

# Growing Smart<sup>SM</sup> Legislative Guidebook

*Model Statutes for Planning and the  
Management of Change*

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General Editor

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## PREFACE

### Two Futures

Picture two metropolitan regions of the United States in the not-so-distant future. Each once had the same resources--water, air, land, and people--but a quick glance reveals that each took different paths in the latter part of the twentieth century.

In one region, the features that had once made it attractive are rapidly vanishing. The region's central city, which formerly prospered with an active downtown, strong manufacturing base, and vibrant neighborhood network, is now experiencing disinvestment. Its residents, at least those who remain, are disproportionately poorer and older, and their neighborhoods are not being renewed with younger families and new or rehabilitated housing. The aging suburbs that circle the city have also begun to experience similar patterns of disinvestment. However, the threat of blight and decline is even more ominous here given that they have fewer financial resources than the central city due to a stagnant tax base and are unable to cope with changing demands for services and the need to maintain streets, parks, and sewers.

The region's outlying suburbs lie in what was once a rich and productive agricultural belt, with small independent towns of distinct and diverse qualities. But the agricultural land is quickly disappearing; the small towns have evolved into a characterless blur on the region's landscape with homogeneous commercial strips. The region has reached a point where every place looks like every other place. Visual blight from excessive and inappropriate signage abounds. The residents who had moved to these areas complain that the very attributes that had first drawn them to their communities are fading. Commuting delays grow longer and longer, and no matter how many fixes are made to the expressways, nothing helps to ease the congestion. Families and friends have less time to spend together, and citizens have limited opportunities to participate in community life.

Of course, a few communities in the outlying areas always seem to capture the prestigious office parks and shopping malls, and, consequently, they have low property taxes and very good public services. The rest, however, struggle to keep up with the demands of growth and financing shortfalls. Hoping to attract a large commercial or industrial development, they mortgage their future by offering tax incentives they cannot afford and zoning waivers that will destroy their landscape and community character. Service businesses in these outlying areas cannot entice employees because there is no affordable housing nearby and transportation from the central city and the inner-ring suburbs is infrequent, expensive, and inconvenient. School teachers and police officers in these communities complain that they cannot afford to live near where they work. They face long, time-consuming trips by automobile across the region to reach their jobs.

The natural environment is not much better. Development has been permitted in areas that periodically flood. Repeated damages from flooding threaten to drive out small businesses, creating an economic climate of apprehension and instability in a number of the region's communities. The wetlands and open spaces that had once been so prominent in the region and provided refuge for birds, fishes, and rare plant species are being filled and developed. Forested stream corridors are being denuded. There has been talk about purchasing these lands for a greenbelt system, but the elected officials in the region worry about the costs of acquisition and the loss of property taxes from

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denying development, so the idea is shelved.

### **Are We Growing Smart?**

The seismic aftershocks of explosive growth have registered in the American hinterlands--in distant wilderness preserves, wildlife refuges, and parks; in deserts, prairies, forests, and mountain ranges; and in the agricultural communities and rural horizons that once defined the American experience. The vast American countryside, the fountainhead of national myth, memory and identity, is beginning to lose its distinctiveness.

For many people today, dissatisfaction goes beyond physical change in the landscape and the attendant costs. They are searching for roots, a sense of place, a sense of community. Their discontent may stem from economic uncertainties or reflect unease about the nature and pace of change generally. Their anxiety may be sparked by an influx of newcomers, incidents of street crime, maddening traffic jams, or deteriorating schools. It must seem to some Americans that they have lost control of their communities, maybe even their lives. Many undoubtedly yearn to recapture from the past a seemingly simpler time, with tranquil suburbs or thriving friendly urban neighborhoods. . . .

[It is not] inevitable that the country be locked into the rising costs of extending public facilities or of providing disaster relief because of inefficient land use patterns that do not respect natural forces, especially the flow of water. Rather than treating land as an afterthought incidental to the quality of life, Americans should recognize that land stewardship--promoting efficient use of the land and rational decision making about its use--is central to realizing their desires for a strong economy, a healthy environment, and livable communities. This concern readily cuts across political lines, uniting all Americans who can about the future of their country.

H.L. Diamond and P.F. Noonan, eds., *Land Use in America* (Washington, D.C.: Island Press, 1996), 1, 3-5.

In the second metropolitan region, it is a different story. The region's governments pride themselves on their willingness to cooperate with one another, plan for the general good, and offer their citizens opportunities to participate collaboratively in civic life. These characteristics give the region an international reputation and delegations from other states nationwide and even other countries regularly visit to learn from its successes. The planning for the region is animated by a strong set of commonly held values by the area's citizens and a vision of where the region wants to be in 20 years.

The central city and the inner-ring suburbs work together to prevent the area from slipping into decline. They continue to be vibrant communities, with bustling, diverse neighborhoods. They experience cycles of renewal and rebirth involving housing, retail businesses, and start-up companies. Because the region's leaders had agreed some years before to share tax revenue on a metropolitan basis, businesses have located where people can get to them easily, and no local government feels pressured to accept a business

at a site that is not optimal or on terms that are not in the public interest, or to annex land only for tax ratables.

The federal government had given the region the opportunity to decide its own transportation destiny, to make decisions on where transportation dollars would be spent. As a consequence, the region's leaders had the foresight to opt for a transportation system that offers people many

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alternatives to automobiles, rather than just one or two. Mass transit, many believed, could be quicker, cheaper, and safer than automobiles, and an increasing number of people now leave their cars parked at home. The transportation system is now linked together, and it is possible to cross the region rapidly, moving from train to bus without significant delay. One environmental consequence of reduced auto travel is that the air has become cleaner and fresher.

The region's leaders also initiated a long-range plan to purchase, in advance of development, environmentally significant parcels containing wetlands, steep slopes, stream corridors, and natural habitats. This series of greenways form a continuous recreational and open space link within the region. Bike paths have been constructed through and alongside the greenway system, and as a result, the greenways double as transportation corridors. Because the region has taken steps to direct development away from flood-prone areas, its communities do not have to expend funds to clear up flood debris and repair public facilities. Scenic viewsheds have been identified, mapped, and protected.

Growth has been carefully planned in the region to avoid prime agricultural lands, which benefit from a comprehensive farmland preservation program that relieves the pressure to develop them. The villages in the region's outskirts remain freestanding and retain their distinctive rural character.

The region's leaders have recognized an obligation to ensure that affordable housing is dispersed across the metropolitan area to provide opportunities for all and are taking active measures to guarantee that an adequate supply is built. In this way, teachers, police officers, bank and grocery clerks, waiters and waitresses, and people with other low- and moderate-wage jobs can live within reasonable distances of their employers.

### **NEW TIMES, NEW TOOLS**

These scenarios describe two contrasting environments in contemporary American life. In the first, the set of problems facing the metropolitan region is exacerbated by the local governments' inability to work towards shared goals and the lack of advanced and coordinated planning. In the second, while local governments maintain their independence but cooperate with each other on matters of multi-jurisdictional importance, the region's leadership is able to employ planning early on to systematically address the management of growth and change.

The two scenarios represent some of the choices that leaders and citizens must make to appropriately guide their communities and regions into the twenty-first century. Political will is necessary to confront those choices about the future. The translation of political will into solutions calls for legislation---the adoption of state statutes that will establish new planning systems and tools to adapt to new times.

### **OUR PAST**

The effort to offer new legislative solutions to manage growth and change is not itself novel. In fact, in the 1920s, as our nation's urban areas underwent a surge of growth, far-sighted urban experts and federal officials focused their attention on creating enabling legislation for planning and land-use controls. They believed that, if urban areas had the proper grant of power from their state legislatures, they could create tools to grapple with the social and environmental stresses that

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afflicted the growing cities.

The realization that new powers were needed to cope with growth and change did not occur overnight. States and local governments had been experimenting with various types of planning legislation since 1910. In the 1920s, however, the process of legislative reform accelerated. Secretary of Commerce, and later President, Herbert Hoover appointed an advisory committee that drafted the *Standard City Planning and Zoning Enabling Acts*. These Standard Acts, as they were called, proved enormously popular as many states rushed to adopt legislation based on them.

When the Standard Acts were drafted, the nation was a different place than it is today. Growth was largely confined to central cities and the few suburbs that had commuter train lines. While control of air and water pollution, noise, and industrial hazards was always a factor in urban areas and prompted the adoption of many early land-use regulations, appreciation of the complex interactions of ecological systems--and the human impact on those systems--was still in its infancy.

The post-World War II period, with the vast changes in the shape and complexity of metropolitan areas, tested the structure the Standard Acts provided. Prior to the automotive era, development had spread out radially along a series of public transit lines that brought workers into the central areas during the day. With the advent of the automotive era, development began to fill in vast open spaces between those transportation spokes. Growth shifted outward from the central city to rural areas in ways that would have profound effects on the way cities and towns look. The political and social climate of the period supported financial incentives for building homes in the suburbs (through federally insured low-cost mortgages) and a massive federally-subsidized expansion of highways that included the interstate system. Together they helped pushed development far beyond the nation's central cities.

At first, Americans tended to fantasize about an idyllic existence in these newly developed suburban communities. The new communities had unquestionable attractions--large yards, garages, new schools, safe streets, and a frontier-like sense of promise. Relatively few people seriously challenged this new pattern of growth in the outlying areas or questioned the changes in the central cities wrought by urban renewal and the replacement of older urban neighborhoods with multi-lane freeways. While a few cities responded by experimenting with metropolitan-level or regional forms of government, in most metropolitan areas such ideas got a cool reception.

In the metropolitan areas with characteristics similar to the one described in the first scenario above--and there are many of them--there is a growing appreciation that something is wrong with the way things have turned out. Some persist in believing that the solution to the problems of metropolitan growth, decline, and change is to continue to expand outward to the next tier of open land, striving to remain one jump ahead. But more and more people are acknowledging the social, economic, and environmental costs of pushing ever-outward and the need for more effective planning to respond to changing needs of a region's population. They are asking whether there are better, more action-oriented planning models that are attuned to the realities of today . . . and tomorrow.

### **WHY IS IT IMPORTANT TO REFORM PLANNING ENABLING LEGISLATION?**

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The planning approaches of the 1920s are incapable of meeting the challenges of the twenty-first century. There are at least four reasons for this deficiency:

(1) **A more significant intergovernmental dimension for planning.** In the 1920s, government was simpler, and there were fewer governmental units. Planning was a local activity, not something that was expected of all levels of government. Indeed, the role of the federal and state governments in shaping our urban and rural areas ranged from minimal to nonexistent. Beginning in the 1950s, the federal government created programs addressing transportation, environment, and other functional areas that had statewide or regional significance. Increasingly, the federal government devolved or placed greater responsibility on the state and local governments for making transportation, environmental, and public facilities planning decisions when federal monies were involved. Moreover, the repercussions of decisions on developments whose impacts spill over jurisdictional boundaries are no longer ignored. States recognized this concern and state legislatures responded. In some parts of the country, states now take an active role in managing this intergovernmental dimension to ensure uniformity, fairness, and the advancement of state interests.

(2) **A marked shift in society's view of land.** People no longer believe, as they did in the nineteenth century, that land is something merely to be bought and sold. We now also regard land as a resource. Where we once encouraged the filling in and development of swamps, we now regard those same wetlands as a vital part of nature's system of flood control and important for wildlife and their habitats that should be protected for the benefit of future generations. Where we once built without concern for scenic protection, we now value scenic beauty as an irreplaceable regional asset. We see vacant, developable land as having competing social values--it can be used for the construction of affordable housing or for the continuation of agriculture. We recognize that how we develop our land--at what density or intensity--will have consequences for the form and relative compactness of metropolitan areas, which in turn will affect how much we have to travel to conduct our lives and what consequences that has for the air we breathe.

(3) **A more active citizenry.** In the 1920s, community plans tended to be prepared by consultants working for business elites who sought little broad-based public support or involvement. What opportunities there were for citizen participation were rudimentary and perfunctory--a single public hearing after the major planning decisions had already been made. As a consequence, such plans were not often implemented. Although many planning statutes are silent on the tools and techniques of participation, citizens now expect to be engaged in community planning processes, and, when they participate, they expect to see results from their efforts. The existence of the Internet, on which plans and information about developments can be placed as part of a government's home page, also opens new options for citizen involvement.

(4) **A more challenging legal environment.** Land-use controls are being employed to solve or prevent environmental problems, maintain open space, exact public improvements for schools and roads, and preserve agricultural land. The line between protecting the public from nuisances--the focus of the 1920s--and securing public benefits has blurred over the past 70 years. In response, courts have begun to require government to compensate land owners for regulations that result in either a permanent or temporary taking of private property, that go "too far" in pushing the envelope in protecting the public health, safety, and welfare--the traditional police power objectives of land-

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use controls. Thus, the planning basis for our development decisions becomes even more significant as the justification for the regulatory and public expenditure systems it underpins.

### **THE GROWING SMART<sup>SM</sup> LEGISLATIVE GUIDEBOOK**

Our planning tools date from another era. They are shopworn and inadequate for the job at hand. Just as states and municipalities experimented with new enabling legislation and local land-use controls prior to the Standard Acts, so too since the 1970s have they begun again to refashion their planning statutes. Some states, like Florida, Maryland, Oregon, Tennessee, Vermont, Washington, and Wisconsin have already wholly or partially revamped their planning statutes in order to provide choices and tools for managing growth and change. In others, there are efforts (or least discussions) currently underway on statutory reform. This process of reexamination is not only inevitable, but it is desirable if communities are to respond effectively to change.

To help in this process of reexamination, the American Planning Association has prepared this *Legislative Guidebook*, which contains model statutes for planning and the management of change as well as commentary that highlights key issues in the use of the statutory tools by states, regional planning agencies, and local governments in their use. In the belief that there is no “one-size-fits-all,” the model statutes are presented as alternatives that can be adapted by states in response to their particular needs.

### **ARE WE UP TO THE CHALLENGE?**

Many people sense that we are caught in a race against time. We must regain control over the impact of growth, decline, and change on our quality of life. We must give people new choices concerning housing, employment, transportation, and the environment. The stakes in this quest are high. As *New Yorker* magazine writer Tony Hiss observes in his book, *The Experience of Place*:

Over the next hundred years or so, America will essentially complete itself... Most of [the nation's] future population will live in urbanized surroundings within a hundred miles of a major shoreline--the Atlantic, the Pacific, or one of the Great Lakes. The lasting shape of those late-twenty-first century surroundings will to a large extent be determined by thousands of short-term decisions we will be making during the next thirty years. This is partly because most of the remaining surge of American population growth will take place before 2020.<sup>1</sup>

Reform of planning statutes is a serious contemporary concern that affects every state, region, and community in this nation. This 2002 edition of *Legislative Guidebook* will provide the means to address that subject by offering statutory options--many from contemporary planning practice and successful state experience--to aid legislators, state and local government officials, planners, and concerned citizens confront and make reasoned, informed choices concerning just about any planning issue facing us today.

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<sup>1</sup>Tony Hiss, *The Experience of Place* (New York: Alfred A. Knopf, 1990), 221.

## PREFACE

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The future is closing in. We must work harder to make those “thousands of short-term decisions” to which Tony Hiss refers. We must grow in a *smarter* way.



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## FOREWORD AND ACKNOWLEDGMENTS

This is the 2002 edition of the *Legislative Guidebook*, a product of the Growing Smart<sup>SM</sup> project of the American Planning Association (APA). It contains model statutes, with commentary, for planning and the management of change. It is accompanied by a separately published *User Manual*, which guides the interested reader through the text and the issues of planning statute reform.

### PROJECT STAFF AND CONSULTANTS

The project has been staffed at APA in Chicago by William Klein, AICP, director of research; Stuart Meck, FAICP, principal investigator for the project and general editor of the *Legislative Guidebook*; John Bredin, attorney and research fellow; Marya Morris, AICP, senior research associate; Rodney Cobb, former staff attorney and editor of APA's *Land Use Law & Zoning Digest*; Jim Hecimovich, assistant director of research; Megan Lewis, AICP, research associate; Michael Davidson, research associate; James Schwab, AICP, senior research associate; Michelle Zimet, AICP, attorney and former senior research fellow; Dr. Gerrit Knaap, former senior research fellow. Former senior research associate Michelle Gregory, AICP, contributed to the research note, commentary, and model statutes on neighborhood planning in Chapter 7. During their terms as APA research interns Shannon Armstrong (now an APA research associate and Planning Advisory Service supervisor), Jerome Cleland (now an APA research associate); Nate Hutcheson, Kevin Krizek, Sarah Bohlen, Mary Beth McGuire, Laura Thompson, and Jason Wittenberg also assisted the project staff. The Growing Smart<sup>SM</sup> logo was designed by Richard Sessions, art and design director for APA's *Planning* magazine. Dr. Joseph Whorton, director of the Georgia Rural Development Council, served as project facilitator for meetings of the Directorate (see below). Dr. Jerry Weitz, AICP, of Jerry Weitz & Associates of Alpharetta, Georgia, was APA's consultant on the companion *User Manual* for the *Guidebook*.

A number of planners and attorneys participated in the drafting of the model statutes. Harvey Moskowitz, AICP/PP, a planning consultant from Florham Park, New Jersey, and Peter Buchsbaum, an attorney from Woodbridge, New Jersey, together drafted the initial version of the model balanced and affordable housing act in Chapter 4. Mr. Buchsbaum also drafted the initial version of the housing appeals model that appears in the same chapter. James Berry, attorney and professor of biology at Elmhurst College in Elmhurst, Illinois, wrote the areas of critical state concern model statute contained in Chapter 5. The Hon. Myron Orfield, Jr., a Minnesota state representative and attorney in Minneapolis, drafted the regional tax base-sharing model in Chapter 14. Professor Daniel R. Mandelker, AICP, of Washington University School of Law in St. Louis wrote working papers and drafted model legislation for Chapter 10, on administrative and judicial review of land-use decisions and Chapter 12, on integrating state environmental policy acts with state and local planning. Professor Mandelker also contributed substantially to the model legislation on corridor mapping in Chapter 7 and on amortization in Chapter 8.

Barbara Becker, AICP, associate professor of planning, Drachman Institute, University of Arizona, Tucson, and Susan Bradbury, associate professor of planning, Eastern Washington

## FOREWORD AND ACKNOWLEDGMENTS

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University, Spokane, were the principal drafters of the state telecommunications and information technology plan statute in Chapter 4 and the telecommunications component statute and Chapter 7. Patricia Salkin, director of the Government Law Center at the Albany Law School in Albany, New York, drafted an initial version of the public participation procedures and public hearings provisions for local comprehensive planning that appear in Chapter 7. Jon Witten, AICP, an attorney and environmental planning consultant in Sandwich, Massachusetts, drafted both the critical and sensitive areas element and the agriculture and forestry preservation element as well as most of the supporting commentary for the two statutes, which appear in Chapter 7. Witten also drafted the initial version of the critical and sensitive areas/natural hazards overlay district authorization statute in Chapter 9.

Laura Hood Watchman, a conservation biologist with Defenders of Wildlife in Washington, D.C. and Caron Whitaker, smart growth and wildlife coordinator with the National Wildlife Federation of Reston, Va. drafted the initial commentary and statute for the state biodiversity conservation plan in Chapter 4.

Students from IIT Chicago-Kent School of Law and the Washington University School of Law in St. Louis assisted in the preparation of a 50-state summary of planning statutes. The summaries are available on diskette upon request at APA's web site ([www.planning.org](http://www.planning.org)). Chicago-Kent law students included: Jane Banaszak; Ann Bloss; John Bredin; Patrick Cassidy; Joshua Gubkin; George Hoffman; James Mata; Mark O'Meara; Laurie Altpeter O'Sullivan; Yanick Polycarpe; Janet Stearns; and Joel Sternstein. Washington University's law student was Ann White. A special mention should be made of Theresa Kenders, a former legal intern with APA and an attorney in Elgin, Illinois, who edited the statutory summaries and drafted initial versions of the model statute on siting state facilities in Chapter 5.

