CHAPTER 10

ADMINISTRATIVE AND JUDICIAL REVIEW OF LAND-USE DECISIONS

This Chapter presents model legislation for the review of development permit applications by local governments, and judicial review of land-use decisions on these permits. It is intended to be a complete law, but it also contains such a range of options and ideas that it is possible to pick and choose from the alternatives when drafting legislation. Part one contains definitions and other provisions to be used throughout the Chapter. Part two describes the components of a unified development permit review process. Parts three and four contain authorizing legislation for a hearing examiner who could assume a variety of land-use advisory and decision-making responsibilities and a Land-Use Review Board that would replace the board of adjustment or zoning appeals. Part five describes a variety of administrative actions and remedies that a local government could authorize, including variances, conditional uses, and an experimental proposal for mediated agreements to modify the land development restrictions that apply to a property. Part six describes a uniform procedure for judicial review of land-use decisions.

Chapter Outline

GENERAL PROVISIONS

UNIFIED DEVELOPMENT PERMIT REVIEW PROCESS FOR LAND-USE DECISIONS

HEARING EXAMINERS

LAND-USE REVIEW BOARD

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CHAPTER 10

ADMINISTRATION OF LAND DEVELOPMENT REGULATIONS[1]

A local comprehensive plan is adopted, and land development regulations (zoning, subdivision, site plan review, impact fees, etc.) implementing it are enacted. But the process of carrying out the goals and policies of the plan doesn't just stop there. The application of the regulations occurs through an administrative process that has (or should have) a beginning, a middle, and an end. The applicant must know what development permit approvals are required, what information is needed, how long the review process will take, what person or body will act on the permits, and what happens if he or she disagrees with the decision of the local government–what are the procedures for appeal and judicial review of the decision.

ADMINISTRATIVE REVIEW IN THE SZEA

The *Standard State Zoning Enabling Act* (SZEA) did not expressly provide for a system of permits for development. In fact, the term "permit" does not even appear in the model act. Section 8 of the SZEA said simply that the local legislative body "may provide by ordinance for the enforcement of this act and of any ordinance or regulation made thereunder." As noted in Chapter 8, Local Land Development Regulation, the entity that was charged with handling appeals from administrative officers of the local government (presumably in interpretation of the zoning regulations in issuing permits and making enforcement decisions) and specialized adjudicatory decisions was the board of adjustment (hereinafter referred to the board of zoning adjustment or appeals, or BZA), composed of five members. The BZA was given the following powers:

> 1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto.
>
> 2. To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
>
> 3. To authorize upon appeal in specific cases such variances from the terms of the ordinance as will not be contrary to the public interest, where, owing the special conditions, a literal enforcement of the provisions of the ordinance will result in

[1]The model statutes and supporting commentary in this Chapter were written by Daniel R. Mandelker, AICP, Stamper Professor of Law, Washington University School of Law, with additional drafting and material by John Bredin, Esq., Research Fellow for the Growing Smart[SM] project, and Stuart Meck, FAICP, Principal Investigator for the Growing Smart[SM] project. Mr. Meck wrote the introductory commentary to the Chapter on administration of land development regulations.

> unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.[2]

The SZEA required a concurring vote of four members of the board – not just a simple majority – in order "to reverse any order, requirement, decision, or determination of any such administrative official, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in the ordinance."[3] The board was to keep minutes of its proceedings that showed the vote of each member upon each question as well as abstentions and absences. The board was not obligated to provide a decision in writing that explained its thinking or rationale, but was required to "keep records of its examinations."[4]

THE CHANGING FACE OF DEVELOPMENT PERMIT REVIEW

It is fair to say that, since the SZEA was promulgated in the 1920s, the development review process has gotten a lot more complicated and unwieldy in many communities. The literature critiquing the modern land-use regulatory system, including reports of federal and state study commissions, is substantial. Some of that literature is summarized in Chapter 8; this Chapter includes an appendix that lists law journal articles on other aspects of administrative and judicial review.

There are two principal reasons for the increased complexity and corresponding delay.[5]

(1) **The use of discretionary approvals**. In the 1920s, even though the SZEA does not expressly mention it, the standard means of approving a development was a building permit or, sometimes, a building permit combined with a zoning permit. The local government's building official was usually the administrative officer who issued the permit. The building permit indicated that the building plans complied with the building code, which was typically a local ordinance, and the zoning permit or its equivalent (if such a permit were issued) confirmed that the proposed use of the property, and the building itself–if a new building or addition was to be constructed–complied with the zoning code.[6]

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[2]Advisory Commission on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (Washington, D.C.: U.S. GPO, 1926), §7.

[3]Id.

[4]Id.

[5]This discussion is adapted in part from John Vranicar, Welford Sanders, and David Mosena, *Streamlining Land Use Regulation: A Guidebook for Local Governments*, prepared for the Office of Policy Development and Research, U.S. Department of Housing and Urban Development by the American Planning Association (Washington, D.C.: U.S. GPO, November 1980), 4-5.

[6]See, e.g., the City of Cleveland, Ohio zoning ordinance, adopted in 1929, appearing in James Metzenbaum, *The Law of Zoning* (New York: Baker, Voorhis, 1930), 392-418. Section 1281-19 of the ordinance provided: "The construction, alteration or relocation of any building or any part thereof shall not be commenced or proceeded with

The land-use system contemplated by the SZEA was intended to be self-executing. Once enacted, the zoning scheme would need few amendments. One indication of this was that, in the SZEA, a temporary zoning commission formulated the proposed zoning regulations and map of districts (although the city planning commission, where it existed, could also serve as the zoning commission). The SZEA rejected the idea that all changes to the zoning ordinance "be reported upon by the zoning commission before action on them can be taken by the legislative body." According to commentary in the SZEA, that would mean making such a commission a permanent body, "which may not be desirable."[7] Moreover, the SZEA argued that it was *before* the zoning ordinance was in place that "careful study and investigation" was necessary.[8] "Amendments to the original ordinance," stated a note in the SZEA, "do not as a rule require such comprehensive study and may be passed upon by the legislative body, provided property notice and opportunity for the public to express its views have been given."[9] The implication, of course, was that the zoning pattern was to be relatively static and, when it was modified, the change would be of much lesser significance.

Early zoning codes, based on the ordinance in *Euclid v. Ambler Realty*,[10] the 1926 Supreme Court decision that established the constitutionality of zoning, contained a few zones–residential, commercial, and industrial. Such ordinances typically listed a large number of permitted and prohibited uses. According to one analysis, "[a] few uses such as funeral parlors or airports were so unique they were not permitted in any zone but were allowed under an *ad hoc* determination as a special exception."[11]

This began to change in the 1960s and 1970s. As-of-right development permitting was supplanted by discretionary approaches, including – to name a few – conditional uses (also known as special exceptions), overlay zones, planned unit development, and cluster development, a variant

except after the issuance of a written permit for same by the Commissioner of Buildings in accordance with this and other city regulations." Section 1281-20 required a "certificate of compliance to change the use classification or enlarge the use in any building or premises." Id., at 408-418. See also Edward M. Bassett, *Zoning: The Laws, Administration, and Court Decisions During the First 20 Years* (New York: Russell Sage Foundation, 1940), 109-110 (describing building permits and occupancy permits, which are issued before buildings can be used).

[7]SZEA, n. 43.

[8]Id.

[9]Id.

[10]*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Village of Euclid ordinance appears in James Metzenbaum, *The Law of Zoning* (New York: Baker, Voorhis, 1930), 335-352. Cleveland Attorney James Metzenbaum represented the Village in the litigation.

[11]Donald G. Hagman, *Urban Planning and Land Development Control Law* (St. Paul: West 1971), 71.

of planned unit development where residential units are grouped together on a site.[12] The intention was to allow staging of development and to encourage innovative site design, the retention of open space, the protection of environmentally sensitive areas, and, through clustering, a reduction in infrastructure costs. These new techniques recognized that development had changed from a lot-by-lot approach to one at a much larger scale. Major, multiphase subdivisions, regional shopping centers, industrial parks, planned communities, and mixed use development became the rule rather than the exception in the suburbs.

Accompanying this was the practice of zoning vacant areas into "holding zones," large-lot districts of one to five acres. This "wait-and-see" technique, as it has been termed, called for the developer to apply for a zone change for more intensive use as well as seek additional discretionary permits that governed the actual design of development. The process for obtaining the zone change and the discretionary permits is often a sequential, rather than a concurrent, one, and considerable negotiation and uncertainty (especially with neighboring property owners) occur at each step of the process.

(2) **The use of layered approvals.** Closely related to the use of discretionary permitting is the layering of the approval process itself. For example, a proposed development may be subject to a state environmental quality act (see Chapter 12, Integrating State Environmental Quality Acts into Local Planning) that calls for the preparation of an environmental impact report upon which there can be considerable comment. The development may also be subject to specialized regulations that apply to wetlands and require separate authorizations from state and federal agencies. Within the local government itself the development proposal may need to be reviewed not only by the local planning commission and legislative body, but also by a specialized review board like an environmental commission (if special environmental resources are involved) and a design review/historic preservation commission (if, for example, the project is in a historic district, if the local government has adopted special design guidelines, or if a historic site or structure is involved).[13] These specialized local reviews were certainly not something that the SZEA anticipated or provided for. Each of these layers involves an additional level of discretion, sometimes with a public hearing, and telescopes the approval process.

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[12]For a discussion of these techniques, and others, from the vantage point of the 1970s, see Michael J. Meshenberg, *The Administration of Flexible Zoning Techniques*, Planning Advisory Service Report No. 318 (Chicago: American Society of Planning Officials (now the American Planning Association), June 1976).

[13]The emergence of specialized review boards in the development process has resulted, some have contended, in the narrowing of the traditional purview of the local planning commission, as its function is appropriated by other body for a select area of development policy. As a result, the planning commission's review may be less comprehensive and less central than it was originally envisioned when the commission was first instituted. Moreover, in built-up communities, with little vacant land, bodies such as a board of zoning appeals or a historic preservation commission may, as a practical matter, have a greater say in what gets built because each project will require a variance or involve a structure that is historic. See John Vranicar, et al., *Streamlining Land Use Regulation*, 29.

THE INTERNAL ADMINISTRATIVE PROCESS

Even for routine permits, the process within the local government's administrative structure may be labyrinthine. The development proposal will need to be examined by the local government's planning department, the engineering department, various utility departments, the building department, and, in some cases, even the police department (for comments on security-conscious site design). How efficiently this review occurs will depend on formal organizational structure for development review (i.e., "one stop shopping" vs. being bounced back and forth between various local government offices), the skills of the reviewing staff and their willingness to complete reviews in a timely manner, the information provided to the applicant (e.g., clear application forms, checklists, and flow charts), and the deadlines for decisions, among other factors. Some of these factors may be influenced by statutes (such as number of hearings) or ordinances (such as application requirements and approval criteria), but other factors, such as the willingness of the local government review staff to coordinate with one another and provide clear advice and counsel to permit applicants at each step of the process or the recognition of problems with procedures in local development regulations, are more difficult to influence, except by the political leadership and administrators of the local government. Indeed, there may be citizen pressure to keep the local review process as difficult as possible as a device to stop or slow down growth, or – taking a Darwinian slant – to insure that the only development that occurs is accomplished by the most hardy, with the deepest pockets.[14]

THE BOARD OF ADJUSTMENT

Originally designed as the "safety valve" of land-use administration, the board of adjustment or board of zoning appeals (BZA) has been the subject of much criticism. These criticisms have focused on the board's expertise, the manner in which it makes decisions, and its propensity for granting use variances, which allow uses in a particular district that are not permitted by the zoning ordinance itself–in effect amending the zoning ordinance.[15]

The model for the board that appears in the SZEA was based on New York City's board of appeals, which included five members with very strong technical qualifications: a chairman who was to be an architect or structural engineer; an architect member; a structural engineer member; a builder member; a fire chief member, plus two unspecified members. The chair was required to

[14]John Vranicar et al., *Streamlining Land Use Regulation*, 5, 16-17.

[15]Robert M. Anderson, "The Board of Zoning Appeals – Villain or Victim?" *Syracuse Law Review* 13 (Spring, 1962): 353; Frederick H. Bair, Jr. "Boards of Adjustment and How They Got That Way," in *Planning Cities: Selected Writings on Principles and Practice*," Virginia Curtis, ed. (Chicago: American Society of Planning Officials, 1970), 486-49; Jesse Dukeminier and Clyde L Stapleton, "The Zoning Board of Adjustment: A Case Study in Misrule," *Kentucky Law Journal* 50 (1962): 273; R.M Shapiro, "The Zoning Variance Power – Constructive in Theory, Destructive in Practice," *Maryland Law Review* 29 (1969): 3.

have not less than 15 years of experience, and the other technical members not less than 10 years. For the chair, the position was full-time, and could hold no other employment.[16]

Under the SZEA, there were no membership requirements to serve on the board. Perhaps the drafters of the SZEA believed that local governments, of their own accord, would incorporate membership requirements into their local ordinances, and therefore legislative direction wasn't necessary. Some, in fact, did, and typical membership requirements may include an architect, an attorney, a general contractor, a licensed engineer, a licensed real estate broker, and/or a planner.[17] However, especially in small communities, it often proved difficult to get volunteers with the necessary expertise and, if they had expertise, to ensure that it was not tainted with conflict of interest. As a consequence, according to one trenchant commentary, "most cities simply eliminated qualifications and made the whole thing ultrademocratic. Anybody could join. This resulted in selection of board members without technical backgrounds to an 'expert administrative body.'"[18]

The prevalence of lay boards, often without training, has often meant that the decision-making process at the local level is flawed with variances and other determinations frequently made on political grounds rather than by a careful analysis of facts against a set of stated criteria.[19] The BZA was established as a creature to *grant* variances, not to *withhold* them, and indeed, in many communities, that is exactly what they do. In some communities, the approval rate is as high as 95 percent of petitions.[20] Caseload varies, but it is heavy in most places. In a survey of 50 communities in 1996, the American Planning Association found:

> Overall, the [annual] average was 153, but the range was broad, running from 12 in Springfield, Missouri, to 600 in both Milwaukee and Pittsburgh. Dividing that survey group yields a clearer picture. The 29 jurisdictions that fall in the 100,000 to 199,000 population range average 92 cases per year. The 21 jurisdictions at or above 200,000 average 237 cases per year. Twenty-nine of the communities had more than

[16]Frederick H. Bair, Jr., *The Zoning Board Manual* (Chicago: APA Planners Press, 1984), ch. 1 (discussion of the historic development of the board of zoning appeals and the impact of New York City on the SZEA).

[17]See Michael Barrett, "The ABCs of ZBAs: The Sequel," *Zoning News* (Chicago: American Planning Association, March 1996): 1-5 (describing membership requirements of ZBAs from a survey of 50 communities).

[18]Frederick H. Bair, Jr. "Boards of Adjustment and How They Got That Way," in *Planning Cities: Selected Writings on Principles and Practice*," Virginia Curtis, ed (Chicago: American Society of Planning Officials, 1970), 486-491, 488-489.

[19]See, e.g., Stuart Meck, "Rhode Island Gets It Right," *Planning* 63, No. 11 (November 1997): 10-15, 10-11 (describing how zoning board variance decisions were frequently set aside by Rhode Island state courts "because there was no record and little or no rationale," which led to a reform of the state's planning and zoning statutes in the late 1980s).

[20]Michael Barrett, at 2. In Smithtown, N.Y., the board hears 300 cases a year and the approval rate is 95 percent.

