This Chapter contains model statutes that authorize local governments to adopt a variety of land development regulations. Topics covered include zoning, subdivision, planned unit development (PUD), uniform development standards, exactions, development impact fees, vesting, nonconforming uses, and development agreements, among others. A feature of the Chapter is model language to gauge consistency between a local comprehensive plan and land development regulations or specific development proposals.

The Chapter is intended to be used in conjunction with Chapter 9, Special and Environmental Land Development Regulation and Land-Use Incentives, Chapter 10, Administrative and Judicial Review of Land-Use Decisions, and Chapter 11, Enforcement of Land Development Regulations. Specific provisions related to the administration of land development regulations, including the adoption of a unified development permit review system, appear in Chapter 10.
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8-102 Authority to Adopt Land Development Regulations; Purposes; Presumption of Validity
8-103 Adoption and Amendment of Land Development Regulations; Notice and Hearing
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THE EVOLUTION OF MODEL ZONING AND SUBDIVISION STATUTES

This commentary reviews the various model statutes that have influenced (or have attempted to influence) the enactment of state legislation for zoning and subdivision controls as well as the major studies that have critiqued land development controls in the U.S. It is intended to provide an overview, chiefly focusing on zoning and subdivision, which are the two principal land-use controls used in the United States. It does not include model statutes on planning, which are covered elsewhere in the Legislative Guidebook. Later in this Chapter as well as in Chapters 9, 10, and 11, the Guidebook assesses specific techniques and issues and analyzes approaches from different states.

A zoning ordinance divides the jurisdiction of a local government into districts or zones and regulates land-use activity in each district, the intensity or density of such uses, the bulk of buildings on the land, parking, and other characteristics or aspects of land use. The ordinance consists of a text and a zoning map, both of which may be periodically amended by the local legislative body. By contrast, subdivision regulations govern the division of land into two or more lots, parcels, or sites for building, and the location, design, and installation of supporting infrastructure. Sometimes the subdivision regulations will also incorporate detailed engineering and design criteria for required public infrastructure. Zoning and subdivision control are interrelated; the layout of a subdivision is shaped by standards in the subdivision regulations themselves, but zoning requirements for lot area, width, and building setbacks also greatly influence the ultimate site design.

EARLY EFFORTS

Interest in planning and zoning enabling legislation in the U.S. began in the 1910s. The proceedings of the Fifth National Conference on City Planning in 1913 in Chicago contained a report of the conference’s Committee on Legislation. The committee report, which was adopted by the conference and published as part of its proceedings, contained several model acts for land development control (as well as planning):

1. establishing a city planning department and giving it extraterritorial (three-mile) planning jurisdiction and the authority to regulate plans of lots;
2. empowering cities to create from one to four districts within their limits and to regulate the heights of buildings thereafter constructed in each district;
3. authorizing the platting of civic centers;

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(4) authorizing the platting of reservations for public use without specifying the particular public use; and

(5) authorizing the establishment of building lines on any street or highway.

In 1916, New York City was the first municipality in the nation to adopt zoning. During this early period many states adopted enabling acts, freely borrowing from other another. For example, by 1919, at least 10 states had authorized all or certain classes of cities to adopt zoning. That same year, Congress instructed the commissioners of the District of Columbia to prepare comprehensive zoning regulations. The Texas legislature approved an amendment to the Dallas city charter in 1920 to permit overall zoning. The next year it sanctioned zoning for all cities in the state. In 1921 alone, Connecticut, Indiana, Kansas, Michigan, Missouri, Nebraska, Rhode Island, South Carolina, and Tennessee all granted cities the authority to regulate the use of land and building bulk.3

THE STANDARD ACTS

The Standard State Zoning Enabling Act (SZEA) and the Standard City Planning Enabling Act (SCPEA), drafted by an advisory committee of the U.S. Department of Commerce in the 1920s, laid the basic foundation for land development controls in the U.S.4 For many states, the Standard Acts still supply the institutional structure, although some procedural and substantive components may have changed.

There were several motivations for drafting the Standard Acts. One was the interest of Secretary of Commerce (and later President) Herbert Hoover. Witnessing the tremendous building boom in many American cities in the 1920s, Hoover was concerned that the value of private investment, especially in residences, be protected from incursions of incompatible uses, and that cities be planned so there was an adequate public infrastructure, as well as amenities, to support the burgeoning population.5 Another motivation, for the SZEA in particular, was to ensure that there was a clear grant of the state’s police power authority to local governments. When the question of the constitutionality of zoning came before state and federal courts, the matter of delegation of power to undertake zoning would have been resolved through the enactment of the enabling statute.6

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3Mellier Scott, American City Planning Since 1890 (Berkeley, Calif.: University of California Press, 1971), 193.


6See SZEA, iii.
The SZEA, which was drafted first, had nine sections. It included a grant of power, a provision that the legislative body could divide a municipality’s territory into districts, a statement of purpose for the zoning regulations, and procedures for establishing and amending the zoning regulations. The legislative body was required to establish a zoning commission to advise it as to the initial development of the zoning regulations. The zoning commission was a temporary body that was intended to go out of existence after the regulations were adopted—in effect a task force with a limited mission. It was not necessary to continue a zoning commission beyond the adoption of the original ordinance under the SZEA. Where it existed, the planning commission could also serve as the zoning commission. The SZEA’s longest section described the powers of the board of adjustment, a quasi-judicial body with the ability to authorize hardship variances and special exceptions (also known as conditional uses). The SZEA concluded with authorization for the adoption of enforcement mechanisms and language resolving conflict with other laws.

The SCPEA was intended to complement its predecessor. In the area of land development control, it included:

1. Provisions for adoption by the governing body of a master street plan and subsequent control of a master street plan and subsequent control of private building in the bed of mapped but unopened streets, and of public building in unofficial or unapproved streets; and

2. Control of private subdivision of land into building parcels and accompanying streets and other open spaces.

The U.S. Department of Commerce tracked the SZEA’s progress. By 1930, the department could report that 35 states had adopted legislation based on it. The SZEA was adopted in some form by all 50 states and is still in effect, in modified form, in 47 states. The SCPEA was not as popular, perhaps because there was less pressure to authorize planning institutions and more to allow zoning.

One criticism of the two acts was the confusion between a land-use element and a “zoning plan.” The SZEA required that zoning regulations be “in accordance with a comprehensive plan.” It did not define what a “comprehensive plan” was, or the exact nature of the analysis that a municipality would need to undertake to determine what the relationship was to be between the zoning regulations and the plan, especially when the zoning map was being amended. Nonetheless, a footnote to the SZEA attempted to clarify the phrase with the explanation: “This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.”

The SCPEA’s provisions for subdivision control are discussed in more detail in the commentary to Section 8-301, Subdivision Review.

Indeed, the SZEA did not contain any definitions at all!

SZEA, note 43.
Both acts used the term “zoning plan” to describe a map of zoning districts developed as part of the proposed regulatory scheme. The SCPEA, in Section 6, included a “zoning plan” as element of the “master plan.” It did not describe or list a land-use element—the guiding policy framework for land-use regulations—as a part of a master plan. The SZE A language, in the words of one critic, “thus encouraged overall zoning unsupported by a thoughtfully prepared general plan for the future development of the city.” Perhaps the zoning plan requirement in the SCPEA reflected the decision to publish the zoning act before the planning act. Still another view is that the practice in the 1920s was to prepare a detailed zoning plan as part of a comprehensive or master plan, as opposed to a more conceptual land-use element, but the studies that underpinned the zoning plan were similar (although more rudimentary than) those that would support the land-use element.

**MODEL LAWS FOR PLANNING CITIES**


Bassett and Williams drafted a series of statutory models that tended to be narrow in focus and procedural in nature, avoiding legislation with substantive content that dictated how planning was to be accomplished. For example, they believed that the legislation should not require the creation of a planning organ in local government. Thus, under their legislation, the legislative body was authorized but not required to create a planning commission. Under their model, there was also a zoning commission, which formulated the original zone plan and regulations, and a separate planning commission. Their model allowed the planning commission or board to serve as the zoning commission, although it would have to keep separate sets of minutes in order to distinguish between the planning and land-use control functions.

The Bassett and Williams model zoning enabling act included broad standards to guide the board of appeals (the term was used in preference to board of adjustment, which appears in the SZE A) in authorizing variances and exceptions and procedures for appeal to the courts. The language is virtually identical to the *Standard State Zoning Enabling Act*. The pair recognized the problems of boards overstepping their authority and, through use variances, effectively rezoning property, a

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function of the legislative body. Ability to appeal to the courts, they contended, “would tend to keep the actions of these boards within reasonable limits.”

Bettman conceded the seriousness of the problem often caused by the boards. Many boards, he wrote, took advantage of the indefiniteness of the “hardship clause” in the language of the SZEA for granting variances and exceptions. The cumulative effect of these changes “represents a far more serious impairment of the integrity of the zoning plan than results from court decisions or councilmanic spot zoning,” he wrote. Bettman’s model did not establish standards themselves. Instead it authorized the legislative body to define and presumably limit the scope of the appeals board’s authority, based on “the product of actual experience.” Thus, the legislative body could rein in the board if it had been abusing its powers. Bettman did not provide a special procedure for court review of zoning decisions, contending that conventional court procedures were adequate for this purpose.

**USDA Rural Zoning Enabling Legislation**

In 1936, the U.S. Department of Agriculture’s Resettlement Administration published an illustrative rural zoning enabling act accompanied by an extensive, very sophisticated commentary. The act was a series of changes to the basic structure of the SZEA in order to adapt it to serve rural zoning interests in unincorporated areas. The publication also contained examples of alternative language that would give the state some control in rural zoning. The inclusion of these provisions seems prescient for their time, since they anticipate a state interest in controlling land use and supervising local actions. For example, the USDA model proposed: (1) giving a state planning board or some similar agency authority to approve or appoint the membership of the county zoning commission; and (2) limiting the ability of the commission to adopt zoning regulations only after they had been approved by the board. It also proposed state aid and direct technical assistance to the county zoning commission in formulating zoning regulations.

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13Id., at 15.

14Id., 64.

15Id., 65.

16Of course, the fact that the board was abusing its authority and the legislative board knew this but failed to rein in the board could indicate something far more serious about the ethical environment of the local government. Forcing the legislative body to modify decision-making standards to eliminate abuses requires elected officials to slap the wrist of board of appeals members that they were responsible for appointing. It is therefore a better idea to have strict decision-making standards and limiting language on the board’s authority in the enabling legislation itself than to rely on local government to rectify the problem.


18Id., 47-50.
THE NEW MEXICO REPORT

In 1962, Harvard University Planning Professor William Doebele completed an extensive enabling statute study for the State of New Mexico Planning Office that was later summarized in a law journal article. While most of the recommendations were specific to New Mexico, some have broader implications, especially those regarding development control. In particular, Doebele proposed an imaginative presumption-shifting approach to relate the general (or comprehensive) plan to implementing ordinances, such as zoning or subdivision. In any litigation or dispute, the adoption of the plan could be introduced as evidence supporting the reasonableness of the ordinance. When this occurred, the party seeking to invalidate the ordinance assumed a “correspondingly greater burden of proof of unreasonableness.”

ASPO CONNECTICUT REPORT

In 1966, the American Society of Planning Officials, a predecessor of APA, assisted by the Chicago law firm of Ross, Hardies, O'Keefe, Babcock, McDugald, and Parsons, produced *New Directions in Connecticut Planning Legislation*. The first major postwar study on planning law reform, the study, prepared for the Connecticut Development Commission, recommended major changes in the Connecticut statutes. Many of the study’s proposals were aimed at revamping the state’s system of development control and have a great deal of transferability. They stressed procedural uniformity and fairness, and limitations on local powers and practices that tended to lead to ineffective, unnecessary, or inappropriate development regulation. The study recommended, among other things:

- A single planning and development agency. This agency would replace separate commissions for “planning” and “zoning,” a legacy of the SZEAs. A single administrative agency, either a planning and development commission or an executive department, would be established by the governing body of the municipality.
- A municipality that adopts land-use regulations should be required to establish the office of development administrator to enforce the regulations. Enforcement of the regulations should...
be through the issuance of certificates of compliance, and the issuance or denial of such certificates could be appealed to a local review board.

- The statutes should prohibit the inclusion of minimum house size requirements in local zoning regulations.
- The public hearing requirements of the existing statutes should be broadened so that no significant decision affecting land-use controls may be made without a public hearing. The hearing should be conducted by the agency that is the deciding authority, and all testimony taken at the hearing should be under oath, with the opportunity to cross-examine witnesses given to the applicant. A complete and accurate record of a hearing should be made either by stenographic transcription or mechanical recording device. The hearing agency should be given subpoena powers. The manner of giving notice for hearings on variance matters must be standardized and uniform time periods employed.
- The statutes should require explicit findings of fact and explicit reasons for each decision rendered by a local hearing agency or legislative body.
- The statutes should define the proper factors to be considered by a local agency in deciding applications for variances or special use permits. Use variances—variances that allow uses to be established that are not permitted in the zoning district—should be expressly prohibited.

**The Use of Land**

*The Use of Land*, a 1973 study sponsored by the Rockefeller Brothers Fund, described a “new mood in America . . . that questions traditional assumptions about the desirability of urban development . . . [and that was] part of a rising emphasis on human values, on the preservation of natural and cultural characteristics that make for a humanly satisfying living environment.” The study’s focus was national and did not touch on specific states or local practices. However, the report favored more discretionary reviews in approving local development proposals, among them, environmental impact statements. It also cited the need for state and local laws that would disqualify state and local officials for voting on or otherwise participating in any regulatory decision whose outcome would confer financial benefit to themselves, their families, or their business or professional association. It advocated citizen suits to appeal local regulatory decisions and to enforce ordinance requirements (note: these are typically permitted).

According to the study, to reduce “exclusionary incentives” by local governments to minimize costs or keep out the poor, states should enact measures to reduce the impact of new development on local tax rates, although it did not present specifics. The report called for state legislation to

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23 Id., 25.

24 Id., 26-27.

25 Id., 236.
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deprive local governments of the power to establish minimum floor area requirements for dwellings in excess of a statewide minimum established by statute. 26 In addition, it encouraged incentives, such as density bonuses, to stimulate large-scale developments, which it championed. 27 The report contained an extensive discussion of open space preservation techniques, such as mandatory parkland dedication and fees-in-lieu, cluster zoning, acquisition of easements along beaches, and revision of federal tax laws to encourage land donations. 28

ALI Model Land Development Code

The American Law Institute’s A Model Land Development Code (ALI Code), published in 1976 after 11 years of work, represented a critical rethinking of American planning and zoning law. 29 The ALI Code was not intended as a unified document to be adopted in its entirety by states to replace the Standard Acts, but instead as a source of various statutory models to address specific development concerns. Each state could select the provisions it needed for the 12 articles in the ALI Code. Other Chapters in the Legislative Guidebook discuss and update various proposals contained in the ALI Code with respect to state, regional, and local planning as well as state-level land use control (e.g., developments of regional impact and areas of critical state concern).

The ALI Code allocates responsibility for planning and land-use decision making between the state and local governments. The local government retains control over its planning and development regulation, subject to state supervision and policy guidance.

The core proposals affecting zoning and subdivision control appear in Article 2. 30 The Code combines both into a “development ordinance.” The ordinance is required to list for “general development” all of the “permitted uses in a given area.” Any developer seeking to build such a use may apply for a “general development permit.”

In addition, the Land Development Agency— the local entity that oversees all planning and development control—can issue “special development permits” for certain types of development. These permits may be issued only after notice and hearing of a type similar to that required for variances and special exceptions under the SZEA. Every Land Development Agency may allow variances in matters other than use, modification of nonconforming uses, and subdivision of land. Other types of special development permits can be granted by the Land Development Agency only if specifically authorized by the local development ordinance. These include permits allowing “economic use” of property, permits that involve minor modifications in zoning district boundary

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26 Id., 27.
27 Id., 28.
28 Id., 19-22.
30 This summary of Article 2 is abstracted from ALI, A Model Land Development Code, 28-29.
lines, and permits to allow development on property designated a landmark site or located in special preservation district.

Comprehensive planning was not mandatory under the ALI Code—a matter of sharp debate among its critics—but local governments that adopted what the Code termed a “Local Land Development Plan” may issue special permits for planned unit development and for development in “specially planned areas,” and may devise other categories of special development permits that incorporate material in the plan by reference.\(^{31}\)

In administering the development ordinance, the Land Development Agency must follow procedures set forth in the Code. The local legislative body can amend the development ordinance in the same manner as it may amend any other local ordinance, except that, if the amendment is the equivalent to the rezoning of a particular piece of property, the amendment is valid only if it is preceded by an administrative hearing by the Land Development Agency followed by findings that the action accomplished by the amendment meets a set of standards set forth in the Code. This subtle modification in the Code is intended to ensure that parcel-specific zone changes are treated as administrative (or policy-effectuating) matters, rather than legislative (or policy-making) actions.

Finally, under the Code, all governmental agencies are required to comply with local development regulations. If a state (or other governmental agency) disagrees with local regulations, its remedy is an appeal to a State Land Adjudicatory Board, a specialized land-use court. Noted the ALI Code: “In most states this would significantly enlarge the power of local governments to control development by state or regional agencies.”\(^{32}\)

**ACIR Model State Statutes**

The U.S. Advisory Commission on Intergovernmental Relations (ACIR), a now-defunct (since 1997) body created by Congress to study relationships among local, state, and national levels of government, published a series of model state statutes in 1975. The land-use legislation included local planning, zoning, and subdivision legislation drawn from enabling statutes for Florida counties. It also addressed planned unit development and mandatory dedication of park and school sites and fees-in-lieu.\(^{33}\)

**Council of State Governments Model Legislation**

The Council of State Governments, a joint research and information service supported by all the states, publishes annually a compendium of suggested model legislation. These models are typically

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\(^{32}\)ALI Code, 29.

based on exemplary or prototypical work in one or more states and appear in a standardized format. The models that relate to land development control are listed in the footnote below.34

OTHER MODELS

As part of a 1988 symposium issue on impact fees, the Journal of the American Planning Association published two model impact fee enabling acts, later reprinted in a collection of articles from that issue.35 The National Association of Home Builders (NAHB) Research Center in 1993 published Proposed Model Land Development Standards and Accompnying Model State Enabling Legislation. This report, funded by the U.S. Department of Housing and Urban Development, contained model minimum design and construction standards and two alternative statutes that would provide a mechanism to establish such standards on a statewide basis, with the standards either being voluntary or mandatory for all local governments.36 These models are reviewed in Section 8-401, Uniform Development Standards.

ABA HOUSING FOR ALL UNDER LAW

The American Bar Association (ABA) Advisory Commission on Housing and Urban Growth published a far-reaching report in 1978, Housing for All Under Law: New Directions for Housing, Land Use and Planning Law.37 Funded by a grant from the U.S. Department of Housing and Urban Development, the study proposed a series of measures to increase housing opportunity and choice and to promote a more rational growth process.

Among its recommendations in the area of land development controls, the study endorsed the then-new trend of treating zoning amendments that involve only individual parcels of property and have limited impact on the immediate area, as opposed to those affecting the community-at-large.


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(such as adoption of a new zoning map for a city), as “adjudicatory” acts instead of legislative decisions. Such a characterization would subject zone changes to a higher level of judicial scrutiny. “If zone changes are treated as adjudicatory,” the report concluded, “they will be subject to the essentials of procedural due process that are traditionally expected of administrative bodies--adequate notice, an opportunity to present and rebut evidence, a statement of findings, and will not be subject to voter referendum.”

To correct unevenness in the administration of land-use controls, the report discussed limitations on ex parte contacts between the parties to an action and the public officials involved, formal participation by neighborhood groups in land-use decisions that substantially affect their interests, and consolidation of administrative reviews and development permits. The report strongly backed the use of hearing examiners in lieu of zoning boards to ensure a more efficient and professional land-use appeals process at the local level.

FEDERAL STUDIES

Beginning with the Douglas Commission in 1968, numerous federal commission and federally sponsored study groups have recommended, in varying degrees, overhaul of state planning and zoning legislation. The major studies are discussed below, with emphasis on recommendations for land development controls.

1. National Commission on Urban Problems (Douglas Commission). In 1968, the National Commission on Urban Problems (also known as the Douglas Commission after its chair, Senator Paul Douglas) issued its report, Building the American City. A number of the report’s recommendations addressed state enabling legislation for land-use controls.

The report proposed abolishing local planning commissions as constituted in many communities. Under the commission’s proposal, planning commissions would retain their authority as citizen advisory commissions and advocates for comprehensive planning. However, administration of land-use regulations (such as review of subdivision plats and site plans, approving or making recommendations on special exceptions, variances, and rezoning), and plan-making itself, would be the job of paid professionals under the general direction of elected officials or a chief executive office, like a mayor or city manager. The report called for state recognition of local development controls by the enactment of legislation that grants to large units of government the same regulatory power over the actions of state and other public agencies (this was similar to a proposal in the ALI Code).

38Id., xxi.

39Ibid.

40National Commission on Urban Problems, Building the American City: Report of the National Commission on Urban Problems to Congress and to the President of the United States (Washington, D.C. U.S. GPO, 1968). The recommendations summarized here appear in the report at 242-252, passim. The report’s recommendations are also discussed in the commentary to Section 2-102, State Interests for Which Public Entities Shall Have Regard, and in the introduction to Chapter 6, Regional Planning.
State governments, said the report, should enable local governments to establish holding zones in order to postpone urban development in areas that are inappropriate for development within the next three to five years.\footnote{This recommendation was a precursor to contemporary legislation that authorizes or requires the designation of urban growth areas. See Section 6-201.1, Urban Growth Areas.} In such areas, local governments should be authorized to limit development to houses on very large lots (10 to 20 acres), agriculture, and open space uses. The state legislation should require that localities review such holding zones at least once every five years.

The report urged state legislation authorizing planned unit developments in both undeveloped and built-up areas. In addition, it proposed state statutes that enabled local governments to classify undeveloped land in planned development districts. In such districts, development would be allowed to occur at a specified minimum scale, one that was sufficiently large to allow only development that created its own environment.

The commission proposed that states adopt statutes that established clear policies as to the allocation of various costs between developers and local governments—a predecessor of development impact fees. This legislation should specify the kinds of improvements and facilities for which developers may be required to bear the costs and the manner in which such obligations may be satisfied. At minimum, the legislation was that developers provide for local streets and utilities and dedicate land (or make payments in lieu of dedication), parks, and schools, provided that “such facilities will directly benefit the development and be readily accessible to it.”\footnote{National Commission on Urban Problems, \textit{Building the American City}, 247.} Under this legislation, local governments would not be permitted to deviate from state policies.

The commission report also advocated legislation containing stricter procedural and substantive requirements for variances, rezonings, and nonconforming uses. For example, the report favored giving local governments the power to impose substantive limitations on the power of boards of appeal to grant variances and to eliminate deleterious nonconforming uses that adversely affect the environment. Also proposed was authorization for the establishment of formal rezoning policies on individual zoning map amendments.

2. \textbf{President’s Commission on Housing}. In 1982, the President’s Commission on Housing, appointed by President Ronald Reagan, issued a lengthy report on the provision, financing, and regulation of housing.\footnote{The President’s Commission on Housing, \textit{Report of the President’s Commission on Housing} (Washington, D.C., 1982). The recommendations summarized below appear at 202-9, 232-233, passim. See also the discussion of this report at Section 2-102, State Interests for Which Public Entities Shall Have Regard.} In particular, the report was critical of overregulation by state and local governments through zoning. A number of recommendations related to enabling legislation. For example, the report proposed:
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- Leaving the density of development to the conditions of the market except where a lesser density is necessary to achieve a “vital and pressing governmental interest,” a new standard by which the constitutionality of development controls would be gauged.
- Requiring states and local government to remove from their zoning laws all forms of discrimination against manufactured housing, providing the housing conforms to nationally recognized model codes.
- Eliminating minimum or maximum limits on the size of individual dwelling units.
- Ensuring that builders and developers should be obligated only for such fees, dedications, easements and servitudes, parking requirements, or other exactions as specifically attributable to the development.
- Streamlining local permit processing by eliminating or consolidating multiple public hearings, establishing a central permit authority and joint review committees whenever several departments are involved in a project approval, and employing a hearing officer to conduct quasi-judicial hearings on applications or parcel rezonings, special use permits, variances and other such devices.

The report urged states and local governments to implement its recommendations, but it did not contain specific enabling language to do so.

3. Advisory Commission on Regulatory Barriers to Affordable Housing. The 1991 Report of the Advisory Commission on Regulatory Barriers to Affordable Housing, which was appointed by HUD Secretary Jack Kemp, contained 31 recommendations addressing government regulations that drive up housing costs. A number of them were directed at states, some echoing recommendations of previous federal commissions. The report proposed, for example, that states institute “barrier removal plans,” a comprehensive assessment of state and local regulations and administrative procedures as well as state constitutional authority and enabling legislation. From this analysis, states would propose a program of state enabling reform and direct state action, as well as provide for model codes, standards, and technical assistance to local governments. In addition, states needed to review and reform their zoning and land planning systems to remove all institutional barriers to affordability.

Like the Douglas Commission and the President’s Commission on Housing, the report pointed to the need to consolidate and streamline multiple regulatory responsibilities, favoring state legislation to centralize authority in a single agency to shorten and improve state and local approval.

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44Many of the report’s recommendations in this area have been incorporated into the Legislative Guidebook. The report proposed that each local government have a housing element of a local comprehensive plan subject to state approval. It also recommended state authority to override barriers to affordable housing as well as the authority to establish state housing targets and fair-share planning mechanisms. See the two alternative statutes in Section 4-208, State Planning for Affordable Housing, and Section 7-207, Housing Element.
processes. States should also enact legislation that establishes time limits on building code, zoning, and other approvals and reviews. Statewide impact fee legislation should be enacted that restricts the use of impact fees “to fund only facilities that directly serve or are directly connected to the house or development on which these fees are levied.”

States, said the report, should either enact a statewide subdivision ordinance and mandatory development standards or, alternatively, formulate a model land development code for use by localities. In addition, states should amend enabling acts that authorize manufactured housing under appropriate conditions and standards, as a permitted dwelling unit, and bar local governments from prohibiting them. Local governments should be directed to permit accessory apartments as of right, not as a conditional use, in any single-family district, subject to appropriate design, density, and other occupancy standards adopted by the state. Finally, the state should require localities to include a range of residential-use categories that permit, as of right, duplex, two-family, and triplex housing and adequate land within their jurisdictions for such use.

**OTHER CRITIQUES OF ZONING ENABLING LEGISLATION**

A 1991 article in the *Urban Lawyer* by George Liebman, a Maryland attorney, proposed a “developer’s bill of rights” in connection with a revised zoning enabling act. Liebman’s proposals for revision of enabling statutes focused on increasing the supply and reducing the cost of housing in developed areas and those areas proposed for development.

Liebman’s proposals, in large measure, tracked the recommendations of the various study commissions and models describe above. For example, in order to eliminate delays and jurisdictional conflicts, he favored abolishing planning commissions, vesting zoning, subdivision, and building and housing code enforcement in one agency, and establishing a uniform structure of appeal to a board of zoning appeals. Similarly, he called for duplexes and accessory apartments to be permitted uses as of right in all new residential construction. Liebman declared that municipalities “should be required to scrap the extravagant street width requirements imposed in the gas-guzzler era, possibly by imposition of a 26 foot maximum for collector and subcollector roads and an 18 foot maximum for dead end and cul-de-sac streets.”

Other recommendations would have eliminated the statutory authorization of minimum lot sizes, setback, and yard requirements and replaced them with authorization for density and floor area ratio.
limitations, and light and air standards.\footnote{Id., 13.} Another proposal would guarantee “the right of developers to reduce lot sizes and dimensional requirements, so long as density limitations are met and open space dedicated.”\footnote{Ibid.} In areas where development is sought to be concentrated, such as cities, municipalities of a certain size, or redevelopment areas, development permits should be deemed issued, if not denied or conditionally granted within 180 days of application.\footnote{Id., 13, citing S.B. 419, 1981 Oregon Laws.} Municipalities should be denied the right to distinguish between development of similar physical characteristics on the basis of tenure or form of ownership (i.e., condominium, owner-occupied, rental).\footnote{Id., 15, citing Ore. Admin. Rules §660-07-022 (no distinction on the basis of form of tenure).} Liebman also wanted municipalities to be required to permit in residential zones home offices and telecommuting not involving show windows, exterior display advertising, or frequent personal visits of persons not employed on the premises.\footnote{Id., 14, citing 24 Vt. Stat §4406(3).}

Zoning ordinances, Liebman contended, should be precluded from distinguishing between permitted structures on the basis of the number of housing units contained within them, so long as density, buffer, and architectural conformity requirements are satisfied. “The enabling act,” wrote Liebman, “should make clear . . . that zoning ordinances are regulations of physical development and its physical consequences (e.g., traffic, damage to landscape, overburdening of public services, and prevention of nuisances) not vehicles for discriminating among housing types having similar environmental effects.”\footnote{Id., 14, citing 24 Vt. Stat §4406(3).} Concluded Liebman: “The fundamental emphasis in these proposals is certainty, equality among subdivisions, and respect for market forces. The mechanism best attuned to this approach is amendment of state enabling statutes, since this alone permits landwasting [sic] and burdensome local regulations to be immediately swept away.”\footnote{Id., 14.}

\footnote{Id., 13.}
\footnote{Ibid.}
\footnote{Id., 13, citing S.B. 419, 1981 Oregon Laws.}
\footnote{Id., 15, citing Ore. Admin. Rules §660-07-022 (no distinction on the basis of form of tenure).}
\footnote{Id., 14, citing 24 Vt. Stat §4406(3).}
\footnote{Id., 14.}
\footnote{Id., 24.}
GENERAL PROVISIONS

8-101 Definitions

As used in this Act, the following words and terms shall have the meanings specified herein:

“Adequate Public Facility” means a public facility or system of facilities that has sufficient available capacity to serve development or land use at a specified level of service;

“Adjusted Cost” means the cost of designing and constructing each new fee-eligible public facility or capital improvement to an existing fee-eligible public facility, less the amount of funding for such design and construction that has been, or will with reasonable certainty be, obtained from sources other than impact fees.

“Base Flood” means the flood having a one percent chance of being equaled or exceeded in any given year.

According to the Growing SmartSM Directorate, effective development controls should:

• Balance community vision with rights of property owners.
• Support community in the broadest sense.
• Account for long-term intended and, where possible, unintended impacts.
• Engender fairness and equity for all people in the community, not just those served by any given development.
• Incorporate smart growth principles, including efficient use of land, and mixing uses, in creating transportation and housing choices, and promoting good urban design.
• Be based on adequate enabling legislation.
• Aspire to reach a middle ground with standards that are both clear and predictable but that also allow flexibility and creativity.
• Encourage information sharing on the parts of administrators, lay board members, and applicants with regard to all standards, the characteristics of development sites, and the potential impacts of development.
• Include review processes that have a beginning, middle, and an end.
• Provide for nonjudicial mediation and review of decisions.
• Include incentives where possible and appropriate.
“Base Flood Elevation” means the elevation for which there is a one percent chance in a given year that flood levels will equal or exceed it.

“Concurrent” or “Concurrency” means that adequate public facilities are in place when the impacts of development occur, or that a governmental agency and/or developer has/have made a financial commitment at the time of approval of the development permit so that the facilities are completed within [2] years of the impact of the development;

“Construction Drawings” mean the maps or drawings and engineering specifications accompanying a final plat and showing the specific location and design of public and nonpublic improvements to be completed as part of a development.

“Dedication” means the transfer of title to, and responsibility for, public improvements to the local government from the owner of a development subject to an improvements and exactions ordinance.

“Development Agreement” means an agreement between a local government, alone or with other governmental units with jurisdiction, and the owners of property within the local government’s jurisdiction regarding the development and use of said property.

“Development Impact Fee” or “Impact Fee” means any fee or charge assessed by the local government upon or against new development or the owners of new development intended or designed to recover expenditures of the local government that are to any degree necessitated by the new development. It does not include real property taxes under [cite to property tax statute] whether as a general or special assessment, utility hookup or access fees, or fees assessed on development permit applications that are approximately equal to the cost to the local government of the development permit review process.

“Development Standards” mean standards and technical specifications for improvements to land required by an improvements and exactions ordinance for subdivisions, developments subject to site plan review, and planned-unit developments. Development standards include specifications for the placement, dimension, composition, and capacity of:

(a) streets and roadways;

(b) sidewalks, pedestrian ways, and bicycle paths;

(c) signage for traffic control and other governmental purposes, including street name signs, and other traffic control devices on streets, roadways, pedestrian ways, and bicycle paths;

(d) lighting of streets, pedestrian ways, and bicycle paths;

(e) water mains and connections thereto, including connections for the suppression of fires;

(f) sanitary sewers and storm-drainage sewer mains and connections thereto;

(g) utility lines and poles, conduits, and connections thereto;
(h) off-street parking and access thereto;

(i) landscaping and contouring of land, and other provisions for drainage, sedimentation, and erosion control;

(j) open space, parks, and playgrounds; and

[(k) public elementary and secondary school sites.]

“Fee-Eligible Public Facilities” mean off-site public facilities that are one or more of the following systems or a portion thereof:

(a) water supply, treatment, and distribution, both potable and for suppression of fires;

(b) wastewater treatment and sanitary sewerage;

(c) stormwater drainage;

(d) solid waste;

(e) roads and public transportation; and

(f) parks, open space, and recreation.

“Financial Commitment” means that sources of public or private funds or combinations thereof have been identified which will be sufficient to finance public facilities necessary to serve development and that there is a reasonable written assurance by the persons or entities with control over the funds that such funds will be timely put to that end. A “Financial Commitment” shall include, but shall not be limited to, a development agreement and an improvement guarantee;

“Floodplain” means any land area susceptible to being inundated by water from any source.

“Final Plat” means the map of a subdivision to be recorded after approval by the local government.

“Improvement” means any one or more of the following which is required by an improvements and exactions ordinance to be constructed on the premises of a subdivision, development subject to site plan review, or planned-unit development:

(a) streets and roadways;

(b) sidewalks, pedestrian ways, and bicycle paths;

(c) signage for traffic control and other governmental purposes, including street name signs, and other traffic control devices on streets, roadways, pedestrian ways, and bicycle paths;
(d) lighting of streets, pedestrian ways, and bicycle paths;

(e) water mains and connections thereto, including connections for the suppression of fires;

(f) sanitary sewers and storm-drainage sewer mains and connections thereto;

(g) utility lines and poles, conduits, and connections thereto;

(h) off-street parking and access thereto;

(i) landscaping and contouring of land, and other provisions for drainage, sedimentation, and erosion control;

(j) open space, parks, and playgrounds; and

[(k) public elementary and secondary school sites.]

“Improvement Guarantee” means a security instrument, including but not limited to a bond, accepted by a local government to ensure that all public and nonpublic improvements required by an improvements and exactions ordinance or otherwise required by the local government as a condition of approval of a development permit will be completed in compliance with the approved plans and specifications of the development.

“Land Use” means the conduct of any activity on land, including, but not limited to, the continuation of any activity the commencement of which constitutes development.

“Level of Service” means an indicator of the extent or degree of service provided by, or proposed to be provided by, a public facility or system of public facilities based on and related to the operational characteristics of the facility or system;

“Local Capital Budget” means the annual budget for capital improvements adopted by ordinance that is also the first year of the local capital improvement program.

“Local Capital Improvement Program” means the document prepared pursuant to Section [7-502].

“Maintenance Guarantee” means any security instrument that may be required by a local government to ensure that necessary public and nonpublic improvements installed in connection with a development will function as required for a specific period of time.

“Manufactured Home” means a building unit or assembly of closed construction that is fabricated in an off-site facility and constructed in conformance with the federal construction and safety standards established by the secretary of housing and urban development pursuant to the “Manufactured Housing Construction and Safety Standards Act of 1974,” as amended, 42 U.S.C. §5401 et seq., and that has a permanent label or tag affixed to it, as specified in 42 U.S.C. §5415, certifying compliance with all applicable federal construction and safety standards.
“Minor Subdivision” means any subdivision containing not more than [3 to 5] lots fronting on an existing street, not involving any new street or road or the creation or extension of any public improvements.

“Nonconforming Land Use” means a land use, lot, or parcel that was lawfully established or commenced prior to the adoption or amendment of a local government’s land development regulations, and was in compliance with any land development regulations then in effect, but which does not presently comply with the land development regulations.

“Nonconforming Lot or Parcel” means a lot or parcel that was lawfully established or commenced prior to the adoption or amendment of a local government’s land development regulations, and was in compliance with any land development regulations then in effect, but which does not presently comply with the land development regulations.

“Nonconforming Sign” means a sign that was lawfully constructed or installed prior to the adoption or amendment of a local government’s land development regulations, and was in compliance with any land development regulations then in effect, but which does not presently comply with the land development regulations.

“Nonconforming Structure” means a building or structure that was lawfully constructed prior to the adoption or amendment of a local government’s land development regulations, and was in compliance with any land development regulations then in effect, but which does not presently comply with the land development regulations.

“Nonconformity” means a nonconforming land use, nonconforming lot or parcel, nonconforming structure, and/or nonconforming sign.

“Nonpublic Improvement” means any improvement for which the owner of the property, a homeowners’ association, or some other non-governmental entity is presently responsible and which the local government will not be assuming the responsibility for maintenance or operation.

“Off-Site” means not located on property that is the subject of new development.

“Overlay District” means a district that is superimposed over one or more zoning districts or parts of districts and that imposes specified requirements that are in addition to those otherwise applicable for the underlying zone.58

♦ An overlay district is a type of district that lies on top of another, like a bedspread over a blanket. The blanket is the underlying zoning district, such as a single-family detached with 10,000-square-foot lots. With an overlay zone, the provisions of underlying zones that are not affected by the provisions of the overlay zone remain the same. Instead, like the bedspread over the blanket, the requirements of the overlay district are placed over portions of the underlying zone or zones. The boundaries of the overlay also do not have to correspond perfectly with the

58See Maryland Office of Planning, Overlay Zones (Baltimore, Md.: The Office, March 1995).
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underlying zone; the overlay district may cover only part of a regular zone or may cover part of several underlying zones.

“Performance Standards” mean criteria to control and limit the impact of land uses and their operation upon the surrounding neighborhood and the community as a whole.

Therefore, instead of fixed uses, zoning with performance standards would permit those uses in a particular district as do not exceed the district’s specified limits for traffic, noise, odors, visual impact, etcetera.

“Permanent Foundation” means permanent masonry, concrete, or other locally-approved footing or foundation to which a building may be affixed.

“Permanently Sited Manufactured Home” means a manufactured home that meets all of the following criteria:

(a) The structure is affixed to a permanent foundation and is connected to water mains or wells, sewer mains or a septic system, and electric services, as may be required by generally-applicable ordinance;

(b) The structure, excluding any addition, has a width of at least [twenty-two] feet at one point, a length of at least [twenty-two] feet at one point, and a total living area, excluding garages, porches, or attachments, of at least [nine hundred] square feet;

(c) The structure has a six-inch minimum eave overhang, including appropriate guttering; and

(d) [other.]

“Planned Unit Development” means one or more lots, tracts, or parcels of land to be developed as a single entity, the plan for which may propose density or intensity transfers, density or intensity increases, mixing of land uses, or any combination thereof, and which may not correspond in lot size, bulk, or type of dwelling or building, use, density, intensity, lot coverage, parking, required common open space, or other standards to zoning use district requirements that are otherwise applicable to the area in which it is located.

“Preliminary Subdivision” or “Preliminary Plan” means the initial drawing or drawings that indicate the proposed manner or layout of a proposed subdivision to be submitted to the local government.

“Public Improvement” means any improvement for which the local government entity is presently responsible or will, upon acceptance and determination that it has been constructed as approved, ultimately assume the responsibility for maintenance and operation.

“Resubdivision” means any change to an approved or recorded subdivision plat or lot, or parts thereof, that creates a lesser number of lots or parcels, changes the area or dimensions of lots or parcels, or changes the area or dimensions of any areas reserved for public use. Land that has been subject to, or is proposed to be subject to, resubdivision is a subdivision for the purposes of Chapter 8 [and this Act].
“Site Plan” means a scaled drawing that shows the development of lots, tracts, or parcels, whether or not such development constitutes a subdivision or resubdivision of the site. A site plan may include elevations, sections, and other architectural, landscape, and engineering drawings as may be necessary to explain elements of the development subject to review;

“Special Flood Hazard Area” means land in the floodplain within the jurisdiction of a local government subject to one percent or greater chance of flooding in any given year.

“Subdivision” means any land, vacant or improved, which is divided or proposed to be divided into two (2) or more lots, parcels, or tracts for the purpose of offer, sale, lease, or development, whether immediate or future. Subdivision includes the division or development of land for residential or nonresidential purposes, whether by deed, metes and bounds description, devise, intestacy, lease, map, plat, or other recorded instrument. Subdivision does not include condominiums pursuant to the [cite state condominium act] or the division of land into lots or parcels for cemetery purposes.

“Uniform Development Standards” mean standards and technical specifications for improvements to land required by subdivision, site plan review, and planned-unit development ordinances and, in order to be considered complete for purposes of Section [8-401(1)], shall include specifications for the placement, dimension, composition, and capacity of:

(a) streets and roadways;

(b) sidewalks, pedestrian ways, and bicycle paths;

(c) signage for traffic control and other governmental purposes, including street name signs, and other traffic control devices on streets, roadways, pedestrian ways, and bicycle paths;

(d) lighting of streets, pedestrian ways, and bicycle paths;

(e) water mains and connections thereto, including connections for the suppression of fires;

(f) sanitary sewers and storm-drainage sewer mains and connections thereto;

(g) utility lines and poles, conduits, and connections thereto;

(h) off-street parking and access thereto, except that local governments retain the power to prescribe minimum and maximum number of parking spaces for given types, locations, and densities or intensities of land use; and

(i) landscaping and contouring of land, and other provisions for drainage, sedimentation, and erosion control.

Commentary: Authority to Adopt Land Development Regulations
Section 8-102 below gives broad authorization to local government to adopt, amend, and provide for the enforcement of land development regulations. The Section lists in one place the entire range of land-use controls and related development incentives that individually may constitute a form of land development regulation that local governments may wish to use.\textsuperscript{59}

Paragraph (4) contains general requirements for all land development regulations. The language contains a requirement that the land development regulations be published in both electronic and paper format. That ordinances exist in an electronic format is a fact of life that should be reflected in enabling legislation.\textsuperscript{60} An advantage, of course, is that the electronic version will be searchable by phrase or keyword and the language below provides for that as well as requiring an index to further ensure user-friendliness.

Another provision in Paragraph (4) is intended to ensure that the land development regulations are kept current, reflecting amendments during the previous year. By providing for the regular updating of the land development regulations, users can be assured that they are relying on the most current version. Several states have similar provisions.\textsuperscript{61}

Under paragraph (4), all land development regulations must “contain approval standards and criteria that are clear and objective.” This language is derived from the administrative rules for Oregon’s statewide land-use planning program.\textsuperscript{62} It is intended to ensure regulations are specific enough that property owners and community residents affected by the regulations can understand what types of development and land use are allowed fully, not at all, or conditionally, and under what conditions.

Section 8-103 concerns the procedures for adoption and amendment of land development regulations, including notice and hearings. Paragraph (1) states who may initiate land development regulations and amendments and includes property owners who would be affected by the change as well as citizens of the local government. Paragraph (6) indicates who is to receive notice of the hearing when the proposed land development regulation affects “discrete and identifiable parcels

\textsuperscript{59}For similar legislation that lists a variety of development controls that are authorized, see Wash. Rev. Code §36.70.560 (1998) (Official controls–forms of controls).