### DIRECTORATE

A project Directorate, consisting of representatives of national organizations and representatives for the built and natural environments and local government law, plus APA, advised the project team. The practical counsel of Directorate members was invaluable in guiding the project. Operating under a charter—a set of bylaws for its operation—and working by consensus, the Directorate met 13 times during the course of the project (from 1995 to 2001) to review and suggest changes, including alternatives not previously considered, in drafts of Chapters of the *Legislative Guidebook* and other work products. Directorate members also reviewed proposals and comments on the project materials from organizations and persons not represented on the Directorate but affected by legislative reform. Membership on the Directorate, however, does not imply or mean endorsement of any aspect of the Growing Smart<sup>SM</sup> project; each member organization retains its right to act independently with respect to any proposal contained in the *Guidebook*. **The APA Board of Directors has stated that the *Guidebook* is a research product and does not necessarily represent the policy of the APA, unless specifically identified as such in a policy guide or other Board action.**

Present and former members (who are noted by an asterisk) of the Directorate include, by

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organization:

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### **Council of Governors' Policy Advisors**

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### **Council of State Community Development Agencies**

John Sidor,\* executive director, Washington, D.C.

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### **National Conference of State Legislatures (NCSL)**

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John Epling,\* AICP, former executive director, NARC

### **National Association of Towns and Townships**

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### **National League of Cities**

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### **Member-at-Large for Local Government Law**

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Benjamin Brown,\* Attorney, Baltimore

### **Member-at-Large for the Natural Environment**

James McElfish, senior attorney, Environmental Law Institute, Washington, D.C.  
William Futrell,\* president, Environmental Law Institute, Washington, D.C.

### **ACKNOWLEDGMENTS**

Many individuals critiqued chapter drafts or provided advice during the course of the project. Their suggestions notably improved the quality, scope, and utility of the *Legislative Guidebook*. They include: Deborah Bassert and Robert McNamara, AICP, planners, and Michele LeFaivre, staff counsel, with the National Association of Home Builders, Washington, D.C.; Gus Bauman, attorney, Washington, D.C.; John Delaney, AICP, attorney, Silver Spring, Maryland; Bruce McDowell, AICP, now-retired director of governmental policy research, U.S. Advisory Commission on Intergovernmental Relations, Washington, D.C.; Irving Hand, AICP, professor of planning emeritus, Pennsylvania State University, Harrisburg; Teree Bergmann, AICP, planning director, Columbus, Ind.; Mark Wyckoff, AICP, president of the Planning and Zoning Center, Inc., Lansing, Mich.; Arnold Cogan, AICP, a planning consultant in Portland, Ore.; Mitch Rohse, AICP, communications

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<sup>2</sup>The National Governors Association removed itself from the Directorate in April 2001.

## FOREWORD AND ACKNOWLEDGMENTS

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manager for the Oregon Department of Land Conservation and Development in Salem; A. Dan Tarlock, professor of law, IIT-Chicago Kent School of Law; Fred Bosselman, AICP, professor of law, IIT Chicago-Kent School of Law; Ronald Levin, professor of law, Washington University School of Law; Brian Ohm, assistant professor of urban and regional planning, University of Wisconsin, Madison; Clyde Forrest, AICP, professor of urban and regional planning, University of Illinois at Champaign-Urbana; Brian Blaesser, attorney, Boston; Linda Cox, AICP, program officer, Lila Wallace/Reader's Digest Fund, New York City, and former director, Planning Center, Municipal Art Society, New York City; Horace Brown, AICP, retired undersecretary of the comprehensive planning division, Connecticut state office of policy and management, Manchester, Conn.; Gary Johnson, professor and director of urban studies and planning at Virginia Commonwealth University in Richmond; Marina Pennington, community program administrator, Florida Department of Community Affairs, Tallahassee; Mark Pisano, executive director, Southern California Association of Governments; Nancy Stroud, attorney, Boca Raton, Florida; Edward Kaiser, AICP, professor of planning, University of North Carolina at Chapel Hill; and David Godschalk, AICP, professor of planning, University of North Carolina at Chapel Hill.

The National Association of Regional Councils appointed a committee that reviewed drafts of chapters and offered helpful perspectives. The committee included: Howard Maier, AICP, executive director, Northeast Ohio Areawide Coordinating Agency, Cleveland; Robert Shepherd, executive director, Land-of-Sky Regional Council, Asheville, N.C.; Floyd Villines, Pulaski County judge, Little Rock, Ark.; and William Wagner, executive director, Oregon Cascades West Council of Governments, Albany.

Others providing comment include: Rick Pruetz, AICP, planning consultant; Constance Beaumont, Paul Edmonson, Esq., Julia Miller, Esq., and Leslie Tucker, Esq. of the National Trust for Historic Preservation; Joseph Molinaro, AICP, and Joe Maheady, of the National Association of Realtors<sup>SM</sup>; a coalition of groups including Defenders of Wildlife (Laura Watchman), Natural Resources Defense Council (Deron Lovaas), National Trust for Historic Preservation (Constance Beaumont), National Wildlife Federation (Caron Whitaker), Scenic America (Meg Maguire), Sierra Club (Melody Flowers), and the Surface Transportation Policy Project (David Burwell); a coalition of groups from the National Association of Industrial and Office Properties (Thomas Bisacquino); the National Multi Housing Council (Douglas Bibby), the Self Storage Association (Michael Kidd), and the American Road and Transportation Builders Association (T. Peter Ruane); and Ellen Greenberg, AICP, of the Congress for the New Urbanism.

### WORKING PAPER AUTHORS

APA was fortunate to have a brilliant and passionate group of planners, academics, and attorneys who wrote working papers for the project. The papers have been published in two volumes, *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: APA, March 1996) and Volume 2, Planning Advisory Service Report No. 480/481 (Chicago: APA, September 1998). The papers suggested alternate conceptual approaches to planning statute reform and were incorporated into the commentary in the *Legislative Guidebook*.

## FOREWORD AND ACKNOWLEDGMENTS

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Authors who contributed papers to Phases I and II included: Peter Buchsbaum; Deborah Johnson; Dan Mandelker; Peter Salsich; and Patricia Salkin.

Other working paper authors for Phase I included: James Berry; David Callies; John DeGrove; AICP, John Delaney, AICP; Clyde Forrest, AICP; Robert Freilich, AICP; Stephen Galowitz; Gloria Jeff; AICP; Jay Hicks, AICP; Robert Lincoln, AICP; James McElfish, Jr.; William Futrell; Harvey Moskowitz, AICP; John Nolon; the Hon. Myron Orfield; Douglas R. Porter, AICP; Mitch Rohse, AICP; Nancy Stroud; S. Mark White; and the late Norman Williams, Jr., AICP, professor of law, Vermont Law School in South Royalton, whose writings on American planning law have inspired us all.

The working paper authors for Phase II included: Barbara Becker, AICP; Phillip Berke; Brian Blaesser; Scott Bollens; Susan Bradbury; Frank Costa; Charles Connerly; Leo Estrada; David Godschalk, AICP; Deborah Johnson; Edward Kaiser, AICP; Gerrit Knaap; Michael Marshall; Catherine Preston; Tovah Redwood; Brian Sommers; Gail Gordon Sommers; Ralph Stone; and Jerry Weitz, AICP.

Working paper authors for Phase III include: Professor Michael Addonizio of Wayne State University (whose working paper is summarized at the end of Chapter 14); Deborah Bassert; Nancy Benzinger Brown, AICP; Robert McNamara, AICP, and Douglas Porter, AICP. The working papers for Phase III will be included in a PAS Report in 2002, after the publication of the *Guidebook*.

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American Planning Association

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## FOREWORD AND ACKNOWLEDGMENTS

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William R. Klein, AICP  
Director of Research, APA

Stuart Meck, FAICP  
Principal Investigator

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## INTRODUCTION

# MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE

This *Legislative Guidebook* contains model statutes for planning and the management of change. The statutes are intended as an update to and rethinking of the *Standard City Planning and Zoning Enabling Acts* drafted by an advisory committee of the U.S. Department of Commerce in the 1920s (“Standard Acts”), and the American Law Institute’s *A Model Land Development Code* (1976), as well as other model statutes.

Wherever possible, the *Guidebook* presents alternative approaches to drafting statutes. Commentary typically precedes the statutory models. The commentary provides background about the topic that is the focus of the statute, describes the pros and cons of the legislative alternatives, and makes suggestions concerning implementation. In places, the commentary directs the reader, through footnotes and special research notes, to relevant state and federal statutes, books, reports, and articles. The research notes detail subjects addressed by the model statutes.

The model statutes are intended to provide governors, state legislators, state legislative research bureaus, local elected and appointed officials, planners, citizens, and advocates for statutory change with ideas, principles, methods, procedures, phraseology, and alternative legislative approaches drawn from various states, regions, and local governments across the country. A number of the legislative models are composites of existing, successful statutory language; the commentary or

### Heritage of the 1920s: The Standard Acts

Most states' planning statutes are the offspring of the two model statutes drafted by an advisory committee of the U.S. Department of Commerce in the 1920s. For many states, the *Standard City Planning and Zoning Enabling Acts* still supply the institutional structure for planning (such as the establishment of planning commissions and boards of zoning adjustment or appeals), although some procedural and substantive components have changed over time.

These acts regarded planning and zoning as matters of purely *local* and, more particularly, *urban* concern. The acts were intended to provide clear delegation of the state’s police power authority to local government, which is the fundamental reason enabling legislation exists. They were also intended to preserve private property rights and to protect cities against slums, blight, congestion, and loss of amenities.

Their drafters also wanted to ensure that private investments and the value they produce could be protected from nuisances and other incompatibilities from neighboring properties. They also wanted to establish a uniform national framework of planning and zoning that could survive challenges in state and federal courts.

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research notes will indicate the source for further reference.

Users of the model statutes should be aware that the structure of government and the names of governmental units may differ from state to state; a term such as “municipality” may mean, variously, “borough,” “town,” or “village” in different states. Further, states may distinguish among classes of local government by granting a broader array of powers to those governmental units in higher classes, and the planning legislation may need to be adjusted to correspond to this distribution of powers.

### HOW THE GROWING SMART<sup>SM</sup> STATUTES WERE DEVELOPED

APA developed the model statutes in conjunction with a project Directorate, an advisory group that has included representatives of national public interest organizations and of various affected constituencies, and APA staff. Directorate members met 13 times from 1995 to 2001 to review each of the *Guidebook* chapters. They also suggested ways in which the materials APA produced could be most helpful to their audience of elected officials and others who are actively involved in statutory reform. A number of outside planners and attorneys also critiqued drafts of chapters contained in the *Guidebook* (see Foreword and Acknowledgments).

APA also commissioned working papers from national experts on various aspects of statutory reform. These working papers formed the conceptual foundation for some of the approaches that APA used. In several cases, parts of the working papers were incorporated into the commentary that accompany the statutes. The papers have been published separately in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service (PAS) Report No. 462/463 (March 1996) and *Vol. 2*, PAS Report No. 480/481 (September 1998). A final set of working papers will be published as a PAS report in 2002.

To prepare the model statutes, project staff reviewed virtually every statutory reform study completed by a state, federal agency or commission, or private group in the post-WWII period; an annotated bibliography of these studies is available upon request from APA. In addition, a 50-state statutory summary was completed with the assistance of law students at Chicago-IIT Kent School of Law in Chicago and Washington University School of Law in St. Louis. The summary enabled APA to identify innovative statutes and provisions and to incorporate them into the model statutes. This statutory summary is available on diskette and APA’s Internet site: <http://www.planning.org>, where the annotated bibliography may also be found.

### STATEMENTS OF PHILOSOPHY THAT GUIDE GROWING SMART<sup>SM</sup>

There is a philosophy that guided the drafting of the Growing Smart<sup>SM</sup> model statutes that evolved through suggestions from the Directorate members and others. There are 11 elements to this philosophy:

(1) **There is no single, “one-size-fits-all” model for planning statutes.** As APA began to research planning statutes, it quickly became apparent that states were increasingly shaping their statutes to address problems that were unique to their circumstances. Consequently, the model statutes had to be drafted to give users alternative ways of approaching planning issues. These alternatives have been developed along a continuum that takes into account the degree of planning

## Factors to Consider in Reforming Planning Statutes

- The political perspective that finds current regulations cumbersome and complex, and questions the need for new regulation
- The fiscal impacts of development decisions on local government
- The capacity of local government to design and implement planning systems
- Ongoing problems of housing affordability, lack of housing diversity, traffic congestion, environmental degradation, and exposure of life and property to natural hazards
- Increased sensitivity to the operation of the private market
- The obligation to promote social equity--the expansion of opportunities for betterment, creating more choices for those who have few--in the face of economic and spatial separation
- Encouragement of compact development patterns to conserve resources
- The need to quantify and offset impacts of development that go beyond the borders of one jurisdiction
- The challenge of managing growth in undeveloped and developing areas while encouraging reinvestment in older areas that are not growing

required and graduated levels of state or regional intervention. This continuum is discussed in detail in Chapter 2, Purposes and Grant of Power, and is summarized here:

*Planning permissive only.* Legislation that permits, but does not mandate, planning that is purely advisory.

*Planning encouraged with incentives.* Legislation that encourages planning by authorizing supplemental powers, such as the enactment of development impact fees, to local governments that prepare and adopt plans.

*Planning required with sanctions.* Legislation that mandates planning by local governments. Under this alternative, a government could not exercise regulatory and related powers unless it has adopted a comprehensive plan that satisfies statutory criteria. Such planning would ensure that parts of an individual plan relate to, or do not conflict with, one another, and are prepared with the same assumptions.

*Completely integrated planning system.* Legislation that mandates a state-regional-local planning system that is integrated and both vertically

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and horizontally consistent. Vertical consistency is the concept that regional and local plans be consistent with state plans and vice-versa. Horizontal consistency calls for neighboring local governments to ensure that their plans do not conflict with one another.

From this array of choices, a state can strike a balance between local self-determination and increasing state and regional involvement. The alternatives enable a state to make choices knowing some of the likely long-run consequences and trade-offs of each decision.

The model statutes include other internal options as well. For example, they may describe a certain type of plan in several different ways, depending on how directive the plan is intended to be. Or, they may offer choices in the manner in which the plan is to be adopted. APA has prepared a separate user manual for the *Guidebook* to show how to link the components of the model legislation together to achieve various policy alternatives.

**(2) Model statutes should provide for planning that goes beyond the shaping and guidance of physical development.** Reflecting the influence of the Standard Acts of the 1920s and their progeny, much contemporary planning emphasizes the improvement of the physical environment. Increasingly, however, states, regional agencies, and local governments are engaging in a broader type of planning that expressly deals with social and economic issues. For example, APA reviewed a selection of state plans as part of the preparation of Chapter 4, State Planning. It found that a number of states had developed plans to address job creation, natural disasters and hazards, education, tourism, emergency management, government efficiency, and public safety. Other states are involved in processes intended to devise a broad-brush vision of the future, and only parts of that vision relate to the physical environment. These approaches go well beyond the traditional view of planning as relating only to the development of land and should not be ignored in drafting model statutes.

**(3) Model statutes should build on the strengths of existing organizations that undertake and implement planning.** Some planning statute reform efforts have been intentionally linked to the creation of new planning organizations. Proper planning can be effective, it is argued, only through new institutions. The Growing Smart<sup>SM</sup> models do not opt for that approach, although it may be an alternative that some governments may wish to pursue. Resistance to change often occurs not because the concept is flawed, but because the creation of a new organization may necessarily threaten the authority of existing organizations.

As commentary to Chapter 6, Regional Planning, notes in another context, the organizational structure of a planning agency is usually less important than the powers and duties it has, the clarity with which the powers and duties are described in the enabling legislation, and how effectively those powers and duties are actually carried out. Thus, the model statutes consistently provide alternative ways to establish organizations that plan. In order to offer additional flexibility to planning organizations, the model statutes grant rule-making authority so that procedures can be adapted to shifting political realities. In addition, they authorize the preparation of written agreements between planning agencies and other governmental units and nonprofit organizations to provide options to the way plans can be carried out. In applying these models, the user should *first* examine the powers

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and duties of existing organizations, and should consider modifying them to reach desired outcomes, *before* endeavoring to create wholly new organizations.

### **Goals of Statutory Reform: A Checklist for What Can Be Accomplished**

- ✓ Certainty and efficiency in the development review and approval process can be improved.
- ✓ Statutes will contain a mix of carrots and sticks to promote planning.
- ✓ People affected by the planning process can be involved early in the process.
- ✓ Plans can address the interrelationships of employment, housing, fiscal impacts, transportation, environment, and social equity.
- ✓ Governments are empowered with a range of planning tools to manage growth and change locally to create quality communities.
- ✓ The timing, location, and intensity of development can be linked to existing or planned infrastructure.
- ✓ Mechanisms to monitor the ongoing performance of planning systems can be created.

(4) **Planning statute reform should not look just at regulation but also at provision of infrastructure and property taxation.** The late Norman Williams, Jr., Professor of Law at the Vermont Law School and author of the multivolume national treatise, *American Land Planning Law: Land Use and the Police Power* (1985-88), observed, in two influential articles, that there is not one system of land-use control, but rather three, with each tending to work against the others.<sup>3</sup> Williams noted that in most parts of the country, the property tax system supports major public services but does not bring in enough revenue to meet local needs. Inevitably, local officials are driven to take into account the revenue-raising capacities of various proposed land uses. This leads

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<sup>3</sup>Norman Williams, “The Three Systems of Land Use Control,” *Rutgers L. Rev.* 25 (1970): 80, 82-85; and “Planning Law in the 1980’s: What Do We Know About It?” *Vermont L. Rev.* 7 (1982): 205, 212-214.

## INTRODUCTION

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to a situation where “good ratables,” such as industrial, most commercial, and high-value residential development--which bring in significant real property taxes and require little in the way of public services--are encouraged, but “bad ratables,” such as quality affordable housing, are discouraged.

The second system concerns the impact of major public services, particularly transportation facilities, such as highway interchanges, and those for sewage collection and disposal. Williams observed that, while the construction of some facilities, such as schools, depends primarily on the type and intensity of land use in the area, other public facilities, such as water and sewers, can have such a strong influence on adjacent land use that they actually may dominate the official set of controls.

The third official system of land-use control that Williams identified is comprised of zoning, subdivision control, official mapping, and other devices. Counter-intuitively, Williams pointed out that the official system may actually be the least important. If the first two systems work to produce unbalanced development in search of good ratables or development in the wrong place due to lack of forethought and coordination, the third system, in Williams’s words, “comes out third best.”

Professor Williams’s reasoning has strongly influenced the drafting of these model statutes. Only when planning statute reform accounts for the impacts of all three systems will states, regions, and local governments be effective in shaping development patterns.

**(5) Model statutes should account for the intergovernmental dimension of planning and development control.** The "three systems" analysis described above acknowledges that planning and development decisions are affected by and affect a variety of governmental units. They include adjoining and nearby local governmental units; special districts (e.g., school, sewer, flood control, and water districts), which plan, construct, and operate facilities; and state agencies. The planning system must contain mechanisms to ensure that plans and policies that have intergovernmental consequences are reviewed and assessed in a manner that addresses their multijurisdictional impacts.