> 100 cases per year; 13 had more than 200. Despite the broad range, it is clear that most ZBAs are very busy.[21]

One law journal article, which documented the problems of the board of zoning appeals in Lexington, Kentucky, appraised the problem as follows:

> . . . [T]he variance procedure really falls short of giving intelligent flexibility within a framework designed to accord equal protection of the law. Planning considerations do not receive careful consideration there. The board does not have the expertise to know what is trivial and can be disposed of quickly and what is substantial and requires close examination. For lack of time it cannot sit down with the applicant and, by patience, suggestions, and persuasion, bring him around to making changes which will make the use compatible with the area. Furthermore, because of the "strict and severe limitations" courts have imposed on the board's powers, the board is not always prepared to be honest and articulate about its reasons for reaching a particular result. It cannot promulgate the kind of standards we need for administrative decisions, for queerly enough, they would be illegal. An ideal breeding ground for adventitious factors results.[22]

SOME SOLUTIONS

Commentary to Chapter 8, Local Land Development Regulation, describes the principle model statutes and studies on land-use controls, some of which bear on administration. These statutes and reports included: establishing a central permit authority and joint review committees whenever several local government boards or departments are involved in project approval; employing a hearing officer to conduct quasi-judicial hearings on development proposals (see below); and imposing substantive limitations on the powers of boards of appeal to grant variances.[23]

HEARING EXAMINERS

[21]Id., at 5.

[22]Jesse Dukeminier, Jr. and Clyde L. Stapleton, "Boards of Adjustment: The Problem Re-examined," *Zoning Digest* 14, No. 12 (December 1962): 361-371, at 370-371 .

[23]See generally Annette Kolis, ed., *Thirteen Perspectives on Regulatory Simplification*, Urban Land Institute (ULI) Research Report No. 29, (Washington, D.C. ULI, 1979).

One oft-recommended solution that has enjoyed increasing use is the hearing examiner.[24] The hearing examiner is an appointed official, typically with training in planning and law, who conducts quasi-judicial hearings on applications for development permits, conditional use permits, variances, planned unit developments, parcel-specific zone changes–and enters written findings based on the record established at the hearing, and either decides on the application, or a makes a recommendation to a local legislative or administrative body for a decision. A number of states expressly authorize the establishment of the zoning hearing examiner position.[25] The use of hearing examiners was a major recommendation of a special American Bar Association Advisory Commission on Housing and Urban Growth in a 1978 report (see commentary to Chapter 8).

The hearing examiner is often used where there is a heavy caseload or where elected officials felt the BZA needed to be replaced with a single professional decision-maker who is accountable for the final decision (rather than having the decision-making responsibility diffused among a number of lay officials). The hearing examiner thus frees the time of planning commission members and elected officials. The hearing examiner may also be able to hold hearings more frequently than lay boards and commissions (since the problem of obtaining a quorum is eliminated) and thus can reduce delay for both large and small applicants.

Duties and powers of a hearing examiner can vary. In some communities, the hearing examiner is limited to variances and conditional uses, and makes the final decision. In others, the hearing examiner may conduct hearings on subdivisions, if they are required, and rezonings, and makes a recommendation. There is still staff input to the hearing examiner, the same that is required for lay review bodies. The local government also typically adopts rules of procedure that govern the conduct of the hearing and the manner in which the hearing examiner renders a decision or recommendation.

THE ALI CODE PROPOSALS

The American Law Institute's *Model Land Development Code* contained several proposals aimed at improving the administration of local land development review process. The ALI Code rejected a specific structure – a "rigid mold," in its terms – for local planning and land development control. Consequently, it did not include express authorizing legislation for a local planning commission and board of zoning appeals as direct participants in the development review process. Rather, as noted in commentary in Chapter 8, it required the designation of a Land Development Agency that would oversee all planning and development control, including permitting, with the internal organization to be determined by the local government itself or by the Agency. Under the

[24]This discussion is adapted from John Vrainicar et al., *Streamlining Land Use Regulation*, 34-38, and Daniel Lauber, *The Hearing Examiner in Zoning Administration*, Planning Advisory Service Report No. 312 (Chicago: American Society of Planning Officials (now the American Planning Association), 1975).

[25]See, e.g., Alaska Stat. §29.40.050 (1998); Idaho Code §67-6520 (1998); Md. Ann. Code Art. 66B, §§2.06 and 4.06 (1998); Nev. Rev. Stat. §278.262 (1998); Or. Rev. Stat §§215.406 and 227.165 (1999); Wash. Rev. Code §35A.63.170 (1998).

Code, the Land Development Agency could be the local governing body or any committee, commission, board or officer of the local government. The Code also allowed the power to make decisions dealing with particular matters to be given to officers, panels, boards or committees, that were either within *or without* the Agency, but the final responsibility for the decision, regardless of who made it, was that of the Agency.[26]

The Code recast the variance power under new terminology, although, as noted, it did not provide for a BZA to grant them. For example, the Land Development Agency could grant a special development permit allowing modifications in regulations applicable to a permitted or existing use, but, in the Code's language, "would differ in regard to some other characteristic from general development [development permitted as of right], if compliance with the general development provisions would cause practical difficulties [as defined in the Code]" and if the modification was no more than necessary and if it would not "significantly interfere with the enjoyment of other land in the vicinity."[27] This was the Code's version of a bulk or area variance, where the "practical difficulties" arose from some physical characteristic of the property.

Another Code provision was a special development permit to allow economic use. This was the Code's language for the much-

Table 10-1
Why Development Permitting Processes Should Be Reformed

- To assure fairness and due process to protect the rights of all participants.
- To make citizen participation more constructive, responsive and timely.
- To make the regulatory system accountable and reduce opportunities for backroom agreements or corruption.
- To establish better working relationships between permit applicants and reviewers.
- To enable public officials to use their time more efficiently.
- To contain rising administrative costs.
- To control one of the factors that increase the cost of new housing.
- To encourage the kind of development the community wants by giving the community a competitive edge.

Source: John Vranicar, Welford Sanders, and David Mosena, *Streamlining Land-Use Regulation: A Guidebook for Local Governments*, prepared by the American Planning Association for the U.S. Department of Housing and Urban Development Office of Policy Development and Research (Washington, D.C.: U.S.GPO, November 1980), 3.

[26]American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia,: ALI, 1976), §2-301, Organization of Land Development Agency, 71 (hereinafter cited as "ALI Code"). Giving the authority to make certain development decisions to entities outside the Land Development Agency, as the ALI Code permitted, and then holding the Agency accountable for those decisions seem like an odd way of ensuring accountability.

[27]ALI Code, §2-202 , Modification of Regulations Applicable to a Permitted or Existing Use.

criticized use variance. Here the permit would be granted if the Land Development Agency, found, among other factors, that "the development will take place on a parcel of land that is not, either alone or in conjunction with any adjacent land in common ownership, reasonably capable of economic use under the general [as of right] development regulations."[28] Unfortunately, the Code did not articulate a test of how a local government was to determine when land was not "reasonably capable of economic use." Nor did it impose any substantive limitation on this power to prevent abuses, unless an aggrieved party wanted to litigate the question of whether the special development permit had indeed been properly granted.

The Code addressed the question of streamlining through two devices: (1) a statewide permit register; and (2) joint hearings for development requiring multiple permits. The Code required the State Land Planning Agency to publish and make available a listing of all the permits required in connection with development by any governmental agency (including the federal government, state agencies, local governments, and special districts). These permits could include "construction permits" (which involve the review of detailed drawings) like building permits and state elevator permits, permits that had no substantial relationship to the planning and land development control process (such as a license for a beauty or barber shop), and all other permits, including such as those involving preliminary or tentative approval of applications for construction permits, which were termed "initial development permits."[29]

The joint hearing procedure enabled a developer whose project involved more than one permit to seek such a joint hearing on all of the permits at the same time. The procedure did not change any of the substantive standards under which the permits are to be issued, but merely authorized a coordinated procedure to simplify and speed up the administrative process. The decision to conduct the joint hearing is that of the State Land Planning Agency, but the hearing itself is held within the jurisdiction of the local government where the development was located.

The Code authorized a panel of hearing officers to prepare a recommended decision on the basis of the joint hearing. The recommendation would not change any substantive standards for the issuance of permits but merely set time limits within which decision must be made and provides a consolidated procedure for judicial review. If any permit-issuing agency failed to issue a decision within the time required by the Code, then it would be deemed to have adopted the recommended decision of the hearing examiner panel.[30]

CONSOLIDATED PERMITS; JOINT HEARINGS

A number of states now authorize consolidated permitting or joint hearings. For example, Oregon allows local governments to established a "consolidated procedure by which an applicant

[28]ALI Code, §2-204, Special Development Permit to Allow Economic Use.

[29]ALI Code, §2-401, Permit Register. The permit register concept has been incorporated, in part, in Section 10-201(2), Unified Development Permit Review Process, in the *Legislative Guidebook*.

[30]ALI Code, §§2-402, Joint Hearing, and 2-403, Agency Decision.

may apply at one time for all permits or zone changes needed for a development project."[31] Washington state allows a local government to combine any hearing on a project permit with any hearing that may be held by another local, state, regional, federal, or other agency provided that the hearing is held within the geographic boundary of the local government; hearings must be combined if requested by an applicant so long as statutory time periods are satisfied or the applicant agrees to a schedule that would provide additional time to allow for the combination of hearings.[32] Maryland has a statutory provision that allows "joint and consolidated hearings on permits" for projects that involve development permits by state agencies and local governments.[33]

Table 10-2
Factors Affecting Development Permitting Delays

- Overly complex land development regulations.
- Duplicative information requirements.
- Resistance to, or prolonged scrutiny for, innovative land use controls such as planned unit development or cluster development.
- Conflicts between building, zoning, health, and subdivision regulations.
- Hidden agendas aimed at keeping out particular types of development, such as affordable housing.
- Multiple and sequential hearings before different hearing bodies.
- Turf problems between permit-issuing agencies.

Source: National Institute of Building Sciences, *Land-Use Regulations Handbook* (Washington, D.C.: The Institute, 1990), 15-16.

SOLUTIONS NOT REQUIRING ENABLING LEGISLATION

Some of the solutions aimed at improving the efficiency of the development review process, making it more predictable, fair, and efficient, have not necessarily been the creatures of enabling legislation, but instead have been homegrown–the result of local administrative initiatives.[34] These include practices such as:

[31]Or. Rev. Stat.§§215.416(2) and 227.175(2) (1999).

[32]Rev. Code Wash. §36.70B.110(7) (1998).

[33]Md. Code Ann., State Government, Tit. 11, §11-501 et seq. (Consolidated Procedures for Development Permits).

[34]For discussions of voluntary local streamlining initiatives, see John Vranicar, et al., *Streamlining Land Use Regulation*; NAHB National Research Center, *Affordable Residential Land Development: A Guide for Local Government and Developers*, prepared for the U.S. Department of Housing and Urban Development, Office of Policy Development and Research (OPDR) (Washington, D.C.: OPDR, November 1987); National Institute of Building Sciences, *Land-Use Regulations Handbook* (Washington, D.C.: The Institute, 1990), 16-19.

- on-going training of planning commissions, BZAs, and other local boards that conduct hearings on and approve development permits;
- a central permit information desk that allows information about permits and permits themselves to be obtained from a single central location;
- cross-training of staff to reduce specialization, increase coordination, and enhance flexibility, especially in times of high case loads;
- interdepartmental review committees with a designated coordinator who would coordinate reviews by multiple agencies and resolve problems;
- computerized tracking systems to tell an applicant the status of an application and more readily identify scheduling problems; and
- joint inspections that are conducted by several departments simultaneously; and pre-application conferences with applicants to address issues before expensive technical and engineering work is undertaken.[35]

A CAVEAT

It should be emphasized that there are limits to what state enabling legislation can accomplish in the development review area, since the process is so susceptible to: (a) the political and administrative direction that the local review agencies receive; (b) their organizational culture (in particular whether the local review agency sees value in efficiency, prompt decisions, certainty, and predictability); and (c) the capabilities and competence of the staff and boards conducting permit reviews. Moreover, if a local (or state) reviewing agency wishes to drag its feet to demonstrate its importance or independence or if the local political culture rewards delay, or when sweet reason otherwise fails, there is little else one can do short of litigation.

GENERAL PROVISIONS

10-101 Definitions

As used in this Chapter:

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

"Aggrieved"means that a land-use decision has caused, or is expected to cause, [special] harm or injury to a person, neighborhood planning council, neighborhood or community organization, or governmental unit,

[35]See Debra Bassert, "Streamlining the Development Approval Process," in *Modernizing State Planning Statutes: The Growing Smart℠ Working Papers, Vol. 3*, Planning Advisory Service Report No. ___ (Chicago: American Planning Association, forthcoming).

[distinct from any harm or injury caused to the public generally]; and that the asserted interests of the person, council, organization, or unit are among those the local government is required to consider when it makes the land-use decision.

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

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

"Certificate of Appropriateness" means the written decision by a local historic preservation or design review board that a proposed development is in compliance with a historic preservation or design review ordinance.

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

"Conditional Use" means a use or category of uses authorized, but not permitted as of right, by a local government's land development regulations in designated zoning districts pursuant to Section [10-502].

"Development Permit" means any written approval or decision by a local government under its land development regulations that gives authorization to undertake some category of development, including, but not limited to, a building permit, zoning permit, final subdivision plat, minor subdivision, resubdivision, conditional use, variance, appeal decision, planned unit development, site plan, [and] certificate of appropriateness[.] [, and zoning map amendment(s) by the legislative body]. "Development permit" does not mean the adoption or amendment of a local comprehensive plan or any subplan, the adoption or amendment of the text of land development regulations, or a liquor license or other type of business license.

♦ This paragraph defines the land-use approvals that are to be considered a development permit. Note that a development permit is any "written approval or decision" that authorizes development. This term includes written approvals or decisions that are made following

administrative reviews, record hearings, and record appeals. A "master permit" is defined later in this Section as a development permit.

The procedures for hearings on the record apply only to development permits. The adoption and amendment of comprehensive plans is usually considered a legislative act. This definition means that plan adoption and amendment are not covered by the administrative review provisions of this Chapter. States in which a zoning map amendment is a quasi-judicial decision may want to include optional bracketed language that makes such amendments a development permit. See Section 10-201(5).

"Enforcement Action" means an action pursuant to Chapter 11 of this Act.

"Hearing" means a hearing held pursuant to this Chapter.

"Issued" or "Issuance" means: (a) [3] days after a written decision on a development permit is mailed by the local government or, if not mailed, the date on which the local government provides notice that the written decision is publicly available; or (b) if the land-use decision is made by ordinance or resolution of the legislative body, the date the legislative body adopts the ordinance or resolution.

"Land Use" means the conduct of any activity on land, including, but not limited to, the continuation of any activity, the commencement of which is defined herein as "development."

"Land-Use Decision" means a decision made by a local government officer or body, including the legislative body, on a development permit application, an application for a conditional use, variance, or mediation, or a formal complaint pursuant to Chapter 11, and includes decisions made following a record hearing or record appeal. It also means an enforcement order and/or supplemental enforcement order pursuant to Chapter 11, but only for purposes of judicial review pursuant to Section [10-601] *et seq.*. A "completeness decision," "development permit," and "master permit" are "land-use decisions" for purposes of this Chapter.

♦ The definition of a "land-use decision" differs from the definition of a "land-use action" in Chapter 12. It is based in part on the Washington State Project Review Act, Wash. Rev. Code §§36.70B.010 et seq.

"Master Permit" means the development permit issued by a local government under its land development regulations and any other applicable ordinances, rules, and statutes that incorporates all development permits together as a single permit and that allows development to commence.

♦ The master permit is the unification of all development permits necessary for a land development. For example, in order to build a single-family home in a subdivision that has been platted, it may only be necessary to obtain a building permit (approving the plans for the residence itself) and a zoning permit (indicating that the use is allowed and the structure meets all applicable zoning requirements). Once the requirements for the two permits are met, and the

two permits are granted, the master permit would automatically be issued, allowing development to commence. The master permit is authorized under Section 10-208, Consolidated Permit Review Process.