\textsuperscript{61}See e.g., 65 Ill. Comp. Laws §5/11-13-1 (1997) (requiring zoning map to be published not later than March 31 of each year); R.I. Gen. Laws §45-24-45(A) (1996) (printed copies of zoning ordinance and maps shall be available to the general public and shall be revised to include all amendments).

of land,” such as a zoning map amendment. These provisions, however, would not apply to administrative actions, such as a conditional use permit or a variance, which are addressed in Section 10-204, Notice of Hearing, and 10-205, Methods of Notice.

8-102 Authority to Adopt Land Development Regulations; Purposes; Presumption of Validity

(1) A local government may adopt and amend by ordinance land development regulations requiring that development within its jurisdiction be undertaken in accordance with the terms of the regulations.

(2) The purposes of land development regulations are to:

(a) implement the local comprehensive plan; and

(b) have regard for the state interests described in Section [2-102].

[or]

(b) promote the public health, safety, environment, morals, and general welfare.63

(3) Land development regulations may include the following types of land-use controls:

(a) a zoning ordinance, in text and map form;

(b) a subdivision ordinance;

(c) a planned unit development ordinance;

(d) a site plan review ordinance;

(e) an improvements and exactions ordinance that is part of the subdivision, site plan review, and/or planned unit development ordinance;

(f) a development impact fee ordinance;

(g) a concurrency or adequate public facilities ordinance;

(h) a transfer of development rights ordinance;

(i) an ordinance adopting a corridor map;

63This phrase is drawn from the SZE, §1.
(j) a historic preservation or design review ordinance;

(k) a trip reduction or transportation demand management ordinance;

(l) an ordinance regulating development in critical and sensitive areas and/or natural hazard areas;

(m) an ordinance regulating development in floodplain areas;

(n) an ordinance regulating stormwater and/or erosion and sedimentation; and

(o) an ordinance authorizing mitigation banking;

(p) an ordinance regarding the provision of affordable housing, including, but not limited to, development incentives;

(q) an ordinance regarding the promotion of infill and brownfields redevelopment, including, but not limited to, development incentives;

(r) development agreements;

(s) interim versions of any of the ordinances above, to the extent consistent with the provisions of the Sections of this Act governing such ordinances; and

♦ For example, Boston employs interim overlay zoning districts to regulate individual areas of the city while the plans for that area are being revised.

(t) other local government regulations that affect the use or development of land.

(4) Land development regulations may provide for:

(a) development that, when in compliance with the terms of land development regulations, will be granted a development permit as of right;

(b) development for which a development permit will be granted only after the exercise of discretion by a body, agency, or officer of the local government in accordance with the criteria of this Act and any additional criteria contained in the land development regulations;

(c) development that is exempt from the requirement of obtaining a development permit but is otherwise subject to the requirements of the land development regulations; and

♦ Examples of development that might be exempt from obtaining a development permit but still subject to land development regulations would include agriculture, small signs, and minor repairs and maintenance.
(d) development that is exempt from the requirements of the land development regulations.\textsuperscript{64}

\textbullet\ Federal or state statutes may completely preempt local government regulations. For example, Ohio law (Ohio Rev. Code § 4906.13) provides that only a state permit is required for the siting of major utility facilities and expressly exempts them from local authority.

\textbullet\ See Sections 10-201 \textit{et seq.}, which describe the unified development permit review process.

(5) Regardless of the type of land-use control, land development regulations adopted by a legislative body of a local government shall:

(a) be drafted in a uniform format;

(b) employ common definitions, including any definitions that are required by this [Act or cite to applicable Chapters or Sections];

(c) contain approval standards and criteria that are clear and objective;

(d) be in both electronic and paper form; and

(e) contain an index, and be searchable in the electronic version.

\textbullet\ Note that elaborate or expensive computing resources are not required to satisfy the requirements of subparagraphs (d) and (e). The “electronic form” or “electronic version” of land development regulations may be as simple as the word-processing files that were used to generate the printed version; most, if not all, word-processing programs include a “search” or “find” function.

(6) Land development regulations adopted by a legislative body of a local government shall:

(a) be certified by the [clerk of the local government] as a duly-adopted ordinance of the local government, effective as of the effective date in the ordinance;

(b) upon certification, be published by the local government on [\textit{insert month and day}] of each year, unless there have been no amendments during the previous year, and made available for sale to the public at actual cost, or a lesser amount. A local government may also publish the electronic version of its land development regulations on a computer-accessible information network; and

(c) undergo periodic reexamination pursuant to Section [7-406].

\textsuperscript{64}This language is adapted from the ALI Code, §2-101(2).
A land development regulation that is certified pursuant to paragraph (6) above shall be presumed to be valid.

8-103 Adoption and Amendment of Land Development Regulations; Notice and Hearing

(1) An ordinance adopting or amending land development regulations may be initiated by:
   (a) a member of the local legislative body;
   (b) the local planning agency;
   (c) the local planning commission (if one exists);
   (d) petition by owners of record of lots and parcels constituting at least [51] percent of the area that is to be the subject of the proposed ordinance; or

♦ This provision is necessary to allow landowners to apply for rezonings and zoning map amendments. Without it, they could not even formally seek a rezoning or map amendment without the “sponsorship” of the local planning agency or commission or of a member of the local legislative body.

[(e) petition by at least [insert number] bona fide adult residents of the local government.]

♦ This provision is included for states where the initiative mechanism is strongly embedded in the state constitution and the political culture. Where a state does not authorize initiative, or the lack of an initiative mechanism for land development regulations is not a “third-rail” issue, it is preferable that this provision not be included. Land development regulations should be coherent and consistent, and legislation drafted completely outside the planning process by citizen or special interest groups can threaten that basic coherency and consistency. On the other hand, where the local government is unwilling to implement the comprehensive plan, citizen initiative can provide the impetus for plan-consistent land development regulations.

(2) Before any ordinance adopting or amending any land development regulations may be enacted, the legislative body of the local government shall refer the proposed ordinance to the local planning commission (if one exists) for its written recommendations pursuant to Section [7-106(2)(d)]. The legislative body shall enter the written recommendations into its minutes.

(3) No ordinance adopting or amending any land development regulations may be enacted except by the legislative body of the local government, and only after it has held at least one public hearing on the proposed land development regulations or amendment, with notice in writing beforehand.
(4) Notice shall include:

(a) the date, time, and place of hearing;

(b) a description of the substance of the proposed land development regulations or amendment. If the proposed regulation or amendment affects discrete and identifiable lots or parcels of land, the description shall include a [legal and common] description of the affected lots or parcels;

(c) the officer(s) or employee(s) of the local government from whom additional information may be obtained;

(d) the time and place where such proposed land development regulations or amendment may be inspected by any interested person prior to the hearing; and

(e) the location where copies of the proposed land development regulations or amendment may be obtained or purchased.

(5) The local government shall give notice in writing of all public hearings on proposed land development regulations or amendments by publication in a newspaper or newspapers having general circulation in the jurisdiction of the local government [and may also give notice by publication on a computer-accessible information network or by other appropriate means] at least [30] days before the public hearing.

(6) The local government shall also give notice in writing of all public hearings on proposed land development regulations or amendments to:

(a) neighborhood planning councils established pursuant to Section [7-109]; and

(b) neighborhood and community organizations recognized pursuant to Section [7-110],

by certified mail, mailed at least [30] days before the public hearing and addressed to the secretary of such council or organization, or such other person as may be designated to receive notice.

(7) When a proposed amendment to an existing land development regulation to be considered at a public hearing, including, but not limited to, a zoning map amendment, does not apply to all land in the local government and instead applies to discrete and identifiable lots or parcels of land, the legislative body shall also give notice in writing of that hearing by certified mail, mailed at least [30] days before the public hearing and addressed to:

(a) the owners of record of all parcels or lots that would be subject to the proposed amendment;
The statutory language is adapted from Cal. Gov’t Code §65091 (1999).

(b) the owners of record of parcels or lots [within 500 feet of or adjoining or confronting] parcels or lots that would be subject to the proposed amendment; and

(c) any other local governments that are [within 500 feet of or adjoining] parcels or lots that would be subject to the proposed amendment.

If the number of persons who are entitled to receive notice under subparagraphs (a) and (b) above exceeds [100], then the local government need not provide notice by certified mail to such persons.

The purpose of notice is to have interested persons appear at the hearing and present their views on the proposed ordinance. When the proposed ordinance is of general importance, notice by publication is sufficient. However, when an ordinance affects a relatively small number of specified landowners65 more or differently than the general class of landowners or residents, the opportunity for these persons to present their opinion becomes even more important, and such persons thus must receive direct notice by certified mail. For example, if a proposed zoning map amendment affects only a handful of parcels, the owners of these parcels must receive notice by certified mail. On the other hand, if a proposed zoning map amendment affects hundreds of owners, it is most likely a comprehensive rezoning and does not require notice by certified mail. In addition, this language also requires notice by certified mail to nearby local governments that could be affected by the proposed change.

(8) When a proposed amendment to an existing land development regulation to be considered at a public hearing, including, but not limited to, a zoning map amendment, applies only to a specific lot or parcel, or contiguous lots or parcels, the local government may also require the posting of a sign bearing the notice required by this Section upon the property in question and may establish standards for the location, size, and composition of the sign.

(9) At the public hearing, the legislative body shall permit all interested persons, specifically including persons entitled to notice by certified mail pursuant to this Section, to present their views orally or in writing on the proposed land development regulation or amendment.

(10) The hearing may be continued from time to time.

(11) After the public hearing, the legislative body may revise the proposed land development regulation or amendment, giving consideration to all written and oral comments received.

(12) Local governments may employ a streamlined procedure for interim land development regulations, pursuant to [statute on emergency ordinances], but such procedure shall include notice to the parties required by this Section and the public hearing required by this Section.

65The statutory language is adapted from Cal. Gov’t Code §65091 (1999).
Commentary: Gauging Regulatory Consistency with a Local Comprehensive Plan

The Standard Zoning Enabling Act (SZEA), as noted above, required in Section 3, that zoning regulations be “in accordance with a comprehensive plan.” The meaning of that phrase, left undefined in the SZEA, has spawned a large body of litigation and corresponding commentary and analysis on the question of regulatory consistency. Was a separate plan required as a prerequisite to the enactment of a zoning ordinance? Assuming a plan was required, what was the nature of the analysis to be conducted to determine the connection between the plan and the zoning regulations, especially the zoning map.

Several states have provided in their statutes that zoning, and in some cases other land development regulations, must be consistent with and implement the local comprehensive plan specifically, as opposed to the SZEA’s “a comprehensive plan.” Arizona states that zoning ordinance and regulations “shall be consistent with and conform to the adopted general plan of the municipality, if any.” California law is that a zoning ordinance shall be consistent with the general plan of a county or city if the plan has been officially adopted and “if the various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and


programs specified in such a plan.” Delaware\textsuperscript{70} provides that the land use map in a comprehensive plan has “the force of law” and “no development shall be permitted except in conformity with the land use map ... and with land development regulations enacted to implement the other elements of the adopted comprehensive plan”. Kentucky\textsuperscript{71} requires consistency unless findings are made concerning appropriateness of zoning or that economic, physical, or social changes have occurred that were not anticipated in the comprehensive plan and which have substantially altered the basic character of the area. Maine\textsuperscript{72} states that local zoning ordinances and maps must be “pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.” Nebraska\textsuperscript{73} provides that zoning regulations must be preceded by the adoption of a comprehensive development plan and must be consistent with that plan. Oregon\textsuperscript{74} states that comprehensive plans “[s]hall be the basis for more specific rules and land use regulations which implement the policies expressed through the comprehensive plans”). Rhode Island\textsuperscript{75} defines a comprehensive plan as the document “to which any zoning adopted [pursuant to the statute] shall be in compliance” and, in requiring consistency with the comprehensive plan, specifically provides that the zoning ordinances shall be interpreted to “further the implementation of” the plan. Washington’s Growth Management Act\textsuperscript{76} requires city and county land development regulations to be “consistent with and implement” the comprehensive plan, and also\textsuperscript{77} provides that the development regulations of cities and counties that are not subject to the Growth Management Act “shall not be inconsistent with the city’s or county’s comprehensive plan”) and Wash. Rev. Code (development regulations for cities and counties that plan must be “consistent with and implement” the comprehensive plan). And Wisconsin\textsuperscript{78} states that all programs or actions of a local government that affect land use must be consistent with the local comprehensive plan, including annexation and cooperative boundary agreements as well as zoning and subdivision regulation.

**Contents of the Model Section**

\textsuperscript{70}Del. Code tit. 9 §§2653, 2656 (1999).


\textsuperscript{72}Me. Rev. Stat. tit. 30A §§4352.2 to .3 (1999).


\textsuperscript{74}Or. Rev. Stat. §197.010(1) (1997).


\textsuperscript{76}Wash. Rev. Code §36.70A.040(1)(1999).

\textsuperscript{77}Wash. Rev. Code §35.63.125.

\textsuperscript{78}Wis. Stat. §66.0295 (1999).
Based in part on a Florida statute, Section 8-104 below embodies the idea that the local comprehensive plan should be implemented through the local regulatory framework—the zoning ordinance, the subdivision ordinance, and related land development regulations—as well as individual development decisions that are either legislative or administrative in nature. The consistency doctrine merges intentions and actions. The local comprehensive plan is not simply a rhetorical expression of a community’s desires. It is instead a document that describes public policies a local government actually intends to carry out. If it were otherwise, why bother to complete and adopt one?

Section 8-104 calls for a written analysis to be conducted by the local planning agency whenever there are land development regulations, amendments, or “land-use actions” proposed. The agency applies a three-prong test in paragraph (3) in evaluating consistency. Here the purpose is to provide positive coordination and to ensure that, when proposals involving land development regulations and individual development decisions arise: (a) there is a careful assessment of their relationships with the local comprehensive plan; and (b) that assessment is part of the public record concerning the legislative or administrative decision. The only situation where such an analysis need not (indeed cannot) be produced is where there is no comprehensive plan with which to compare the land development regulations in states that have not mandated the adoption of a comprehensive plan. Where a comprehensive plan is mandatory and one has not been adopted, the local government’s land development regulations will be void, since they cannot be consistent with the plan.

The written report must state whether or not, in the opinion of the local planning agency, the regulations, amendment, or action is consistent with the local comprehensive plan. The written report is also to contain recommendations as to whether or not to approve, deny, substantially change, or revise the regulations, amendment, or action. If the agency finds there is an inconsistent relationship between the local comprehensive plan and the proposal, it may also recommend ways of modifying the plan to eliminate it. The written report is advisory to the legislative or administrative body receiving it. The legislative or administrative body may: (a) adopt the report; (b) reject the report; or (c) adopt the report in part and reject it in part. If the body rejects the report or part of it, it must conduct the same analysis that the local planning agency undertook concerning consistency, and must make its own findings before taking action.

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80See Raabe v. City of Walker, 383 Mich. 165, 174 N.W.2d 789 (1970)(absence of a formally-adopted municipal plan does not invalidate zoning but does “weaken substantially the well-known presumption” that normally applies to a zoning ordinance); Forestview Homeowners Association, Inc. v. Cook County, 18 Ill.App.3d 230, 309 N.E.2d 763 (1st Dist. 1974)(failure of county to comprehensively plan for land use within its jurisdiction and to link land development regulations to plans and data “weaken the presumption of validity which otherwise would attach to a zoning ordinance.”); Board of County Commissioners v. City of Las Vegas, 95 N.M. 387, 622 P.2d 695 (1980)(where the state statute requires zoning regulations to be “in accordance with” a comprehensive plan, the absence of such a plan renders the zoning ordinance invalid).
8-104 Consistency of Land Development Regulations with Local Comprehensive Plan

(1) Land development regulations and any amendments thereto, including amendments to the zoning map, and land-use actions shall be consistent with the local comprehensive plan, provided that in the event the land development regulations become inconsistent with the local comprehensive plan by reason of amendment to the plan or adoption of a new plan, the regulations shall be amended within [6] months of the date of amendment or adoption so that they are consistent with the local comprehensive plan as amended.

(a) Except as provided in paragraph (1) above, any land development regulations or amendments thereto and any land-use actions that are not consistent with the local comprehensive plan shall be voidable to the extent of the inconsistency.

(b) Any land development regulations or amendments thereto shall be void [6] months from the date on which a local comprehensive plan is required to be adopted, if a comprehensive plan must be adopted pursuant to Section [7-201] but no comprehensive plan has been adopted.

(c) As used in this Section, “Land-Use Action” means preliminary or final approval of a subdivision plat; approval of a site plan; approval of a planned unit development; approval of a conditional use; granting of a variance; adoption of a development agreement; issuance of a certificate of appropriateness; and a decision by the local government to construct a capital improvement and/or acquire land for community facilities, including transportation facilities. Approval as used in this paragraph includes approval subject to conditions.

* If a local government is required to adopt a comprehensive plan, but it has not, then its land development regulations will be voidable, as they are not consistent with a plan. The bracketed subparagraph (1)(b) is linked to Alternative 2 for Section 7-201– if Alternative 2 is adopted, so must the bracketed subparagraph be adopted.

(2) A local government shall determine, in the manner prescribed in this Section, whether such land development regulations, amendments thereto, and land-use actions are consistent with the local comprehensive plan. Before the legislative body of a local government may enact or amend land development regulations and before the legislative body, the local planning commission, the hearing examiner, the Land-Use Board of Review, or any other body with administrative authority may take any land-use action, the local planning agency shall prepare a written report to the legislative or administrative body regarding the consistency with the local comprehensive plan of: the proposed land development regulations; a proposed amendment to existing land development regulations; or a proposed land-use action. The written report shall be advisory to the legislative or administrative body. Pursuant to paragraph (3) below, the written report shall state whether or not, in the opinion of the local planning agency, the regulations, amendment, or action is consistent with the local comprehensive plan. The written report shall also contain recommendations pursuant to paragraph (4) below as to whether or not to approve, deny, substantially change, or revise
(3) The local planning agency shall find that proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land-use action is consistent with the local comprehensive plan when the regulations, amendment, or action:

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

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

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

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

(4) If the local planning agency determines that the regulations, amendment, or action is not consistent with the local comprehensive plan, it:

(a) shall state in the written report what changes or revisions in the regulations, amendment, or action are necessary to make it consistent; and

(b) may state in the written report what amendments to the local comprehensive plan are necessary to eliminate any inconsistency between the plan and the regulations, amendment, or action.

(5) The legislative or administrative body shall, upon receipt of the written report of the local planning agency, review it and, giving the report due regard, shall in the written minutes of its deliberations:

(a) adopt the report;

(b) reject the report; or

(c) adopt the report in part and reject it in part.

(6) If the legislative or administrative body rejects the report in part or in whole, in the written minutes of its deliberations:
(a) it shall state whether the proposed land development regulations, a proposed amendment to existing land development regulations, or a proposed land-use action is consistent with the local comprehensive plan pursuant to paragraph (3) above; and/or

(b) if the legislative or administrative body determines that the regulations, amendment, or action is not consistent with the local comprehensive plan:

   1. it shall state what changes or revisions in the regulations, amendment, or action are necessary to make it consistent; and/or

   2. it may state what amendments to the local comprehensive plan may be necessary to eliminate any inconsistency between the plan and the regulations, amendment, or action.

Commentary: Relationship of Land Development Regulations with Other State and Federal Programs

It is important for a local government to understand how its land development regulations may interact or interfere with the efforts of other sovereign governmental units. For example, a local government may formulate land development regulations to control the siting of hazardous waste facilities only to find out, after costly litigation, that the state government was already doing the same thing and had preempted local action.\(^{81}\) Alternately, a local government may believe it has the authority to require a conditional use permit for dredging and filling, but that it turns out, again after litigation, that the legislature had clearly delegated water resource conservation responsibility, particularly jurisdiction over dredging and filling, to the state resources agency.\(^ {82}\)

Based on administrative rules from Washington state,\(^ {83}\) Section 8-105 below calls for the local government to at least “take into consideration” a variety of federal or state laws, regulations, programs, and plans when formulating and drafting land development regulations. By so doing, a local government can reduce the likelihood of mishaps and poor coordination, as well as actions that may be flatly prohibited. To assist the local government, the Section, in paragraph (3), calls for the

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\(^{81}\) See, e.g., Clermont Envtl. Reclamation Co. v. Wiederhold, 2 Ohio St.3d 44, 442 N.E. 2d 1278 (1982) (holding that townships may not prohibit the construction of a hazardous waste facility once the state hazardous waste facility review board has issued a license to operate the facility).


state planning agency to maintain a list of such state and federal activities and to publish it for local
government use.

8-105 Relationship of Land Development Regulations to Other Federal and State Laws, Regulations,
Programs, and Plans; Maintenance of List by the [State Planning Agency]

(1) In formulating and drafting proposed land development regulations for adoption or
amendment pursuant to Sections [8-102] and [8-103] above, a local government shall take
into consideration the effects of federal authority over land or resource use on the area within
the jurisdiction of the local government, including, but not limited to:

(a) treaties with Native Americans;
(b) jurisdiction on land owned or held in trust by the federal government;
(c) federal statutes or regulations imposing standards; and
(d) federal permit programs and plans.

(2) In formulating and drafting proposed land development regulations pursuant Sections [8-
102] and [8-103] above, a local government shall take into consideration the effects of any
state agency, [regional planning agency], and special district regulatory and planning
provisions regarding land use, resource management, environmental protection, and public
utilities on the area within the jurisdiction of the local government, including, but not limited
to:

(a) state statutes and regulations imposing standards;
(b) programs involving state-issued permits or certifications;
(c) state statutes and regulations regarding rates, services, facilities, and practices of
public utilities, and tariffs of utilities in effect pursuant to such statutes and
regulations;
(d) state and regional plans; and
(e) regulations and permits issued by [regional planning agencies] and special districts
that affect areas within the jurisdiction of the local government.

(3) The [state planning agency] shall maintain and publish on an annual basis a current list of
federal and state laws, regulations, programs, or plans for use by local governments in regard
to the purposes of paragraphs (1) and (2) above.
Commentary: Federal and State Exemption from Local Development Regulations

The question of whether the state and its agencies are or should be exempt from local land development regulation is a difficult one. Generally, the state would rather not be subject to local land development regulation of any kind because that would interfere in the ability of state agencies to perform their duties, which include the construction and operation of facilities. Most state enabling acts are silent on this topic, and the state is generally assumed to be a sovereign and thus beyond any local control, as is the federal government under the U.S. Constitution. The leading case adopting the sovereign immunity rule is Kentucky Institute for Education of the Blind v. City of Louisville. In the absence of a specific state statute, state courts have developed a variety of tests to resolve conflicts between governmental units in land-use matters. One approach is the governmental-proprietary test. This test distinguishes between functions of governmental units, exempting functions that are governmental (or essential) in nature, but requiring compliance from uses that are proprietary (or permissive) in nature. For example, under this theory, a state university that ran a student union that included a McDonald’s and a Taco Bell would be operating in a proprietary manner. Another is the balancing test that views sovereign immunity as only one factor to consider in intergovernmental land use conflict cases. An Ohio case, for example, provides that the state need not obtain a permit from a local government but must attempt to comply with the local zoning scheme or show that such compliance was impossible given the state purpose and use.

Governmental units such as school districts and special districts may also be exempt through a transfer of the immunity of the state, on the theory that the governmental unit is exercising a state

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85Pursuant to the Supremacy Clause of the U.S. Constitution, land owned or leased by the United States or an agency thereof for purposes authorized by Congress is immune from and supersedes state and local laws. U.S. Const., Art. IV. See e.g., *Tim v. City of Long Branch*, 135 N.J.L. 549, 53 A.2d 164 (1947); *United States v. Chester*, 144 F.2d 415 (3d Cir. 1944).

8697 S.W. 402 (1906).


function. Similarly, a county as an administrative unit of the state would be exempt from municipal zoning. As state-regulated entities, public utilities may be exempt from local zoning regulation.90

Several states have provided statutory guidance in this matter. For example, Oregon, which certifies local comprehensive plans, provides that local zoning ordinances are applicable to any publicly-owned property.91 California allows local school districts and any other “local agency” to exempt themselves, as agents of the state in the local performance of governmental or proprietary functions, from local zoning regulations under certain circumstances.92 In Rhode Island, which has a procedure for state review and approval of local comprehensive plans, state projects must conform to approved local comprehensive plans. However, if a state agency wishes to undertake a project or to develop a facility which is not in conformance with the comprehensive plan, the state agency may petition the state planning council for relief.93 The Rhode Island statute, however, is silent on whether state agencies must obtain zoning or other development permits from the local government.

Section 8-106 below provides four different alternatives for exempting or not exempting state owned or leased land and other public owned land from local development regulation. All four alternatives provide that federally owned or leased land is completely exempt. Alternative 1 assumes that a system of state certification of local comprehensive plans, described in Chapter 7 of the Legislative Guidebook, is in place. Local governments whose plans have been approved by the state and have been adopted by the legislative body may regulate state facilities through their land development regulations, although a state agency may appeal to a state comprehensive appeals board. Alternative 2 subjects state-owned or leased land to local regulation, unless the local government passes ordinances to the contrary (a local government could decide it simply does not want to regulate state facilities). Alternative 3 is an absolute exemption for the state and state agencies, but allows other publicly owned land to be subject to local regulation. And Alternative 4 provides that the state and its agencies are not bound by the land development regulations in their development activities but that when a proposed development that would otherwise be contrary to local land development regulations, a public hearing, non-binding and for purpose of commentary and information only, must be held.

8-106 Relationship of Land Development Regulations to Lands Owned by the Federal, State, and Other Governmental Units (Four Alternatives)

90See, e.g., Ohio Rev. Code §§303.211(A), 519.211(A) (prohibiting counties and townships from regulating public utilities through zoning).


CHAPTER 8

Alternative 1—Complete Exemption of Lands Owned by the Federal Government, But No Exemption for Lands Owned or Leased By the State and Certain Other Public Agencies When the Local Comprehensive Plan Has Been Approved by the State

(1) Where a local comprehensive plan has been approved by the state pursuant to Section [7-402.2] and lawfully adopted, then the land development regulations of a local government shall apply to lands owned or leased by the state and state agencies, and school districts, except as the regulations may prescribe to the contrary, but shall not apply to lands owned or leased by the Federal Government. Until its local comprehensive plan has been approved by the state and lawfully adopted, a local government shall not adopt and enforce land development regulations that apply to lands owned or leased by the state and state agencies, and school districts, and any purported adoption or enforcement of such regulations shall be void, but it may adopt and enforce regulations that apply to other publicly owned or leased land.

(2) No state agency, or special district, or school district shall engage in any significant capital improvement, as that term is defined in Section [7-402.4], which requires a development permit from the local government and which is not described in and not included in the local comprehensive plan, as amended, except as provided in Section [7-402.4]. Where the Comprehensive Plan Appeals Board approves a petition pursuant to Section [7-402.4], then no development permit from the local government shall be required in order for a state agency, or special district, or school district to construct a significant capital improvement.

Alternative 2—Complete Exemption of Lands Owned by the Federal Government, But No Exemption for Lands Owned by the State

The land development regulations of a local government shall apply to all publicly owned or leased land, including lands owned or leased by the state and state agencies, except as the regulations prescribe to the contrary, but shall not apply to lands owned or leased by the Federal Government.

Alternative 3—Complete Exemption of Lands Owned by the State or Federal Government

The land development regulations of a local government shall not apply to lands owned or leased by the state and state agencies or to lands owned or leased by the Federal Government, but shall apply to other publicly-owned or leased land, except as the regulations may prescribe to the contrary.

♦ Note that special districts and school districts are subject to local land development regulations, under this Alternative.

Alternative 4-Exemption of Lands Owned by the State or Federal Government, Subject to Non-Binding Public Hearing for Certain State Development Proposals

(1) Except as provided in paragraph (2) below, the land development regulations of a local government shall not apply to lands owned or leased by the state and state agencies or to...
lands owned or leased by the Federal Government, but shall apply to other publicly-owned or leased land except as the regulations may prescribe to the contrary.

(2) If the local [planning or code enforcement agency] determines that any proposed development upon lands owned or leased by the state or state agencies would be contrary to the land development regulations of the local, it shall hold a public hearing upon the proposed development. The information and opinions presented at the hearing and any results or conclusions of the hearing shall not be binding upon the local government or upon the state or state agencies.

(3) Notice of a public hearing required by paragraph (2) above shall be provided as stated in this paragraph.

(a) Any notice pursuant to this Section shall include:

1. the date, time, and place of hearing;

2. the name of the state agency proposing the development, and the means by which the agency may be contacted regarding the proposed development by mail, telephone, and other common means of communication;

3. a [legal and common] description of the lots or parcels that would be subject to the proposed development;

4. a description of the proposed development;

5. the time and place where documents describing the proposed development may be inspected by any interested person prior to the hearing; and

6. the location where copies of the documents describing the proposed development may be obtained or purchased.

(b) The local [planning agency or code enforcement agency] shall give notice in writing of the public hearing by publication in a newspaper or newspapers having general circulation in the jurisdiction of the local government [and may also give notice by publication on a computer-accessible information network or by other appropriate means] at least [30] days before the public hearing.

(c) The local [planning agency or code enforcement agency] shall also give notice in writing of the public hearing to:

1. neighborhood planning councils established pursuant to Section [7-109];

2. neighborhood and community organizations recognized pursuant to Section [7-110];
3. the owners of record of parcels and lots [within 500 feet of or adjoining or confronting] the parcels or lots that would be subject of the proposed development; and

4. any other local governments that are [within 500 feet of or adjoining] the parcels or lots that would be subject of the proposed development,

by certified mail, mailed at least [30] days before the public hearing and addressed to the secretary of such council or organization, or such other person as may be designated to receive notice. If the number of persons or entities entitled to receive notice under subparagraphs 3 and 4 above exceeds [100], then the local [planning agency or code enforcement agency] need not provide notice by certified mail to such persons.

(d) The local government may also require the posting of a sign bearing the notice required by this Section upon the property in question and may establish standards for the location, size, and composition of the sign.

(4) At the public hearing required by paragraph (2) above:

(a) the local [planning agency or code enforcement agency] shall permit all interested persons, specifically including persons entitled to notice by certified mail pursuant to this Section, to present their views orally or in writing on the proposed development;

(b) at least one official or employee of the state agency proposing the development shall attend the hearing at all times; and

(c) copies of all written submissions to the hearing shall be forwarded by the local [planning agency or code enforcement agency] to the state agency proposing the development within [5] days after the conclusion of the hearing.

ZONING

Commentary: The Contents of a Zoning Ordinance

Section 8-201 below grants the specific authority to a local government to adopt and amend a zoning ordinance. Like the Standard Zoning Enabling Act, it states, in paragraph (2), the permissible scope of regulation, but in broader terms that incorporates many of the topics that are contained in contemporary zoning ordinances (e.g., floodplains, stormwater, landscaping, signage). Note that it also permits the local government to specify both minimum and maximum densities and intensities. This language takes into account the importance of density and intensity in establishing
urban form. It is necessary if local governments are to incorporate urban growth areas into their planning system, as provided for in Section 6-201.1. Note also that it does not restrict or prohibit zoning regulation within agricultural use zones, as some states do.

Paragraph (3) is based, in part, on zoning enabling acts from Kentucky and Rhode Island. These acts identify minimum contents of the zoning ordinance that include: definitions, provisions for administration and enforcement of the regulations affecting particular use districts, and establishment of the zoning map. The intent here is to provide local governments with a basic structure for the ordinance. Of course, local governments may elect to add other special provisions (e.g., planned unit development, site plan review, transfer of development rights) as their needs change.

Note also the requirement in subparagraph (3)(o)1 for a table listing amendments to the zoning map. Typically, when an ordinance amending the zoning map is enacted, the ordinance contains a legal description of the property. Sometimes errors can inadvertently occur in the transfer of the written description (often in metes and bounds) to the graphic representation of the description on zoning map. Listing the ordinance number of the amending ordinance will allow for a check on the accuracy of the map amendment in case of a later dispute over interpretation.

BILLBOARD AND SIGN REGULATION

Under the Federal Highway Beautification Act, states must prohibit all “outdoor advertising signs, displays, and devices” within 660 feet of the right-of-way of federal interstate and primary highways. The Act provides that, in non-urban areas, outdoor advertising must not be visible from the same highways if installed with the intent of being thus visible, with an exemption for on-premises signs. Areas zoned for commercial and industrial uses are also exempt from the Act. Any state that does not comply with the Act is subject to a 10 percent penalty of its state federal-aid highway funds. The Act does not preempt state controls of outdoor advertising, nor does it bar local governments from enacting strict billboard regulations. The removal of nonconforming signs along federal highways is authorized; compensation is required, but the federal government shares 75 percent of the cost with the state. The law effectively prohibits the use of amortization of signs along nonconforming federal highways by state and local governments, in that sign removal without compensation, or in less than five years after nonconformity, incurs the highway funding penalty. Every state has adopted a statute or statutes to expressly implement the Highway Beautification Act, and some of these statutes impose more stringent controls on billboards than required by the federal law.

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Alaska\(^{96}\) bans all outdoor advertising except as expressly permitted by statute.\(^{97}\) No outdoor advertising which is visible from, an interstate, primary, or secondary highway is permitted except for directional signs, on-premises signs, signs of landmark (historic or artistic) significance, and advertisements on bus benches and garbage cans.\(^{98}\) Signs in violation of the statute are nuisances and may be removed at the owner’s expense,\(^{99}\) and violations are also punishable by fine.\(^{100}\) Compensation for the removal of advertising signs is authorized but not required.\(^{101}\) Municipal ordinances regulating outdoor advertising more restrictively than the state statute are expressly authorized.\(^{102}\)

Hawaii\(^{103}\) prohibits all outdoor advertising visible from any state or federal-aid highway, with the exception of directional signs, signs advertising on-premises activities, and signs in lawful existence on October 22, 1965 and deemed by the state to be landmark signs.\(^{104}\) Signs may be required to be removed five years after becoming nonconforming,\(^{105}\) but compensation must be paid, although that compensation includes only the loss of rights in the sign and land.\(^{106}\) Signs in violation of the statute are nuisances,\(^{107}\) and violations of the statute are subject to fine and imprisonment.\(^{108}\) More restrictive regulations of signs may be adopted.\(^{109}\)

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\(^{97}\)Alaska Stat. §19.25.090.


\(^{99}\)Alaska Stat. §19.25.150.

\(^{100}\)Alaska Stat. §19.25.130.

\(^{101}\)Alaska Stat. §19.25.140.


CHAPTER 8

Hawaiian counties are also expressly authorized\(^{110}\) to regulate “outdoor advertising devices,” with the exception of official signs, on-premises signs for meetings, businesses, residences, sale or lease of property, warning signs, political advertisements within a certain time before and after an election, “grandfathered” signs older than July 8, 1965, and some other minor exceptions.\(^{111}\) The licensing of both signs and the billboard advertising business are authorized, but no more than $100 a year may be charged for the business license or $25 a year for each billboard license.\(^{112}\) County regulations may be enforced civilly\(^{113}\) and criminally.\(^{114}\)

Maine\(^{115}\) has delegated the power to regulate outdoor advertising visible from any public way – including municipal streets and county roads as well as state and federal highways – to the Commissioner of Transportation.\(^{116}\) The commissioner is advised in this task by a Travel Information Advisory Council representing various interests: lodging, restaurants, garden clubs, agriculture, recreational facilities, environmental organizations, historical and cultural institutions, sign designers, and the general public.\(^{117}\) Business direction signs may be permitted, subject to regulations adopted by the commissioner that govern their location, size, color, shape, lighting, and other aspects.\(^{118}\) The license fee for business direction signs is fixed at $30 initially and the same amount for annual renewal.\(^{119}\) On-premises signs do not require a license or permit, but may be regulated. Specifically, they cannot be located more than 1000 feet from the “principal building” of the establishment or within a specified distance of the public way, exceed 25 feet above the ground or 10 feet above the building to which they are attached, be located on rocks or other natural features, block views of traffic, or use lighting or movement.\(^{120}\) Other signs not requiring permits can be summarized as either temporary signs (political signs, placards on trucks and train cars, advertisements for fairs and expositions) or signs considered to be noncommercial (signs for


\(^{115}\) Me. Rev. Stat. tit.23 §§1901 et seq.


\(^{120}\) Me. Rev. Stat. tit.23 §1914.
In granting permits for business direction signs, the Commissioner is required to consider "such factors as the effect upon highway safety, the convenience of the traveling public, and the preservation of scenic beauty." Business direction signs may be located only where travelers must change roads to reach the establishment advertised, no more than six business direction sign licenses may be granted for any one establishment, and no business direction sign may be located more than 10 miles from the establishment advertised. The removal of nonconforming signs, lawful as of the first day of 1978, must be compensated if performed under the state’s statutory authority; lawful sign removal under some other law or authority need not be compensated. Amortization of signs lawful as of 1978 was authorized to extend up to six years. Unlawful signs may be removed at the owner’s expense, and fines may be imposed. Stricter local ordinances, consistent with the state statute, are expressly allowed.

Rhode Island bans all outdoor advertising signs on interstate, federal, or state highways with the exception of on-premises signs, bus-shelter signs up to 24 square feet in area, and existing lawful signs. The outdoor advertising permitted by statute must have a permit from the state Director of Transportation, who may adopt regulations under the statute. Signs in violation of the statute may be removed by the director as a public nuisance after due notice and a 30-day period for the owner to place the sign in compliance with the law, and violations of the statute may be punished by...
fines up to $500. Lawfully-erected nonconforming signs may not be required to be removed less than five years from becoming nonconforming, and compensation is due for the removal of lawfully-erected signs. Existing lawful signs may be moved with approval of all relevant governments if the sign is the same size or smaller and conforms to the applicable municipal comprehensive plan and zoning ordinance. Ordinances or regulations more restrictive than the statute may be adopted.

Vermont prohibits all signs “visible to the travelling public” except as expressly permitted by the state. The enforcement of the statute, including the adoption of regulations, is delegated to the Travel Information Council (TIC), consisting of seven members representing the state Department of Commerce and Community Development, the lodging industry, restaurant industry, recreation industry, transportation, agriculture, and the general public. Off-premise signs directing the public to a business require a license from the TIC. With limited exceptions, they must be located in the same community as the business they advertise and near the place where one must exit or change highways to reach that business, and the TIC may restrict the number of such signs at any one location and for any one business. On-premises signs are limited to 150 square feet (except for real estate sales or lease signs, which may not exceed 6 square feet) and cannot be more than 1500 feet from the nearest highway entrance nor exceed 25 feet above the ground or 10 feet above the roof of the building to which it is attached. No sign may resemble an official traffic control sign, block the clear view of traffic, employ lights or moving parts, be attached to a tree or rock, or advertise an out-of-state or terminated business or product. Noncompliant signs, except for those lawfully existing on March 23, 1968, may be removed by the TIC or state transportation agency, and
violators may be fined or imprisoned. The statute and the regulations of the TIC expressly do not preclude stricter regulation of signs by local governments. Other states with billboard regulations more stringent than required by the Federal Highway Beautification Act include Missouri and Oregon.

The Growing Smart Legislative Guidebook expressly authorizes local governments to regulate the “location, period of display, size, height, spacing, movement, and aesthetic features of signs, including the locations at which signs may and may not be placed.” However, it does not authorize regulation of content. The regulation of signs and billboards is also effectively authorized by the provision enabling local governments to control “development and land use that may affect access to air, light, views and scenic resources, and solar energy.” The amortization of nonconforming signs (and other uses) is expressly authorized by the Guidebook as well. The local government may plan and coordinate its regulation of signs and billboards either as part of the land-use element of the local comprehensive plan, or, if the issue of sign control is considered to be of particular importance, through an optional agriculture, forest, and scenic preservation element.

**8-201 Zoning Ordinance**

(1) The legislative body of a local government may adopt and amend a zoning ordinance in the manner for land development regulations pursuant to Section [8-103 or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances].

(2) A zoning ordinance may regulate the following:

(a) types and classes of development and land use;

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148 Sec. 8-201(2)(h).
149 Sec. 8-201(2)(k).
150 Sec. 8-502(4) - (6).
151 Sec. 7-204.
152 Sec. 7-212.
(b) density, intensity, and scale of development and land use, including minimum and maximum densities and intensities;

(c) area and dimensions of parcels or lots of land;

(d) area, height, number of stories, floor area ratio, size, and aesthetic aspects of buildings and other structures;

(e) architectural and design features of buildings and other structures that are located in designated historic or design districts, or that are designated historic landmarks, pursuant to Section [9–301];

(f) placement of buildings and other structures upon parcels or lots of land, including but not limited to maximum or minimum setbacks from the borders of parcels or lots and provisions for yards, plazas, or other open space;

(g) access of parcels or lots of land to adequate streets, roads, and other thoroughfares, including but not limited to trails dedicated to use by pedestrians and/or bicycles and similar conveyances, and to adequate public utilities, including but not limited to easements for and connections to the wires, pipes, antennae, or other equipment used to provide the public utility service;

(h) location, period of display, size, height, spacing, movement, and aesthetic features of signs, including the locations at which signs may and may not be placed;

(i) provision of parking facilities for vehicles and parking and storage facilities for bicycles or similar conveyances;

(j) buffering, landscaping, and screening of development and land use;

(k) development and land use that may affect access to air, light, views and scenic resources, and solar energy;

(l) development and land use that may affect drainage and stormwater runoff;

(m) development and land use that may affect soil erosion or sedimentation;

(n) development and land use that may affect the quality of air, water, and groundwater and/or the quantity of water and groundwater;

(o) development and land use that may affect critical and sensitive areas, or natural hazards areas, including floodplains, pursuant to Section [9-101].
(3) A zoning ordinance adopted pursuant to this Section shall consist of the ordinance text, together with all charts, tables, graphs, and other explanatory matter, and the zoning map with any explanatory matter shown thereon. A zoning ordinance shall include the following minimum provisions:

(a) a citation to enabling authority to adopt and amend the zoning ordinance;

(b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)];

(c) a statement of consistency with the local comprehensive plan[, if one exists,] that is based on findings made pursuant to Section [8-104];

♦ If a local comprehensive plan is mandatory, the bracketed language is unnecessary.