**(6) Model statutes should prescribe the substantive contents of plans.** Many existing planning and zoning enabling acts lack a good description of comprehensive and functional plans. Clear language on what constitutes a plan will eliminate any subsequent confusion over its scope and purpose. When the statute is not precise on the nature of a comprehensive plan, it is difficult for a local government to prepare the plan document. This creates inconsistencies from one plan to the next. Detailing the types of analyses that must underpin plans and describing plan elements in statutes are two ways of ensuring that thorough, systematic, and useful documents will result from the planning process.

**(7) Model statutes should anticipate the potential for abuse of planning tools and correct for it.** The drafters of the Standard Acts began to recognize, several years after the Acts were released, that many local boards of zoning appeals were overstepping their authority and granting

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variances that, in effect, amended the zoning regulations.<sup>4</sup> By then, many states had adopted the Standard Acts in one form or another and the die was cast; the legislative framework was difficult to alter. Exclusionary zoning, interminable local delays in development decisions, imposition of exactions on new developments that bear little relationship to their impact, and failure or refusal to consult with adjoining jurisdictions when preparing plans are other examples of questionable actions and abuses. They arise, in part, out of enabling legislation that does not clearly circumscribe the procedures and authority of governmental units in anticipation of the potential misuse of planning powers.

(8) **Model statutes should use familiar terminology.** Language can often be a barrier to accepting new ways of doing things. As a consequence, the model statutes in this *Guidebook* use terms that most states, regions, and local governments will recognize and accept. Where new concepts or terms are introduced, the model statutes thoroughly explain, in commentary, their origins and meaning to help the user.

(9) **Model statutes should expressly provide for citizen involvement.** The processes for engaging the public in planning are not made clear in many planning statutes. Requirements for public notice, public hearings, workshops, and distribution and publication of plans and development regulations are often improvised. Consequently, the public may find its role and the use of its input uncertain, and it may be suspicious of plans and decisions that emerge. Planning should be doing the opposite; it should engage citizens positively at all steps in the planning process, acknowledging and responding to their comments and concerns. Through collaborative approaches, planning should build support for outcomes which ensure that what the public wants indeed will happen.

(10) **Model statutes should allow flexibility in planning administration.** Not every nuance or impact of a statute's operation can be anticipated. New Jersey, for example, provided for a three-step process of "cross-acceptance" in its 1985 state planning statute. Under cross-acceptance, the state planning commission, counties, and municipalities negotiated and resolved conflicts between the state development and redevelopment plan and local plans. Yet the statute did not describe exactly what was to occur in the cross-acceptance process, leaving it to the state planning commission to develop the steps through rule-making.<sup>5</sup> This gave the state planning commission a measure of flexibility to modify the process to ensure that it was workable. Statutes should not contain very specific language providing detailed guidance for administrative or managerial decisions, such as the contents of an application form or the precise composition of all the subcommittees of a regional planning agency. These are matters for which administrative rule-making is particularly appropriate.

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<sup>4</sup>Ruth Knack, Stuart Meck, and Israel Stollman, "The Real Story Behind the Standard Planning and Zoning Acts of the 1920s," *Land Use Law & Zoning Digest* 48, no. 2 (February 1996): 3, 5-6.

<sup>5</sup>N.J.S.A. §52:18A-202.1; N.J.A.C. §17:32, Subchap. 2-5.

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(11) **Model statutes should be based on an appraisal of what has worked.** Often when states consider new legislation, they look to the experience of other states. This approach is certainly understandable and pragmatic. It saves time and can minimize surprises as to secondary and unanticipated consequences of a new initiative. Generally, this has been the approach used in drafting these model statutes. This is not to suggest, however, that innovative approaches have been necessarily rejected. Rather, it is a recognition that innovation comes about not just by a single big idea, but by constant reassessment and adjustment of how that idea is actually being carried out.

### **HIGHLIGHTS OF THE 2002 EDITION OF THE *GUIDEBOOK***

Highlights in the 2002 edition include model statutes for:

- ▶ initiating reform of planning and land-use statutes (Chapter 1);
- ▶ establishing state planning agencies and state comprehensive, transportation, economic development, and land development plans as well as ensuring state agency consistency with adopted state plans (Chapter 4);
- ▶ authorizing state and regional planning for affordable housing and the removal of regulatory barriers to it (Chapter 4);
- ▶ a state telecommunications and information technology plan (Chapter 4);
- ▶ a state “smart growth act,” based on the innovative 1997 Maryland law (Chapter 4);
- ▶ a state biodiversity conservation plan (Chapter 4);
- ▶ innovative procedures for siting controversial state facilities and for reviewing developments of regional impact (Chapter 5);
- ▶ designation of areas of critical state concern that are crucial to the environmental health of the state or represent other critical resources (Chapter 5);
- ▶ alternative organizational arrangements for regional planning agencies (Chapter 6);
- ▶ describing regional comprehensive, infrastructure, housing, and transportation plans and the manner in which they are adopted (Chapter 6);
- ▶ agreements for the purpose of providing and coordinating urban services (Chapter 6);
- ▶ different organizational structures for local planning commissions and neighborhood planning entities to ensure a broad spectrum of perspectives by citizens (Chapter 7);

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- ▶ describing local comprehensive plans (including natural hazards, telecommunications, economic development, and agriculture, forest and scenic preservation elements), transit-oriented development plans, redevelopment area plans, neighborhood plans, and ensuring early and continuous citizen participation in plan preparation (Chapter 7);
- ▶ establishment of urban growth areas on a regional or countywide basis and land market monitoring systems to ensure an adequate supply of buildable land (Chapter 6);
- ▶ state review and approval of local and regional comprehensive plans (Chapter 7);
- ▶ creation of a state comprehensive plan appeals board to hear appeals of state reviews of local or regional plans and county or regional designation of urban growth areas (Chapter 7);
- ▶ corridor maps to reserve land for future transportation improvements, benchmarking, and implementation agreements to carry out local comprehensive plan proposals (Chapter 7);
- ▶ a full suite of land development regulations, including special provisions for traditional neighborhood development, either as a zoning overlay district or as part of a planned unit development (Chapter 8);
- ▶ amortization of nonconforming uses (Chapter 8);
- ▶ development moratoria, with alternatives for different purposes (Chapter 8);
- ▶ a vested right to develop through development permit review, including alternate “bright-line” and estoppel-based models (Chapter 8);
- ▶ transfer and purchase of development rights (Chapter 9);
- ▶ land-use incentives for affordable housing, community design, and open space dedication (Chapter 9);
- ▶ a comprehensive, yet flexible, unified development permit review system (Chapter 10);
- ▶ administrative and judicial review of land-use decisions (Chapter 10);
- ▶ enforcement of land development regulations (Chapter 11);
- ▶ integrating existing state environmental policy acts into local planning as well as providing for nonbinding environmental evaluations of key elements of a local comprehensive plan prior to

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- its adoption (Chapter 12);
- ▶ financing alternatives for required local planning (Chapter 13);
- ▶ tax abatement, redevelopment, and tax increment financing (Chapter 14);
- ▶ authorizing regional tax-base sharing and permitting voluntary intergovernmental agreements among two or more units of local government to create a joint economic development zone (Chapter 14); and
- ▶ a statewide geographic information system (Chapter 15).

# INITIATING PLANNING STATUTE REFORM

This Chapter discusses how to initiate planning statute reform through the state legislature, the governor, and private interest groups. It identifies several institutional mechanisms, including special study commissions composed of state legislators, independent study commissions, task forces composed of legislators and nonelected officials, private coalitions, and joint legislative study committees. The Chapter also reviews specific approaches that will help ensure the reform initiative's success (regardless of which organizational vehicle is selected). Finally, it provides three model statutes and two model executive orders that describe the structure and authority of the various institutional alternatives.

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## Chapter Outline

### *Alternative 1 – Study Commission Composed of State Legislators and State Department Head*

- 1-101 Creation of Planning and Land-Use Legislative Study Commission; Membership; Reimbursement for Expenses**
- 1-102 Functions and Duties; Public Hearings; Interim and Final Reports; Recommended Legislation**
- 1-103 Staff and Consulting Support; Application for and Acceptance of Gifts and Grants**
- 1-104 Advisory Committees; Cooperation of State Departments and Agencies**
- 1-105 Appropriation of Funds**
- 1-106 Commission to Expire Unless Extended**

### *Alternative 2 – Independent Study Commission Composed of State Legislators, a State Department Head, and Citizen Representatives*

- 1-201 Creation of Planning and Land-Use Legislative Study Commission; Membership; Reimbursement for Expenses**
- 1-202 Functions and Duties; Public Hearings; Interim and Final Reports; Recommended Legislation**
- 1-203 Staff and Consulting Support; Application for and Acceptance of Gifts and Grants**
- 1-204 Advisory Committees; Cooperation of State Departments and Agencies**
- 1-205 Appropriation of Funds**
- 1-206 Commission to Expire Unless Extended**

### *Alternative 3 – Permanent Joint Legislative Study Committee on Planning, Land Use, and Growth Management*

- 1-301 Creation of Joint Legislative Study Committee on Planning, Land Use, and Growth Management; Membership; Vacancies; Reimbursement for Expenses; Quorum**
- 1-302 Functions and Duties of Committee; Powers**
- 1-303 Staff and Consulting Support; Executive Secretary**
- 1-304 Annual Report; Other Reports**
- 1-305 Appropriation of Funds**

### *Alternative 4 – Executive Order No. \_\_\_\_ Establishing a State Interagency Planning and Land-Use Task Force [and Advisory Committee] Appointed by the Governor*

### *Alternative 5 – Executive Order No. \_\_\_\_ Establishing an Independent [Growth Strategies] Study Commission Appointed by the Governor*

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### INITIATING PLANNING LAW REFORM

#### STARTING THE PROCESS

How do you begin the process of revamping state laws affecting planning and the management of change? In the early years of planning in the U.S. – the period roughly between 1915 and 1930 – states adopted, in whole or in part, the *Standard City Planning Enabling Act* and *Standard State Zoning Enabling Act* drafted by an advisory committee of the U.S. Department of Commerce in the 1920s, or they copied each others' laws.

Planning statute reform began quietly in the 1960s and accelerated in the 1970s.<sup>1</sup> States such as Wisconsin, Connecticut, and New Mexico began to reexamine their legislation and consider new approaches. In this sophisticated political environment, states approached the assessment and drafting of legislation in a novel way. No longer did legislators simply draft a bill and place it in the hopper to await enactment. The new process called for a more formal, systematic approach for defining the procedural, substantive, and structural components of planning legislation and envisioned a broad citizen involvement.

#### STATES TAKE DIFFERENT APPROACHES

States undertake planning statute reform through either initiation by (1) the state legislature; (2) the governor; or (3) private interest groups. These private interest groups may be APA chapters themselves or coalitions of groups who have agreed, via a privately sponsored consensus-building process, that reform is desirable.<sup>2</sup> In addition, there is (4) the joint legislative committee, which monitors the effect of new legislation and provides ongoing responses to state agencies charged with implementing and administering the statutes. Occasionally, those initiating land-use reform will use the services of a facilitator, often connected to a state university that has a research institute in planning or public administration. This Chapter contains a variety of models and executive orders

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<sup>1</sup>See generally Fred Bosselman and David Callies, *The Quiet Revolution in Land-Use Control* (Washington: U.S.GPO, 1971); John M. DeGrove, *Land, Growth and Politics* (Chicago: APA Planners Press, 1974); Robert Linowes and Don T. Allensworth, *The States and Land Use Control* (New York: Praeger, 1975); Frank Popper, *The Politics of Land-Use Reform* (Madison, Wis.: University of Wisconsin, 1981); Nelson Rosenbaum, *Land Use and the Legislatures: The Politics of State Innovation* (Washington, D.C.: The Urban Institute, 1976); Robert G. Healy and John S. Rosenberg, *Land Use and the States*, 2d ed. (Baltimore, Md.: Johns Hopkins University Press, 1979).

<sup>2</sup>Sarah Bohlen, Mary Beth McGuire, and Stuart Meck, "Getting Started: The Process of Initiating State Planning Law Reform," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, 1996), 171-183.

intended to initiate legislative or administrative reform. The characteristics of the political leadership of the state, the state's political traditions, and the nature of the problems to be addressed all influence how reform will be approached.

**(1) Legislature initiates reform.** When the state legislature initiates reform, the vehicle may be a special study commission composed of state legislators. This tends to work when there is broad, bipartisan agreement on the general need for reform since the commission will draw on both houses of the legislature. The reform process itself may be comprehensive (that is, it looks at all aspects of planning legislation and proposes new concepts, tools and institutional relationships) or incremental, fixing only the parts of existing statutes that pose the most pressing or immediate problems. State legislators may not have looked at the planning statutes for a while and feel they need to undertake an intensive analysis. The commission may be permanent or temporary, with a life of two to five years, depending on its scope of work.

The legislature may also create a special independent study commission composed of state legislators and citizens. The citizen representatives may be from local government and other interest groups (e.g., homebuilders, county and municipal associations, development groups, environmentalists, historic preservationists, "smart growth" advocates, and manufactured housing representatives). Sometimes state agency directors or other members representing the state's chief executive will also serve on the commission, by appointment of the governor. The special independent study commission is more appropriate when there is less certainty on the part of the legislature or governor about the nature of needed reforms. Legislators

### **Moving Forward on Planning Law Reform**

In most states, the legislative and institutional structure for land-use decision making is antiquated, ineffective, poorly integrated, and not likely to succeed in guiding growth and change in a way that results in better communities.

If you care about the future quality of life in your state, you can begin and sustain actions to accomplish meaningful change over time by following a few basic principles:

- (1) Establish a comprehensive goal, such as modernizing planning and zoning enabling legislation and implementation tools, and related, but much smaller objectives, such as individually amending existing acts.
- (2) Strategically establish priorities and find partners to tackle them (but don't let priorities get in the way of opportunity).
- (3) Know your state laws, how they work, and why they don't. Identify valuable tools that communities lack authority to use but which are in use elsewhere.

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may want to gauge political acceptability and build support using citizen members of the commission and the organizations they represent. Such commissions are created via statute or resolution.

(2) **Governor initiates reform.** The governor may initiate reform in partnership with the legislature via statute or independently through executive order. The reform vehicle is the independent study commission or, on occasion, a special task force whose membership consists of state agency officials. Wisconsin uses a state interagency land-use council composed of secretaries of state departments or their representatives to develop a renewed vision for land use for the state and recommend land-use policy objectives for state agencies. The council is assisted by a strategic growth task force of representatives of state and local agencies, municipal associations, and other public and private groups. Governor Tommy G. Thompson created the council and task force through an executive order.<sup>3</sup>

In Delaware, Governor Thomas R. Carper has created both an advisory panel on intergovernmental planning and coordination, pursuant to statute, and a state planning citizens advisory council. The advisory panel consists of two members from each county appointed by the governor, a member appointed by the speaker of the house, and a member appointed by the president pro tem of the senate.<sup>4</sup> The citizens advisory council includes both members of the advisory council and additional representatives from various statewide interest groups.<sup>5</sup> The Delaware groups have a charge similar to that of their Wisconsin counterparts.

<b>Fitting Reform to the Political Climate</b>	
<b><i>Approach</i></b>	<b><i>Use Where There Is:</i></b>
Special study commission composed of state legislators	Strong bipartisan legislative support
Special independent study commission or task force	Mixed gubernatorial and legislative support and where the state needs to define objectives
Private coalition or consensus building	Little or mixed support in legislature or by governor
Joint legislative study committee program	A reform agenda or implementation that requires legislature's ongoing assessment

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<sup>3</sup>State of Wisconsin, Office of the Governor, *Executive Order No. 236, Relating to the Creation of the State Interagency Land Use Council and the Wisconsin Strategic Growth Task Force* (September 15, 1994).

<sup>4</sup>Del. Code, Tit. 29, §9102(a) (Advisory Panel on Intergovernmental Planning and Coordination).

<sup>5</sup>State of Delaware, Executive Department, *Executive Order No. 29, Establishment the State Planning Citizens' Advisory Council* (April 28, 1995).

## Factors Stimulating Planning Statute Reform

- Desire to protect significant natural resources of state, such as coastal areas
- Lack of affordable housing
- Desire to ensure balanced economic growth among the state's regions
- Need to link regulation and capital investment with planning
- Lack of mechanism to resolve interjurisdictional conflicts; lack of coordination among governmental units
- Perception that existing system is unfair, unwieldy, unpredictable, and delay-ridden
- Loss of open space and agricultural lands
- Control of urban sprawl
- Mismatch between development and infrastructure
- Need for new planning tools and techniques

A variation on this approach is the creation of a state futures commission with the authority to prepare a state futures plan or report. The state futures commission attempts to obtain statewide consensus on where the state should be heading and what actions should be taken to bridge the gap between the reality of the present and the potential of the future. It may result in proposals to revamp state planning laws or study the issue of planning statute reform more thoroughly. Model legislation for a state futures commission is included in Chapter 4 of the *Legislative Guidebook*.

**(3) Private group initiates reform.** Private coalition building or consensus building is appropriate when there is little support among legislators or governors for planning law reform or when reform has not been perceived as a statewide issue. Private groups like APA chapters may join with others in the hope of getting agreement on the elements of a bill that could then be introduced by a supportive state legislature. For example, in 1991, the Kansas APA Chapter joined with representatives of the Kansas League of Municipalities, the state homebuilders association, the Kansas Association of Counties, and the Manufactured Housing Institute, and successfully obtained enactment of major amendments to the state's planning statutes.<sup>6</sup> Consensus building has been attempted in California as a mechanism to break the legislative gridlock among competing political interests over pending growth management statutes, although with little

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<sup>6</sup>“Kansas Modernizes Planning and Zoning Laws,” *Zoning News*, January 1992, 3.

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success.<sup>7</sup> In Massachusetts, 1000 Friends of Massachusetts, a statewide, private, nonprofit, advocacy group, assumed the job of overseeing the drafting of a reform bill to implement recommendations of the Special Commission on Population Growth and Change, after it made its report in 1990.

**(4) Legislature monitors reform statutes.** Another alternative is the joint study committee, a standing committee of the state legislature. Such a committee may be established in tandem with an independent study commission or after a state has enacted a comprehensive rewrite of its planning laws and wishes to monitor its implementation, provide advice to the state agency charged with administering it, and consider amendments. The joint committee is an approach that can ensure effective communication between two houses of the legislature and provide a state planning agency with quick responses on proposed initiatives.

The Oregon legislature has such a committee. According to Mitch Rohse of the Oregon Department of Land Conservation and Development, the committee “serves as a bellwether for the legislature in the interim periods” between sessions. If we are struggling with a policy and need a test from the legislature, they can provide it.” A joint legislative committee can oversee evaluations of how programs are being executed and to what degree state objectives are being achieved. “You can’t make appropriate policy or make appropriate mid-course corrections unless you know what the policy is doing,” says Rohse. While the joint legislative study committee may initiate legislation, it is more likely to produce amendments to existing statutes rather than comprehensive reform.

### INGREDIENTS OF SUCCESSFUL REFORM EFFORTS

No matter what institutional approach is selected, statutory reform tends to be successful when it does the following:<sup>8</sup>

**(1) Hold public hearings and invite widespread participation.** All reform efforts included a series of statewide public hearings and workshops, held on a regional basis, to gauge citizen sentiment on the issues and involve them in the process. These public hearings may include testimony from representatives from other states where reform has already been undertaken. Both

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<sup>7</sup>The California experience is discussed by Professor Judith Innes in “The Growth Management Consensus Project,” and “The Economic and Environmental Recovery Coalition” in Judith Innes *et al.*, *Coordinating Growth and Environmental Management Through Consensus Building* (Berkeley: California Policy Seminar, 1994), 73-91.

