Rev. Code §67-5279. Paragraph (2) is
1509 based on Pa. Stat. Ann. tit. 53, §11006-A, and authorizes the court to require the local
1510 government to consider alternative requirements and conditions on remand. Paragraph (3) is

1511 intended to give a court broad discretion in attaching conditions to a remand. For example, a
 1512 court could condition a remand with an extension or stay of compliance or enforcement
 1513 proceedings. This type of order is recommended by the American Bar Association. See the
 1514 guidelines on judicial relief in House of Delegates, Amer. Bar Ass'n, Resolution No. 107B (Aug.
 1515 1997). The Resolution provides guidelines for decisions when stays should be granted, and
 1516 recommends against granting stays in most cases. Although these guidelines are not an
 1517 interpretation binding on the model law, they can be consulted for guidance on stay orders.

1518
 1519 In some states small tract amendments to comprehensive plans are considered quasi-judicial,
 1520 rather than legislative, in nature. In these states, decisions on comprehensive plan amendments
 1521 can be combined with decisions on development permits. They may not be combined in states
 1522 that consider small tract amendments to be legislative.

1523

1524 **616 Definitive Relief**

1525

1526 If the court reverses a land-use decision that is based on a record or record appeal, and if the
 1527 land-use decision denied the petitioner a development permit, or approved a development permit
 1528 with conditions, the court may grant the petitioner such definitive relief as it considers
 1529 appropriate.

1530

1531 Comment: Definitive relief is essential, in appropriate cases, to allow a petitioner to proceed with
 1532 her development without going back to the local government for additional proceedings. Some
 1533 courts, if they reverse a land-use decision, will order the issuance of a development permit to the
 1534 petitioner rather than remand if issuance of the permit is justified on the record. A typical case is
 1535 the denial of a zoning variance. This paragraph codifies this authority, but the decision on
 1536 whether to issue a development permit is in the court's discretion. Note that the court must find
 1537 that definitive relief is "appropriate," and it is the intent that this determination should be based
 1538 on the court's decision reversing the denial or conditional approval. Presumably, a court would
 1539 not order definitive relief by compelling the issuance of a development permit unless it found, in
 1540 its decision, that the applicant had complied with all the requirements on which the issuance of a
 1541 development permit would be based, whether or not they were considered in the court hearing. It
 1542 is intended that the court would call for a hearing on definitive relief, in which it would consider
 1543 arguments on whether definitive relief is appropriate under the circumstances. For example, there
 1544 may be issues not considered in the court hearing which would require consideration after a
 1545 remand. See Section 616. This Section is based on 53 Pa. Stat. §11006-A(c)(e).

1546

1547 **617 Compensation and Damages Disclaimer**

1548

1549 A grant or denial of definitive or other relief under this Chapter is admissible in later litigation
 1550 seeking compensation or monetary damages. However, it a grant of definitive or other relief
 1551 does not, by itself, establish liability for compensation or monetary damages, nor does a denial of
 1552 definitive or other relief under this Chapter establish a presumption against liability for
 1553 compensation or other monetary damages.

1554

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1555 *The model statute and commentary are based on Chapter 10 of the American Planning
1556 Association, Growing Smart Legislative Guidebook: Model Statutes for Planning and
1557 Management of Change (S. Meck ed. 2002).

1558

1559

1560 **APPENDIX OF OPTIONAL SECTIONS**

1561
1562 This Appendix contains provisions that are made optional. Some are entire sections, and some
1563 are paragraphs from sections that are part of the model law.

1564
1565 **103 Exemptions for Corridor Maps**

1566
1567 This Chapter does not apply to applications and decisions on, development on land reserved in
1568 corridor maps.