(d) definitions, as appropriate, for such words or terms contained in the zoning ordinance. Where this Act defines words or terms, the zoning ordinance shall incorporate those definitions, either directly or by reference;

(e) division into zoning use districts. The zoning ordinance shall divide the area of the local government into zoning use districts of such number, kind, type, shape, and area as may be deemed suitable to carry out the purposes of land development regulations pursuant to Section [8-102(2)]. Within such districts, the zoning ordinance may regulate development and land use. All such regulations shall be uniform for each class or kind of development or land use throughout each district, but the regulations in one district may differ from those in other districts;

(f) provisions for interpreting the boundaries of zoning use districts;

(g) a listing of all land uses and/or performance standards for uses that shall be permitted within the zoning use districts;

(h) provisions for nonconformities pursuant to Section [8-502];

(i) provisions for a hearing examiner pursuant to Sections [10-301] to [10-307] and/or for a Land-Use Board of Review pursuant to Sections [10-401] to [10-405];

(j) provisions for conditional uses and variances, pursuant to Sections [10-501] to [10-503], inclusive, and Sections [10-505] to [10-507], inclusive;

(k) a unified development permit review process pursuant to Sections [10-201] to [10-207], inclusive, and [10-209] to [10-211], inclusive;

(l) provisions for adoption and amendment of the zoning ordinance pursuant to Section [8-103];
(m) provisions for enforcement pursuant to Chapter [11]; and

(n) a reproducible zoning map or map series at a suitable scale that shows at a minimum:

1. the names of and symbols for the zoning use districts and any overlay districts;

2. the boundaries of the zoning use districts overlaid onto a base map of the local government. Where the local government has adopted a historic preservation ordinance, a design review ordinance, a critical and sensitive areas ordinance, a natural hazards ordinance, or any other land development regulation that employs an overlay district, the zoning map shall show the boundaries of the overlay district. The zoning map shall also show the location of historic landmarks, where they have been designated;

3. a map scale;

4. a table that lists any amendments to the zoning map by reference to an ordinance number and date of enactment and that includes a certification of such amendments by the clerk of the legislative body and the director of the local planning agency. The table shall list any ordinances delineating any overlay districts as well as ordinances designating historic landmarks. If there is a discrepancy between the legal description of property that is the subject of an ordinance amending the zoning map and the graphic representation of the boundaries of zoning use districts or overlay districts affecting that property on the zoning map, the legal description shall control; and

5. a table that lists any changes to the base map of the local government that includes a summary of the change, the date it was made, and the certification of such change by the director of the local planning agency. For the purposes of this Section, a change to the base map shall be considered a ministerial act, and shall not constitute an amendment to the zoning map.

(4) A zoning ordinance shall:

(a) provide a reasonable use as of right for every lot or parcel;

This provision requires that every property have a zoned land use as of right. While a zoning ordinance may provide for conditional uses for a lot or parcel pursuant to Section 10-502, the approval of which is discretionary, that property must also have an underlying use permitted as of right.
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(b) not contain a minimum floor area requirement for residential units, or for any class or type of residential unit, except for a minimum floor area requirement expressed in terms of a minimum floor area per occupant, or given number of occupants, per unit. The minimum floor area requirement may provide for smaller or declining increments of floor area per occupant in excess of the first occupant; and

♦ In other words, a requirement that a residence have a minimum of 2500 square feet is not permissible, but a provision requiring 300 square feet for each person dwelling in a residence is proper. The last sentence authorizes a regulatory system where, for example, the first occupant must have 300 square feet but an additional occupant entails an additional 100 square feet only.

(c) not prohibit, or restrict the location of, a permanently-sited manufactured home in any zoning use district in which single family residences are permitted as of right. A local government, however, may require that all permanently-sited manufactured homes comply with all zoning requirements that are uniformly imposed on all single family residences in the relevant zoning use district except for:

1. requirements that do not comply with the standards established pursuant to the Federal Manufactured Housing Construction and Safety Standards Act of 1974 as amended, codified at 42 U.S.C. §5401 et seq.; and

2. requirements that specify a minimum roof pitch, except that such requirements in a historic preservation ordinance pursuant to Section [9-301] may be applied.

♦ This provision on manufactured housing is adapted from Ohio Rev. Code §§303.212, 519.212, and 3781.06. It is intended to ensure that manufactured housing is treated the same as site-built housing and that manufactured single-family housing may be placed in any single-family residential use district.153

(5) A zoning ordinance may authorize or require:

(a) traditional neighborhood development zoning use districts or overlay districts, in which development is governed by site planning standards intended to ensure:

1. the creation of compact neighborhoods oriented toward pedestrian activity and including an identifiable neighborhood center, commons, or square;

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2. a variety of housing types, jobs, shopping, services, and public facilities;

3. residences, shops, workplaces, and public buildings interwoven within the neighborhood, all within close proximity;

4. a pattern of interconnecting streets and blocks, preferably in a rectilinear or grid pattern, that encourages multiple routes from origins to destinations;

5. a coordinated transportation system with a hierarchy of appropriately designed facilities for pedestrians, bicycles, public transit, and automotive vehicles;

6. natural features and undisturbed areas that are incorporated into the open space of the neighborhood;

7. well-configured squares, greens, landscaped streets, and parks woven into the pattern of the neighborhood;

8. public buildings, open spaces, and other visual features that act as landmarks, symbols, and focal points for community identity;

9. compatibility of buildings and other improvements as determined by their arrangement, bulk, form, character, and landscaping to establish a livable, harmonious, and diverse environment; and

10. public and private buildings that form a consistent, distinct edge, are oriented toward streets, and define the border between the public street space and the private block interior.

The site planning standards may be supplemented by the adoption, by ordinance, of a manual of graphic and written design guidelines to assist applicants in the preparation of proposals for a traditional neighborhood development.

* This language is intended to encourage local governments to formulate design standards that will encourage traditional neighborhood development through mixing of land uses, increased density, walkability, and urban design elements such as front porches, rear alleys, grid streets, zero-lot lines, ground level retail areas, and town squares. Such development, which has also been termed “new urbanism” or “neotraditional development,” has gained, or regained, increasing acceptance in the U.S. beginning in the early 1990s. Note that Section 8-303(8) and (9) also authorize traditional neighborhood development in the context of planned unit development, or PUD.

(b) [other].
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REVIEW OF PLATS AND PLANS

Commentary: Subdivision Ordinances and Subdivision Review

A subdivision ordinance is a land development regulation that governs the division of land into two or more lots, parcels, and sites for building. Such an ordinance includes procedures and standards that affect the design and layout of lots, streets, utilities, and other public improvements. The ordinance usually contains or makes reference to minimum engineering specifications or development standards, requires improvement guarantees, or performance bonds, to ensure that the public improvements are built by the developer as approved and within a certain period, and may provide for fees-in-lieu for facilities such as parks that are built off-site. It protects purchasers of land by ensuring that public improvements are available when it is time to build on the lots and by providing a mechanism for the official recording of lots with the appropriate governmental agency. Because a subdivision ordinance affects the lot configuration and street pattern, it is often thought to have more influence on urban form and is more permanent (or less easily changed) than zoning.

All states have statutes authorizing subdivision regulation, although municipal charters may also provide for such controls. State and local legislation may also exempt certain types of land subdivision from detailed local review, or any review at all. This typically occurs when no public improvements or land dedication is required, and only a few lots are created. These are called minor subdivisions or lot splits. Also, legislation may provide for resubdivision, which occurs when lot lines are changed (for example, if a street is widened), or when lots are combined to form larger lots (for example, when a larger lot is required to meet minimum requirements for a different use). This latter type of resubdivision is often called lot consolidation.

The Subdivision Review Process


155For an excellent overview of state regulation of subdivisions, including the different definitions of “subdivision” among the states, see Patricia Salkin, “Subdivision Controls,” Ch. 45, in Zoning and Land Use Controls, Vol. 9, Eric D. Kelly, Gen. Ed. (New York: Matthew Bender, 1996), esp. §45.01 to 45.02. See also James A. Kushner, Subdivision Law and Growth Management (Eagan, Minn.: West Group, 1998), Chs. 5, 7, 8, and 9; Edward H. Ziegler, Rathkopf’s The Law of Zoning and Planning, Vol 5, Ch. 64 to 66 (Eagan, Minn. West Group, 1998); and Daniel R. Mandelker, Land Use Law, 4th ed. (Charlottesville, Va.: Lexis Law Publishing, 1997), §9.01 et seq.
Typically subdivision regulation is a two to three-part process. In some communities, there is an informal, nonbinding review of a sketch plan showing a proposed lot configuration and street location. If there is no sketch plan review, the process really begins when the developer submits a preliminary plan for the initial planning and layout of streets and lots, and type, size, and placement of utilities. The preliminary plan shows topographic contour lines—the result of a survey of the site—and other site features such as streams and ponds, large trees, and other vegetation, flood hazard areas, and existing buildings. Often the preliminary plan will cover an area that is larger than the portion that will be initially developed. A developer may wish to improve only that portion of the site that may be sold as lots within one to two years. Consequently, the preliminary plan may show the phases in which the subdivision will be built.

After the local government has approved the preliminary plan, with or without conditions, the developer goes ahead with the preparation of the final plat, prepared by a surveyor. The final plat is a precise drawing that contains the necessary information that will fix the location of lots and streets with reference to survey markers or monuments, such as iron pins driven deep into the ground or concrete monuments. The drawing will be the means by which streets and other proposed public improvements are conveyed to and accepted by the local government after the developer constructs them to the government’s standards. The final plat is accompanied by engineering drawings and supporting technical analyses, such as those dealing with stormwater or water pressure. These drawings describe the construction of public and private improvements, and other site development modifications such as site grading. Some plats may be accompanied by plans to control erosion and sedimentation during site development, or to address specialized issues such as impact on existing wetlands. The engineering drawings will show proposed vertical and horizontal profiles of streets, water and sewer lines, location of street lights and fire hydrants, sidewalks, design of detention and retention basins, and construction specifications, such as type of concrete or asphalt used and depth of pavement and aggregate base.

After the local government reviews and approves the final plat, along with the engineering drawings, and the developer makes any additional changes that may be required, the plat is almost ready for recording. But before that occurs, the developer must first construct the required improvements or post a bond that will ensure that the improvements will be constructed as approved within a certain period. Should the developer fail to complete the improvements, the local government may use the bond to pay for the installation of the improvements. If the developer completes the improvements or posts the bond, the plat is recorded in the county land records, usually in the form of a reproducible mylar or linen drawing and, sometimes, in electronic form. When site development work is completed, the developer requests a release of the performance bond and, if the improvements have been installed properly (as determined through an inspection by the local government’s engineer), the local government releases the bond and accepts responsibility for

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the improvements as public improvements. Some communities may also require a maintenance bond to ensure that the infrastructure will survive one to two years.

WHO REVIEWS SUBDIVISIONS?

In some states and communities, the review of subdivisions is the purview of the local planner and planning commission. For example, in Rhode Island and New Jersey, the review and approval process is chiefly handled by the city or town planning board.\textsuperscript{157} In others the legislative body may be involved. In California, the legislative body approves the final plat, but may be advised by the local planning commission or some other advisory agency.\textsuperscript{158} In Kentucky, a planning commission or the county fiscal court may have authority to approve subdivisions.\textsuperscript{159} In Ohio, county or regional planning commissions are responsible for subdivision approvals in unincorporated areas, but if there is no planning commission, then the board of county commissioners assume responsibility.\textsuperscript{160}

MODEL ACTS FOR SUBDIVISION CONTROL

The \textit{Standard City Planning Enabling Act} (SCPEA), published in 1928, authorized subdivision regulation.\textsuperscript{161} Under the SCPEA, the municipal planning commission was given the power to review and approve subdivisions both within the municipality’s jurisdiction and within a five-mile radius of the municipality’s boundaries.\textsuperscript{162} This power was conditioned upon the commission first adopting a major street plan and then adopting regulations. (Note that the regulations need not be adopted by the local legislative body.) The SCPEA allowed the commission to give “tentative” and “final” approval of the plat, to accept a bond with surety, and to enforce the bond.\textsuperscript{163} The tentative approval was just that, and could be revoked. The commission was required to approve or disapprove a plat within 30 days after it was submitted; if the commission did not take action, the plat was deemed to have been approved and a certificate so attesting was to be issued by the commission on demand. The SCPEA required the planning commission to hold a public hearing on any plat submitted to it and to provide notice of the hearing to adjoining property owners as well as the applicant.

\textsuperscript{157}R.I. Gen. Laws, Tit. 45, Ch. 23 (1997). Note: Some types of subdivisions in Rhode Island can be approved by an administrative officer or referred by the officer to the planning board. §42-23-37 (General provisions–administrative subdivision); N.J. Stat. Ann. §40: 55D-37 (1998).

\textsuperscript{158}Cal. Gov’t Code, §66440 (1998).


\textsuperscript{159}Ohio Rev. Code §711.041, §711.05 §711.10 (1998).

\textsuperscript{160}SCPEA, §§12 to 17.

\textsuperscript{161}Id., §12.

\textsuperscript{162}Id., §14.
Approved plats were treated as amendments to the municipal plan. The planning commission was also given the power to “agree with the applicant upon use, height, area or bulk requirements or restrictions governing buildings, provided such requirements or restrictions do not authorize the violation of the then-effective zoning ordinance of the municipality.” The SCPEA established penalties for transferring lots in unapproved subdivisions and gave the municipality the power to enjoin such transfers and to recover penalties by civil action. A county recorder who filed or recorded a subdivision without the approval of the planning commission was to be guilty of a misdemeanor and could be fined from $100 to $500.

A 1935 model act drafted by attorneys Edward M. Bassett and Frank B. Williams was similar to the SCPEA, but also included general standards that a planning commission was to apply in approving a plat where the standards were relevant to the public improvements contained in the plat. The standards related to such topics as street width, access for fire-fighting equipment to buildings, and size of neighborhood playgrounds or other recreation uses. Attorney Alfred Bettman also drafted in 1935 a model subdivision statute similar to the SCPEA. Bettman emphasized that in his model the platting jurisdiction was given to the planning commission, with the power left in the legislative body of finally determining the location of public streets or other public lands, a two-thirds vote being required to overrule the planning commission’s disapproval of the location.

The American Law Institute’s Model Land Development Code did not contain detailed subdivision provisions. Instead, it treated the division of land into parcels as “general development,” authorized as of right under the development regulations, or “special development permits,” issued after notice and hearing of a type similar to that required for variances and special exceptions. The Code also contained a provision that required the recorder to refuse to record any map unless he has a statement from the local government that the approval of recordation is not required or a statement that approval has been given.

A model statute published by the now-defunct U.S. Advisory Commission on Intergovernmental Relations in 1975 authorized county subdivision regulation, but, other than providing a list of

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164 Id.


166 Id., 84-88.

167 Id., at 66.

168 ALI Code, §2-203 (Division of Land into Parcels).

169 Id., §11-204 (Recording of Plats and Subdivision Maps) and Note, 477-78.
purposes that such regulation should serve, did not detail the contents of an ordinance or the manner in which it was to be administered.\footnote{U.S. Advisory Commission on Intergovernmental Relations (ACIR), ACIR State Legislative Program, No. 5, Environment, Land Use and Growth Policy (Washington, D.C. U.S. GPO, November 1975), 91-104, esp. 100-101.}

\textbf{GROWING SMART\textsuperscript{SM} MODEL STATUTE FOR SUBDIVISION CONTROL}

The model statute in Section 8-301 below is drawn in part from the SCPEA, and state statutes from Kentucky, New Jersey, and Rhode Island.\footnote{Ky. Rev. Stats. §§100.273 to 100.292; N.J. Rev. Stat. Ch. 55D, Art. 6; R.I. Gen. Laws, Tit. 45, Ch. 23. The \textit{Guidebook} particularly utilizes language from the excellent Rhode Island subdivision statute.} The model requires the adoption of a subdivision ordinance and describes minimum and optional contents of such an ordinance. It follows the general categories of subdivisions outlined in the commentary above. However, it does not describe the exact procedures for approval or the bodies who would approve subdivisions (the exception being the final plat, which is the responsibility of the legislative body to approve). The procedures for issuance of development permits are covered as part of the unified development permit review process in Sections 10-201 et seq. of the \textit{Legislative Guidebook}. Nor does the model describe in detail the contents of a plat, as do some state statutes.\footnote{For example, California describes in great detail the format for “final maps,” which are final plats, including the size of sheet on which the map is to be drawn, the color of ink, and the particular media (“polyester base film” or “tracing cloth”). Cal. Gov’t Code §66434 (1998).} This is more appropriate for the subdivision ordinance itself, or for an administrative rule by a state agency or county recording agency that accepts the plats and that is under the supervision of the state.

Note that all forms of subdivision are subject to local government review under this model by virtue of the definition of “subdivision.” There are no exemptions in the definition to bypass the subdivision review process, although review is abbreviated for minor subdivisions and resubdivisions. The intent is that subdivision review is an important local government function and is not to be dodged through exemptions that evade public scrutiny.

\textbf{8-301 Subdivision Ordinance; Review and Approval of Subdivision by Local Government}

\begin{itemize}
\item[(1)] The legislative body of a local government shall adopt and amend a subdivision ordinance in the manner for land development regulations pursuant to Section \[8-103, or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances.\]
\item[(2)] The purposes of a subdivision ordinance, in addition to the purposes of land development regulations as stated in Section \[8-102(2)\], are to:
\end{itemize}
(a) establish reasonable standards of design and procedures for the division and redivision of land into lots, parcels, or sites for building;

(b) further the design of subdivisions that are well-integrated with surrounding neighborhoods and areas with regard to natural and built features;

(c) ensure proper legal descriptions and monumentation of land that has been subdivided;

(d) provide for the fair, orderly, thorough, and expeditious public review of subdivisions;

(e) secure safety from fire, flood, and other danger;

(f) ensure compliance of proposed subdivisions with the zoning ordinance, where such an ordinance exists; and

(g) implement the corridor map pursuant to Section [7-501];

(3) The legislative body of a local government shall adopt and amend a subdivision ordinance only after it has adopted a local comprehensive plan.]

The bracketed language in paragraph (3) should be omitted if there is no requirement to adopt a comprehensive plan. See also subparagraph (5)(c) below, where the bracketed language should also be omitted.

(4) No person or his or her agent shall subdivide any land until the minor subdivision, resubdivision, or final plat designating the areas to be subdivided has been approved pursuant to this Section by the local government having jurisdiction over the land.

(a) No minor subdivision, resubdivision, or final plat shall be recorded by the county recorder of deeds until it has been approved by the local government and the approval entered in writing thereon by a duly authorized officer of the local government as designated in the subdivision ordinance. See also subparagraph (5)(c) below, where the bracketed language should also be omitted.

(b) Any purported subdivision of land or plat recordation of a minor subdivision, resubdivision, or final plat that has not been so approved is void.

(5) A subdivision ordinance adopted pursuant to this Section shall include the following minimum provisions:

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\(^{173}\)See SCPEA, §17 (imposing a penalty on a county recorder who files or records a plat without the approval of the municipal planning commission).
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(a) a citation to enabling authority to adopt and amend the subdivision ordinance;

(b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;

(c) a statement of consistency with the local comprehensive plan[, if one exists,] that is based on findings made pursuant to Section [8-104];

(d) definitions, as appropriate, for such words or terms contained in the subdivision ordinance. Where this Act defines words or terms, the subdivision ordinance shall incorporate those definitions, either directly or by reference;

(e) procedures for review of minor subdivisions and resubdivisions, including specification of all application documents and other documents to be submitted;

(f) procedures for review of preliminary plans, including specification of all application documents and other documents to be submitted, and procedures for review by affected public utilities and those agencies of local[, ] [and] state [, and federal] government having a substantial interest in the proposed subdivision, provided however that a utility or agency may not delay the local government’s action on the preliminary plan beyond the time limits specified in this Act. The failure of any agency to complete a review of the preliminary plan shall not be a basis for disapproval of the preliminary plan by the local government;

(g) procedures for review of final plats, including specification of all application documents and other documents to be submitted and requirements for format [as prescribed by the state planning agency, the county recorder, or other official or agency];

(h) criteria and standards to be applied in review of minor subdivisions and resubdivisions, preliminary plans, and final plats, including requirement for compliance with the zoning ordinance, if one exists.175 Such standards shall require that:

♦ The language in subparagraph (5)(f) assumes that the major coordination with agencies external to the local government would be done in the preliminary plan stage. For example, it is in this stage that the public utility would indicate its preference for where easements are to be located in the subdivision. This language is drawn from Montana statutes.174


175For a discussion of the relationship of the administration of the subdivision ordinance to zoning, see Daniel R. Mandelker, Land Use Law, 4th ed., §9.06.
1. all lots and parcels in a subdivision shall have frontage on and access to either an existing public road or highway or to a road or street in the subdivision required by the local government through an improvements and exactions ordinance pursuant to Section [8-601];

Section 8-601 authorizes local governments to require the construction of streets as a condition of subdivision approval. The streets may be dedicated to the local government or may be privately owned, but in either case must be built to local government standards.

2. a preliminary subdivision shall identify any natural hazard areas, and any flood-prone or special flood hazard areas and the base flood elevation, as applicable; and

3. a minor subdivision, resubdivision, or final plat shall provide the minimum elevation of proposed structures and pads in the event that the plat includes any land in a flood-prone or special flood hazard area. The minimum elevations specified may exceed those necessary to place structures and pads outside the identified flood-prone or special flood hazard areas as is necessary to protect the public health, safety, environment, or general welfare;

Language in subparagraph (5)(h)(2) and (3) regarding flood hazards is intended to ensure that the statute is consistent with the Federal National Flood Insurance Program (NFIP). The performance standards for subdivision regulations for NFIP appear at 44 C.F.R. §§60.3 (a)(4), (b)(3), and (c)(11). Note that the provision above authorizes standards stricter than those mandated by the NFIP.

(i) provisions requiring public and/or nonpublic improvements, and/or the payment of impact fees, incorporating by reference the improvements and exactions ordinance pursuant to Section [8-601] and/or the development impact fee ordinance pursuant to Section [8-602];

(j) procedures for recording of minor subdivisions, resubdivisions, and final plats, including the designation of an administrative officer of the local government to enter in writing the approval of the local government upon minor subdivisions, resubdivisions, and final plats;

(k) procedures for enforcement and penalties that are consistent with the provisions of Chapter 11 of this Act;

(l) requirements for monumentation of the boundary lines of lots and parcels and of the subdivision;

(m) where a corridor map has been adopted pursuant to Section [7-501], provisions for reviewing minor subdivisions, resubdivisions, preliminary plans, and final plats as they relate to land reserved for transportation facilities on the corridor map.

(n) procedures for vacation of subdivisions, pursuant to paragraph (12).

(6) A subdivision ordinance adopted pursuant to this Section may include the following provisions:

(a) procedures for preapplication meetings to allow the applicant for a subdivision to meet with appropriate officials of the local government, including members of the local planning commission, if one exists, and, where appropriate, officials of state [and federal] agencies, for advice and guidance as to the required steps in the subdivision approval and land development process, pertinent local plans, the subdivision ordinance, and other land development regulations that may bear upon the subdivision. Such meetings shall aim to encourage information sharing among the participants, but shall not be considered to be approval of a subdivision, in whole or in part;

(b) provisions for a preliminary plan to be divided into reasonable phases, and thereafter the review of final plats by the local government according to the phases designated in the preliminary plan;

(c) provisions that require that minor subdivisions, resubdivisions, and final plats are submitted in an electronic, computer-readable format;

(d) procedures and standards for extending or oversizing water lines, storm sewers, stormwater retention and detention facilities, and other public improvements that serve or will serve property other than the property contained in a subdivision and for reimbursing the subdivider for the additional cost involved in constructing such public improvements;

[(e) provision for dedication of land or fees-in-lieu for parks, recreation, and open space and for school sites, pursuant to Section [8-601];]

[(f) for local governments that are municipalities, provision for review and approval of subdivisions within [5] miles of the corporate limits of the municipality and not located in any other municipality, except, in the case of any such [nonmunicipal or unincorporated] land lying within [5] miles of more than one municipality, the]
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jurisdiction of each such municipality shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities; and])

The intent of extraterritorial review is to ensure that subdivided lands that may eventually be annexed by a municipality meet its development standards and related requirements. The bracketed subparagraph (5)(f) may be omitted if it is desired that municipalities not have extraterritorial review authority. Alternately, the language may be modified to provide for a joint review between a county planning agency, with review authority over plats in unincorporated areas, and a municipality.

(g) [other].

(7) The approval of a minor subdivision, resubdivision, or a final plat pursuant to this Section shall constitute a development permit. An application for a preliminary plan shall constitute an application for both the preliminary plan and the final plat solely for purposes of vesting pursuant to Section [8-501], unless and until the preliminary plan is no longer valid pursuant to subparagraph (7)(b) below.

Thus, for a subdivision that must have both a preliminary plan and a final plat, the vested right to have a development permit application evaluated under existing regulations only is created by the application for the preliminary plan and lasts through the review of the final plat as long as the owner applies for final plat approval within two years of the approval of the preliminary plan.

(a) The denial or approval, with or without conditions, of a preliminary plan shall not constitute a development permit, but a preliminary plan shall be reviewed in the manner prescribed in Section [10-201] et seq. as if it were an application for a development permit. However, the denial of a preliminary plan shall be reviewable as a land-use decision pursuant to Chapter [10] of this Act, as shall conditions to the approval of a preliminary plan that are conditions precedent to approval of a final plat.

(b) The approval of a preliminary plan shall expire [2] years from the date of approval by the local government, shall include all general and specific conditions shown on the approved preliminary plan drawings and supporting material, and may only be extended in the manner described in Section [8-501(5)].

(c) An approved minor subdivision, resubdivision, or final plat shall be recorded within [1] year from the date of approval by the local government after which such approval shall expire and may only be extended in the manner described in Section [8-501(5)].

177This language appears in the SCPEA, §12.
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♦ Paragraph (7) makes it clear which categories of subdivision are actually to be the subject of a development permit that would authorize development to commence. A preliminary plan, however, does not result in subdivision development and is simply a step, albeit an important one, in the process leading to the review of a final plat. Nonetheless, because the denial of a preliminary plan or an approval that contains conditions precedent to the approval of a final plat can affect whether or not an application for a final plat can even be submitted, this paragraph allows the review of a preliminary plan as a land-use decision under Chapter 10 of the Guidebook.

(8) The subdivision ordinance shall provide for an administrative review, pursuant to Section 10-204, on development permits for minor subdivisions and resubdivisions. The subdivision ordinance may designate the legislative body, local planning agency, the local planning commission, or a hearing examiner to review, and approve or deny, minor subdivisions and resubdivisions.

(9) The subdivision ordinance shall provide for either an administrative review pursuant to Section 10-204 or a record hearing pursuant to Section 10-207 on preliminary plans, and shall designate the legislative body, local planning agency, local planning commission, a hearing examiner, or some combination thereof, to conduct the administrative review or hearing. The subdivision ordinance shall designate one of these bodies to approve or deny preliminary plans.

(10) The subdivision ordinance shall provide for a record hearing, pursuant to Section 10-207, by the local planning agency, a hearing examiner, the local planning commission, or the legislative body on development permits for final plats. The subdivision ordinance shall provide that approval of a final plat must be by ordinance of the legislative body after such hearing.

(11) A subdivision may be vacated, in part or in full.

(a) Vacation shall occur when:

1. the owners of all lots or parcels in the subdivision consent in writing to the vacation, and the local government approves the vacation in the same manner as a resubdivision;

2. the legislative body finds in writing, after a hearing with proper notice, that a hazard, unknown to the local government at the time the subdivision was approved, exists on or near the property that would endanger the public safety.

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178In the SCPEA, for example, the preliminary plan was termed a “tentative plan,” and the “tentative approval” by the planning commission was “revocable” and was not to be entered on the plat as the official action of the planning commission. SCPEA, §14. The SCPEA contemplated that the tentative approval “would be followed by the formal and final approval.” SCPEA, n. 14.
health or safety if development were to commence or proceed pursuant to the terms and conditions of the subdivision approval;

3. the legislative body finds in writing, after a hearing with proper notice, that there is an error in the subdivision or the plat thereof; or

4. the legislative body by ordinance declares that a public improvement in a subdivision is no longer needed by the local government, but such a vacation shall apply only to the extent of the public improvement so declared.

♦ This provision is based upon N.H. Rev. Stat. §676:4-a (1999).

(b) For a vacation pursuant to subparagraphs (12)(a)2., 3., or 4. above, the legislative body must also find in writing that the vacation will not adversely affect the interests or rights of persons in the subdivision being vacated.

(c) When vacation is approved, an instrument of vacation, including the legal description of the subdivision and a copy of the plat to be vacated, shall be prepared and recorded with the county [recorder of deeds].

Commentary: Site Plan Review

A site plan is a scaled drawing that shows the layout and arrangement of buildings and open space, including parking and yard areas, the provision for access to and from the public street system, and, often, the location of facilities such as water and sewer lines and storm drainage systems. In the administration of land development regulations, site plan requirements appear in several forms. A site plan of some type is usually required for issuance of zoning permits that involve new construction or expansion of existing uses in order to check for compliance with the zoning regulations and to ensure that it is clear that the applicant knows which lot or parcel is being built upon. When an area variance (e.g., a variance requiring a departure from front, rear, or side lot line requirements) is needed, a site plan is necessary to show the relationship of the proposed building or use to the lot lines or other features, such as easements. Discretionary permitting procedures such as planned unit development and conditional uses, where the approving authority

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has the latitude to decide whether the proposed use is appropriate in the context of the surrounding area, require site plan review.

As used here, site plan review is limited to the examination of proposals for development of nonresidential and multifamily residential uses that are permitted as of right by the zoning ordinance, but where there is a limited degree of discretion in evaluating how well the proposal fits the characteristics of the site itself. Site plan review, for the purposes of this Section alone, does not involve determination of whether the particular use is appropriate in a specific location or area, since the zoning ordinance will have (or should have) already resolved that as a matter of legislative policy. 180

In many communities, site plan review of this type is a function that is the responsibility of the local planning commission or board, although it could also be assigned as an administrative responsibility, either to the planning staff or a hearing officer. Indeed, where there is a planning staff that is capable of undertaking a review of proposed site plans as a matter of course of reviewing development permits, the site plan review procedure, as an extra step in the development process, will be unnecessary.

The late Professor Norman Williams, Jr., observed that the legal authorization for site plan review “originally came from the local governing body’s statutory power to refer matters to the planning board for comment.” 181 Some state courts have found the authority to conduct site plan review to be implied, absent express statutory authority. 182 Others found the power to require site plan review as part of the process to approve special exceptions (i.e., conditional uses) or zoning map amendments. 183

A number of states have statutes that expressly authorize site plan review. Connecticut 184 allows local zoning regulations to require that a site plan be filed with the zoning commission or another municipal agency or officials to aid in determining the conformity of a proposed building.

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180 According to Professor Daniel R. Mandelker, “[i]f a site plan complies with site plan review requirements and if the proposed use is authorized by the zoning ordinance, the reviewing agency may not disapprove the site plan because it finds the proposed use objectionable.” Daniel R. Mandelker, Land Use Law, 4th ed., §6.68, at 281, citing Kozinski v. Lawler, 418 A.2d 66 (1966).

181 Williams, American Land Planning Law, Vol. 5, §152.01, at 282. Williams was apparently referring to New Jersey case law. See Kozenik v. Twp. of Montgomery, 24 N.J. 154, 131 A.2d. 1 (1957) (N.J. statute then in effect granting governing body the authority to refer “any action” to planning commission).


184 Conn. Gen. Stat. §§ 8-3(g) (site plan review); 8-3 (h) (change of zoning regulations or districts), 8-3(i) to (j) (completion of approved work), and 8-7d (hearings and decisions) (1998).
use or structure with specific provisions of such regulations. A site plan may be modified or denied only if it fails to comply with requirements already set forth in the zoning or inlands wetland regulations. Approval is presumed unless a decision to deny or modify the site plan is rendered within 65 days after receipt of the site plan, although an applicant may consent to extensions. A decision to deny or modify a site plan must set forth the reasons for such denial or modification and must be sent by certified mail to the applicant within 15 days after the decision is rendered.

Michigan allows a zoning ordinance to contain procedures and requirements for the submission and approval of site plans, which it defines as “the documents and drawings required by the zoning ordinance to ensure that a proposed land use or activity is in compliance with local ordinances and state and federal statutes.” The statute requires that the site plan be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance, and the conditions imposed by it, other applicable ordinances, and state and federal statutes.

New Hampshire allows a municipality that has adopted a zoning ordinance and subdivision regulations to adopt an ordinance or resolution to further authorize the planning board to “review and approve or disapprove site plans for the development or change or expansion of use of tracts of nonresidential uses or multifamily dwelling units, defined as any structures containing more than two dwelling units, whether or not such development includes a subdivision or resubdivision of the site.” Before it can conduct site plan review, the planning board must adopt site plan review regulations, the scope of which is described in general terms in the statute.

New Jersey’s site plan review requirements are lengthy and complex, in contrast to other states, and are grouped with the subdivision enabling legislation. Consequently, they provide for a two-step approval process, with preliminary site plan approval, and a final site plan approval. The statute allows an abbreviated review for a “minor site plan,” which means a “development plan for one or more lots which (1) proposes new development within the scope of development specifically permitted by ordinance as a minor site plan; (2) does not involve any new street or extension of any off-tract improvement, and (3) contains the information required in order to make

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185 Mich. Comp. Stats. §125.286e (townships); §125.584d (cities and villages). The definition of site plan appears in paragraph (1) of both statutes.

186 Mich. Comp. Stats. §125.286e (5); §125.584d (5). The language addressing state and federal statutes appears to require that local governments, which customarily do not enforce such laws, have some type of confirmation or signoff from those governments that they do in fact comply with applicable statutes.


188 Id., §674:44.


190 Id., §40:55D-50.

191 Id., §40:55D-46.1.
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an informed determination [that it meets the requirements established in the ordinance for approval as a minor site plan].”192 The statute includes a list of standards and requirements that may be included in a site plan ordinance.193

The New York statutes194 are similar in approach to New Hampshire’s in authorizing the local planning board or other administrative body as the entity to review the site plan. The local government may require a hearing, but the statutes do not mandate one. The New York statutes give the planning board or other authorized body the ability to impose such reasonable conditions and restrictions as are “directly related to and incidental” to a proposed site plan. These conditions must be met in connection with permit issuance.

Rhode Island authorizes:

development plan review of applications for uses that are permitted by right under the zoning ordinance, but the review must be based on specific and objective guidelines which must be set forth in the zoning ordinance. The review body shall also be set forth in the zoning ordinance. A rejection of the application shall be considered an appealable decision pursuant to [state statute].195

The Rhode Island statute bars waivers of any regulations unless approved by the permitting authority pursuant to the local ordinance and the act itself.196

In contrast to variances and conditional uses, site plan review is limited to onsite conditions, unless the enabling legislation provides otherwise.197 In one decision construing the New Jersey legislation, the court interpreted the site plan review statute to bar the denial of a site plan because of off-site traffic congestion. A site plan could be denied, said the court, only if the ingress and

192§40:55D-5, Definitions M to O.
193Id., §40:55D-41.
196Id., §45-24-49(C).
197If enabling legislation were to grant the authority to consider off-site conditions, such as the character of the surrounding area, the legislation would inadvertently convert site plan review into a discretionary technique such as conditional use permit review.
egress proposed by the plan creates “unsafe and inefficient vehicular circulation.” Other state court decisions have reached similar conclusions regarding the scope of site plan review.

**MODEL STATUTE**

The model statute in Section 8-302 below gives the local government the authority to allow site plan review for nonresidential and multifamily residential uses that are permitted as of right, whether or not they require subdivision. However, the local government can elect to determine which nonresidential and multifamily residential uses should be the subject of site plan review and in which zoning use districts site plan review is to occur. Site plan review is to be incorporated into the unified development review process established under Section 10-201. Under that Section, the local government can assign review functions to the planning staff, the local planning commission, a hearing officer, or some other official. Review can occur either with a record hearing or an administrative review. The model statute describes the contents of a site plan review ordinance and identifies the types of standards that may be included in such an ordinance. It allows the approving authority to impose conditions that are directly related to the standards contained in the ordinance. Again, it is important to emphasize that where the planning staff is capable of checking site plans as a matter of course in the review of development permits, and the land development regulations are specific in terms of their requirements, a special separate site plan review procedure of the type described below will not be necessary. Instead, site plan review will occur as a matter of course, without the very narrow discretion authorized in this model.

### 8-302 Site Plan Review

1. The legislative body of a local government may adopt and amend a site plan review ordinance in the manner for land development regulations pursuant to Section [8-103 or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances].

2. As used in this Section:

   a. “Site Plan” means a scaled drawing that shows the development of lots, tracts, or parcels, whether or not such development constitutes a subdivision or resubdivision of the site. A site plan may include elevations, sections, and other architectural, landscape, and engineering drawings as may be necessary to explain elements of the development subject to review; and

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(b) “Multifamily Residential Use” means a land use employing any structures that contain more than [2] dwelling units.

(3) Site plan review shall be limited to those nonresidential uses and multifamily residential uses as may be listed in the site plan review ordinance.

[4] The legislative body of a local government shall adopt and amend a site plan review ordinance only after it has adopted a local comprehensive plan.

(5) A site plan review ordinance adopted pursuant to this Section shall include the following minimum provisions:

(a) a citation to enabling authority to adopt and amend the site plan ordinance;

(b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)];

(c) a statement of consistency with the local comprehensive plan that is based on findings made pursuant to Section [8-104];

(d) definitions, as appropriate, for such words or terms contained in the site plan review ordinance. Where this Act defines words or terms, the site plan review ordinance shall incorporate those definitions, either directly or by reference;

(e) a list of the nonresidential and multifamily uses that require site plan review, provided that the site plan review ordinance may only apply to those uses that are permitted as of right by the zoning ordinance in a particular zoning use district;

(f) specifications, or reference to specifications, for all application documents and plan drawings;

(g) provisions describing the manner of review pursuant to paragraph (6) below; and

(h) provisions requiring public and/or nonpublic improvements, and/or the payment of impact fees, incorporating by reference the improvements and exactions ordinance pursuant to Section [8-601] and/or the development impact fee ordinance pursuant to Section [8-602];

(i) standards limited to:

1. preservation of natural resources existing on the site, including topography, vegetation, floodplains, marshes, and watercourses;

2. minimizing exposure of buildings, structures, and other improvements to the effects of natural hazards;
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3. safe and efficient vehicular and pedestrian circulation, parking, and loading on the site;

4. screening, landscaping, and location of structures on the site;

5. adequacy and location of water lines, sewer lines, storm drainage, and other utilities on the site

6. type and location of exterior lighting on the site in addition to any requirements for street lighting; 200 and

7. [other].

(6) The approval of a site plan shall constitute a development permit. The site plan review shall be part of the unified development permit review process established pursuant to Section [10-201]. The site plan review ordinance shall state whether or not a record hearing is required as a condition precedent to the approval of the development permit.

(7) When an officer or body of the local government approves a site plan pursuant to this Section, it may adopt such conditions which, in its opinion, are directly related to standards described in subparagraph (5)(i), provided such conditions do not conflict with or waive any other applicable requirement of the zoning ordinance. The officer or body shall base any conditions it adopts on competent, credible evidence it shall incorporate into the record and its decision. A failure to comply with an approved condition is a violation of the land development regulations. A site plan shall be approved if it contains the information required by the site plan review ordinance and complies with the applicable zoning ordinance requirements. If the officer or body approving the site plan adopts conditions pursuant to this paragraph, the site plan shall be revised to include such conditions before the development permit is issued.

(8) This Section does not allow an officer or body of a local government, in a decision on a development permit for a site plan, to prohibit or deny a use that is permitted as of right by the applicable zoning use district. The enactment of a site plan review ordinance pursuant to this Section shall not preclude any discretionary review of any site plan in conjunction with a planned unit development pursuant to Section [8-303] or with a conditional use pursuant to Section [10-502].

Commentary: Planned Unit Development

Traditional zoning codes adopted by local governments under the *Standard Zoning Enabling Act* were intended to regulate development and land use on a lot-by-lot basis. When large-scale residential and commercial developments began to appear in the 1950s and 1960s, zoning fell short of meeting the need to mix land uses, provide transitions between zones, preserve open space, and provide standards for improvements and amenities such as roads, parks, and utilities. Rigid zoning controls also squelched creativity in land planning, site design, and protection of environmentally sensitive lands.

In the 1950s, cluster developments constituted a response to the proliferation of monotonous subdivisions of identical single-family detached houses. These newer developments featured transfers of density from one part of the site to another where dwelling units were grouped or concentrated, common open space that was often managed by a community or homeowners association, and curvilinear and circular street patterns.

With prototypes of large developments emerging everywhere in the late 1950s and 1960s, the only thing lacking was a legal construct in which local governments could manage the desired flexibility and innovation. Enter planned unit developments (PUD). The intent of the PUD zoning provisions, and later, state enabling legislation adopted in the 1960s, was to give a legal basis to an emerging innovative design technique.

Merging zoning and subdivision control, PUD provisions allow developers to mix land uses, housing types, and densities, and to get development approval on large developments that will be built in phases over a number of years. The benefits of PUDs to local governments are in the amenities and infrastructure improvements that developers provide in exchange for flexibility and, ideally, in better-planned neighborhoods, office parks, and other developments than may result with traditional zoning. The potential drawbacks of PUDs lie in the level of discretion afforded the agency or board charged with review and approval. Local governments, through PUD ordinances and with authority granted by the state, must provide sufficiently detailed criteria upon which decisions are made so as to avoid abuse of discretion on the part of the reviewing body. The trick, however, is to do so while also encouraging and allowing innovation in land-use planning.

**LEGISLATION FOR PUDS**

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Local governments began incorporating PUD provisions into zoning ordinances in the 1950s and 1960s, sometimes before states had adopted enabling legislation expressly permitting the local governments to do so. The rationale of the early drafters of PUD ordinances was that it was simply an extension of the use of the traditional police power to protect the health, safety, and general welfare.

The first model PUD statute was drafted by the late Chicago land use lawyer Richard Babcock and several other attorneys for a joint project of the Urban Land Institute and the National Association of Home Builders in 1965. The model was touted as a means to use “recent planning innovations” to better serve the general objectives of the Standard Zoning Enabling Act and to meet new demands for housing. Under the act, local governments were granted authority to enact a PUD ordinance that must: refer to the state act, include a statement of objectives for PUDs, designate a local agency to review PUDs, and provide development standards and procedures for their review and approval.

The act required local governments to include density standards but, to meet the purpose of flexibility, suggested that local governments allow density to vary among different parts of the PUD site. The model also paid particular attention to assignment of responsibility for maintenance and upkeep of the common open space, noting that this issue had frightened off some municipalities from allowing PUDs prior to that time. The model permitted dedication of the open space to the local government, but also gave it the authority to require a private organization, such as a home owners association, to maintain the space. An added measure allowed the local government to assume responsibility for the open space on a year-to-year basis if it was not adequately maintained and further stated that assuming responsibility does not constitute a taking. Finally, the model dealt with the issue of rights and responsibilities of the public and private land owners in the carrying out the plan for the PUD and in modifications to the plan.

The ULI/Babcock model was enacted almost in its entirety in New Jersey and Pennsylvania. Other states have that have adopted PUD legislation of varying detail include Arkansas, Colorado, Connecticut, Idaho, Kentucky, Massachusetts, Montana, Nevada, New York, and Ohio.

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The American Law Institute also promulgated a model statute for PUDs in 1975 in *A Model Land Development Code*. The ALI Code authorized PUDs through a “special development permit,” which is akin to a conditional use. The Code provided far less prescriptive detail than the ULI/Babcock model, opting instead to grant local governments the authority to devise their own PUD regulations based on individual needs, and thus maximizing the flexibility that is at the heart of the PUD concept.

One significant addition in the ALI model was the requirement that the plan for the PUD be consistent with the comprehensive plan of the local government (termed the “land development plan” in the Code’s words).

**A MODEL STATUTE**

The model statute in Section 8-303 below authorizes the adoption of a planned unit development ordinance but only if the local government has first adopted a local comprehensive plan. Though planned unit development is inherently concerned with land being developed as a single entity, PUD ordinances under the Section apply equally to property with one owner and land with multiple owners. The submission of an application for PUD may be made mandatory at the local government’s option, essentially allowing the local government to create PUD zones where PUD is the normal land use method. The statute, in paragraph (6), describes the minimum contents of a PUD ordinance. Subparagraph (6)(f) requires that the ordinance contains site planning standards against which any proposed PUD is to be reviewed. Two alternatives for PUD review and approval are provided, in the manner of a subdivision (for projects of 10 or more acres or, if subdivision is also proposed, under 10 acres as well), or in the manner of a conditional use (for projects less than 10 acres if no subdivision is proposed).