<sup>8</sup>For an excellent account of how Pennsylvania enacted a single-purpose bill, see Robert A. Peters, “The Politics of Enacting State Legislation to Enable Local Impact Fees: The Pennsylvania Story,” *Journal of the American Planning Association* 60, no.1 (Winter 1994): 61-69; see also Patricia Salkin, “Political Strategies for Modernizing State Land-Use Statutes,” *Land Use Law & Zoning Digest* 44, no. 8 (August 1992): 3-6. Salkin recommends the appointment of an official body to oversee the modernization process.

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Massachusetts and Pennsylvania used public hearings to initiate their study projects.<sup>9</sup> Public hearings may also be held after the study commission has issued its report and before legislation is introduced, although this may telescope the process of getting a bill drafted.<sup>10</sup> The study commission should always try to keep the avenues for communication with various constituencies open.

**(2) Review previous efforts and undertake new research.** In most states, the formation of an official body to examine the state's planning statutes has been preceded by other studies, often undertaken by a state agency or private group. To avoid reinventing the wheel, these studies should be reviewed for an identification of problems and approaches that have been previously considered.

The research phase should also include gathering statutes from other states, model legislation, and working papers written by experts in planning and planning law reform. The Virginia Commission on Population Growth and Development prepared "background" readers for its members containing papers on regionalism, growth strategies, state strategic planning, and housing and economic development.<sup>11</sup> The New York State Legislative Commission on Rural Resources prepared a similar set of "white papers" for a community planning and land-use retreat of state legislators, state and local officials, and planning experts.<sup>12</sup>

Research may also include surveys of local governments, developers, homebuilders, and other "users" of the planning system. In New York in 1994, the Legislative Committee on Rural Resources surveyed cities, towns, and villages to determine what land-use tools they were currently using.<sup>13</sup>

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<sup>9</sup>Commonwealth of Massachusetts, Special Commission on Growth and Change, *Final Report* (Boston: The Commission, Adopted January 23, 1990), 13 (discussion of result of ten public hearings); Commonwealth of Pennsylvania, House of Representatives, *Final Report of the 1991-92 House Select Committee on Land Use and Growth Management* (Harrisburg, Pa.: The Committee, 1992), 2-11 (discussion of individual public hearings).

<sup>10</sup>See, e.g., Massachusetts Association of Regional Planning Agencies, *Report on the Public Hearings on the Final Report of the Special Commission on Growth and Change* (June 1991).

<sup>11</sup>State of Virginia, Commission on Population Growth and Development, *Regionalism: Shared Decision Making; A Background Reader* (Richmond, Va.: The Commission, July 1994); \_\_\_\_\_, *Growth Management and Strategic Planning; A Background Reader* (Richmond, Va.: The Commission, July 1994).

<sup>12</sup>New York State Legislative Commission on Rural Resources, *White Papers for a Community Planning and Land Use Retreat Held At The Government Law Center, Albany Law School, January 10-11, 1991* (Albany, N.Y.: The Commission, 1991).

<sup>13</sup>New York State Legislative Commission on Rural Resources, *Local Planning and Zoning Survey: New York State Cities, Towns and Villages* (Albany, N.Y.: The Commission, April 1994); see also Commonwealth of Pennsylvania, Department of Community Affairs, Planning Services Division, *1992 Inventory of Selected Land Use Controls by County and Municipality* (Harrisburg, Pa.: The Division, 1992).

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Study commissions should avail themselves of state resources like regional planning commissions, university faculty and extension services, legislative research bureaus, and nonprofit organizations that have expertise in particular areas. These organizations can often conduct specialized studies quickly and with objectivity. When the State of Illinois studied land-use reform for the first time in 1970-71, it commissioned an extensive survey of local government officials and attorneys specializing in local government law through the Bureau of Urban and Regional Planning Research at the University of Illinois at Urbana-Champaign.<sup>14</sup>

**(3) Develop a clear statement of the problems to be addressed.** What is important for one part of the country may be less so in another. Therefore, the changes stimulating planning law reform initiatives are diverse. Defining them and agreeing on their magnitude establish a framework in which appropriate reform measures can be considered.

The problem statement must be tailored to the individual state, reflecting its unique range of issues. Sustained growth has been a reform stimulus in many regions of the nation, particularly in coastal states; other areas are excluded from the boom. For example, in West Virginia, the eastern panhandle, which is under the influence of the Washington, D.C., metropolitan area, is growing rapidly, but the remainder of the state is not, thereby creating differences in perception of the need for statutory change.

In Michigan, a careful analysis of trends by the Michigan Society of Planning Officials showing loss of farmland and the implications of that loss on the state's economy helped to galvanize support for state-level proposals to stem farmland conversion that resulted from a special task force appointed by Governor John Engler.<sup>15</sup> While such trend analyses need not be elaborate, they do help to sharpen the focus of the study commission's effort and develop broad support for reform measures.

**(4) Ensure good staff support.** Good staff is critical in order to keep the initiative on track. Staff can schedule meetings, prepare agenda materials, meet with interest group representatives, arrange for consultant assistance, and oversee details, like obtaining outside speakers or handling report publication. A state study commission may employ a small staff or may use employees from different state departments. For the Georgia Growth Strategies Commission (GSC), whose work resulted in the enactment of the Georgia Planning Act of 1989, the state Department of Community

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<sup>14</sup>Clyde W. Forrest, David C. Lager, and Katherine A. Messenger, *Zoning Problems: Supplementary Statistical Report for the Illinois Zoning Laws Study Commission* (Urbana-Champaign, Ill.: Bureau of Urban and Regional Planning Research, 1971).

<sup>15</sup>Michigan Farmland and Agriculture Development Task Force, *Policy Recommendations and Options for the Future Growth of Michigan Agriculture: A Report to Governor John Engler* (Lansing, Mich.: The Task Force, December 1994).

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Affairs staff, along with other agencies, provided administrative backup.<sup>16</sup> The GSC also used a facilitator from the University of Georgia's Institute for Community and Area Development to build consensus on problem identification and the development of solutions.<sup>17</sup> APA chapters may also provide extensive assistance. In Michigan, the chapter produced a detailed outline of reform legislation that influenced a task force of Republican legislators from the House of Representatives in preparing recommendations.<sup>18</sup>

**(5) Obtain representation on study commission.** A successful study commission will speak the language of differing viewpoints. Consequently, it is important that regardless of who appoints the representatives, the commissions be comprised of individuals, elected or not, with varying perspectives. Often, legislation or executive orders establishing such commissions will specify the nature of the outside groups to be represented. Typical stakeholders come from the office of the governor, state agencies, the legislature, local government, environmental groups, universities, developers, home builders, businesses, and transportation.

**(6) Limit size of commission, but provide for outside advisors.** Study commissions should be kept small – 15 members or less. One study commission director, Katherine Imhoff, AICP, of the Virginia Commission on Population Growth and Development, worked with a 33-member group. That number was unwieldy and the commission had to break up into subcommittees to be effective. A large commission will spread staff resources too thin, taking away time from necessary research.

### The Governor's Role in Planning Reform

The chances of success in generating and passing a comprehensive legislative package [for planning law reform] are greatly enhanced by leadership from the state's chief executive. The politics of state land- use reform are such that there is always strong opposition to extending the state's authority in this sensitive area. In such an environment, getting the issue on the public policy agenda is a challenge. And the state's chief executive is uniquely positioned to do so if he or she is willing to spend always scarce political capital in this way.

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on Urban Problems*

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<sup>16</sup>John M. DeGrove with Deborah Miness, *The New Frontier for Land Policy: Planning and Growth Management in the States* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1992), 103.

<sup>17</sup>Ibid.

<sup>18</sup>Michigan APA Planning Law Committee, "Suggested Outline for Unified Planning Enabling Legislation in Michigan" (Unpublished, July 1994).

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Some study commissions – such as those in New York and Georgia – have used advisory bodies of experts to give depth and breadth to their work. These groups may meet separately to study certain defined areas and recommend alternatives for the commission but would not be responsible for the final recommendation. The Georgia commission divided into four task forces to look more closely at economic development, infrastructure, land-use, and environmental issues, and recruited persons who were not commission members to assist. The New York commission has a special standing advisory group of experts on planning law, including planners, builders, surveyors, and attorneys.

**(7) Establish strong links to the governor and legislature.** The closer the study effort is to the state legislature or governor, the more likely the initiative will succeed.<sup>19</sup> Legislators have many issues competing for their attention; in some states they may meet for a short period each year (and, in some places, every two years) and must resolve their business quickly.

A signal from a legislative leader or the state government’s chief executive that planning law reform is important will distinguish it from other pressing matters. In Rhode Island, the skills of Representative (now Lt. Governor) Robert Weygand in initiating the reform effort and steering the resulting bills through the legislature were credited with the

<b>Major State Planning Statute Reforms</b>		
Year	State	Title
1969	Massachusetts	Affordable Housing Appeals Act
1970	Vermont	Act 250-State Land Use and Development Act
1970	Maine	Site Location Act
1972	Florida	Environmental Land and Water Management Act
1973	Oregon	SB 100 – Oregon Land Use Act
1984-5	Florida	State and Regional Planning Act and Omnibus Growth Management Act
1985-6	New Jersey	State Planning Act and Fair Housing Act
1988	Maine	Comprehensive Planning and Land Use Regulation Act
	Vermont	Act 200-Growth Management Act
	Rhode Island	Comprehensive Planning and Land Use Regulation Act and Comprehensive Appeals Board Act
1989	Georgia	State Planning Act
1990-1	Washington	Growth Management Acts I and II
1991	Kansas	SB23 (comprehensive planning and zoning)
1992	Maryland	Economic Growth, Resource Protection and Planning Act
1994	South Carolina	Comprehensive Planning Enabling Act
1997	Maryland	HB 1195, Smart Growth Act
1998	Tennessee	SB 3278 (growth management)
1999	Wisconsin	1999 Wis. Act 9

<sup>19</sup>John M. DeGrove, “The Role of the Governor in State Land Use Reform,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, 1996), 71-74.

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enactment of new laws.<sup>20</sup> In Georgia, Governor Joe Frank Harris made planning law reform a high priority for his second term in office; he created the Growth Strategies Commission and actively lobbied the legislature for the passage of legislation carrying out its recommendations.<sup>21</sup>

Florida's Governor Bob Graham provided the push for the reforms in the mid-1980s in Florida.<sup>22</sup> In contrast, in California, where Governor Pete Wilson decided not to participate formally in the Growth Management Consensus Project (a private effort to agree on principles that would lead to legislation), no statutory reform of any significance resulted.<sup>23</sup>

**(8) Emphasize consensus, but don't expect 100 percent agreement.** Reform requires a balancing of interests, but it is often difficult to completely satisfy all of them. If success is to be achieved, participants in reform commissions should expect to negotiate workable compromises rather than perfect solutions. The private effort in California, the Growth Management Consensus Project, established a requirement of complete agreement on reform principles that proved to be a significant roadblock. While the project developed some mutual understandings between the various public and private stakeholders (who represented 32 interest groups), the effort to be inclusive, combined with the complete consensus requirement, practically guaranteed no agreement on any point.<sup>24</sup>

**(9) Minimize time between report and proposed legislation.** Reducing or eliminating the period between a study commission's recommendations and the drafting of legislation is highly desirable. The public hearings and the attendant publicity surrounding the commission's recommendations create an air of expectation. Moreover, the reasons the study effort began may be due to temporary factors like a strong economy – leading to a development boom – rapid increases in housing costs, or a major locational controversy. Timing is often a key to success. Public interest in reform may also fade as conditions change. In Rhode Island, the study commission eschewed an interim and even a final report, preferring instead to go from public meetings and hearings directly to drafting the bill and getting it introduced into the legislature. Thus the commission was able to press for the enactment of the first legislative package quickly before the climate cooled and the legislature's attention shifted to other priorities. Alternately, the legislation

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<sup>20</sup>DeGrove and Miness, *The New Frontier for Land Policy*, 88-89; Stuart Meck, "Rhode Island Gets It Right," *Planning* 63, No. 11 (November 1997): 10-15.

<sup>21</sup>Tom Walker, "Governor Joe Frank Harris," *Planning*, March 1990, 12.

<sup>22</sup>DeGrove, *The Role of the Governor in State Land Use Reform*, 4.

<sup>23</sup>Innes, "The Growth Management Consensus Project," 74, 78.

<sup>24</sup>*Ibid.*, 78.

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establishing the study commission may call for the commission to draft the new legislation in conjunction with the preparation of the final report.

(10) **Keep the study commission in existence while the legislation is underway.** The study commission will typically develop a great deal of expertise during its term of operation. Consequently, keeping it in existence while the reform legislation is being considered is highly desirable. The commission can continue to advise the legislature and the governor as to possible alternatives, suggest compromises, and generally serve as an external advocate for change. Therefore, legislation creating a study commission should not terminate the commission after it makes its final report, but should allow for its continuation for a reasonable period.

(11) **Initiate a public information campaign.** When a commission or other group proposes changes to the existing system, a public information program is typically mounted to explain the nature of the reforms, gain support and defuse potential opposition.

Attorney Patricia Salkin, Director of the Government Law Center at the Albany Law School, observes that, where state planning offices exist, undertaking public education – including information, training, and technical assistance – is easier. However, says Salkin, “[i]n those states where the community planning office is either nonexistent or scaled down to an ineffective level, creativity in the development and financing of this strategy will be important.”<sup>25</sup> Both state legislators and local officials will want to know who is to provide the information and how and what kind of help the state will provide.

For the Georgia Growth Strategies Commission, this took the form of a simplified version of the Commission’s recommendations in a final report, slide presentations, a video production and brochures.<sup>26</sup> In Vermont, the Governor’s Commission on Vermont’s Future produced an elegant report with photographs, many of them drawn from the statewide public hearings held by the Commission.<sup>27</sup> Vermont’s Department of Housing and Community Affairs followed up with a brochure in 1990 to explain changes in the state planning statutes made as a consequence of the Commission’s recommendations.<sup>28</sup> In South Carolina, the state municipal and county associations,

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<sup>25</sup>Patricia Salkin, “Political Strategies for Modernizing State Land Use Statutes,” *Land Use Law & Zoning Digest* 44, no. 8 (August 1992): 6.

<sup>26</sup>See Governor’s Growth Strategies Commission (GSC), *Quality Growth Partnership: The Bridge to Georgia’s Future, Final Report* (Atlanta: GSC, undated).

<sup>27</sup>Governor’s Commission on Vermont’s Future, *Report of the Governor’s Commission on Vermont’s Future: Guidelines for Growth* (Montpelier, Vt.: The Commission, December 31, 1987).

<sup>28</sup>Vermont Department of Housing and Community Affairs, *Planning Your City’s Future: A Guide to Recent Changes in Vermont’s Municipal and Regional Planning and Development Act (24 V.S.A., Chapter 117)* (Montpelier, Vt.: The Department, December 1990).

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in conjunction with the Institute of Public Affairs at the University of South Carolina and the Strom Thurmond Institute of Government at Clemson University, published a comprehensive planning guide for local officials. It explained how to bring their local planning process into compliance with the state's new Comprehensive Planning Enabling Act of 1994. The manual contained the act, sample forms, model rules of procedure, and helpful narratives on technical aspects of the revised South Carolina statute.<sup>29</sup>

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### ***Commentary: Model Legislation and Executive Orders for Initiating Planning Statute Reform***

The model statutes and executive orders that follow have been written so that they may be tailored to individual states by adding or deleting language or adopting alternate wording. The number of members of the commission or committee may be increased or decreased beyond those in brackets; however, the maximum number shown, 15, represents a reasonable upper limit on the size of such commissions. If additional advice or perspectives are needed, they can be obtained through the creation of advisory committees or small working groups.

Alternative 1 assumes the initiative will come from the state legislature. Under Alternative 2, the legislature and the governor are responsible for appointments. Alternative 3 provides for a joint legislative study commission. Several of the planning statute reforms have occurred through initiative of the governor by executive order instead of action of the state legislature through enactment of statutes. The following executive orders address the most typical scenarios: Alternative 4 is an internal task force composed of state agency officials; and Alternative 5 is the independent study commission, similar to Alternative 1 above. With a less specific mandate, the internal study task force is more likely to focus on improving procedures and defining a state role in planning than on drafting legislation, although legislation may be a consequence of its activities. Combinations of these models are possible. For example, the governor could create an independent state study commission by executive order (e.g., Alternative 5) that would work with a joint legislative study commission. In addition to these alternatives, states may have standard approaches to the study of complex topics requiring legislation that derive from their political traditions.

States typically have standard formats for legislation or executive orders, as dictated by a legislative service commission or other bureau. Consequently, these models will need to be redrafted into those formats.

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<sup>29</sup>Municipal Association of South Carolina and South Carolina Association of Counties, *Comprehensive Planning Guide for Local Governments* (Columbia, S.C.: The Associations, December 1994).

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## *Alternative 1 – Study Commission Composed of State Legislators and State Department Head*

### **1-101 Creation of a Planning and Land-Use Legislative Study Commission; Membership; Reimbursement for Expenses**

- (1) There is hereby created a special planning and land-use legislative study commission, referred to in this Act as the commission.
- (2) The commission shall consist of [15] members, [7] of whom shall be from the house of representatives, not more than [4] from the same political party, to be appointed by the speaker of the house; [7] of whom shall be from the senate, not more than [4] from the same political party, to be appointed by the president of the senate; and [1] member, who is a director of a state department, to be appointed by the governor. If the speaker of the house of representatives or the president of the senate is a member, either may designate from time to time an alternate from among the members of the appropriate house to exercise powers as a member of the commission, except that the alternate shall not preside if the speaker or president is chair. Vacancies in the commission shall be filled in a like manner as the original appointment.
- (3) The commission shall elect a chair and vice chair from among its members who are either state representatives or senators. The chair may, in addition to other duties, approve voucher claims for expenditures or may delegate this function to staff.
- (4) The members of the commission shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties in the work of the commission.

### **1-102 Functions and Duties; Public Hearings; Interim and Final Reports; Recommended Legislation**

- (1) The commission shall perform the following functions and duties:
  - (a) evaluate the effectiveness of current state, regional, and local planning and land-use laws;
  - (b) survey state and regional agencies, local governments, and the private sector to determine the extent and types of planning techniques, and land-use tools being used and their attitudes toward the current system, and identify desired new tools;
  - (c) survey developers, builders, contractors, planners, engineers, surveyors, environmentalists, historic preservationists, attorneys, citizen groups, and local

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- government agencies about problems associated with the current system and seek their advice on solutions to those problems;
  - (d) review model legislation and studies on planning and land-use systems and collect information on states that have undertaken reform efforts and have working systems;
  - (e) identify public information, training, and technical assistance needs by state and regional agencies and local governments related to planning and land use;
  - (f) identify incentives or techniques for sharing the benefits of economic growth and eliminating or reducing fiscal competition among local governments;
  - (g) propose initiatives for the development of geographic information systems related to planning and land use at all levels of government;
  - (h) propose innovative and cooperative planning and land-use approaches that will accommodate and guide growth and development, ensure the planning and construction of adequate supporting services and infrastructure, including utilities, stormwater management systems, and transportation, provide opportunities for or eliminate barriers to affordable housing, protect the environment and historic and scenic resources, enhance community livability, and minimize exposure to natural hazards;
  - (i) examine and evaluate methods of coordinating activities of the legislature and state agencies relating to matters of growth and development, protection of the environment and natural resources, and stabilization and revitalization of existing communities, including, but not limited to, the consideration of a statewide planning process and the establishment of state goals and policies to guide state strategic and functional planning and regional and local planning;
  - (j) evaluate and recommend approaches that will balance the advancement of the public interest with the protection of private property rights and ensure certainty in the planning and land-use system and streamlined and efficient administrative and judicial review of development proposals; and
  - (k) stimulate statewide discussion on problems related to planning and land-use change, identify alternative planning, regulatory, and capital investment solutions, and attempt to reach consensus on desired approaches.
- ◆ This list of activities can be reduced, expanded, or modified to address issues in a particular state.
- (2) The commission may hold public hearings on a regional basis throughout the state, take testimony, and make its investigations at such places as it deems necessary. Each member

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of the commission shall have power to administer oaths and affirmations to witnesses appearing before the commission. [The commission may, at its option, hold hearings after releasing its final report, as described in paragraph (3) below, but before drafting proposed legislation to carry out its recommendations.]