"Owner" means any legal or beneficial owner or owners of land, including the holder of an option or a contract to purchase, whether or not such option or contract is subject to any condition.

"Record" means the written decision on a development permit application, and any documents identified in the written decision as having been considered as the basis for the decision.

"Record Appeal" means an appeal to a local government officer or body from a record hearing on a development permit application.

"Record Hearing" means a hearing, conducted by a hearing officer or body authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures required by this Chapter. "Record hearing" also means a record hearing held in an appeal, when no record hearing was held on the development permit application.

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

- (For definitions of "local comprehensive plan," "development," "land development regulation," and "local government" see Chapter 3).

10-102 Purposes

The purposes of this Chapter are to:

(1) provide for the timely consideration of development permit applications.

(2) provide a unified development permit review process for land-use decisions by local governments;

(3) authorize a consolidated development permit review process for land-use decisions by local governments;

(4) provide for the appointment of hearing examiners;

(5) provide for a Land-Use Review Board;

(6) authorize conditional uses, variances, and mediation in land development regulations; and

(7) provide a judicial review process for land-use decisions.

♦ This Section states the purposes of this Chapter. The judicial review process is limited to "land-use decisions," which include any decisions made on an application for a development permit. It does not include "land-use actions," as defined in Section 12-101(3), which are not so limited. A land-use decision can include a decision on a zoning map amendment if it is defined as a "development" that requires a development permit.

10-103 Exemptions for Corridor Maps

This Chapter does not apply to applications under Section [7-501] for, and decisions on, development on land reserved in corridor maps.

♦ Section 7-501 provides its own procedures for the consideration of development on land reserved in corridor maps. These procedures take into account the possible takings implications of corridor map reservations, and special needs to coordinate the administration of corridor maps with other state and local agencies that may have an interest. If a state adopts Alternative 3 proposed in Chapter 12, it will have to adopt additional procedures for the joint consideration of environmental reviews with development permit applications that supplement the procedures in this Chapter. Procedures that accomplish this objective are in Wash. Rev. Code Chapter 36.70B.

UNIFIED DEVELOPMENT PERMIT REVIEW PROCESS FOR LAND-USE DECISIONS

The following Sections provide a unified development permit review process for all decisions on development permits that, at some point, are subject to an administrative review or record hearing. These Sections also provide procedures for appeals on development permits. The unified development permit review process applies to all land-use decisions, whether by the legislative body, the planning commission, a hearing officer, or land-use review board authorized by this Chapter. The Chapter adopts the Washington reform that allows only one hearing that produces a record and one appeal from a record hearing on a development permit. Limiting the number of hearings in this way should minimize the confusion and expense that often accompany the present system. However, as the brackets indicate, it is optional when adopting this Section to provide for more than one of each type of hearing.

In addition, a local government has the option of establishing a development permit review process in which it does not require a record hearing. This option is available because Section 10-204 authorizes administrative reviews on development applications without the benefit of a hearing.

However, the law of a particular state may require a record hearing on some types of land-use decisions, such as variances and other land-use decisions held to be quasi-judicial.

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

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

The local government may choose any structure it prefers. It can, for example, assign rezonings to the legislative body, conditional uses and other initial approvals to the planning commission, and appeals and variances to the Land-Use Review Board, which may also be named as the Board of Zoning Adjustment or Appeals. This is the traditional structure. The local government can then decide what kinds of hearings should be held at each decision level. For example, the Land-Use Review Board can be authorized to hear record appeals on development permits reviewed by other bodies, and record hearings on variances it has the authority to issue.

An ordinance may defer a record hearing to the appeal stage. For example, the ordinance could allow the planning commission to make its decision without a record hearing, but then provide for a record hearing by the land-use review board.

Table 10-3
Suggested Time Limits for Decisions on Development Permits & Appeals

Section No.	*Action*	*No. of Days*
10-203(1)	Time from submitting a development permit application when completeness determination is issued or an application is deemed complete.	28
10-203(2)	Time from completeness determination that applicant must submit additional information requested by local government for an incomplete application.	28
10-203(3)	Time from submitting additional information that local government requires for an incomplete application for completeness determination to be issued or when development application is deemed complete	28
10-205(1)	Time for providing notice of the date of a record hearing (when a record hearing is required) after completeness determination or after permit application is deemed complete	15
10-205(1)	Time that notice of record hearing must be mailed in advance of hearing	20
10-205(1)	Maximum period within which to hold record hearing after notice has been mailed	30
10-207(2),(3)	Time that staff reports and any materials related to consideration of the development permit must be available to the public for inspection prior to the record hearing	7
10-210(1)	Maximum period in which a local government can approve or disapprove any development permit application after completeness determination or from the time the application is deemed complete, including record hearings and administrative reviews (Option 1)	90, 120, or 180
10-210(2)	Maximum period that a local government and an applicant for a development permit may extend the time limits for a decision on the permit	90
10-209(1)	Maximum period in which an appeal may be taken to an appeals board after a land-use decision is issued or after the land-use decision is deemed approved under Section 10-210	30
10-209(4)	Maximum period between the time the appeal is filed and the time the appeals board holds the hearing on the appeal	20
10-209(4)	Minimum period required for notice of the appeal in advance of the hearing	10
10-209(7)	Maximum period from commencement of appeal hearing that notice of decision must be mailed	30

Note: Some of the time periods above run simultaneously with other time periods, and therefore a mere addition of the time limits in this Table would not indicate the maximum time period for the processing of a development permit application and a Section 10-209 appeal.

10-201 Development Permit; Unified Development Permit Review Process; Inclusion of Amendment of Zoning Map

(1) The legislative body of each local government shall adopt, as part of its land development regulations, an ordinance that establishes a unified development permit review process for applications for development permits.

(2) The ordinance establishing a unified development permit review process shall contain a list of all development permits required by the local government. For each such development permit, the list shall include:

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

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

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

(d) the designation of the officer or body of the local government responsible for reviewing and granting the development permit and the subsequent certificate of compliance;

(e) whether a record hearing is required; [and]

(f) the approximate time necessary for review and grant of such development permit; [and]

[(g) the time limit for granting, granting subject to conditions, or denying such development permit pursuant to Section [10-210], said time limit:

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

2. being reasonably based on the approximate time determined under paragraph (2)(f) above.]

♦ This optional provision is included if the local time limit option in Section 10-210 is chosen. If the state-determined time limit is chosen in Section 10-210 instead, paragraph (g) is not needed.

(3) The ordinance establishing a unified development permit review process may provide for no more than [1] record hearing for each development permit and [1] record appeal. The ordinance may also authorize the administrative review of development permit applications without a hearing, as provided by Section [10-204], and [1] appeal for each development permit, in the form of a record hearing. The ordinance may assign the responsibility for

record hearings, record appeals and administrative reviews to the legislative body, the local planning commission, or such other officers or bodies as the legislative body shall determine.

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

- Different types or scales of development may require different durations. Generally, the permits for more complex development should have longer durations.

(a) The ordinance shall provide for the extension of such time limits whenever a change in circumstances precludes or precluded the landowner from completing the development according to the terms and conditions of the permit within the time limit established by the permit despite the landowner's reasonable efforts to complete the development within that time limit.

(b) The ordinance may provide for the extension of such time limits under other circumstances as the local government sees fit.

(c) An extension of time limits:

1. shall provide adequate time to complete the development authorized by the original development permit, based upon a good faith effort towards completion; and.

2. does not by itself preclude or prohibit further extensions as necessary.

(d) An application for extension of time limits is a development permit application.

- The effect of the last provision is to require the local government to describe the procedure for granting such permit extensions in the ordinance, as provided in paragraphs (2) and (3) above. It also makes the decision on a permit extension application appealable under Section 10-209 and reviewable under Section 10-601 *et seq.* judicial review.

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

- States may adopt paragraph (5) where the courts have characterized the amendment of a zoning map as a quasi judicial act, when it affects specific individuals and when it involves the

application of existing policy to a specific fact setting.[36] Even though the map amendment must be approved by the legislative body, as opposed to a board, agency, or officer, it is still intended to allow a specific development to occur. In that context, a zoning map amendment is simply another permission, albeit one made by elected officials, in the development review process. The definition of "development permit" in Section 10-101 contains optional language that defines the amendment of the zoning map as a development permit.

> [(6) Within a local government's corporate limits, no building or structure for which a valid building permit has been issued may be denied permission, upon payment of a reasonable fee, to connect to existing lines of a local government-owned utility at the permit applicant's expense.]

♦ Under this optional provision, there is no obligation to provide a connection where the utility line would have to be extended, unless the developer is willing to pay the expense of extension. Also, a moratoria on building permits for a shortfall in public facilities would not run afoul of this provision because the issuance of a building permit is a necessary prerequisite to this right to connect.

10-202 Development Permit Applications

> (1) As part of the ordinance establishing the unified development permit review process, the legislative body shall specify in detail the information required in every application for a development permit and the criteria it will apply to determine the completeness of any such application. The ordinance shall require the local government to notify applicants for development permits, at the time they make application, of the completeness determination, notice, and time-limit requirements required by this Chapter for the review and approval of development permits.
>
> (2) No local government may require a waiver of the time limits on a completeness determination or a decision on a development permit as a condition of accepting or processing an application for a development permit, nor shall a local government find an application incomplete because it does not include a waiver of these time limits.

♦ Without this provision, a local government could effectively negate the time limits of this Article by routinely requiring waiver of time limits as a condition to the approval of development permits.

[36] *New Castle v. BC Dev. Assoc.*, 567 A.2d 1271 (Del. 1989); *Golden v. Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978); *Fasano v. Bd. of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Fleming v. Tacoma*, 81 Wash.2d. 292, 502 P.2d 327 (1972); *Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971).

Commentary: Completeness

This Section provides a process under which a local government must make a completeness decision on a development application. It is based on Cal. Gov't Code §65943 et seq. and on Wash. Rev. Code §36.70B.070. The application requirements the local government includes in its ordinance will determine the basis on which the completeness decision is made. The brackets indicate that time limits for decisions can be modified by the state legislature. The legislative body may want to direct administrative bodies and officers to propose requirements for development permits to it for its approval by ordinance.

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

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

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

Paragraph (5) provides an opportunity to the local government to request additional information when necessary after a completeness decision, but also makes it clear that an application is complete when it meets the completeness requirements of this Section. A completeness determination, or a deemed-completeness requirement under paragraph (4), starts the time limits running on when a decision on the application must be made under Section 10-210. A completeness decision is a "land-use decision," which means it is an interlocutory decision that is appealable under the judicial review provisions of this Chapter.

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

10-203 Completeness Determination

(1) Within [28] days after receiving a development permit application, the local government shall mail or provide in person a written determination to the applicant, stating either that the application is complete, or that the application is incomplete and what is necessary to make the application complete.

(2) If the local government determines that the application is incomplete, it shall identify in its determination the parts of the application which are incomplete, and shall indicate the manner in which they can be made complete, including a list and specific description of the additional information needed to complete the application. The applicant shall then submit this additional information to the local government within [28] days of the determination pursuant to paragraph (1), unless the local government agrees in writing to a longer period.

(3) The local government shall determine in writing that an application is complete within [28] days after receipt of the additional information indicated in the list and description provided to the applicant under paragraph (2).

(4) A development permit application is deemed complete under this Section if the local government does not provide a written determination to the applicant that the application is incomplete within [28] days of the receipt of an application under paragraph (1) or within [28] days of the receipt of any additional information submitted under paragraph (2).

(5) A development permit application is complete for purposes of this Section when it meets the completeness requirements of, or is deemed complete under, this Section, even though additional information may be required or modifications in the development may occur subsequently. The completeness determination does not preclude the local government from requesting additional information or studies either at the time of the notice of completeness or subsequently if new information is required or substantial changes in the proposed development occur.

Commentary: Administrative Review

This Section authorizes administrative reviews of development permit applications without a record hearing. There is no hearing, but paragraph (2) broadly authorizes persons, organizations and government units to submit materials concerning the application. The term "aggrieved" is defined in Section 10-101 above. The officer or body that makes the decision must provide a written decision and give notice. The time limits for decisions on development permits required by Section 10-210 apply to administrative reviews. The protections provided for record hearings through the ban on *ex parte* communications does not apply to administrative reviews. Communication with the applicant and others interested in the application is expected during an administrative review.

Land-use decisions made following an administrative review are subject to an appeal under Section 10-209, but a record hearing will then by held by the officer or body that conducts the appeal. Under the exhaustion of remedies doctrine, codified at Section 10-604 below, this means that, before any appeal may be made to a court, an appeal pursuant to Section 10-209 must be taken if it is not futile.

10-204 Administrative Review

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

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

(a) The applicant; and

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

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

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

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

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

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

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

3. explains how the decision is based on the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement;

4. responds to all relevant issues raised by documents and materials submitted to the administrative review; and

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

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

♦ To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process. This Section also authorizes conditions on approved applications, which often are necessary to meet problems discovered about the application during the process. This authority is intended to be flexible, as conditions can implement any of the regulations or planning policies on which the decision is based. Subparagraph (c) makes newspaper and electronic publication of a decision optional. This Section is based on Idaho Code §67-6519, N.J. Stat. Ann. §40:55D-10, and Ore. Rev. Stat. §§227.173(3) and 227.175(3).

(5) **Request for clarification.** Within [30] days of a request for clarification of findings and decisions specifically included in the written notice of decision pursuant to paragraph (4)(b) above, the local government shall issue a written clarification concerning those specific findings and decisions. Notice of the clarification shall be given in the same manner as the notice of decision pursuant to paragraph (4)(c) above.

♦ It may be important for a permit applicant, or some other interested party, to obtain clarification or explanation of some issue raised by the local government in its development permit decision. This paragraph authorizes the applicant for a development permit to make a request for such a clarification.

(6) **Certificate of compliance.** The officer or body that grants a development permit shall issue a certificate of compliance if the completed development is in accordance with the conditions of the development permit that must be satisfied before a certificate of compliance can issue. The officer or body may delegate the responsibility of issuing the certificate of compliance to another officer.

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

(b) An owner of land for which a development permit has been issued may apply upon completion of the development for a certificate of compliance, and may introduce documentation and evidence, including the written reports of inspections performed according to paragraph (6)(a) above, and if the agency that issued the development permit finds that the completed development was in accordance with the terms and conditions of the development permit as of a particular date, the certificate of compliance shall be effective as of that date.

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

(d) A local government may bring enforcement proceedings to remedy a violation of this paragraph, as authorized by Chapter 11 of this Act.

♦ The usual process for the issuance of a certificate of compliance is automatic once the agency that granted a development permit determines that the development has been completed in compliance with the development permit. However, if a development was in compliance before the agency found it to be so, or the agency has not yet made a decision, or, for some reason, the local government failed to issue a certificate, and the land owner wants the certificate to be retroactive to the date of compliance (i.e. for purposes of nonconforming use protection), subparagraph (b) authorizes the owner to specifically apply for a retroactive certificate, and shall be issued a certificate retroactively if he or she can prove compliance on the earlier date.

10-205 Notice of Record Hearing

(1) **Notice required.** If a local government holds a record hearing on a development permit application, it shall provide notice of the date of the record hearing within [15] days of a completeness determination on the application under Section [10-203], or within [15] days from the date an application is deemed complete under Section [10-203(5)]. Notice of the record hearing shall be mailed at least [20] days before the record hearing, and the record hearing must be held no longer than [30] days following the date that notice of the record hearing is mailed. A local government may hold a record hearing at a later date, but no more than [60] days following the date that notice of the record hearing was mailed, if state agencies or other local governments must approve or review the development application, or if the applicant for a development permit requests an extension of the time at which the record hearing will be held.