Approval of a PUD constitutes a development permit. In approving the development permit for a PUD, the local government must find that the PUD is consistent with the local comprehensive plan, is likely to be compatible with development and land use permitted as of right by the zoning ordinance on substantially all land in the vicinity of the proposed planned unit development, will not significantly interfere with the enjoyment of other land in its vicinity, and satisfies other ordinance requirements.

The model statute contains an option that the site planning standards may also encourage traditional neighborhood development. Paragraph (8) contains a description of the characteristics of such development.

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**8-303 Planned Unit Development; Traditional Neighborhood Development**

(1) The legislative body of a local government may adopt and amend a planned unit development ordinance in the manner for land development regulations pursuant to Section

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208See Rohan, *Zoning and Land Use Controls*, §32.04 [1][b].
(2) The purposes of a planned unit development ordinance are to:

(a) permit flexibility in the application of land development regulations that will encourage innovative development and redevelopment for residential and nonresidential purposes so that a growing demand for other housing and other development and land use may be met by variety in type, design, and layout of dwellings and other buildings and structures, including traditional neighborhood development;

(b) provide flexibility in architectural design, placement, and clustering of buildings, use of open areas, provision of circulation facilities, including pedestrian facilities and parking; and related site and design considerations;

(c) encourage the conservation of natural features, preservation of open space and critical and sensitive areas, and protection from natural hazards;

(d) provide for efficient use of public facilities;

(e) encourage and preserve opportunities for energy-efficient development and redevelopment; and

(f) promote attractive and functional environments for nonresidential areas that are compatible with surrounding land use.

(3) As used in this Section and in all other Sections of this Act, “Planned Unit Development” means one or more lots, tracts, or parcels of land to be developed as a single entity, the plan for which may propose density or intensity transfers, density or intensity increases, mixing of land uses, or any combination thereof, and which may not correspond in lot size, bulk, or type of dwelling or building, use, density, intensity, lot coverage, parking, required common open space, or other standards to zoning use district requirements that are otherwise applicable to the area in which it is located.

(4) The legislative body of a local government may adopt a planned unit development ordinance only after it has adopted a local comprehensive plan.

(5) The application of a planned unit development ordinance to a proposed development:

(a) shall not depend upon whether the development has one owner or multiple owners;

(b) may be limited to development that is equal to or greater in area than a minimum area specified in the planned development ordinance; and
Subparagraph (c) authorizes local governments to mandate clustering and similar PUD tools in selected zoning use districts (for example, residential), rather than making PUD voluntary.

(6) A planned unit development ordinance adopted pursuant to this Section shall include the following minimum provisions:

(a) a citation to enabling authority to adopt and amend the planned unit development ordinance;

(b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;

(c) a statement of consistency with the local comprehensive plan that is based on findings made pursuant to Section [8-104];

(d) specifications, or reference to specifications, for all application documents and plan drawings;

(e) definitions, as appropriate, for such words or terms contained in the planned unit development ordinance. Where this Act defines words or terms, the planned unit development ordinance shall incorporate those definitions, either directly or by reference;

(f) site planning standards for the review of proposed planned unit developments. Such standards may vary the density or intensity of land use otherwise applicable to the land under the provisions of the zoning ordinance in consideration of and with respect to all of the following:

1. the amount, location, and proposed use of common open space;

2. the location and physical characteristics of the proposed planned unit development;

3. the location, design, type, and use of structures proposed;\(^{209}\) and

4. \([other]\);

(g) where the planned unit development is also proposed as a subdivision, procedures for the joint review of the proposed planned unit development as a subdivision; and

(h) provisions requiring public and/or nonpublic improvements, and/or the payment of impact fees, incorporating by reference the improvements and exactions ordinance pursuant to Section [8-601] and/or the development impact fee ordinance pursuant to Section [8-602].

(7) A planned unit development ordinance may provide for, as part of the site planning standards described in subparagraph (6)(f) above, the authorization of uses, densities, and intensities that do not correspond with or are not expressly permitted by the zoning use district regulations for the area in which a planned unit development is located, provided that the local comprehensive plan contains a policy in written and/or mapped form encouraging mixed use development and/or development at higher overall densities or intensities if such development is subject to planned unit development requirements. The ordinance may provide that:

(a) the local legislative body shall review any application that proposes uses, densities, or intensities that do not correspond with or are not expressly permitted by the applicable zoning regulations, and

(b) no planned unit development shall vary from the uses, densities, and intensities of the applicable zoning regulations without a review and approval by the local legislative body.

◆ The language in paragraph (7) permits the local government to designate areas in which mixed use and/or higher-density development is to be allowed, provided it is undertaken as a planned unit development, even if the underlying zoning is more restrictive in terms of uses. Therefore, even though any change in use or density is authorized by an administrative agency, it can be done only if the legislative body has adopted an express policy through the local comprehensive plan. Additionally, the local legislative body, in adopting the ordinance, can require that all planned unit development applications containing such exceptions be submitted to itself for its review.

(8) A planned unit development ordinance may also contain site planning standards, as described in subparagraph (6)(f) above, for traditional neighborhood development that are intended to ensure:

(a) the creation of compact neighborhoods oriented toward pedestrian activity and including an identifiable neighborhood center, commons, or square;

(b) a variety of housing types, jobs, shopping, services, and public facilities;

(c) residences, shops, workplaces, and public buildings interwoven within the neighborhood, all within close proximity;
(d) a pattern of interconnecting streets and blocks, preferably in a rectilinear or grid pattern, that encourages multiple routes from origins to destinations;

(e) a coordinated transportation system with a hierarchy of appropriately designed facilities for pedestrians, bicycles, public transit, and automotive vehicles;

(f) natural features and undisturbed areas that are incorporated into the open space of the neighborhood;

(g) well-configured squares, greens, landscaped streets, and parks woven into the pattern of the neighborhood;

(h) public buildings, open spaces, and other visual features that act as landmarks, symbols, and focal points for community identity;

(i) compatibility of buildings and other improvements as determined by their arrangement, bulk, form, character, and landscaping to establish a livable, harmonious, and diverse environment; and

(j) public and private buildings that form a consistent, distinct edge, are oriented toward streets, and define the border between the public street space and the private block interior.

(9) Where a planned unit development ordinance contains site planning standards for a traditional neighborhood development, the legislative body of a local government may also adopt by ordinance a manual of graphic and written design guidelines to assist applicants in the preparation of proposals for a traditional neighborhood development.

* The language in paragraphs (8) and (9) is intended to encourage local governments to formulate design standards that will encourage traditional neighborhood development through mixing of land uses, increased density, walkability, and urban design elements such as front porches, rear alleys, grid streets, zero-lot lines, ground level retail areas, and town squares. Such development, which has also been termed “new urbanism” or “neotraditional development,” has gained, or regained, increasing acceptance in the U.S. beginning in the early 1990s. 210 Note that

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traditional neighborhood development may also be authorized in the context of zoning use districts pursuant to Section 8-201(5)(a).

(10) The site planning standards shall require that any common open space resulting from the application of such standards on the basis of density or intensity of use be set aside for the use and benefit of the residents of the proposed planned unit development and shall include provisions by which the amount and location of any common open space shall be determined and its improvement and maintenance as common open space be secured.

(a) A planned unit development ordinance may provide that the local government may, at any time and from time to time, accept the dedication of land or any interest thereon for public use and maintenance [but the ordinance shall not require, as a condition of approval of a planned unit development, that land proposed to be set aside for common open space be dedicated or made available to public use].

♦ If local governments make the dedication of open space effectively created by PUD a routine condition of development approval, then developers may be wary (at best) of entering into PUD knowing they will lose land that they may be able to use outside PUD. On the other hand, there may be cases where public ownership of the open spaces created by PUD is desirable but the blanket prohibition on open space dedication as a condition of approval would prevent it. Each adopting state legislature must decide which consideration is more important and therefore whether to include or delete the bracketed provision.

(b) The ordinance may require that the applicant or landowner provide for and establish an organization or trust for the ownership and maintenance of any common open space, and that such organization or trust shall not be dissolved or revoked nor shall it dispose of any common open space, by sale or otherwise, except to an organization or trust conceived and established to own and maintain the common open space, without first offering to dedicate the same to the local government or other governmental agency.\(^\text{211}\)

(11) The approval of a proposed planned unit development pursuant to this Section shall constitute a development permit, which shall be based on findings by the local government that the proposed planned unit development:

(a) is consistent with the local comprehensive plan pursuant to Section [8-104];

(b) is likely to be compatible with development and land use permitted as of right by the zoning ordinance on substantially all land in the vicinity;

\(^{211}\)This language is adopted from Richard F. Babcock, et al., “The Model State Statute,” at 147.
(c) will not significantly interfere with the enjoyment of other land in the vicinity;\textsuperscript{212} and

(d) satisfies any other requirements of the planned unit development ordinance.

(12) A proposed planned unit development shall be reviewed and approved:

(a) in the manner of a preliminary plan and final plat of subdivision pursuant to [Section 8-301] if its total area is [10] or more acres, or less than [10] acres if subdivision is also proposed to occur, except that a planned unit development need not be recorded pursuant to Section [8-301(4)(a)] unless it is also a subdivision; and

(b) as a conditional use pursuant to Section [10-502] if its total area is less than [10] acres and no subdivision is also proposed to occur.

(13) The director of the local planning agency shall record the approval of a planned unit development on the zoning map or map series as required by Section [8-201(3)(n)] by reference to the number of the development permit, but such a recordation shall not constitute an amendment to the zoning map or map series.

(14) The planned unit development ordinance may contain provisions for the preliminary plan of the proposed planned unit development to be divided into reasonable phases, and thereafter the review of final plats by the local government according to the phases in the preliminary plan, if the total area is [10] or more acres pursuant to paragraph (12) above.

\textsuperscript{212}This language is adapted from the ALI Model Land Development Code, §2-210, at 51.
CHAPTER 8

UNIFORM DEVELOPMENT STANDARDS

Commentary: Uniform Development Standards

In theory, each local government formulates land development regulations that express its character and advance the goals and policies contained in the local comprehensive plan. Many larger jurisdictions may indeed have the capability to do just that. However, the practical reality is that local governments often adopt model language from various sources or borrow from other local governments’ codes. There are numerous models to choose from, and local governments can, in adopting such ordinances, adapt them to local circumstances.

Individually prepared and differing regulations may have the most significant negative impact in the area of development standards. Development standards are the provisions in subdivision, planned-unit development, and site plan review ordinances that prescribe the engineering specifications and technical standards for improvements, such as streets, sidewalks, sewer and water lines, drainage, and placement of utilities. (Detailed development standards are in contrast to the broader policy determinations in subdivision, planned-unit development, and site plan ordinances as to the type, density or intensity, and placement of the land uses themselves.) The standards can be very precise, which has several consequences: (1) smaller local governments may not have the resources to formulate effective standards, or even to adequately modify model or borrowed standards; (2) local governments often apply inappropriate or excessively burdensome (“gold-plated”) standards, a common example being state highway department standards, intended for high-use roadways, being applied to local streets; (3) smaller local governments may not have the resources to undertake a detailed technical and legal analysis or review of the standards before adoption; (4) the standards are often drafted by local government engineers and adopted by the local government with little or no critical public commentary at either the preparation or adoption stage; and (5) developers facing different specifications for improvements on projects in various


jurisdictions may have to become familiar with very technical differences in standards in order to comply with the law.\(^\text{217}\) This can add unnecessarily to the cost of development.

Therefore, there is a need for a uniform set of development standards. The local government with a small population or scarce resources can enact comprehensive standards equivalent to those drafted by the largest jurisdictions with extensive resources. The uniform standards will have undergone a detailed review and analysis by state engineers, attorneys, and other experts that many smaller local governments could not afford, so that the legality and effectiveness of the standards is more predictable. Public hearings on the uniform standards provide a forum for public debate and comment on the standards, which would otherwise be the technical province of municipal engineers. And owners and developers can rely on the fact that standards are consistent and uniform across the many jurisdictions in which they do business.

**Model Uniform Development Standards and Enabling Legislation**

Various groups have recognized the need for uniform development standards. For example, the National Commission on Urban Problems (the Douglas Commission) in 1968 recommended a national framework for “the development and maintenance of technically valid standards for controlling all types of development activity.”\(^\text{218}\) Similarly, the U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, in its 1991 report, recommended that states either formulate mandatory standards or publish such standards as models for local governments.\(^\text{219}\)

The U.S. Department of Housing and Urban Development, working with the National Association of Home Builders, has produced proposed model land development standards for adoption by local governments.\(^\text{220}\) The standards include specifications for streets, pedestrian and bicycle ways, public signage, lighting, water and sewer lines, utility easements, and drainage.

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\(^{220}\)HUD, *Proposed Model Land Development Standards*. 
The publication also contains three model state enabling acts, authorizing the preparation of such standards. One provides for standards both formulated and directly imposed by the state, the second provides for state-prepared standards to be voluntarily adopted by the local governments, and the third is a model ordinance for local creation and adoption of development standards. All three model provisions include an advisory board, representing local governments, architects and engineers, and developers, that prepares the uniform development standards. However, the commissioner of the appropriate state department, or local planning board under the model ordinance, actually adopts the standards into law. Annual review of the standards, including recommendation of necessary changes, is required.

**STATE EXPERIENCE WITH UNIFORM DEVELOPMENT STANDARDS -- NEW JERSEY**

One state has committed itself to creating uniform development standards – New Jersey. Under the New Jersey Site Improvement Law, uniform site improvement standards are to be prepared by a Site Improvement Advisory Board, consisting of members representing county and municipal government, engineers, and developers. The proposed standards are submitted as recommendations to the Commissioner of the Department of Community Affairs, who actually adopts the site improvement standards as state regulations. However, the Commissioner cannot reject any standard proposed by the Advisory Board without a finding that it either places an unfair economic burden on some local governments or would result in a danger to public health or safety. Also, the Advisory Board can, with a two-thirds vote,

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**Development Standard: An Example**

What does a uniform development standard look like? Here is an example of a standard for a water supply system.

The water system shall be designed to provide satisfactory pressure at fixtures during the peak hourly demand. For residential buildings less than four stories, a minimum design pressure of 30 psi at the service connections shall be provided during the period of peak hourly demand. Alternatively, the system shall be designed to provide adequate pressure during the period of peak hourly demand at the most remote fixture in a dwelling.

override any rejection by the Commissioner of a particular proposed standard.\textsuperscript{226} The Advisory Board must conduct an annual review of the site improvement standards and make any recommendations for changes in writing to the Commissioner.\textsuperscript{227} Local site improvement standards are superseded by the state’s uniform standards, though a local government may obtain from the Commissioner a waiver of particular standards if adherence to the standard “would jeopardize the public health or safety.”\textsuperscript{228}

The Advisory Board released its first set of proposed uniform site improvement standards, applicable to residential development only, in June 1996.\textsuperscript{229} The proposed standards were adopted in June 1997, after the necessary public hearings.\textsuperscript{230} Minor amendments, mainly to resolve issues of interpretation, have arisen from the annual review mandated by the Site Improvement Law.\textsuperscript{231} No waivers have been issued under the law, but there have been approximately 20 “agreements to exceed” (agreements between a local government and the owners or developers of a particular development project to be bound by standards that exceed the uniform site improvement standards) and 60 de minimis exceptions (granted by the local governments to allow minor variations from the uniform standards by particular development projects).\textsuperscript{232}

A member of the Advisory Board who is also a municipal planning official expressed her dissatisfaction with the provision of the Site Improvement Law that requires standards to be “based on recommended site improvement standards promulgated under the authoritative auspices of any academic or professional institution or organization.”\textsuperscript{233} In other words, no standard can be proposed by the Advisory Board which is not already either a model or actual standard. The criticism is that such a requirement unnecessarily limits the ability of the Advisory Board to formulate the best standards and makes no use of the engineering and planning experience that arises from the Board’s composition.\textsuperscript{234}

\begin{itemize}
\item \textsuperscript{226}N.J. Stat. Ann. §40:55D-40.4(a) & (b).
\item \textsuperscript{228}N.J. Stat. Ann. §§40:55D-40.4(c), -40.5.
\item \textsuperscript{229}The Residential Site Improvement Standards are codified at N.J. Admin. Code tit. 5, ch. 21 (1998).
\item \textsuperscript{230}Telephone interview on March 19, 1999 with Mr. John Patella, Senior Policy Advisor, New Jersey Department of Community Affairs, Trenton, N.J..
\item \textsuperscript{231}Id.; Telephone interview on March 19, 1999 with Ms. Joanne Harkins, Director of Land Use and Planning, New Jersey Builders Association, Trenton, N.J..
\item \textsuperscript{232}Id.
\item \textsuperscript{233}Telephone interview on March 24, 1999 with Ms. Leslie P. McGowan, member, Site Improvement Advisory Board and Treasurer, New Jersey Chapter of the American Planning Association; N.J. Stat. Ann. § 40:55D-40.4(d).
\item \textsuperscript{234}Telephone interview with Leslie McGowan.
\end{itemize}
There has been some reluctance on the part of local governments toward enforcing the state-imposed uniform standards, though some local governments are now accepting the standards as less onerous than they first believed them to be.²³⁵ A major criticism by local governments has been that the street widths in the uniform standards are allegedly too narrow for the passage of fire engines and other emergency vehicles when vehicles are parked on the side of the road.²³⁶ There is a pending (as of April 1999) lawsuit by the New Jersey State League of Municipalities, challenging the site improvement standards enacted under the Site Improvement Law as a violation of the local zoning power. The Appellate Division of the Superior Court (in New Jersey, challenges to state statutes proceed directly to the Appellate Division) upheld the law,²³⁷ and the League of Municipalities appealed to the state Supreme Court. That court also upheld the Site Improvement Law, stating that “zoning is an exercise of the state’s police power” and that “...while our Constitution authorizes legislative delegation of the zoning power to municipalities, it reserves the legislative right to repeal or modify that delegation.”²³⁸

On the other hand, the New Jersey Builders Association is generally pleased with the uniform development standards -- the organization filed an amicus curiae brief in the League of Municipalities suit supporting the site standards -- although one association official believes that the Site Improvement Law should include a body with the power to provide a uniform interpretation of the site improvement standards and to settle disputes under the standards.²³⁹

**Provisions of the Model Statute**

The model statute below, Section 8-401, creates procedures for the preparation, adoption, and implementation of uniform development standards. Development standards are the technical standards and specifications for on-site improvements that are required by subdivision, site plan, and planned-unit development ordinances. While the local governments still make the policy decisions about the type, density, and location of development on a parcel or in a development project, development standards provide the details of the dimensions, composition, and design of the improvements required to serve the development. These include streets, pedestrian ways, water and sewer lines, and utility easements.

²³⁵Telephone interview with Joanne Harkins.

²³⁶Id.

²³⁷*New Jersey State League of Municipalities v. Dep ’t of Community Affairs*, 708 A.2d 708 (N.J. App.Div. 1998) (State enactment of site improvement standards modifies and does not limit the zoning power of local governments, as the local governments participate in the preparation and enforcement of the standards).


²³⁹Telephone interview with Joanne Harkins.
There may be a concern about the effect of uniform development standards on local discretion to regulate development. Even though the standards are intended to be technical specifications that merely clarify and supplement the local government’s power to determine the type, density or intensity, and placement of land uses, it can be argued that uniform standards can have a significant substantive effect on development. For example, prescribing wide streets (ample parking for multiple-auto households) while not requiring sidewalks or street lamps promotes low-density “sprawl” development. On the other hand, narrow streets and mandatory sidewalks and street lamps encourages higher-density “neo-traditional” development. To address this concern, and to give the uniform standards the flexibility that will make it more likely that local governments will adopt them, the model Section requires that the standards must be formulated in classes that are related to and compatible with various types and densities or intensities of land use. For example, one classification system for standards could be low-density, medium-density, or high density residential, each with different requirements for street width, sidewalks, sewer and water lines, etc. Another potential system could be rural subdivisions, with no mandate for sewers or water service, suburban subdivisions, with water and sewer mains but no sidewalks, and urban subdivisions with sidewalks.

Since the goal is to formulate development standards that are uniform across the state, the most appropriate body to adopt such standards is the state planning agency. However, since it will be local governments that choose to adopt, modify, or even reject the uniform development standards, the state planning agency should be advised in its preparation of the standards by an advisory board consisting of representatives of local government and the development community. To ensure that the standards it adopts are appropriate to the state, the state planning agency must also consult directly with the local governments and hold public hearings. Once the state planning agency has adopted uniform development standards, these standards are provided to regional planning agencies and all local governments.

To ensure that the uniform development standards are effective and responsive to current conditions, a five- or ten-year review of the standards is required. The review, by the advisory board, results in a report that is to be adopted by the state planning agency, either in whole or with changes. If no report is adopted within five or ten years of the last adoption of a report, the uniform development standards are no longer presumed to be reasonable. The standards do not thereby become ineffective, but they do have to be defended against legal challenges individually and on their own merit.

There are two alternative approaches to the effect of the uniform development standards. The first option is to permit local governments that adopt the uniform development standards without substantive changes to obtain a certificate of uniformity from the state planning agency. This certificate is not required in any way, but it puts owners, developers, neighborhood groups, residents, and any other interested parties on notice that the local government has land development regulations that can be relied upon to be the same as the familiar state standards. A local government granted a certificate of uniformity can enlist the assistance of the state in defending legal challenges to the uniform development standards. They can also publicize the certificate and its significance in efforts to encourage development.
The second option is to mandate the local adoption of the standards. If the uniform development standards are mandatory, then there must also be a uniform interpretation of those standards. The Section therefore provides that all issues of interpretation of the uniform development standards are to be referred to the Advisory Board for its binding (and appealable) decision.

If the mandatory option is adopted, waivers from particular development standards are provided, but may be granted only by the Advisory Board and only when adherence to the standards would create an imminent threat to public health or safety or the environment.

8-401 Uniform Development Standards

(1) The [state planning agency] shall adopt uniform development standards within [one] year from the effective date of this Act, and may adopt amendments to the uniform development standards as reasonably necessary.

(2) “Uniform Development Standards” mean standards and technical specifications for improvements to land required by subdivision, site plan review, and planned-unit development ordinances and, in order to be considered complete for purposes of paragraph (1) above, shall include specifications for the placement, dimension, composition, and capacity of:

(a) streets and roadways;

(b) sidewalks, pedestrian ways, and bicycle paths;

(c) signage for traffic control and other governmental purposes, including street name signs, and other traffic control devices on streets, roadways, pedestrian ways, and bicycle paths;

(d) lighting of streets, pedestrian ways, and bicycle paths;

(e) water mains and connections thereto, including connections for the suppression of fires;

(f) sanitary sewers and storm-drainage sewer mains and connections thereto;

(g) utility lines and poles, conduits, and connections thereto;

(h) off-street parking and access thereto, except that local governments retain the power to prescribe minimum and maximum number of parking spaces for given types, locations, and densities or intensities of land use; and

(i) landscaping and contouring of land, and other provisions for drainage, sedimentation, and erosion control.
(3) Uniform development standards:

(a) shall be divided into classes that are defined by and appropriate to types and densities or intensities of land use; and

(b) shall not encompass standards for open space, parks, or playgrounds. Any provision of this Section to the contrary notwithstanding, local governments retain the power to formulate and adopt standards regarding exactions of open space, parks, and playgrounds.

(4) There is hereby created a Uniform Development Standards Advisory Board, hereinafter the “Advisory Board,” consisting of [seven] persons appointed by the [state planning agency] for a term of [two] years.

(a) The membership of the Advisory Board shall be as follows: [describe composition of Board].

The composition of the Board is an issue best left to each state. However, since the purpose of the uniform development standards is to provide a resource to local governments and certainty to developers and the public, the board should have representatives of regional planning agencies, county and municipal planning bodies, and home builders and developers, and at least one engineer to ensure the standards are feasible.

(b) All members of the Advisory Board shall serve as such without compensation. However, members may be reimbursed by the [state planning agency] for any expenses incurred in the performance of their duties.

(c) The Advisory Board shall prepare proposed uniform development standards and amendments thereto, and shall present the proposed standards or amendment to the [state planning agency] for adoption.

(d) Before adopting uniform development standards or amendments thereto, the [state planning agency] shall send copies of the proposed standards or amendment to all relevant state agencies[, regional planning agencies] and local governments, which may send written comments thereon within [30] days of receiving the proposed standards or amendment.

(e) Before adopting uniform development standards or amendments thereto, the [state planning agency] shall hold a public hearing thereon. The [state planning agency] shall give notice by publication in newspapers having general circulation within the state [and may also give notice by publication on a computer-accessible information network or by other appropriate means, such notice being accompanied by a computer-accessible copy of the proposed standards or amendment,] at least [30]
days before the public hearing. The form of the notice of the public hearing shall include:

1. the date, time, and place of the hearing;
2. a description of the substance of the proposed standards or amendment;
3. the officer(s) or employee(s) of the [state planning agency] from whom additional information may be obtained;
4. the time and place where the proposed standards or amendment may be inspected by any interested person prior to the hearing; and
5. the location where copies of the proposed standards or amendment may be obtained or purchased.

(f) At the public hearing, the [state planning agency] shall permit interested persons to present their views orally or in writing on the proposed uniform development standards or amendment, and the hearing may be continued from time to time.

(g) After the public hearing and the receipt of all written comments, the [state planning agency] may revise the proposed standards or amendment, giving appropriate consideration to all written and oral comments received. The [state planning agency] must state in writing all revisions from the proposed standards or amendment presented by the Advisory Board and the reasons for such revisions.

(5) Uniform development standards and amendment thereto:

(a) shall be considered rules of the [state planning agency] for purposes of Section [4-103] of this Act, and their preparation and adoption shall be governed by the [Administrative Procedure Act], except as otherwise provided in this Section; and

◆ This provision requires that the uniform development standards be entered into the state administrative code or similar codification of state-agency regulations.

(b) shall be sent to all [regional planning agencies] and local governments within [30] days after adoption.

(6) [Alternative A -- Voluntary adoption of standards]
Any local government that voluntarily adopts the uniform development standards and all amendments thereto without substantive amendment may apply to the [state planning agency] for, and shall receive, a certificate of uniformity. The state planning agency shall revoke a certificate of uniformity if a local government with such a certificate does not adopt, without substantive amendment, an amendment to the uniform development standards within [90] days of receipt.
(a) The [Attorney General] shall have the duty to defend all legal actions brought against any local government that has a valid certificate of uniformity in which the validity or constitutionality of the uniform development standards is challenged. Since the local government is effectively acting as the state’s agent by adopting and enforcing the state’s uniform development standards, the state and not the local government should bear the cost of defending the standards against legal attack.

(b) A local government that has a valid certificate of uniformity may disclose, publicize, and advertise the receipt and significance of the certificate of uniformity.

Alternative B -- Mandatory adoption of standards
Upon receipt of the uniform development standards and amendments thereto, all local governments shall, by ordinance, adopt the uniform development standards.

(a) If a local government does not adopt the uniform development standards within [90] days of receipt, or makes any substantive alterations or amendments thereto, then the [state planning agency] shall in writing declare the uniform development standards to be enacted, and the local government shall enforce the uniform development standards in the same manner as any other local land development regulation.

(b) No local government may adopt development standards other than the uniform development standards and all amendments thereto, and any purported adoption of other development standards shall be void.

(c) All disputes over the interpretation or meaning of the uniform development standards shall be referred by the hearing board, officer, or examiner to the Advisory Board, whose interpretation shall be binding. An interpretation by the Advisory Board 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 land-use decisions at Sections [10-601 et seq.].]

(7) The Advisory Board shall, at least once every [5 or 10] years, conduct a general review of the uniform development standards. The general review shall result in a written report to the [state planning agency] that contains:

(a) an analysis of changes in, or alternatives to, existing uniform development standards that would increase their effectiveness or reduce any identified adverse impacts; and/or

(b) an analysis of why such changes or alternatives are less effective or would result in more adverse effects than the existing uniform development standards.
The [state planning agency] shall give due regard to the written report, and shall adopt or reject the report in writing, stating in that writing any revisions or alterations from the report and the reasons therefor. If the [state planning agency] fails to adopt, in whole or with revisions, such a written report within [5 or 10] years of the adoption of the first uniform development standards pursuant to this Act or of the last adoption of a written report, the uniform development standards shall not enjoy a presumption of reasonableness, and the [state planning agency] shall bear the burden of demonstrating such reasonableness. The removal of the presumption of reasonableness does not by itself affect any presumption of validity, nor does it affect the validity or reasonableness of development permits already issued under the uniform development standards. Paragraph (6)(b) of this Section notwithstanding, if the uniform development standards as amended do not enjoy a presumption of reasonableness, local governments may adopt development standards other than the uniform development standards.

Without the last sentence, a local government would be in a dilemma: faced with uniform standards that have to justify their reasonableness but unable to adopt its own reasonable development standards.

[(8) A local government, or owner of property upon which a development project is planned or proceeding, may apply to the Advisory Board for a waiver of one or more particular uniform development standards, and the Advisory Board shall approve such application, waiving the application of the standard or standards to that development project on that particular property, only if the Advisory Board finds that application of the standard or standards to the particular development project on that particular property:

(a) constitutes an imminent threat to public health or safety or the environment; or
(b) would deprive the owner of all reasonable use of the property.

The Advisory Board shall render a written decision on the application within [60] days of receipt, including in the decision the bases. Such written decision shall be sent to the applicant and to the local government in which the property is located within [10] days of the decision. The decision of the Advisory Board 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.].]
Commentary: Vested Right to Develop

WHAT IS A VESTED RIGHT TO DEVELOP?

Several states have “vesting” statutes intended to protect the legal status of rights obtained at various points in the development review process. Vesting statutes are laws that create criteria for determining when a landowner has achieved or acquired a right to develop his or her property in a particular manner, which cannot be abolished or restricted by regulatory provisions subsequently enacted. This is called a vested right because it is a right that has become fixed (“vested”) and cannot be eliminated or amended. Such laws are not the same as “takings” or “property rights” statutes, which either provide for review of regulatory statutes for potential taking effects or lower the threshold amount by which property must be diminished in value by enforcement of a regulation for there to be a compensable taking.

Vesting statutes are also not the same as development agreement statutes. Though the effect of a development agreement is to fix the government’s right to regulate the property in question, the method used is an agreement in which the landowner typically agrees to at least some restrictions that the government could not generally obtain in exchange for his or her obligations becoming fixed (and for other favorable variances from land development regulations). Vesting statutes, in contrast, apply to the generally applicable regulations of land use, and no agreement is needed for the landowner to be able to assert a vested right to develop.

There is a common thread through most existing vesting statutes. For the development rights to be vested, the government must have made a decision and the landowner must have, in good faith, relied, to his or her detriment, on that decision by making some improvement to the land or some other commitment of resources. It is not surprising that these elements are found so frequently, either expressly or implicitly, for the common law has for hundreds of years included the doctrine of estoppel. Estoppel means that when someone does something with the intent that you will rely on their action or statement, and you indeed rely in good faith on that action or statement and...
demonstrate that reliance by some action to your detriment (not a mere statement that you will rely on it), the original party is legally bound by that action or statement.242

While the doctrine of estoppel is most commonly applied in private disputes, it has also been used by some courts in land-use cases to create a vested right to develop which is protected by the Federal and state constitutions.243 However, some state courts have restricted or denied the applicability of the estoppel doctrine to land-use cases. In some cases, these courts have stated that granting vested rights at all would be an improper restriction on the police power.244 In other cases, they have ruled that the landowner must demonstrate that the local official upon whose statement or decision he or she relied was within authority to make the statement or decision, as the government is not bound by an official’s unauthorized acts.245 Even where estoppel is applied to land-use decisions and a vested right was recognized, there is a difference of opinion on what sort of government acts and what level of reliance triggers estoppel. It is almost universal across the case law that the reliance must be in the form of “substantial” or “extensive” expenditures or actual construction, but these terms are rarely defined, instead being left to a case-by-case analysis. Also decided on an ad-hoc basis is the more fundamental issue of what sort of government statement, action, or decision could be the basis of estoppel. Is a statement by an official that one will receive

242 Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267 (1965) (Plaintiffs induced to raise $18,000, sell bakery, buy and operate a small grocery store in a neighboring town and then sell it at the height of the sales season, purchase a building site for the proposed franchise, and rent a residence in the town in which the franchise was to be located. Though franchisor never offered the applicant a contract, franchisor liable due to representations that the application was likely to be granted and that the preparations were necessary for a successful franchise).

243 City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970) (Owner bought and improved land based upon rezoning from residential to industrial. City later changed zoning back to residential and sued to block owner’s industrial development. City estopped by earlier rezoning). A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) (developer’s due process right violated when new zoning ordinance denied developer’s previously-granted right to develop in a particular manner).

244 Golden Gate Corp. v. Town of Narragansett, 359 A.2d 321 (R.I. 1976) (all property is subject to the police power, so that a vested right would unduly restrict government’s ability to regulate use of those parcels with vested rights attached).

245 Town of Blacksburg v. Price, 266 S.E.2d 899 (Va. 1980) (Act unauthorized by local government is void ab initio and cannot be basis of estoppel).
approval sufficient246 Preliminary approval of a site plan247 Final approval of a site plan248 Issuance of a building permit249

Further confusing an examination of the case law is the issue of “last-minute” amendments to land development regulations250 Some state courts have decided that a development permit application may be subject to an ordinance that was pending in the local legislative process at the time the application was submitted.251 Courts in some other states have applied estoppel to such pending ordinances, and have not allowed a new or amended regulation to apply to a development permit application where the applicant had made a substantial investment in good-faith reliance on the ordinances in place at the time of application.252 And some state courts have found that an applicant who was entitled to a development permit under the regulations in place at the time of application could not be denied a permit based on amended regulations even where there was no substantial investment or reliance by the applicant landowner.253 “Where a project is caught in a

246Cox Corporation v. City of Evanston, 27 Ill.2d 570, 190 N.E.2d 364 (1963) (Statements by city officials at four conferences between landowners and officials that project was acceptable, compliant with all legal requirements, and would be approved were alone sufficient to create vested right, when combined with substantial expenses incurred in anticipation of development).


248Tellimar Homes, Inc. v. Miller, 14 A.D.2d 586, 218 N.Y.S.2d 175 (1961) (Maps for two of four sections of subdivision approved; developer installed roads, water, sewer, and drainage, built model homes, and advertised for those sections. Vested development right existed.)

249Avco Community Developers, Inc. v. South Coast Regional Commission, 553 P.2d 546 (Cal. 1976) (Owner spent more than $3 million in reliance on final approval of map and initial approval of development permit. State then imposed additional permit requirement which owner challenged. No estoppel because owner did not have final building permit.)


251Rockville Fuel & Feed Co. v Gaithersburg, 266 Md. 117, 291 A.2d 672, (1972); Willdel Realty, Inc. v New Castle County, 270 A2d 174 (Del.Ch. 1970), aff’d 281 A.2d 612 (Del.Sup.); Glickman v Parish of Jefferson, 224 So.2d 141 (La.App. 1969); State ex rel. Humble Oil & Refining Co. v Wahner, 25 Wis.2d 1, 130 N.W.2d 304 (1964); Franchise Realty Interstate Corp. v Detroit, 368 Mich. 276, 118 N.W.2d 258 (1962).


change in the law due to denials of successive applications or delays in processing, the court might look askance at a denial based exclusively on the new law.\textsuperscript{254} In such states, courts are especially willing to ignore post-application amendments where the court finds that the local government amended its regulations after the application, or delayed the application until the ordinance became effective, with the intent of barring the application.\textsuperscript{255}

**STATUTORY APPROACHES TO VESTED RIGHTS**

To clarify the issues raised in the case law, a number of states have enacted vesting statutes that specify what sort of government decision, and what detrimental landowner actions made in reliance on that decision, trigger estoppel, as well as other issues concerning vesting of development rights. Arizona grants vested rights in a “protected development right plan,” which can be a planned unit development plan, subdivision plat, site plan, or a general or final development plan, but which must be identified as a protected development right plan at the time it is approved by the local government.\textsuperscript{256} However, it is up to the local government adopting a protected development right ordinance to identify exactly what constitutes a protected development right plan. Such a plan must describe “with a reasonable degree of certainty” the boundaries, natural features, intended use, and the intended locations of buildings and structures, roads, and utilities.\textsuperscript{257} The duration of the protected development right is to be determined at the time the protected development right plan is approved, and a phased development plan, with less information than a final protected development right plan, can be vested if the local government so provides.\textsuperscript{258} A protected development right can be granted conditionally, but demanding that the owner waive his or her protected development rights is not a valid condition. If the condition is that a variance be obtained, then the right does not vest until the variance is obtained.\textsuperscript{259}

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\textsuperscript{257}Ariz. Rev. Stat. §9-1202 (A), (B).

\textsuperscript{258}Ariz. Rev. Stat. §9-1202(C), (F).

Under the Arizona statute, a protected development right lasts for up to three years, except for phased developments, which are protected for five years. An extension of up to two additional years can be obtained at the discretion of the local government “if a longer time period is warranted by all relevant circumstances.” 260 If a protected development right terminates, but a building permit was issued before termination and the footings or foundations of the buildings have been completed, the protected right extends to the expiration of the building permit, but not more than one year from termination. 261 The protected development right is a right to develop pursuant to the protected development right plan, regardless of later amendments in land-use regulation by the local government. There are exceptions when the owner consents in writing to be subject to new regulations, the plan approval was based on an intentional material misrepresentation, or the local government finds, by ordinance after a public hearing, “that natural or man-made hazards on ... the property would pose a serious threat to the public health, safety, and welfare if the project were to proceed as approved.” 262 The protected development right does not include federal or state laws or regulations, to generally applicable codes such as building, fire, plumbing, electrical, or mechanical codes, or to overlay zones that do not affect type of use or density. 263 The protected development right does not preclude the formation of development agreements, nor is it exclusive—common-law vesting still applies, in addition to the statute. 264

In California, the developer of a subdivision can file, in place of a tentative map, a vesting tentative map. 265 The approval or conditional approval of a vesting tentative map confers a vested right to develop “in substantial compliance with the ordinances, policies, and standards” of the local government, with that right expiring if a final map is not approved before the vesting tentative map expires. 266 The vested right includes the right to amend the vesting tentative map in response to amendments to the ordinances, policies, and standards, and the right to seek approvals or permits that depart from the ordinances, policies, and standards 267—in effect, the right to opt into favorable changes in local land-use policy while not being bound by unfavorable changes, and the right to seek variances and similar exceptions. A developer may submit a vested tentative map that is inconsistent with the existing zoning of the property, and the local government may deny approval

264 Ariz. Rev. Stat. §9-1205(B), (C).
266 Cal. Gov’t Code §66498.1(b), (d).
or condition approval of the map upon obtaining the necessary rezoning. If the map is approved or approved conditionally and the rezoning is later obtained, then the vested right includes the right to develop at the new zoning, not the prior zoning that was in effect when the map was approved.\textsuperscript{268} On the other hand, the local government may condition or deny a later permit or approval, though this may be contrary to the vested development right, if this is necessary to comply with state or federal law or if “a failure to do so would place residents ... in a condition dangerous to their health or safety...”\textsuperscript{269}

\textbf{Colorado} focuses on the “site-specific development plan”—a document submitted to the local government for approval, be it a subdivision plat, planned unit development plan, development agreement, or other instrument (but not a variance, sketch plan, or preliminary plan), that describes “with reasonable certainty the type and intensity of use for a specific parcel or parcels of property.”\textsuperscript{270} What constitutes a site-specific development plan is to be defined by local ordinance, but if a local government does not adopt a vesting ordinance by January 1, 2000 and define in that ordinance what constitutes a site-specific development plan, then a vested right to develop will arise from any plat or plan that satisfies the statutory definition of a site-specific development plan.\textsuperscript{271}

An application for approval of a site-specific development plan is to be reviewed under the laws and regulations in effect on the date of application, except that new or amended laws and regulations “necessary for the immediate preservation of public health or safety” are immediately applicable.\textsuperscript{272} When a site-specific development plan is approved or approved with conditions, after due notice and public hearing, a vested property right to develop pursuant to the plan is created.\textsuperscript{273} The right extends for three years, which can be extended through development agreements approved by the local legislature or through amendments to the site-specific development plan that are expressly approved by the local government.\textsuperscript{274} A vested right created under one local government is binding on any other local government that may later assert jurisdiction over the property.\textsuperscript{275} The vested right does not apply to building, electrical, mechanical, and plumbing codes, and the local government may act contrary to the vested right if the landowner consents, if just compensation is paid for all expenditures made in reliance on the right (but not for the diminution in value of the land...)

\textsuperscript{268}Cal. Gov’t Code §§66498.3.
\textsuperscript{269}Cal. Gov’t Code §§ 66498.1(c), 66498.6(b).
\textsuperscript{272}Colo. Rev. Stat. §24-68-102.5.
\textsuperscript{274}Colo. Rev. Stat. §24-68-104.
\textsuperscript{275}Colo. Rev. Stat. §24-68-106.
itself), or if there are natural or man-made hazards on or near the property, that were not reasonably discoverable at the time of the approval, posing a “serious threat to the public health, safety, and welfare.” 276

The Florida law on vested rights is very succinct: a development approved as a development of regional impact that has been commenced and is presently proceeding in good faith is not affected by an amendment to the state statute authorizing local land-use planning and regulation. 277 This statute is little more than a restatement of the general definition of estoppel.

The vested-rights statute in Kansas provides that development rights in single-family residential property vest upon the recording of a plat and that such a right extends for five years, during which construction must commence or the right expires. 278 For other property, the right vests only when all permits required by city and county regulations are issued and construction has begun with substantial amount of work completed. 279 In either instance, local governments can provide by ordinance for earlier vesting of development rights, as long as the vesting event is the same for all land within a particular land-use classification. 280

In Massachusetts, the usual nonconforming uses statute is broadened, so that a zoning ordinance or by-law does not apply to a structure or other use that is “lawfully in existence or lawfully begun, or to a building or special permit issued” before the first notice of the public hearing on the adoption of the ordinance or by-law. 281 However, this provision does not apply to billboards or to various adult uses, and amendments to a zoning ordinance or by-law can apply if the use or construction is not commenced within six months after the permit is issued and the construction is “continued through to completion as continuously and expeditiously as is reasonable.” 282 Massachusetts also has a more typical vesting provision, which grants vesting rights in the context of subdivisions to “a definitive plan, or a preliminary plan followed within seven months by a definitive plan” if notice is given to the local government that the plan was submitted, and the plan is approved. 283 Such vested right is a right to develop according to the ordinances and by-laws in place at the time of the submission of the first plan and lasts eight years, with any moratorium on construction, permits, or utility connections, whether imposed by the state, a federal agency, or a court, staying that time.

283Mass. Gen’l Law Ch. 40A, §6(par. 5).
The owner of land subject to a vested right may waive that right in a writing properly recorded in the manner of a deed, in which case the ordinances and by-laws in place apply in full. This gives the owner the option to take advantage of favorable changes in local land use policy.