1569
1570 **201 Development Permit; Unified Development Permit Review Process; Inclusion of Amendment of**
1571 **Zoning Map**

1572
1573 Optional additional language for paragraph (2):

1574
1575 For each such development permit, the list shall include:

1576
1577 (a) citation to the land development regulations, statute, rule, or other legal authority under which the
1578 development permit is required;

1579
1580 (b) the category of development to which it applies;

1581
1582 (c) the stage or sequence of the development process at which it must be obtained;

1583
1584 (d) the designation of the officer or body of the local government responsible for reviewing and granting
1585 the development permit and the subsequent certificate of compliance; whether a record hearing is
1586 required; [and] the approximate time necessary for review and grant of such development permit; [and]
1587 the time limit for granting, granting subject to conditions, or denying such development permit pursuant
1588 to Section [10-210]. The time limit shall:

1589
1590 1. commence from the time the local government makes a written determination that a development
1591 permit application is complete, or from the time a development application is deemed complete; and

1592
1593 2. be reasonably based on the approximate time determined under paragraph (2)(d) above.

1594
1595 **204 Administrative Review**

1596
1597 The following provisions in paragraph (6) are optional:

1598
1599 (a) The ordinance establishing the unified development permit review process may describe the
1600 type and sequence of inspections regarding a development authorized by a development permit
1601 in order that a determination of compliance may be issued at the completion of the development.

1602
1603 (b) An owner of land for which a development permit has been issued may apply upon
1604 completion of the development for a determination of compliance, and may introduce
1605 documentation and evidence, including the written reports of inspections performed according to
1606 paragraph (6)(a) above, and if the agency that issued the development permit finds that the

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1607 completed development was in accordance with the terms and conditions of the development
1608 permit as of a particular date, the determination of compliance shall be effective as of that date.
1609 The determination of compliance shall only address matters of physical construction, not
1610 conditions that concern ongoing operations, such as hours of operation, lighting and
1611 maintenance.

1612
1613 (c) The ordinance establishing the development review process may also provide for the periodic
1614 review of compliance with development permits.

1615
1616 (d) A local government may bring enforcement proceedings to remedy a violation of this
1617 paragraph, as authorized by law.

1618
207 Record Hearings

1619
1620 The following provisions in paragraph (11) are optional:

1621
1622
1623 (a) The ordinance establishing the unified development permit review process may describe the
1624 type and sequence of inspections regarding a development authorized by a development permit
1625 in order that a determination of compliance may be issued at the completion of the development.

1626
1627 (b) An owner of land for which a development permit has been issued may apply upon
1628 completion of the development for a determination of compliance, and may introduce
1629 documentation and evidence, including the written reports of inspections performed according to
1630 paragraph (6)(a) above, and if the agency that issued the development permit finds that the
1631 completed development was in accordance with the terms and conditions of the development
1632 permit as of a particular date, the determination of compliance shall be effective as of that date.
1633 The determination of compliance shall only address matters of physical construction, not
1634 conditions that concern ongoing operations, such as hours of operation, lighting and
1635 maintenance.

1636
1637 (c) The ordinance establishing the development review process may also provide for the periodic
1638 review of compliance with development permits.

1639
1640 (d) A local government may bring enforcement proceedings to remedy a violation of this
1641 paragraph, as authorized by law.

1642
208 Consolidated Permit Review Process

1643
1644
1645 (1) As part of the ordinance establishing the unified development permit review process, the
1646 legislative body of each local government [shall *or* may] establish a consolidated permit review
1647 process in which an applicant for a development permit may apply at one time for all
1648 development permits or zoning map amendments needed for a development.

1649
1650 (2) If an applicant for a development permit applies for a master permit, the local government
1651 shall determine what procedures apply to the review of the development, and shall designate a

1652 permit coordinator who shall coordinate the consolidated permit review process. A consolidated
 1653 permit review process may provide different procedures for different categories of development
 1654 permits. If a development requires permits from more than one category of development permit
 1655 as well as zoning map amendments, the local government [shall *or* may] provide for a
 1656 consolidated permit review process with [1] record hearing and no more than one record appeal.
 1657

1658 (3) The local government may authorize the permit coordinator to issue a master permit. The
 1659 permit coordinator shall issue a master permit if all required development permits have been
 1660 granted.

1661

1662 HEARING EXAMINERS

1663

1664 301 Hearing Examiner System

1665

1666 (1) The legislative body of each local government may adopt an ordinance, as part of its land
 1667 development regulations, which establishes a hearing examiner system. The ordinance shall
 1668 specify those matters on which a hearing examiner may hear and make decisions and
 1669 recommendations including, but not limited to, the following;

1670

1671 (a) development permit applications;

1672

1673 (b) proposals for the adoption or amendment of a local comprehensive plan or subplan, or the
 1674 text or map amendment of a land development regulation;

1675

1676 (c) the administration, interpretation, and enforcement of land development regulations;

1677

1678 (d) such other matters as the legislative body believes should be heard and decided by a hearing
 1679 examiner.