- (3) The commission shall prepare an interim report of findings by *[date]*, a final report with specific recommendations for legislation or administrative changes by *[date]*, and proposed legislation to carry out its recommendations by *[date]*. These reports and proposed legislation shall be transmitted to the members of the legislature and the governor and shall be made available to the public. Copies shall be deposited in the state library and sent to all public libraries in the state that serve as depositories for state documents.

### **1-103 Staff and Consulting Support; Application for and Acceptance of Gifts and Grants**

- (1) The commission is empowered to employ such staff as may be necessary to enable it to perform its duties as set forth in this Act. It is authorized to determine the duties of such staff and to fix staff salaries and compensation within the amounts appropriated therefor. The commission may also contract for assistance from consultants.
- (2) The commission is further authorized to apply for, accept, and expend gifts, grants, or donations from public or private sources to enable it to better carry out its functions.

### **1-104 Advisory Committees; Cooperation of State Departments and Agencies**

- (1) The commission may establish such advisory committees as are necessary to enhance its work. Such committees may be composed of commission members as well as other individuals selected by the commission.
- (2) All departments and agencies of the state shall cooperate with the commission and provide information and advice and otherwise assist the commission in its work.

### **1-105 Appropriation of Funds**

There is hereby appropriated out of any money in the state treasury not otherwise appropriated for the fiscal year *[name of year]* the sum of *[amount]* to the commission. The state *[controller]* is hereby authorized and directed to draw orders upon the treasurer for the payment of said sum, or so much thereof as may from time to time be required, upon receipt by the *[controller]* of properly authenticated vouchers.

### **1-106 Commission to Expire Unless Extended**

The provisions of this Act shall expire on *[date – a minimum of two years from the date of establishment of the commission]* unless extended by an act of the legislature.

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### *Alternative 2 – Independent Study Commission Composed of State Legislators, a State Department Head, and Citizen Representatives*

#### **1-201 Creation of Planning and Land-Use Legislative Study Commission; Membership; Reimbursement for Expenses**

- (1) There is hereby created a special planning and land-use legislative study commission, referred to in this Act as the commission.
- (2) The commission shall consist of [15] members, [4] of whom shall be from the house of representatives, not more than [2] from the same political party, to be appointed by the speaker of the house; and [4] of whom shall be from the senate, not more than [2] from the same political party, to be appointed by the president of the senate. If the speaker of the house of representatives or the president of the senate is a member, either may designate from time to time an alternate from among the members of the appropriate house to exercise powers as a member of the commission, except that the alternate shall not preside if the speaker or president is chair. In addition, there shall be [7] members to be appointed by the governor:
  - (a) [1] member who is the director of a state department;
  - (b) [1] member who is an elected or appointed municipal official or employee;
  - (c) [1] member who is an elected or appointed county official or employee;
  - (d) [1] member who is a builder or developer;
  - (e) [1] member who is a municipal or regional planner;
  - (f) [1] member who is a representative of an environmental, historic preservation, or community revitalization organization in the state; and
  - (g) [1] at-large member.
- (3) The committee shall elect a chair and vice chair from among its members who are either state representatives or senators. The chair may, in addition to other duties, approve voucher claims for expenditures or may delegate this function to staff.
- (4) The members of the committee shall receive no compensation for their services but shall be reimbursed for their actual expenses incurred in the performance of their duties in the work of the committee.

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### **1-202 Functions and Duties of Committee; Public Hearings; Interim and Final Reports; Recommended Legislation**

- ◆ The language in this section is the same as Section 1-102 above.

### **1-203 Staff and Consulting Support; Application for and Acceptance of Gifts and Grants**

- ◆ The language in this section is the same as Section 1-103 above.

### **1-204 Advisory Committees; Cooperation of State Departments and Agencies**

- ◆ The language in this section is the same as Section 1-104 above.

### **1-205 Appropriation of Funds**

- ◆ The language in this section is the same as Section 1-105 above.

### **1-206 Commission to Expire Unless Extended**

- ◆ The language in this section is the same as Section 1-106 above.

### *Alternative 3 – Permanent Joint Legislative Study Committee on Planning, Land Use, and Growth Management*

### **1-301 Creation of Joint Legislative Study Committee on Planning, Land Use, and Growth Management; Membership; Vacancies; Reimbursement for Expenses; Quorum**

- (1) There is hereby created a joint legislative study committee on planning, land use, and growth management referred to in this Act as the committee.
- (2) The committee shall consist of [7] members, [4] of whom shall be from the house of representatives, not more than [2] from the same political party, to be appointed by the speaker of the house; and [3] of whom shall be from the senate, not more than [2] from the same political party, to be appointed by the president of the senate. If the speaker of the house of representatives or the president of the senate is a member, either may designate from time to time an alternate from among the members of the appropriate house to exercise powers as a member of the committee except that the alternate shall not preside if the speaker or president is chair.
- (3) The committee shall have a continuing existence and may meet, act, and conduct business during sessions of the legislature or any recess thereof, and in the interim between sessions.

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- (4) The committee shall elect a chair and a vice chair from among its members. The chair may, in addition to other duties, approve voucher claims or expenditures, or may delegate this function to staff.
- (5) The term of a member shall expire upon the convening of the legislature in regular session next following the commencement of the member's term. When a vacancy occurs in the membership of the committee in the interim between sessions, until such vacancy is filled, the membership of the committee shall be deemed not to include the vacant position for the purpose of determining whether a quorum is present and a quorum shall be the majority of the remaining members.
- (6) The members of the committee shall receive no compensation for their services, but shall be reimbursed for their actual expenses incurred in the performance of their duties in the work of the committee.
- (7) Action of the committee shall be taken only upon the affirmative vote of the majority of the members of the committee.

### **1-302 Functions and Duties of Committee; Powers**

- (1) The committee shall perform the following functions and duties:
  - (a) advise the [state department *or* office of planning] on all matters under the jurisdiction of the [department *or* office];
  - (b) review and comment on any proposed comprehensive or functional plans of any state department or agency;
  - (c) review and comment on the state capital budget and capital improvements program;
  - (d) study, evaluate, and make recommendations to the legislature on the political, social, economic, historic, scenic, and environmental effects of the state's land-use and planning program on local governments, public and private land owners, and the citizens of the state;
  - (e) study, evaluate, and make recommendations to the legislature on improvements in laws and regulations for state planning, land-use, growth management and revitalization of existing communities, to ensure certainty in the planning and land-use system and streamlined and efficient administrative and judicial review of development proposals;
  - (f) study and evaluate the impact of planning, land-use, and growth management laws on the supply and cost of housing, particularly for low- and moderate-income

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- persons, and make recommendations to ensure an adequate supply of housing at appropriate locations for all income levels on a statewide basis;
- (g) study, evaluate, and make recommendations on measures designed to encourage redevelopment and revitalization of existing communities;
  - (h) stimulate interest in planning, land use, growth management, and revitalization of existing communities by the citizens of the state;
  - (i) study, evaluate, and make recommendations on geographic information systems related to planning, land use, growth management, and revitalization of existing communities at all levels of government;
  - (j) study, evaluate, and make recommendations on measures to minimize the effects of natural hazards on existing and future development;
  - (k) study, evaluate, and make recommendations on the impact of planning, land-use, and growth management laws on the environment and natural resources; and
  - (l) make recommendations to the legislature on any other matter relating to planning, land use, growth management, and revitalization of existing communities in the state.
- (2) The committee may perform the following functions and duties:
- (a) request from any department, division, board, commission, or other agency of the state or any political subdivision of the state, such information as may be necessary for the committee's studies;
  - (b) subpoena witnesses, take testimony, and compel the production of books, records, documents, papers, and other sources of information deemed by the committee to be relevant to its studies;
  - (c) have access to all books, records, documents, and papers of any political subdivision of this state;
  - (d) exercise all the powers and authority of other standing committees of the legislature; and
  - (e) convene a meeting anywhere within the state to carry out its duties.

### **1-303 Staff and Consulting Support; Executive Secretary**

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- (1) The commission is empowered to employ such staff as may be necessary to enable it to perform its duties as set forth in this Act. It is authorized to determine the duties of such staff and to fix staff salaries and compensation within the amounts appropriated therefor. The commission may also contract for assistance from consultants.
- (2) The committee [may *or* shall] appoint a staff member as executive secretary who shall serve at the pleasure of the committee and under its direction. The executive secretary shall be selected for his or her training, knowledge, and experience in planning, land use, growth management, and revitalization of existing communities.

### **1-304 Annual Report; Other Reports**

- (1) The committee shall prepare an annual report of its studies, evaluations, and recommendations and shall submit it to the legislature by [date].
- (2) The annual report shall be transmitted to the members of the legislature and the governor and shall be made available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.
- (3) The committee may, from time to time, prepare other reports and studies that shall be transmitted and deposited in the same manner as provided for in paragraph (2) above.

### **1-305 Appropriation of Funds**

- ◆ The language in this section is the same as Section 1-105 above.

*Alternative 4 – Executive Order No. \_\_\_\_\_ Establishing a State Interagency Planning and Land-Use Task Force [and Advisory Committee] Appointed by the Governor*

#### **Section 1**

WHEREAS, local governments in the State of [name] have identified a need for a greater state awareness of the planning and land-use decisions of state agencies, improved consistency in the policies and programs of state agencies, and increased assistance to local governments in resolving planning and land-use problems; and

WHEREAS, decisions about new growth and development in the State have become increasingly complex and challenging for all levels of government due to regulation, differing public policy objectives, the need for better coordination and cooperation, and diverse viewpoints; and

WHEREAS, local land-use decisions increasingly affect the ability of state agencies to accomplish their missions; and

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WHEREAS, state agencies have recognized that they need to provide appropriate and acceptable responses to these land-use decisions; and

WHEREAS, state-initiated development and land-use coordination efforts may lead to public infrastructure cost savings, better stewardship of the state's natural, historic, scenic, and cultural resources, an increased supply of affordable housing, orderly, safe, and well-planned urban and rural environments, preservation of important historic and scenic resources, and increased private economic development activities.

## Section 2

NOW THEREFORE, I, [name], Governor of the State of [name], by virtue of the authority vested in me, hereby establish the state interagency planning and land-use task force.

- (1) The task force shall be made up of the directors, or their designees, of the following state departments and agencies: *[List departments and agencies]*.
- (2) The director of the state department of [name] shall serve as the chair of the task force. The department of [name] shall provide staff and administrative support.
- (3) All departments and agencies of the state shall cooperate with the task force and shall provide information and advice and otherwise assist the task force in its work. This assistance shall include free access to any books, records, or documents in the custody of the department or agency.

## Section 3

- (1) The commission shall have the following functions and duties:
    - (a) identify state planning goals and objectives;
    - (b) recommend planning and land-use policies and administrative procedures for state agencies, including identification of alternative coordination processes;
    - (c) recommend mechanisms for state agency participation in local land-use decisions;
    - (d) recommend mechanisms for local government participation in state agency land-use decisions; and
    - (e) identify information and training needs for state agency personnel [and local government officials] in the area of planning and land use.
- ◆ Alternatively, include all or a portion of those functions and duties listed in Sections 1-102(1)(a)-(k) above.

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- (2) In undertaking these functions and duties, the commission shall hold public hearings throughout the state and shall seek broad-based involvement from the state's governmental units and citizens.
- (3) Subject to the review and consent of the governor, the chair shall appoint an advisory committee comprised of [15] members to advise the task force on coordinating land-use activities and issues between state agencies and local public and private interests. The members of the advisory committee shall be from diverse geographic areas of the state and shall represent a variety of individual and business perspectives and interests, including, but not limited to [state and local government, business and industry, real estate, building and development, municipal and regional planning, academia, law, environment, architecture, landscape architecture, historic preservation, scenic conservation, engineering, emergency management, and/or transportation].
- (4) The task force [and advisory committee] may seek advice from other sources as [it or they] deem[s] necessary.
- (5) All meetings of the task force [and advisory committee] shall be open to the public. [or All meetings of the task force [and advisory committee] shall comply with the [state statute governing public meetings]].

## Section 4

The task force shall submit to the governor an interim report no later than [date], followed by a more comprehensive report with recommendations and budget proposals related to state-level and joint-state local-level planning and land-use issues no later than [date]. These reports shall be made available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

## Section 5

The task force shall terminate within two weeks submitting its final report, as provided for in Section 1 above, at which time it may continue only at the pleasure of the governor.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the State of [name] to be affixed at [place] this \_\_\_ day of \_\_\_, A.D., [year].

\_\_\_\_\_  
Governor of [State]

By the Governor:

\_\_\_\_\_  
Secretary of State

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*Alternative No. 5 – Executive Order No. \_\_\_\_ Establishing An Independent [Growth Strategies] Study Commission Appointed by the Governor*

## **Section 1**

WHEREAS, the State of [name] is experiencing rapid growth and land-use change in the periphery of metropolitan centers in the [geographic area] of the state; and

WHEREAS, this growth and land-use change have resulted in significant impacts on development patterns, traffic, air and water resources, historic and scenic resources, open space, wetlands, availability of affordable housing, and the ability of local governments to finance public facilities and service improvements; and

WHEREAS, new growth and development in the State have been uneven and imbalanced, with rural areas, small towns, and older portions of metropolitan areas losing economic vitality, resulting in out-migration, loss of revenue, disinvestment, and increased unemployment; and

WHEREAS, this imbalance in growth and development has resulted in loss of community character and natural beauty in all parts of the State and an imbalance in economic opportunity to its citizens; and

WHEREAS, many of the problems of growth and development are interjurisdictional and require cooperation, coordination, and creative partnerships by all levels of government; and

WHEREAS, this growth and development have, in some cases, resulted in heightened exposure of property to the effects of natural hazards, requiring additional public expenditures for repair, replacement, and mitigation after the natural disasters; and

WHEREAS, local governments lack adequate tools to address new growth and development.

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## Section 2

NOW THEREFORE, I, [name], Governor of the State of [name], by virtue of the authority vested in me, do hereby establish the [Growth Strategies] Commission.

- (1) The commission shall be composed of [11] citizens and [4] state legislators, of whom [2] shall be from the house of representatives and [2] from the senate. The members of the commission shall, to the extent possible, be from diverse geographic areas of the state and shall represent a variety of individual and business perspectives and interests, including, but not limited to [state and local government, business and industry, real estate, building and development, municipal and regional planning, academia, law, environment, architecture, landscape architecture, historic preservation, scenic conservation, engineering, emergency management, and/or transportation].
- (2) All members of the commission shall serve at the pleasure of the governor [who shall appoint a chair and vice chair from among the commission's membership]. [or The commission shall elect a chair and vice chair from among its members].
- (3) The department of [planning or community affairs or community development] shall provide staff and administrative support for the commission. The members of the commission shall receive no compensation for their services, but shall be reimbursed by the department for their actual expenses incurred in the performance of their duties in the work of the commission.
- (4) All departments and agencies of the state shall cooperate with the commission and shall provide information and advice and otherwise assist the commission in its work. This assistance shall include free access to any books, records, or documents in the custody of the department or agency.

## Section 3

- (1) The commission shall have the following functions and duties:
  - ◆ Include all or a portion of those functions and duties listed in Sections 1-102(1)(a)-(k) above.
- (2) In undertaking these functions and duties, the commission shall hold public hearings throughout the state and seek broad-based involvement from the state's governmental units and citizens.

## Section 4

The commission shall prepare an interim report of findings by [date], a final report with specific recommendations for legislation or administrative changes by [date], and proposed legislation to carry out its recommendations by [date]. These reports and proposed legislation shall be transmitted

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to the governor and the legislature and shall be made available to the public. [The commission may, at its option, hold hearings after releasing its final report, but before drafting proposed legislation to carry out its recommendations.] Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

## Section 5

All meetings of the commission shall be open to the public [*or* All meetings of the commission shall comply with the [*state statute governing public meetings*]].

## Section 6

The commission shall terminate on [*date*], at which time it may continue only at the pleasure of the governor.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the State of [*name*] to be affixed at [*place*] this \_\_\_\_ day of \_\_\_\_, A.D., [*year*].

\_\_\_\_\_  
Governor of [*State*]

By the Governor:

\_\_\_\_\_  
Secretary of State

## CHAPTER 2

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### **PURPOSES AND GRANT OF POWER**

This Chapter discusses purpose statements – language that indicates why state planning legislation was enacted and what it is intended to accomplish. The purpose statements contained in the model statutes provide four alternatives posed as fundamental policy choices for state legislatures: (1) planning as an advisory function; (2) planning as an activity to be encouraged through incentives; (3) planning as a mandatory activity necessary in order to exercise regulatory and related powers; and (4) mandated state-regional-local planning that is integrated both vertically and horizontally. The model legislation then describes a series of long-range state interests that all levels of government must take into account when exercising planning authority. Finally, the legislation includes language that grants planning powers to local government.

## CHAPTER 2

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### Chapter Outline

- 2-101 Purposes (Four Alternatives)**
- 2-102 State Interests for Which Public Entities Shall Have Regard**
- 2-103 Grant of Power**

### Cross-References for Sections in Chapter 2

<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
<b>2-101</b>	<b>8-601, 8-602, 8-603, 8-701, 9-201, 9-301, 9-401, 13-102, 14-301, 14-302</b>
<b>2-102</b>	<b>2-101</b>

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### STATEMENTS OF PURPOSE IN PLANNING STATUTES

#### WHAT DOES A PURPOSE STATEMENT DO?

Statements of purpose in statutes indicate why the particular legislation was enacted and what it is intended to accomplish. Many state planning statutes today contain purpose statements originally drawn from the *Standard City Planning Enabling Act* (SCPEA) and the *Standard State Zoning Enabling Act* (SZEa), drafted in the 1920s. In the case of the SZEa, the purpose was “promoting the health, safety, morals, or the general welfare of the community.”<sup>1</sup>

The police power is inherent in the state’s sovereign power to regulate private conduct to protect and further the public welfare.<sup>2</sup> The police power includes the authority to pass laws that, for example, limit the speed at which automobiles may travel, or that bar the discharge of poisonous materials into public water supplies. Local governments themselves do not possess the police power; they must obtain it from the state. Enabling acts provide the mechanism by which a state delegates its police power authority, including the power to plan and to zone, to local government, although the power may be delegated broadly through the state constitution in a “home rule” provision.

The SCPEA and the SZEa were, by their own definitions, acts that “authorized and empowered” planning and zoning. The grant of power from the state did not impose duties upon local government other than to follow procedures in the act. It did not require local governments to enact zoning laws nor did it condition the enactment of zoning laws on underlying planning that met certain minimum standards. Instead, it authorized local governments “to avail themselves of the powers conferred by the act if they so wish.”<sup>3</sup>

The SZEa, under the title, “Purposes in view,” thus enabled the adoption of zoning regulations that would be:

in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid

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<sup>1</sup>Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations* (SZEa), Sec. 1 (1926, revised edition). The SZEa’s drafters observed that “[t]he main pillars on which the police power rests are these four, viz., health, safety, morals and general welfare. It is wise, therefore, to limit the purposes of this enactment [the SZEa] to these four,” cautioning not to add additional purposes such as “convenience” or “prosperity,” since “there is nothing to be gained thereby.” Ibid., §1, n. 3.

