

CHAPTER 11

ENFORCEMENT OF LAND DEVELOPMENT REGULATIONS

This Chapter addresses the manner in which local land development regulations are enforced. It stresses pursuing administrative remedies before resorting to judicial measures. Under these models, informal enforcement is the initial option. Should more formal means be required, the Chapter provides model language for official notice to alleged violators, procedures for issuing preliminary orders and conducting enforcement hearings, and methods for enforcing final orders. Where administrative action is not or would not be successful, the local government can pursue judicial relief, through civil and criminal proceedings that ensure compliance.

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ENFORCEMENT OF LAND DEVELOPMENT REGULATIONS

Land development regulations, no matter how carefully crafted, are only as good as their enforcement. This Chapter is concerned with enforcement methods. The topics in this Chapter are distinct from those in Chapter 10, which addresses issues of appeal or review (i.e., instances in which a property owner seeks reevaluation of some local government decision).

For land development regulations, the norm is compliance. Instances of a local government having to resort to enforcement are, in fact, relatively rare. Nevertheless, for compliance to be routine, there must be an enforcement procedure, with remedies and penalties that will obtain compliance from the reluctant or obstinate.

APPROACHES TO ENFORCEMENT IN MODEL LAWS

The *Standard State Zoning Enabling Act*¹ (SSEA), drafted in the 1920s by an advisory committee of the U.S. Department of Commerce, contains provisions governing the enforcement of land-use regulations. Section 8 of the Act granted broad authority for the local legislative body to “provide by ordinance for the enforcement of this Act and of any ordinance or regulations made thereunder.” In addition to general authority, the SSEA provides specific remedies: violation of the Act or zoning ordinances or regulations is a misdemeanor, civil penalties may be assessed, and the local government has a cause of action “to prevent . . . unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.”

The Municipal Zoning Enabling Act (MZEA), written by Edward Bassett and Frank Williams in 1935,² varies in significant ways from the *Standard State Zoning Enabling Act*. Section 8 of the MZEA, regarding enforcement, however, parallels the SSEA. It authorizes the local legislative body to “provide by ordinance for the enforcement of this Act and of any ordinance or regulations made thereunder.” It also includes the same specific remedies of a misdemeanor criminal offense, civil penalties, and a cause of action “to prevent . . . unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use, to restrain, correct, or abate such violation, to prevent the occupancy of said building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.”

¹Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (Washington, D.C.: U.S. GPO, 1926, rev'd ed.), 13.

²Edward Bassett and Frank B. Williams, in Edward Bassett, Frank B. Williams, Alfred Bettman, and Robert Witten, *Model Laws for Planning Cities, Counties and States Including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935), 37.

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The American Law Institute's (ALI) *Model Land Development Code*³ provides two methods for the enforcement of local development regulations:

- (1) “a civil action to prevent an unlawful land use from occurring, to prevent its continuance, or to restrain, correct, or abate a violation of an order, rule or ordinance”; and
- (2) an administrative procedure to “obtain an enforcement order. . .and thereafter. . .prosecute a person who causes a violation of an enforcement order, maintain a civil action to enforce the order,. . .[or] enter upon the land and structures where the unlawful land use exists and take necessary action to correct or abate it.”⁴

Persons satisfying certain standing requirements can also bring “a civil action to prevent, restrain, correct, or abate a violation of [the] Code,” after notifying the local government of the proceeding.⁵

To obtain an enforcement order under the ALI Code, the local government first has to send to the record owners an enforcement notice that describes the alleged unlawful land use and names the persons against whom an enforcement order is sought. The notice also prescribes any remedial steps that could correct the alleged violation and a deadline for compliance. In addition, it alerts the recipient that they have the right to a hearing but must demand that hearing in writing by a certain date to receive it, and advises them that failing to respond to the notice by that date is a violation punishable by sanctions.⁶

If no hearing is requested in the prescribed time, the local government may proceed to issue an enforcement order.⁷ An enforcement order is recorded with the county recorder or registrar against the property in question, and may also be entered with the local trial court as a judgment thereof.⁸ An enforcement order may be judicially reviewed, and a person who receives an enforcement notice can treat it like an order and directly seek judicial review rather than resorting to the administrative

³American Law Institute (ALI), *A Model Land Development Code* (Washington, D.C.: American Law Institute, 1975).

⁴Id., 448 (§ 10-101).

⁵Id., 449 [§ 10-102(2) & (3)].

⁶Id., 450-451 (§ 10-201).

⁷Id., 452 [§ 10-202(2)].

⁸Id., 452 [§ 10-202(4)].

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hearing.⁹ If the persons subject to the enforcement order have not complied by the date set in the order, the local government may enter upon the land in question and act to put it in compliance. The government also has a right to be compensated by the persons subject to the order for the expenses related to such an action and can place a lien on the property to enforce that right.¹⁰ Noncompliance by the set date of the order may also be penalized by fines collectable in civil proceedings. This fine is initially \$500 and \$200 per day of continuing violation. If the person is found to be a “persistent offender,” the fine may be increased up to twice the gain the offender has made from his or her violation.¹¹

APPROACHES TO ENFORCEMENT IN STATE STATUTES

Some states allow the local government discretion to specify what the remedies and penalties for violation of the ordinances and regulations will be. **Maryland** authorizes municipalities, in cases of zoning violations, to “provide for punishment by fine or imprisonment or both” and “to provide civil penalties for such violation.”¹² **Michigan** provides that uses or structures in violation of local ordinances are nuisances *per se*, and also authorizes local governments, in their zoning ordinance, to provide a penalty for the violation,¹³ and to “designate the violation as a municipal civil infraction and provide a civil fine for the violation.”¹⁴ **Virginia** allows zoning administrators to order “in writing. . .the remedy of any noncompliance” and to bring civil actions to enforce the order.¹⁵ **Washington** gives county boards broad authority to set procedures for enforcement of land-use controls and to delegate the enforcement authority to the “appropriate” agency or official.¹⁶ **Wisconsin** local governments are authorized to enforce zoning “ordinances by appropriate fines and penalties” and by “injunctional order at the suit of” the local government.¹⁷

⁹Id., 452 [§ 10-202(3)].

¹⁰Id. 453-454 (§ 10-203).

¹¹Id. 455-456 (§ 10-204).

¹²Md. Ann. Code art. 66B, § 2.10(a).

¹³Mich. Comp. Laws § 125.224 (1997).

¹⁴Va. Code. Ann. § 15.2-2299 (Michie 1997).

¹⁵Wash. Rev. Code § 36.70.670 (1997).

¹⁶Wis. Stat. § 59.97(11) (1997).

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Both civil and criminal enforcement have precedent in the statutes of the various states. Several states reiterate the language of the MZEA.¹⁷ Some states combine this civil remedy with fines and criminal penalties, varying from “a misdemeanor” for each day of violation,¹⁸ to \$100 or 10 days imprisonment per day of violation,¹⁹ to \$500 per violation collectable by civil proceeding.²⁰

Oregon provides for a civil action to “enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use,” and specifically provides that attorney fees as well as costs are available to the prevailing party in limited cases.²¹ Oregon also makes it a crime to “locate, construct, maintain, repair, alter or use” a structure or use in violation of a local land-use ordinance or regulation, but does not specify the penalty.²²

Vermont provides that the violation of a land-use ordinance or regulation is punishable by a \$50 fine collectable by civil proceeding, with each day of violation constituting a separate violation and with a double-fine provision when the violator defaults on paying the fine.²³ Vermont also gives municipalities a cause of action “to prevent, restrain, correct, or abate such construction or use, or to prevent, in or about such premises, any act, conduct, business, or use constituting a violation.”²⁴

Other states rely on fines: **Hawaii** assesses \$1,000 per violation of county zoning provisions, with an increase to \$5,000 for violations in agricultural zones or violations unabated for more than six months.²⁵ In **Nevada**, violation of any ordinance or regulation of the Tahoe Regional Planning Agency is a misdemeanor.²⁶

¹⁷Ala. Code § 11-52-83 (1997); Colo. Rev. Stat. § 31-23-308 (1997); Del. Code tit. 9, § 2609 (1997); Iowa Code § 414.20 (1996); Md. Ann. Code art. 66B, § 2.10(c) (1997); Neb. Rev. Stat. § 23-114.05 (1997) N. J. Stat § 40:55D-18.

¹⁸Neb. Rev. Stat. § 23-114.05.

¹⁹Del. Code tit. 9, § 2609.

²⁰Md. Ann. Code art. 66B, §§ 2.10(b), 7.01(c).

²¹Or. Rev. Stat. § 215.185 (1997).

²²Or. Rev. Stat. § 215.190.

²³Vt. Stat. Ann. tit. 24, § 4444 (1997).

²⁴Vt. Stat. Ann. tit. 24, § 4445.

²⁵Haw. Rev. Stat. § 205-13 (1997).

²⁶Nev. Rev. Stat. § 278.818 (1997).