In New Jersey, the preliminary approval of a subdivision plat or site plan grants the owner, for three years, the right to develop pursuant to the plat or plan “except that nothing herein shall be construed to prevent the municipality from modifying by ordinance such general terms and conditions of preliminary approval as relate to public health or safety.” If a subdivision or site covers an area of 50 acres or more, the vested right may exist, by consent of the local government, for longer than three years, taking into consideration such factors as the number of dwelling units, economic conditions, and the comprehensiveness of the development. Extensions of the vested right for up to one year, with an absolute limit of two years total, can be obtained, but if, in the interim, design standards have been revised, such revised standards may govern. An extension of preliminary approval for up to one year, which does not make the project subject to amendments to the design standards, may be granted if the developer proves that he or she “was barred or prevented, directly or indirectly, from proceeding with the development because of delays in obtaining legally required approvals from other governmental entities and that the developer applied promptly for and diligently pursued the required approvals.”

The final approval of a site plan or major subdivision extends the rights from preliminary approval for two years unless the plat has not been duly recorded within the time period provided by New Jersey law. For subdivisions or site plans of 50 acres or more, conventional subdivisions or site plans for 150 acres or more, or site plans for development of a nonresidential use with a floor area of 200,000 square feet or more, the local government may grant vested rights for more than two years, taking into consideration the same factors as were applicable with preliminary approval of large subdivisions or sites. The same extensions are available, including the extension for delays in obtaining permits that were diligently sought.

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284Mass. Gen’l Law Ch. 40A, §6(par. 5).
285Mass. Gen’l Law Ch. 40A, §6(par. 9).
288N.J. Stat. §40:55D-49(c), (d).
292N.J. Stat. §40:55D-52(a), (b), & (d).
North Carolina’s vested rights statute is similar to that of Arizona and Colorado. The two foundations of the statute are the site-specific development plan and the phased development plan. The site-specific development plan is defined in almost precisely the same manner as Colorado: a plan submitted by the landowner, “describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property,” with variances and sketch plans not eligible.\textsuperscript{293} As in Colorado, it is in the hands of the local government to define by ordinance exactly what constitutes a site-specific development plan, but that definition must “designate a vesting point earlier than the issuance of a building permit.”\textsuperscript{294} If no such ordinance is enacted, the issuance of a zoning permit is the vesting point.\textsuperscript{295} A phased development plan is a plan that contemplates development in phases and is not as specific as a site-specific development plan.\textsuperscript{296} The approval of a site-specific development plan or phased development plan, after public notice and hearing, creates a vested right to develop pursuant to the plan, which lasts for two years but can be extended by the local government for a maximum duration of five years for phased development plans.\textsuperscript{297}

In North Carolina, a local government may also place conditions on the approval of a site-specific development plan or phased development plan, but cannot require the landowner to waive his or her vested development right as a condition of plan approval.\textsuperscript{298} For phased development plans, a local government may require the landowner to submit a site-specific development plan for each phase of the project in order for the right to develop that phase to become vested.\textsuperscript{299} The vested right may be amended or abolished if the owner approves, is compensated for expenditures in reliance on the vested right but not for diminution in value of the land, if the owner made misrepresentations that were material to the plan approval, if the development would be in violation of a state or federal law or regulation enacted afterwards, or if it is found in a hearing after proper notice that a hazard exists on or near the property that would endanger the “public health, safety, or welfare” if the project proceeded as approved.\textsuperscript{300} There is no vested right in relation to overlay zoning districts nor as to building, plumbing, electrical, or mechanical codes.\textsuperscript{301}

\begin{itemize}
\item \textsuperscript{294}N.C. Gen’l Stat. §160A-385.1(b)(5).
\item \textsuperscript{295}N.C. Gen’l Stat. §160A-385.1(f)(3).
\item \textsuperscript{296}N.C. Gen’l Stat. §160A-385.1(b)(3).
\item \textsuperscript{297}N.C. Gen’l Stat. §160A-385.1(c), (d).
\item \textsuperscript{298}N.C. Gen’l Stat. §160A-385.1(c).
\item \textsuperscript{299}N.C. Gen’l Stat. §160A-385.1(d)(3).
\item \textsuperscript{300}N.C. Gen’l Stat. §160A-385.1(e)(1).
\item \textsuperscript{301}N.C. Gen’l Stat. §160A-385.1(e)(2).
\end{itemize}
The Oregon statute provides that applications for development permits and related land-use decisions are to be reviewed pursuant to the standards and criteria in place at the time of application, so long as the application was complete when filed or made complete within 180 days of application.

Pennsylvania has a fairly simple statute. It states that, after application for approval of a subdivision plat, amendments to local land-use regulations do not affect the decision on the plat, and that approval of the preliminary application entitles the owner to approval of the final plat. Once a plat has been approved, no further amendment to local land-use regulations may adversely affect the right to develop in accord with the approved plat for five years, which can be extended at the discretion of the local government. A preliminary plat may propose development of the project for more than five years if it includes a schedule of development in stages with deadlines for the completion of each stage. Modification of the schedule requires approval by the local government, and failure to adhere to the schedule revokes the vested right and leaves the owner subject to local land-use law amendments enacted since preliminary plat approval.

The Texas statute provides that, both for the state and for local governments, “the approval, disapproval or conditional approval of an application for a permit [shall be considered] solely on the basis of any ... properly adopted requirements in effect at the time the original application for the permit is filed.” A permit is any approval required by law in order to perform an action or initiate a project. All permits required for a project are considered a single series of permits, and when a series of permits is required for a project, then the requirements in effect at the time the original application for the first permit is filed are the sole basis for consideration of all subsequent permits required for the completion of the project. Once an application for a project is filed, the duration of any permit required for the project cannot be shortened. A permit holder has the right to “take advantage of ... a change to the laws, rules, regulations, or ordinances of a regulatory agency which enhance or protect the project including, without limitation, changes that lengthen the effective life of the permit after the date on which application for the permit was made, without

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308 Tex. Local Gov’t Code §§245.001(1), 245.002(b).
309 Tex. Local Gov’t Code §245.002(c).
forfeiting any rights.” However, the statute does not apply to permits required for “sexually oriented businesses,” nor to uniform building, fire, electrical, plumbing, or mechanical codes or local amendments thereto, zoning regulations not affecting lot or building size or dimensions, regulations of annexation or of utility connections, or any other regulation “to prevent imminent destruction of property or injury to persons.” Also, it does not affect the ability to amend fees imposed in connection with development permits.

Virginia has a law that creates a vested right when a landowner “is the beneficiary of a significant affirmative government act allowing development of a specific project, relies on the significant affirmative government act, and incurs substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative government act.” The statute gives examples, but not an exhaustive list, of significant affirmative government acts: issuance of special exception or use permits, granting of variances, approval of a preliminary subdivision plat or site plan if the owner “diligently pursues approval of the final plat or plan within a reasonable period of time,” or approval of a final plat or plan. This statute, like Florida’s law, is in essence a restatement of the common-law vesting standard based upon estoppel.

**COMMON ELEMENTS OF THE VESTED RIGHT STATUTES**

There are several common elements that run through the vesting statutes. Generally applicable regulations, such as building, fire safety, plumbing, electrical, and mechanical codes, are not subject to the vested development right and apply as amended. There is no vested right from a permit, permission, or approval issued in reliance on an intentional material misrepresentation. If development of the property pursuant to the vested right is found to create a hazard to the public health, or safety, the vested right may be terminated.

The owner can typically opt into amendments that are favorable to development. Some states allow the owner to do this by consenting to submit to the new regulation or amendment, while

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310 Tex. Local Gov’t Code §245.002(d).
311 Tex. Local Gov’t Code §245.004.
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others require that the owner specifically apply for amendment of the instrument creating the vested right, thus necessitating approval by the local planning agency or commission. 318 In the statutes that address the question, the vested right can be terminated by the payment of just compensation. 319 While a permit or approval that creates a vested right can be conditional, it is not a valid condition to require the owner to waive the vested right. 320

As to the key issue in vested right statutes--what permit or approval triggers the right--there are various approaches. Arizona, Colorado, and North Carolina statutes create a vested right from a development plan that is “site specific;” that is, a plan must have sufficient specific detail on the proposed development of the property, such as a subdivision plat, planned unit development, or development agreement, though the amount of necessary specificity is up to the individual local government. 321 California relies upon the “tentative vesting map,” while Massachusetts creates a vested right from approval of “a definitive plan or a preliminary plan followed within seven months by a definitive plan,” and Pennsylvania vests the right to develop pursuant to an approved subdivision plat. 322 Florida grants a right to complete a development of regional impact pursuant to a final development order if development is proceeding in good faith. 323 Kansas vests upon the recording of a plat for single-family residential development, and for all other development upon the issuance of all necessary permits if “substantial amounts of work have been completed” pursuant to the permits. 324 Virginia grants a vested right when there is a significant affirmative governmental act, such as a rezoning, special use permit, variance, or plat or site plan approval, and the owner in good faith reliance on that affirmative act makes significant expenditures or incurs significant obligations. 325

ELEMENTS OF THE MODEL VESTED RIGHT TO DEVELOP SECTION

In the model Section 8-501 below, the Legislative Guidebook has adopted the above common elements, some intact and some with modification. In the Section below, the basis for the vested right is the development permit application. When a land owner applies for a development permit, the owner has the right to rely on the land development regulations that were in effect on the day

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320Ariz. Rev. Stat §9-1202(H), (I); Ca. Gov’t Code §66498.1(c), (e); N.C. Gen’l Stat. §160A-385.1(c).
323Fla. Stat. §163.3167(8).
the application was filed. Once a permit application is filed, subsequent amendments to the relevant ordinances underlying the desired permit do not apply to that permit application. And, of course, if the application is approved and the permit is granted, development may proceed to the extent of the permit, amendments to land development regulations notwithstanding.

Some people contend that the “substantial investment” rule is the only appropriate vesting rule, that only a landowner who has made a substantial investment in reliance on a permit approval has a right that supersedes the local government’s right to regulate land use at all times. As explained above, the statutory trend is to adopt a “bright line” permit vesting rule for its certainty and predictability. However, if an adopting state legislature strongly wishes to employ a “substantial investment” rule, we have provided an alternative Section 8-501 in which a vested right to develop is created by “significant and ascertainable development” pursuant to a validly-issued development permit. This variation on the substantial investment rule, based on Maine and Maryland case law, is somewhat less problematic than typical “substantial investment” in that it is based upon some concrete physical improvement rather than the amount of money spent.

It should be noted that, as with any other important policy issue, there are many types and varieties of vesting rules, both statutory and in case law. It may be desirable for a state with a strong preference for a particular vesting rule other than the ones provided here to substitute that rule for the alternatives in this Section, or even adopt no vesting statute and rely on existing case law precedent.

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8-501  Vested Right to Develop (Two Alternatives)

Alternative 1 – “Bright-Line” Vesting Rule

(1) Except as provided in this Section:

(a) when an owner submits an application for a development permit, and the application is complete when submitted or deemed to be complete pursuant to Section 10-203 within 90 days of submission, no enactment or amendment of the relevant land development regulations after the date of application shall apply to the consideration of that application.

This language freezes the development regulations at the time of application, and any subsequent change in the land development regulations will not affect the consideration of the application. The requirement for this right that the application be made complete within 90 days if it is not complete as filed arises because, under Section 10-203, the local government has 28 days from application to inform the applicant that their application is incomplete, and another 28 days from the submission of requested additional materials to deem the application complete. The 90 days leave the applicant at least 34 days to assemble and submit the additional information, which is a reasonable and not excessive deadline.

(b) the issuance of a development permit pursuant to Section 10-201 shall grant the owner of the property subject to the development permit the right to develop the property pursuant to the terms and conditions of the development permit for the duration of the development permit, including any extensions.

Local land development regulations must specify the duration of development permits, but may specify different durations for different types of permit or different scales of development. Generally, more complex development should be allotted more time for completion and thus a longer vesting period.

These rights shall be collectively termed the “vested right to develop.”

(2) The vested right to develop does not apply to enactment of or amendments to:

(a) ordinances of general application, such as building, fire safety, electrical, mechanical, plumbing, and property maintenance or housing codes; or

(b) state or federal statutes or regulations.

(3) The enactment or amendment of land development regulations by the local government after the date of submission of an application for a development permit shall apply to the development of the property for which the development permit was issued under the following circumstances:
(a) if the owner of the property in question agrees through a development agreement pursuant to Section [8-701] to be subject to subsequent enactments or amendments.

(b) if the [legislative body or hearing examiner or Land-Use Review Board] finds in writing, after a hearing with proper notice, that a development permit was issued in reasonable reliance upon a material misrepresentation by the owner, or by the representative or agent of the owner:

1. in any application, plat, plan, map, or other document filed with the local government in order to obtain the development permit, or

2. in any hearing held in order to obtain the development permit;

(c) if the local government makes just compensation to the owner for the termination of the vested right to develop; or

(d) if the [legislative body or hearing examiner or Land-Use Review Board] finds in writing, after a hearing with proper notice, that a hazard, unknown to the local government at the time the development permit was issued, exists on or near the property for which a development permit was issued that would endanger the public health or safety if development were to commence or proceed pursuant to the terms and conditions of the development permit.

(4) It shall not be a condition for the issuance or continuing validity of any development permit that the owner waive his or her vested right to develop pursuant to the terms and conditions of the development permit. Any such purported condition on the issuance or maintenance of a development permit shall be void.

(5) The vested right to develop may be extended only by:

(a) an extension of the duration of the development permit, granted pursuant to Section [10-201];

(b) a development agreement pursuant to Section [8-701]; or

(c) a period of time equal to the length of any and all moratoria imposed by any governmental entity, including the state and federal governments.

*Alternative 2 – Vested Right Upon Significant and Ascertainable Development*

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(1) Except as provided in this Section, the issuance of a development permit shall grant the owner of the property subject to the development permit the right to develop the property pursuant to the terms and conditions of the development permit and the development permits prerequisite to that permit, notwithstanding new or amended land development regulations to the contrary, when the owner has engaged in significant and ascertainable development pursuant to the development permit with the intention in good faith to complete the development authorized by the development permit and prerequisite development permits. This right shall be termed the vested right to develop.

Under Section 10-208, the local government may issue, for a large-scale development, a master permit that subsumes all the component development permits and allows the entire project to be vested with reasonable certainty.

(2) The vested right to develop shall not apply to state or federal statutes or regulations, and the enactment or amendment of land development regulations by the local government shall apply, any vested right to develop notwithstanding, under the following circumstances:

(a) if the owner of the property in question agrees through a development agreement pursuant to Section [8-701] to be subject to subsequent enactments or amendments;

(b) if the [legislative body or hearing examiner or Land-Use Review Board] finds in writing, after a hearing with proper notice, that the development permit, or any prerequisite development permit, was issued in reasonable reliance upon a material misrepresentation by the owner, or by the representative or agent of the owner:

1. in any application, plat, plan, map, or other document filed with the local government in order to obtain the development permit, or

2. in any hearing held in order to obtain the development permit;

(c) if the local government makes just compensation to the owner for the termination of the vested right to develop; or

(d) if the [legislative body or hearing examiner or Land-Use Review Board] finds in writing, after a hearing with proper notice, that a hazard, unknown to the local government at the time the development permit was issued, exists on or near the property for which the permit was issued that would endanger the public health or safety if development were to commence or proceed pursuant to the terms and conditions of the development permit and prerequisite development permits.

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(4) It shall not be a condition for the issuance or continuing validity of any development permit that the owner waive his or her vested right to develop. Any such purported condition on the issuance or maintenance of a development permit shall be void.

(5) A local government shall define or clarify what constitutes significant and ascertainable development in its land development regulations.

Commentary: Regulation of Nonconforming Uses

WHAT IS A NONCONFORMING USE?

A nonconforming use is a land use, or a structure, which was allowed under local land development regulations when established, but would not be permitted under current development regulations. In deciding how to treat nonconforming uses, local governments must strike a balance between two competing principles:

(1) The intended outcome, when a local government changes its planning goals and policies and then enacts revised land development regulations, is to have all development and land use ultimately conform to those regulations.

(2) It is unfair to require termination of a use or demolition of a structure that was constructed or commenced in compliance with the law when the owner, relying on the legality of the land use or structure at the time, presumptively incurred expenses in maintaining the structure or continuing the use.

The protection of nonconforming uses is thus the “mirror image” of vesting. Vesting deals with the right to complete a development despite changes in land development regulations to the


330 Some definitions of nonconforming use include “a use of land or a building that does not conform with the use restrictions of the zoning ordinance.” Mandelker at 195; and “the lawful use of a building or structure or the lawful use of any land, as existing and lawful at the time of the adoption of a zoning resolution, or, in the case of an amendment of a resolution, at the time of such amendment.” Colo. Rev. Stat. § 30-28-120. The latter definition, with slight variations, is common in statutes.
contrary. Nonconforming uses are about the right to maintain a structure or land use despite changes in land development regulations to the contrary.

**General Approaches to Nonconforming Uses**

Programs for the removal of nonconforming uses are affected by the type of nonconforming use that is involved. At one end of the nonconforming use spectrum are nonconforming uses that are noxious, nuisance-like uses, often located in high-value, nonconforming buildings. An industrial plant in a residential area is an example. These nonconforming uses present difficult removal problems. So do conforming uses in nonconforming buildings.

At the other end of the spectrum are nonconforming uses located on open land, such as billboards or signs. Some of these uses, such as junkyards, are also nuisance-like. Nonconforming uses in conforming buildings also belong at this end of the nonconforming use spectrum. Nonconforming uses that have a minimal capital investment are the easiest to deal with, particularly because they can be amortized over short periods of time.

Most states extend some degree of legal protection to nonconforming uses. The usual approach of local governments is to “grandfather” nonconforming uses -- to state that the land use may continue, so long as it was legal at the time it commenced. When a nonconforming use is terminated or a nonconforming structure is vacant for a certain period, typically six months or more, then the protection of grandfathering is lost. Resumption of the nonconforming use or occupancy is not allowed. The grandfather protection also does not apply to major renovations or expansions of a nonconforming structure, though it does typically protect routine maintenance and repair. A controversial issue is what to do if a nonconforming structure is destroyed or severely damaged by force majeure (“act of God”): should the owner be bound by the law as it now stands and not be allowed to restore the nonconforming structure, or should the grandfather protection extend to a reconstructed nonconforming building as long as it is built with all due diligence within a specific period after the destruction?

Another method of dealing with nonconforming uses is amortization, which requires the termination of a nonconforming use after a period of time. Amortization has long been a controversial land use regulation technique, as owners of nonconforming uses can claim that the removal of a nonconforming use at the end of an amortization period, without compensation, is unconstitutional.

Other techniques for the removal of nonconforming uses often appear in sign ordinances. Some ordinances authorize the removal of nonconforming signs when a vacant lot with nonconforming signs is developed, or when there is a change in the use of a lot on which a nonconforming sign is located. Other sign ordinances require the elimination of a nonconforming sign when there is a change in the sign, such as the sign structure.

**Nonconforming Use Statutes**

331 See *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) (upholding these techniques)
The Standard State Zoning Enabling Act (SZEA)\textsuperscript{332}, the model act produced in the 1920s by the U.S. Commerce Department and the basis of many states’ zoning enabling statutes, did not expressly address the issue of nonconforming uses. Nevertheless, most states, even those whose zoning statute is based directly on the SZEA, provide some protection for nonconforming uses in their zoning enabling act.

The American Law Institute’s (ALI) Model Land Development Code addressed nonconforming uses. Commentary to the ALI Code was skeptical about the ability of local governments to eliminate nonconforming uses, and provided limited authority for their removal.\textsuperscript{333} The ALI Code authorizes local governments to require the discontinuance of nonconformities if there is a local comprehensive or area plan in place and the nonconformity is inconsistent with that plan and with the neighboring land uses.\textsuperscript{334} If development similar to the use or structure proposed to be discontinued could be undertaken in the same area under existing regulations, the local government cannot compel discontinuance.\textsuperscript{335}

Alaska\textsuperscript{336} regulates the height of structures and uses near airports, and provides generally that nonconforming structures cannot “become a greater hazard to air navigation than ... when the applicable regulation was adopted.” But if a structure or tree is abandoned or more than 80 percent “destroyed, deteriorated, or decayed,” under the Alaska statutes, then the height cannot exceed present regulations and the structure or use may be removed at the owner’s expense. Arizona does not expressly authorize the protection of nonconforming uses. However, it does, in its statute authorizing the purchase or condemnation of property with a nonconforming use,\textsuperscript{337} state that such power does not affect “the right to ... continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings ... used for such existing purpose.” Under the Arizona statute, a local government cannot make the termination of a nonconforming use or structure a condition for the issuance of any permit unless it also pays just compensation.

Connecticut’s general zoning enabling statute provides that zoning ordinances “shall not prohibit the continuance of any nonconforming use ... [and] shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to


\textsuperscript{334}ALI Code §§4-101, 102.

\textsuperscript{335}ALI Code §4-102.


the intent of the property owner to maintain that use.\textsuperscript{338} Delaware protects nonconforming uses as long as “no structural alteration of [the] building is proposed or made.”\textsuperscript{339} Indiana has only a general authorization that zoning ordinances may include “provisions for the treatment of uses, structures, or conditions that are in existence when the zoning ordinance takes effect.”\textsuperscript{340}

Kansas\textsuperscript{341} protects nonconforming uses and buildings if they are not altered, and a nonconforming building or use in a building is not protected if the building is damaged by more than half its fair market value. Kentucky\textsuperscript{342} states that “uses lawful at the time any zoning regulation is adopted may continue despite being in violation of that regulation.”\textsuperscript{343} Also, uses that have existed illegally for a continuous ten years or more but have never been the subject of any enforcement action are subject to a provision that prohibits enlargements or extensions of the use and changes from one nonconforming use to another, more intense use.\textsuperscript{344}

Louisiana\textsuperscript{345} protects only “premises which have been continuously used for commercial purposes since January 1, 1929 without interruption for more than six consecutive months at any one time.” Billboards may be removed pursuant to a “reasonable amortization time.” Michigan\textsuperscript{346} extends general protection to nonconforming uses, and grants local legislatures broad authority to regulate the “resumption, restoration, reconstruction, extension, or substitution” of nonconforming uses, with the express authority to treat different classes of nonconforming use differently.

Massachusetts provides that “uses lawfully in existence or lawfully begun” are not subject to new zoning ordinances or bylaws, except for “any change or substantial extension of a use,” “any reconstruction, extension, or structural change of such structure,” and “alteration of a structure ... to provide for its use for a substantially different purpose ... except where alteration, reconstruction, extension, or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure.” If an extension or alteration of a nonconforming use or structure “shall not be substantially more detrimental” than the existing use or structure, the local


\textsuperscript{340}Ind. Code §36-7-4-601(d)(2)(C) (1998).


\textsuperscript{343}Ky. Rev. Stat. §100.253(1).

\textsuperscript{344}Ky. Rev. Stat. §100.253(2), (3).


government may approve a permit for such extension or alteration. Zoning ordinances may regulate nonconforming uses or structures abandoned for two years or more.

Nebraska\textsuperscript{347} protects existing lawful uses of land, except when the use is abandoned or the structure it is located in is structurally altered. If no structural alteration is needed, a nonconforming use may become more intense, but if a nonconforming use is made less intense or becomes conforming, then it may not revert to a more intense nonconforming use. Nevada\textsuperscript{348} has an airport zoning enabling act that requires a permit for structures to be built or altered in the vicinity of an airport, but does not require a permit for the maintenance of an existing structure or for alterations that will not increase the height of the structure. Under the statute, no nonconforming structure may become higher than it was when the relevant airport zoning ordinance was adopted or amended.

New Hampshire\textsuperscript{349} states that zoning ordinances do not apply to structures or uses existing at their adoption unless a building is altered for a use “substantially different” than the one in place at the time of adoption. New Jersey law\textsuperscript{350} states that nonconforming uses may continue, and may be restored or repaired in event of their partial destruction. A certificate of nonconforming use or structure, affirming that the use or structure was lawful when the ordinance rendering it nonconforming was adopted, can be obtained from the local government by owners and prospective purchasers and mortgagees. New York\textsuperscript{351} protects subdivision plats, once approved, from changes in local zoning law that would increase lot dimensions or setback restrictions from those in effect when the plat was filed.

North Dakota generally provides that existing nonconforming uses are protected as long as they are not discontinued for more than two years.\textsuperscript{352} However, the county commission may enact reasonable regulations to “regulate and control” nonconforming uses,\textsuperscript{353} so that the local government may be able to adopt an amortization ordinance. Ohio\textsuperscript{354} protects nonconforming uses unless voluntarily discontinued for more than two years, and municipalities (but not counties or townships) may by ordinance set a discontinuance period of more than six months but less than the statutory


\textsuperscript{351}N.Y. Village Law §7-709 (1998).


\textsuperscript{353}N.D. Cent. Code §11-33-14.

two years. Both municipal legislatures and county and township boards are authorized to regulate “completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon ... reasonable terms.”

Oregon\textsuperscript{355} protects nonconforming uses, except when they are interrupted or abandoned. Alterations in a nonconforming use may be approved in the same circumstances as a variance, but local governments may not prevent or place conditions on an alteration necessary to comply with safety laws or keep the property in good repair. Nonconforming structures destroyed by fire or “other casualty or natural disaster” may be rebuilt within one year of destruction. \textbf{Pennsylvania} authorizes local zoning ordinances to “identify and register” nonconformities.\textsuperscript{356}

\textbf{Rhode Island} provides for nonconforming uses, but expressly provides that this does not restrict the local power to abate nuisances, and authorizes the local government to treat nonconformities of dimension differently than nonconformities of use.\textsuperscript{357} Abandonment terminates the protection, but abandonment must be an overt act demonstrating the owner’s intent to abandon the nonconforming use; involuntary non-use as from a disaster does not constitute abandonment. To ease enforcement, non-use for one year creates a rebuttable presumption of abandonment.\textsuperscript{358} Local governments are authorized to approve alteration of a nonconforming use and to impose conditions on that approval.\textsuperscript{359}

\textbf{South Carolina}\textsuperscript{360} provides a general protection of nonconforming uses and structures and a general authorization for the local government to enact ordinances for the “continuance, restoration, reconstruction, extension, or substitution of nonconformities.” \textbf{Tennessee}\textsuperscript{361} has a very broad amortization protection: a nonconforming use may be expanded, and the local government shall not deny a permit to such expansion, so long as “there is a reasonable amount of space for such expansion on the property” (meaning the existing property, not including any additional acquisition of land) and the expansion does not change the zoning classification of the property under the zoning ordinance applicable to the property (as opposed to the present ordinance).

\begin{footnotesize}
\footnote{\textsuperscript{355} Or. Rev. Stat. §215.130 (1998).}
\footnote{\textsuperscript{357} R.I. Gen. Laws §45-24-39(A), (B) (1998).}
\footnote{\textsuperscript{358} R.I. Gen. Laws §45-24-39(C).}
\footnote{\textsuperscript{359} R.I. Gen. Laws §45-24-40.}
\footnote{\textsuperscript{360} S.C. Code Ann. §5-23-20 (1999).}
\footnote{\textsuperscript{361} Tenn. Code Ann. §13-7-208 (b) - (e) (1999).}
\end{footnotesize}
Texas protects only “property...used in a public service business” under its nonconformity statute.\textsuperscript{362} Vermont\textsuperscript{363} does not expressly protect nonconforming uses, but authorizes local ordinances controlling changes in nonconforming uses, extension or enlargement of uses, resumption of discontinued uses, or enlargement of a structure containing a nonconforming use. Virginia\textsuperscript{364} treats nonconforming uses as an extension of vesting, and protects them unless they are altered, expanded, or discontinued for more than two years.

In West Virginia,\textsuperscript{365} the nonconforming use protection has the usual limitations that the use cannot be altered or abandoned. However, agricultural uses are expressly protected even if they are abandoned, and alteration or replacement of agricultural, industrial, or manufacturing uses does not terminate the protection. Wyoming\textsuperscript{366} protects nonconforming uses except when abandoned, and authorizes local ordinances to regulate or prohibit expansion or alteration of a nonconformity. Wisconsin’s provision on nonconforming uses\textsuperscript{367} does not protect the expansion of uses, nor uses discontinued for a 12 month period, and alterations on a nonconforming structure cannot cumulatively exceed 50 percent of the property’s assessed value or the property must be permanently converted to a conforming use.

REGULATION OF NONCONFORMING USES

There is considerable case law on nonconforming uses from the state courts.\textsuperscript{368} Some states approach nonconforming uses differently than other states, and some things that are upheld in one state may be rejected by the courts in another state. The following summarizes the law of nonconforming uses from the various state courts.

When a use is added to or substituted for the existing nonconforming use, there is a split on whether the state courts consider the use still subject to protection. Clearly, a use unrelated to the

\begin{footnotesize}
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  \item \textsuperscript{362} Tex. Loc. Gov’t Code §211.013 (1999).
  \item \textsuperscript{365} W.Va. Code §8-24-50 (1999).
  \item \textsuperscript{367} Wisc. Stat. §62.23(7)(h) (1999).
  \item \textsuperscript{368} The current status of case law on nonconforming uses can be determined in various annotations in the American Law Reports (ALR), including: “Validity of Provisions for Amortization of Nonconforming Uses,” 8 ALR5th 391; “Alteration, Extension, Reconstruction, or Repair of Nonconforming Structure or Structure Devoted to Nonconforming Use as Violation of Zoning Ordinance,” 63 ALR4th 275; “Change in Volume, Intensity, or Means of Performing Nonconforming Use as Violation of Zoning Ordinance,” 61 ALR4th 806; “Addition of Another Activity to Existing Nonconforming Use as Violation of Zoning Ordinance,” 61 ALR4th 724; “Change in Area or Location of Nonconforming Use as Violation of Zoning Ordinance,” 56 ALR4th 769; and “Construction of New Building or Structure on Premises Devoted to Nonconforming Use as Violation of Zoning Ordinance,” 10 ALR4th 1122.
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protected use is not itself protected. (If it were otherwise, the land development regulations would be rendered ineffective because any nonconforming use could be the legal basis to commence any otherwise-illegal use.) However, while some courts take a strict position that any new or additional use is not protected,\textsuperscript{369} others extend protection to related uses, such as ones essential or integral to the existing use,\textsuperscript{370} uses with the same nature or purpose as the existing nonconforming use,\textsuperscript{371} or uses with the same quality or character.\textsuperscript{372} The expansion of a nonconforming structure is not covered by the nonconforming use protection and is subject to present land development regulations.\textsuperscript{373} Abandonment as a basis for ending protection has been upheld, including ordinances that presumed intent to abandon if the property was unused for a particular period,\textsuperscript{374} but some states have held that “abandonment” compelled by circumstances outside the owner’s control does not terminate protection.\textsuperscript{375} On the other hand, statutes and ordinances prescribing that nonconforming use protection terminates if more than a certain percentage of a structure is destroyed have survived judicial review.\textsuperscript{376}

\textbf{AMORTIZATION}

Amortization is an important but not always successful technique for the removal of nonconforming uses. The removal of nonconforming buildings is usually delayed for substantial periods of time because amortization periods for such buildings are quite long. Enforcement of the


termination required at the end of the amortization period may be difficult. Amortization has had its greatest success in the removal of nonconforming signs. Amortization may be essential in a local sign program when a local government adopts an improved sign ordinance because landowners who erect new signs will be reluctant to comply with the new ordinance if more prominent nonconforming larger signs are allowed to remain.

The amortization of billboards by local governments is affected by the federal Highway Beautification Act, which requires states to regulate billboards along federally-aided highways. A provision in the act effectively prohibits the use of amortization by local governments to remove nonconforming signs along these highways, and many states have adopted statutes that incorporate the federal prohibition. These statutes may also prohibit any amortization of signs or billboards by municipalities. Although the federal law does not make a local ordinance that amortizes billboards invalid, a state can lose federal highway assistance if a local government violates the federal prohibition on amortization.

Most amortization provisions in zoning ordinances fall into two categories. In the first category, an ordinance adopts a fixed time period for the amortization of particular nonconforming uses, such as billboards. At the end of the time period, all nonconforming uses in existence at the time the amortization ordinance was adopted must terminate.

The second type of amortization provision applies amortization on a case-by-case basis. The ordinance contains criteria that the legislative body or another official applies on a case-by-case basis to set an amortization period for nonconforming uses. If a nonconforming user does not agree with the decision on the amortization time period, it can challenge the decision in court.

STATUTES PROVIDING FOR AMORTIZATION.

Only eight states expressly authorize amortization of nonconforming uses. Although the statutory authority to zone may not confer the power to amortize nonconforming uses without express authority, some courts hold that a statutory general welfare provision, or constitutional home rule authority, may confer the power to amortize.

Colorado’s nonconforming use statute authorizes both the protection of nonconforming uses “if no structural alteration of such building is proposed or made” and their amortization “either by specifying the period in which nonconforming uses shall be required to cease or by providing a formula whereby the compulsory termination of a nonconforming use may be so fixed as to allow

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377 U.S.C. §131(g).


379 Service Oil Co. v. Rhodes, 500 P.2d 807 (Colo 1972) (home rule); Naegel Outdoor Adv. v. Village of Minnetonka, 162 N.W.2d 206 (Minn. 1968) (general welfare clause).

for the recovery or amortization of the investment in the nonconformance.” Hawaii\(^{381}\) provides for the protection of nonconforming uses and authorizes the gradual elimination of nonconformities, including amortization “over a reasonable period of time,” but an amortization ordinance cannot apply to agricultural uses or to single family or two-family residential uses. Illinois\(^{382}\) protects existing lawful uses and structures which have not “been destroyed or damaged in major part,” but authorizes “provisions ... for the gradual elimination of uses, buildings, and structures which are incompatible with the character of the districts in which they are made or located.”

Minnesota protects nonconformities in general, with exceptions for uses discontinued for over a year or structures that are destroyed to the extent of more than half their market value.\(^{383}\) Until 1999, it used to authorize local governments to adopt, by ordinance, requirements that “provide for the gradual elimination of nonconformities ... including requiring nonconformities to conform with the official controls of the county or terminate within a reasonable time as specified in the official controls.” In April of 1999, a statute\(^{384}\) was passed that prohibited local governments to “enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization.” There is an express exception, continuing local authority to adopt amortization for “adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance.”

Missouri\(^{385}\) has a general nonconforming use provision, which prohibits applying the zoning power to the elimination of lawfully existing uses, but then permits local governments to adopt “reasonable regulations ... for the gradual elimination of nonconforming uses from districts zoned for residential use.” Oklahoma\(^{386}\) also provides general protection to nonconforming uses and then authorizes the local government to terminate nonconforming uses by designating conditions under which nonconforming uses must terminate, “specifying the period ... within which such use shall be required to cease, ... or by providing a formula ... to allow a reasonable period for the amortization of the investment in the nonconformance.” No such ordinance can be adopted without a public hearing after due notice, nor can such an ordinance terminate a nonconforming use of extracting oil or gas or terminate a sign which has not been altered or abandoned.

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\(^{384}\)1999 Minn. Sess. Laws ch. 96, to be codified at Minn Stat. § 394.21(1a).


South Dakota provides for the protection of nonconforming uses, unless discontinued for more than a year.387 The local legislature may enact ordinances “to regulate or control, or reduce the number or extent of or bring about the gradual elimination of nonconforming uses,” and if a use is discontinued for more than one year, the local government may impose an amortization schedule upon the property.388 In Utah,389 nonconforming uses are protected, and may be expanded in the same structure so long as the structure itself is not expanded or structurally altered. The local government may provide by ordinance for the termination of nonconforming uses “by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of investment in the nonconforming use.”

Colorado and Delaware provide expressly that if the local government obtains title to property with a nonconforming use through non-payment of taxes, then the property must become compliant with the present zoning provisions.390 Michigan391 authorizes the local government to obtain property with a nonconforming use or structure, for the purpose of eliminating the same, “by purchase, condemnation, or otherwise.” Minnesota authorizes local governments to obtain “by purchase” any property with a nonconforming use that the local legislature determines to be detrimental to the goals of the comprehensive plan.392 North Dakota statute states that if any nonconforming property is acquired by the state, all future uses and structures must be compliant with existing zoning.393

Arkansas394 has a rather unusual provision regarding setbacks: if there are any structures located outside the setbacks at the time of the adoption of the setback ordinance, the owner has only six months to remedy the violation, after which the structure constitutes a nuisance and incurs a fine of between $5 and $15 per day. This is akin to amortization, but, as can be seen, involves a relatively very short period in which the use is protected.

Case Law on Amortization

388S.D. Codified Laws §11-2-27.
391Mich. Comp. Laws §125.583a(3).
392Minn. Stat. §394.36(3).
A number of states have upheld the constitutionality of amortization provisions. Other states have found amortization to be per se unconstitutional, or unconstitutional unless used to abate nuisances. Some state courts have not allowed local governments to enact amortization ordinances without express authorization by state statute. Other courts have allowed local amortization provisions without express provision in the state zoning enabling act, asserting that amortization is authorized under the general zoning power. Where amortization is authorized, the key issue is how long an amortization period a structure or land use will be allowed. As stated above, the period must be long enough that the owner has an opportunity to generate a reasonable return on his or her investment in the structure or land use, or the amortization may constitute a taking. Of course, some uses and structures require a longer period of amortization than others due to the amount of the investment and the complexity or permanence of the structure or land use. A large factory building requires a longer amortization period than an automobile junkyard, for example, because more money has to be invested in the former, and more time is required to earn a reasonable return on that investment.

Courts vary in the factors and criteria they consider appropriate as the basis for amortization, and there is no consensus on the factors that are appropriate in determining the length of the amortization period. The New York Court of Appeals (highest court) adopted a balancing test for amortization in Modjeska Sign Studios v. Berle, that other courts have followed. The court held that the critical factors are the length of the amortization period in relationship to the investment in the

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399 Service Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), cert den’d 280 U.S. 556.


nonconforming use, and whether the public gain from amortization outweighs the loss suffered by the owner of the nonconforming use. The court held that the following factors are determinative in deciding whether a loss is substantial: the owner’s initial capital investment, the extent to which that investment has been realized, the life expectancy of the investment, the existence or nonexistence of lease obligations, and whether there is a contingency clause permitting the termination of the lease.

The Eighth Circuit Court of Appeals has upheld a five-year amortization period for billboards and summed up the test for constitutionality of amortization this way:

Assessing the economic injury to a billboard owner and the extent to which the regulation has interfered with his investment-backed expectations involves weighing such factors as whether the land has any other economic use, the depreciation and life expectancy of the billboards, the income from the billboards during the amortization or grace period, the salvage value of the billboards and whether any amortization period is reasonable.\(^{402}\)

**PROVISIONS OF THE MODEL STATUTE**

Section 8-502 below consists of two alternative approaches to nonconformities (the term encompasses nonconforming land uses, buildings and structures including signs, and lots or parcels). The provisions common to both alternatives authorize local governments to facilitate the regulation of nonconformities by inventorying, registering, and issuing certificates for nonconformities. Amortization is authorized, under which a nonconformity must cease after a period of time. A local comprehensive plan with specific policies regarding the desirability of amortization must first be in place, and the determination of the amortization period must be made in a hearing if the zoning ordinance does not prescribe a specific amortization period.

The subsequent paragraphs then present two alternatives for nonconformity regulation other than amortization. It is customary in zoning ordinances to regulate the discontinuance and destruction of nonconformities their change and expansion, and their maintenance. Courts have approved these regulations, and this legislation is based on rules the courts have adopted. The first alternative is open-ended. It authorizes local regulations for nonconformities. It does not specify what these regulations should contain, though it does authorize ordinances that do not require an intent to abandon as the basis for requiring the discontinuance of a nonconformity. The second alternative contains detailed statutory requirements for the regulation of nonconformities. One exception is regulation of the change and expansion of nonconformities, because it is difficult to specify in a statute the criteria that should apply when nonconformities change and expand. Case law in individual states will govern this question, and it may be possible in some states to develop ordinance criteria that will govern the change and expansion of nonconformities.

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8-502 Regulation of Nonconformities; Amortization (Two Alternatives)

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\(^{402}\) *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996).
(1) **Inventory.** A local government [shall or may] prepare an inventory that identifies in detail the lots or parcels, structures, signs, and land uses that constitute nonconformities. The local government shall file the inventory with the [local planning agency or code enforcement agency] where it shall be available at reasonable times for public inspection.

The preparation of a nonconformity inventory is not mandatory, but it is highly recommended. The inventory provides a basis for determining what nonconformities exist in a community, and for applying provisions that regulate nonconformities, such as an amortization provision. The inventory also provides a basis for issuing certificates of nonconformity, as authorized in paragraph (3) below.

(2) **Registration.** A local government's zoning ordinance shall authorize the registration with the [local planning agency or code enforcement agency] of nonconformities [included in the inventory of nonconformities]. The [local planning agency or code enforcement agency] shall maintain a register, which shall be available at reasonable times for public inspection, in which all registered nonconformities are listed.

The purpose of the register is to provide a central place where all existing nonconformities are listed. The register provides notice to the public of nonconformities that exist in the community, and can also assist enforcement officials in carrying out the provisions of the nonconformity ordinance. Where a nonconformity inventory exists, registration is available only for nonconformities contained in the inventory, and registration will reference the inventory to provide detail about the extent and character of nonconformities. As an alternative, a local government could include the detailed description of a nonconformity in the inventory as part of the registration.

(3) **Certificates of nonconformity.** A local government [shall or may] authorize the issuance of certificates of nonconformity.

A program for certificates of nonconformity can be a substitute for or in addition to the register authorized in paragraph (2).

(a) A local government shall issue a certificate of nonconformity on application by the owner of a nonconformity if the nonconformity is included in an inventory of nonconformities or if the owner can document in detail the extent of nonconforming land uses, structures, signs, and/or lots or parcels at the time the nonconforming land use was established.

The inventory of nonconformities will contain the detailed information that must be contained in a certificate. If there is no inventory, an owner of a nonconformity can obtain a certificate if he or she can establish the extent and nature of the nonconformity at the time it was established. The key issue here is the status of a nonconformity at the time an ordinance was adopted or
amended. A nonconformity can be established through photographs, maps and drawings, and written statements describing the nonconforming use at the time it became nonconforming.

(b) A certificate of nonconformity shall describe the nonconforming land uses, structures, signs, and/or lots or parcels in sufficient detail so that a reasonable person can determine how the nonconformity is not in compliance with present or previous land development regulations. [A map with drawings, which the location, height and size of structures and signs, and the area of the nonconformity shall be attached to the certificate.]

(c) A local government may rely on the description [and map] of a nonconformity in a certificate of nonconformity:

1. in determining whether a nonconformity has been discontinued, destroyed, changed or expanded; and

2. when it provides for the amortization of a nonconformity.

♦ The issuance of certificates of nonconformity provides a basis for regulating and amortizing nonconformities in the community, and provides owners of nonconformities with an official certification that the nonconformity exists and of its nature and extent. A requirement for a map and drawings of a nonconformity is optional, but can be very helpful when applying provisions that regulate or amortize a nonconformity.

(4) **Amortization.** A local government’s zoning ordinance may:

(a) state a period of time after which nonconforming land uses, structures, and/or signs, or designated classes of nonconforming land uses, structures, and/or signs, must terminate; or

(b) include criteria that the [local planning agency or code enforcement agency] may apply to provide a period of time after which a nonconforming land use, structure, and/or sign must terminate.

♦ This paragraph authorizes the two most common methods of amortization. If the local government’s zoning ordinance provides a period of time for amortization under subparagraph (4)(a), the Section authorizes different periods of times for different classes of nonconforming uses, at the option of the local government. Under subparagraph (4)(b), the designated officer or body can establish amortization periods on a case-by-case basis by applying the criteria for amortization contained in the zoning ordinance.