1680

1681 (2) The ordinance establishing a hearing examiner system may also authorize the hearing
 1682 examiner to exercise some or all of the powers and duties delegated to [*insert names of officials*
 1683 *and boards*]. Sections [10-301] to [10-307] apply to hearing examiners when they exercise the
 1684 powers and duties of the [*insert names of officials and boards*].

1685

1686 (3) The ordinance establishing a hearing examiner system shall specify the qualifications for
 1687 hearing examiners and the terms and conditions under which they shall serve. Hearing examiners
 1688 shall have such training and experience as will qualify them to conduct hearings and make
 1689 decisions and recommendations as authorized by this Chapter.

1690

1691 [(4) A local government may also contract with [*insert name of state official*] for the use of
 1692 administrative law judges appointed under [*cite to state administrative procedure act*] to hear
 1693 any matter a hearing examiner may hear.]

1694

1695 302 Hearing Examiner's Jurisdiction

1696

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1697 The ordinance establishing a hearing examiner system shall specify the procedures for initiating
1698 hearings before a hearing examiner, which may include, but shall not be limited to, procedures
1699 that authorize:

1700

1701 (1) an applicant for a development permit to file an application with a hearing examiner when a
1702 record hearing is required, after the local government has determined that the application is
1703 complete, or after it is deemed complete under this Chapter;

1704

1705 (2) a permit coordinator appointed under Section [10-208] to refer applications for development
1706 permits submitted in a consolidated review process to a hearing examiner;

1707

1708 (3) an appeal, within [30] days after a land-use decision is issued[, or within [30] days after the
1709 date a land-use decision is deemed approved under Section [10-210]]:

1710

1711 (a) if there has been a record hearing, by the applicant for the development permit, and by any
1712 party to the record hearing; and

1713

1714 (b) if there has been an administrative review:

1715

1716 1. by the applicant for the development permit; and

1717

1718 2. by any person, neighborhood planning council, neighborhood or community organization, or
1719 governmental unit, if it is aggrieved by the land-use decision.

1720

1721 (4) the legislative body, the local planning commission, the [Land-Use Review Board], and any
1722 other body or official to refer any matter delegated to them to a hearing examiner.

1723

1724 **303 Decision to Recuse**

1725

1726 The ordinance establishing a hearing examiner system shall authorize the hearing examiner to
1727 recuse himself or herself in any matter submitted, referred, or appealed to the examiner, and to
1728 refer the matter back so that the appointment of another hearing examiner can be considered.

1729

1730 **304 Decisions Based on Record Hearings**

1731

1732 (1) The hearing examiner shall hold a record hearing on an application for a development permit.
1733 If a record hearing has not been held on any other matter submitted, referred, or appealed to him
1734 or her, the hearing examiner shall hold a record hearing within [15] days of receiving an a
1735 referral from an officer or body of the local government, or an appeal.

1736

1737 (2) The hearing examiner shall:

1738

1739 (a) give notice of the record hearing as required by Section [10-205], through the methods
1740 specified in the local government's unified development permit review process ordinance;

1741 (b) conduct the record hearing as required by the local government's unified development permit
 1742 review process; and

1743
 1744 (c) make findings, make a decision or recommendations, and give notice of that decision or
 1745 recommendations as required by Section [10-207(9)];

1746
 1747 **305 Decisions Based on Record Appeals**

1748
 1749 If a record hearing has been held on any matter submitted, referred or appealed to the hearing
 1750 examiner, the examiner shall conduct a record appeal within [15] days of receiving an
 1751 application for a development permit, a referral from a board or official of the local government,
 1752 or an appeal. Section [10-209] shall govern record appeals held by the hearing examiner.

1753
 1754 **306 Effect of Hearing Examiner's Decisions**

1755
 1756 (1) A hearing examiner's decision on the adoption or amendment of a local comprehensive plan
 1757 or subplan, or the textual or map amendment of a land development regulation, shall only be
 1758 given the effect of a recommendation to the legislative body.