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THE COMPONENTS OF ENFORCEMENT

The local agency charged with inspecting property and investigating alleged violations of the land development regulations is the first line of enforcement. In some places this may be the local planning agency. In others, it may be a separate code enforcement agency that is also empowered to enforce the building code, property maintenance code, and similar ordinances. Of course, adequate resources, especially personnel and funding, must be allocated to whatever agency is assigned the task of enforcement. A local government that does not have adequate resources to enforce its own regulations, however, may contract its enforcement out to the county or another local government better equipped to perform the task.

However the enforcement function is organized, the enforcement method most often applied will be informal. Many alleged violations will come to the attention of the enforcement agency by complaints from neighbors, police, and other interested citizens, and most violations will be resolved in full with one or more informal notices or warnings.²⁷ This is especially true since most violations of land development regulations occur more out of ignorance or negligence than intent. Most violators who intentionally break the law assume that their violation will not come to the attention of the authorities and would rather place the property in compliance than face formal proceedings. In either case, informing the property holder of the alleged violation and of the enforcement agency's awareness of it is often all that is needed to obtain compliance.

ADMINISTRATIVE ENFORCEMENT

Though most alleged violations are disposed of informally, when violations – and violators – continue in the face of notices and warnings, formal enforcement procedures must be commenced. In many states, the procedure is an immediate and direct resort to judicial proceedings, either civil or criminal. The *Legislative Guidebook*'s philosophy is that efficiency is better achieved with an administrative enforcement proceeding. While a local government may choose to enforce its land development regulations through civil proceedings rather than administrative proceedings, and indeed is not required to establish an administrative enforcement process, detailed provisions on administrative enforcement are included in this Chapter. The inclusion of a clear administrative enforcement procedure encourages local governments to utilize non-judicial enforcement as a first option and ensures the basic safeguards of due process as required by the U.S. and state constitutions.

(1) *Adequate notice*. The administrative process can be commenced only by reliably providing the alleged violator or owner of land in alleged violation with a notice that adequately informs him or her of the nature of the accusations and of how to respond. According to the United States Supreme Court, “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to

²⁷In their book, *Code Enforcement, A Comprehensive Approach* (Point Arena, Calif.: Solano Press, 1994), Joseph M. Schilling and James B. Hare refer to the “tough 10 percent” – the fact that voluntary compliance is achieved in about 90 percent of cases, while enforcement agencies expend most of their resources on the remaining 10 percent of cases.

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apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”²⁸ The notice must be served in a way that ensures that the person to whom the notice is directed receives it.²⁹

(2) *Hearings.* The most significant safeguard is a hearing, before a hearing officer or board in which all parties have a right to counsel and a right to summon and question witnesses.³⁰ As the Supreme Court observed, “The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment.”³¹ Added the Court in another decision: “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”³²

(3) *Written findings.* A hearing board or officer must state in writing the record of the findings of the hearing as well as the legal and factual bases for the findings.³³ Without a clear statement of the findings, the violator cannot know what he or she must do to obey the enforcement order. Without a clear statement of the legal and factual bases for the finding, the violator is severely limited in responding to the order when it is brought into court. Additionally, without a statement of the bases, the court is left with little guidance in examining or applying the order.

(4) *Judicial review.* An alleged violator can challenge an adverse decision or enforcement order in an appeal to the civil courts.

Many violations, as noted above, come to the attention of the local enforcement agency through the informal complaints of citizens. When the local government is not aware of or does not act upon violations, there should be a mechanism for citizens to commence formal enforcement procedures. The approach chosen in the *Legislative Guidebook* is to examine citizens’ petitions as they are filed, with the local government having discretion on whether or not formal enforcement proceedings should be commenced. This discretion is, however, subject to a right of a petitioner to appeal the rejection of a petition. There is an incentive for people to file only legitimate petition because of the civil liability and criminal penalties for false petitions. If the petition is materially false and the

²⁸*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950).

²⁹*Greene v. Lindsey*, 456 U.S. 444 (1982) (pinning notice of eviction to apartment door inadequate).

³⁰*Morgan v. United States*, 304 U.S. 1 (1938).

³¹*Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

³²*Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

³³*Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Ohio Bell Tel. Co. v. Public Utility Comm’n*, 301 U.S. 292 (1937).

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petitioner knows it, and the local government is unable to prove any past or present violation of the land development regulations, the alleged violators are able to recover in civil court the expenses and losses resulting from defending the false petition. Where a petitioner knowingly makes materially false statements in the petition, the petitioner has also committed a criminal offense. In other words, using this approach can help encourage citizens with legitimate complaints while discouraging others.

While administrative enforcement is encouraged by the *Guidebook*, some violations of land development regulations may be so egregious or cumulative³⁴ that immediate action is necessary. Therefore, there is a need for a preliminary order and for a procedure to issue such an order when it is needed so that the rights of the parties to due process are protected. A preliminary order should be issued along with an enforcement notice so that a violator cannot conceal or aggravate the violation between receipt of the notice and the issuance of an order. Preliminary orders should be reviewable by a hearing officer or board which must be satisfied that it is reasonable to believe that a violation is occurring that needs to be abated immediately.³⁵ For the same reason, the order should seek to preserve the status quo only and forbid further violation, but not attempt to achieve full compliance, which is the point of the hearing and enforcement order.

If the hearing officer or board finds that there is or has been a violation of land development regulations, the officer or board must issue an order stating those findings and providing the remedies and penalties appropriate to the violation. Remedies are orders or instructions intended to achieve compliance with the regulations. These include directives to cease and desist from further violation and to place the property in compliance with regulations, and instructions to the enforcement agency to enter upon the property and place it in compliance at the expense of the owner. Remedial orders, of course, may apply to an owner of the property even if the owner is not personally responsible for the violation. The punitive measure is the application of fines, which may be directed only towards the person(s) found to have violated or to be violating land development regulations.

Is this procedure too complex for simple or minor cases? Some have suggested that the appropriate procedure for minor cases is the issuance of a citation that takes immediate binding effect upon the violator unless challenged.³⁶ The requirements of this Chapter do not preclude such a streamlined procedure. The enforcement notice may be produced as a standardized, “fill in the blank” form, like a traffic citation, for use in minor cases. While Section 11-203 provides that a hearing must be held upon an enforcement notice unless all alleged violators admit their violations

³⁴That is, the longer they continue, the worse the negative effects become.

³⁵Stop-work orders issued automatically, without independent judgment by the hearing officer or board, have been successfully challenged. Martin Jaffe, “A Practical Look at Zoning Enforcement,” *Land Use Law & Zoning Digest* 36, no. 11 (November 1984): 7.

³⁶Jaffe, 4; Eric Damian Kelly, *Enforcing Zoning and Land-Use Controls*, Planning Advisory Service Report No. 409 (Chicago: American Planning Association, 1988), 25-26.

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in writing, this requirement can be satisfied in a streamlined procedure. The citation notice can contain instructions about what is required to admit to the violation (e.g., signing a statement on the citation that constitutes admission) or to challenge the citation (e.g., returning the citation unsigned). This is very similar to the procedure used in traffic enforcement.

The issuance of an order may not be sufficient inasmuch as a person subject to the order may disobey it as he or she disobeyed the land development regulations. Here, there is also a need to ensure due process; a person accused of violating an order must first be informed in writing of the particulars of the alleged violation, which must be followed by a hearing to determine whether the accused is or has violated the order. There are two methods provided for this notice and hearing: the local government may commence a civil action to enforce the enforcement order, or it may hold its own supplemental enforcement hearing (akin to a contempt hearing in the courts) after notice. If it is found after this administrative hearing that he or she has violated the order, appropriate supplemental orders may impose additional fines, have the enforcement agency conduct the necessary compliance actions at the violator's expense, or to refer the case for civil enforcement or criminal proceedings.

CIVIL AND CRIMINAL ENFORCEMENT

As noted above, some cases require immediate enforcement action. Also, some alleged violators make it clear by their actions or statements that a "mere" administrative proceeding will not obtain their compliance. And some local governments may not have adequate resources to provide a proper administrative enforcement process. Therefore, the Chapter authorizes local governments to proceed directly with civil enforcement proceedings. Even where administrative procedures are used, it may be necessary to enforce a resulting order in civil court. In such cases, civil enforcement consists of having the orders of the hearing board or officer entered as the judgment of a civil court. Then, orders to perform or refrain from performing certain actions may be enforced by the court's inherent power of contempt. Money due the local government (i.e., fines or as reimbursement for remediation action by the local enforcement agency) can be collected by the various methods available in civil cases, such as liens, garnishment, and execution. Unless the defendant challenges the government's allegations in a timely manner, the orders of the hearing will automatically become the judgment of the court and enforceable as such. If one or more defendants challenges the administrative orders, the trial is limited to the questions of whether the original, underlying order of the hearing has or has not been violated, and, if so, what the appropriate remedies or penalties are. Where the case is commenced as a civil action, the issue is whether the alleged violator has violated or is violating a valid land development regulation and, if so, the appropriate remedies or penalties. In either case, the burden of proof is on the government, but it must prove a violation only to a preponderance of the evidence; that is, the evidence must show that it is more likely that the defendant violated a land development regulation or an administrative enforcement order than that he or she did not.