Amortization can raise a constitutional problem if the amortization period is so short that it amounts to a taking of property. Courts differ in the criteria they apply to determine whether
a taking has occurred, so the statute does not include amortization criteria under paragraph 4(b). A local government must make this decision when it adopts an amortization provision for its zoning ordinance, based on the law that applies in its state.

Note that nonconforming lots or parcels are excluded from the coverage of this provision. This is because land is a permanent, non-depreciable asset and inherently cannot be “used up” or amortized.

(5) **Comprehensive plan requirement.** A local government may not adopt a provision for amortization unless it first adopts a local comprehensive plan pursuant to this Act, and the amortization of nonconforming land uses, structures, and/or signs implements an express policy contained in the plan. An amortization provision adopted in the absence of a local comprehensive plan and amortization policy is void.

♦ A local government must have a policy for the amortization of nonconforming uses and/or structures in its comprehensive plan as the basis for an amortization program. An amortization policy in the comprehensive plan will help support the constitutionality of amortization, because most courts consider the benefits of amortization to the community when they consider its constitutionality. The comprehensive plan will be able to identify these benefits.

In many instances, especially when an amortization provision is applied to buildings and signs, it is also important to show that a nonconformity is not compatible with other uses in the neighborhood. Lack of compatibility also helps support a decision to amortize a nonconformity. Comprehensive plans should include statements on neighborhood character and compatibility in their amortization policies.

(6) **Decision on amortization period.** If a local government's zoning ordinance authorizes the [local planning agency or code enforcement agency] to provide an amortization period under paragraph (4)(b), it shall require a record hearing pursuant to Section [10-207], including provisions for appealing the decision of a record hearing.

♦ This paragraph specifies the procedures that apply when an officer or body provides an amortization period for a nonconformity by applying criteria contained in the zoning ordinance. The procedures in Chapter 10 apply, and the decision is appealable to the appeals board and from there to a court.

**Alternative 1 – Local Specification of Regulations**

(7) **Regulation of Nonconformities.** A local government’s zoning ordinance shall:

(a) provide that a nonconformity has been discontinued if it has not been occupied, used, or engaged in for a period of time stated in the zoning ordinance, unless the
owner of the nonconformity can show good cause why it should be continued. An intent to abandon is not necessary to show discontinuance.

♦ Paragraph (7)(a) expedites the removal of nonconforming land uses, structures, and signs by not requiring an intent to abandoned to show discontinuance. It is common to provide that a nonconformity is not discontinued if a failure to use or occupy was caused by circumstances beyond the control of the owner of the nonconformity. The “good cause” exception to discontinuance is intended to cover circumstances of this kind. The term “nonconformity” is defined in Section 8-101, and includes “nonconforming lot or parcel,” “nonconforming land use,” “nonconforming structure,” and “nonconforming sign” which are also defined in that Section.

(b) specify the extent to which a nonconformity may be maintained and repaired;

c) specify the extent to which a nonconformity may change or expand;

d) specify the circumstances in which a nonconformity that is destroyed may be rebuilt; and

e) specify other circumstances as are appropriate in which a nonconformity must comply with the land development regulations.

♦ Paragraphs (7)(b) to (7)(e) authorize the most commonly used methods to terminate nonconformities short of amortization. A local government may wish to implement subparagraph (7)(d), for example, by authorizing the rebuilding of a nonconforming building if less than 50 percent of its value has been destroyed. An example of an ordinance authorized by subparagraph (7)(e) is an ordinance requiring a nonconforming sign to comply with the zoning ordinance if it is located on a vacant parcel, and the parcel is developed.

(8) Regulation of nonconformities during amortization. The provisions of a zoning ordinance adopted under the authority of Section [8-502(7)] apply to nonconformities during an amortization period.

Alternative 2 – Direct Statutory Specification of Regulations

(7) Discontinuance. A nonconformity shall no longer be a nonconformity it is discontinued. A nonconformity is discontinued if it has not been occupied, used, or engaged in for more than [one] year, unless the owner of the nonconformity can show good cause why it should be continued. An intent to abandon is not necessary to show discontinuance.

(8) Destruction. A nonconforming land use, structure, or sign shall no longer be a nonconformity if it is destroyed as provided in this paragraph.
(a) A structure that is a building, and the land uses therein, are destroyed if the building as a whole, or more than half of its total floor area, becomes uninhabitable or unusable because of a sudden occurrence or a gradual process of deterioration.

(b) A structure other than a building, including a sign, and any land uses therein or thereon, are destroyed if the structure or sign as a whole, or more than half of its total surface area, becomes uninhabitable or unusable because of a sudden occurrence or a gradual process of deterioration.

Deterioration can result in the “destruction” of a structure. An apartment building that is uninhabitable would be considered “destroyed” even if the building entered that state by gradual decay and not a sudden catastrophe (the usual implication of the term “destroyed”). This paragraph thus means that the owner of a nonconformity cannot continue its nonconforming status if he or she allows a building to deteriorate so that more than half of its floor area is unusable.

(c) If less than half the floor area of a nonconforming structure that is a building, or less than half the surface area of a nonconforming structure that is not a building, including a nonconforming sign, becomes uninhabitable or unusable because of a sudden occurrence or a gradual process of deterioration, the owner of the nonconforming structure or sign may rebuild it on the same lot or parcel as it existed before it became unusable.

1. If the local government issued a certificate for the nonconformity, the structure shall be rebuilt according to the description of the nonconformity in the certificate.

2. Any nonconforming structure or sign that is rebuilt under this paragraph must comply with the local government's building, property management, [fire, floodplain] and any other applicable codes.

This paragraph allows rebuilding only if half or less of a structure or sign is destroyed. If more than that is destroyed, the policy against the continuation of nonconformities means that rebuilding should not occur. The nonconforming structure or sign must be rebuilt as it existed, and the rebuilding must comply with the local building code and other applicable codes.

(9) Repairs and maintenance. The owner of a nonconformity may carry out maintenance or repairs that are required by the [property management code, housing code, or similar ordinance] or that are reasonably necessary or commonly engaged in to maintain the property in a reasonably habitable or useable condition.

(10) Change and expansion. A local government's zoning ordinance may specify the extent to which a nonconformity may change or expand.
(11) **Regulation of nonconformities during amortization.** The provisions of Section [8-502(7) through 8-502(9)], and the provisions of a zoning ordinance adopted under the authority of Section [8-502(10)] shall apply to nonconformities during an amortization period.

**Additional Provisions for Both Alternatives:**

(X) **Conformities amidst nonconformities.** A conforming land use located in a conforming structure and/or upon a nonconforming lot or parcel may be replaced by another conforming land use despite the nonconformity, and a conforming structure or sign upon a nonconforming lot or parcel and/or containing a nonconforming land use may be materially changed or altered in compliance with existing land development regulations despite the nonconformity.

(X) **Eminent domain.** A local government may purchase, or condemn pursuant to eminent domain, any lot or parcel that has a nonconformity upon it, for the purpose of eliminating the nonconformity.

(X) **Abatement of nuisances.** Nothing in this Section shall be deemed to abolish or restrict the power and duty of local governments to abate public nuisances.

♦ The latter two provisions confer the authority to purchase or condemn nonconformities, and preserve the authority to abate public nuisances. The numbering of these paragraphs will vary depending on which alternative is adopted for the regulation and amortization of nonconforming uses.

**EXACTIONS, IMPACT FEES, AND SEQUENCING OF DEVELOPMENT**

**Commentary: Development Improvements and Exactions**

An exaction is the requirement that a developer provide certain improvements in a new development or, in some cases, pay a fee to cover the expense of the local government providing those improvements off-site. Exactions may require the improvements be dedicated to the local government--transferring title to and responsibility for the improvements from the developer to the local government--or may allow the developer or future owners of the development to retain the improvements. These improvements typically include streets and sidewalks, water and sewer lines, utility easements or alleys, and in some cases parks and schools.

The justification for requiring a developer to provide these improvements is two-fold. First, the improvements are reasonably necessary for the public health, safety, or welfare. Clearly, streets are needed for public movement, water and sewer service promote health, street lights help to prevent accidents and suppress crime, and the provision and placement of utilities is a matter of health and safety. Second, the development itself is creating the demand for the improvements, and the public as a whole should not bear the cost of constructing improvements for new development.
Parks and schools should be treated differently than other exactions for two reasons. First, while most exactions inherently concern improvements on the premises of the development (streets, water and sewer mains, alleys or utility easements), parks and school sites may be placed within the subdivision or may be located off-site so that a larger facility may be used by multiple subdivisions or neighborhoods. Therefore, if a park or school site is to be created off-site and exacted from multiple developments, there must be a mechanism for apportioning the costs and collecting the revenue to cover these costs. This is best accomplished through impact fees, as authorized in Section 8-602. Second, while most other improvements are to be owned and operated by the local government itself, parks and schools are often operated by special districts. Therefore, there must be a procedure for coordinating the needs of the school or park district with the exaction and impact fee powers of the local government.

STATUTES ON IMPROVEMENTS AND EXACTIONS

The Standard City Planning Enabling Act included provisions on exactions. Specifically, Section 14 authorized subdivision regulations to include provisions:

for the proper arrangement of streets, ... for adequate and convenient open spaces... [and]
provisions as to the extent to which streets and other ways shall be graded and improved and
to which water and sewer and other utility mains, piping, or other facilities shall be installed
as a condition precedent to the approval of the plat.

Section 14 also provided that, “in lieu of the completion of such improvements and utilities prior to the final approval of the plat, the [planning] commission may accept a bond with surety to secure to the municipality the actual construction and installation of such improvements or utilities according to specifications fixed by or in accordance with the regulations of the commission.”

Many states have enacted similar legislation as part of the subdivision enabling statute. The California statute is very detailed. The law authorizes local governments to require developers to provide and dedicate “streets, alleys, ... drainage, public utility easements and other public easements,” bicycle paths and transit facilities from subdivisions with 200 or more parcels, and sunlight easements. However, dedication requirements must be “reasonably necessary to meet public needs arising as a result of the subdivision,” or they may be declared “excessive,” and therefore invalid, by a court. The local government must then either revoke the dedication requirement or pay just compensation for the exaction. Special provisions govern dedications for parks and recreation and for school sites. In particular, a general plan must be in place before a

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404 Cal. Gov’t Code §§66475 - 66475.3.

405 Cal. Gov’t Code §66475.4(b) - (d).

406 Cal. Gov’t Code §§66477, 66478.
parks and recreation dedication ordinance may be adopted, and the amount of a parks and recreation dedication must be linked to the number of persons residing in a subdivision (not to exceed five acres per 1000 subdivision residents in any case).\footnote{407}{Cal. Gov’t Code §66477.}

**Colorado** requires subdivision regulations to provide for sites and land areas for schools and parks “reasonably necessary” to serve a subdivision, either by dedications of land or the payment of fees in lieu, and to include technical standards for storm drainage, sanitary sewers, and water supply.\footnote{408}{Colo. Rev. Stat. §30-28-133(4) (1998).} This is in connection with the requirement that a subdivision plat cannot be approved until the developer produces evidence to establish that the subdivision has an adequate water supply, sewage disposal, and precautions against any hazardous soil or topographical conditions.\footnote{409}{Colo. Rev. Stat. §30-28-133(6).}

Subdivision regulations may also require that subdivisions pay a fee on a per-acre basis to provide “equitable contribution to the total costs of the drainage facilities in the drainage basin in which the subdivision is located.”\footnote{410}{Mont. Code Ann. §76-3-621 (1999).}

**Montana** has a park dedication statute\footnote{411}{N.J. Stat. Ann. §40:55D-38(b) (1997).} that requires residential subdivisions, except for minor subdivisions and those with lots larger than five acres, to provide park land or a cash donation equivalent to the fair market value of the park land. The amount of the land dedication or cash payment is linked to the acreage of the subdivision parcels. Subdivisions with parcels smaller than a half-acre must contribute 11 percent of their area, those with lots between a half-acre and an acre must dedicate 7.5 percent, those with lots between one and three acres must dedicate 5 percent, and those with more than three acres but less than five must contribute 2.5 percent. Alternatively, if there is a density requirement in the local government’s master plan, the park dedication requirements are to be based upon the plan, but cannot exceed 0.03 acres per dwelling unit.

**New Jersey** requires that a subdivision or site plan ordinance must contain requirements for streets, “adequate water supply, drainage, shade trees, sewerage facilities, and other utilities necessary for essential services to residents and occupants,” and “open space to be set aside for use and benefit of the residents of planned development.”\footnote{412}{N.J. Stat. Ann. §40:55D-38(b) (1997).}

The ordinance must also include:

- standards for grading, improvement and construction of streets or drives and for any required walkways, curbs, gutters, streetlights, shade trees, fire hydrants and water, and drainage and sewerage facilities, and other improvements as shall be found necessary, and provisions ensuring that such facilities shall be completed either prior to or subsequent to final approval.
of the subdivision or site plan by allowing the posting of performance bonds by the developer.413

**New York** mandates that local governments (specifically, towns) require, as a condition of subdivision plat approval:

> streets and highways ... of sufficient width and suitable grade and ... suitably located, ... all streets or other public places shown on such plats be suitably graded and paved; street signs, sidewalks, street lighting standards, curbs, gutters, street trees, water mains, fire alarm signal devices... sanitary sewers, and storm drains, be installed all in accordance with standards, specifications, and procedures... or alternately that a performance bond or other security be furnished to the town.414

The dedication of parkland in residential subdivisions, or the payment of money sufficient to purchase parkland outside the subdivision, may also be required by local governments if the planning board finds that the population growth that the subdivision contributes, combined with the present and future needs for parks, establishes “a proper case” for such an exaction.415 The improvements required by the local government must be completed before the plat may be approved, or the local government may require a bond or other surety to cover the completion of the improvements.416

**Washington**’s subdivision statute provides that a subdivision or dedication shall not be approved unless the local government finds that “appropriate provisions are made for ... open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, [and] schools and school grounds.”417

**MODEL STATUTE**

Section 8-601 below authorizes local governments to require the developers of subdivisions, developments subject to site plan review, and planned unit developments to provide certain necessary and useful amenities on the premises of the development. These amenities are called “improvements” in the Section, and include streets, sidewalks, pedestrian and bicycle trails, street signs, street lighting, water and sewer lines, utility easements, landscaping for drainage and erosion control, and parks and open space. If the state wishes to, it may also include sites for public elementary and secondary schools, but not the construction of schools themselves. The local

415N.Y. Town Law §277(4).
416N.Y. Town Law §277(9).
government may require the owners of subdivisions to transfer these improvements, once constructed, to the ownership and operation of the local government, or the park or school district in the case of open space, parks, playgrounds, and school sites. This transfer is called a “dedication.” Subdivisions are required to make dedications because the development will eventually be owned not by a single developer who can maintain and operate the improvements but by the owners of the various lots or parcels. Other forms of development may also be required to make dedications, even though the development is owned by a single entity, if public ownership of the improvement is desirable or necessary (e.g.: a turn lane for a shopping center).

Improvements and dedications may be required only through an improvements and exactions ordinance, which is considered an integral portion of the subdivision, site plan review, and planned unit development ordinances and which, as a development ordinance, must be consistent with the local comprehensive plan. The existence of a comprehensive plan is required only if the local government includes open space, parks, playgrounds, or school sites as required improvements and dedications. The improvements are to be governed by development standards, and both the required improvements and the development standards must be grouped in classes by, and appropriate to, land use and density or intensity of various developments. For example, an ordinance could require that nonresidential developments and residential developments of under 50 units need not provide parks or playgrounds, while larger residential developments must provide one acre of park land for every 50 units. This approach is in contrast to the lot acreage requirements of the Montana park dedication statute. Though linking the amount of park land dedicated to the size of lots in a subdivision was clearly intended to scale the dedication requirement to the density of development, the acreage of lots or parcels is only a rough measure of the density of development. Therefore, too little or too much land may be dedicated.

Since the improvements required in an improvements and exactions ordinance are on the site of the development, but open space, parks, playgrounds, and schools may be better located off-site and accessible to other developments, the Section authorizes, as an option, the assessment and collection of impact fees to fund these improvements in lieu of requiring their provision on-site. Also, since these improvements are often operated by a separate governmental unit from the local government—the park or school district--the Section includes provisions for coordinating the improvements and exactions ordinance or impact fee ordinance with the park or school board through an implementation agreement.

The Section requires that the developer produce construction drawings of the improvements and that the drawings must be consistent with the development regulations. An inspection by the local government engineer is required, and the written report and recommendations from that inspection must be given due regard. To ensure the completion of the improvements in compliance with the approved drawings, the improvements and exactions ordinance must require that either the development permit will not be issued until the improvements are so completed or the development permit will be issued subject to an improvement guarantee. Improvement guarantees may last up to two years, and may take the form of a bond. They cannot be released unless and until the improvements are completed in compliance with the approved drawings, the engineer has made the inspection and written report with recommendations, the report has been reviewed, and the
improvements have been approved. Local governments may also require maintenance guarantees, which are bonds or other sureties to ensure that the improvements will last for at least a certain period, up to two years.

The local government can require dedications of improvements, but it need not accept them until the improvements are completed according to the approved drawings and any improvement or maintenance guarantees are released. A dedication consists of an instrument of dedication executed by the developer, but the instrument is not valid until the local government accepts responsibility for the improvements and marks the instrument of dedication accordingly. Typically, a developer will not want to be responsible for operating and maintaining the improvements, and will execute the instrument willingly. However, if a developer for some reason refuses or neglects to provide the local government an instrument of dedication, the relevant development permit (plat approval, site plan approval, or planned unit development approval) for the development may be denied or suspended until the developer delivers a proper instrument of dedication.

8-601 Development Improvements and Exactions

(1) The legislative body of a local government that has adopted a subdivision, site plan review, or planned unit development ordinance shall adopt and amend an improvements and exactions ordinance in the manner for land development regulations pursuant to Section [8-103, or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances].

(2) The purposes of an improvements and exactions ordinance, in addition to the purposes of land development regulations as stated in Section [8-102(2)], are to:

(a) secure the construction of improvements directly serving the development;

(b) ensure that such improvements will be reasonably proportional to the needs created by the development and will be built to last;

(c) ensure that improvements that are constructed and dedicated to the public will be easy and economical for the local government to maintain;

(d) provide coordination among private developers and public and private entities in the location, character, and safe design of improvements, the location and character of easements, and the acquisition of public property; and

(e) authorize local government to require specific and enforceable guarantees that improvements will be built on time, according to reasonable standards, and will last for at least a certain reasonable time.

(3) An improvements and exactions ordinance:
(a) shall be considered a part of the subdivision, site plan, and planned unit development ordinances; and

(b) shall be subject to the provisions of Sections [8-301, 8-302, and 8-303], as applicable. If any provision of this Section is contrary to a provision in Sections [8-301, 8-302, or 8-303], the provision in Sections [8-301, 8-302, and 8-303] shall govern to that extent.

Therefore, the limitations in Section 8-302(5)(g) on the standards applicable to site plan review, and the provisions in Section 8-303(7), (8), and (9) regarding traditional neighborhood development and open space, supersede the more general provisions of this Section where there is a conflict.

(4) All public and nonpublic improvements required by an improvements and exactions ordinance shall be in reasonable proportion to the demand for such improvements that can be reasonably attributed to developments subject to the ordinance. Developments subject to an improvements and exactions ordinance shall be divided into classes that are defined by types and densities or intensities of land use. Different public and/or nonpublic improvements, appropriate to the types and densities or intensities of land use permissible in each class, shall be required from each class.

(5) Development standards:

(a) shall be adopted for all public and nonpublic improvements required by an improvements and exactions ordinance;

(b) shall be divided into classes that are defined by, and appropriate to, types and densities or intensities of land use.

(6) Open space, parks, playgrounds[, and public elementary and secondary school sites.]

(a) The legislative body of a local government shall adopt and amend an improvements and exactions ordinance that requires open space, parks, playgrounds[, or public elementary and secondary school sites] only after it has adopted a local comprehensive plan.

(b) A local government may, in lieu of requiring open space, parks, playgrounds[, or public elementary and secondary school sites], assess and collect a development impact fee to finance such improvements, under a development impact fee ordinance pursuant to Section [8-602].

Since improvements pursuant to this Section are inherently on-site, this provision allows local governments to deal with the situation where the open space, park, playground, or school is best located off-site by assessing a development impact fee instead.
(c) Except for open space, parks, or playgrounds that are not intended to be owned or operated by a park district, a local government shall not enact an improvements and exactions ordinance requiring open space, parks, playgrounds[, or public elementary and secondary school sites], or a development impact fee ordinance assessing and collecting an impact fee to finance these improvements, without consulting with the relevant park district [or school district] board in formulating the ordinance and entering into an implementation agreement pursuant to Section [7-503] with the relevant park district [or school district] boards, concerning, at a minimum:

1. for an improvements and exactions ordinance: criteria and formulae for determining the appropriate improvements and development standards therefor for given land uses and/or densities or intensities of development, the collection and transfer to the local government of any information held by the park [or school] district needed to apply such criteria and formulae, and conditions and procedures for the transfer, from the local government to the park [or school] district, of title to and responsibility for these improvements; or

2. for a development impact fee ordinance: the level of service standards for the improvements that are to be financed with impact fees, the adjusted cost of such improvements, criteria and formulae for determining the appropriate impact fee, the collection and transfer to the local government of any information held by the park [or school] district needed to apply such criteria and formulae, the disbursement of funds collected under the impact fee from the local government to the park [or school] district, and the refund of funds from the park [or school] district to the local government when a refund is required by Section [8-602].

(7) A local government may require improvements or dedication only pursuant to an improvements and exactions ordinance adopted and amended pursuant to this Section. An improvements and exactions ordinance shall include the following minimum provisions:

(a) a citation to enabling authority to adopt and amend the improvements and exactions ordinance;

(b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;

(c) a statement of consistency with the local comprehensive plan that is based on findings made pursuant to Section [8-104];

(d) definitions, as appropriate, for such words or terms contained in the improvements and exactions ordinance. Where this Act defines words or terms, the improvements and exactions ordinance shall incorporate those definitions, either directly or by reference;
(e) a statement of the public and nonpublic improvements that the owners of subdivisions, developments subject to site plan review, and planned unit developments are required to construct, including:

1. any criteria by which developments of a particular land use or uses and/or density or intensity are required to have particular improvements, including any formulae used to calculate the appropriate required improvements for any particular development; and

2. in an appendix to the ordinance, the factual bases for such criteria;

(f) development standards for the required public and nonpublic improvements, including:

1. any criteria by which developments of a particular land use or uses and/or density or intensity are subject to particular development standards including any formulae used to calculate the appropriate development standards for any particular development; and

2. in an appendix to the ordinance, the factual bases for such criteria;

(g) if the required improvements include open space, parks, and playgrounds [and/or public elementary and secondary school sites], the provisions of subparagraph (6)(c) above;

(h) requirements for the submission of construction drawings, which shall be in compliance with the applicable development standards, and procedures for the review and approval or rejection thereof;

(i) provisions and procedures for the inspection and review of public and nonpublic improvements, including:

1. access to the property at reasonable times to inspect improvements;

2. a written report and recommendation of the [professional engineer] of the local government, based upon an inspection of the improvements, to determine whether such improvements have been completed according to the approved construction drawings, and;

3. a requirement that the local government review the written report and recommendations of the [professional engineer] and give it due consideration in approving or rejecting the improvements.

(j) a requirement that either:
1. the relevant development permit shall not be issued until the improvements are completed in compliance with the approved construction drawings; or

2. the relevant development permit may be issued subject to an improvement guarantee.

(k) procedures for the dedication of public improvements pursuant to paragraph (11) below;

(8) An improvements and exactions ordinance may contain:

(a) requirements that owners of developments subject to the ordinance provide improvement guarantees and/or maintenance guarantees, pursuant to paragraphs (9) and (10) below;

(b) requirements for the submission of drawings that show the construction of improvements as they have actually been built, as a condition of the release of the improvement guarantee and/or the issuance of a certificate of compliance;

(c) provisions regarding development impact fees in lieu of requiring improvements. For the purpose of such in-lieu fees, “fee eligible public facilities” are not restricted to off-site public facilities, Section [8-602(3)(c)] notwithstanding; and

(d) provisions exempting certain types or classes of development, including, but not limited to, affordable housing, development pursuant to a transit-oriented development plan, and development in a redevelopment area, from the requirement of providing particular improvements at a particular development standard.

1. No such exemption may be created unless there is a policy supporting the exemption expressly stated in the local comprehensive plan.

2. An exemption provision shall state the policy underlying the exemption and shall provide the procedure for granting exemptions to particular new developments.

(9) Improvement guarantees.

(a) Improvement guarantees shall be in an amount and with all necessary conditions to secure for the local government the actual construction and complete installation of all of required public and/or nonpublic improvements. The amount shall be based on actual cost estimates for all required improvements and these estimates shall be reviewed and approved by the [professional engineer] of the local government. The local government may fix the improvement guarantee in a reasonable amount in excess of the estimated costs to anticipate for economic or construction conditions.
(b) An improvement guarantee shall not be released until:

1. the required improvements have been completed pursuant to approved construction drawings;

2. the [professional engineer] has issued a written report and recommendations pursuant to subparagraph (7)(i)2;

3. the local government has reviewed the report and recommendations and given them due consideration; and

4. the required improvements have been approved by the local government.

(c) In the case of developments that are being approved and constructed in phases, the local government shall specify improvement guarantee requirements related to each phase.

(10) Improvement guarantees and maintenance guarantees:

(a) shall be valid for a period of no more than [2] years;

(b) shall be in the form of a financial instrument acceptable to the [solicitor] of the local government and shall enable the local government to gain timely access to secured funds or real property for cause; and

(c) may be enforced by the local government by all appropriate legal and equitable remedies, including access to the property at reasonable times to inspect improvements.

(11) The local government shall take title to public improvements, and have a duty to maintain or improve those public improvements, when, and only when, it has affirmatively and expressly accepted a dedication of the improvements.

(a) The local government shall accept a dedication only when the completed public improvements are in compliance with approved construction drawings, where applicable, and when it has released any improvement guarantee and maintenance guarantee. Any purported acceptance made in absence of these conditions is void.

(b) Approval of a subdivision, site plan, or application for planned unit development, or recordation of the plat or plan of the same, shall not constitute the acceptance by the local government of title to or responsibility for any public improvement and shown thereon, unless acceptance is expressly provided in the approval.

♦ Simply conveying streets and other public improvements to the local government via the final plat is not sufficient to activate acceptance of the dedication by the local government. Until the
local government inspects and approves the improvements as complying with the construction drawings, and has released the various guarantees, the improvements should remain the property and responsibility of the developer.

(c) The owner of a development subject to an improvements and exactions ordinance from which public improvements are required shall execute an instrument dedicating the improvements to the local government.

1. An instrument of dedication shall be signed by the owner, provide the legal description of the development property, and shall identify all public improvements being dedicated by the instrument.

2. An instrument of dedication shall not be of any force or effect, and shall not be recorded with the county [recorder of deeds], until the local government has indicated its acceptance of the dedication in writing on the instrument and placed its official seal thereon.

3. An instrument of dedication so accepted and sealed shall be recorded with the county [recorder of deeds] within 30 days of the acceptance and sealing. A copy of the subdivision plat shall be made part of the instrument of dedication.

4. If the local government is authorized to accept a dedication pursuant to subparagraph (a) above, but the owner has not provided a proper instrument of dedication, then the local government may deny the subdivision plat approval if that development permit has not been issued, or suspend it if it has been issued, Section [8-501] notwithstanding, until the owner provides a proper instrument of dedication.

Commentary: Development Impact Fees

INTRODUCTION

A development impact fee statute authorizes local governmental units to assess fees upon new development projects to cover capital expenditures by the governmental unit on the infrastructure.

The statute prescribes guidelines for what constitutes a capital expenditure on infrastructure and when a capital expenditure results from a new development project, procedures for assessing the fee and for collecting the fee either in money or in kind (provision of the facility by the developer), and other necessary parameters.

Impact fees are intended to pay for the provision of new facilities and the expansion of existing facilities, not for the maintenance of existing ones used wholly by existing development. Nor are impact fees intended to cover operating expenses. Once the development project has paid for the additional facilities it requires, the regular assessment of taxes on all development, old and new, should fund the ongoing operation of all public facilities.

An impact fee provision is not the same as a requirement in a subdivision or site plan ordinance that a developer provide certain facilities, such as streets, sidewalks and utilities, within the development project itself. Impact fees are to be expended on capital facilities that are generally not on the premises of the development project but which are necessitated by the development project. These may include roads, schools, parks and recreation facilities, and utilities. Note that the need for a new facility may be created by more than one development project, with each project paying a fee which covers its share of the facility.

**PROS AND CONS OF IMPACT FEES**

The purpose of an impact fee, as the name suggests, is to require new development to pay for the impact it makes upon the infrastructure of the local government, rather than have the cost paid by both new and existing development through taxes and user fees. Put another way, an impact fee requires the developer or owner of new development to pay a cost generated by the development but which would otherwise be paid by the taxpayers in general.

In economics, costs borne by one party though the benefit goes to another are called “externalities.” Theoretically, decisions made in a free market lead to the most efficient use of resources because costs and benefits balance when every market participant is trying to minimize costs and maximize benefits. However, the existence of externalities means that some decisions will not result in the most efficient outcome because the decisionmakers are either not bearing all the costs of their decision while receiving the benefits thereof (the developer in this instance) while others bear all of the costs of the decision out of proportion to their benefit therefrom (the local government). “Internalizing” externalities – making a decisionmaker bear the full cost of his or her decision -- should therefore result in a more efficient use of resources.

In the instance of new development absent an impact fee, the local government and its taxpayers pay part of the costs created by the new development: the additional infrastructure needed to serve the new development. Not having to bear this cost, a potential developer is more likely to decide to proceed with development than if he or she had to pay for the additional infrastructure. Development that has a net negative impact on society -- more cost than benefit -- may be built. However, when the impact fee is applied, the potential developer will take this cost into consideration in making the decision to develop. If the impact fee a developer has to pay is equal to the cost to society of the development, then it is much less likely that a development with a net
negative impact on society will result, because such a development would also be unprofitable to the developer.

This leads us to the negative aspect of impact fees. Impact fees work as a proper internalizer of externalities only if the impact fee is at least roughly equal to the public expense it is supposed to cover. If the impact fee is significantly lower than the cost to society, then it is less effective in internalizing the infrastructure cost and developments with a net negative impact will still occur. On the other hand, if the fee is substantially higher than the societal cost, then the developer may not build a development that has a net positive impact on society because it has been made unprofitable for him or her. Put in more prosaic terms, an impact fee set too high is not a tool to recover costs but an instrument for excluding development.

Impact fees may be disproportionately high with the intent of excluding all development or some classes of development. For example, the impact fee could be set so that affordable housing development is unprofitable and thus not built while luxury developments are still profitable. Or the fee may be set higher than the infrastructure capital costs because the existing officials and residents see it as a way to keep their own taxes low by passing on government expenses (in excess of the impact of new development) to the new residents and businesses who do not yet have a voice in the community. Though this is not done with the intent of discouraging development -- that would kill the goose that is laying golden eggs -- the effect is the same.

**U.S. Constitution & the U.S. Supreme Court**

A key issue in impact fees is what relationship between a development project and the exaction of fees or conditions from that project is required by the substantive due process requirement of the Fifth and Fourteenth Amendments to the U.S. Constitution. The U.S. Supreme Court addressed the issue of development exactions, though not impact fees specifically, in the case of *Dolan v. City of Tigard*. In that case, a local government placed certain conditions on the approval of the expansion plans of a store. The city required the store owner to dedicate land along a creek for a drainage area and for a bicycle-pedestrian path. The owner challenged these requirements as a taking. According to earlier cases such as *Nollan v. California Coastal Commission*, the Court must first determine whether an "essential nexus" exists between a legitimate state interest and the condition exacted by the city. The Court recognized this test and, in the instant case, found that preserving land from flooding and controlling traffic are legitimate state interests and that the proposed conditions were directly related to those interests.

The second determination the Court faced was "whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's

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421 512 U.S. at 386, quoting *Nollan*, 483 U.S. at 837.
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proposed development.\(^{422}\) The Court rejected, on one hand, “very generalized statements as to the necessary connection”\(^{423}\) which some state courts had made and, on the other, the strict “specific and uniquely attributable”\(^{424}\) test applied first in Illinois. Instead, it adopted the “reasonable relationship” rest of many state supreme courts, requiring “rough proportionality” between the state interest and the exaction. “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”\(^{425}\)

Though the U.S. Supreme Court has not applied the \textit{Dolan} test to an impact fee case,\(^ {426}\) it is the most on-point case from the Court to date and is therefore an important consideration in the drafting of any impact fee legislation. The two-pronged test that \textit{Dolan} creates – “essential nexus” between the exaction and a legitimate state purpose, and “rough proportionality” between the exaction and the impact of the development project – determines whether or not exactions are in compliance with the Federal Constitution. As such, the \textit{Dolan} test may be the minimum hurdle that must be cleared by any impact-fee authorizing statute.

\textbf{STATE COURT CASES}

While the \textit{Dolan} decision may or may not state the Federal constitutional requirements for exactions, state constitutions and statutes -- and thus state courts -- have imposed their own restrictions upon impact fees.

The most liberal standard for impact fees and other exactions is the “reasonable relationship” test. Under this standard, any condition or exaction that is “reasonably related to the protection of the public health, safety, and general welfare” is constitutional and requires no payment of compensation even though the public as a whole benefits from the exaction.\(^ {427}\) In other words, any exaction that can be reasonably justified under the police power is permissible. As one can see, this test authorizes exactions that may not satisfy the \textit{Dolan} test.

Most states apply the “rational nexus” test, which requires (1) a reasonable connection between new development and the need for additional infrastructure to serve the development, and (2) a connection between the expenditures on infrastructure financed by the impact fee and the benefit

\(^{422}\)512 U.S. at 388, quoting \textit{Nollan}, 483 U.S. at 834.

\(^{423}\)512 U.S. at 388.


\(^{425}\)512 U.S. at 391.

\(^{426}\)However, in the case of \textit{Ehrlich v. City of Culver City}, 512 U.S. 1231 (1994), the Court reversed a California state court’s decision upholding an impact fee, ordering the case to be remanded “for further consideration in light of \textit{Dolan v. City of Tigard}.” This was the extent of the Court’s opinion.

\(^{427}\)\textit{Ayres v. City of Los Angeles}, 34 Cal.2d 31, 207 P.2d 1, 5-7 (1949).
that new development receives from those expenditures.\textsuperscript{428} This test is much closer to the Constitutional standard on exactions set forth in \textit{Dolan}, though it is derived separately under state law.\textsuperscript{429} Indeed, the “rough proportionality” requirement was proclaimed by state courts before the \textit{Dolan} decision was handed down.\textsuperscript{430}

The strictest test for exactions is the “specifically and uniquely attributable” standard. The Illinois Supreme Court has stated that “the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public.”\textsuperscript{431} The Rhode Island Supreme Court adopted, in 1970, the position that the Constitution of Rhode Island requires that the need for an exaction “result... from the specific and unique activity attributable to the developer.”\textsuperscript{432} Another case before the Rhode Island Supreme Court, eleven years later, stated that “[a] developer may be required to provide the basic services essential to modern living, such as the construction of water, sewer, and other utilities, mains, pipes, or connections.”\textsuperscript{433} In a 1995 case,\textsuperscript{434} the Illinois Supreme Court clarified the “specifically and uniquely attributable” test. The court held that “the new development must receive a \textit{direct} and \textit{material} benefit from the improvement financed by the impact fee ... [and] there is no requirement that the improvements financed by impact fees must be used exclusively or overwhelmingly by the development paying the fee.”\textsuperscript{435}

While the “specifically and uniquely attributable” test is strict, it is, when clarified as the Illinois Supreme Court has done, not as strict as the name would first suggest. For example, the term “uniquely attributable” would suggest that a new water treatment plant which serves a new subdivision in question as well as three others could not be financed by an impact fee on that subdivision, because the need for the plant is not uniquely attributable to the subdivision. When it is specified that the subdivision must receive a “direct and material benefit” from the capital

\textsuperscript{428}Home Builders Assoc. v. City of Beavercreek, 89 Ohio St.3d 121 (Sup. Ct. 2000); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965); Contractors & Builders Assoc. of Pinellas Cty. v. City of Dunedin, 329 So.2d 314 (Fla. 1976).


\textsuperscript{435}165 Ill.2d 25, 34-35, citing Appellate Court decision, 251 Ill.App.3d 494, 502-503 (emphasis in original).
improvement, then it becomes clear that the subdivision in the same scenario could be assessed an impact fee for a portion of the cost of the treatment plant equal to its share of the use of the plant.

**STATE IMPACT FEE ENABLING ACTS**

Several states have enacted statutes to authorize and to regulate the imposition of impact fees by local governments. These statutes are described in detail because the *Legislative Guidebook* is intended to provide a model act that incorporates best practices, and a comprehensive analysis of current approaches assists users of the *Guidebook* in understanding how the model Section was derived.

**Arizona** authorizes counties to assess development fees upon new development, but only by ordinance and to fund the construction of public facilities included in a benefit area plan. The ordinance must be preceded by a development fee needs assessment. The fees must be “reasonably attributable or reasonably related” to the demand created by the development, fees assessed on a particular development must be proportionate to that development’s share of the public facilities demand, and they can be spent only in the benefit area where the fee was assessed. While development fees cannot be spent to remedy deficiencies in existing public facilities, they can be applied to the cost of excess capacity in existing facilities that serve new development. Credit must be granted for on-site parks built by the developer against development fees that are assessed for parks. Development fees must be spent on public facilities within five years (which can be extended by development agreement) or they must be refunded to the present owner of the property. Development fees can be waived for affordable housing or for other development “determined to serve an overriding public interest.”

The **Georgia** Development Impact Fee Act authorizes municipalities and counties that have a comprehensive plan with a capital improvements element to enact impact fee ordinances. Existing impact fee provisions are protected, but local ordinances are required to be in compliance

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with the Act by a specific date. Municipalities and counties can enter into intergovernmental agreements with each other, schools and special districts, and the state, to jointly plan public facilities and operate impact fee systems. Except for on-site improvements, no exactions, whether in cash or in kind, can be made except pursuant to such an ordinance. An impact fee ordinance cannot be enacted unless the local government holds two properly-noticed public hearings and creates a Development Impact Fee Advisory Committee of five to ten members, at least 40 percent of which represent the development, building, or real estate industries.

Impact fees must be proportional, must be assessed in service areas, derived from the comprehensive plan, on the basis of the public facilities demand in the service area, and must be spent in the service area on the facilities for which they were assessed, which must be included in the comprehensive plan. An impact fee cannot be collected earlier in the development process than the issuance of a building permit. Impact fee ordinances must include a procedure for individualized assessments of impact fees, an appeals process (including authorization of the use of arbitration), and a provision for credits (for on-site improvements and for impact fees paid in excess of a development’s proportionate share), and cannot be retroactive -- fees may not be assessed on the portion of a development project for which a building permit was issued before the ordinance took effect. Assessed impact fees must be refunded to the payor of the fee if the capital improvement is not commenced within 6 years of the collection of the fee. Payment of an impact fee automatically satisfies any adequate public facilities requirement applicable to the development project. Affordable-housing developments, and projects that “create extraordinary economic development and employment growth,” may be exempted from impact fees if the comprehensive plan provides for it and if there is another source of revenue to cover the project’s proportionate share of public facilities in the service area.

449 Ga. Code Ann. §§36-71-4(a) to (c), (m); -8(b).
451 Ga. Code Ann. §§36-71-3(b); -4(g) to (i); -7; -10.
The Idaho Development Impact Fee Act also requires a capital improvements plan as a prerequisite for assessing impact fees, and the plan must be based on the same land-use assumptions as other local plans. Public hearings are required before a local government can adopt a capital improvements plan or make an amendment or material change to such a plan, and a public hearing must also be held before the adoption of an impact fee ordinance. A Development Impact Fee Advisory Committee of at least five members, with two in the businesses of development, building, or real estate (the planning commission will suffice if it meets that criteria or if two complying members are added), advises in the drafting of the ordinance. Existing impact fee provisions are protected for one year after the adoption of the Act, after which they must comply with the Act.

Temporary or accessory structures, and repairs or reconstruction that do not increase the size of a building, are expressly excluded from development, while manufactured housing is expressly included. Fees cannot exceed a project’s proportionate share of the demand for new public facilities, and developers can demand individualized assessment of the fee. However, the addition of fines and penalties for late payment is expressly authorized, as is the denial of utility hookups or development permits. Fees cannot be assessed for or spent on facilities not in the capital improvement plan, the operation or maintenance of facilities, the upgrade of existing facilities for safety or environmental reasons (and not to accommodate new users), or bond payments except on bonds financing the capital improvements in the capital improvement plan. Fee ordinances must provide for credits (for excess impact fees and for system improvements, such as schools and parks, as opposed to project improvements such as streets and sidewalks), refunds to the owner of record when the intended capital improvement is not appropriated for or commenced within five years,
and appeals, including mandatory mediation. Affordable housing may be exempted from impact fees if the plan provides for it and there is another source of revenue to fund the development’s proportionate share.

**Illinois** authorizes local government to assess impact fees for improving or constructing “roads, streets, or highways directly affected by the traffic demands generated from ... new development.” The fee cannot exceed a “proportionate share” of costs “specifically and uniquely attributable to the new development.” While fees can be spent on “engineering and planning costs” as well as the expenses of actually building or improving the road, they cannot be spent on the operation or maintenance of existing roads, nor to improve existing roads in order to make safety or environmental improvements. Impact fees may be assessed only by ordinance, which must be preceded by notice and a public hearing. The fee is to be collected at the time of final plat approval or when a building permit is issued. The ordinance must be consistent with a local comprehensive road improvement plan. In preparing the ordinance, the local government must create and consult with a “road improvement impact fee advisory committee” consisting of between 10 and 20 members, at least 40% of which must represent the real estate, development or building industries, or labor, and cannot be local government officials or employees.

**Indiana** authorizes local governments to adopt impact fee ordinances, after a public hearing and with the approval of the relevant planning commission or commissions. The ordinance must be consistent with the governing comprehensive plan, and the local government must create an impact fee advisory committee of five to ten members, with at least 40 percent representing the development, building or real estate industries. Impact fees do not include utility charges or hookup fees, fees charged to pay the administrative costs of approving a permit, or similar

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466 Idaho Code §§67-8204(14); -8212.
467 Idaho Code §67-8204(10).
469 605 Ill. Comp. Stat. §5/5-904.
470 605 Ill. Comp. Stat. §5/5-905.
471 605 Ill. Comp. Stat. §5/5-911.
472 605 Ill. Comp. Stat. §5/5-904.
474 Ind. Code §36-7-4-1311 (1998).
475 Ind. Code §36-7-4-1312.
Impact fees may be assessed only for facilities in the categories of sewers, parks, and recreation, roads, drainage, and water supply. Impact zones must be created in the ordinance, on the basis of “a functional relationship” between the types of infrastructure needed and that the facilities to be built in the zone will provide “a reasonably uniform benefit” to the new developments in the zone, and fees may be assessed only in an impact zone. Fees must be spent pursuant to a zone improvement plan, which must be consistent with the comprehensive plan. Impact fee ordinances must include a schedule or formula for calculating the impact fee, so that developers can accurately predict the applicable fee. Developers can demand an individualized assessment of their impact fee, which “locks in” the fee if a building permit has been issued. The fee is to be collected within 30 days of receiving a permit or plat approval, whichever is earlier. Permits or other approval of development cannot be delayed with the goal of awaiting the outcome of any impact fee procedure. The zone improvement plan for an impact zone must set a timetable for the improvements to be financed by impact fees, and the developer is entitled to a refund if there has not been “reasonable progress toward completion” of the capital improvements by the deadline, or six years in any case.