<sup>2</sup>Edward Ziegler, ed., *Rathkopf’s The Law of Zoning and Planning*, §1.01[2] (Deerfield, IL: Clark Boardman Callaghan, 1988).

<sup>3</sup>Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act*, §2, n. 7 (1928).

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undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage and other public requirements.<sup>4</sup>

This language, according to SZEA commentary, differed from the statement of purpose in that it contained virtually a direction from the legislative body as to the purposes in view in establishing a zoning ordinance, as well as the manner in which the ordinance should be effectuated. The commentary went on to add that the language was intended to constitute the “atmosphere” under which zoning is to be accomplished.<sup>5</sup>

### WHY HAVE PURPOSE STATEMENTS: PRO AND CON

There are two schools of thought as to whether legislation should even contain purpose statements. One viewpoint is that purpose statements are surplus language. “In most cases,” one attorney who specializes in legislative drafting has written, “statements of findings and purpose are without legal significance; and, in addition, they are matters that are more appropriately (and more safely) dealt with in the various committee reports that will accompany the bill. The proper function of a bill – whatever the sponsor’s reasons for it – is to do what the sponsor wants to do.”<sup>6</sup>

The other school, however, believes that statements of purpose are necessary because they aid in the construction of various sections of the statute and the interpretation of legislative intent, especially if the legislation itself is not clearly drafted. This may also be important when, for instance, a local government proposes a new regulatory approach that was not expressly authorized at the time the legislation was written. For example, when the SZEA was written, planned unit developments – a flexible means of regulating different types of development to allow building clustering, preservation of open space and other amenities, and mixed uses – had not yet emerged as a land-use control technique. Now most state courts have interpreted state statutes based on the SZEA language to permit them.<sup>7</sup>

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<sup>4</sup>Advisory Committee on Zoning, *SZEA*, §3.

<sup>5</sup>*Id.*, §3, n. 22. The SZEA’s purpose statements have been the subject of some criticism that they could be unduly restrictive. In commentary to a draft of the American Law Institute’s *Model Land Development Code*, it was observed that the statement of purpose “was supportive of ordinances designed to prevent ‘undue concentration’ [of population] but was not so easily supportive of ordinances designed to prevent urban sprawl.” American Law Institute (ALI), *A Model Land Development Code, Proposed Official Draft; Complete Text and Commentary* (Philadelphia, Pa. ALI, April 15, 1975), 9.

<sup>6</sup>Lawrence E. Filson, *The Legislative Drafter’s Desk Reference* (Washington, D.C.: Congressional Quarterly, 1992), 119.

<sup>7</sup>See, e.g., *Chrinko v. South Brunswick Twp. Planning Board*, 77 N.J. Super 594, 187A.2d 221 (1963) (upholding a density transfer planned unit development ordinance on the grounds that it reasonably advanced the legislative purposes of securing open spaces, preventing overcrowding and undue concentration, and promoting the general welfare).

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Further, the specific language in purpose statements is important in that it can limit or expand the authority of local governments. For instance, legislation whose purpose is simply to “promote public health, safety, or morals,” but that omits the term “general welfare,” may well prevent a local government from enacting regulations that protect historic structures from inappropriate design changes. While such regulations might advance the interests of aesthetics or the protection of property values (both rubrics of the “general welfare”), they would arguably conflict with purpose language that was limited to public health, safety, or morals. If the statute’s application is challenged, a reviewing court would examine the purpose language to determine what the legislature contemplated when it passed the law.<sup>8</sup>

Purpose language may also serve to guide administrative agencies charged with implementing the legislation. A good example of this comes from Canada. In a 1993 report by the Commission on Planning and Development Reform in Ontario, *New Planning for Ontario*, the commission recommended that a purpose statement be added to the Ontario Planning Act to provide greater clarity and direction.<sup>9</sup> After discussing the various alternatives that a purpose section could contain, the commission recommended language that encompassed general interests important to Ontario as a whole, as well as specific interests pertinent to local governments exercising their authority under the Act. The language proposed by the commission (and eventually enacted) invites a balancing of broader interests by all levels of government in making planning decisions.<sup>10</sup> This approach has been incorporated in the model legislation, in Section 2-102, below.

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### ***Commentary: Purposes of Planning***

The model statutes base their purposes and grant of power on a continuum that ranges from advisory to mandatory planning (see Table 2-1). They also create an optional two-way role for state and regional planning agencies to assume in reviewing local plans and policies and ensuring that

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<sup>8</sup>Robert J. Martineau, *Drafting Legislation and Rules in Plain English* (St. Paul: West, 1991), 116. See, e.g., *Britton v. Town of Chester*, 134 N.H. 434, 595 A.2d 492 (1991) (interpreting the phrase, “general welfare of the community,” in purpose section of state zoning enabling statute in gauging the validity of a local zoning ordinance that excluded low- and moderate-income housing); *Ketchel v. Bainbridge Twp.*, 52 O.S.3d 239, 557 N.E.2d 779 (1992), rehearing denied, 53 O.S.3d 718, 560 N.E.2d 779 (1990), cert denied, 498 U.S. 1120, 11 S.Ct. 1073 (1991) (interpreting the Ohio township enabling legislation to authorize the regulation of lot sizes on the basis that they control “undue concentrations of population” mentioned in the statement of purpose, even though the legislation did not specifically refer to “lot sizes”).

<sup>9</sup>Commission on Planning and Development Reform in Ontario, *New Planning for Ontario* (Toronto: The Commission, June 1993), 8.

<sup>10</sup>Planning Act, Revised Statutes of Ontario, Ch. P.13, Art. 1.1 (1995).

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state and regional plans incorporate local goals.<sup>11</sup> Four approaches are proposed below as fundamental policy choices for state legislatures.

**Alternative 1.** In this purpose statement, planning is to be an advisory function, something that is *desirable* for governments to undertake in order to exert regulatory authority. It would also authorize the creation of state and regional planning agencies. Two broad statements, Paragraphs (1) and (2), justify planning in forthright terms as a vital police power function and offer a two-tiered treatment of planning impacts: one tier averts reductions in value through the prevention of harms and the other tier enhances value through the promotion of orderly growth. The first tier is also directed at the prevention of those harms that constitute common law nuisances and the language should weigh heavily in any judicial review of the balance of interests.

**Alternative 2.** This set of purpose statements builds on language in Alternative 1 and submits that planning should be *encouraged* through incentives of granting supplemental powers to local governments. These supplemental powers must be substantive and desirable enough to serve as a strong motivator to local governments to engage in planning efforts. Under this alternative, local governments would have the basic regulatory authority of zoning and subdivision control. However, supplemental powers, such as the authority for enacting impact fees,<sup>12</sup> would be available only to local governments that adopt and periodically update a separately prepared comprehensive plan.

**Alternative 3.** These purpose statements provide for mandatory planning by local governments. A local government could not exercise regulatory and related powers unless it had adopted a comprehensive plan satisfying certain enumerated statutory criteria. The plan must also be periodically updated to reflect changing conditions and needs. The purpose statement calls for planning that is *internally consistent*, which is a concept that ensures that the parts of an individual plan relate to or do not conflict with one another, and are prepared using similar assumptions. For example, the community facilities element of a local plan, which proposes the need for water and wastewater plants, would be based on the same population forecasts as the land-use element, which forecasts the need for different types of land uses.

The mandate that local governments undertake planning can be accomplished in a variety of ways. All local governments could be required to prepare and adopt a plan within a certain time period as a condition of exercising their regulatory powers. Alternately, the mandatory planning requirement could apply to certain classes or sizes of local governments (e.g., municipalities of 2,500 persons or more). Mandatory planning may also be phased-in for different classes of local

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<sup>11</sup>For a discussion of alternatives similar to those in these model statutes, see Richard H. Slavin, "Toward a State Land-Use Policy," *Land-Use Controls Quarterly* 4, no. 4 (Fall 1970): 42-54.

<sup>12</sup>Some have argued that impact fees increase the cost of housing through the pass-through of such costs to buyers and renters, thereby precluding affordable housing opportunities. A local government that exercises supplemental powers, like the use of impact fees, must be careful to balance the need to finance its infrastructure with the obligation to produce or allow a broad range of housing types at various sales and rental levels.

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government over time, with shorter deadlines for governments that are undergoing rapid development – as gauged by percentage of population increase, change in population density, or similar measures – and longer deadlines for those governments where there is little or no change. These alternatives are discussed in more detail in Chapter 7, Local Planning, of the *Legislative Guidebook*.

**Table 2-1: Pros and Cons of Requiring Different Levels of Planning**

<b>Approach</b>	<b>Pros</b>	<b>Cons</b>
Planning as an advisory function	Authorizes planning for local governments that desire to undertake it	No commitment to backing up local regulation and public capital investment with planning
Planning as an activity to be encouraged with incentives	Authorizes supplemental powers to local governments	Quality of planning may be uneven and unbalanced
Planning as a mandatory activity	Provides clear direction and rationale for local regulation and public capital investment	Seen as an unfunded mandate unless state provides assistance or other financial aid is available
Mandatory state-regional-local system	Requires various levels of government to coordinate plans and share common assumptions in planning	Requiring planning coordination increases potential for conflict among governmental units

**Alternative 4.** This set of purposes is the broadest, calling for a *mandated*, integrated, state-regional-local planning system that is vertically and horizontally consistent. *Vertical consistency* is the concept that regional and local plans be consistent with state plans and vice versa. *Horizontal consistency* calls for neighboring local governments to ensure that their plans do not conflict with each other's. The purpose statements direct the state and regional agencies to establish a variety

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of planning goals and policies. In addition, they require local governments to have regard or account for these goals and policies in establishing their own goals, preparing their own plans, and implementing their own programs. This alternative suggests that a fundamental respect – a kind of a statesmanlike attitude – must exist between different governmental units so that they cannot frustrate one another’s legitimate objectives.

In the legislative models that follow, Alternatives 2 through 4 include all of the purposes identified in Alternative 1, but with substantial additions to their scope. In Alternative 4, the list of purposes is lengthened with additional language addressing state and regional planning.

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### **2-101 Purposes (Four Alternatives)**

#### *Alternative 1 – Planning as an Advisory Activity*

It is the purpose of this Act to:

- (1) recognize that new growth and development may have collateral state, regional, and local impacts, often unintended. When considered cumulatively, these impacts may adversely affect the public health, safety, and general welfare. The impacts may include, but shall not be limited to: air and water pollution; contamination of soil; accumulation of wastes and hazardous substances; neighborhood deterioration; disinvestment in central business districts; excessive noise and odors; excessive runoff, erosion, and sedimentation; congestion of public ways; flooding, fire, and other safety hazards; destruction of wildlife and their habitats; loss or impairment of scenic and natural resources; and deprivation of adequate water supplies, sanitary facilities, police and fire protection, or other essential public services;
- (2) recognize that the proper exercise of planning and regulatory powers promotes the general welfare by protecting or enhancing the value of individual parcels of property and the overall quality of localities or regions. Such protections and enhancements may include, but shall not be limited to: separating incompatible and encouraging compatible land uses; supporting community design that favors pedestrians; maintaining or decreasing the cost of public services; promoting a variety of types and affordability of housing; matching development with adequate public infrastructure and services; increasing efficiency in transportation systems and networks; lessening the use of energy; reducing the effects of natural hazards on life, property, and infrastructure; conserving critical natural resources and wildlife; preserving open spaces and scenic resources; maintaining an attractive aesthetic environment; and supporting the balanced economic viability of central business districts and neighborhoods; commercial and industrial centers, and rural areas in the state;

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- (3) designate local governments as the primary authorities for planning and managing development within their jurisdictions according to a system of uniform statewide procedural standards;
- (4) encourage local governments to adopt a comprehensive plan that establishes policies to guide the administration of local development regulations and related ordinances, the acquisition and disposition of land and interests in land, and the scheduling and execution of capital projects;
- (5) provide for planning processes that are fair by making them open, accessible, timely, and efficient;
- (6) encourage cooperation and coordination among various interests in the planning and development process;
- (7) establish a system of administrative and judicial review of local planning and development decisions that encourages both effective citizen participation and the prompt resolution of disputes;
- (8) authorize the creation of state and regional planning agencies; and
- (9) establish a system for permanently recording development regulations and decisions that will enable the most efficient and accurate dissemination of this information.

### *Alternative 2 – Planning as an Activity to be Encouraged Through the Use of Incentives*

- ◆ Substitute the following language in Section 2-101(4), leaving paragraphs (5) through (9) unchanged:
  - (4) encourage local governments to adopt a comprehensive plan that establishes policies to guide the administration of local development regulations and related ordinances, the acquisition and disposition of land and interests in land, and the scheduling and execution of capital projects by granting the following supplemental powers to a local government when it adopts and updates on a [5]-year basis a local comprehensive plan:
    - (a) authority to enact development impact fees as provided in Section [8-602];
    - (b) authority to adopt transportation demand management regulations as provided in Section [9-201];
    - (c) authority to require the dedication of parkland or payment of fees-in-lieu as provided in Section [8-601];
    - (d) authority to designate and regulate historic districts and sites, and/or designate and regulate design review districts as provided in Section [9-301];

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- (e) authority to establish redevelopment areas as provided in Section [14-301];
- (f) authority to undertake tax increment financing [*or other tax incentive programs*] as provided in Section [14-302];
- (g) authority to enact a property transfer tax as provided in Section [13-102];
- (h) authority to regulate the timing of development as provided in Section [8-603]
- (i) authority to regulate the transfer of development rights as provided in Section [9-401];
- (j) authority to enter into development agreements as provided in Section [8-701]; and
- (k) authority to receive the following state grants as provided in Sections [*cite to Section nos.*]: [*List types of grants.*]

- ◆ This list is representative of the types of supplemental authority that may be granted to local governments that adopt a comprehensive plan. It can be reduced, expanded, or modified to address issues in a particular state.

### *Alternative 3 – Planning as a Mandatory Activity*

- ◆ Substitute the following language in Section 2-101(4):

- (4) require local governments to adopt and update on a [5]-year basis an internally consistent local comprehensive plan that establishes policies to guide the administration of local development regulations and related ordinances, the acquisition and disposition of land and interests in land, and the scheduling and execution of capital projects.

### *Alternative 4 – Planning as a Mandatory Activity, to be Vertically and Horizontally Integrated*

- ◆ Substitute and add the following language in Section 2-101:

- (4) require local governments to adopt and update on a [5]-year basis an internally consistent local comprehensive plan that establishes policies to guide the administration of local development regulations and related ordinances, the acquisition and disposition of land and interests in land, and the scheduling and execution of capital projects, and that [takes into account *or* has regard for] the plans of adjoining local governments, regional planning agencies and special districts, and state government in order to attain compatibility and coordination among them;

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- (10) incorporate regional considerations into local planning and decision making;

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- (11) provide for state designation of areas of critical state concern and provide for state agency [and regional planning agency] review of proposed developments that are developments of regional impact; and
  - (12) authorize the preparation of state and regional plans that [take into account *or* have regard for] plans of local governments in order to attain compatibility and coordination among them.
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### *Commentary: Addressing Statewide Planning Interests*

Section 2-102, which follows, describes a series of statewide planning interests that all governments must take into account when exercising authority under the Act, regardless of which alternative approach is selected. These planning interests may be characterized as long-range or even “sustainable,” to the extent that local governments, regional planning agencies, and state agencies must consider how to meet the needs of the present generation without compromising the ability of future generations to meet their own needs.<sup>13</sup> The degree to which governmental units would have regard for these considerations when they exercise planning, regulatory, or public expenditure authority under the model statute would depend on individual circumstances, as well as on priorities or emphases in state, regional, and local plans. The objective of the language is to ensure that a balance is achieved between the social, economic, and cultural well-being of people, communities, and the environment.<sup>14</sup>

For example, when a local government is approving a permit for renovations to a significant historical building in a built-up urban area, it would take into consideration the conservation of features of significant architectural, cultural, historical, scenic, or archaeological interest (see Section 2-102(9) below) but would not necessarily need to weigh the impact on agricultural resources, a consideration of Section 2-102(2). On the other hand, a local government that is reviewing a proposal for a 400-acre planned unit development that has frontage along a tidal estuary, is near the edge of an urban area, and is located in a region that has a shortage of affordable housing, would have to take many, if not all, of these state interests into consideration.

The National Commission on Urban Problems (also known as the Douglas Commission after its chair, Senator Paul Douglas) first proposed in 1968 that state governments “amend [s]tate planning

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<sup>13</sup>James M. McElfish, Jr. and J. William Futrell, “Sustainable Development Law: More than a Planning Goal,” citing the report of the World Commission on Environment and Development (Brundtland Commission), in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 63.

<sup>14</sup>Kurt H. Schindler, “Lessons from New Zealand’s Land-Use Laws,” *Land Use Law and Zoning Digest* 46, no. 8 (August 1994): 4. This article discusses how New Zealand incorporated the goal of “sustainable management for the needs of future generations” into its national planning laws.

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and zoning enabling acts to include as one of the purposes of the zoning power the provision of adequate sites for housing persons of all income levels.”<sup>15</sup> Similarly, the American Bar Association’s (ABA) Advisory Commission on Housing and Urban Growth, in 1978, contended that “the ‘general welfare,’ as a basic state constitutional principle and the predicate for local police power regulations, should be understood as being regional in nature [and that it included]. . . the fundamentally important state interest that the housing needs of all income groups of the state be promoted and enhanced.”<sup>16</sup> The ABA commission maintained that local governments had an “affirmative duty” to carry out the state interest of ensuring housing for all.

Section 2-102(6) includes the provision of a broad range of housing types as a state interest under the Act. It should be noted, however, that state and local governments have a broad range of tools to address this interest under the model statute, not just zoning. Consequently, the placement of the language here is intended as an express acknowledgment that *all* activities under the model legislation have potential implications for the provision of a broad range of housing types for persons of *all* income levels, and that governmental units must assess those implications when taking action under the authority of the Act.

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### **2-102 State Interests for Which Public Entities Shall Have Regard**

In order to achieve the purpose of Section [2-101], all local governments, regional planning agencies, and every department, board, commission, or agency of the state, in exercising power under this Act, shall have regard for, among other things, the following state interests:

- (1) the promotion of the public health, safety, morals, or general welfare of the state;
- (2) the protection of agricultural resources;
- (3) the conservation and management of natural resources, both living and non-living, and the mineral resource base;
- (4) the protection and restoration of ecosystems, including natural areas, features, and functions;
- (5) the adequate and cost-effective provision and efficient use, operation, and maintenance of transportation, sewage and water services, and waste management systems;

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<sup>15</sup>National Commission on Urban Problems, *Building the American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States* (Washington, D.C.: U.S. GPO, 1968), 242.

<sup>16</sup>Richard P. Fishman, ed., *Housing for All Under Law: New Directions in Housing, Land Use and Planning Law; A Report of the American Bar Association Advisory Commission on Housing and Urban Growth* (Cambridge, Ma.; Ballinger, 1978), 123.

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- (6) the adequate provision of a full range of housing opportunities for persons of all income levels;
  - (7) the adequate provision of employment opportunities;
  - (8) the adequate provision and distribution of educational, health, cultural, and recreational facilities;
  - (9) the conservation of features of significant architectural, cultural, historical, scenic, or archaeological interest;
  - (10) the coordination of planning activities of public bodies; and
  - (11) the efficient resolution of planning conflicts involving public and private interests.
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### ***Commentary: Delegation of Power***

Many of the planning powers of local governments are diffused among a number of enabling acts, such as those authorizing urban renewal and tax exemptions for rehabilitation of housing or new construction of industry. This typically occurs because the specialized statutes granting these powers were considered at different times and in response to different political constituencies.<sup>17</sup> The following delegation of power language is adapted from the *ALI Model Land Development Code*.<sup>18</sup> The grant of authority is drafted broadly to “consolidate in one authorization all of the power available to a local government to guide the future development of land within its jurisdiction.”<sup>19</sup> This consolidated language should eliminate the need for a separate grant of power for each of these specialized planning powers.