Criminal proceedings are a last resort, but alas may be necessary in the most egregious cases. As in any criminal case, the local government must prove intentional or knowing noncompliance with the enforcement order beyond a reasonable doubt. If the local government is successful, the defendant may pay a substantial fine or serve time in jail or prison, but he or she will still not have

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placed the property in compliance with the order and the underlying land development regulations. Criminal enforcement should be used in conjunction with, and not as a substitute for, abatement of the noncompliance by the local government itself and/or the commencement of civil proceedings.³⁷ As with all criminal offenses, the penalty should be proportionate to the negative impact of the crime upon society. Thus, the *Legislative Guidebook* provides that, in general, it is a misdemeanor to intentionally violate an order of the hearing board or officer, but that it is a felony to intentionally violate an order when the violation creates a substantial risk of or causes injury to a person or substantial physical destruction of property.

GENERAL PROVISIONS

Commentary: Enforcement Generally

The local government should be expressly granted the general authority to enforce land development regulations so that it may have power to act in cases not foreseen at the time of the drafting of the statute but within the realm of enforcement. This Section provides such broad authority as well as authorization to perform specific actions in the course of enforcement. A violation or noncompliance consists of development without a permit or in violation of a development permit, and engaging in a land use not authorized by land development regulations.

In many instances, the local government becomes aware of violations of development regulations through informal complaints from neighbors or other citizens. In most cases, compliance is obtained by informal notices and warnings. This is so because, in most cases, the owner was either not aware that he or she was in violation in the first place or does not wish to face the expenses and penalties of formal enforcement. “An informal. . .meeting with a violator can be effective, particularly where a violation is minor, where the developer may not be aware of the violation, and where development has just begun without significant expenditures by the violator.”³⁸ Section 11-101 thus expressly authorizes the local government to act upon citizen informal complaints of violations and to issue informal notices and warnings to both employ resources efficiently and reserve the full power of the government for those cases where it is necessary.

Another means by which the local government discovers violations is by inspection. This Section authorizes the local government to enter upon land and inspect it with the consent of the owner or a rightful occupant of the land,³⁹ or when the owner or occupant has no reasonable

³⁷Jaffe, 5.

³⁸Jaffe, 3.

³⁹*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

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expectation of privacy.⁴⁰ Land where the owner or occupant has no reasonable expectation of privacy includes areas in plain view⁴¹ and highly regulated businesses.⁴² There is a reasonable expectation of privacy in a residence⁴³ and in the land directly surrounding a residence, even if the yard is open and unfenced, because such land, called curtilage, “warrants the Fourth Amendment protections [regarding involuntary search and seizures] that attach to the home.”⁴⁴ Because cooperation is the norm and many violations can be discovered in areas where there is no reasonable expectation of privacy, these provisions should be sufficient in most cases. For cases where this is not true, the Section also provides for the power to obtain an inspection warrant if there is probable cause to believe the property is not in compliance with land development regulations. The usual safeguards of the Fourth and Fourteenth Amendments to the U.S. Constitution against unreasonable searches apply, and so the procedure for obtaining a warrant is the same procedure used to obtain other inspection warrants.

11-101 Enforcement Generally

- (1) The local government shall have the power and the duty to enforce land development regulations, and shall, by ordinance, delegate that power and duty to the [local planning *or* code enforcement agency]. The ordinance may provide for, among other things, the organization, staffing levels, training, and compensation of the agency and its personnel.
 - ♦ This paragraph is a specific reiteration of the power and duty of a local planning agency to “administer land development regulations” pursuant to Section 7-103(2)(h). The power of the local planning agency, however, comes from the local government. Furthermore, the local government itself has the power and duty to enforce land development regulations because agencies of the local government other than the local planning agency, such as the police and the local government attorney, are also engaged in this duty.
- [2] The local government shall allocate funding, personnel, and other resources to the [local planning *or* code enforcement agency] at levels sufficient to reasonably execute the powers and duties of enforcement. If the local government finds that it cannot allocate sufficient

⁴⁰*Katz v. United States*, 389 U.S. 347 (1967).

⁴¹*Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861 (1974)(smoke detected from yard of factory); *Horton v. California*, 496 U.S. 128 (1990) (discovery of evidence in plain view need not be inadvertent).

⁴²*New York v. Burger*, 482 U.S. 691 (1987) (junkyard).

⁴³*Camara v. Municipal Court*, 387 U.S. 541 (1967).

⁴⁴*United States v. Oliver*, 466 U.S. 170 (1984).

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resources, it shall form an implementation agreement pursuant to Section [7-503] assigning the powers and duties of this Chapter to another governmental unit with sufficient resources.]

- ♦ Depending on whether the state legislature wants to emphasize to local governments that adequate resources for enforcement are necessary, this paragraph may or may not be included. Omitting this paragraph leaves the issue of “sufficient resources” to the local government’s discretion.
- (3) In performance of its duty to enforce land development regulations, the [local planning *or* code enforcement agency] shall have the power to enter upon any land and make inspections thereon:
 - (a) with the consent of the property owner or of some other person with the authority to grant consent; or
 - (b) where the property owner or occupant has no reasonable expectation of privacy thereon.
 - (4) In performance of its duty to enforce land development regulations, and when entrance upon land or inspection thereof is not permitted pursuant to paragraph (3) above, the [local planning *or* code enforcement agency] shall have the power to petition the [*trial-level*] court for the county in which the property is located for an inspection warrant.
 - (a) The petition shall set forth the facts and information that are the basis for the issuance of the warrant, and shall be accompanied by the sworn affidavit or affidavits of the person or persons who have direct knowledge of the facts and information in the petition.
 - (b) Except as provided herein, the procedure for the issuance of an inspection warrant shall be the same as that for the issuance of inspection warrants to other agencies of the State.
 - (c) The court shall issue an inspection warrant if the local government proves that there is probable cause to believe that the property is not in compliance with land development regulations.
 - (d) An inspection warrant shall be executed by one or more agents or employees of the [local planning *or* code enforcement agency], who may be accompanied by one or more sworn officers of the police department of the local government at the discretion of the [local planning *or* code enforcement agency]. The officers shall not participate in the inspection, and an entry and inspection pursuant to this paragraph shall not, by the mere presence of police officers pursuant to this paragraph, be considered to be a search by police officials.

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- ♦ Police officers should accompany planning agency or code enforcement personnel only when it is believed there is a possibility of violence against the personnel in performance of their duties. Since the courts hold searches by police to a higher standard than inspections by administrative personnel, the officers should *not* participate in the inspection.
- (5) Entrance upon land and inspection pursuant to paragraph (3) or (4) above shall not constitute a violation of Section [*section defining criminal trespass on land*] of the [Penal Code or Criminal Code], nor shall any owner or occupant of the property have a cause of action for trespass except for intentional, knowing, or reckless damage to the property.
- (6) The [local planning or code enforcement agency] may receive from any person informal communications alleging that a person or persons are or may be violating land development regulations or that property is or may be noncompliant with land development regulations. Such communications include reports or memoranda from agents of other agencies of the local government, including but not limited to the police department. The [local planning or code enforcement agency] may act upon communications as defined in this paragraph as it deems appropriate given their level of credibility.
- (7) In performance of its duty to enforce land development regulations, the [local planning or code enforcement agency] may notify or warn persons that they are or may be violating land development regulations or that their property is or may be noncompliant with land development regulations.
- (a) Such notices or warnings shall have no legal effect, except that they may be used as evidence of the duration of a violation or of notice to the recipient of the allegations or facts contained in the notice or warning.
- (b) Such notices or warnings shall notify the person of the alleged violation or noncompliance in sufficient detail that they may act upon the notice or warning and cease the violation or place the property in compliance. Such notices or warnings shall state the provision or provisions of the land development regulations alleged to have been violated, and may notify the person of the terms of this Chapter and of the powers of the local government pursuant to this Section.
- (c) No such notice or warning shall be designed in such a manner that it gives the person the impression or belief that enforcement proceedings are thereby being commenced or have already been commenced. However, a notice or warning may state that, if the property is not compliant by a reasonable date prescribed in the notice or warning, enforcement proceedings may be commenced after that date.
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Commentary: Adoption of Administrative Enforcement

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If a local government chooses to utilize administrative enforcement as provided in Sections 11-201 through -204, there must be hearing officers or hearing boards. This Section provides for their creation and includes safeguards of due process. These safeguards include: training for members; provisions for an odd number of members in hearing boards (to avoid ties); fixed terms of office of at least one year; compensation for expenses; and salaries for full-time hearing officers or board members, which cannot be diminished during one's present term of office (to provide a measure of independence). The Section also provides for the enactment of rules of procedure for the enforcement process, so that the local government may resolve details of procedure before disputes arise.

The integrity of the administrative enforcement process is further protected by paragraph (4), which requires recusal by hearing officers or board members in cases of conflict of interest or when the officer or member has engaged in ex parte communication (out-of-court and off-the-record communication by an adjudicative official with a party without the other party's presence).