Impact fee ordinances must provide for an appeal of an assessment, and for credits for any capital improvement to be financed by impact fees which the developer constructs itself. Decisions on appeals of assessments, credits, and refunds are to be made by a three-member impact fee review board, consisting of one real-estate broker, one engineer, and one certified public accountant, none of which may be members of the planning commission. Independent judicial

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477 Ind. Code §§36-7-4-1311(e); -1313.
478 Ind. Code §36-7-4-1309.
479 Ind. Code §§36-7-4-1314 to -1316.
480 Ind. Code §§36-7-4-1318; -1319.
481 Ind. Code §36-7-4-1320.
482 Ind. Code §36-7-4-1322.
483 Ind. Code §36-7-4-1322.
484 Ind. Code §36-7-4-1341.
485 Ind. Code §§36-7-4-1331; -1332.
486 Ind. Code §§36-7-4-1333; -1334.
487 Ind. Code §§36-7-4-1335 to -1337.
488 Ind. Code §36-7-4-1338.
review of the impact fee ordinance and decisions thereunder is authorized. A reduction in impact fees may be granted to affordable housing developments, but a public hearing must be held first, the governmental unit providing the reduction must pay the reduction amount, and a decision on reducing an impact fee is appealable by the developer or by the governmental unit which was to receive the fee money. To ease payment of large fees, ordinances must include an installment payment plan. Impact fees can be collected in a civil action, and the local government has a lien under the statute.

Maine authorizes municipalities to require developers to provide off-development improvements or pay impact fees to finance public construction of such improvements. The fees may be expended on new capital facilities or the expansion or replacement of existing facilities, in the categories of sewer, water, solid waste, fire protection, road and traffic control, and parks and recreation. The fee must be “reasonably related” to a development project’s share of the demand for improvements, the municipality must establish a schedule for the construction of the capital improvements which is consistent with the comprehensive plan, fee revenue must be kept in a separate fund in the municipal treasury, and the municipality must refund impact fees that were assessed for projects which were not built according to that schedule or when the fees assessed for a project exceeded the actual cost of the project.

Nevada authorizes local governments to assess impact fees for new facilities, and improvements to existing facilities made necessary by new development, for drainage, sewer, water, and street projects. Impact fees cannot be assessed unless the local government has in place a capital improvements plan, which assesses existing public-facility capacity and predicts demand based on land-use assumptions that must, as well as the plan itself, be approved by the local legislature after public hearing and an opportunity for formal complaints and objections. The capital improvement plan must be reviewed every three years. In the capital planning process and afterwards, the local government is to be advised by a five-member capital improvements advisory committee, which

489 Ind. Code §36-7-4-1339.
490 Ind. Code §§36-7-4-1326 to -1328.
491 Ind. Code §36-7-4-1324.
492 Ind. Code §36-7-4-1325.
may be the planning commission if it has at least one non-governmental member who is in the real-
estate, development, or building industries.497

Impact fees can be expended upon not only the cost of obtaining land and of construction, but of professional advice and of bond interest if the bonds are to finance the capital improvements for which the fee was collected.498 Impact fees cannot be spent upon capital improvements not in the capital improvement plan, operation or maintenance of facilities, or expansion of existing facilities to better serve existing development or for safety or environmental reasons.499 There is a maximum impact fees for each unit of service provided, which is the total estimated cost of a capital improvement as set in the capital improvements plan, divided by the number of service units that improvement is projected in the plan to provide.500 A development that pays impact fees has a right to the services of the facilities for which the fee was assessed.501 Credits must be provided for a developer’s construction of off-site improvements,502 and there must be a refund of impact fees to the present owner if construction of the intended capital project is not commenced within five years, and of any portion of a fee not spent within ten years.503

**New Hampshire**504 authorizes impact fees as one of many “innovative land use controls.” Impact fees may be employed to finance the construction or improvement of capital facilities, made necessary by new development, of the following types: water, sewers, drainage and flood control, solid waste, recycling, roads, municipal office buildings, public schools, public safety facilities, libraries, and parks and recreation (but expressly not open space). It is expressly stated that expansion or improvement of public facilities not made necessary by new development is not a legitimate expenditure of impact fees. The fee is to be proportional to a development’s share of the new demand for public facilities, and fee revenue is to be placed in a fund segregated from the general fund of the local treasury. An impact fee ordinance must establish a reasonable time, not to exceed six years, for the completion of improvements financed by impact fees, and refunds must be provided if the fees are not spent in that time. Appeals must be provided for, and the granting of waivers of impact fees is authorized, as long as the criteria for waiver are expressly stated.

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New Mexico’s Development Fee Act provides that municipalities and counties may impose impact fees, and may enter into joint powers agreements to impose impact fees in areas under the jurisdiction of both the county and a particular municipality. Before enacting an impact fee ordinance, there must be in place a capital improvements plan. There must be public hearings, after due notice, on the land use assumptions behind the capital improvement plan, on the capital improvement plan itself, and on the impact fee ordinance before they can be approved by the municipal or county legislative body. The land-use assumptions and capital improvement plan must be reviewed every five years, and there must be a public hearing with due notice before any amendment, or decision not to amend, the assumptions, plan, or ordinance can be adopted. Advising the legislative body at all stages is an advisory committee of at least five members, none of which may be officials of the municipality or county, and at least 40% of which must represent the development, real estate, and building industries. No moratorium can be placed on development for the purpose of awaiting the outcome of any of the above processes.

There is a statutory requirement of a maximum fee per service unit. Impact fees are to be assessed as early as possible, and collected at the time a development permit or building permit is issued, and a developer can enter into an agreement with the local government to pay the impact fee over time. Fees cannot be collected unless the capital improvement plan provides that the capital facility to be financed by the fees will be constructed and in operation within seven years, and a refund is due to the present owner for impact fee money not spent within that period. A development has the right to use facilities financed by its impact fees. Fee revenue must be held

505 N.M. Stat. §§5-8-1 et seq. (1997).
506 N.M. Stat. §5-8-3.
507 N.M. Stat. §5-8-6.
508 N.M. Stat. §§5-8-19 to -29.
509 N.M. Stat. §§5-8-30 to -36.
510 N.M. Stat. §5-8-37.
511 N.M. Stat. §5-8-42.
512 N.M. Stat. §5-8-7.
513 N.M. Stat. §5-8-8.
514 N.M. Stat. §5-8-10.
515 N.M. Stat. §§5-8-11; -17.
516 N.M. Stat. §5-8-12.
in separate, interest-bearing accounts, and must be accounted for separately than the general revenue. Credit for dedication of land or construction of facilities by the developer includes such on-site improvements as sewers, roads, and sidewalks.

Oregon authorizes the assessment of “system development charges” by local governments. There must be a system for challenging expenditures of the charges, and credits for particular improvements made by developers must be provided. The impact fee ordinance must state the methodology for calculating the charge, with that method available for public review -- any proposed change in the methodology must be preceded by notice to the public. System development charges are divided into reimbursement fees, which are to be assessed and spent on improvements to existing facilities, and improvement fees, intended for new capital facilities. A local government with a system development charge ordinance must also enact a capital improvements plan, public facilities plan, or similar plan for governing the expenditure of revenues from the charges.

Pennsylvania authorizes municipalities to assess impact fees to finance “public transportation capital improvements.” No other offsite improvements may be exacted, either as construction by the developer or as an in-lieu fee, as a condition of development approval. Despite the phrase “public transportation,” the impact fees may be spent only on “construction, enlargement, expansion, or improvement of public highways, roads, or streets” and expressly does not include “bicycle lanes,

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517 N.M. Stat. §5-8-16.
518 N.M. Stat. §§5-8-11, -15.
523 Or. Rev. Stat. §223.304(1), (2), (5).
524 Or. Rev. Stat. §§223.299(2) to (4); 223.307.
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bus lanes, pedestrian ways, rail lines, or tollways." Nor are the fees to be spent on maintenance or repair of existing roads, or on the improvement of existing roads to satisfy safety or environmental standards or to better serve existing development. The local government must first adopt a transportation capital improvements plan, with the advice of an advisory committee of 7 to 15 members, none of which can be local government officials or employees, and 40 percent of which must represent the real estate, development, or building industries (the planning commission may be designated as the advisory committee if the requisite 40% representation is added to the commission when it is acting as the advisory committee). Both the advisory committee and the local legislative body must hold public hearings on the plan before it may be adopted. No approval or permit for development can be delayed or denied in order to await the enactment or complete implementation of a capital improvement program or an impact fee ordinance.

The impact fee itself must be adopted by ordinance. The ordinance must specify which local agency is assessing and collecting the impact fee, the method for calculating the fee, when and from whom the fee is to be collected, and the procedure for providing credits and reimbursement of impact fees paid. Transportation impact fees are payable at the time a building permit issues. Credits may be provided for affordable housing and for other developments “determined by the municipality to serve an overriding public interest.” De minimis applications for development approval are not subject to impact fees, and the impact fee ordinance must specify what is de minimis. Fee revenue must be placed in a segregated, interest-bearing account. The fees are to be assessed and spent on a service-area basis. There must be a refund of impact fees not spent

by the time the capital project is completed, or when the intended project is not commenced within three years of the date scheduled in the transportation capital improvements plan. Appeal to the court of common pleas is provided, but unlike most civil actions, each side must bear its own costs.

Impact fees in Rhode Island are governed by Section 47 of the Land Development and Subdivision Review Enabling Act of 1992. This section governs both in-kind exactions, where the developer provides the capital improvement, and in-lieu fees. The need for a particular exaction or fee must be documented in the local comprehensive plan and in the capital improvement plan. In-lieu payments cannot be assessed until the local government enacts a formula for calculating the fee. A dedication or fee assessed to mitigate the negative impact of a development project cannot exist unless the negative impact is clearly documented and there is a relationship between the impact and the public improvement for which the fee is collected or the dedication. In-lieu fees must be kept in a separate account and can be spent only on the capital improvement project or other mitigation measure for which it was collected. Appeals are provided for elsewhere in the Act.

Texas authorizes “political subdivisions” to impose impact fees. The fees can be assessed only for capital improvements or facility expansions, the latter being the expansion of the capacity of an existing capital facility to accommodate new development. The fees cannot be spent on maintaining or operating public facilities or upgrading existing facilities to improve service to existing development or to improve safety or environmental standards. A capital improvements plan must be adopted, and no fee revenue can be spent on a capital improvement or facility expansion unless it is included in the plan. There must be a hearing, after notice, on the land use assumption used in the capital improvements plan, as well as on the plan itself and on the fee ordinance. Also, the land use assumptions and capital improvement plans must be updated at least

546 Tex. Loc. Gov’t Code §§395.001; .012.
549 Tex. Loc. Gov’t Code §§395.042 to .045; .046 to .051.
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every three years, with a public hearing, after due notice, on the subject.\textsuperscript{550} No moratorium on development may be placed in order to await completion of any of the aforementioned steps.\textsuperscript{551} Advising at all stages is a capital improvements advisory committee of at least five members, at least 40 percent of which must represent the development, real estate, or building industries and not be a government official.\textsuperscript{552} Based on the capital improvements plan, there is a statutory maximum impact fee per service unit.\textsuperscript{553} Developers and the political subdivision may enter into an agreement setting the fee.\textsuperscript{554} Once fees have been assessed, additional fees can be collected only if there are additional service units in the development.\textsuperscript{555} A new development has the right to the services of the facilities that were funded by its impact fees.\textsuperscript{556} Fees cannot be collected where public services are unavailable, except when the capital improvement plan provides for the necessary facilities to be commenced within two years and completed in a reasonable time not to exceed five years, or where the developer and the political subdivision agree that the developer will construct the facilities and will receive an appropriate credit against impact fees.\textsuperscript{557} Refunds must be provided to the present owner of the property if facilities to be financed by impact fees are not commenced within two years and completed in a reasonable time not to exceed five years, as must the portion of fees not spent when the facility is completed.\textsuperscript{558} An appeals process must be provided.\textsuperscript{559} A developer must receive a credit for constructing off-site roads.\textsuperscript{560} Impact fees may be waived for affordable housing, with the express provision that if the housing turns out to be not affordable as defined by Federal law, the impact fee may be assessed.\textsuperscript{561}

\textsuperscript{550}Tex. Loc. Gov’t Code §§395.052 to .057.
\textsuperscript{551}Tex. Loc. Gov’t Code §395.076.
\textsuperscript{552}Tex. Loc. Gov’t Code §395.058.
\textsuperscript{553}Tex. Loc. Gov’t Code §§395.014; .015.
\textsuperscript{554}Tex. Loc. Gov’t Code §395.018.
\textsuperscript{555}Tex. Loc. Gov’t Code §395.017.
\textsuperscript{556}Tex. Loc. Gov’t Code §395.020.
\textsuperscript{557}Tex. Loc. Gov’t Code §395.019.
\textsuperscript{558}Tex. Loc. Gov’t Code §395.025.
\textsuperscript{559}Tex. Loc. Gov’t Code §395.027.
\textsuperscript{560}Tex. Loc. Gov’t Code §395.023.
\textsuperscript{561}Tex. Loc. Gov’t Code §395.016.
Vermont grants municipalities the power to levy impact fees. The municipality must have a capital budget in place before it can enact an impact fee ordinance. The fee must be calculated by a formula set forth in the capital budget, the municipality must account annually for fees assessed and their expenditure, and refunds are available to the present owner for the portion of an impact fee which is not spent within six years of the fee collection or which exceeds the projected expenses of the capital improvements it was assessed for. An ordinance may provide for exemptions as long as the basis for exemption is clear in the ordinance, and developers can set aside off-site land in an undeveloped state in lieu of paying an impact fee. Impact fees are a lien on the property until paid, and a municipality may demand payment of a fee before a necessary development permit issues.

Virginia authorizes impact fees for counties with a population over 500,000, adjacent counties and cities, cities adjacent to the adjacent counties and cities, and towns in such counties. These governments may impose fees only on new development for “reasonable road improvements attributable in substantial part to the new development.” Road development does not include streets and other roads that a developer is required to build within the development. The government must first create an impact fee advisory committee of five to ten members, at least 40% of which must represent the real estate, development, or building industries. A road improvements program must be adopted, after public hearing, to evaluate the existing roads, the need for additional

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road capacity, and the cost thereof. According to the program, the government must divide its territory into service areas, and fees assessed on development in an area must be spent on road improvement in the same service area. Only then may the government adopt an impact fee ordinance, which must set forth a schedule of fees. The program and the ordinance must be reviewed and updated at least every two years. A formula for calculating a statutory maximum impact fee is provided. The fee is to be collected at the time a certificate of occupancy is to be issued. Fee revenue is to be segregated in a “road improvement account,” deposited in an interest-bearing bank account. Appeals must be provided for in the ordinance, as must credits for off-site road improvements by the developer, and no fee may be assessed if the developer offers to build off-site road improvements and the government accepts the offer. There must be a refund, to the present owner, of impact fees not spent on road improvements in the service area within a reasonable time, not to exceed fifteen years.

West Virginia’s Local Powers Act grants counties the power to require new development projects to pay the cost of capital improvements, the need for which is attributable to the projects. The capital project may be in the areas of water, sewer, drainage, schools, roads, parks, and police, fire, and emergency services. The fee assessed against a project must be proportional to the project’s share of the demand, and the project must receive some reasonable benefit from a capital improvement for a fee to be assessed against the project to fund that improvement.

585 W.Va. Code §7-20-3(a), (b).
586 W.Va. Code §§7-20-4; -7(a).
revenue can be spent only on new or expanded facilities or services specified in the local capital improvement plan and located in the same area where the fee was assessed.\textsuperscript{587} The fees must be assessed according to a standard formula.\textsuperscript{588} Refunds for fee money not expended within six years from collection must be paid to the present owner.\textsuperscript{589} Credits for past or future payments must be appropriately adjusted for time (i.e. the present value of the payment must be used).\textsuperscript{590} Capital improvements may be financed by revenues other than impact fees if the development project they serve “benefit[s] some public purpose,” such as affordable housing or a project that increases employment.\textsuperscript{591}

\textbf{Elements of a Good Impact Fee Statute}

From the case law, and the above statutes, one can extract some elements of a well-drafted impact fee enabling statute on which the model statute in Section 8-602 below is based. There must be a local comprehensive plan from which land-use assumptions (including land-use density and intensity as well as use) may be established. There must also be a requirement of a capital improvements program, so that the local government makes an assessment of its existing capital facilities, their capacity, planned or projected demand from new development, and planned capital facilities to meet that demand.

Other characteristics of a well-drafted impact fee statute include:

- The imposition of a fee must be rationally linked (the “rational nexus”) to an impact created by a particular development and the demonstrated need for related capital improvements pursuant to a capital improvement program.
- Some benefit must accrue to the development as a result of the payment of a fee.
- The amount of the fee must be a proportionate fair share of the costs of the improvements made necessary by the development and must not exceed the cost of the improvements.
- A fee cannot be imposed to address existing deficiencies except where they are exacerbated by new development.
- Funds received under such a program must be segregated from the general fund and used solely for the purposes for which the fee is established.

\begin{itemize}
\item \textsuperscript{587}W.Va. Code §7-20-8.
\item \textsuperscript{588}W.Va. Code §7-20-7(c).
\item \textsuperscript{589}W.Va. Code §7-20-9.
\item \textsuperscript{590}W.Va. Code §7-20-5.
\item \textsuperscript{591}W.Va. Code §7-20-7(c).
\end{itemize}
• The fees collected must be encumbered or expended within a reasonable time frame, typically not to exceed five years, to ensure that needed improvements are implemented.

• The fee assessed cannot exceed the cost of the improvements, and credits must be given for outside funding sources (such as federal and state grants, developer initiated improvements for impacts related to new development, etc.) and local tax payments which fund capital improvements, for example.

• The fee cannot be used to cover normal operation and maintenance or personnel costs, but must be used for capital improvements, or, under some linkage programs, affordable housing, job training, child care, etc.

• The fee established for specific capital improvements should be reviewed at least every two years to determine whether an adjustment is required, and similarly the capital improvement plan and budget should be reviewed at least every 5 to 8 years.

• Provisions must be included in the ordinance to permit refunds for projects that are not constructed, since no impact will have manifested.

• Impact fee payments are typically required to be made as a condition of approval of the development, either at the time the building or occupancy permit is issued.\(^592\)

• The statute should expressly state that the payment of impact fees entitles the owners in a development project to use the facilities built with their fees.

• The statute should forbid delaying or denying issuance of development permits or approvals in order to await the adoption of an impact fee system.

While not necessary, the division of the local government into service areas, where impact fees assessed in an area are spent on planned capital improvements in the area, is a powerful tool in complying with constitutional requirements of a relationship between the development project’s demand for public facilities, the fee assessed, and the facilities ultimately provided.

Still another useful component of an impact fee statute is an authorization of exemptions from impact fees, to encourage particular types of development. An exemption from impact fees for affordable housing is common. Another common exemption is for developments that serve an “overriding public purpose.” Some states require that, for an exemption to be granted, the policy behind granting the exemption must be stated in the local comprehensive plan and the local government must have an alternate source of revenue to offset the impact fee that the exempted development would have paid.

Although a number of the statutes provide for the creation of an advisory committee, with heavy involvement from the development industry, the model statute below rejects this approach. There is ample provision for the development community to make its feelings and concerns known in public hearings on the capital improvement plan and on the impact fee ordinance itself. What specific or technical advice the local government desires on the effect of impact fees on development can be just as easily obtained by employing a consultant. Also, as a practical matter, it may be very difficult to assemble a committee that satisfies the proposed membership requirements, specifically

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40 percent representation of certain industries with no government officials or employees, especially in smaller communities.

8-602 Development Impact Fees

(1) A local government may adopt and amend in the manner for land development regulations pursuant to Section [8-103 or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances] a development impact fee ordinance.

(2) The purposes of this Section are to:

(a) determine what local capital improvements are reasonably necessary to serve new development, and the cost thereof;

(b) determine the portion of the demand for local capital improvements which is created by particular new developments; and

(c) assess against new developments an impact fee to finance the cost of local capital improvements which is proportional to the new developments’ demand for the capital improvements.

(3) As used in this Section, and in any other Section where “impact fees” are referred to:

(a) “Adjusted Cost” means the cost of designing and constructing each new fee-eligible public facility or capital improvement to an existing fee-eligible public facility, less the amount of funding for such design and construction that has been, or will with reasonable certainty be, obtained from sources other than impact fees.

(b) “Development Impact Fee” or “Impact Fee” means any fee or charge assessed by the local government upon or against new development or the owners of new development intended or designed to recover expenditures of the local government that are to any degree necessitated by the new development. It does not include real property taxes under [cite to property tax statute] whether as a general or special assessment, utility hookup or access fees, or fees assessed on development permit applications that are approximately equal to the cost to the local government of the development permit review process.

◆ The definition of impact fee is intentionally broad, so that local governments cannot impose an impact fee that is contrary to the provisions of this Section and justify it as being some fee or charge other than an impact fee.

(c) “Fee-Eligible Public Facilities” mean off-site public facilities that are one or more of the following systems or a portion thereof:
1. water supply, treatment, and distribution, both potable and for suppression of fires;
2. wastewater treatment and sanitary sewerage;
3. stormwater drainage;
4. solid waste;
5. roads, public transportation, pedestrian ways, and bicycle paths;
6. parks, open space, and recreation; and
7. public elementary and secondary school sites.

(d) “Off-Site” means not located on property that is the subject of new development.

(4) A local government may assess, collect, and expend impact fees only for the design and construction of new fee-eligible public facilities or of capital improvements to existing fee-eligible public facilities that expand their capacity:

(a) when the demand for the new fee-eligible public facilities or for the additional capacity added to existing fee-eligible public facilities can be reasonably attributed to new development, and

(b) that are included in the local capital improvement program and local capital budget.

No impact fee or any portion of an impact fee may be assessed for or expended upon the operation or maintenance of any public facility, or for the construction or improvement of public facilities that does not create additional capacity.

(5) A local government may assess and collect impact fees only from new development and only against a particular new development in reasonable proportion to the demand for additional capacity in fee-eligible public facilities that can be reasonably attributed to that new development. The owners, residents, and tenants of a property that was assessed an impact fee and paid it in full shall have the right to make reasonable use of all fee-eligible public facilities that were financed by the impact fee.

(6) A local government may assess, collect, and expend impact fees only pursuant to a development impact fee ordinance adopted and amended pursuant to this Section. A development impact fee ordinance shall:

(a) be adopted or amended by the legislative body of a local government after:
1. the legislative body has adopted a local comprehensive plan that includes the elements required by Section [7-202(2)], provision for the fee-eligible public facilities that are to be financed under the impact fee ordinance, and level of service standards for all of the fee-eligible public facilities that are to be so financed, and

2. the local government has pursuant to Section [7-502] prepared a local capital improvement program and the legislative body has adopted a local capital budget, both of which include the fee-eligible public facilities that are to be financed under the development impact fee ordinance;

(b) contain a statement of the:

1. new fee-eligible public facilities and capital improvements to existing fee-eligible public facilities that are to be financed by impact fees,

2. level of service standards included in its local comprehensive plan for the fee-eligible public facilities that are to be financed with impact fees,

3. cost of designing and constructing each such new construction or capital improvement, such cost being either consistent with the local capital budget or accompanied with an explanation in detail of the changed circumstances which cause the cost to differ from the cost projected in the local capital budget,

4. sources and amounts of funding, other than impact fees, for the design and construction of each such new construction or capital improvement, and

5. adjusted cost of each such new construction or capital improvement;

(c) contain the actual formula or formulas for assessing the impact fee, which shall utilize adjusted costs and shall be consistent with the level of service standards;

(d) provide the procedure by which impact fees are to be assessed and collected;

(e) provide the procedure for refund of excess impact fees, pursuant to paragraph (8) below; and

(f) provide the procedure for review of the assessment of an impact fee, and for the payment of impact fees under protest, pursuant to paragraph (9) below.

(7) A development impact fee ordinance may include a provision exempting certain types or classes of development, including, but not limited to, affordable housing, development pursuant to a transit-oriented development plan, and development in a redevelopment area, from the assessment and collection of impact fees.
(a) No such exemption may be created unless there is a policy supporting the exemption expressly stated in the local comprehensive plan.

(b) An exemption provision shall state the policy underlying the exemption and shall provide the procedure for granting exemptions to particular new developments.

(8) The portion of collected impact fees that has not been expended, or encumbered by contract for expenditure and earned by the contractor or contractors, on the new public facilities or capital improvements to existing public facilities specified in the impact fee ordinance within the time or by the date certain specified for their completion, and the interest thereon, shall be refunded.

♦ If contractors have completed a capital improvement project within the stated period and the local government has failed to pay them by the scheduled completion date, the money is owed to the contractors and should not be refunded. By including in the refund the money set aside by the local government and earned by the contractors but not yet paid, this result is ensured.

(a) The time or date certain for completion shall be the time or date specified in the local capital improvement program and shall be stated in the impact fee ordinance. If no completion time or date certain has been specified in the local capital improvement program, then the impact fee ordinance shall specify a reasonable time, ending at a date certain, for the completion of each new public facility and capital improvement to existing public facilities. The date certain shall in no case be more than five years from the effective date of the impact fee ordinance.

(b) All refunds shall be paid to the present owners of the property that was the subject of new development and against which the impact fee was assessed and collected. Notice of the right to a refund, including the amount of the refund and the procedure for applying for and receiving the refund, shall be sent or served in writing to the present owners of the property within 30 days of the date certain upon which the refund becomes due. The sending by regular mail of such notice to all present owners of record shall be sufficient to satisfy the requirement of notice.

(c) The refund shall be made on a pro rata basis, and shall be paid in full within 90 days of the date certain upon which the refund becomes due. If the local government does not pay a refund in full within that period to any person entitled to a refund, that person shall have a cause of action against the local government for the refund or the unpaid portion thereof in the trial-level court for the county in which the property is located.

(9) Any owner of property against which an impact fee has been assessed may seek a review of the assessment. The procedure for such a review shall conform to the provisions of Chapter 10 of this Act for land-use decisions except where the provisions of this paragraph are contrary.
(a) There shall be a record hearing on all reviews of an impact fee assessment.

(b) An owner of property against which an impact fee has been assessed may pay the impact fee and preserve the right to review the assessment by:

1. paying the impact fee in full as assessed, and

2. submitting with payment a written statement that payment is made “under protest” or that includes other language that would notify a reasonable person that the owner intends to preserve the right of review.

(10) An impact fee:

(a) is both a personal liability of the owners of property that is the subject of new development and a lien upon the property;

(b) shall be paid in full before any building permit may issue for a new development; and

(c) may be paid in full through the design and construction of new public facilities or capital improvements to existing public facilities by such owners at their expense when:

1. the new development is solely responsible for the demand for the new public facilities or capital improvements to existing public facilities, and

2. both the owners and the local government agree through a development agreement to such a disposition.

(11) The funds collected pursuant to a development impact fee ordinance shall be deposited to a special interest-bearing account of the local government treasury.

(a) No other revenues or funds shall be deposited into the special account.

(b) The funds deposited into the special account and the interest earned shall be expended only pursuant to the provisions of this Section.

(12) Two or more local governments may, through a implementation agreement pursuant to Section [7-503] and complying with the provisions of this Section governing development impact fee ordinances, jointly assess, collect, distribute, and expend an impact fee where the demand for new fee-eligible public facilities, or additional capacity added to existing fee-eligible public facilities, in two or more local governments can be reasonably attributed to the same new development.
Therefore, if a subdivision located in one municipality but near its border with another municipality necessitated road construction in both municipalities, they could agree to jointly assess and collect an impact fee on that subdivision for those road improvements.

**Commentary: Concurrency and Adequate Public Facilities Controls**

A concurrency management or adequate public facilities ordinance is a type of land development regulation that ties or conditions development approvals to the availability and adequacy of public facilities. The purpose is to ensure the local government’s public facility or system of facilities have sufficient available capacity to serve development at a predetermined level of service (LOS). Development is determined to be in compliance with the ordinance if its impacts do not exceed the ability of public facilities to accommodate those impacts at the specified LOS. If the proposed development cannot be supported by the existing system at the required service level, the developer must either install or pay for the required infrastructure improvements or postpone part or all of the development until the local government provides the needed public facilities. Alternatively, the local government can elect to move up the

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<th>The Problem with Level of Service Standards</th>
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<td>Capacity standards [for public facilities] are rather subjective determinations based to some extent on scientific data and to a greater degree on local experience. Transportation engineers, for example, understand that LOS [level of service] standards are only crude measures of actual congestion. A sprinkling of F level [gridlock] intersections through a street network that affords many optional routes may not pose grave congestion problems. In addition, LOS ratings are determined during peak commuting hours and thus do not reflect general traffic conditions. However, selection of an appropriate level to be used as the standard is basically a political decision based on citizen toleration of congestion...“Adequacy” is a subjective turn that appears to work on a sliding scale related to the urban experience of local residents... Furthermore, it is not uncommon for “acceptable” levels to be set above current levels, thus automatically putting a brake on future development until the condition is improved. In this way, APF [adequate public facility] requirements can be employed as a no-growth measure.</td>
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priorities of constructing new or expanded facilities. Such an ordinance allows control over the timing of development and clarifies the local government role in fulfilling its responsibility for providing public infrastructure. It also creates a direct linkage between the local government’s comprehensive plan and its long-term capital improvement program and capital budget. Applying the LOS standards to public facilities is one way a local government can translate the vague concept of “quality-of-life” into concrete terms.

The earliest experimentation with an adequate public facilities ordinance was the subject of a 1960 decision from New York, Josephs v. Town Bd. of Clarkstown, which upheld an ordinance that required the town board to grant a special permit for residential development when it found that existing community facilities or reasonable possibilities for expansion of such facilities were adequate to provide for the needs of future residents of the proposed development.

In 1972, the New York Court of Appeals (highest court in New York) in Golden v. Planning Bd. of Town of Ramapo upheld a development timing ordinance tied to a comprehensive plan and an 18-year capital improvement program. Using a point factor system to evaluate proposals, the Ramapo ordinance allowed subdivision development only by special permit upon showing that adequate municipal services were available or would be provided by the developer. Once a development acquired enough points, it could occur. The Court of Appeals held the ordinance was constitutional and properly authorized under the state’s enabling legislation. The landmark Ramapo system was to influence growth management systems around the country.

Several states now expressly authorize adequate public facilities ordinances by statute, and in addition provide direction to local governments through rulemaking or technical assistance. Florida’s requirement arises out of the state’s 1985 planning legislation. Local governments were to adopt land development regulations that ensured that public facilities and services would meet or exceed the standards established in a mandatory capital improvement element. They are barred from granting permits for new development unless the public infrastructure is available or will be provided. The ordinance is subject to judicial review and serves as a planning tool to bring development in line with the overall development plan. The achievement of LOS standards in public facilities is a means for a local government to implement its comprehensive plan, especially when dealing with questions of quality-of-life. 

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594 See 24 N.Y. Misc. 2d 366, 198 N.Y.S. 965 (Sup. Ct. 1960). The town denied a permit for the use of property for a single-family residence on a 22,500 square foot lot on the basis of inadequate school facilities, not lack of other physical infrastructure such as water and sewer. For a discussion of the background of this case, see Norman Williams, Jr., American Land Planning Law, Vol. 3A (Deerfield, Ill.: Clark Boardman Callaghan, 1988), §73.13. The ordinance was the subject of a session at the American Society of Planning Officials (ASPO) national planning conference in 1955. See Richard May, Jr. “Development Timing,” in Planning 1955 (Chicago: ASPO, April 1956), 90-94.


596 For an extensive analysis of the Ramapo case, including commentary by Robert Freilich, the attorney for the Town of Ramapo, and a reproduction of the development timing ordinance, see Zoning Digest, No. 3 (1972): 67-81.
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from issuing permits that resulted in a level of services for the affected public facilities below the level of services provided in the comprehensive plan.597 A 1986 amendment clarified this requirement with the following language:

It is the intent of the Legislature that public facilities and services needed to support development shall be available concurrent with the impacts of such development. In meeting this intent, public facility and service availability shall be deemed sufficient if the public facilities and services for a development are phased, or the development is phased, so that the public facilities and those related services which are deemed necessary by the local government to operate the facilities necessitated by that development, are available concurrent with the impacts of the development.598

The Florida Department of Community Affairs has adopted an administrative rule regarding concurrency that is part of a longer rule on criteria for state review of local comprehensive plans.599 The rule requires each local government to adopt, as a component of its comprehensive plan, objectives, policies, and standards for a concurrency management system.600 The rule identifies the categories and facilities that are subject to the concurrency rule. It requires a system for monitoring and ensuring adherence to the adopted level of service standards, the schedule of capital improvements, and the availability of public facilities capacity.

The rule provides that the local government must adopt land development regulations that implement the concurrency management system. The rule states that, under the concurrency management system, “the latest point in the application process for the determination of concurrency is prior to the approval of an application for a development order or permit which contains a specific plan for development.”601 The concurrency rule requires the adoption of level of service standards for roads, sanitary sewer, solid waste, drainage, potable water, parks and recreation, and, if applicable, mass transit. A local government may voluntarily make additional facilities, such as

600 For a survey and assessment of Florida practice in the early 1990s, see Ivonne Audirac, William O’Dell, and Anne Shermeyen, Concurrency Management Systems in Florida, BEBR Monographs, Issue No. 7 (Gainesville, Fla.: University of Florida Bureau of Economic and Business Research, March 1992). For examples of concurrency ordinances, see e.g., City of Gainesville, Gainesville Code, Land Development Code (1998), Div. 2 (concurrency management); Patrick Rohan, Eric D. Kelly, Gen. Editor, Zoning and Land Use Controls, Vol. 8 (New York: Matthew Bender, Feb. 1999), §53.08 (based on ordinance from Orange County, Fla.)
schools or health facilities, subject to concurrency provided such facilities and level of service standards are included in the local comprehensive plan.

There have been several criticisms of the Florida system. One criticism, particular to Florida’s approach, has been the state’s failure to provide adequate monies for infrastructure funding, particularly transportation. According to one commentary, Florida “has also greatly restricted local revenue sources by requiring public referendum approval for the major local option infrastructure taxes, making it difficult for local governments to comply with this mandate.” The second criticism, and one generally applicable to adequate public facilities requirements, is that concurrency, coupled with inadequate state funding for infrastructure, may encourage development in rural and exurban areas where excess road capacity exists, and this would be contrary to Florida’s state goals discouraging urban sprawl.

An analysis of concurrency by Ruth Steiner, an assistant professor of planning at the University of Florida, notes a contradiction in views among local government planners, based on her interviews.

The first concern is that concurrency uses a one size fits all approach for the diversity of communities across the state. The other concern is that the law provides too much flexibility so that communities can ignore the concurrency mandate.

Regarding the spatial impact of concurrency – that it penalizes infill and promotes development at the urban fringe – Dr. Steiner comments:

Even where there is a political will and a plan to encourage higher density infill development, neighbors who would prefer lower densities of development have used concurrency to fight some development projects. Projects at the urban fringe will continue to be built at lower costs and without consideration of any mode of transportation other than the automobile.

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604 Arthur C. Nelson et al., Growth Management Principles and Practices, 97; for a similar criticism, see Douglas R. Porter, Managing Growth in America’s Communities (Washington, D.C.: Island Press, 1997), 131 (noting that while concurrency appeared to encourage development in rural areas, it hampered development in congested urban areas that were prime targets for future development).


606 Id., 15-16.
Dr. Steiner contends that, absent strong incentives from the state, the pattern of new development in Florida is unlikely to change.

A 1999 report by the Transportation and Land Use Study Committee under the aegis of the Florida Department of Transportation has suggested a number of changes to the state’s concurrency requirements. These include exempting public transit facilities, strengthening the requirements that local governments demonstrate to the state their capacity to fund roadway improvements through their capital improvement programming process, and allowing local governments in urbanized areas to set a level of service for general use lanes of the state interstate highway system, with the FDOT’s approval (presently the FDOT has the authority to set level of service standards on the interstate system). The report also suggested that local governments should be required to publish on an annual basis a summary of current transportation LOS conditions, approved developments, their incremental trips assigned to the transportation network, and the anticipated resulted LOS. With the exception of the exemption of public transit facilities, most of the changes appear to be ones that can be accomplished through rulemaking.

Washington state also requires concurrency as part of its growth management act, but only for transportation. Once a local government has adopted a plan, it must “adopt and enforce ordinances which prohibit development approval if the development causes the level of services on a locally owned (not state-owned) transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.” The strategies can be non-infrastructure related activities, like increased public transportation service, ride-sharing, and demand management. Under the statute “concurrent with the development” is defined as meaning that “the improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years,” which is also the time span of the required capital facilities element under the growth management act. The state issues administrative rules interpreting the concurrency requirements, but, unlike Florida, they are guidelines rather than directives.

Maryland and New Hampshire both authorize, but do not require, adequate public facilities ordinances. Neither state describes the operation of adequate public facilities ordinances. In

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607 Transportation and Land Use Study Committee (Tallahassee, Fla.: Florida Department of Transportation, January 15, 1999), 19-32.


609 Id.

610 Wash. Admin. Code §365-195-835 (1997). Some of the provisions of this rule have been used in Section 8-603 below.

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Maryland, the state office of planning publishes a monograph that describes typical state practices and the steps in designing an adequate public facilities program. The New Hampshire statute describes adequate public facilities ordinances as “innovative land use controls” that include “timing incentives” and “[p]hased development” and requires the adoption of a master plan and a capital improvement program in order to use them.

THE MODEL STATUTE

Section 8-603 below authorizes a local government to adopt a concurrency management ordinance to ensure adequate public facilities for future development. The Section describes in general terms the components of such an ordinance, including the steps in the concurrency determination process. In contrast to the Florida model, the model below limits local governments to five types of public facilities or facility systems: potable water supply and distribution; wastewater treatment and sanitary sewerage; stormwater drainage; solid waste; and roads (as well as public transportation, pedestrian ways, and/or bicycle paths at the option of adopting state legislatures). These are “the most fundamental facilities without which development cannot be occupied without serious threats to public health or safety” and, for that reason, are the most appropriate upon which to place restrictions on the commencement of development. Like the Florida statute, the state planning agency is responsible for issuing rules that amplify upon and interpret the statute and for reviewing and approving any local concurrency management ordinance or amendment before it is adopted. In addition the state planning agency may provide additional guidance to local governments in terms of publication of manuals, training, and distribution of adopted ordinances.

The state plays a key role. The state would be responsible for defining the level of service standards for different types of facilities or systems of facilities and for ensuring statewide uniformity in the establishment of such standards. This will eliminate the need for local governments to undertake a series of separate (and costly) but identical studies to define what such standards are. Ensuring uniformity would, for example, eliminate the possibility that standards would be so rigorous that they are unreachable by most new developments, would add unnecessarily to the cost of new development, or – if they are too weak – would not adequately protect public health and safety.

Rulemaking can take into account the fact that some facilities fall under the joint jurisdiction of local governments (because of geography) and the state (because of the responsibility for maintenance and repair). Flexibility would be needed in designing the level of service standards; a

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standard imposed by one local government can effectively bind the operation of the facility of another governmental unit, and the prospects for conflict must be assessed. For example, one local government could apply a level of service standard for all wastewater treatment and collection within its jurisdiction, but the wastewater treatment plant is operated by a special district. Similarly, a storm drainage standard imposed for new development by one local government could affect a regional detention facility under the control of another governmental unit.

Interstate highway systems and state highways that cross numerous local government boundaries pose the problem of open public facility systems. Obviously, one local government cannot adopt a relaxed service level for an arterial road segment that runs through another jurisdiction with tougher requirements. One commentary on the Florida concurrency system observed that local governments are not able to internalize traffic impacts in their communities because they cannot control access to roads that cross jurisdictional boundaries. Thus, local governments cannot control traffic congestion through the development review process than as they can, for example, control adequacy of water and sewer service, which involve closed systems as successfully. Rulemaking becomes particularly important in metropolitan areas where the application of the level of service standards by similarly situated local governments needs to be coordinated and entire transportation systems or corridors need to be examined.

Under this model, transportation is accorded the most lenient treatment because “it takes more time and money to provide transportation facilities.” Requiring level of service standards for each road (or path) segment “works satisfactorily in rural areas with limited roads and traffic congestion, but it is totally unsatisfactory in urban areas where transportation systems consist of a much more complex network of roads and public transit.” Other facilities, like parks and recreation, are better addressed through development impact fees.

Devising as well as applying level of service standards will, of necessity, be a trial and error process, particularly for metropolitan areas. It is also at the metropolitan level where the state review will ensure that conflicts among communities in applying such standards can be resolved.

A state that decides to use this model may want to consider three alternatives in its application, all of which can be accomplished with, at most, minor modification to the language: (1) simply authorize local government adoption of the concurrency management ordinance as provided below; (2) require adoption of concurrency management ordinances by all local governments in a metropolitan area, and authorize other local governments to adopt them should they so choose. This would be on the theory that concurrency would be most important in metropolitan settings where the consequences of growth would have the most far-reaching impacts; or (3) require concurrency of all local governments on the theory that provision of adequate public facilities is a statewide interest.
A local government [may or shall] adopt land development regulations and amendments thereto that include a concurrency management ordinance that is consistent with administrative rules promulgated by the [state planning agency] pursuant to this Section.

The purposes of a concurrency management ordinance are to:

(a) ensure that adequate public facilities are in place when the impacts of development occur, or that a governmental agency and/or developer has/have made, in writing, a financial commitment at the time of approval of the development permit so that the facilities are completed within [2] years of the impact of the development in order to protect public health, safety, and convenience;

(b) direct development and land use into areas that are served by, or will be served by, adequate public facilities;

(c) apply level of service standards for those public facilities and systems of facilities for which concurrency may be required;

(d) provide a mechanism by which the capacity of public facilities or systems of facilities covered by the ordinance may be reserved for a reasonable period of time in connection with approval of a development permit; and

(e) designate types and categories of development and land use that are exempt from the ordinance pursuant to this Section.

As used in this Section, and in all other Sections of this Act where “concurrency” is referred to:

(a) “Adequate Public Facility” means a public facility or system of facilities that has sufficient available capacity to serve development or land use at a specified level of service;

(b) “Concurrent” or “Concurrency” means that adequate public facilities are in place when the impacts of development occur, or that a governmental agency and/or developer has/have made a financial commitment at the time of approval of the development permit so that the facilities are completed within [2] years of the impact of the development;

(c) “Financial Commitment” means that sources of public or private funds or combinations thereof have been identified which will be sufficient to finance public facilities necessary to serve development and that there is a reasonable written assurance by the persons or entities with control over the funds that such funds will
be timely put to that end. A “Financial Commitment” shall include, but shall not be limited to, a development agreement and an improvement guarantee;

(d) “Level of Service” means an indicator of the extent or degree of service provided by, or proposed to be provided by, a public facility or system of public facilities based on and related to the operational characteristics of the facility or system;

(e) “Local Capital Budget” means the annual budget for capital improvements adopted by ordinance that is also the first year of the local capital improvement program; and

(f) “Local Capital Improvement Program” means the document prepared pursuant to Section [7-502].