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

(a) state the date, time, and location of the record hearing;

(b) explain the nature of the application and the proposed use or uses which could be authorized;

(c) list the land development regulations and any goals, policies, and guidelines of the local comprehensive plan that apply to the application;

♦ This is a very important paragraph, because the land regulations and comprehensive plan goals, policies and guidelines listed in the notice will determine the issues on which the hearing will be held. Of course, it is open to any party to challenge this part of the notice as legally incomplete if it omits regulations or plan goals, and policies and guidelines that apply to the application.

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

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

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

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

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

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

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

Commentary: Methods of Notice

Land-use statutes typically specify in detail how notice must be given by local governments. These statutes may either require too much notice or not enough, and often create technical compliance problems that can lead to litigation. This Section allows local governments to determine what type of notice they want to give, subject to a requirement that notice by posting and publication be given as a minimum. Inclusion of notice requirements in the development permit review ordinance required by Section 10-201 is mandated, because it is essential that the ground rules for giving notice be known. This Section is based on Wash. Rev. Code §36.70B.110.

10-206 Methods of Notice

(1) A local government shall use reasonable methods to give notice of a development permit application to the public, including [neighborhood planning councils established pursuant to Section [7-109], neighborhood or community organizations recognized pursuant to Section [7-110]], and to local governments or state agencies with jurisdiction. A local government shall specify the methods of public notice it will use in its development permit review ordinance, and may specify different types of notice for different categories of development permits. However, any ordinance adopted under this paragraph shall at least specify all of the following methods:

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

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

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

(d) mailing of notice to all adjacent local governments and to all state agencies that have jurisdiction over the development application.

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

(a) notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

(b) notifying the news media;

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

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

(e) mailing notice to abutting and confronting property owners.

10-207 Record Hearings

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

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

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

♦ Paragraphs (2) and (3) require full disclosure of applicant materials and local government reports prior to a hearing. Failure to disclose these materials creates fairness problems that frustrate all parties to a hearing and that can lead to litigation. These paragraphs mean that parties to a hearing must submit materials for witnesses they intend to call, and materials must also be submitted by persons who would like to testify though they are not parties. See Section 10-207(6)(b).

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

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

- Party status is granted as of right only to public agencies that have jurisdiction over the development application, and to owners and tenants that confront or abut the property that is the subject of the development application. These parties can be expected to have a direct and substantial interest in the development permit application. All other persons and agencies must be "aggrieved" to have standing, the term "aggrieved" being defined in Section 10-101.

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

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

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

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

(d) If a party to the record hearing provides additional documents or evidence, the presiding officer may allow a continuance of the record hearing or leave the record open to allow other parties a reasonable opportunity to respond.

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

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

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

(7) **Ex parte communications.**

Alternative 1

A land-use decision based on a record hearing is void if a decision-making officer, or a member of a decision-making body, engages in a substantial ex parte communication concerning issues related to the development permit application with a party to the record hearing or a person who has a direct or indirect interest in any issue in the record hearing.

Alternative 2

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

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

♦ These subparagraphs provide two alternatives for dealing with ex-parte communications. Ex-parte communications are described as "substantial" in both, excluding unintentional, *de minimis*, contacts from the purview of this paragraph. (Also, since Section 10-615 authorizes reversal of a land-use decision only if there was prejudicial error, a court can reverse on the grounds of substantial ex-parte communication only if the communication was prejudicial.) The first alternative bans ex-parte communications. The second allows them if they are disclosed on the record, a controversial exception because enforcement is difficult. The second alternative also exempts verbal communications by staff from the ex-parte communications bar, but written staff reports must be placed on the record as required by Section 10-207(3). This subparagraph is based on Ore. Rev. Stat. §§215.422 and 227.180, and Wash. Rev. Code § 42.36.060. For more detailed regulation of ex-parte communications see Fla. Stat. Ann. §268.0115.

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

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

(a) A local government may approve or deny a development permit application, or may approve an application subject to conditions.

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

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

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

3. explains how the decision is based on the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement of the comprehensive plan;

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

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

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

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

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

(10) **Request for clarification.** Within [30] days of a request for clarification of findings and decisions specifically included in the written notice of decision pursuant to paragraph (9)(b) above, the local government shall issue a written clarification concerning those specific findings and decisions. Notice of the clarification shall be given in the same manner as the notice of decision pursuant to paragraph (9)(c) above.

♦ It may be important for a permit applicant, or some other interested party, to obtain clarification or explanation of some issue raised by the local government in its development permit decision. This paragraph authorizes the applicant for a development permit to make a request for such a clarification.

(11) **Certificate of compliance.** The officer or body that grants a development permit shall issue a certificate of compliance if the completed development is in accordance with the conditions of the development permit that must be satisfied before a certificate of compliance can issue. The officer or body may delegate the responsibility of issuing the certificate of compliance to another officer.

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

(b) An owner of land for which a development permit has been issued may apply upon completion of the development for a certificate of compliance, and may introduce documentation and evidence, including the written reports of inspections performed according to paragraph (11)(a) above. If the agency that issued the development permit finds that the completed development was in accordance with the terms and conditions of the development permit as of a particular date, the certificate of compliance shall be effective as of that date.

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

(d) A local government may bring enforcement proceedings to remedy a violation of this paragraph, as authorized by Chapter 11 of this Act.

♦ The usual process for the issuance of a certificate of compliance is automatic once the agency that granted a development permit determines that the development has been completed in compliance with the development permit. However, if a development was in compliance before the agency found it to be so, or the agency has not yet made a decision, or, for some reason, the local government failed to issue a certificate, and the land owner wants the certificate to be

retroactive to the date of compliance (i.e. for purposes of nonconforming use protection), subparagraph (b) authorizes the owner to specifically apply for a retroactive certificate, and shall be issued a certificate retroactively if he or she can prove compliance on the earlier date.

Commentary: Consolidated Permit Review Process

This Section authorizes a consolidated permit review process. It gives local governments the flexibility to decide how this process should be constructed, and they may provide different procedures for different types of development permits under their jurisdiction when necessary. The consolidated permit review process may combine the review of development permits under this Chapter with rezonings, which may be considered legislative rather than quasi-judicial actions. This Section is based on Ore. Rev. Stat. §215.416 and Wash. Rev. Code §36.70B.120.

10-208 Consolidated Permit Review Process

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

(2) If an applicant for a development permit applies for a master permit, the local government shall determine what procedures apply to the review of the development, and shall designate a permit coordinator who shall coordinate the consolidated permit review process. A consolidated permit review process may provide different procedures for different categories of development permits. If a development requires permits from more than one category of development permit as well as zoning map amendments, the local government [shall *or* may] provide for a consolidated permit review process with [1] record hearing and no more than one record appeal.

♦ Paragraph (2) gives the local government the flexibility to decide on the procedures that apply in a consolidated permit review process, which may include administrative reviews and record hearings. If the development requires permits from a number of permit categories as well as a zoning map amendment, the statute can either mandate or authorize a simplified review process by having one record hearing and one record appeal. This option is intended for states in which the zoning amendment is quasi-judicial.

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

♦ Paragraph (3) allows the local government to authorize the permit coordinator to issue a master permit. The issuance of a master permit is intended to be a ministerial act that does not require the exercise of discretion. The permit coordinator is to issue a master permit once he or she determines from local government records that all development permits have been granted. However, a court may still decide that the master permit is discretionary, and states that have a state environmental policy act may require an environmental review of the master permit under that act. In addition, a master permit is an appealable land-use decision under this Chapter.

10-209 Appeals

(1) An appeal of a land-use decision may be taken to an appeals board within [30] days after the decision is issued[, or within [30] days after the date the decision is deemed approved under Section [10-210]]:

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

(b) if there has been an administrative review:

1. by the applicant for the development permit; or

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

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

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

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

(3) An appeal that is not dismissed shall stay any and all proceedings to enforce, execute, or implement the land-use decision being appealed, and any development authorized by said land-use decision, unless the officer or body from whom the appeal is taken certifies in writing to the appeals board that a stay in the decision or development thereunder would cause immediate and irreparable harm to the appellant with no comparable immediate and

irreparable harm to the applicant or imminent peril to life or property. If such a certification is filed, there shall be no stay other than by a restraining order, which may be granted by the [*name of court*] on due cause shown and with notice to the officer or body from whom the appeal is taken.

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

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

(5) (a) The appeals board shall hold a hearing on the record in a record appeal. As part of its unified development permit review process, the legislative body shall adopt rules under which the appeals board may hear arguments on the record by the parties to the record appeal.

♦ This paragraph is based on R.I. Gen Laws §§45-24-64 and 45-24-66, and Wash. Rev. Code § 36.70.830. They authorize an appeal on the record to the appeals board designated by the legislative body and give the board the authority to adopt rules under which it will hear argument.

[(b) Supplementary evidence.

1. The appeals board may take supplementary evidence in record appeals only in those limited cases in which it makes a written finding that evidence proffered by any party was improperly excluded from the record hearing.

2. A finding that additional evidence will be taken is an interlocutory order that is not appealable. If the appeals board decides to take supplementary evidence, it shall provide mailed notice of this decision to all parties to the record hearing that was appealed, and shall hold a record hearing as required by the local government's unified development review process.]

♦ This paragraph is optional, and the authority to take additional evidence is narrowly drawn. Whether additional evidence should be taken by the appeals board is debatable, since every opportunity is provided at the record hearing to introduce necessary evidence. An argument can also be made that record supplementation should be reserved for judicial appeals, where opportunities to supplement a record can be broader.

The appeals board must give notice to the parties to the record hearing so that they can participate in a new hearing in which supplementary evidence is taken. The paragraph states that the hearing must comply with the record hearing requirements contained in the local government's unified development review process, which must comply with the record hearing requirements contained in this Section. See Section 10-207(4).

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

2. The appeals board shall not make findings of fact[, unless the board has taken evidence supplementing the record on appeal, in which case it shall make findings of fact based on this evidence and shall make a decision based on such findings as required by Section [10-207(9)]].

♦ This paragraph is standard. See, e.g., Rhode Island Gen. Laws § 45-24-67. The second part of paragraph (b) is optional, and requires a decision based on findings of fact only if the board allowed the introduction of evidence to supplement the record.

(6) In an appeal from an administrative review, the appeals board shall hold a record hearing and make a decision as provided in Section [10-207].

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

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

♦ These provisions are standard. See R.I. Gen. Laws §45-24-61.

Commentary: Time Limits and Their Effect

It is one of the fundamental elements of due process that a decision maker must come to a final decision within a reasonable period of time. Certainty is one of the goals of the land-use decision making process established in this Chapter, and a failure by a local government to decide either way on a development permit application destroys certainty. Therefore, this Section establishes an overall time limit for the development permit review process, and alternatively requires local governments to fix time limits under Section 10-201. The applicant and the local government may mutually consent to an extension of that time limit. It should be noted that a local government cannot demand a waiver of time limits in an application for a development permit. See Section 10-202(4). The Section provides that the time limits do not apply when the local government identifies a specific land development regulation that prohibits the development and with which the application does not comply. This exception, which is based on N.H. Rev. Stat. §676:4, is intended to cover nondiscretionary requirements not considered in the decision making process, such as a restriction on development in floodplains. There is also an exception to the time limit for periods when the local government cannot process permit applications due to circumstances beyond its control. This is meant to cover disasters and similar events that disrupt normal operations of the local government.

The major issue that follows from establishing a time limit is the effect of that time limit. In this regard, the Section also has two alternatives. The first is based on Cal. Gov't Code §65950 and provides that a development application is deemed approved after the time limits expire. Time limit provisions including "deemed approval" clauses are common in state enabling statutes for subdivision review,[37] going back to the *Standard City Planning Enabling Act* in the 1920s.[38] Paragraph (3) requires mailed notice that a decision has been made on an application and that the application is deemed approved.

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[37]States with an express "deemed approved" rule: Alabama (Ala. Code §11-19-14); Arizona (Ariz. Rev. Stat. §11-809); California (Cal. Gov't Code §§66452 *et seq.*); Colorado (Colo. Rev. Stat. §31-23-215); Connecticut (Conn. Gen'l Stat. §§8-26, -26d); Delaware (Del. Code tit. 9 §6811); Georgia (Ga. Code §32-6-152); Indiana (Ind. Code §36-7-4-918.6); Kansas (Kan. Stat. §12-752); Louisiana (La. Rev. Stat. §33:113); Maryland (Md. Ann. Code. art. 66B §5.04); Massachusetts (Mass. Gen'l Laws ch. 41, §81V); Michigan (Mich. Comp. Laws §125.45); Minnesota (Minn. Stat. §462.358); Missouri (Mo. Rev. Stat. §89.420); Nevada (Nev. Rev. Stat. §278.350); New Hampshire (N. H. Rev. Stat. §676:4); New Jersey (N.J. Stat. Ann. §40-55D-47); New Mexico (N.M. Stat. §3-20-7); New York (N.Y. Gen'l City Law §32, N.Y. Town Law §276, N.Y. Village Law §7-728); North Dakota (N.D. Cent. Code §40-48-21); Ohio (Ohio Rev. Code §711.05); Oklahoma (Okla. Stat. §863.9); Pennsylvania (53 Pa. Stat. §1-508); Rhode Island (R.I. Gen'l Laws §45-23-43); South Carolina (S.C. Code §5-23-630); Texas (Tex. Loc. Gov't Code §212.009); Vermont (Vt. Stat. tit. 24 §4415); Wisconsin (Wis. Stat. §236.12).

States that enforce time limits by other means or do not state means of enforcement: Illinois (65 Ill. Comp. Stat. §5/11-12-8); Iowa (Iowa Code §354.10); Kentucky (Ky. Rev. Stat. §100.281); Maine (Me. Rev. Stat. tit. 30A §4403); Montana (Mont. Code §76-3-604); Washington (Wash. Rev. Code §58.17.140); Virginia (Va. Code §15.2-2259).

[38]Advisory Committee on Planning and Zoning, U.S. Department of Commerce, A Standard City Planning Enabling Act (Washington, D.C.: U.S. GPO, 1928), Sec. 15 (municipal planning commission shall approve or disapprove a subdivision plat within 30 days, after which plat "shall be deemed to have been approved").

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

10-210 Time Limits on Land-Use Decisions (Two Alternatives)

(1) If a local government fails to approve, conditionally approve, or disapprove a development permit application within [*Option A:* [90, 120, *or* 180] days from the time it makes a written determination that a development permit application is complete, or from the time a development application is deemed complete] [*Option B:* the time period specified for that development permit under Section [10-201(2)(g)]; then

Alternative 1
the failure to act shall be deemed an approval,

Alternative 2
(a) the local government shall refund to the applicant any development permit application fee paid to the local government pursuant to Section [10-211]; and

(b) the applicant shall have a cause of action, in the nature of mandamus, in the [*name of court*] in order to compel the local government to approve, approve with conditions, or disapprove the development permit application;

unless within that period the local government has identified in writing some specific land development regulation provision with which the application does not comply, and that prohibits the development of the property.

(2) The local government, and the applicant for a development permit, may mutually agree to an extension of the time limits for a decision specified in paragraph (1) for a period not in excess of [90] days.

[(3) If an application for a development permit is deemed approved under this Section, the officer or body shall send by mail written notice that the permit has been deemed approved to all:

[39]Or. Rev. Stat. §§215.427, 215.429, 227.178, and 227.179 (1999).

(a) parties to the record hearing, or

(b) persons, neighborhood planning councils, neighborhood and community organizations, and governmental units that submitted documents and materials to the administrative review.]

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

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

♦ This paragraph is based on Wash. Rev. Code §36.70B.080 and provides more flexibility to the time limits provision.

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

10-211 Fees

A local government may charge such fees as are necessary to carry out the responsibilities imposed by Sections [10-201] through [10-210] and [15-201]. It shall base such fees on the actual costs of typical or average review and processing of development permit applications and appeals from decisions on development permit applications, and may adopt different schedules of fees for different categories of development reviews and appeals.