11-102 Adoption of Administrative Enforcement

- (1) The local legislative body may adopt an ordinance establishing an administrative enforcement procedure pursuant to Sections [11-201] through [11-204]. Such an ordinance shall be referred to in this Chapter as an "administrative enforcement ordinance."
 - (2) An administrative enforcement ordinance shall create hearing boards or positions for hearing officers to carry out the duties of hearing officers or boards pursuant to Sections [11-201] through [11-204].
 - (a) The chief executive officer of the local government, with the consent of the local legislative body, shall appoint the hearing officers or members of hearing boards, and may remove hearing officers or members of hearing boards without consent of the local legislative body.
- ♦ The chief executive officer of the local government is the mayor in municipalities where the mayor has executive power and is the city/town/village manager where the mayor has merely ceremonial duties.
- (b) The administrative enforcement ordinance may designate:
 1. the hearing examiners appointed pursuant to Sections [10-301] *et seq.* as hearing officers; or
 2. the Land-Use Review Board created pursuant to [10-401] *et seq.* as a hearing board.

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- (c) A local government may appoint persons who are not residents of the local government to be hearing officers or members of hearing boards, any provision of state law or local ordinance to the contrary notwithstanding. Hearing officers or members of hearing boards may be retained on a full-time or part-time basis.
 - ◆ This provision allows a small community to employ non-residents as hearing officers or board members, and to employ part-time or full-time officers or board members. This avoids shortages of hearing officers in cases where one or more officers or members is recused.
 - (d) The appointment of any hearing officer or member of a hearing board shall be for a term fixed by ordinance of not less than [1] year.
 - (e) If the local legislative body chooses to employ a hearing board or boards, the number of members thereof provided by ordinance shall always be an odd number, and the ordinance creating the hearing board shall provide that any action or decision approved by a majority of members of the board is so approved by the board.
 - (f) The local government shall provide in that ordinance for the training of hearing officers or of the members of hearing boards. [At least one member of a hearing board shall be an attorney licensed to practice in this State.]
 - (g) The local government shall provide in that ordinance for the reimbursement of reasonable expenses of hearing officers or members of hearing boards. It may provide for compensation in the form of a salary for hearing officers or members of hearing boards for whom said position is not their full-time employment, and it shall provide for compensation in the form of a salary for hearing officers or members of hearing boards for whom said position is their full-time employment. Such compensation shall not be diminished as to any particular hearing officer or member of a hearing board during their term in said position.
- (3) An administrative enforcement ordinance shall include reasonable rules of procedure for all proceedings before such hearing officers or boards. The hearing officer or board may make reasonable rules of procedure for proceedings before him, her, or it, in order to resolve issues not addressed in the rules of procedure enacted by the local legislative body.
- (a) The rules of procedure of any hearing officer or board shall not be contrary in any way to the rules enacted by the local legislative body, and shall not address any issue of substantive law.
 - (b) A copy of all rules made by a hearing officer or board shall be provided to the local legislative body and to all parties to cases before the hearing officer or board, and shall be posted prominently in and just outside the hearing room.

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- (c) Any amendment to rules of procedure shall not affect cases pending when the amendment takes effect.
 - (4) To ensure that there is neither impropriety nor an appearance of impropriety in any proceeding pursuant to Sections [11-201] through [11-204], any hearing officer or member of a hearing board shall immediately recuse him or her self from a case in which the hearing officer or member:
 - (a) engages in significant ex parte communications with a party to the case or a person who has a direct or indirect interest in any issue in the case, but a communication with local government staff in the hearing officer or member's capacity as an employee of the local government, and not related to any particular case, shall not constitute an ex parte communication for purposes of this paragraph; or
- ◆ A significant ex parte communication is one that is not insignificant; that is, one that is not *de minimis*. Communication with local government staff is excluded from the ban when the communication occurs because the hearing officer or member is him or her self an employee of the local government and must, as such, be able to communicate on a day-to-day basis with other members of the local government staff.
- (b) has a direct or indirect financial interest in property that is the subject of a case, who is related by blood, adoption, or marriage to any party to a case or to an owner of property that is the subject of a case, or who resides at or owns property within [500] feet of property that is the subject of a case.

Failure of a hearing officer or member to recuse him or her self when it is required by this paragraph shall void any decision made by the hearing officer or board in the case.

Commentary: Election of Procedures

When a local government determines that informal enforcement has not worked or will not work, it must resort to formal enforcement procedures – either administrative or judicial – to obtain compliance with its land development regulations. While a local government has a duty to enforce its land development regulations under Section 11-101(1), there is an element of discretion in the enforcement agency's decision to initiate enforcement in particular cases. This is similar to the discretion that prosecutor has in criminal cases. Note also that, though Section 11-101 authorizes and recommends the use of informal methods of seeking compliance, including letters of warning, there is no requirement that such measures be applied before formal proceedings can be commenced under this Section. This allows for situations where the local enforcement agency determines that informal methods would be futile – where informality will not work – as well as for circumstances where informal enforcement has been tried and has not been successful.

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There is a need for those who are affected by the use of land and by violations of land development regulations to be able to commence the enforcement process when the local planning or enforcement agency is not aware of, or is not acting on, a violation. This Section provides three alternatives as to who constitutes such a class. They are:

- (1) Owners, lessees, or residents of property within a particular distance of the property in question. This is the most restrictive approach and focuses on those who are particularly affected by the property at issue.
- (2) Those with a particular interest in local land development regulations: residents of the local government or owners of land or businesses in the local government.
- (3) Any adult. This is the least restrictive approach. The logic behind it is that behind the *qui tam* action and “whistle blower” laws: any person who has knowledge of a violation of the law has a sufficient interest based on their “citizenship alone in having the law enforced. No particular interest in the use of the property is required.

Admittedly, the third class goes beyond the group that would have standing to challenge the violations in a court of law, since they do not suffer a unique “adverse effect” from the violation. However, the purpose of accepting complaints from all citizens is not to grant those citizens relief for their particular injuries but to harness the opportunity arising from potentially thousands of pairs of eyes looking for violations of land development regulations. On the other hand, there is always the problem of citizen demands for formal proceedings based upon spite or insufficient information.

The solution applied in the *Legislative Guidebook* to this dilemma is to give the local government some discretion as to commencing formal proceedings based on a citizens’ petition but then make a decision not to commence proceedings appealable. Also, groundless petitions are discouraged with penalties and with compensation for those injured thereby. As well as establishing criminal penalties for false accusations in petitions, akin to perjury, the Section below creates a civil action for damages when the petition turns out to be both groundless and founded on intentional misstatement. In this way, the alleged violator can recover expenses related to defending themselves against a false petition. Some may believe that providing such penalties may “chill” citizens from making legitimate petitions. However, the penalties apply in such limited circumstances that they should not significantly suppress valid petitions, while being sufficiently severe that they will discourage the feuding neighbor and the self-appointed town gadfly from using the local government to settle his or her own personal issues.

Paragraph (3) states expressly that adopting an administrative enforcement procedure does not by itself require the local planning or code enforcement agency to utilize that procedure. And the last paragraph, (4), clarifies that this Chapter does not eliminate or affect in any way the right of a person particularly injured by unreasonable land use to bring a civil action for nuisance.

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11-103 Election of Procedures

- (1) When the [local planning *or* code enforcement agency] has reason to believe that a person or persons has violated, is in violation of, or is about to violate, land development regulations and that a resort to informal enforcement methods will not achieve or has not achieved compliance, and the director thereof decides to enforce the land development regulations and seek compliance from that person or persons, it shall, at its option, either:
 - (a) if an administrative enforcement ordinance has been adopted pursuant to Section [11-102], commence an administrative enforcement proceeding pursuant to Section [11-201];
 - (b) commence a civil enforcement proceeding pursuant to Section [11-301]; or
 - (c) commence a criminal enforcement proceeding pursuant to Section [11-302].
- (2) When any adult [resident, lessee, or owner of property within [500] feet of the property in question *or* resident of, owner of any real property in, or owner of any business with premises located within the local government *or* person] files with the [local planning *or* code enforcement agency] a petition in compliance with the requirements of this paragraph stating that a person or persons is in violation of land development regulations, the [local planning *or* code enforcement agency] shall review the petition and give it due regard in determining whether or not to commence administrative, civil, or criminal enforcement proceedings, based upon the allegations of the petition, pursuant to paragraph (1) above. The [local planning *or* code enforcement agency] may conduct its own investigation of the allegations in the petition in making its determination.
 - (a) The [local planning *or* code enforcement agency] must make a decision on the petition within [30] days of receiving the petition, and must notify in writing the person or persons who signed the petition of the decision and the basis therefor.
 - (b) A petition pursuant to this paragraph shall set forth a description of the alleged violation in sufficient detail that the local government may commence an enforcement proceeding, administrative, civil, or criminal, in response to the petition.
 - (c) A petition shall be signed, and the signatory shall attest with his or her signature that:
 1. the signatory has personal knowledge of the facts that are the foundations of the allegations in the petition;
 2. the allegations therein are true to the best knowledge of the signatory; and
 3. the signatory is aware of the penalty provided in subparagraph (2)(d) below.