1759
 1760 (2) The ordinance establishing a hearing examiner system shall specify the legal effect of all
 1761 other decisions by a hearing examiner, and may provide that their legal effect may vary for the
 1762 different categories of development permits, referrals, and appeals heard by the hearing
 1763 examiner. The ordinance may include any or a combination of the following:

1764
 1765 (a) it may give the hearing examiner's decision the effect of a recommendation to the legislative
 1766 body, board or official having jurisdiction; or

1767
 1768 (b) it may give the hearing examiner's decision the effect of a final decision, and may specify
 1769 whether the decision is appealable to the legislative body or to a designated official or body, or
 1770 whether the decision is a final decision subject only to judicial review as provided by this
 1771 Chapter.

1772
 1773 **307 Review of Hearing Examiner Recommendations**

1774
 1775 (1) If the hearing examiner has held a record hearing on the recommendation, the legislative
 1776 body, board, or officer shall consider the recommendation as a record appeal and shall make a
 1777 decision on the recommendation as provided by Section [10-209].

1778
 1779 [(2) If the hearing examiner has not held a record hearing on the recommendation, the legislative
 1780 body, board, or officer shall hold a record hearing on the recommendation and shall make a
 1781 decision on the recommendation as provided by Section [10-207]

1782
 1783 [(3) The legislative body, board, or officer shall give [due regard *or* substantial weight] to the
 1784 recommendation of the hearing examiner.]

1785

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1786 **308 Filing and Publication of Hearing Examiner Decisions**

1787

1788 The ordinance establishing the hearing examiner system shall require the filing of hearing
1789 examiner decisions in a manner that makes them available to the public, and may require the
1790 publication of hearing examiner decisions in print or electronic media.

REPORT

Introduction

For the past two years, the Sections on State and Local Government Law and Administrative Law and Regulatory Practice have been working on reforms of local land use planning procedures. Approximately three-quarters of the states have adopted some form of the Standard Zoning Enabling Act of 1926 (SZE), which resulted from efforts by the United States Department of Commerce to provide states with model legislation to deal with zoning. While some states have revised their enabling legislation, there is no common base that local governments can use as a model to modernize their land use planning procedures. The SZE is outdated and provides only minimal procedures. For example, it does not expressly provide for a system of permits for development projects. In fact, the term “permit” does not even appear in the SZE. Section 8 of the SZE says simply that the local legislative body “may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder.”

The provisions of the model statute that are the subject of this recommendation grew out of efforts of the American Planning Association, which worked on a reform of planning and zoning enabling legislation in its *Growing Smart* project since 2002 and published a Legislative Guidebook containing model legislation for planning and land use regulation. Two Sections of the ABA worked on this model law. The Section of Administrative Law and Regulatory Practice has an extensive base of experience in state and federal administrative procedure acts, which can be brought to bear to make local land use procedures (as well as appeals from local land use decisions) fair and transparent. Members of the Section of State and Local Government have extensive experience in land use practice, and the Section is aware that many small local governments cannot afford expensive procedures and that many land use permits are relatively uncontroversial.

The work of the two Sections has largely focused upon how to provide fair and efficient procedures for land use decisions and appeals. The Sections formed a Task Force to undertake that process. The Task Force was chaired by Edward J. Sullivan, Portland, OR and its members included:

Professor Michael Asimow, Los Angeles, CA
David E. Cardwell, Orlando FL
Cynthia Drew, Washington DC
John Gedid, Harrisburg, PA
Jim Godlewski, Neenah, WI
Otto Hetzel, Bethesda, MD
Richard Lehmann, Madison, WI
Robert Lincoln, Sarasota, FL
Professor Daniel Mandelker, St. Louis, MO
Christine Monte, Fair Lawn, NJ
Ed Schoenbaum, Springfield, MO
Bryan Wenter, Walnut Creek, CA

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Hon. Alexander White, Chicago, IL

The Task Force was ably assisted by the work of Professor Daniel Mandelker, AICP, Stamper Professor of Law, Washington University School of Law. Professor Mandelker was a consultant on the *Growing Smart* project and has written and lectured on local land use procedures for more than fifty years.