♦ Section 15-201 deals with the recording of development permits and related documents.

HEARING EXAMINERS

Commentary: Hearing Examiner System

This Section authorizes the creation of a hearing examiner system and the appointment of a hearing examiner. It also specifies the categories of land-use matters the hearing examiner can hear. These matters include all of the issues likely to arise under a land development regulation, including development applications. Development applications include applications for administrative remedies, such as variance. The legislative body may also specify additional responsibilities for hearing examiner review. A hearing examiner need not be an official or employee of the local government.

Paragraph (2) authorizes the legislative body to assign all or some of the functions of designated boards and officials to the hearing examiner. Smaller communities that may not wish to staff all of these boards and officials can then delegate their functions to the hearing examiner.

Paragraph (4), which is optional, authorizes contracts for the use of state administrative law judges, and is a useful alternative for smaller communities that may not need hearing examiners on a regular basis. This Section is based partly on Ariz. Rev. Stat. §9-462.08; Ind. Code Ann. §36-7-4-923; Tenn. Code Ann. §7-101-105(a); and Wash. Rev. Code Ann. §35A.63.170.

10-301 Hearing Examiner System

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

(a) development permit applications;

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

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

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

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

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

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

10-302 Hearing Examiner's Jurisdiction

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

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

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

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

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

(b) if there has been an administrative review:

1. by the applicant for the development permit; and

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

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

♦ The local government has the option under this Section of deciding when, and under what circumstances, a hearing examiner may take jurisdiction of a land-use matter. For example, a local government ordinance could authorize applicants to file an application with the hearing examiner only when the development permit will require a quasi-judicial hearing. An application must be complete, as required by this Chapter, before an applicant can use this option. Paragraph (3) authorizes appeals of land-use decisions to hearing examiners by persons and organizations authorized to take appeals under Section 10-209(1). The ordinance can also provide that local boards and officials can refer matters to a hearing examiner. This Section is based on statutes such as Alaska Stat. §29.40.050; Idaho Code §67-6520; Md. Ann. Code Art. 66B, §2.06; Nev. Rev. Stat. §278.262; and Wash. Rev. Code §35A.63.170.

10-303 Decision to Recuse

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

- Because the hearing examiner has the expertise to determine when a hearing under his or her authority is advisable, the examiner is given the authority by this Section to recuse himself or herself from a particular case. It is intended that the decision to recuse oneself is an interlocutory decision that is not appealable.

10-304 Decisions Based on Record Hearings

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

(2) The hearing examiner shall:

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

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

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

- If a record hearing has not been held on a matter referred to the hearing examiner, this Section authorizes the hearing examiner to hold a record hearing under procedures required by the unified development review permit ordinance. The Section does not authorize the hearing examiner to make a decision or recommendation without a hearing. For a provision authorizing hearing examiners to make decisions without hearings, see e.g., Ore. Rev. Stat. §§215.416(11)(a) and 227.175(10).

10-305 Decisions Based on Record Appeals

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

Commentary: Effect of Hearing Examiner's Decisions

Local governments may differ on the extent to which they want to make hearing examiner decisions final or simply recommendations to other decision making bodies. This Section provides the option to make hearing examiner decisions a recommendation, an appealable decision, or a final decision. Hearing examiner decisions on legislative actions, such as the adoption and amendment of a local comprehensive plan, may only be given the effect of a recommendation.

Appeals to boards and officials are governed by the appeals statutes that apply, such as Section10-209. If the examiner's decision is final, it is judicially reviewable under the judicial review provisions of this Chapter. This Section is based in part on Wash. Rev. Code §35A.63.170(2).

10-306 Effect of Hearing Examiner's Decisions

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

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

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

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

10-307 Review of Hearing Examiner Recommendations

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

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

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

♦ This Section provides the procedure for the legislative body's review of a hearing examiner's recommendation. The requirement that the legislative body, board or officer may not hold an additional record or limited record reflects the expectation in Section 10-201 that only one such hearing should be held. However, paragraph (2) authorizes such hearings if the hearing examiner has not held a hearing on the recommendation. Paragraph (3) contains an optional provision that requires that "due regard" be given to the hearing examiner's recommendation.

[10-308 Filing and Publication of Hearing Examiner Decisions

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

♦ This Section is optional. However, it is highly recommended that local governments at least require the filing of hearing examiner decisions so they can be accessible to the public.

LAND-USE REVIEW BOARD

Sections 10-401 *et seq.* provide for the creation and organization of a Land-Use Review Board. In most zoning enabling legislation, this board is called a Zoning Board of Adjustment or Zoning Board of Appeals. These Sections adopt a different name because a local government's land development regulations will probably contain more than zoning regulations. However, a state may use another name if it prefers.

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

Moreover, a local government may decide not to create a Land-Use Review Board. This Chapter allows a local government to assign functions traditionally exercised by a zoning board of adjustment or appeals to another officer or body, such as the local planning commission or a hearing examiner. Sections 10-401 et seq. are based in part on R.I. Gen. Laws §45-24-56.

10-401 Land-Use Review Board Authorized

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

10-402 Organization and Procedures

An ordinance creating a Land-Use Review Board shall:

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

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

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

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

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

10-403 Compensation, Expenses and Assistance

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

10-404 Training

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

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

10-405 Powers

The ordinance creating a Land-Use Review Board shall specify the powers the Board may exercise. The ordinance may provide that the Board shall serve as the local government's appeals board.

♦ This Section gives the local government the flexibility to determine what powers the Land-Use Review Board will exercise. It authorizes the appointment of the Board as the local government's appeal board, which Section 10-101 also authorizes.

ADMINISTRATIVE ACTIONS AND REMEDIES

Commentary: Authority to Approve

This Section gives the legislative body flexibility in designating the officer or body that has the authority to approve the administrative actions and remedies authorized in the following sections.

10-501 Authority to Approve.

Each local government's land development regulations [shall *or* may] authorize the Land-Use Review Board, the planning commission, the legislative body, or such other officer or body as the land development regulations shall designate, to approve the administrative actions, remedies, and procedures authorized by Sections [10-502] and [10-503].

Commentary: Conditional Uses

Section 10-502 authorizes the Land-Use Review Board, or any other designated officer or board, to grant conditional uses, which is a traditional administrative function. The Section authorizes conditional uses in any of the land development regulations adopted by a local government, in addition to zoning regulations. The legislative body must also specify the areas or districts in which special uses are available. It is the intent of this Section that the land development regulations specify special uses by type, e.g., hotels as a special use in a commercial district. This paragraph is based on R.I. Gen Stat.§45-24-42.

This Section retains the format of the *Standard State Zoning Enabling Act*. It authorizes the legislative body in its land development regulations to specify the uses the Board, the planning commission, or other officer or body may consider as conditional uses and the criteria the Board is to apply.

10-502 Conditional Uses

The officer or body designated under Section [10-501] may approve conditional uses. The land development regulations shall:

(1) specify the uses, or categories of uses, requiring approval as a conditional use, and the areas or districts in which they are available; and

(2) provide criteria for approving each category of conditional use. The criteria shall include a determination of consistency with the local comprehensive plan pursuant to Section [8-104].

Commentary: Variances

This Section authorizes the traditional dimensional, or area, variance., but limits the cases in which it may be granted by limiting "uniqueness" to specified physically difficult circumstances. It uses language from Ky. Rev. Stat. §100.247 that expressly prohibits use variances.

It is the intent of this Section that the authority to grant dimensional variances be exercised infrequently. The test adopted is a "reasonableness" test as shown by the absence of a reasonable alternative to granting the variance. However, a variance cannot be granted simply because it would make a use or structure more profitable. It is also intended that the "hardship" test included in this Section should not be interpreted as a test of economic hardship similar to the test for "economically viable use" that courts apply under the takings clause. The Section is based on N.J. Stat. Ann. §40:55D-70(c) and R.I. Gen. Stat. §45-24-41. An alternative "reasonableness" test for dimensional variances can be found in R.I. Gen. Stat. §45-24-46. A similar balancing test for dimensional variances is contained in N.Y. Town Law § 267-b(3).

10-503 Variances

The officer or body designated under Section [10-501] may approve variances. The land development regulations shall:

(1) provide for the approval of variances from any of the numerical dimensional requirements of the land development regulations;

(2) prohibit the granting of a variance for use, density, or intensity for land, buildings or structures which is not authorized by the land development regulations;

♦ Use variances are not permitted under this Section because they would constitute an amendment of the zoning ordinance adopted by an administrative body instead of the local legislative body.

(3) provide that the variance requested is required by exceptional or unique hardship because of:

(a) exceptional narrowness, shallowness, or shape of a specific piece of property; or

(b) exceptional topographic conditions or physical features uniquely affecting a specific piece of property;

(4) require a showing that there are no other reasonable alternatives to enjoy a legally permitted beneficial use of the property if the variance is not granted;

(5) prohibit the granting of a variance based on a showing that a use may be more profitable or that a building or structure may be more valuable if the variance is granted; and

(6) require that the variance requested be consistent with the local comprehensive plan as determined pursuant to Section [8-104].

Commentary: Mediated Agreement

A comprehensive land-use regulation system requires some sort of remedy or procedure to address land development regulations that are unduly restrictive as applied to a particular property and to avoid claims that the regulation in question constitutes a taking. The use variance has been the traditional remedy since the *Standard State Zoning Enabling Act* in the 1920s. However, critics have long complained that the use variance confers too much discretion on zoning boards by allowing them to approve changes in land use that improperly amend the zoning ordinance. Therefore, this Chapter prohibits the use variance in Section 10-503.

In the absence of the use variance, the need for a "relief valve" still exists. Commentators have called for the adoption of express authority for local governments to provide some sort of remedial measure or procedure.[40] There are two important considerations that must be balanced in the creation of such a relief mechanism. Because each parcel of land is unique and is therefore uniquely affected by land development regulations, which are themselves complex and which interact in complicated ways, the available remedies must be flexible. On the other hand, the local government has not only the power but the duty to regulate the development and use of land for the benefit and advancement of the entire community. A requirement of powerful and broad remedies has the potential to subsume the community interest to that of the individual landowner. This is especially problematic when the relief authorized is so broad as to constitute policy-making or legislation but the power to grant relief is assigned to an administrative body, as is the case with the use variance.

MEDIATION

With this essential balance in mind, mediation appears to be the most appropriate method of providing the needed "relief valve" for land development regulations. Mediation is a non-binding process where a neutral person assists the parties to a dispute in negotiating a mutually-beneficial solution. This is in contrast to arbitration, where a neutral person or panel hears the presentations and arguments of both sides to a dispute and then makes a decision which will presumably resolve the dispute. Mediation, because it is still essentially the negotiation of two parties, does not have to conclude in an agreement. Arbitration, on the other hand, always ends in a decision, which because it is not an agreement may not satisfy either or both parties. Mediation has a long history as a method of settling disputes between parties who have to deal with each other on an ongoing basis

[40]See John Delaney, "Avoiding Regulatory Wipe-Outs: Proposed Model Legislation for a Local Mechanism," *Land-use Law & Zoning Digest* 50, No. 7 (1998): 3.

and therefore would rather cooperate than approach the dispute adversarially. For example, mediation has an important role in the settlement of labor disputes under federal law; there has been federal mediation for railway (and now airline) labor disputes since before the New Deal.[41] Mediation is used in areas as dissimilar as financial services and child custody disputes.

Idaho[42] requires that the local land development approval process include the right to mediation. This mediation may occur at any time in the process, and is outside the process in the sense that it is not part of the record and tolls (suspends) any time limits on the approval process. Mediation may be requested by an applicant, the local government, or an "affected person." The mediator is selected by the local government and paid by the local government for the first, mandatory, session; the cost of later sessions may be apportioned between the parties by agreement.

Maine has adopted a statute[43] authorizing mediation in land-use cases. Mediation is available whenever a landowner alleges significant harm as the result of a land use regulation. However, the applicant landowner must have not only been denied a permit, variance, or the like but must have exhausted all administrative remedies; mediation is an alternative to judicial review, not to adversarial proceedings altogether. As such, mediators are assigned by the superior (trial) courts and the mediator must report upon the resolved and unresolved issues to the court if the mediation does not result in a completely dispositive agreement.

CONTENTS OF THE MODEL SECTION

Under Section 10-504 below, any landowner who has been denied a development permit, or granted a permit subject to conditions, and who feels that the land development regulations, individually or cumulatively, impose an undue hardship on his or her development and use of the land may request mediation. The local government then has 30 days to decide whether or not there will be mediation. The goal of the mediation is to enter into a development agreement pursuant to Section 8-701, although other remedies and measures may be considered. However, the only duty of the landowner and the local government is to participate and negotiate in good faith. Therefore, no remedy can be imposed by the mediator, and failure to reach an agreement is not a reviewable land-use decision. Also, mediation is not a required part of exhausting administrative remedies preceding a judicial review under Part 6 of this Chapter.

The preferred method of selecting a mediator is by mutual consent of the landowner and the local government. However, such consent may not always be possible. In such cases, the state planning agency shall appoint a mediator. The state planning agency has the necessary "distance" from the dispute at hand, in that its interest is in the implementation of the state plans and in the regulation of land use and development to best serve the people of the state as a whole rather than either wholly local interests or the private interest of the landowner.

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[41] 45 U.S.C. §§154, 155.

[42] Idaho Code § 67-6510 (2001).

[43] 5 Me. Rev. Stat. § 3341 (2000).

The centerpiece of the Section is the development agreement. As Section 8-701 provides, a development agreement may address any issue that local land development regulations can cover. A development agreement is considered to be, and must be approved as, a land development regulation. The development agreement must therefore be consistent with the local comprehensive plan. Regardless of who negotiates it on behalf of the local government, it must receive the approval of the local legislative body to become effective, thus avoiding the problem of policy decisions being made by administrative bodies. And approval of the development agreement must be preceded by public notice and hearings, so that the perception of secrecy and back-room dealing is reduced. To the same end of avoiding secret dealing and the perception thereof, this Section requires that the mediation sessions be open to the public.

10-504 Mediated Agreement

(1) Any owner or developer of land who:

(a) has made a development permit application, complete or deemed complete, for the land in question and the application was denied by the local government or approved subject to conditions; and

(b) believes that a land development regulation, or the land development regulations cumulatively, imposes an undue hardship upon his or her use or development of the land in question;

may petition for mediation as provided in this Section.

(2) As used in this Section,

(a) "**Development Agreement**" means a development agreement pursuant to Section [8-701];

(b) "**Mediation**" means a process of negotiation where a disinterested person assists the parties in their negotiations.

(c) "**Parties**" mean the owners and/or developers and the local government.

(3) Upon the filing with the local government of a written petition for mediation, the local government shall notify the petitioner in writing within [30] days of receipt of the petition whether mediation will commence.

(a) The petition for mediation shall include:

1. the name and mailing address of the petitioner;

2. the name and mailing address of the petitioner's attorney, if any;

3. the names and mailing addresses of all owners of the property in question, if the petitioner is not the sole owner of the property;

4. a description of the property in question;

5. a statement of the nature and extent of the alleged undue hardship; and

6. an identification of the land development regulation or regulations that allegedly create the undue hardship.

(b) Local governments may, by ordinance, specify the form and content of petitions for mediation.

(4) The parties shall by mutual written agreement select a mediator within [30] days of the issuance of a notice by the local government that mediation shall commence. If the parties cannot agree upon a mediator within that time, the local government shall notify the [state planning agency] in writing at the end of the [30]-day period and the [state planning agency] shall select a mediator within [10] days of its receipt of the notice. The [state planning agency] shall notify the parties in writing of the selection at the time the selection is made.

(5) Absent a written agreement to the contrary, the cost of mediation shall be divided equally between the parties.