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- (d) It is a [*grade of criminal offense*] to sign or file, or cause to be signed or filed, a petition pursuant to this paragraph, or a document purporting to be a petition pursuant to this paragraph, with the knowledge that any material allegation therein is untrue.
- (e) A person or persons alleged in an enforcement proceeding pursuant to a petition to be, or have been, in violation of land development regulations, and the owner or owners of property alleged in an enforcement proceeding pursuant to a petition to be in noncompliance with land development regulations, when:
 - 1 the resulting enforcement order or court judgment is a determination that no violation has occurred or is occurring; and
 - 2. the person or persons who signed or filed, or caused to be signed or filed, the petition did so with the knowledge that any material allegation in the petition is untrue,

has a cause of action against the person or persons who so signed, filed, or caused to be signed or filed for all expenses incurred as a result of the enforcement proceeding, plus costs and reasonable attorney fees, in the [*trial-level*] court for the county in which the primary offices of the local government are located.

- [[(f) If the local government decides not to commence an enforcement proceeding based on a petition that was filed by a person or persons who may, under this paragraph, file a petition, that person or persons may appeal that decision in the same manner as a land-use decision.]
- (3) The adoption of an administrative enforcement ordinance shall not, by itself, preclude or prohibit the local government from enforcing its land development regulations through a civil proceeding pursuant to Section [11-301], as provided in paragraph (1) above.
- (4) Nothing in this Chapter shall be interpreted as eliminating or amending any cause of action for nuisance or in the nature of nuisance that any person may have, or eliminating or limiting the right of any person to commence and prosecute a civil action based upon such a cause of action.

ADMINISTRATIVE PROCEDURE

Commentary: Enforcement Notice

The enforcement notice is the instrument that begins the administrative enforcement process. The due process requirement of the Fourteenth Amendment to the U.S. Constitution and of every state constitution is the primary consideration in determining what must be included in an

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enforcement notice, who is to receive an enforcement notice, and how. Without proper notice, due process has been denied, and the entire process may potentially be tainted. Thus, the enforcement notice is a vital document and is the equivalent of a summons and complaint in civil court. The notice: begins the enforcement process; informs the owner or alleged violator what they are accused of doing or not doing; instructs the violator about what they must do to contest the matter, including where any written response or evidence may be presented and the date, time, and place of any hearing; and effectively makes the owner subject to the enforcement process.

Because it is such a vital document, the enforcement notice cannot simply be sent to the owner or alleged violator by regular mail. It must be handed to him or her, or to an agent or family member, or it must be sent by certified mail. In this manner, the local government can state with some certainty that the owner received the notice. Publication of a notice in local newspapers should be used only as a last resort. As the U.S. Supreme Court ruled: “We hold that [publication notice] is incompatible with the requirements of the Fourteenth Amendment as a basis for adjudication, depriving known persons whose whereabouts are also known of substantial property rights.”⁴⁵ Because many remedies that will be applied will require action (or refraining from action) regarding the property itself, the property’s owners of record should receive notice, not just the person in actual possession of the property. In this manner, the local government may apply a resulting enforcement order against any owner of the property who does not comply with the order, even if he or she was not an alleged violator. Furthermore, this allows persons who may be directly affected by enforcement but who are not alleged to be violators to protect their interests.

11-201 Enforcement Notice

- (1) The [local planning *or* code enforcement agency] shall commence an enforcement proceeding by preparing and serving an enforcement notice pursuant to this Section.
 - (2) An enforcement notice shall contain:
 - (a) the names and addresses of all persons to whom the enforcement notice shall be sent pursuant to paragraph (3) below;
 - (b) a [legal and common] description of the property or properties where the alleged violations have occurred or are occurring;
- ♦ Since legal descriptions of property can be complex, especially where metes and bounds must be employed (as on land that has not been subdivided and in states not covered by the township system of the Survey of the Northwest Ordinance), it is left to the discretion of the state

⁴⁵*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 320 (1950).

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legislatures whether to require a legal description of the property. Even where a legal description is used, a common description (e.g., an address) should also be provided for the sake of clarity.

- (c) a description of the alleged violation, in sufficient detail that the person or persons may reasonably respond to the allegations;
 - (d) a description of the relief or penalties that are sought by the [local planning *or* code enforcement agency] for the alleged violation;
 - (e) the date, time, and place of the hearing required by Section [11-203(1)], which shall be at least [30] but not more than [60] days from the first service of the enforcement notice;
 - (f) notification of the right, pursuant to Section [11-203(6)] below, to testify, present reasonable evidence, summon and question witnesses, and have counsel present at the hearing;
 - (g) notification of the right of the person or persons to respond to the allegations in writing before the hearing, pursuant to Section [11-203(4)] below, including a statement of the time limitations thereof; and
 - (h) the address, telephone, and facsimile number at which the [local planning *or* code enforcement agency] may be contacted, including for purposes of a written response as provided in Section [11-203(4)].
- (3) An enforcement notice shall be served upon:
- (a) all persons alleged in the enforcement notice, pursuant to subparagraph (2)(c) above, to have violated land development regulations; and
 - (b) all owners of record of the property or properties upon which the alleged violations have occurred or are occurring.
- (4) An enforcement notice shall be considered duly served upon a person when it has been:
- (a) personally served upon the person;
 - (b) personally served upon an agent of the person, including but not limited to a registered agent for service of process;
 - (c) personally served upon a person over the age of [13] years living in the household of the person;

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- (d) sent by certified mail, return receipt requested, to the person or to the person= registered agent for service of process, if any; or
 - (e) served by publication notice pursuant to Section [*cite to relevant section*] of the [Code of Civil Procedure], but only if reasonable attempts to utilize the methods prescribed by subparagraphs (a) through (d) above are not successful.
- (5) An enforcement notice may be personally served by any employee or agent of the [local planning *or* code enforcement agency], or by any sworn officer of the police department of the local government.
- (6) Except as provided in paragraph (5) above, the requirements of, and terms used in, paragraph (4) of this Section shall be interpreted and applied as in cases and judicial decisions concerning the service of process in civil actions in this State.
- ♦ This paragraph ensures that the requirements of proper service of the enforcement notice will be according to the long-settled case law on service of civil summonses. Otherwise, this Section might be interpreted in a vacuum, thus bringing uncertainty.
- (7) The [local planning *or* code enforcement agency] shall transmit the enforcement notice, within [one] business day of the first service of the enforcement notice to any person, to a hearing board or officer of the local government, chosen randomly by a process prescribed by ordinance, and the hearing board or officer so assigned shall be the hearing board or officer for the case unless otherwise provided.
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Commentary: Preliminary Order

Some ongoing violations are of such a nature that irreparable harm will occur to the public in general or to neighboring properties in particular if they are not stopped as soon as possible. These include cumulative violations – violations where the negative impact worsens as the violation continues. Others are gross or egregious violations, the prime example being where lives or property are physically threatened by the violation. When such a violation exists, an order against the violation cannot wait for the completion of full hearings. Building codes, because they deal with structures that can potentially endanger lives and property if not constructed properly, typically include a provision for a “stop work order” to stop construction performed without or in violation of a building permit until a full hearing can be held.⁴⁶

⁴⁶Building Officials and Code Administrators (BOCA), Int'l, *BOCA National Building Code 1996* (Country Club Hills, Ill.: BOCA, 1996), 6 (Section 117.0); N.C. Gen. Stat. §160A-421 (1997).

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The local government should be able to issue a preliminary order, as the *Legislative Guidebook* terms it, before or simultaneously with an enforcement notice, so that there can be no opportunity for a violator to conceal or aggravate a violation between the receipt of the notice and the issuance of an order. The Fifth and Fourteenth Amendments to the U.S. Constitution require that “no person shall . . . be deprived of life, liberty, or property without due process of law.”⁴⁷ Due process does not require a hearing at any particular point in a proceeding, so long as a hearing is held before the final order becomes effective.⁴⁸ Because a preliminary order is issued in the absence of a hearing, however, the government should seek to preserve the status quo only; namely, it should forbid further violation, but it should not attempt to achieve full compliance, which is the point of the hearing and enforcement order. For the same reason, a preliminary order should be issued only when the alleged violation presents or will present a serious threat of irreparable harm. Death or injury to persons is presumed to constitute irreparable harm.

A preliminary order under this Section may be served independently of a pending administrative enforcement proceeding. The order is binding on all parties who receive it and is in effect until a final enforcement order pursuant to Section 11-204 is issued.

Once the order is issued, any person subject to it may request, in writing, a hearing. A hearing must be held within five days of the request, and notice of the hearing must be provided to all parties. If the hearing board or officer determines from the hearing that the preliminary order should not have been issued, it must put this determination in writing and state the reasons for it before the preliminary order is considered void.