(4) A concurrency management ordinance shall be adopted and amended only pursuant to this Section and shall:

(a) be adopted or amended by the legislative body of a local government:

1. after the legislative body has adopted a local comprehensive plan that includes the elements required by Section [7-202(2)] and that includes level of service standards in the transportation and community facilities elements for water supply, treatment, and distribution; wastewater treatment and sanitary sewerage; stormwater drainage; solid waste; and roads [and public transportation];

2. after the local government has prepared a local capital improvement program and the legislative body has adopted a local capital budget consistent with the requirements of paragraph (7) below, and

3. after the proposed ordinance has been reviewed and approved by the [state planning agency] for consistency with this Section and with any administrative rules promulgated in connection with this Section;

(b) contain a statement of the level of service standards included in its local comprehensive plan for the following public facilities or systems of public facilities:

1. water supply, treatment, and distribution;

2. wastewater treatment and sanitary sewerage;

3. stormwater drainage;

4. solid waste; and

5. roads[, public transportation, pedestrian ways, and bicycle paths];
(c) contain procedures, standards, and assignments of responsibility regarding the issuance of development permits to ensure concurrency, as provided in paragraphs (5) and (6) below. Such procedures shall be incorporated into the uniform development permit review process established pursuant to Section [10-201] et seq. or the consolidated permit process established pursuant to Section [10-208];

(d) contain a statement that no applicant for a development permit shall be required, as a condition of issuance of that permit, to correct or remedy existing deficiencies in public facilities and systems of facilities covered by the ordinance;

(e) contain a list of types and categories of development and land use that are exempt from the requirements of concurrency pursuant to paragraph (8) below; and

(f) contain a procedure to appeal a determination of concurrency pursuant to Section [10-209].

(5) The procedures contained in a concurrency management ordinance regarding the issuance of development permits to ensure concurrency shall include at least the following minimum provisions:

(a) a process for ensuring adherence to the adopted level of service standards, including ensuring that proposed capital improvements contained in the local capital budget that are intended to establish, replace, or add capacity to those categories of public facilities and systems of facilities that are covered by the level of service standards are constructed within [2] years of the impact of development for which a development permit has been issued, and for monitoring the capacity of existing public facilities so that it can be determined at any point how much of that capacity is being used, or has been otherwise reserved;

(b) a process for allocating capacity to determine whether a proposed development can be accommodated within the existing and proposed public facilities or systems of facilities, which may include preassigning amounts of capacity to certain areas within the jurisdiction of the local government;

(c) provisions for reserving public facility capacity for proposed developments[, provided, however, that such capacity shall not be sold, assigned, or transferred to another development by the recipient of the development permit];

如果您认为国家政府有权创建一个计划，该计划允许一个开发商可以建造或融资公共设施，超出该计划所要求的公共设施标准，并将额外的公共服务设施转让给另一个需要额外公共设施的开发项目，则应保留上述【】中的语言。还应指出，保留的条款不适用于销售、转让或转让给同一开发项目内任意一个位置的公共设施的使用。
(d) provisions that describe what actions may occur when the local government determines, in the review of an application for a development permit, that there is insufficient capacity in a public facility or system of facilities to serve a proposed development, including but not limited to:

1. denying a development permit;

2. issuing a development permit subject to the guarantee of such additional capacity through a development agreement pursuant to Section [8-701] or other financial commitment; and

3. issuing a development permit that authorizes and requires development to occur in stages based on the availability of adequate public facilities at each stage;

(e) provisions that describe the form, timing, and duration of concurrency approval when a development permit is issued, including a specification of the length of time that a determination of concurrency and a reservation of capacity are to be effective; and

(f) provisions assigning the responsibility of the administration of the concurrency management ordinance to a person, department, division, or agency, or combinations thereof, of the local government.

(6) A local government shall meet the following standards to satisfy a concurrency requirement for a type or category of public facilities and system of facilities and shall incorporate such standards into a concurrency management ordinance:

(a) for water supply, treatment, and distribution, wastewater treatment and sanitary sewerage, solid waste, and stormwater drainage, a development permit is issued subject to the condition that, at the time of issuance of a certificate of compliance, the needed public facilities or systems of facilities are in place to serve the new development;

(b) for road[, public transit, pedestrian, and bicycle] facilities, a development permit is issued subject to the condition that, at the time of issuance of a certificate of compliance, the public facilities or systems of facilities needed to serve the new development are either in place or are scheduled to be in place not more than [2] years after issuance of a certificate of compliance.

(7) Any local government that adopts or amends a concurrency management ordinance shall, as a condition of continuing validity of the ordinance, annually prepare a local capital improvement program and annually adopt a local capital budget. The capital improvement program and capital budget shall authorize, and provide for the funding of, capital
improvements necessitated by proposed development or development projected by the local comprehensive plan.

Absent a local government commitment to construct necessary capital improvements, a concurrency management ordinance is an empty regulatory device. This language ensures that the local government continues to recognize its own obligation to build new or expand existing public facilities to accommodate development.

(8) The following developments and land uses are exempt from the requirement of concurrency, provided that a concurrency management ordinance shall not exempt any development or land use other than as specified in or authorized by this paragraph:

This language makes it clear that a local government cannot pick and choose among development types, by, for example, allowing commercial uses but precluding multiple-family residences, or distinguishing between types of housing. The concurrency system is intended to apply to all development and land use because they affect all the public facilities in the community.

(a) development of affordable housing, but only for public facilities and systems of facilities for roads[, public transportation, pedestrian ways, and bicycle paths];

(b) any development in an area for which a transit-oriented development plan pursuant to Section [7-302] has been prepared and adopted [provided that the total land area contained within areas covered by such a plan or plans does not exceed [5 or 10] percent of the land area of the local government];

(c) any development in a redevelopment area for which a redevelopment area plan pursuant to Section [7-303] has been prepared and adopted [,provided that the total land area contained within redevelopment areas does not exceed [5 or 10] percent of the land area of the local government]; and

For an example of a growth management system that subjected all residential development to an annual permit cap based on contentions of inadequate public facilities but that did not apply to commercial or industrial development, see Schenck v. City of Hudson, 114 F. 3d 590 (6th Cir. Ohio 1997). If inadequate public facilities are a serious enough problem that justifies the use of the police power to protect public health and/or safety by delaying the commencement of development until those facilities are declared to have sufficient capacity, then it is hard to justify a system that would differentiate among classes of development, unless there were some very strong public purpose behind the distinction.
Language exempting transit-oriented development and redevelopment areas from concurrency is intended to serve as an incentive to promote infill development. Bracketed language limiting the amount of land area is intended to ensure that a local government does not designate large areas of the community for transit-oriented development or redevelopment areas in order to escape the requirements of concurrency.

(d) such other developments and land uses as may be designated by the [state planning agency] by rule as having:

1. no or minimal impact on adopted levels of service and public facilities or systems of facilities; and

2. whose approval will not impair the public health, safety, or convenience.

For example, a cemetery or an accessory outbuilding may require a development permit but its impact on public facilities may be negligible. This type of development should therefore be exempt from concurrency determinations.

(9) The [state planning agency] shall promulgate rules to administer this Section, including level of service standards for public facilities and systems of facilities, and provide further direction and guidance to local governments.

(a) In promulgating level of service standards that are to be applied by local governments for roads[, public transit pedestrian ways, and bicycle paths], the [agency] may distinguish between public facilities that are owned by the local government and those that are owned by the state, or some other governmental unit. The [agency] may authorize the determination of concurrency for roads[, pedestrian ways, and bicycle paths] on an areawide basis, including an area that includes more than one local government, by reference to an areawide average level of service rather than on a road[, pedestrian way, or bicycle path] segment-by-segment basis.

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619 A critique of the Florida concurrency system notes that there has been little empirical research on the impact of de minimis development that is exempted from concurrency requirements, and the impact of such development can vary widely. “For example, when an underutilized site, or vacant building, is redeveloped the capacity that was available from the previous site is credited toward the trips generated from that site. One the other hand, a series of developments each of which generates less than 0.1 percent of the maximum service volume at the adopted LOS but cumulatively take up much of the capacity of the roadway may have a major impact on a specific segment of roadway.” Ruth Steiner, “Transportation Concurrency: The Florida Example,” 9.
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(b) The [state planning agency] shall complete its review of a concurrency management ordinance or amendment thereto proposed by a local government within [60] days of the date of submission by the local government and it may, in writing, approve, approve with conditions, or disapprove the proposed ordinance or amendment.

c) The [state planning agency] shall maintain, and periodically publish for public use, concurrency management ordinances that have been adopted by local governments pursuant to this Section.

d) The [state planning agency] may promulgate rules that permit one or more local governments, or one or more state agencies and one or more local governments, to jointly administer a concurrency management ordinance, provided that they enter into an implementation agreement pursuant to Section [7-503].

e) The [state planning agency] may prepare guidelines other than administrative rules, including manuals, and conduct training in order to implement this Section.

Commentary: Development Moratoria

A moratorium is “an authorized delay in the provision of government services or development approval.” Generally speaking, moratoria are imposed because some problem affecting the governmental unit’s jurisdiction is perceived as being caused or exacerbated by the issuance of too many such permits or licenses or by excessive provision of such public services that outstrips available capacity. A moratorium on development can take the form of denying applications for development permits, including but not limited to building permits, or denying requests to connect newly-developed property to publicly owned utilities such as water and sewer lines. Depending on the purpose, some moratoria include exceptions for applications that demonstrate that the applicant will somehow avoid or mitigate the problem for which the moratorium was imposed.

Typically, development moratoria are imposed for one of two purposes:

The first purpose for moratoria is when a local government is preparing a comprehensive plan or extensive amendment of land development regulations. The local government wishes to avoid a “rush” of development permit applications under the existing plan or regulations in anticipation of presumably more restrictive provisions in the new enactments. Such a deluge not only presents the...
logistical problem of processing so many applications, but also creates the prospect that large amounts of development contrary to the proposed plan or regulations will be “grandfathered” under the old plan or regulations with the intent of avoiding the application of the new plan or regulations.

The second reason for imposing a moratorium is that there is an inadequacy or lack of capacity in public facilities needed to serve new development. Such facilities can include roads or highways, water supply, sewer and waste treatment, drainage, and other necessary systems. The purpose of the moratorium is to allow the local government to plan, finance, and construct the necessary infrastructure so that both new and existing development receive adequate levels of public services.

Both of these purposes strongly imply that, if the local government is acting in good faith, the moratorium will have a definite conclusion, even if the moratorium does not include an express duration or concluding date. A moratorium to allow time for a new local comprehensive plan or land development regulation to be adopted loses its purpose once the plan or regulation is adopted and takes effect. A moratorium to allow time for public facilities to be built to accommodate new development should no longer be necessary once adequate public facilities are constructed and in operation. However, moratoria are not always imposed for the reason officially stated in the ordinance. In these cases, a tool that is supposed to allow temporary “breathing space” for a particular purpose of public necessity is instead imposed as a tool to curb or prohibit growth for an indefinite period. A moratorium imposed for the (unstated) purpose of keeping growth out of the local government’s jurisdiction raises issues under the takings provisions of the federal and state Constitutions.

Therefore, the key to a well-drafted statute authorizing and regulating moratoria is to clearly delineate the legitimate reasons or purposes for a moratorium and provide mechanisms that effectively require those reasons to actually exist if a moratorium is to be imposed. Another important matter for a moratorium statute is setting a clear duration or concluding date for moratoria, so that the period of restriction does not become indefinite and therefore, for practical purposes, permanent.

**Statutes on Moratoria**

Several states have statutes authorizing and regulating moratoria, and these may be part of statutes authorizing interim zoning ordinances. It may be necessary to have such enabling legislation, as moratoria may not be considered an inherent part of the zoning power in the absence of specific statutory reference to moratoria. Arizona requires a public hearing after notice before a moratorium ordinance may be adopted or extended, and the ordinance must be justified by findings that a shortage of essential public facilities (water, sewer, and street improvements) would otherwise occur on urban or urbanizable land, or if a “compelling need” exists for adequate public facilities other than essential facilities. The findings must also include evidence that the moratorium

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is sufficiently geographically limited, that alternative methods to achieve the same goal would be ineffective, and that the resources and plans exist to remedy the problem requiring the moratorium. Moratoria for non-essential public facilities on urban or urbanizable land cannot be in effect for more than 120 days, but may be renewed for additional 120-day periods if the problem still exists, progress has been made on the problem, and a date certain for resolution of the problem has been determined. Moratoria do not affect existing development agreements or vested rights to develop, and any landowner aggrieved by a moratorium may seek review of the moratorium in superior court.

In authorizing interim land-development ordinances, California\textsuperscript{623} provides that local governments can adopt ordinances “prohibiting any uses which may be in conflict with a contemplated general plan, specific plan, or zoning proposal which the legislative body, planning commission, or the planning department is considering or studying or intends to study within a reasonable time.” Such an ordinance need not be enacted “following the procedures otherwise required prior to the adoption of a zoning ordinance,” but must be approved by at least four-fifths of the legislative body and must be preceded by a finding that there is a “current and immediate threat to public health, safety, or welfare, and that approval of additional [development permits] would result in that threat to public health, safety, or welfare.” The ordinance loses all force after 45 days from adoption, but may be renewed once for 10 months and 15 days, and again for one year, with no further extensions possible and with all extensions requiring the “current and immediate threat” finding and four-fifths approval. California law\textsuperscript{624} also states that local ordinances that set numerical limits on residential building permits or on residential lots that may be developed, or that otherwise restrict residential development, lose the presumption of reasonableness, and the local government must demonstrate the necessity of the ordinance to protect the public health, safety, or welfare.

Maine\textsuperscript{625} authorizes moratoria “on the processing or issuance of development permits or licenses,” for one of two purposes: “to prevent a shortage or an overburden of public facilities” and “because the application of existing comprehensive plans [and] land use ordinances or regulations. . . is inadequate to prevent serious public harm from. . . development in the affected geographic area.” The moratoria must be of a set term, which cannot exceed 180 days but which may be extended for an additional 180 days if the local government finds that the problem necessitating the moratorium still exists and “reasonable progress is being made to alleviate the problem.”

Minnesota\textsuperscript{626} allows local governments that are contemplating or drafting a comprehensive plan, or that have annexed territory that has no plan or zoning in place, to adopt interim zoning ordinances, which may “prohibit any use, development, or subdivision within the jurisdiction or a portion thereof.” Such ordinances are effective for no more than a year, but may be extended by the

\textsuperscript{624}Cal. Evid. Code §669.5.
\textsuperscript{626}Minn. Stat. §462.355(4) (1999).
local government for additional periods not to exceed a total of eighteen additional months. An interim ordinance cannot prevent the development of a subdivision that has received preliminary approval before the ordinance was adopted.

**New Hampshire** authorizes the adoption of “interim regulations upon development”\(^{627}\) when “unusual circumstances requiring prompt attention” arise and “for the purpose of developing or altering a growth management process.”\(^{628}\) There must be at least one hearing on the interim zoning ordinance, and it expires on the date set in the ordinance, when repealed by the local legislative body, or after one year from adoption.\(^{629}\) The statute specifies in minute detail the development permissible and impermissible under an interim zoning ordinance.\(^{630}\) With some exceptions, only residential and agricultural uses are permitted,\(^{631}\) and the interim zoning ordinance thus acts as a partial moratorium on commercial and industrial development.

**New Jersey**\(^{632}\) expressly prohibits moratoria imposed to prepare a master plan or development regulations, and requires that any moratoria must be for the reason that, and preceded by the finding in writing by a “qualified health professional” that, “a clear imminent danger to the health of the inhabitants ... exists.” No such moratorium may exceed six months.

An **Oregon** statute\(^{633}\) authorizes moratoria only if “a shortage of public facilities ... would otherwise occur” for urban or urbanizable land or if some other “compelling need” exists.\(^{634}\) Compelling need requires findings that applying existing land development regulations would be “inadequate to prevent irrevocable public harm from development,” that the moratorium is


\(^{630}\)N.H. Rev. Stat. §674:25: except with special exception, only residential and agricultural uses are allowed; residences may have no more than two apartments, must be on lots of an acre or larger, must adhere to specific setbacks (50’ from the right of way and 30’ from the sides of the lot), must not exceed 35 feet in height, and must not exceed 30% of their lot; signs must not flash, exceed 6 sq. ft. in area, or be placed within 25 feet of a right of way. §674:26: agriculture is allowed except that animal slaughtering uses are restricted. §674:27: commercial uses must present a site plan and obtain special exception, are subject to setbacks stricter that those for residential (75’ in front, 50’ on the sides and rear), and must have a specific number of parking spaces per number of customers and employees. § 674.28: nonconforming uses and buildings may continue indefinitely, may be altered or expanded so long as the change does not make the property non-compliant with the interim ordinance, and may be rebuilt within 2 years if destroyed by act of God..


\(^{634}\)Or. Rev. Stat. §197.520(2), (3).
sufficiently geographically limited, that alternative methods to achieve the same goal would be ineffective, and that the resources and plans exist to remedy the problem requiring the moratorium. A public hearing must be held before a moratorium may be adopted, and the state Department of Land Conservation must be notified prior to any public hearing on a moratorium or extension thereof. For moratoria imposed on urban or urbanizable land for a “compelling need,” the moratoria may not last more than 120 days, which may be extended for up to six months if there are findings after a public hearing that the problem still exists, that progress has been made to alleviate the problem, and that the moratorium will no longer be necessary after a date certain. For moratoria to correct inadequate public facilities, a corrective program must be adopted within 60 days of the effective date of the moratorium, and the moratorium cannot extend more than 60 days from the adoption of the program unless findings like those for “compelling need” extensions are made. No such extension can exceed 60 days, and no more than three extensions may be taken. Moratoria may be reviewed by the Land Use Board of Appeals upon the petition of the local government, a state agency, or any substantially-affected person, but may not be reviewed independently by the courts.

Washington requires that ordinances adopting moratoria cannot be in effect for more than six months, or up to one year if a work plan is adopted. The appropriate findings must be made, and a public hearing must be held before the ordinance or extension is adopted or within 60 days thereafter.

CASES ON MORATORIA

Because a development moratorium involves denying development permits to all or most applicants, and because development cannot legally occur without such a permit, takings claims are a potential concern when a moratorium is imposed. Therefore, an examination of the relevant case law is both useful and necessary.

The U.S. Supreme Court, in the 1987 First English case, considered an interim ordinance that prohibited all construction or reconstruction on a parcel of property (in the particular case, a parcel in a flood protection area) for an indefinite period. The Court did not directly address whether the ordinance in question constituted a compensable taking, nor did it consider whether a prohibition

635 Or. Rev. Stat. §197.520(3).
636 Or. Rev. Stat. §197.520(1), (5).
of development for a specifically-defined period would run afoul of the Constitution. The Court also stated that the decision does “not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.”

In its famous Lucas decision (1992), the Supreme Court declared that a government regulation that has the effect of denying all reasonable use of private property constitutes a taking unless the use or development prohibited by the regulation constitutes a nuisance under the common law, or the regulation states a “background principle” of that particular state’s law that went into force before the present owner took title. “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” The Court added: “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”

Giving these two cases the broadest and most pro-landowner interpretation possible, they might appear to limit the ability to adopt and enforce a development moratorium (without payment of compensation) to two circumstances: where the public health and/or safety are endangered by a problem that constitutes a nuisance, and where the policy underlying the moratorium is a principle of state law that was in effect when the takings claimant took title to the land.

However, the subsequent case law has not supported such an interpretation. An eight-year sewer moratorium was upheld in Maryland, and a one-year water moratorium was upheld by the federal Ninth Circuit. The Minnesota Court of Appeals has affirmed a two-year moratorium on rezoning, subdivision approval, and site plan review imposed to preserve a transportation corridor, stating that “We interpret [deprivation of] ‘all economically viable use for two years’ as significantly different from ‘all economically viable use’ as applied in Lucas.” A moratorium on mobile-home permits

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642 482 U.S. 321.


644 505 U.S. 1027.

645 505 U.S. 1029.


647 Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994).

imposed until a comprehensive plan, including provisions on mobile homes, could be adopted was found not to constitute a taking by the Eleventh Circuit. 649 A moratorium to study the extent and effects of growth was upheld in Colorado, where the court stated that “an interim regulation prohibiting construction or development is not a temporary taking even if such restrictions would be held too onerous to survive scrutiny had they been permanently imposed.” 650

And in a 2000 decision on this point, the Ninth Circuit reversed 651 a federal District Court decision 652 that found a planning moratorium of 32 months effected a taking. In its decision, the Circuit Court declared that the very concept of a temporary taking involves a division of property rights into time periods that is inconsistent with the Supreme Court’s refusal in takings cases to divide property physically 653 or by the legal elements of ownership. 654 The Ninth Circuit stated that a taking can be “temporary” only in the sense that a permanent or indefinite prohibition of development is at some point invalidated by a court, and the loss in value or use during that time is the measure of compensation for the property owner. The court further stated, however, that a moratorium “designed to be in force so long as to eliminate all present value of a property’s further use” may constitute a taking, and considered the duration of the moratorium and the diligence of the local government in remebery the underlying problem as reasonable factors in determining whether a moratorium was in fact intended to be temporary.

PROVISIONS OF THE MODEL STATUTE

Section 8-604 below establishes three options for the purpose of moratoria: a narrow alternative with only moratoria to address shortfalls in public facilities and other compelling needs, defined in terms of threats to public health and safety; a moderate option that adds limited planning moratoria and includes the general welfare in compelling needs; and a broad option that authorizes moratoria for planning on a wider basis as well as the full range of compelling needs.

The Legislative Guidebook requires periodic review of the local comprehensive plan and of the land development regulations in light of the comprehensive plan in Section 7-406. Therefore, if moratoria could be imposed every time a routine revision to the comprehensive plan or land development regulations was contemplated, there could be moratoria in place a significant portion of the time. On the other hand, the adoption or amendment of a plan in response to a previously-

651 Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000).
653 The “whole parcel” rule that a regulation alleged to constitute a taking must be judged on its effect on the entire parcel and not some portion thereof. Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 130-131 (1978).
uncontemplated change in conditions may require more fact-finding and deliberation than the routine or periodic amendment of a comprehensive plan. Similarly, the preparation and adoption of an initial comprehensive plan under Chapter 7 of the Guidebook is a unique event in shaping the character and development patterns of the community, and many local governments will need to prepare a new plan essentially from scratch.

Moratoria are not permitted in smart growth areas designated pursuant to Section 4-401 except where development would present a significant threat to public health or safety. This paragraph is in brackets, and may be included or deleted at the option of an adopting legislature. In designating a smart growth area, a major policy decision has been made that the area in question will be developed at urban densities and intensities, while a moratorium are often imposed to provide time to determine whether further urban development of a given area should occur. It should be noted that exempting such areas from moratoria does not in any way affect the application of Section 8-603 regarding concurrency and adequate public facilities for individual developments.

Under the model Section below, a moratorium must be adopted as a land development regulation. Therefore, the moratorium must be adopted by the local legislative body through an ordinance, after a public hearing with due notice, and must be consistent with the comprehensive plan. The ordinance must include findings supporting the claim of an underlying problem, and the findings must be supported by the written report of a health, environmental, engineering, or other professional.655

A moratorium ordinance must also include a corrective program to alleviate the problem in a timely manner, and may exempt permit applications that will not significantly contribute to the problem so long as the exemption is not applicable solely to single-family houses. The geographic scope of the moratorium and the development permits subject to the moratorium must be identified in the ordinance. A moratorium ordinance must state a duration for the moratoria not in excess of 180 days, but a moratorium may be extended by ordinance if it is found in writing, supported by the written report of the appropriate professional, that the shortage or overburden still exists and that there has been “reasonable progress” on the corrective program. An extension may not last over 180 days, and the Section provides for either only one extension or up to two at the adopting legislature’s option. If the option of up to two extensions is chosen, then each extension must be made separately: the local government cannot adopt two extensions simultaneously.

The Section does not limit the power of the state or state agencies to impose moratoria, nor does it restrict the authority of local governments to adopt and enforce policies temporarily prohibiting zoning map amendments, or limiting or prohibiting extensions or hookups to local-government-owned utilities outside the corporate limits. Such local policies are discretionary and legislative, and therefore the need to provide procedural safeguards against these policies is not as great as for moratoria on permits that otherwise would be granted as of right.

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655 The requirement of a report from a qualified health professional is drawn from the New Jersey moratorium statute, N.J. Stat. §40:55D-90.
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8-604 Moratorium on Issuance of Development Permits for a Definite Term

(1) The legislative body of a local government may adopt and amend in the manner for land development regulations pursuant to Section [8-103 or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances] an ordinance establishing a moratorium on the issuance of development permits for a definite term.

(2) For the purposes of this Section and of any ordinance adopted pursuant to this Section, “Qualified Professional” means:

(a) a qualified health professional, such as a registered sanitarian or a licensed physician;

(b) the director of the [state] department of health;

(c) the director of the [state] environmental protection agency;

(d) a registered professional engineer; or

(e) a member of the American Institute of Certified Planners.

(3) A moratorium on the issuance of development permits may be adopted:

Alternative 1

(a) for any significant threat to the public health or safety or general welfare presented by proposed or anticipated development; or

(b) for the preparation and adoption of a local comprehensive plan, or amendment thereto, and for the preparation and adoption or amendment of land development regulations implementing the new or amended local comprehensive plan.

Alternative 2

(a) to prevent a shortage or overburden of public facilities that would otherwise occur during the effective term of the moratorium or that is reasonably foreseeable as a result of any proposed or anticipated development;

(b) within two years of the effective date of this Act, for the preparation and adoption of the first local comprehensive plan pursuant to Sections [7-201] et seq. and for the preparation and adoption or amendment of land development regulations implementing the new local comprehensive plan;

(c) for the preparation and adoption of a local comprehensive plan, or amendment thereto, in response to a substantial change in conditions not contemplated at the
time the present local comprehensive plan was adopted or most recently amended, and for the preparation and adoption or amendment of land development regulations implementing the new or amended local comprehensive plan; or

(d) for some other compelling need. A compelling need is a significant threat to the public health or safety or the general welfare presented by proposed or anticipated development.

**Alternative 3**

(a) to prevent a shortage or overburden of public facilities that would otherwise occur during the effective term of the moratorium or that is reasonably foreseeable as a result of any proposed or anticipated development; or

(b) for some other compelling need. A compelling need is a significant threat to the public health or safety presented by proposed or anticipated development.

[(4) A moratorium on the issuance of development permits may not be adopted for or applied to smart growth areas pursuant to Section [4-401], except when proposed or anticipated development presents a significant threat to the public health or safety. Nothing in this paragraph affects in any way the application of Section [8-603] within smart growth areas.]

A moratorium is a decision that development not be permitted in a given area while some underlying problem is addressed. However, in designating a smart growth area, the local government has designated an area as a site where more intense development is not only permitted but encouraged. In principle, a smart growth area is designated because it has sufficient public facilities and infrastructure in place and the local government wants development to occur there rather than in areas without adequate infrastructure. In such a location, the only reasonable basis for a suspension of development is when it presents a significant threat to public health or safety.

(5) An ordinance adopting a moratorium on the issuance of development permits shall contain:

(a) a statement of the problem giving rise to the need for the moratorium;

(b) findings on which subparagraph (a) above is based, including the written report required by paragraph (6) below where applicable, which shall be included as an appendix to the ordinance;

(c) the term of the moratorium, which, except as otherwise provided herein, shall not be more than [180] days;

(d) a list of the types or categories of development permits that will not be issued during the term of the moratorium;
(e) a description of the area of the local government to which the moratorium applies; and

(f) a statement of the specific and prompt plan of corrective action that the local government intends to take during the term of the moratorium to alleviate the problems giving rise to the need for the moratorium.

(6) Except for a moratorium for the purpose of preparing and adopting a local comprehensive plan or amendment thereto and related land development regulations, pursuant to paragraphs [(3)(b) or (3)(c)], an ordinance establishing a moratorium on the issuance of development permits shall be based on a written report by a qualified professional:

(a) concluding that a significant threat to the public health or safety or the general welfare exists and that the threat is sufficient to justify a moratorium, and

(b) recommending a course of action to correct or alleviate the danger.

(7) An ordinance establishing a moratorium on the issuance of development permits may provide for the exemption from the moratorium of those development permits that have minimal or no impact on the problems giving rise to the moratorium, except that the ordinance shall not permit an exemption for the construction of single-family detached dwelling units while applying the moratorium to other types or categories of dwelling units.

(8) A local government may, by ordinance, extend an ordinance establishing a moratorium on the issuance of development permits for [only one or up to two] additional [180]-day period[s]. The local legislative body shall not extend a moratorium:

(a) for more than one [180]-day period at a time; and

(b) unless it finds in writing, for each extension at the time of the extension, that the problems giving rise to the need for the moratorium still exist and that reasonable progress is being made in carrying out the specific and prompt plan of corrective action as required by subparagraph (5)(f) above.

In extending the ordinance, the legislative body shall refer in its findings to a revised written report made pursuant to paragraph (6) above, where applicable.

Local governments may wish to employ an expedited procedure for the adoption of an extension ordinance, but, as provided in Section 8-103 for interim ordinances, the requirement of notice and a public hearing still applies.

(9) For purposes of this Section, a “development permit” includes, for lots or parcels within the corporate limits of the local government, a connection to, or right to connect to, a local government-owned utility.]
The purpose of this paragraph is to preclude evasion of this Section’s requirements by, instead of placing a permanent or unreasonable moratorium on development permits, granting such permits but then restricting or prohibiting the owners from hooking up to the local government’s utility. In other words, the local government cannot do in its role as utility owner what it cannot do through regulatory means. Note that it only applies to hookups within the corporate limits; the local government is under no obligation to extend services outside its borders and may refuse to do so for any reason or no reason.

(10) This Section does not restrict or limit the power of:

(a) the state or state agencies to impose temporary moratoria upon permits issued pursuant to state law;

(b) local governments to adopt and enforce temporary policies against approving, or reviewing petitions for, zoning map amendments; or

(c) local governments that own utilities to restrict or prohibit extensions of or hookups to that utility in areas outside the corporate limits of the local government, whether for business, economic, policy, or other reasons.

(11) A moratorium pursuant to this Section shall be deemed a final land-use decision for purposes of judicial review pursuant to Chapter 10 of this Act.

This paragraph makes a moratorium appealable in the same manner as a land-use decision. The word “final” clarifies that any review of a moratorium shall proceed directly to court.

Commentary: Development Agreements

A development agreement is “a statutorily authorized, negotiated agreement between a local government and a private developer that establishes the respective rights and obligations of each party with respect to certain planning issues or problems related to a specific proposed development or redevelopment project.” There are times when a local government and a developer may both wish to vary in some way from the development and land use choices possible under the existing land development regulations and have those variations be fully enforceable. A development agreement allows both flexibility and certainty. It permits flexibility by allowing terms and conditions that are different from and more detailed than the requirements of land development regulations and the statutes authorizing them. It brings certainty by making all elements of the agreement enforceable, against the local government as well as the developer. Thus, it is superior to informal agreements that are only worth as much as the good faith of the parties.

Such agreements are not absolutely necessary, since the Legislative Guidebook contains a vesting statute (Section 8-501), which automatically creates enforceable rights for developers, and the flexible development tools provided in Chapter 10 such as conditional uses and variances (Sections 10-502 and 10-503 respectively). Nevertheless, they are useful and efficient instruments of land use policy and are thus included in the Guidebook.

**STATUTES ON DEVELOPMENT AGREEMENTS**

A number of states have statutes expressly authorizing development agreements. These statutes differ somewhat in their structure and level of detail. Arizona provides that such agreements can be formed “by resolution or ordinance” to govern development of property both within and outside the municipal boundaries, but that agreements regarding property outside the corporate limits do not take effect until the property is annexed. The agreement has to be consistent with the general plan and may be amended or canceled by consent of all the parties. The benefits and burdens of the agreement “run with the land” (apply to future owners of the property), and therefore the agreement must be recorded. The agreement must provide its duration in its terms and conditions, and may provide for municipal enforcement of traffic safety laws on private roads with the developer paying for necessary signage.

California’s statute on development agreements authorizes cities and counties to enter into development agreements with the owners of property both inside and outside the corporate limits. However, as in Arizona, agreements regarding land in the unincorporated areas do not take effect until the area is annexed. Development agreements must be approved by ordinance or referendum after public hearings by the planning agency and the legislative body, and they may be amended or

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660 Cal. Gov’t Code §65865.
canceled by mutual consent of the parties. Since the agreement runs with the land, it must be recorded once approved. The agreement is governed by the land-development regulations in place when the agreement was executed, but amendments that are not contrary to the regulations at time of execution may be applied. If an agreement is contrary to subsequent state or federal laws, it may be amended to be placed into compliance with those laws. Development agreements are enforceable by all parties thereto. There must be periodic review, at least annually, of the developer’s performance under the agreement. Failure of the developer to comply in good faith can result in termination or modification of the agreement.

Florida’s authorizing statute on development agreements is similar to California’s. Local governments may enter into development agreements, which must be consistent with a state-approved comprehensive plan and the land development regulations thereunder. Approval or revocation of an agreement must be preceded by two public hearings, at least one of which must be held by the local legislative body. The agreement may not last for more than ten years, and may be rescinded or amended by consent of the parties or when the agreement is inconsistent with a subsequent state or federal law. A development agreement is governed by the land development regulations in place at its execution. Subsequent regulations and amendments may be applied only if they are: (1) not contrary to the regulations at the time of execution, (2) are “essential to the public health, safety, or welfare” and specifically state their applicability to development agreements, (3) are provided for in the agreement, or (4) the agreement “is based on substantially inaccurate information provided by the developer.” The agreement may be enforced by any party in civil

661 Cal. Gov’t Code §§65867 - 65868.
662 Cal. Gov’t Code §65868.5.
663 Cal. Gov’t Code §65866.
664 Cal. Gov’t Code §65869.5.
665 Cal. Gov’t Code §65865.4.
666 Cal. Gov’t Code §65865.1.
669 Fla. Stat. §163.3225.
courts by injunction, and, since the agreement runs with the land, must be recorded. Periodic review, at least annually, of the developer’s performance under the agreement is required, a report of the review must be made to the state land planning agency for reviews conducted after the fifth year of the agreement, and a finding of noncompliance by the developer can result in modification or termination of the agreement.

**Hawaii** has a development agreement statute that is also similar to that of California. Counties may enact an ordinance authorizing the county executive to enter into agreements with developers concerning the development of their land. Other governmental units including federal agencies may also be parties. Such agreements must be consistent with the county’s general plan and other applicable development plans, and will not take effect until approved by the county legislative body after a public hearing. They must identify the land that is the subject of the agreement and set a termination date, which may be extended by mutual agreement. The agreement is subject to the land use laws and regulations in place when the agreement was executed, except that amendments to laws and regulations of general application may be applied if “failure to do so would place the residents ... in a condition perilous to the residents’ health or safety.” Development agreements are enforceable by the parties and their successors in interest, and thus must be recorded. Periodic review of the developer’s performance under the agreement is mandated, and the agreement may be terminated for a material breach, but only after the developer has been notified of the breach and provided a reasonable period to cure the breach.

**Idaho** has a relatively simple law on development agreements. Local governments may enact ordinances requiring developers to “make a written commitment concerning the use or development of the subject parcel” and prescribing procedures and criteria for such commitments.

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672 Fl. Stat. §§163.3239, .3243.

673 Fl. Stat. §163.3235.


commitment must be approved by ordinance amending the zoning ordinance, and must be recorded; it is enforceable on the signatories to the agreement whether recorded or not, but may bind subsequent owners only if recorded or if that owner has actual notice of the commitment. A commitment may be amended only by ordinance after notice and hearing, but may be terminated if the local government finds that the developer has not complied with the commitment.

Maryland grants local governments the power to enter into “development rights and responsibilities agreements” with developers of land within their jurisdiction. Other governmental units may also be parties to such an agreement. The agreement must be consistent with the comprehensive plan, and cannot be adopted without first holding a public hearing. The agreement must state the legal description of the property in question, the names of all owners of the property, and the duration of the agreement, and may include a schedule for the commencement and completion of development. No agreement may last for more than five years. Agreements may be amended by mutual consent after a public hearing and approval of the legislative body, and may be terminated either by consent or by the local government alone if it finds that “suspension or termination is essential to ensure the public health, safety, or welfare.” The agreement is governed by the land use laws and regulations in place at the time of its execution, except that subsequent amendments to generally applicable laws necessary to protect health or safety may be applied. An agreement is void unless recorded, and recordation renders the benefits and burdens of the agreement applicable to successors in interest.

Like many development agreement statutes, Nevada’s law also provides that development agreements are governed by the land development regulations in place at the time of execution of the agreement, except for amendments that are not contrary to the terms of the agreement. The agreement must be approved by ordinance of the local legislative body, a copy of which must be recorded at the state capital, but only if the agreement is consistent with the master plan. The agreement itself must be recorded within a reasonable time after approval, and recordation binds the parties and their successors in interest. The agreement may be amended or canceled, after public notice of the intent to amend or cancel, by mutual consent (with approval of the legislative body) or if a periodic review of performance under the agreement, conducted at least once every two years, shows that the agreement is not being complied with.

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ELEMENTS OF THE MODEL STATUTE

Section 8-701 below presents a statute authorizing development agreements. One of the most important characteristics of the Section is that a development agreement constitutes a land development regulation. As such, it must be consistent with the local comprehensive plan, cannot be adopted without a public hearing after due notice, and must be reviewed at least every five years. Additionally, the Section requires that a local comprehensive plan be adopted before a development agreement may be formed. This is necessary because another provision of the Section (paragraph (4)) allows development agreements to vary from otherwise-applicable land development regulations, so that flexibility and innovation are possible. Therefore, the only guidance or limitation on a development agreement are the goals and policies of the comprehensive plan (and the model Section, of course).

Under Section 8-701, a development agreement is also a development permit to the extent that it is self-executing; that is, when the agreement directly authorizes development, without a need for a separate development permit to be issued. Therefore, a development agreement creates a vested right in the development it expressly authorizes, and the agreement is governed by the land development regulations in effect at the time the land owner formally applied to the local government to form a development agreement. Furthermore, the agreement is fully enforceable by both the governmental parties and the owners or developers of the land. A development agreement that is also a development permit “runs with the land” to the benefit and burden of future owners of the subject property, and as such must be recorded.

The proper procedure for enforcement by governmental parties is through the procedures of Chapter 11, which may include an administrative enforcement action, while private parties may seek compliance through a civil action. However, if either procedure has already been commenced and is still pending, all further enforcement action or legal challenges have to proceed in that forum regardless of who commences it. For example, if there is a pending administrative enforcement action, legal challenges by private parties to the agreement have to be brought there and not in civil court. The Section also authorizes mediation or arbitration clauses in development agreements but preserves full judicial review once such procedure is exhausted.

Under this model, a development agreement may be terminated in advance of its agreed-upon duration by one of two methods: (1) the parties may all consent in writing to rescind the agreement, effective when the local legislature approves the recission by ordinance; or (2) the local government may unilaterally terminate the development agreement if it finds in a hearing, after due notice, that public health or safety would be endangered by development under the agreement. However, the local government may not apply this public health and safety provision if it knew of the danger at the time the agreement was approved.
(1) A local government may enter into and adopt agreements concerning the development and use of real property within the local government’s jurisdiction with the owners of such property, and with other governmental units with jurisdiction, pursuant to this Section.

(2) The purpose of this Section is to:

(a) provide a mechanism for local governments and owners and developers of land to form agreements, binding on all parties, regarding development and land use;

(b) promote innovation in land development regulation by allowing local governments to form agreements with owners and developers of land that include terms, conditions, and other provisions that may not otherwise be authorized under this Act;

(c) promote stability and certainty in land development regulation by providing for the full enforceability of such agreements by both the local government and the owners and developers of land; and

(d) provide a procedure for the adoption of such agreements that ensures the participation and comment of the public and elected officials.

(3) As used in this Section, and in all other Sections of this Act where “development agreements” are referred to, “Development Agreement” means an agreement between a local government, alone or with other governmental units with jurisdiction, and the owners of property within the local government’s jurisdiction regarding the development and use of said property.

(4) A development agreement may be entered into and adopted only pursuant to this Section and shall have the force and effect of a land development regulation.

(a) Except as provided expressly to the contrary in a development agreement, development and use of the property that is the subject of a development agreement shall occur according to the terms, conditions, and other provisions of the agreement, notwithstanding any land development regulations and amendments thereto to the contrary.

(b) Where the development agreement does not include any term, condition, or other provision concerning a matter that is regulated by one or more land development regulations as amended, then those land development regulations shall apply.

(5) To the extent that a development agreement, by itself and without further hearing or approval, authorizes development, it constitutes a development permit. A development agreement that constitutes a development permit shall be:
(a) binding upon and enforceable by the local government and all subsequent owners of the property that is the subject of the agreement, for the duration of the agreement; and

(b) recorded, by the owner or owners that are party to the development agreement, with the county [recorder of deeds] within [30] days of its adoption.

(6) A development agreement shall:

(a) be entered into and adopted only after the local government has adopted a local comprehensive plan that includes the elements required by Section [7-202(2)];

(b) be consistent with the local comprehensive plan, pursuant to Section [8-104];

(c) be adopted only by an ordinance of the legislative body after notice and hearing as required for the adoption of land development regulations pursuant to Section [8-103];

(d) be enforceable by the local government and other governmental units that are party to the development agreement in the same manner as a land development regulation pursuant to Chapter 11 of this Act, except that if a civil action pursuant to subparagraph (6)(e) below has previously been commenced and is still pending, any and all enforcement or disputes shall be determined in the civil action;

(e) be enforceable by the owners of land who are party to the development agreement and their successors in interest by civil action against the local government or other parties as may be necessary, except that if an enforcement action upon the development agreement pursuant to Chapter 11 of this Act has previously been commenced and is still pending, any and all enforcement or disputes shall be determined in the enforcement action;

(f) be in writing and include the following terms:

1. the names of all parties to the development agreement;

2. a description of the property that is the subject of the development agreement;

3. a statement detailing how the development agreement is consistent with the local comprehensive plan;

4. the date upon which the owner applied to the local government to form a development agreement;
The date when the owner applied to form a development agreement would be the date of application for vested rights purposes, if the agreement constitutes a development permit.

5. the effective date of the development agreement;

6. the duration of the development agreement, which shall not exceed [5] years except where the development agreement authorizes phased development, when the duration of the agreement shall not exceed [10] years;

7. a reiteration in full of the provisions of paragraph (7) below;

8. a reiteration in full of the provisions of subparagraphs (6)(d) and (e) above, and any other agreed terms concerning enforcement, including any agreement to submit disputes to arbitration or mediation before resorting to commencement of an enforcement action or civil action;

(7) A development agreement may be canceled at any time:

(a) by the mutual written consent of all parties thereto, with the consent of the legislative body by ordinance; or

(b) by the local government if it finds in writing, after a hearing with proper notice, that a hazard, unknown to the local government at the time the development agreement was adopted, exists on or near the property that is the subject of the development agreement that would endanger the public health or safety if development were to commence or proceed pursuant to the development agreement.

(8) A development agreement may contain a mediation or arbitration procedure by which disputes concerning the development agreement may be decided. The decisions reached under such procedure shall be considered land-use decisions for purposes of Chapter 10, and any provision in a development agreement precluding or limiting judicial review pursuant to Section [10-601] et seq., once a mediation or arbitration procedure has been exhausted, is void.

A broad arbitration clause, restricting judicial review, is typical in contracts but not desirable in development agreements. Development agreements arise out of a regulatory relationship unlike the typical contractual relationship and can directly affect persons and groups beyond the parties to the agreement.