(6) The focus of mediation pursuant to this Section shall be the negotiation of a development agreement to remedy or ameliorate undue hardship and to resolve potential takings claims, but all appropriate remedies, measures, and responses may be considered.

(a) The parties shall participate in the mediation in good faith.

(b) The mediator shall coordinate the mediation with the parties, including the date, time, and place of meetings. All meetings shall be open to the public.

(c) The mediator may invite any person, organization, or governmental unit to participate in the mediation. The parties may suggest persons, organizations, or governmental units to invite.

(d) Failure to enter into or adopt a development agreement is not a land-use decision. Mediation is not a remedy that must be exhausted pursuant to Section [10-604] as a prerequisite to judicial review pursuant to this Chapter.

10-505 Referral to Planning Commission

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

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

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

Commentary: Imposition of Conditions

Local governments almost always condition a grant of administrative relief, usually with several conditions. This Section grants the authority to adopt conditions. A purpose of conditions is to ensure that the effect of an approved development on surrounding areas and natural resources is minimized. This requirement can form the basis for integrating development approvals with environmental reviews under state environmental policy acts, as authorized by Chapter 12. To accomplish this objective, and to allow local governments to review the details of developments, this Section also authorizes the submission of a site plan, if authorized by the land development regulations. Controls over development staging will assist the local government in coordinating development in the community with the provision of necessary public facilities. This Section is based in part on R.I. Gen. Stat. §45-24-43.

10-506 Conditions

(1) When an officer or body approves a conditional use or variance, it may adopt such conditions which, in its opinion, will promote the intent and purpose of the local comprehensive plan and land development regulations. These conditions may include, but are not limited to, conditions that:

(a) minimize the adverse effect of a development on the surrounding area and on any natural resources that will be affected by the development;

(b) require the submission and approval of a site plan, if authorized by the land development regulations, that specifies the location and nature of the development and any necessary improvements;

(c) guarantee the satisfactory completion and maintenance of any required improvements;

(d) control the sequence of development, including when it must be commenced and completed; and

(e) require detailed records, including drawings, maps, plats or specifications.

(2) The officer or body shall base any conditions it adopts on competent, credible evidence it shall incorporate into the record and its decision.

(3) A failure to comply with an approved condition is a violation of the land development regulations.

Commentary: Integration of Procedures

Section 10-507 specifies the procedures required for all of the remedies and administrative actions authorized by this Chapter. It integrates applications for development permits with applications for these remedies and actions: the application procedures for these remedies must be the same as the local government's development permit review process. As such, the decision on the requested remedy or action is also a final and appealable decision under this Chapter.

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

Paragraph (2)(a) requires the local government to specify which officers and bodies review applications for remedies and actions. It is possible that a request for an administrative remedy or action may not be heard by the same officer or body that hears the application for a development permit that accompanies the application for an administrative remedy. The consolidated review process authorized by Section 10-208 can provide for joint hearings on applications for a development permit and an administrative remedy when the same officer or body reviews both applications. Record hearings on applications for a remedy or action are mandated by paragraph (2)(b). Paragraph (2)(c) requires development permits to include any approved administrative action or remedy.

10-507 Procedures

(1) (a) Each local government shall adopt an application procedure for conditional uses and variances. This procedure must incorporate the procedures of the development permit review process, and a decision on an application for a conditional use or variance is a final appealable decision under this Chapter.

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

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

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

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

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

JUDICIAL REVIEW OF LAND-USE DECISIONS

The legal structure for the judicial review of land-use decisions is chaotic.[44] The *Standard State Zoning Enabling Act*, which state laws followed, contains limited provisions for the judicial review of administrative zoning decisions. Courts have had to find additional methods of judicial review for actions not reviewable under the statutory procedures. These procedures are incomplete and unclear, standing to sue requirements can limit opportunities for review, and remedial relief available is inadequate. Important land-use disputes often cannot get to court. Other issues complicate judicial review. These are an increasing concern about decision making procedures, a trend toward classifying land-use decisions as quasi-judicial, the requirement that compensation is payable when a taking occurs and the availability of a federal statutory remedy in state courts. This

[44]Portions of this commentary appeared in different form as "Judicial Review of Land-Use Decisions," by Daniel R. Mandelker, in *Modernizing State Planning Statutes: The Growing Smart℠ Working Papers, Vol. 1, Planning Advisory Service Report No. 462/463* (Chicago: American Planning Association, March 1996): 163-165. See generally Daniel R. Mandelker, *Land Use Law*, 4th ed (Charlottesville, Va.: Lexis Law Publishing Co), Ch. 8, Land Use Litigation and Remedies.

commentary discusses some of the topics related to judicial review and identifies some alternative solutions.

METHODS OF JUDICIAL REVIEW

The methods available for judicial review of local land-use decisions are confused. The *Standard State Zoning Enabling Act* provided only for judicial review of decisions by the board of zoning adjustment through a writ of certiorari, but was silent on other forms of judicial review.[45] In many states, judicial review of other land-use decisions, such as rezonings by the legislative body, occurs through extraordinary or "high prerogative" judicial writs. For example, a landowner who believes a land-use agency should issue a building permit can bring a writ of mandamus to compel its issuance. However, the usual remedy to test the invalidity of a zoning restriction applied to land is the injunction and declaratory judgment. The difficulty with this system is that the use of extraordinary writs to secure judicial review is cumbersome: under mandamus, relief will not be granted unless the obligation of the local government to act in a particular manner is clear, and if a mandamus action is unsuccessful, the landowner may have to try all over again with a new civil action. Decisions in several states that characterize local land-use decisions as quasi-judicial rather than legislative also complicates the choice of remedy. The writ available for judicial review varies depending on how a court characterizes a land-use decision.[46]

Additional problems occur if state agencies exercise authority over local land-use decisions. Judicial review of state agency decisions is available under state administrative procedure acts. These acts do not usually apply to local governments.

The availability of federal remedies in state courts also complicates judicial review. A plaintiff may bring a state court suit against a local government for a federal constitutional violation under Section 1983 of the Federal Civil Rights Act for a federal constitutional violation. A plaintiff may also bring an action in state court directly under the federal constitution for compensation when a land-use regulation is a taking of property.

There are several alternatives for providing judicial review: A state could (1) provide a state remedy similar to the federal §1983 remedy that would apply to all land-use decisions. This would greatly simplify existing review processes; (2) revise and expand the statutory basis for review in planning and land-use legislation; (3) rely on the extraordinary writs but specify by legislation when

[45]Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (SZEA), (Washington, D.C. U.S. GPO, 1926, rev'd ed.), §7.

[46]Cases that consider rezoning as quasi-judicial: *Board of County Comm'rs of Brevard County v. Snyder,* 627 So.2d 469 (Fla. 1993); *New Castle v. BC Dev. Assoc.*, 567 A.2d 1271 (Del. 1989); *Golden v. Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978); *Fasano v. Bd. of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Fleming v. Tacoma*, 81 Wash.2d. 292, 502 P.2d 327 (1972); *Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971). Cases that consider rezoning to be legislative: *Quinlan v. Dover*, 136 N.H. 226, 614 A.2d 1057 (1992); *Hampton v. Richland County*, 292 S.C. 500, 357 S.E.2d 463 (1987); *Bell v. Elkhorn*, 122 Wis.2d 558, 364 N.W.2d 144 (1985); *Arnel Dev. Co. v. Costa Mesa*, 28 Cal.3d 511, 620 P.2d 565 (1980); *Wait v. Scottsdale*, 127 Ariz. 107, 618 P.2d 601 (1980); *Montgomery County v. Woodward & Lothrop*, 280 Md. 686, 376 A.2d 483 (1977), cert den'd 434 U.S. 1067 (1978).

these writs are available to review land-use decisions; or (4) revise the state administrative procedure act to include review of land-use decisions by local governments. The model legislation below adopts a combination of the first alternative and the second alternative.

TIMING OF JUDICIAL REVIEW

The problem of timing in judicial review has become increasingly important since the U.S. Supreme Court adopted ripeness rules to decide when litigants could bring land-use cases in federal courts.[47] These federal rules make it difficult to bring land-use cases in federal courts. Some states now apply federal ripeness rules to decide when courts should take land-use cases rather than state exhaustion of remedies rules that traditionally decided this question.[48]

There is an important difference between timing rules in federal and state courts. These rules have a constitutional basis in federal courts because they decide when a constitutional "case and controversy" exists that confers jurisdiction on a federal court. State constitutions do not have similar requirements. A state court bases a decision not to hear a case on its discretionary power to define its jurisdiction. Because of these differences, states have greater opportunities through legislation to decide when land-use cases should come to court. Initial questions are whether a state wishes to make access to courts easy or difficult, and whether it wishes to codify the rules that decide whether a case is ripe for decision. Clarification is essential because the federal ripeness and state exhaustion rules have created considerable confusion. The federal rules, especially, have operated to bar access to federal courts and could have the same effect in the states if states continue to adopt them.

There are two approaches to state timing legislation. One is to have state legislation specify what types of decisions at the local level are "final" for purposes of judicial review or required to "exhaust" remedies. There is a question whether legislation of this kind can limit state court discretion to decide when to accept or refuse cases.

An alternate legislative approach would require local governments to specify by ordinance the land-use decisions that are "final" or meet the "exhaustion" rules. There is precedent for this kind of legislation in states, like Oregon, which require local governments to specify requirements for conditional uses, moratoria and other controls.[49] Timing legislation could specify the kinds of decisions that require timing rules. Courts are likely to accept local determinations of finality and exhaustion because the purpose of timing rules is to give local governments an opportunity for decision making that can avoid litigation. The model statute below defines when a decision is final

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[47] *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 (U.S. 1997); *McDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[48] *Port Clinton Assoc. v. Bd. of Selectmen*, 217 Conn. 588, 587 A.2d 126 (1991); *Long Beach Equities Inc. v. Ventura County*, 282 Cal.Rptr. 877 (Cal. App. 1991); *Drovers Bank v. Village of Hinsdale*, 208 Ill.App.3d 147, 566 N.E.2d 899 (1991).

[49] Or. Rev. Stat. §197.015(10) (1998).

for purposes of judicial review, and allows local governments to determine the administrative remedies authorized by this Chapter that are required for exhaustion.

Another issue legislation should address is the link between federal and state court jurisdiction. Considerable confusion has arisen when federal courts remand land-use cases to state courts because the federal court abstained or decided the case is not yet final. Often it is not clear whether the state court decision precludes a return to federal court because the state court has decided the issues raised in the federal litigation. Federal courts look to state courts for decisions on these issues, so state legislation should specify the role of state courts on remand. It should require a state court to make a record on the issues decided so that litigants will know whether res judicata bars them from returning to federal court.

STANDING: WHO CAN BRING SUIT?

Standing rules determine who may bring suit in court. Landowners have standing to challenge land-use decisions affecting their property. The principal standing problem arises with "third party" organizations and individuals who wish to challenge a land-use decision in court but who did not participate in the decision making process. Neighbors who wish to challenge rezonings to more intensive uses are one example. Organizations and nonresidents who wish to challenge exclusionary zoning are another. Third party standing often is essential to raise social issues in land-use cases because the parties to the case may be pleased with the decision and will not seek judicial review.

Federal and state standing rules differ. Standing has a constitutional basis in federal court because standing to sue is part of the constitutional "case and controversy" requirement. No constitutional requirement governs standing in state courts, and the decision to take or decline cases is within a state court's discretion.

Federal courts beginning about 25 years ago developed liberal standing rules that opened the doors of federal courts to third party litigants.[50] Some state courts have adopted the federal rules, but some have not. The U.S. Supreme Court in recent years has been less willing to grant standing to third parties,[51] and state court cases may follow these recent decisions.

The issue of whether to grant standing to third parties is a complex one. On the one hand, a local government may not have considered, or even deliberately ignored, legitimate issues and interests when making its decision, and the decision has therefore infringed upon a valid interest or caused injury to some person or group. In such cases, a legal remedy should be available to an affected third party. On the other hand, a person or group that had an opportunity to participate in an open and inclusive planning process but whose position was ultimately rejected in full debate may use

[50]A person has standing if he or she (1) suffered an injury in fact and (2) the interest he or she seeks to protect is arguably within the zone of interests to be protected. *Warth v. Seldin*, 422 U.S. 490 (1975); Assn. *of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

[51]The more recent Supreme Court cases have required a "but for" causal connection between the injury and the conduct complained of, and there must be a "substantial likelihood" that the relief sought, if granted, would remedy the harm. *Lujan v. Defenders of Wildlife*, 497 U.S. 871 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984).

legal challenges to delay, obstruct, or even reverse the valid decision of that democratic process. Any standing rule for third parties must therefore be an attempt to balance the need to allow injured persons and groups to challenge bad decisions with the need to have good decisions reached by good process implemented in an efficient and timely manner.

Third-party standing is used in a variety of ways – when neighbors challenge rezonings to more intensive uses, nonresidents challenge exclusionary and other zoning actions, organizations seek to have their perspective or interest addressed specifically in a land-use decision, or businesses challenge actions that affect competitors. Generally speaking, courts grant standing to neighbors to challenge a rezoning only if it clearly has an impact on the use of their land. Courts divide on whether to grant standing to nonresidents and to organizations, although some state courts follow the federal rules that allow courts to grant standing to organizations.[52] State courts do not allow litigants to challenge zoning that benefits their competitors. Courts may also deny standing to litigants who did not participate in the land-use decision they challenge.

State legislation usually handles standing problems by granting standing to persons "aggrieved" by land-use decisions.[53] This is the usual method for defining standing, but the "aggrievement" standard is ambiguous – some states define the term "aggrieved" by statute while some others do not – and not always helpful in deciding standing disputes. State legislation should specify rules for standing in land-use cases, so that standing rules are relatively clear and are tailored to the planning and land-use statutes with which they will interact.

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[52] *Northridge Community Ass'n v. Fulton County*, 257 Ga. 722, 363 S.E.2d 251 (1988); *Brandywine Pk. Condo. Council v. Wilmington Zoning Bd. of Adjustment*, 534 A.2d 286 (Del. Super. 1987); *Douglaston Civic Ass'n v. Galvin*, 43 A.D.2d 739, 350 N.Y.S.2d 708 (1973). Basically, the federal standard is that an organization cannot *in itself* have standing, but may have standing to represent the common interests of the organization's members. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

[53] Examples from state statutes show how they address the question of who is "aggrieved": "Any person aggrieved in any manner by an action of a board of adjustment may within thirty days appeal to the superior court, and the matter shall be heard de novo as appeals from courts of justices of the peace." Ariz. Rev. Stat. §11-807(D) (this statute as originally enacted also granted standing to "any taxpayer" of the local government, but was amended to remove this language); "Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer or any officer, department, board or bureau of the municipality may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality." Del. Code. Ann. tit. 22, §328; "Any aggrieved or adversely affected party may maintain an action for injunctive or other relief against any local government to prevent such local government from taking any action on a development order ... which materially alters the use or density or intensity of use on a particular piece of property that is not consistent with the comprehensive plan adopted under this part." Fla. Stat. §163.3215(1); "[A]ny person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court...." Me. Rev. Stat. tit. 5, §11001(1); "An appeal of an enactment of or an amendment to a zoning ordinance may be taken to the superior court for the county in which the municipality is situated by filing a complaint, as set forth herein, within thirty (30) days after the enactment or amendment has become effective. The appeal may be taken by an aggrieved party or by any legal resident or landowner of the municipality or by any association of residents or landowners of the municipality." R.I. Gen. Laws §45-24-71(A).

SCOPE OF JUDICIAL REVIEW AND REMEDIES

The basis for state court review of land-use decisions often is unspecified in state statutes. Review for lack of statutory authority or lack of authority in a local ordinance always is available. State courts may also review for "arbitrary and capricious" decisions without specifying whether this standard means review for unconstitutionality. State courts can also apply federal constitutional law because litigants can sue on the federal constitution in state courts. They usually apply federal free speech law and may apply federal decisions on equal protection and due process issues.