11-202 Preliminary Order

- (1) The [local planning *or* code enforcement agency] may at any time issue a preliminary order pursuant to this Section if it is reasonable to believe that a violation of the land development regulations is occurring or is about to occur and that the alleged violation presents, or will present, a significant threat of irreparable harm. Death or injury to any person shall presumptively constitute irreparable harm.
- (2) A preliminary order shall contain:
 - (a) the names and addresses of all persons to whom the preliminary order shall be sent pursuant to paragraph (3) below;
 - (b) a [legal and common] description of the property or properties where the alleged violations are occurring or are about to occur;

⁴⁷U.S. Const., amend. V.

⁴⁸*Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153 (1941).

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- (c) a description of the alleged violations, in sufficient detail that the person or persons may reasonably respond to the allegations;
 - (d) a description of the relief or penalties that are imposed by the preliminary order. A preliminary order may require only that the persons to whom it is directed:
 1. cease and desist from violation of land development regulations;
 2. refrain from a specific act or acts which frustrate the purpose of subparagraph (2)(d)1 above; and/or
 3. perform a specific act or acts which support the purpose of subparagraph (2)(d)1 above;
 - (e) notification of the right, pursuant to paragraph (8) below, to a hearing upon the preliminary order; and
 - (f) the address, telephone, and facsimile number at which the [local planning *or* code enforcement agency] may be contacted, including for purposes of requesting a hearing as provided in paragraph (8) below.
- (3) A preliminary order shall be served upon:
- (a) all persons alleged in the preliminary order to have violated or about to violate land development regulations; and
 - (b) all owners of record of the property or properties upon which the alleged violations have occurred, are occurring, or are about to occur.
- (4) A preliminary order shall be considered duly served upon a person when it has been:
- (a) personally served upon the person;
 - (b) personally served upon an agent of the person, including but not limited to a registered agent for service of process;
 - (c) personally served upon a person over the age of [13] years living in the household of the person;
 - (d) sent by certified mail, return receipt requested, to the person or to the person's registered agent for service of process, if any; or
 - (e) served by publication notice pursuant to Section [*cite to relevant section*] of the [Code of Civil Procedure], but only if reasonable attempts to utilize the methods prescribed by subparagraphs (a) through (d) above are not successful.

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- (5) A preliminary order may be personally served by any employee or agent of the [local planning *or* code enforcement agency], or by any sworn officer of the police department of the local government.
 - (6) Except as provided in paragraph (5) above, the requirements of, and terms used in, paragraph (4) of this Section shall be interpreted and applied as in cases and judicial decisions concerning the service of process in civil actions in this State.
 - (7) A preliminary order:
 - (a) is an enforcement order for the purposes of Section [11-204(7), (8), and (9)], and also for the purposes of Sections [11-301] and [11-302].
 - (b) shall be in effect until an enforcement order is issued, except as provided in paragraph (8) below.
- ♦ This paragraph makes the preliminary order enforceable by the same procedure as a final enforcement order, and also makes a preliminary order appealable, akin to the appealability of an interlocutory decree.
- (8) If any person subject to a preliminary order requests in writing a hearing on the order, a hearing on the preliminary order shall be held within [5] days of the request.
 - (a) Due notice of the time, place, and nature of the hearing shall be given to all parties.
 - (b) The hearing shall be subject to the same rules and held according to the same procedure as an enforcement hearing pursuant to Section [11-203].
 - (c) If the hearing officer or board finds at hearing that the preliminary order should not have been issued, he, she, or they shall state in writing this determination and the legal and factual bases therefor, and the preliminary order shall become void.
 - (d) The written determination shall be served upon all parties who were served with the preliminary order within [10] days of the written determination.
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Commentary: Enforcement Hearings

Once an enforcement notice has been prepared and served, there must be a hearing on the notice, unless the alleged violators voluntarily admit their violation as alleged and agree to the remedy or penalty requested by the local government. This, of course, includes instances where the alleged violators place the property into compliance to the satisfaction of the local government. Whether this hearing should be held by a single hearing officer or by a hearing board is an issue best left to

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the local government, which knows best what resources are available to it. Thus, this Chapter authorizes the use of both hearing officers and hearing boards.

Section 11-203 below requires that the parties actually accused of violating land development regulations must be present at the hearing, either in person or through legal counsel. If an alleged violator does not attend, he or she may lose by default. Note that there is an element of discretion; the hearing officer or board is not required to find an absent party in default. For example, if there are multiple alleged violators and at least one attends the hearing and presents a case, and it is determined that there has been no violation by any person or entity, subjecting any other party to loss by default would probably be considered arbitrary and capricious.

As persons who have an interest in the case, other owners of record of the property have the right but not the duty to attend the hearing. Thus, as well as the opportunity to testify and question witnesses in the hearing itself, all parties have an opportunity, but are not required, to respond to the allegations of the enforcement notice in writing. This allows those who feel more comfortable expressing their position in writing, or who for practical reasons cannot attend the hearing, to have their position placed before the hearing officer or board.

Under the Section, the hearing may be postponed or advanced for good cause. The hearing may be postponed when an alleged violator has not been properly served with the enforcement notice within 15 days of the hearing or if any other party was not served in the same time.

The hearing should give every party the right to summon witnesses and to question them, and to present evidence and testify. Any party may be represented by counsel and receive advice of counsel during the hearing. The sole issue in the hearing is whether the alleged violators did violate or are violating land development regulations and, if so, what is the appropriate remedy or penalty. The interpretation of a regulation can be placed in issue, but the validity of the regulation cannot be questioned except when the alleged violator is claiming that he is in compliance with a regulation that is equal or superior in force and directly contrary to the one he or she has allegedly violated. In short, one can claim as a defense in an enforcement hearing that the regulation one is accused of violating is contrary to an ordinance that one is not violating and, thus, the regulation in question is invalid. This exception is allowed because it goes to the key question of ability to obey in a way that other challenges to validity do not.

11-203 Enforcement Hearings

- (1) The local government, through a hearing officer or board, shall hold a hearing on the allegations of the enforcement notice at the date, time, and place set forth in that notice.
- (2) For the purposes of this Section, “parties” refers to the [local planning *or* code enforcement agency] and all persons to whom an enforcement notice shall be sent pursuant to Section [11-201(4)].

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- (3) At any time before the scheduled date of the hearing, any party may request in writing from the hearing officer or board a postponement or advancement of the hearing, and shall transmit a copy of the request to all parties, whereupon all parties may respond in writing to the request within [15] days of the request. The hearing officer or board shall grant a request for postponement or advancement if the requesting party shows good cause to grant the request and no other party shows good cause to deny the request. A request for postponement or advancement may be denied if any party shows good cause why it should be denied. The hearing officer or board shall notify all parties in writing whether or not a postponement or advancement has been granted and, if so, its duration.
- (a) It shall constitute good cause to postpone the hearing when one or more of the persons alleged in the enforcement notice to have violated land development regulations has not been duly served with the enforcement notice at least [15] days before the hearing.
- (b) It shall constitute good cause to postpone the hearing when a party other than one alleged in the enforcement notice to have violated land development regulations has not been duly served with the enforcement notice at least [15] days before the hearing.
- (4) Any party may submit to the hearing officer or board a written response to the enforcement notice, up to [10] days before the hearing. A copy of the response shall be submitted to all other parties at least [5] days before the hearing.
- (a) If all persons alleged in the enforcement notice to be violating or have violated land development regulations submit a written response in which they admit the validity of all allegations of the enforcement notice and consent to the remedies and penalties requested by the [local planning *or* code enforcement agency] in the enforcement notice, then:
1. there shall be no hearing;
 2. the allegations of the enforcement notice shall be the determination of the hearing officer or board in the enforcement order as if there were a hearing on the allegations; and
 3. the remedies and penalties applied in the enforcement order shall be those requested in the enforcement notice, or such other remedies and penalties as are proposed by the parties and approved by the hearing officer or board.
- (b) If all persons alleged in the enforcement notice to be violating or have violated land development regulations submit such a written response in which they admit the validity of all allegations of the enforcement notice, but one or more parties contest or object to the remedies or penalties requested in the enforcement notice, then:

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1. the allegations of the enforcement notice shall be the determination of the hearing officer or board in the enforcement order as if there were a hearing on the allegations; and
 2. a hearing shall be held, but only on the issue of the remedies and penalties to be applied in the enforcement order.
- (c) If one or more, but not all, persons alleged in the enforcement notice to be violating or have violated land development regulations submit such a written response in which they admit the validity of all allegations of the enforcement notice, the response or responses shall be given due weight by the hearing officer or board but the hearing shall proceed on all relevant issues as provided in paragraph (7) below.
- (5) All persons alleged in the enforcement notice to be violating or have violated land development regulations shall be present at the hearing, either in person or through legal counsel. A default decision that the person has violated land development regulations as alleged may be made if such a person was duly served with an enforcement notice, is not present at the hearing, and there is a finding that there is or was a violation of land development regulations.
- (6) At the hearing, any party, except for parties who, pursuant to paragraph (4) above, are not entitled to a hearing, may present evidence and testimony, summon witnesses, question all witnesses, and be represented by and receive the advice of legal counsel.
- (7) The issues for the hearing officer or board to determine, by a preponderance of the evidence, are:
- (a) whether the alleged violator or violators are violating or have violated any land development regulations;
 - (b) if so, what remedies or penalties are appropriate and just, taking into consideration the requests of the [local planning *or* code enforcement agency] in the enforcement notice.
- (8) The interpretation or meaning of any land development regulation shall be a valid issue for the hearing officer or board to determine. The validity or constitutionality of any land development regulation, or of the local comprehensive plan, shall not be a valid issue for determination at the hearing, except in such cases that a person alleged to have violated a regulation claims in good faith that the regulation in question is directly contrary to another regulation of equal or superior force, which he or she alleges that he or she has not violated. However, questions of validity or constitutionality of any land development regulation, or of the local comprehensive plan, are preserved for appeal pursuant to Section [11-204(9)].
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Commentary: Enforcement Order; Remedies and Penalties

Once a hearing has been held on the enforcement notice or once an alleged violator has admitted his or her violation, the hearing office or board must (a) state the determination, and (b) give it force. The enforcement order carries out both of these responsibilities.