Since the state already possesses these powers, no grant of authority to state agencies is necessary.

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### **2-103 Grant of Power**

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<sup>17</sup>See American Law Institute (ALI), *A Model Land Development Code*, Note to §1-102, 9.

<sup>18</sup>*Ibid.*, §1-102.

<sup>19</sup>*Ibid.*, Note to §1-102, 9.

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This Act authorizes each [regional planning agency] and local government to plan or otherwise direct, guide, regulate, encourage, or undertake the development of land in accordance with its provisions.

- ◆ A state may want to limit the type of class of “local government” to which it wants to grant powers under the statute. For example, “local government” may be limited to counties, or to counties having a population of more than x thousand, as well as municipal governments.

## CHAPTER 3

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### **DEFINITIONS**

This Chapter assembles in one location all of the definitions of “general applicability” that are used in the *Legislative Guidebook*. Specific definitions that are pertinent only to particular model statutes are located in their applicable Chapters. The reader is therefore urged to consult the individual Chapters before relying on any definitions contained in this Chapter.

## CHAPTER 3

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### Chapter Outline

#### 3-101 Definitions

#### Cross-References for Sections in Chapter 3

Section No.	Cross-Reference to Section No.
3-101	4-204, 6-101 <i>et seq.</i> , 6-201, 6-601, 6-602, 7-103

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### THE NEED FOR DEFINITIONS

Definitions have a number of functions. First, they establish with precision the meaning of a word or phrase that might be subject to diverse interpretations or that might be ambiguous or unclear; in other words, definitions promote internal consistency.<sup>1</sup> This is particularly true for planning legislation that contains many terms, such as “affordable housing,” and “development,” about which there may be several connotations. Second, they simplify the text and eliminate the need to explain the term repeatedly. Third, they translate technical terms into meaningful and usable terminology.<sup>2</sup> An example of this might be a definition involving building height. Using the description in the definition of how the height of a building is to be calculated – the points from which measurement is taken – the reader can determine how high the building may be and whether it meets a standard contained in the legislation. Definitions usually appear at the beginning of the model legislation in order to give the reader an “early warning” of terms that are obscure or technical or that may depart from the dictionary definition. **Any words and terms not defined in the *Legislative Guidebook* will have the meaning indicated by common dictionary definition.**

The definitions below are specific to words and phrases contained in the *Guidebook*. As a consequence, the user is **strongly cautioned** against modifying them without a full understanding of the particular context in the *Guidebook* in which they were meant to be applied.

#### 3-101 Definitions

As used in these Acts, the following words and terms shall have the meanings specified herein:

**“Affordable Housing”** means housing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.<sup>3</sup>

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<sup>1</sup>Lawrence E. Filson, *The Legislative Drafter’s Desk Reference* (Washington, D.C.: Congressional Quarterly, 1992), 22-23.

<sup>2</sup>Harvey S. Moskowitz and Carl G. Lindbloom, *The New Illustrated Book of Development Definitions* (New Brunswick, N.J.: Center for Urban Policy Research, 1993), xvii-xviii.

<sup>3</sup>As used in the *Legislative Guidebook*, “affordable housing” also means housing that has some type of subsidy associated with it (see definition of “subsidy” or “subsidized” later in this Chapter). See also “affordable housing development” below. It should be acknowledged that much privately constructed housing, constructed without any

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**“Affordable Housing Developer”** means a nonprofit entity, limited equity cooperative, public agency, or private individual firm, corporation, or other entity seeking to build an affordable housing development.

**“Affordable Housing Development”** means any housing that is subsidized by the federal, state, or local government, or any housing in which at least [20] percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices which preserve them as affordable housing for a period of at least [15] years.<sup>4</sup>

**“Agriculture”** or **“Agricultural Use”** means the employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops, or feeding (including grazing), breeding, managing, selling, or producing livestock, poultry, fur-bearing animals or honeybees, or by dairying and the sale of dairy products, by any other horticultural, floricultural or viticultural use, by animal husbandry, or by any combination thereof. It also includes the current employment of land for the primary purpose of obtaining a profit by stabling or training equines including, but not limited to, providing riding lessons, training clinics and schooling shows.

**“Agricultural Land”** means land on which the land use of agriculture occurs.

**“Areawide”** or **“Regional”** means the geographic territory that encompasses the whole area of influence of a program or impact of a problem to be addressed, usually transcending the boundaries of any single unit of local government.

**“Buildable Land”** mean land within urban and urbanizable areas that is suitable, available, and necessary for residential, commercial, and industrial uses, and includes both vacant land and developed land that, in the opinion of the local planning agency, is likely to be redeveloped.

**“Capital Improvement”** means any building or infrastructure project that will be owned by a governmental unit and purchased or built with direct appropriations from the governmental unit, or with bonds backed by its full faith and credit, or, in whole or in part, with federal or other public funds, or in any combination thereof. A project may include construction, installation, project management or supervision, project planning, engineering, or design, and the purchase of land or interests in land.

**“Comprehensive Plan, Local”** means the adopted official statement of a legislative body of a local government that sets forth (in words, maps, illustrations, and/or tables) goals, policies, and guidelines intended to direct the present and future physical, social, and economic development that occurs within its planning jurisdiction and that includes a unified physical design for the public and private development of land and water.

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subsidy, may also be affordable to middle-, moderate-, and low-income housing.

<sup>4</sup>This definition is used in connection with Section 4-208.1 *et seq.* (Alternative 2 – Application for Affordable Housing Development; Affordable Housing Appeals).

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**“Comprehensive Plan, Regional”** means that plan prepared pursuant to Section [6-201] and adopted by a [regional planning agency].

**“Context-Sensitive Highway Design”** means the application to roadways of design criteria that take into account, in addition to road safety, durability, and economy of maintenance:

- (a) the built and natural environment surrounding the roadway, including environmental, scenic, and historic attributes of the area; and
- (b) interaction with other modes of transportation, including but not limited to walking, bicycling, and public transportation.

**“Density”** or **“Net Density”** means the result of:

- (a) dividing the total number of dwelling units existing on a housing site by the net area in acres; or
- (b) multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit.

“Density” or “Net Density” is expressed as dwelling units per acre or per net acre.

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

**“Development of Regional Impact”** or **“DRI”** means any development that, because of its character, magnitude, or location, would have substantial effect upon the health, safety, welfare, or environment or more than one unit of local government.

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

**“Forest”** means a tract or tracts of contiguous trees or tree stands.

**“Forest Land”** means land on which the land use of forestry occurs.

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**“Forestry” or “Forest Operations”** means the growing or harvesting of forest tree species trees used for commercial or related purposes.

**“Goal”** means a desired state of affairs to which planned effort is directed.

**“Guideline”** means an agency statement or a declaration of policy that the agency intends to follow, which does not have the force or effect of law and that binds the agency but does not bind any other person.

**“Housing Region”** means that geographic area that exhibits significant social, economic, and income similarities, and which constitutes to the greatest extent practicable, the applicable primary metropolitan statistical area as last defined and delineated by the United States Census Bureau.

**“Household”** means the person or persons occupying a dwelling unit.

**“Inclusionary Development”** means a development containing [at least 20 percent] low- and moderate-income dwelling units. This term includes, but is not necessarily limited to, the creation of new low- and moderate-income dwelling units through new construction, the conversion of a nonresidential structure to a residential structure, and/or the gut rehabilitation of a vacant residential structure.<sup>5</sup>

**“Land Development Regulations”** mean any zoning, subdivision, impact fee, site plan, corridor map, floodplain or stormwater regulations, or other governmental controls that affect the use, density, or intensity of land.

**“Legislative Body”** means the governing body of a local government with the power to adopt ordinances, regulations, and other documents that have the force of law.

**“Level of Service”** means an indicator of the extent or degree of service provided by, or proposed to be provided by, a public facility based on and related to the operational characteristics of the facility. “Level of service” shall indicate the capacity per unit of demand for each public facility.

**“Local Government” or “Unit of Local Government”** means any county, municipality, village, town, township, borough, city, or other general purpose political subdivision.

**“Local Planning Agency”** means an agency designated or established as such by the legislative body, which may be constituted as a local planning commission, a community development department, a planning department, or some other instrumentality as having the powers of Section [7-103] of this act..

**“Local Planning Commission”** means a board of the local government consisting of such [elected and appointed *or* appointed] members whose functions include advisory or nontechnical aspects of planning and

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<sup>5</sup>This definition is used in connection with Section 4-208.1 *et seq.* (Alternative 1 – A Model Balanced and Affordable Housing Act).

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may also include such other powers and duties as may be assigned to it by the legislative body, pursuant to this act.

**“Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.

**“Middle-Income Housing”** means housing that is affordable for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 80 percent but does not exceed [*specify a number within a range of 95 to 120*] percent of the median gross household income for households of the same size within the housing region in which the housing is located.

- ◆ While the definitions of low-income and moderate-income housing are specific legal terms based on federal legislation and regulations, this term is intended to signify in a more general manner housing that is affordable to the great mass of working Americans. Therefore, the percentage may be amended by adopting legislatures to fit the state’s circumstances.

**“Moderate-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.

**“Net Area”** means the total area of a site for residential or nonresidential development, excluding street rights of way and other publicly dedicated improvements such as parks, open space, and stormwater detention and retention facilities. “Net area” is expressed in either acres or square feet.

**“New Fully Contained Community”** means a development proposed for location outside of existing designated urban growth areas and that will be characterized by urban growth.

**“Non-profit Conservation Organization”** means an entity that holds, in fee simple or in easement, land for conservation purposes.

**“Plan”** means a document, adopted by an agency, that contains, in text, maps, and/or graphics, a method of proceeding, based on analysis and the application of foresight, to guide, direct, or constrain subsequent actions, in order to achieve goals. A plan may contain goals, policies, guidelines, and standards.

**“Policy”** means a general rule for action focused on a specific issue, derived from more general goals.

**“Regional Planning Agency”** means an organization engaged in areawide comprehensive and functional planning organized under Section [6-101, *et seq.*].

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“**Scenic**” means of or pertaining to natural features of the landscape that are visually significant or unique.

“**Scenic Corridor**” or “**Scenic Viewshed**” means an area visible from a highway, waterway, railway or major hiking, biking, or equestrian trail that provides vistas over water, across expanses of land, such as farmlands, woodlands, or coastal wetlands, or from mountaintops or ridges.

“**Scenic Highway**” includes scenic byways pursuant to 23 U.S.C. §162 as amended.

“**Special District**” means a local or areawide unit of special government, except school districts, created pursuant to general or special law for the purpose of performing specialized functions within an area’s boundaries.

“**Standard**” means a criterion that defines the meaning of a policy by providing a way to measure its attainment.

“**State Agency**” means any department, commission, board, or other administrative unit of state government.

“**State Capital Budget**” means the [annual *or* biennial] budget for capital improvements proposed by the governor and adopted by the state legislature.

“**State Capital Improvement Program**” means the [5]-year schedule of capital improvements for the state, the first [year *or* 2 years] of which is the capital budget. The capital improvement program is a proposed plan of expenditures and, except for the capital improvements included in the capital budget, shall not constitute an obligation or promise by the state to undertake projects or appropriate funds for any project in years [2 to 5 *or* 3 to 5] of the schedule.

“**State Planning Agency**” means the [*insert name of state planning agency*].

“**Subsidy**” or “**Subsidized**” means or refers to a federal, state, or local grant or aid that is extended to the construction or rehabilitation of housing for which a public interest in ensuring that it is affordable is imputed. A subsidy may include, but shall not be limited to: a payment in money; a donation of land or infrastructure; financing assistance or guarantees; a development or impact fee exemption; tax credits; full or partial property tax exemption; or a density bonus or other regulatory incentive to a market rate housing development in order to provide low- and moderate-income housing.. A subsidy shall not include federal home mortgage interest deductions.

“**Substate District**” means the geographic area within each set of boundaries delineated by the governor under Section [6-601].

“**Substate District Organization**” means a [regional planning agency] designated by the governor pursuant to Section [6-602] to perform areawide comprehensive and functional planning and other multijurisdictional responsibilities authorized by statute, agreement, interstate compact, or delegation by the governor.

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**“Telecommunications”** means any origination, creation, transmission, emission, storage-retrieval, or reception of signs, signals, writing, images, sounds, or intelligence of any nature, by wire, radio, television, optical, or other means.

**“Telecommunications Facility”** means any facility that transmits and/or receives signals by electromagnetic or optical means, including antennas, microwave dishes, horns, or similar types of equipment, towers or similar structures supporting such equipment, and equipment buildings.

**“Unnecessary Cost Generating Requirements”** mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, and oversized water and sewer lines to accommodate future development, without reimbursement.

**“Urban Growth”** means development that makes intensive use of land for the location of buildings, other structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, fiber, or other agricultural products, or the extraction of mineral resources and that, when allowed to spread over wide areas, typically requires urban services.

**“Urban Growth Area”** means an area delineated in an adopted [regional *or* county] comprehensive plan [in accordance with the goals, policies, and guidelines in the state land development plan, prepared pursuant to Section [4-204]] within which urban development is encouraged by delineation of the area, compatible future land-use designations, and implementing actions in a local comprehensive plan, and outside of which urban development is discouraged. An urban growth area shall allow existing or proposed land uses at minimum densities and intensities sufficient to permit urban growth that is projected for the [region *or* county] for the succeeding [20]-year period and existing or proposed urban services to adequately support that urban growth.

**“Urban Growth Boundary”** means a perimeter drawn around an urban growth area.

**“Urban Services”** mean those activities, facilities, and utilities that are provided to urban-level densities and intensities to meet public demand or need and that, together, are not normally associated with nonurban areas. Urban services may include, but are not limited to: the provision of sanitary sewers and the collection and treatment of sewage; the provision of water lines and the pumping and treatment of water; fire protection; parks, recreation, and open space; streets and roads; mass transit; and other activities, facilities, and utilities of an urban nature, such as stormwater management or flood control.

**“Very Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the housing region in which the housing is located.

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# STATE PLANNING

This Chapter proposes legislation that establishes various types of state planning agencies, describes their functions, and details different types of state plans and procedures for their adoption and use by state agencies. Some state plans are intended as vehicles simply to formulate policy or create a “vision” for the state. Others have regulatory implications for state and regional agencies and local governments, such as plans for affordable housing. The Chapter includes a model state capital budgeting and capital improvement programming statute, and concludes with a Smart Growth Act based on a 1997 Maryland law.

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### Chapter Outline

#### STATE PLANNING AGENCY ORGANIZATION

- 4-101 [State Planning Agency] (Five Alternatives)
- 4-102 Functions and Duties of the [State Planning Agency]
- 4-103 Authority to Adopt Rules, Issue Orders, and Promulgate Guidelines
- 4-104 Biennial Report

#### STATE PLANS

- 4-201 State Futures Commission; Strategic Futures Plan
- 4-202 State Agency Strategic Plan of Operation
- 4-203 State Comprehensive Plan
- 4-204 State Land Development Plan
- 4-204.1 State Biodiversity Conservation Plan

#### FUNCTIONAL PLANS

- 4-205 State Transportation Plan
- 4-206 State Economic Development Plan
- 4-206.1 State Telecommunications and Information Technology Plan
- 4-207 State Housing Plan; Housing Advisory Committee; Annual Progress Report
- 4-208 State Planning for Affordable Housing (Two Alternatives)

#### *Alternative 1 – A Model Balanced and Affordable Housing Act*

- 4-208.1 Findings and Purposes
- 4-208.2 Intent
- 4-208.3 Definitions
- 4-208.4 Creation and Composition of Balanced and Affordable Housing Council
- 4-208.5 Organization of the Council

#### *Alternative 1A – Strong Council with No Regional Planning Agency Involvement*

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### **4-208.6 Functions and Duties of the Council**

*[or]*

*Alternative 1B – Council and Regional Planning Agency Work in Tandem*

- 4-208.6 Functions and Duties of the Council and [Regional Planning Agencies]**
- 4-208.7 Appointment of Council Executive Director; Hire by Contracts; Purchases and Leases; Maintenance of Public Records**

*Alternative 1A – Action by Council*

- 4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Regional Fair-Share Allocations; Adoption of Need Estimates and Allocations**

*[or]*

*Alternative 1B-Action by Council and Regional Planning Agency*

- 4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Preparation of Regional Fair-Share Allocation Plan by [Regional Planning Agency]; Adoption of Plan; Review and Approval of Plan by Council**
- 4-208.9 Contents of a Housing Element**
- 4-208.10 Submission of Housing Element to [Council *or* Regional Planning Agency]**
- 4-208.11 Notice of Submission**
- 4-208.12 Objection to Housing Element; Mediation**
- 4-208.13 [Council *or* Regional Planning Agency] Review and Approval of Housing Element**
- 4-208.14 Adoption of Changes to Development Regulations After Approval**
- 4-208.15 Quasi-Legislative Review**
- 4-208.16 Appeal to Council of Decision Made by a Local Government Regarding an Inclusionary Development When a Housing Element is not Approved or is not Submitted**
- 4-208.17 Review of Decisions of the Council [and Regional Planning Agency]**
- 4-208.18 Enforcement of Housing Element Requirements**
- 4-208.19 Assistance of Court in Enforcing Orders**
- 4-208.20 Council as Advocate**
- 4-208.21 Designation of Authority; Controls on Affordability of Low- and Moderate-Income Housing**

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- 4-208.22 Controls on Resales and Re-rentals of Low- and Moderate-Income Dwelling Units
- 4-208.23 Enforcement of Deed Restriction
- 4-208.24 Local Government Right to Purchase, Lease, or Acquire Real Property for Low- and Moderate-Income Housing
- 4-208.25 Biennial Report of the Council to Governor and Legislature

### *Alternative 2 – Application for Affordable Housing Development; Affordable Housing Appeals*

- 4-208.1 Findings
- 4-208.2 Purpose
- 4-208.3 Definitions
- 4-208.4 Local Government Action on Affordable Housing Applications
- 4-208.5 Basis for Approving Authority Determination
- 4-208.6 Appeal to [State Housing Appeals Board *or* Court]
- 4-208.7 Enforcement
- 4-208.8 Nonresidential Development as Part of an Affordable Housing Development
- 4-208.9 Overconcentration of Affordable Housing
- 4-208.10 Housing Appeals Board
- 4-208.11 Publication of List of Exempt Local Governments
- 4-208.12 Effective Date

### PROCEDURES RELATED TO STATE PLAN MAKING, ADOPTION, AND IMPLEMENTATION

- 4-209 Workshops and Public Hearings
- 4-210 Adoption of Plans (Four Alternatives)
- 4-211 Certification of Plan; Availability for Sale
- 4-212 Effect of State Plans on State Agencies; Interagency Coordination (Two Alternatives)
- 4-213 [Effect of State Plans on Regional and Local Agencies–See Sections 7-402.1 to 7-402.5]
- 4-214 [Resolution of Conflict Between State, Regional, and Local Plans; Certification – See Sections 7-402.1 to 7-402.5]

### STATE CAPITAL BUDGET AND CAPITAL IMPROVEMENT PROGRAM

- 4-301 Definitions
- 4-302 Submission of State Capital Budget and Capital Improvement Program
- 4-303 Contents of State Capital Budget and Capital Improvement Program
- 4-304 Participation by and Cooperation of State Agencies

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### SMART GROWTH ACT

**4-401 Smart Growth Act**

**Table 4-1 Elements of the Civic and Management Models of State Planning**

**Table 4-2 Types of State Planning Agencies**

**Table 4-3 Typical State Plans and Their Purposes**

**Table 4-4 Methods of State Plan Adoption and Their Pros and Cons**

**Table 4-5 Policy/Plan Context of State Planning Goals**

#### NOTE 4A – A NOTE ON STATE PLANNING GOALS

#### NOTE 4B – A NOTE ON STATE PLANNING APPROACHES TO PROMOTE AFFORDABLE HOUSING

### Cross References for Sections in Chapter 4

#### Section No. Cross-Reference to Section No.

**4-101 4-102, 4-104, 4-203, 4-204, 4-204.1, 4-302, 7-402.2**

**4-102 4-204.1, 4-213, 4-301 et seq., 5-201 et seq., 5-301 et seq., 7-402.2**

**4-103**

**4-104 4-101**

**4-201**

**4-202 4-203, 4-303**

**4-203 4-101, 4-202, 4-209, 4-201, 4-211, 4-302, 4-303, 4-304, 5-103**

**4-204 4-209, 4-210, 4-211, 5-104, 5-202, 5-204, 6-201.1**

**4-204.1 4-209, 4-210, 4-211, 5-201**

**4-205 4-208, 4-209, 4-210, 4-211, 6-204, 7-205**

**4-206 4-209, 4-210, 4-211, 7-206**

**4-206.1 4-209, 4-210, 4-211**

**4-207 4-208, 4-209, 4-210, 4-211, 6-203, 6-602, 7-207**

**4-208.1**

**et seq.**

***Alt. 1* 4-207, 6-203, 7-207**

**4-208.6 4-208.8**

**4-208.8 4-208.6**

**4-208.9 4-208.22**

#### Section No. Cross-Reference to Section No.

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4-208.14	4-208.16
4-208.18	4-208.9
4-208.19	4-208.17
4-208.22	4-208.9, 4-208.23
4-208.1	
et seq.,	
<i>Alt. 2</i>	4-207, 6-208, 7-207
4-208.4	4-208.5
4-208.5	4-208.4
4-208.9	4-208.3
4-209	4-203, 4-204, 4-204.1, 4-205, 4-206, 4-207, 4-210, 4-211, 4-212
4-210	4-205, 4-206, 4-207, 5-202
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4-301	4-302, 4-303, 4-304
4-302	4-203, 4-301, 4-303, 4-304
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4-304	4-202, 4-203, 4-301, 4-302, 4-303
4-401	6-201, 6-201.1, 7-201, 7-204, 7-204.1

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### STATE PLANNING

#### STATE PLANNING: EARLY YEARS

State planning in the United States has a long history, but one characterized by starts, stops, and attempts at seeking a definition and a role. Early state planning in the twentieth century focused on the creation of state development and conservation departments, whose mission was the management of the states' natural resources. It was not until the Great Depression of the 1930s that state planning received its first strong stimulus from the federal government.