This overlap and confusion in the scope of judicial review may make it necessary to specify through legislation the basis for judicial review of land-use decisions. This type of provision is common in state administrative procedure acts. Another issue that requires attention is the presumption of constitutionality. Federal and state courts increasingly shift the presumption of constitutionality against government when they believe it should bear the burden of proof in land-use cases. Exclusionary zoning is an example.

Existing state legislation is unclear on the basis for review when a lower court reviews a land-use decision. Some states allow a trial de novo of the facts, while others confine trial court review to a narrow review of the record. A trial de novo is preferable when the land-use agency does not hold a hearing and does not create a formal record, as often happens with legislative land-use decisions. Review in a lower court can be on the record when a land-use agency makes a formal record following a quasi-judicial hearing.

Specific remedial relief is another important issue. A minority of courts grants specific relief based on findings included in a trial record if they find a land-use regulation is invalid. Specific relief usually requires a municipality to grant permission for a development a landowner proposed, such as the "builder's remedy" courts grant in exclusionary zoning cases.

SOME APPROACHES TO REFORM

There are a number of approaches to addressing the issues of judicial review, standing, timing, and remedies discussed above.

The American Law Institute's *Model Land Development Code* proposed a unified system for judicial review of land-use decisions. These provisions, in Article 9 of the Code, are complex and are not easily summarized. However, a basic philosophy of the Article is that the grounds for review, such as unconstitutionality or abuse of administrative discretion, are to be made the same regardless of the form of action. The Article thus prescribed a standardized method of judicial review of the three principal actions that may be taken under the Code: legislative ordinances, administrative rulemaking, and administrative orders–the grant, denial, or issuance with conditions of a development permit–with or without an adjudicatory type of hearing.[54] This complicated attempt to transfer procedures for the judicial review of state agencies to the local level is, as a practical matter, unworkable, and no state adopted it as proposed.

[54] ALI Code, 366-367.

In **Oregon**, the Land-use Board of Appeals (LUBA) is a state body of three attorneys appointed by the governor with the consent of the senate.[55] It hears appeals from all land-use decisions, whether quasi-judicial or legislative, of municipal, county, and regional governments, and of special districts and state agencies whose decisions are not directly appealable to a court of law.[56] The standing requirement for an appeal to LUBA is very liberal: any person who participated in the local land-use proceeding can appeal the decision arising from that proceeding.[57] LUBA conducts its appeals on a closed-record basis, relying on the record prepared by the government in making its decision, and the statutory time limits for filing appeals, briefing, and the production of an opinion and order mean that LUBA conducts its reviews much more expeditiously that the courts of law.[58] LUBA has the power to stay land-use decisions pending its review.[59] LUBA must reverse and remand land-use decisions that (a) violate the constitution, state goals, or the applicable comprehensive plan, (b) are based on an error in law, or (c) have an inadequate evidentiary basis.[60] However, a reversal or remand on procedural grounds may be granted only when "substantial rights" were impaired or prejudiced by the procedural error.[61]

The intent in creating LUBA was to provide an efficient means of resolving disputes over land-use decisions within a relatively short period of time. Local governments in Oregon are required by statute to make decisions, including appeals, on development applications (permits and zone changes) within 120 days after the application is deemed complete.[62] From the date of the final land-use decision from a local government, a petitioner has 21 days to file an appeal. The statute requires that the record must be submitted, the case briefed, and LUBA's opinion and order must be issued within 77 days of the transmittal of the record.[63] Extensions can be granted under limited circumstances.[64]

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[55]Or. Rev. Stat. §197.810.

[56]Or. Rev. Stat. §197.015(10)(a).

[57]Or. Rev. Stat. §197.830(3)(c)(B) (1997); *Jefferson Landfill Comm. v. Marion County*, 297 Or. 280, 686 P.2d 310 (1984); *League of Women Voters v. Coos Cty.*, 15 Or. LUBA 447 (1987).

[58]Or. Rev. Stat. §197.830(8), (13), (14).

[59]Or. Rev. Stat. §197.845.

[60]Or. Rev. Stat. §197.835(3) - (7)(a).

[61]Or. Rev. Stat. §197.835(7)(a).

[62]Or. Rev. Stat. §§215.428(1) and 227.178(1).

[63]Or. Rev. Stat. §197.830 (1998).

[64]Id., §197.840.

Washington's approach to administrative review is embodied in the Land-use Petition Act.[65] The land-use decisions of counties, cities, and incorporated towns are reviewable in the Superior Court upon petition.[66] Applicants for the land-use decision and owners of the land that is the subject of that decision have standing to appeal. Other persons aggrieved by the decision have standing only if (a) the decision prejudices them, (b) their interests were among those the local government was required to consider in making the decision, (c) a judgment in their favor would substantially redress the prejudice, and (d) they have exhausted administrative remedies.[67] The petition must be served in the manner of a civil complaint and summons upon the local government that made the land-use decision, all applicants and owners, and any person who brought an appeal.[68] The judicial appeal is to be an expedited review, and a hearing on the merits must be held within 60 days of the date when the local government record of the decision is due to be filed with the court.[69] As an expedited review, the procedure is an appeal on the record and discovery is not usually available.[70] The court may order a stay of action on the land-use decision pending its judgment, but only if the party requesting a stay will be irreparably harmed without it and is likely to win on the merits.[71] The court cannot find for the petitioner except on the grounds that the land-use decision (a) was made by an officer or body engaged in unlawful procedure (unless the error was harmless), (b) is an erroneous interpretation of the law, (c) is not supported by substantial evidence, (d) is a clearly erroneous application of the law to the facts, (e) is outside the authority or jurisdiction of the officer or body making the decision, or (f) violates the constitutional rights of the petitioner.[72] The judicial review provisions in the model statute below are modeled on the Land-use Petition Act, the only law of its kind in the country.

In **Pennsylvania**, when an landowner (or developer) challenges a zoning ordinance, he or she may submit a curative amendment to the ordinance that would remedy the alleged invalidity. The municipality may also prepare and consider its own curative amendment, if it finds the zoning ordinance, or portion thereof, is "substantially invalid." If the local government rejects the landowner's curative amendment but a court finds that the challenge has merit, a state court may invalidate those portions of the ordinance that are contrary to the landowner's proposed curative

[65]Wash. Rev. Code §§36.70C.005 *et seq.* (1998).

[66]Wash. Rev. Code §36.70C.040.

[67]Wash. Rev. Code §36.70C.060.

[68]Wash. Rev. Code §36.70C.040.

[69]Wash. Rev. Code §36.70C.090.

[70]Wash. Rev. Code §36.70C.120.

[71]Wash. Rev. Code §36.70C.100.

[72]Wash. Rev. Code §36.70C.130.

amendment. [73] If a court could not give a landowner specific relief, but only generally invalidates the ordinance, a municipality may still adopt a different – but still invalid – land-use regulation, and the landowner will then have to sue again.[74] This reform has not proved successful, and the model statute below does not adopt it. However, it does authorize a court to grant specific relief to a litigant when it reverses a decision by a local government and decides that specific relief is justified, rather than a remand.

The model statute proposed here addresses all of the issues that are likely to arise in the judicial review of land-use decisions. In some states, such as New Jersey, procedural matters concerning judicial review are covered in Supreme Court rules. In these states, procedural issues covered in the model statute could be addressed in Supreme Court rules.

10-601 Purposes

> The purpose of Sections [10-601 to 10-618] is to provide for the judicial review of land-use decisions by local governments by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

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

Commentary: Exclusive Method of Judicial Review

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

As defined by Section 10-101, a "land-use decision" is a decision made by a local government on a development permit application. A "development permit," as defined in Section 10-101, is a permit for development under the land development regulations. It incorporates, for example, the final plat approval subdivision, and a remedy, such as conditional uses and variances under this chapter. A land-use decision on an application for a development permit is often made following

[73]Pa. Stat. Ann. tit. 53, §10609.1to .2 (1999).

[74]Jan Krasnowiecki & L.B. Kregenow, "Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code," Vill. L. Rev. 39 (1994): 879.

a hearing in which a record is created, and the judicial review authorized under this chapter takes the existence of a record into account.

A writ of mandamus, which seeks to compel an action by a local government, and a writ of prohibition, seeking to prohibit action by a local government, are exempt from judicial review under this Chapter. For example, an applicant who believes that a local government has improperly refused to find her development application complete can bring an action in mandamus to compel the local government to accept the application, on the theory that there is a duty to accept an application that complies with the legal requirements for applications. See Sections 10-202, 10-203.

Neither does the Section prohibit an application for an injunction or declaratory judgment where the claim is that a land development regulation or comprehensive plan is invalid or unconstitutional. The adoption or amendment of a comprehensive plan or land development regulation is usually considered a legislative act that does not require a development permit, so the judicial review remedy provided by this Chapter does not apply.

Section 10-602 also exempts claims for damages or compensation, which may be brought in state court under the state constitution or under the federal constitution, and claims brought in state court under Section 1983 of the Federal Civil Rights Act. While a petitioner may join these claims with a petition for judicial review under this Chapter, they do not have to do so in order to preserve the claims, and the filing of a petition for review does not bar the later filing of an action for damages or compensation. Also, the procedures unique to Chapter 10 judicial review do not apply to legal claims for damages or compensation. This Section is based on Wash. Rev. Code Ann. §36.70C.030.

10-602 Method of Judicial Review Exclusive

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

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

(a) a writ of mandamus or prohibition;

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

(c) claims for monetary damages or compensation.

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

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

Commentary: Judicial Review

Section 10-603 makes it clear that judicial review of land-use decisions is available by filing a land-use petition, which is equivalent to a complaint or petition in a civil action. A state may want to add a provision on joinder of parties, if this problem is not covered by court rules or another statute. See Wash. Rev. Code §36.70C.050.

This Section, in paragraph (1), requires a final land-use decision before judicial review is available. Paragraph (2) defines finality. The definition of finality is written so that an appeal of a land-use decision to a court is not necessary to make a decision final. (However, under Section 10-604, a final decision is not appealable if administrative remedies have not been exhausted, unless seeking those remedies would be futile.) Neither is an application for a zoning map amendment necessary.

10-603 Judicial Review of Final Land-Use Decisions

(1) Any person with standing pursuant to Section [10-607] may obtain judicial review of a final land-use decision under this Chapter by filing a land-use petition with the [*name of court*].

(2) A land-use decision is a "final land-use decision" if:

(a) an application for a development permit is complete or deemed complete pursuant to Section [10-203]; and

(b) the local government has approved the application, has approved the application with conditions, or has denied the application; [or]

[(c) the application is deemed approved under Section [10-210]].

♦ This provision is in brackets because "deemed approval" is an option in Section 10-210. If the alternative option is chosen, there is no "deemed approval" and this subparagraph serves no purpose.

(3) The issuance or denial of a certificate of nonconforming use under Section [8-502] is a final land-use decision.

(4) A decision arising from an appeal pursuant to Section [10-209] is a final land-use decision.

Commentary: Exhaustion of Remedies

State courts require that petitioners for judicial review must exhaust administrative remedies and appeals before judicial review is available. Courts may impose this requirement in addition to or instead of the ripeness requirement. Section 10-604 below codifies this requirement. It clarifies its meaning by only requiring exhaustion of administrative appeals and the conditional use and variance remedies available in this Chapter.

A land-use decision is appealable under Section 10-603. However, since land development regulations must include an appeal to a local officer or body under Section 10-209, it will be necessary to first make such an appeal, with limited exceptions. State courts have adopted a futility exception to exhaustion,[75] which this Section codifies in paragraph (2)(a). The definition of futility is left to judicial decision. See also Minn. Stat. Ann. §462.361 (need not exhaust remedies if court finds "that the use of such remedies would serve no useful purpose under the circumstances of the case"). Paragraph (2)(b) codifies the judicial rule[76] that exhaustion is not required if the administrative remedy is inadequate. Paragraph (2)(c) codifies the judicial rule[77] that exhaustion is

[75] *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 526 N.E.2d 1350 (Sup. Ct. 1988)(city attorney states on record that variance will not be issued); *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66 (Minn. 1984)(no need to appeal to city council when council's statements and past decisions indicated clearly that relief requested would not be granted); *Van Laten v. City of Chicago*, 28 Ill.2d 157, 190 N.E.2d 717 (1963)(zoning ordinance amended twice since suit but change sought not made). But see *O & G Industries v. Planning & Zoning Comm'n*, 655 A.2d 1121 (Conn. 1995) (mere claim of bias not sufficient).

[76] *In re Fairchild*, 616 A.2d 228 (Vt. 1992)(no adequate administrative remedy when zoning official refuses to enforce zoning ordinance); *City of Rome v. Pilgrim*, 246 Ga. 281, 271 S.E.2d 189 (1980)(ordinance had no authorization for requested use variance); *Montgomery County v. Citizens Bldg. & Loan Ass'n*, 20 Md. App. 484, 316 A.2d 322 (1974)(sign ordinance did not authorize variances; sign review board could not grant relief); *Sinclair Pipe v. Village of Richton Park*, 19 Ill.2d 370, 167 N.E.2d 406 (1960)(doubtful that zoning board of appeals could legally grant desired variance for light industrial use in multi-family residential zone).

[77] *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926); *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972), appeal dismissed on other grounds 409 U.S. 1003. See *Northwestern Univ. v. City of Evanston*, 28 Ill.2d 157, 383 N.E.2d 964 (1978)(prohibition of commercial activities in university zone not arbitrary in the abstract; challenge to prohibition therefore not facial).

not required if a petitioner for judicial review claims a comprehensive plan or land development regulation under which a land-use decision was made is facially invalid. A state may decide not to codify or to modify the codification of the exhaustion of administrative remedies rule.

10-604 Exhaustion of Remedies

(1) The [*name of court*] shall have jurisdiction over a land-use petition if and when the petitioner has exhausted the appeal procedures provided under Section [10-209] and the applicable remedies available under Sections [10-502 and 10-503] of this Chapter.

♦ For example, if there is no conditional use provision applicable to the property in question as zoned, an applicant does not have to seek a conditional use before commencing judicial review.

[(2) Exhaustion of administrative remedies under paragraph (1) is not required:

(a) if an appeal or an application to obtain an administrative remedy would be futile;

(b) if an administrative remedy is inadequate; or

(c) for a claim that the local comprehensive plan or land development regulations on which the local government relied for its land-use decision are facially invalid.]

♦ It should be noted that different exceptions may have arisen in individual states, and such states may wish to substitute those exceptions for those provided in paragraph (2).

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

♦ The intent of this provision is to adopt the body of case law interpreting the specified terms and provisions of this Section. In some states, "common law" signifies case law or judge-made law in general. In other states, "common law" has the specific meaning of the rules of case law and certain English statutes up to a particular year, often 1776.

Commentary: Federal Claims

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

to reserve a federal claim. This Section also deals with a question of jurisdiction in federal courts, and arguably is not appropriate for inclusion in a model land-use statute. However, it is only in land-use cases that the federal courts apply stringent jurisdictional rules that often bar litigants who wish to file a land-use action. The Section is therefore optional.

[10-605 Federal Claims

Any person who files a land-use petition under this Chapter may include in the petition a statement reserving any federal claim arising out of the land-use decision that is the basis for the petition, and a prayer that the court reserve these claims in its decision under Section [10-615].]

10-606 Filing and Service of Land-Use Petition

(1) A land-use petition is barred, and a court may not grant review, unless the petitioner has timely filed the petition with the court and timely served, by summons, the petition on the following persons, who shall be parties to the review of the land-use petition:

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

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

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

(2) The petition is timely if it is filed and served on all parties listed in paragraph (1) of this Section within [21] days of the issuance of the land-use decision by the local government, or within [21] days after a decision is deemed approved under Section [10-209].