First, the enforcement order makes clear the determination of the hearing and the legal and factual bases for the determination. Both must be stated in reasonable detail because it is the enforcement order that may be the subject of further enforcement (e.g., if there is noncompliance or an appeal). The success of the local government in the court conducting the enforcement or appeal may depend on providing a reliable record of the determination.

The enforcement order gives force to the determination of the hearing because it dismisses the case if it is found that there was no violation and states the remedies or penalties that result from a determination if it is determined that there was a violation. The range of remedies include: (1) orders to cease and desist from violation of land development regulations; (2) orders to restore property to compliance with land development regulations; and (3) any specific order that achieves the same purpose. Such orders, whether mandating action or refraining from action regarding the property, may be enforceable against owners of record who may not be violators.

In order to be able to confirm compliance with enforcement orders, the local government has authority to enter upon the property in question. This is proper even without the consent of the owner because entry can be performed only after a determination in a proper hearing that the property is or was in violation of land development regulations. Remedies also include the ability of the local government to enter upon the property and take whatever measures are reasonably necessary to place the property into compliance with the enforcement order. The local government is then entitled to reimbursement for the reasonable expenses of such intervention. This remedy allows the local government the option of conducting compliance measures itself, rather than entrusting the owner or violator to do so. The penalty is a fine payable to the local government, but being a penalty, a fine should be applied only in the case of intentional, knowing, or reckless violation of land development regulations.

If the violator or owner persists in the violation and does not comply with the remedies or penalty of the order, the local government may refer the case for civil enforcement pursuant to Section 11-301 or criminal enforcement under 11-302, or it may hold a supplemental hearing on the allegations of persistent violation. If that hearing results in a finding that the enforcement order was violated, the local government may impose an additional fine, may conduct any remediation itself at the violator's expense, or may refer the case for civil or criminal enforcement pursuant to Sections 11-301 and 11-302. Therefore, there is an intermediate option before judicial enforcement, while preserving the local government's option to commence court action if it is clear that the imposition of further fines will not be effective.

Enforcement orders and supplemental enforcement orders are appealable directly to the civil courts. The procedure for such appeals is the judicial review procedure set forth in Sections 10-601 *et seq.* of Chapter 10, Administrative and Judicial Review of Land-Use Decisions.

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11-204 Enforcement Order; Remedies and Penalties

- (1) Within [10] days of the conclusion of the enforcement hearing, or of the date upon which the hearing was to be held if there was no hearing, the hearing officer or board shall issue in writing an enforcement order. It shall be sent by certified mail or facsimile to all parties.
- (2) The enforcement order shall state the determination of the hearing officer or board regarding the allegations of the enforcement notice, and shall state in reasonable detail all legal and factual bases for that determination.
- (3) If the hearing officer or board determines that no violation of land development regulations is being or has been committed by any person alleged to have done so in the enforcement notice, the enforcement notice shall be dismissed and the enforcement order shall so state.
- (4) If the hearing officer or board determines that a violation of land development regulations is being or has been committed, the enforcement order shall state the appropriate and just remedies or penalties, and shall state the party or parties against which the enforcement order is effective. The remedies and penalties may include:
 - (a) an order to cease and desist from continuing and future violation of land development regulations;
 - (b) an order to bring the property in question into compliance with land development regulations;
 - (c) an order to perform a specific act or acts, or to refrain from a specific act or acts, which effectuates the purposes of subparagraphs (4)(a) and (b) above;
 - (d) authorization for the [local planning *or* code enforcement agency] to enter upon the property and take all reasonably necessary steps to place the property in compliance with land development regulations, combined with an order to compensate the [local planning *or* code enforcement agency] for all reasonable expenses incurred pursuant to this subparagraph; and
 - (e) an order to pay to the local government a fine, but only if the hearing officer or board determines that the violation is or was intentional, knowing, or reckless. Such fine shall not exceed \$[1,000] for each day of violation.
- (5) Any owner of the property may be subject to an order pursuant to subparagraphs (4)(a) through (d) above, even if he or she is not determined in the enforcement order to be a violator. Only a violator may be subject to an order pursuant to subparagraph (4)(e).
- (6) The enforcement order may include authorization for employees or agents of the [local planning *or* code enforcement agency] to enter upon the property in question in order to

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determine that the enforcement order is being or has been complied with. Entrance upon land pursuant to an enforcement order, or any supplemental enforcement order, and to this Section shall not constitute a violation of Section [*cite to section defining criminal trespass on land*] of the [Penal Code or Criminal Code], nor shall any owner or occupant of the property have a cause of action for trespass except for intentional, knowing, or reckless damage to the property.

- (7) The [local planning or code enforcement agency] shall monitor compliance with the enforcement order. If the [local planning or code enforcement agency] has reason to believe that any person subject to the enforcement order is not complying with the enforcement order, the [local planning or code enforcement agency] may, at its option, either:
- (a) refer the matter to the local government attorney for the commencement of a civil action pursuant to Section [11-301];
 - (b) commence a supplemental enforcement action pursuant to paragraph (8) of this Section; or
 - (c) refer the matter to the [*prosecuting attorney*] for the commencement of criminal proceedings pursuant to Section [11-302].

A referral or commencement under this paragraph (7) does not preclude a later referral or commencement when noncompliance is alleged to be continuing or a new act of noncompliance is alleged.

- (8) A supplemental enforcement action is commenced by the [local planning or code enforcement agency] by filing a petition with the hearing officer or board stating its belief that one or more persons subject to the enforcement order is not complying with the enforcement order, and the reasons for this belief.
- (a) A copy of the petition shall be sent by the [local planning or code enforcement agency] to all parties by certified mail or by facsimile. Any party alleged in the petition to be in noncompliance shall respond to the petition in writing, and any other party may respond to the petition in writing.
 - (b) Upon receipt of the petition and of the responses of all parties required to respond, the hearing officer or board shall schedule a hearing on the petition and shall notify all parties of the date, time, and place by certified mail or facsimile. If any party required to respond to the petition does not do so within [15] days of receiving the petition, the hearing officer or board may schedule the hearing regardless.
 - (c) The hearing shall be subject to the same rules and held according to the same procedures as an enforcement hearing pursuant to Section [11-203].

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- (d) The hearing officer or board shall issue a supplemental enforcement order within [5] days of the completion of the hearing.
 - (e) If the hearing officer or board finds that there is no significant noncompliance with the enforcement order, then the petition shall be dismissed and the supplemental enforcement order shall so state.
 - (f) If the hearing officer or board finds that there is significant noncompliance with the enforcement order, then the board shall include in the supplemental enforcement order an order or authorization:
 1. that the person or persons in noncompliance pay an additional fine, either a single fine or a fine assessed for each day of noncompliance;
 2. that the [local planning *or* code enforcement agency] enter upon the property and take all reasonably necessary steps to place the property in compliance with land development regulations, and that the person or persons in noncompliance compensate the [local planning *or* code enforcement agency] for all reasonable expenses incurred pursuant to this subparagraph;
 3. that the matter be referred to the local government attorney for the commencement of a civil action pursuant to Section [11-301]; or
 4. that the matter be referred to the [*prosecuting attorney*] for the commencement of criminal proceedings pursuant to Section [11-302].
- (9) Enforcement orders and supplemental enforcement orders shall be appealable to the [*trial-level*] court for the county in which the property in question is located, pursuant to the procedures set forth in this Act for judicial review of administrative decisions at Sections [10-601 *et seq.*]

JUDICIAL PROCEDURE

Commentary: Civil Proceeding

A local government may choose to enforce its land development regulations by civil action. Even where the local government elects to employ administrative enforcement, there must be a remedy available to the local government when a person subject to a preliminary order or enforcement order fails to comply with that order, and the most appropriate remedy is a civil action.