Among the features of the proposed statute are:

- A comprehensive set of definitions. Sec. 101.
- Provisions for the conduct of administrative decisions, including time limitations on decisions, completeness determinations, notice, conflicts, findings and decisions, notice of decisions. Secs. 201-204.
- Provisions for the conduct of record hearings, including types of hearings, completeness determinations, notice, conflicts, findings and decisions and notice of decisions. Secs. 205-207.
- A local government option of holding a record hearing with respect to an application for development, or making a decision based only on written materials. If any person wishes to appeal a decision which was based on written materials, a record hearing must then be provided.
- Consolidation of multiple decisions at option of applicant. Sec. 208.
- Appeals of administrative decisions to a local Land Use Board, including procedures, notice, hearings, findings and decisions and notices of decisions. Sec. 209.
- Time limitations for decision making. Sec. 210.
- Creation of a Land Use Board, including composition, appointment, and powers. Sec. 401
- Authority for Administrative Actions, including types (e.g., variances, conditional use permits), mediation, conditions, and procedures). Secs. 501-507.
- Authority for Judicial Review, including exclusivity of review, procedures, standing and intervention, stays, and record. Secs. 601-618.

There are also optional sections (in the appendix) relating to corridor maps and the use of hearing officers or examiners.

The Model Statute provides a vast improvement in local land use procedures, incorporates the accumulated legal experience of the last eighty years, and provides a uniform, efficient, and fair method of treating land use applications. The Sections on State and Local Government and Administrative Law and Regulatory Practice recommend this model statute.

Respectfully submitted,
Michael Asimow, Chair, Section of Administrative Law and Regulatory Practice
Ben Griffith, Chair, Section of State and Local Government
August, 2008

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice
Section of State and Local Government

Submitted By: Kimberly Knight, Section Director

1. Summary of Recommendation(s).

Urges states, territories, and local legislative bodies to adopt the Model Statute on Land Use Procedures which addresses local land use procedures, incorporates the accumulated legal experience of the last eighty years and provides a uniform and fair method of treating land use applications.

2. Approval by Submitting Entity.

The Section of Administrative Law and Regulatory Practice approved the resolution and report on February 9, 2008. The Section of State and Local Government approved the submission in February 2008.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously? No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? None.

5. What urgency exists which requires action at this meeting of the House? The problem of inadequate procedures in local land use planning disputes has been obvious for many years. Existing models are highly outdated. A fair process of decision-making in local land use planning is essential for both developers and person who oppose development.

6. Status of Legislation. (If applicable.) Not applicable.

7. Cost to the Association. (Both direct and indirect costs.) None.

8. Disclosure of Interest. (If applicable.) Not applicable.

9. Referrals. (List entities to which the recommendation has been referred, the date of referral and the response of each entity if known.) The Section of State and Local Government has participated as an equal partner in the drafting of this resolution and report. The Section of Real Property, Probate and Trust Law was consulted in the drafting and formed a task force to review the recommendation. The task force had no comments.

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10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.) Michael Asimow, Professor Emeritus, UCLA School of Law, 405 N. Hilgard Ave, Los Angeles, CA 90095; Phone: 310-825-1086; Email: asimow@law.ucla.edu.

11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.) Judy Kaleta, ABA Admin Law Section, 740 15th Street NW, Washington, DC 20005; Phone: 202-493-0992; Email: judy.kaleta@dot.gov. Cell phone: 703-980-2328.

EXECUTIVE SUMMARY

1. Summary of the recommendation:

Urges states, territories, and local governments to adopt the Model Statute on Land Use Procedures which addresses local land use procedures, incorporates the accumulated legal experience of the last eighty years and provides a uniform and fair method of treating land use applications.

2. Summary of the issue which the recommendation addresses:

The problem of inadequate procedures in local land use planning disputes has been obvious for many years. Existing model statutes are highly outdated.

3. An explanation of how the proposed policy position will address the issue:

A fair process of decision-making in local land use planning is essential for both developers and persons who oppose development.

4. A summary of any minority views or opposition which have been identified:

No minority views have been identified.