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

Commentary: Standing and Intervention

State courts require petitioners for judicial review of land-use decisions to have standing to sue, and many state land-use statutes define standing. In addition to mandatory standing for the applicant or owner of property that is the subject of the land-use decision, parties to a hearing, and neighbors, this Section grants standing to persons and organizations aggrieved by the land-use decision. This is the usual basis for standing in state courts. The Section also extends standing to organizations, and uses the tests for standing to control intervention in judicial review proceedings. The Section is

based on Wash. Rev. Code §36.70C.060, with the addition of mandatory standing for neighbors, as provided by Vt. Stat. Ann. tit. 23, §4464(b).

The Section adapts language from the Washington statute that defines when a person or organization is aggrieved. The purpose of this definition is to require that parties seeking standing to challenge a land-use decision have a sufficient interest to create an actual controversy. This requirement makes it unnecessary to place additional limitations on appeals by organizations, such as a requirement that a neighborhood or community organization show that it represents a certain percentage of residents in a neighborhood it purports to represent. It is the intention of this Section that aggrieved persons and organizations have standing without necessarily having participated in a hearing on the development permit application that was the subject of the land-use decision. This Section applies to administrative reviews on development permit applications as authorized by Section 10-204.

The Section, at various points, contains alternative language to define standing. These alternatives are enclosed in brackets. A state may decide not to define when a party seeking standing is aggrieved. That decision will then be left to the courts. And because a state may have a clear standing rule from case law or statute that it wishes to use in the *Guidebook* in place of the model provided, the entire substantive portion of the Section has been placed in brackets.

10-607 Standing and Intervention

The following persons have standing to bring a land-use petition under Section [10-603], and to intervene in a proceeding for judicial review brought under that Section:

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

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

♦ This provision authorizes a local government to seek judicial review of an adverse decision in a Section 10-209 appeal.

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

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

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

10-608 Required Elements in Land-Use Petition

A land-use petition must set forth:

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

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

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

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

(5) identification of the decision-making officer or body, together with a duplicate copy of the written decision;

(6) identification of each person whom the petitioner knows or reasonably should know is eligible to become a party under Section [10-606(1)];

(7) facts demonstrating that the petitioner has standing to seek judicial review under Section [10-607];

(8) a separate and concise statement of each error alleged to have been committed in an administrative review, record hearing, or record appeal.

(9) a concise statement of facts upon which the petitioner relies to sustain the statement of error; and

(10) a request for relief, specifying the type and extent of relief requested.

♦ This Section is based on Wash. Rev. Code §36.70C.080 and contains standard language specifying the contents of a petition.

10-609 Preliminary Hearing

(1) When appropriate, in the petition served on the parties identified in Section [10-607(1)], the petitioner shall note, according to the rules of the [*name of court*], a preliminary hearing on jurisdictional and preliminary matters, including standing. The court shall set the preliminary hearing no sooner than [35] days and no later than [50] days after the petition is served on the parties identified in Section [10-606(1)].

(2) The parties shall raise all motions on jurisdictional and procedural issues for resolution at the preliminary hearing, except that a motion to allow discovery may be brought sooner.

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the preliminary hearing, unless the court allows discovery on such issues.

(4) The petitioner shall move the court for an order at the preliminary hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the preliminary hearing by scheduling with the court a date for the hearing or trial on the merits, and by filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in paragraphs (3) and (4) of this Section.

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

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

10-610 Expedited Judicial Review

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

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

Commentary: Stays of Action

Whether, and under what circumstances, a court should stay an action by a local government or another party is an important question. For example, if a development that is permitted by a land-use decision is not stayed, a developer can moot the case by completing the development pending the appeal.

This Section authorizes a stay, and is based on Wash. Rev. Code §36.70C.100. Unlike the Washington law, this Section does not provide for an evidentiary hearing on the stay order to

determine whether the party requesting the stay is likely to prevail on the merits, whether the stay is necessary to prevent irreparable injury, and whether will not substantially harm other parties and is timely. An evidentiary hearing on the need for a stay order is a mini-trial on the merits of the petition, and can create unnecessary delays before the case goes to trial. It is the intention of this Section, however, that a court should have the discretion to consider the merits of the case and the other factors noted above when setting the amount of the bond. See Jan Krasnowiecki and L.B. Kregenow, "Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code," *Vill. L. Rev.* 39 (1994): 879, 904-06

When a development is approved by a local government in a land-use decision, an opponent of the development may file a petition for judicial review. Because the filing of petition may delay the development for a substantial period of time, even if the petitioner does not obtain a stay order, this Section also authorizes the owner of the land that has been approved for development to request an order requiring the petition to file security. The intent again is to give the court the discretion to take the merits of the opponent's case and other factors concerning the effect of a delay on the development into account when deciding whether to require security. See Krasnowiecki & Kregenow, supra. Section 10-602(4) makes the rules for civil actions applicable to appeals under this chapter, and the rules can provide additional guidance on stay orders, including guidance on the escrow and disposition of security.

10-611 Stay of Action Pending Judicial Review

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

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

10-612 Submittal of Record for Judicial Review

(1) Within [45] days after entry of an order to submit the record, or within such further time as the court allows or as the parties agree, the local government shall submit to the court a certified copy of the record of the land-use decision for judicial review, except that the petitioner shall prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter.

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

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

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

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

Commentary: Review and Supplementation of the Record

This Section authorizes a reviewing court, when presented with the record of the administrative hearing below, to either remand the case to the decision-making body or to supplement the record in proceedings before the court. Remand is the preferred method of resolving shortcomings in the record, as the grounds for supplementing the record under the model Section are limited, but judicial supplementation of the record has a place in a proper system of judicial review.

There are positive and negative effects from authorizing courts to supplement the record. Generally speaking, the benefits are:

(1) *Time*. It is more efficient to resolve all issues recognized by the court while the parties are before the court, as opposed to the delay involved in a remand to the local governmental body.

(2) *Fairness.* The court is a neutral arbiter, while the local governmental body may have a vested interest in, or be subjected to political pressure to make, a particular decision.

(3) *The "Ping-Pong" Effect.* If an administrative body or officer is determined (for whatever reason) to make a particular decision, regardless of the court's judgment, it can, upon remand, make minor adjustments to its findings while coming to the same basic decision. This could create a circle of remands, "new" decisions, appeals, and further remands.

(4) *Politically-impaired fact-finding.* Though a local body sitting quasi-judicially has a duty to make findings of fact in a neutral manner, political considerations may cause the body to make whatever findings are needed to achieve a particular outcome. And since reviewing courts are

generally required to defer to administrative fact finding, judicial review with remand as the only remedy would not necessarily solve this problem.

Conversely, the potential negative effects of permitting judicial supplementation of the record are:

(1) *Cost.* Judicial proceedings are generally more expensive than administrative hearings.

(2) *Experience.* The local government is more familiar than the judge with the intent and content of its regulations and the land-development and socio-economic environment it faces, and thus has a better foundation upon which to make an informed decision.

(3) *"Right Decision, Wrong Reason."* There may be multiple facts or arguments supporting the local government decision, but the written determination addressed only one or some because the local government did not need to reach the others to make its decision. A remand would allow the local body or officer to consider these unaddressed arguments, while a court willing to go beyond the record may reverse the decision on the grounds that the stated basis in the written determination is not legally or factually correct.

(4) *Local government autonomy.* When a local body effectively loses its fact-finding power in a particular case because the court has retained the case for supplementation of the record, it loses the ability to consider the facts and circumstances in light of local policy in all its written and unwritten intricacies. The court is aware of the written policy but not necessarily of the uncodified interpretations and nuances the policy has amassed in its adoption and enforcement.

PROVISIONS OF THE MODEL SECTION

This Section makes it clear that judicial review of factual issues is based on the record made before the body or official that made the decision. Paragraph (1) provides limited opportunity to introduce evidence to supplement the record. It is based on Wash. Rev. Code §36.70C.120 and is typical of authority found in other statutes allowing the review of land-use decisions. See Utah Code Ann. §10-9-708(5)(a)(i). This narrow authority to allow supplementary evidence is intended to allow additional evidence at trial only when exclusion of the evidence would be patently unfair. Except in such limited circumstances, the remedy for an inadequate record should be a remand to the local government for further proceedings.

Paragraph (1) reflects the belief that the taking of evidence should occur at the local government level in the local hearing process, where it can form the basis for the local government's decision. Parties would not be allowed, under this view, to retry a case on the facts once it gets into court. Paragraph (2) applies when the record for review does not contain findings of fact. It authorizes the court to allow evidence of material facts that are not part of the submitted record. Paragraph (2) is based on Wash. Rev. Code §36.70C.120.

10-613 Review and Supplementation of Record

(1) When the [*name of court*] is reviewing a land-use decision by an officer or body that made findings of fact in a record to support its decision, the court shall base its review on the

record and may remand the land-use decision for further proceedings, or may supplement the record with additional evidence only if that additional evidence relates to:

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

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

(c) correction of ministerial errors or omissions in the preparation of the record; [or]

Optional Paragraph (d)

[(d) matters indispensable to the equitable disposition of the appeal.]

♦ Because judicial review occurs only after a hearing on the development permit application after which a decision is made based on findings in a record, supplementation of the record in judicial review should occur rarely. One instance, specified in subparagraph (a), occurs when information that would disqualify a decision maker was unknown by the petitioner at the time of the hearing. Another instance, specified in subparagraph (b), occurs when matters were matters were improperly excluded from the hearing. The Section gives the court the authority, in its discretion, to order supplementation of the record or to remand the case to the decision-making body so it can take additional evidence.

Optional paragraph (d) is based on Conn. Gen. Stat. §8-8(k), and similar statutes, that give the trial court some discretion on the decision to admit supplementary evidence or to remand. See also N.H. Rev. Stat. §677:15(III). This paragraph reflects the view that the court should have a limited amount of discretion to admit supplementary evidence because it, unlike the local government that makes the decision, is an impartial decision maker in the land-use controversy.

(2) When a court is reviewing a land-use decision by an officer or body that did not make findings of fact in a record to support its decision, the court may supplement the record by allowing evidence of material facts that were not made part of the local government's record.

(3) If the court allows the record to be supplemented, the court shall require the parties to disclose before the preliminary hearing or trial on the merits the specific evidence they intend to offer.

10-614 Discovery When Record Supplemented

The parties may not conduct pretrial discovery except with the prior permission of the court, which may be sought by motion at any time after service of the petition. The court shall not grant permission unless the party requesting it makes a prima facie showing of need. The court shall strictly limit discovery to what is necessary for equitable and timely review of the issues that parties seek to raise through the introduction of supplementary evidence as authorized by Section [10-613].

♦ This Section authorizes discovery when parties are allowed to supplement the record. It is based on Wash. Rev. Code §36.70C.120. A motion for discovery may be brought before the preliminary hearing. See Section 10-609(2). This Section is not necessary if discovery is covered by rules of court or another statute.

Commentary: Standards for Granting Relief

This Section provides the standards under which a court can award relief. The standards provided are similar to those contained in state administrative procedure acts, but the Section adds a requirement that the land-use decision must be consistent with the local comprehensive plan and must comply with the land development regulations. Paragraph 1(g) is intended to cover violations of both the state and federal constitution, and includes procedural and substantive due process, equal protection and takings claims. A court is not allowed to award compensation in the judicial review of a land-use decision under this Chapter. However, the petitioner can join claims for compensation, as well as claims under Section 1983 of the Federal Civil Rights Act, in a petition for judicial review. See Section 10-602(3). In these actions, a court can award compensation and other appropriate compensatory relief. Paragraph (2) implements Section 10-605(1), which authorizes a petitioner for judicial relief to reserve federal claims.

10-615 Standards for Granting Relief

(1) The court may grant relief only if the party seeking relief has carried the burden of establishing that one or a combination of the following standards has been met. The standards are:

(a) the officer or body that made the land-use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error did not do substantial harm;

♦ The term "unlawful procedure" is intended to refer to procedure that violates the local government's unified development permit review process, as required by this Chapter.

(b) the land-use decision is an erroneous interpretation of the law[, after allowing for such deference as is due the construction of a law by a local government with expertise];

- The bracketed language would require a court to defer to the agency's expertise in deciding questions of law. This language can be omitted if a state decides that a court should decide legal questions without being limited by this presumption.

(c) the land-use decision is not consistent with the local comprehensive plan as determined pursuant to Section [8-104], [if consistency is required by [*name statute*]], or does not comply with the land development regulations; or

- Subparagraph (c) is based on Ore. Rev. Stat. §197.835(8). It requires the land-use decision to be consistent with the local comprehensive plan and land development regulations and requires the court to make a legal judgment based on the textual provisions of the plan and regulations. The language contained in brackets should be inserted if the enabling legislation does not require all land-use decisions to be consistent with the plan. For example, it might not require site plans to meet a consistency requirement.

(d) the land-use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court, and any evidence submitted to the court, including such supplementary evidence as the court permitted under Section [10-613].

- The "substantial evidence" test is the standard test applied to the judicial review of findings of fact based on a record. This subparagraph modifies this test to include supplementary evidence introduced at trial. A court is not required to make findings of fact based on supplementary evidence submitted to it, but may rely on this evidence as a basis for granting relief to the plaintiff, if it believes that relief is justified.

(e) the land-use decision is a clearly erroneous application of the law to the facts;

(f) the land-use decision is outside the authority or jurisdiction of the officer or body making the decision; or

(g) the land-use decision violates the constitutional rights of the party seeking relief.

(2) If a petitioner has reserved a federal claim in a petition filed under Section [10-605], the court shall note in its decision that these claims are reserved.

10-616 Decision of the Court

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

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

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

♦ Paragraph (1) is standard language governing the availability of judicial relief. It is based on Wash. Rev. Code §36.70C.140. See also Idaho Rev. Code §67-5279. Paragraph (2) is based on Pa. Stat. Ann. tit. 53, §11006-A, and authorizes the court to require the local government to consider alternative requirements and conditions on remand. Paragraph (3) is intended to give a court broad discretion in attaching conditions to a remand. For example, a court could condition a remand with an extension or stay of compliance or enforcement proceedings. This type of order is recommended by the American Bar Association. See the guidelines on judicial relief in House of Delegates, Amer. Bar Ass'n, Resolution No. 107B (Aug. 1997). The Resolution provides guidelines for decisions when stays should be granted, and recommends against granting stays in most cases. Although these guidelines are not an interpretation binding on the model law, they can be consulted for guidance on stay orders.

Commentary: Definitive Relief

Definitive relief is essential, in appropriate cases, to allow a petitioner to proceed with her development without going back to the local government for additional proceedings. Some courts, if they reverse a land-use decision, will order the issuance of a development permit to the petitioner rather than remand if issuance of the permit is justified on the record. A typical case is the denial of a zoning variance. This paragraph codifies this authority, but the decision on whether to issue a development permit is in the court's discretion.

Note that the court must find that definitive relief is "appropriate," and it is the intent that this determination should be based on the court's decision reversing the denial or conditional approval. Presumably, a court would not order definitive relief by compelling the issuance of a development permit unless it found, in its decision, that the applicant had complied with all the requirements on which the issuance of a development permit would be based, whether or not they were considered in the court hearing. It is intended that the court would call for a hearing on definitive relief, in which it would consider arguments on whether definitive relief is appropriate under the circumstances. For example, there may be issues not considered in the court hearing which would require consideration after a remand. See Section 10-616. This Section is based on 53 Pa. Stat. §11006-A(c)(e).

10-617 Definitive Relief

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

10-618 Compensation and Damages Disclaimer

A grant of definitive or other relief under this Chapter does not, by itself, establish liability for compensation or monetary damages, nor does a denial of definitive or other relief under the Chapter establish a presumption against liability for compensation or other monetary damages.

Appendix – Literature on Administrative and Judicial Review of Land-Use Decisions[78]

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