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A civil action requires that the local government must prove its case only to a preponderance (e.g., that it is more likely than not likely that there is or was noncompliance by the accused), not beyond a reasonable doubt as in criminal cases. Civil cases are generally remedial, as opposed to the punitive nature of criminal cases. Local governments that have “decriminalized” land-use violations and enforce their land development regulations through civil proceedings have reported good results from this approach.⁴⁹ The court hearing a civil action can enforce its orders and judgments with the power of contempt and can collect fines or other money legally owed through various collection methods, such as liens, garnishments, and executions.

The object of a civil action commenced after an administrative proceeding is to make the enforcement order, and the supplemental order that establishes noncompliance, the judgment of the court so that if noncompliance persists, the power of the state may be applied to compel obedience from the intransigent violator. Since the local government has already held a supplemental enforcement hearing and found noncompliance with the enforcement order, the procedure under this cause of action is summary: the issues to be litigated are limited and the procedure is generally streamlined. Unless a defendant demands a trial on the merits or a hearing on the appropriate remedies and penalties, the supplemental enforcement order is entered as the judgment of the court without further proceeding.

If there is a trial, the issues before the court are whether the defendants violated valid land development regulations and the appropriate remedy or penalty if violation is found. All other issues should be addressed through the appeals process provided in Chapter 10. The remedies and penalties available to the court are the same as those available in the administrative enforcement procedure: injunctive relief, fines, and the power to enter upon the land in question and remedy the violations at the owner’s or violator’s expense.

Because the local government is acting with the police power to achieve the public welfare, it should not be required to post a bond in order to obtain an injunction against a defendant. The posting of bond in cases involving large tracts of land could be prohibitively costly, unduly restricting the local government’s power to obtain compliance with its land development regulations.⁵⁰

Section 11-301 below provides for the losing party to reimburse the court costs of the winning party, as is typical in all civil actions. It also authorizes the reimbursement of reasonable attorney fees of the winning party.

11-301 Civil Proceeding

- (1) A local government has a cause of action, in the [*trial-level*] court for the county in which the property in question is located to enforce the land development regulations of the local

⁴⁹Kelly, 25.

⁵⁰Kelly, 30.

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government. Such cause of action may include the owner or owners of property upon which a violation of land development regulations has occurred, is occurring, or is about to occur, to the extent that it is reasonably necessary for the owner or owners to be subject to the judgment of the court to obtain relief from or abatement of the violation.

- (2) A local government that:
 - (a) has issued an administrative enforcement order pursuant to Section [11-204], where a person or persons subject to the administrative enforcement order has not complied with or is not complying with that order; or
 - (b) issues a supplemental administrative enforcement order pursuant to Section [11-204(7)(b)] that:
 1. determines that a person or persons subject to an administrative enforcement order has not complied with or is not complying with that order, and
 2. directs that the case be referred to the local government attorney for proceedings under this Section;
- has a cause of action, in the [*trial-level*] court for the county in which the property in question is located, against the person or persons in noncompliance, or determined in the supplemental administrative enforcement order to be in noncompliance.
- (3) Except as otherwise provided herein, the procedure governing a civil action pursuant to this Section shall be the procedure applicable in all civil actions by statute and by rule of court.
- (4) In any civil action pursuant to paragraph (2) of this Section:
 - (a) the administrative enforcement order and any supplemental administrative enforcement orders to which the defendant or defendants are subject shall be attached to the complaint and by such attachment shall be incorporated therein; and
 - (b) the [clerk of the court shall *or* judge may] enter the administrative enforcement order and any supplemental administrative enforcement orders as the judgment of the court after [30] days from the date upon which the last answer is due to be filed, accounting as in other civil cases for postponements in that date due to motions pursuant to [*Sections or Rules of civil procedure on motions to dismiss, to strike, and for summary judgment*], unless one or more defendants requests a trial in his or her answer. If such a default occurs and:
 1. there is no supplemental administrative enforcement order; or

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2. the supplemental administrative enforcement order does not specify an appropriate and just remedy or penalty beyond the commencement of a civil action pursuant to this Section;

there shall be a hearing limited to determining the appropriate and just remedies and penalties to be applied.

- ◆ Whether the default judgment is at the discretion of the judge or is automatic and effected by the clerk of court is an issue best decided on a state-by-state basis according to the existing practice of the courts on default judgments.

- (5) The issues before the court in a trial of a civil action pursuant to this Section are limited to determining, by a preponderance of the evidence:

- (a) whether the alleged violator or violators are violating or have violated any constitutionally and statutorily valid land development regulations; and

- ◆ Since the first issue is whether a valid regulation has been violated, it is relevant to challenge the validity of a land-use regulation at the judicial stage (though it cannot be challenged in the administrative proceeding).

- (b) if so, what remedies or penalties are appropriate and just. In a civil action commenced pursuant to paragraph (2) above, the court shall, in determining the appropriate and just remedies or penalties, take into consideration the requests of the [local planning *or* code enforcement agency] in the administrative enforcement notice and the provisions of the administrative enforcement order.

- (6) The appropriate and just remedies and penalties that may be imposed in a judgment pursuant to this Section include:

- (a) an order to cease and desist from continuing and future violation of land development regulations;

- (b) an order to bring the property in question into compliance with land development regulations;

- (c) an order to perform a specific act or acts, or to refrain from a specific act or acts, which effectuates the purposes of subparagraphs (6)(a) and (b) above;

- (d) authorization for the [local planning *or* code enforcement agency] to enter upon the property and take all reasonably necessary steps to place the property in compliance with land development regulations, combined with an order to compensate the [local planning *or* code enforcement agency] for all reasonable expenses incurred pursuant to this subparagraph; and

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- (e) an order to pay to the local government a fine, but only if it is determined that the particular defendant intentionally, knowingly, or recklessly committed the violation. Such fine shall not exceed \$[1,000] for each day of violation.
 - (7) Entrance upon land pursuant to paragraph (6)(d) above shall not constitute a violation of Section [*cite to section defining criminal trespass on land*] of the [Penal Code or Criminal Code], nor shall any owner or occupant of the property have a cause of action for trespass except for intentional, knowing, or reckless damage to the property.
 - (8) The local government need not post bond in order for an injunction, whether preliminary or final, to issue against any defendant.
 - (9) Costs shall be taxed in any civil action pursuant to this Section as in other civil actions, as shall reasonable attorney fees as provided in Section [*statutes on taxing attorney fees*] of the [Code of Civil Procedure].
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Commentary: Criminal Proceeding

The criminal justice system, and the penalties imposed therein, are the extreme measure, the “last resort” in obtaining compliance with local land development regulations. The penalties can include imprisonment, accompanied by loss of the right to vote and hold public office during imprisonment. In many states, statutes restrict the availability of certain privileges and benefits (the possession of firearms, employment in certain government positions or other positions of trust) to convicted persons, especially felons. A criminal conviction, regardless of the offense, is considered by some to be a stigma.⁵¹ Furthermore, because of these negative effects, the procedure for obtaining a criminal conviction is long and has many safeguards for the defendant. The foremost of these, from the point of view of a local government seeking conviction, is that the violation, and the intentional nature thereof, must be proven beyond a reasonable doubt.

Section 11-302 below has three grades of offense and three corresponding grades of penalty. These differences are based on the fact that a violation of land development regulations should be punished more severely when the violation results in a risk of physical injury to persons or damage to property than when it potentially or actually diminishes property values, quality of life, or other important but not vital values. The first type of penalty is a serious misdemeanor or the equivalent in the state’s Criminal Code for an offense where the person is intentionally violating land development regulations but is not thereby recklessly creating a risk of death or injury, or of destruction of a significant amount of property. The intermediate penalty should be that of a minor felony, or the state equivalent, when the violator recklessly endangers the lives or property of others. The highest penalty is reserved for when the intentional violation of land development regulations

⁵¹Schilling & Hare 111.

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actually causes death, injury, or destruction of property and the violator knew of the risk of such a result. The exact value that constitutes “significant” property is left up to adopting states, but \$25,000 is recommended here as a benchmark to define “significant.” Destruction of property is specified so that a higher penalty is imposed for physical damage to property, or the risk thereof, and not for mere diminution of value of property due to violation of land development regulations.

11-302 Criminal Proceeding

- (1) It is a criminal offense to intentionally [or knowingly] violate the land development regulations of any local government. Each day of violation may be considered a separate offense. Except as otherwise stated, such offense is a [*grade of criminal offense*].
 - (a) It is a [*higher grade of criminal offense*] when an offense under this Section causes a significant risk of death or injury to persons, or of destruction of the property of another of a value of [\$25,000] or more, and the person or person so violating knows of the risk at the time of the violation.
 - (b) It is a [*even higher grade of criminal offense*] when an offense under this Section causes the death or injury of persons, or destruction of the property of another to a value of [\$25,000] or more, and the person or person so violating knows of the risk of death, injury, or destruction at the time of the violation.
- (2) The [*criminal trial court*] shall determine whether, beyond a reasonable doubt, an intentional violation of local land development regulations is occurring or has occurred, and is not required in any way to defer to the findings of an administrative enforcement hearing as expressed in the administrative enforcement order and supplementary administrative enforcement order or orders.