The federal agency that backed state planning was the National Planning Board (NPB), which went under various names during the 1930s. The NPB was first established in 1933 as part of the Federal Public Works Administration, under Interior Department Secretary Harold Ickes. The following year, President Franklin Roosevelt made the board a presidential board by executive order. The NPB underwent a name change in 1935 and became the National Resources Committee (NRC). In 1939, Congress formally created and renamed the board by statute as the National Resources Planning Board (NRPB). The NRPB was formally terminated in 1943, the victim of Congressional hostility and opposition from other federal agencies, most notably the Army Corps of Engineers.<sup>1</sup>

During its existence, the NPB and its successors actively promoted state planning, allotting federal funds to governors who would establish a nonpaid state planning board and a professional to direct its work, sponsor legislation to make the board a continuing agency, and develop a planning program and a long-range public works program for the state. The federal government's support for state planning resulted in an increase in the number of state planning boards from 14 in 1933 to 47 in 1938, with 42 of those having been given a statutory basis.<sup>2</sup> Observed the NRC in a 1938 report:

It is probably generally accurate to say that in one-third of the States, the planning boards have come to be recognized and accepted as an integral part of the governmental structure. In these States the necessity for such an agency has been generally recognized and the planning notion is permeating the State government as a whole. In another third, the planning boards are in a more precarious position. They are less firmly established and less generally accepted. In another third, planning boards are relatively inactive or nonexistent. In general, the planning boards are not likely to be much better or worse than the administrative and political tradition of the State itself.<sup>3</sup>

The approach of these state planning boards was derived from that used in American city planning and their activities mirrored the type of work carried out by city planning commissions,

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<sup>1</sup>Harold F. Wise, *History of State Planning – An Interpretive Commentary* (Washington: Council of State Planning Agencies, 1977), 10.

<sup>2</sup>National Resources Committee, *The Future of State Planning: A Report to the Advisory Committee by the State Planning Review Group* (Washington, D.C.: U.S. GPO, March 1938), 3.

<sup>3</sup>*Id.*, 3-4.

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particularly the collection and analysis of data and inventories. The NRC reported in 1938 that the state boards “have engaged in a bewildering variety of activities,” including participation in a national inventory of public works and drainage basin work, a recreation survey, and, in some states, highway planning surveys.<sup>4</sup> Boards were also active in stimulating planning by counties and cities through conferences, promotion of legislation, and technical assistance.

### A TEMPORARY DEMISE

The NRPB’s demise and the shifting of the nation’s attention to World War II also resulted in the phasing out of the state planning boards in most parts of the nation, although continuing state planning activities remained in some states, especially Maryland, Tennessee, Connecticut, and Pennsylvania. The reason for the phase-out was that state planning, as it was constituted in the 1930s and early 40s, “belonged neither to the [g]overnor nor to the legislature, and, as the new boy on the block, in an outgoing and established state bureaucracy, it appeared to be a threat to the established state machinery.”<sup>5</sup> In short, it was outside of the political mainstream and had no strong political constituency. Moreover, state planning had no overall doctrine or philosophy to justify its existence. The activities of many of the state boards – inventorying and data collection – were a “catch all or miscellany of jobs [with] no clear or integrative purpose.”<sup>6</sup>

### RESURGENCE

State planning underwent a resurgence beginning in the late 1950s and continuing into the 1960s and 1970s. The leader of the movement was Hawaii. While still a territory, Hawaii in 1958 enacted legislation establishing a state planning office under the governor and then published a general plan for the state in 1961. Its efforts led to state-level zoning that divided the state into watershed and conservation areas, agricultural lands, and land for urbanization. California prepared a state development plan in 1962 using state funds and federal planning assistance monies. Under an office of regional development in Governor Nelson A. Rockefeller’s office, the State of New York, also influenced by the Hawaii initiative, produced a state development policy report in 1964, under the

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<sup>4</sup>Id., 9. For other reports discussing state planning activities in the 1930s and 40s, see, e.g., National Resources Board, *State Planning: Review of Activities and Progress* (Washington, D.C.: U.S. GPO, June 1935); American Society of Planning Officials, *Newsletter* I, no. 11 (December 1935) (special issue on state planning); National Resources Committee, *State Planning: Programs and Accomplishments* (Washington, D.C.: U.S. GPO, December 1936); and National Resources Planning Board, *State Planning* (Washington, D.C.: U.S. GPO, June 1942).

<sup>5</sup>Wise, *History of State Planning*, 12.

<sup>6</sup>Id., 12, 13. See also Leopold A. Goldschmidt, *Principles and Problems of State Planning*, Planning Advisory Service Report No. 247 (Chicago: American Society of Planning Officials, June 1969).

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title *Change/Challenge/Response*.<sup>7</sup> In 1971, the New York office of planning coordination released Phase I of the *New York State Development Plan*. The plan:

contained a series of regional maps detailing projected settlement and land use patterns, urging that they not be used as regional plans, but rather that they provide objectives or guidelines for the development of plans by existing regional planning groups. In further support of region-wide planning, the document recommended that counties be authorized to adopt regulations dividing the county into development districts (e.g., urban, agricultural, recreation, conservation), and to prescribe development intensity and population density within each district. At the same time the Development Plan was touting regionalized planning efforts, it also called for broader local control and the authorization of flexible and innovative zoning techniques for cities, towns, and villages.<sup>8</sup>

The *New York State Development Plan* was a remarkably sophisticated and detailed document and one well ahead of its time. However, the plan produced a great deal of controversy, apparently over its lack of citizen outreach and involvement in its preparation. Ultimately, the office of planning coordination underwent a name change and its authority was limited to technical assistance, not functional planning.<sup>9</sup>

Other states, prompted by the availability of federal planning monies, began to create their own new planning organizations. By 1968, new state planning legislation had been adopted by Arizona, Colorado, Florida, Georgia, Kansas, Louisiana, Michigan, Minnesota, Nebraska, New Mexico, Oregon, Texas, Washington, and Wisconsin.<sup>10</sup>

The passage of the federal Intergovernmental Cooperation Act of 1968<sup>11</sup> greatly enhanced state planning. Title IV of the act was implemented through Office of Management and Budget Circular A-95 and gave states and regional planning organizations the ability to review and comment on applications for federal funds and their relationship to state and regional plans, goals, and policies.<sup>12</sup>

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<sup>7</sup>Wise, 14-15. See also Patricia E. Salkin, "Regional Planning in New York State: A State Rich in National Models, Yet Weak in Overall Statewide Planning Coordination," *Pace L. Rev.* 13, no. 2 (Fall 1993): 512-513 (discussion of New York State development policy report).

<sup>8</sup>Salkin "Regional Planning in New York State": 513, citing State of New York, Office of Planning Coordination, *New York State Development Plan – I* (Albany, N.Y.: January 1971), 8, 44, 50, and 88.

<sup>9</sup>*Id.*, 516.

<sup>10</sup>*Id.*, 18.

<sup>11</sup>82 Stat. 1103.

<sup>12</sup>Frank S. So, Irving Hand, and Bruce D. McDowell, eds., *The Practice of State and Regional Planning* (Washington, D.C.: International City Management Association, 1986), 75. The A-95 review process has since been modified by the federal government. The A-95 Circular has been replaced by a Presidential Executive Order, No. 12372, of July 14, 1982, *Federal Register* 47, no. 137, July 15, 1982.

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Beginning in the late 1960s and continuing into the 1990s, a number of states initiated growth management programs.<sup>13</sup> These programs were characterized by the development of state goals and, in a number of cases, the preparation of a plan map that showed land uses, environmentally sensitive or critical areas, or areas expected to urbanize. (Recent efforts by these states are described in Table 4-4 and discussed below.) Massachusetts, Connecticut, and Rhode Island created housing appeals boards to which local decisions regarding proposals for affordable housing could be appealed.<sup>14</sup>

### **NEW DIRECTIONS: STRATEGIC PLANNING AND BUDGETING**

In the 1970s and 80s, many state planning offices and departments began to be involved in doing research for the governor and cabinet officers, preparing budgets, and developing legislative agendas. This trend was born out by a 1992 report based on a survey and analysis of centralized planning efforts in 37 states conducted by the Virginia Commission on Population Growth and Development. The report noted that eight states:

appear to have created a new planning entity to assist with the formation or creation of the state's long-range, strategic planning effort. For example, Arkansas created a new commission to devise its plan. Both New Jersey and Rhode Island formed two new entities concurrent with the enactment of their strategic planning statutes. Vermont transferred planning authority back to the office of the governor [from a "central planning office"] when it enacted Act 250.<sup>15</sup>

According to the Virginia commission report, six states— Kentucky, Massachusetts, New Mexico, Pennsylvania, West Virginia, and Wisconsin – answered that they did not engage in centralized planning at the state level. In these states, planning was accomplished by cabinet

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<sup>13</sup>See generally Fred Bosselman and David Callies, *The Quiet Revolution in Land-Use Control* (Washington, D.C.: U.S. GPO, 1971); John M. DeGrove, *Land, Growth, and Politics* (Chicago, IL: APA Planners Press, 1984); and John M. DeGrove with Deborah A. Miness, *The New Frontier for Land Policy: Planning and Growth Management in the States* (Cambridge, Mass.: Lincoln Institute for Land Policy, 1992).

<sup>14</sup>Mass. Ann. Laws, Ch. 40B, §§20-23 (1993 & Supp. 1994); Conn. Gen. Stat. Ann. §80-30g (1989 & Supp. 1994); and R.I. Gen. Laws §§45-53-1 to -7 (1991 & Supp. 1994).

<sup>15</sup>Marc Bernstein, "Survey of Centralized Planning Efforts of State Governments," in *Growth Management and Strategic Planning: A Background Reader* (Richmond, Va: Commission on Population Growth and Development, July 1994), 2. The states are Arkansas, Florida, Hawaii, Maryland, New Jersey, Oregon, Rhode Island, and Vermont. Arkansas' Commission for Arkansas' Future was created in 1989 to develop the state's comprehensive plan. Ark. Code Ann. §25-25-101 (Supp. 1993). New Jersey established its Office of State Planning and its State Planning Commission when it enacted its State Planning Act of 1985. N.J.S.A. §52:18A-201 (1995 Supp.). The Office of State Planning exists within the Department of Treasury and the director serves at the pleasure of the governor. The office assists the State Planning Commission in creating and revising the State Development and Redevelopment Plan. Rhode Island's statewide planning program includes the State Planning Council, the Office of Strategy Planning, and the Office of Systems Planning. R.I. Gen. Laws §42-11-10(b)(2) (1993). The Office of Strategic Planning and the Office of Systems Planning are both housed in the Division of Planning, which is located in the Department of Administration.

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departments and executive branch agencies in their fields of expertise.<sup>16</sup> Four other states responded that they did not maintain an office dedicated to centralized planning.<sup>17</sup> The remaining 19 states, noted the Virginia report, “fell somewhere between these two extremes. These states engage to some degree in centralized coordination, but do not have a major planning entity dedicated solely to this purpose.”<sup>18</sup> In addition, the study determined that at least five states that engaged in long-range strategic planning – California, Minnesota, Texas, Rhode Island, and Washington – linked their planning efforts to some degree with the budget process.<sup>19</sup> This new direction documented by the Virginia study confirms the a partial shift away from the natural resource- and physically-oriented city planning heritage of state planning and a move toward policy analysis and strategic planning.

### TWO STATE PLANNING MODELS

Two general approaches in state planning have emerged and pose useful paradigms for drafting legislation (see Table 4-1). One has been called the “*civic model*” and is derived from the heritage and assumptions of city planning. The second has been termed the “*management model*” and draws its orientation and techniques from the science of organization management. Under the civic model, the state would engage in a goal-setting process, develop an inventory of resources and an appraisal of existing conditions that affect the ability to achieve those goals, identify a set of alternative actions, and compile a list of implementing measures. The civic model would produce plans affecting land use and critical areas management or addressing functional topics like transportation, water, and economic development. The plans would have regulatory impact and/or affect the programming of infrastructure to support particular growth strategies.

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<sup>16</sup>Bernstein, “Survey of Centralized Planning Efforts,” 2.

<sup>17</sup>Id. The states are Alaska, Delaware, North Dakota, and South Carolina. Delaware does, however, have a Cabinet Committee on State Planning. Del. Stat. Ann. Tit. 29 §9101 (1994).

<sup>18</sup>Id.

<sup>19</sup>Id. According to the Virginia report, California’s Office of Planning and Research assists the Department of Finance in the budgeting process. Cal. Gov’t. Code §§65037, 65038 (1992). Minnesota maintains an independent cabinet level strategic planning agency, the Office of Strategic Long-Range Planning. The office coordinates with the commissioner of finance, affected agencies, and the legislature in the planning and financing of major public projects. Minn. Stat. §4A.01 (Supp. 1993). Under the Texas strategic planning legislation, planning authority is lodged in two agencies, the Governor’s Office of Budget and Planning and the Legislative Budget Board. The Governor’s Office, housed within the executive branch, has responsibility for developing the initial draft of *Texas Tomorrow*, “a statement of the vision, philosophy, mission, and goals” for the state. H. 2009, 72d Leg. §3 (1991). The Legislative Budget Office, a ten-member board within the legislative branch comprised solely of members of the legislature, monitors and analyzes performance indicators supplied by the planning process. Rhode Island, discussed above, requires “close coordination” between strategic planning and budgeting. Washington’s Office of Financial Management is responsible for state planning and program development, including budgeting. Wash. Rev. Code Ann. §§43.41.030 to 43.41.980 (1994).

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**Table 4-1: Elements of the Civic and Management Models of State Planning**

Characteristics	Civic Model	Management Model
<i>Purpose</i>	To identify public goals and large-scale policy choices that will shape the future of the state consistent with those goals	To ensure that state agencies operate in an efficient and coordinated manner consistent with the priorities of the chief executive
<i>Implementing agent</i>	State government	State government
<i>Source of power</i>	The people, through consensus	The governor, operating under the constitution
<i>Source of goals</i>	The people, directly through various techniques	The people, indirectly through the electoral process
<i>Organizational status of planning</i>	Various, not inherently sited within government	Adjacent to or part of the office of the governor
<i>Administrative role of planning</i>	Strictly advisory	Advise and control
<i>Relationship to legislative branch</i>	Varies - may be very close or quite distant	Limited by the separation of powers tradition
<i>Time horizon</i>	Typically long-range, though not inherently limited to long-range issues	Typically short range, though not inherently limited to short-range issues
<i>Typical products</i>	“State comprehensive plan;” “state land use plan;” “state goals;” and “futures programs”	“Planning systems;” “planning and budgeting systems;” “policy directives;” and “coordination mechanisms”
<i>Advantages</i>	Permits citizen participation, encourages long-range thought, and frees planning from immediate political concerns	Likely to be directly relevant to current decisions
<i>Disadvantages</i>	May be ignored by policy makers and may lack political legitimacy	Tied to the management style of governors and may be short-range, narrowly focused, and sometimes partisan.

SOURCE: Lynn Muchmore, *Concepts of State Planning, State Planning Series 2* (Washington, D.C.: Council of State Planning Agencies, 1977), 14.

While the purpose of the civic model is to identify public goals and large-scale policy choices that will shape the state’s future, the purpose of the management model is to ensure that state

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agencies operate in an efficient and coordinated manner consistent with the priorities of the chief executive. Under the management model, the governor, who is the state's chief executive, implements policies and measures enacted by the state legislature and uses the planning system to exert administrative control over state agencies by establishing operational guidelines and directions for them.<sup>20</sup>

Note that the civic model is more likely to be used for plans that have a physical dimension to them, such as land use. State-supervised land-use planning has been a central concern in many states, as noted above. Five main approaches to state land-use planning programs have been identified, exclusive of those that simply enable planning by local government.

*State planning* – the state plans and zones land, develops and maintains a statewide land-use plan, and implements the plan through permits and regulations (Hawaii is the only state that comes closest to this model).

*State-mandated planning* – the state sets mandatory standards, some of which apply to regional agencies and local governments, for those aspects of land use planning and control that involve state interests (e.g., Oregon, Florida).

*State-promoted planning* – the state sets guidelines for those aspects of planning that involve state interests, establishing incentives for local governments to meet the guidelines (e.g., Georgia).

*State review (the “mini-NEPA system”)* – the state requires environmental impact reports for certain types of development, thus superimposing a second tier of review on the traditional local planning model. The state agency reviews the reports for conformance with state standards. (e.g., California, Washington).

*State permitting* – the state requires permits for certain types of development, thus preempting local review and permitting for those types of development. (e.g., Vermont).<sup>21</sup>

The management model would be more likely to employ a *strategic planning approach* through which a state agency or agencies would develop strategic plans that would cut across state agency

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<sup>20</sup>Lynn Muchmore, *Concepts of State Planning* (Washington, D.C.: Council of State Planning Agencies, 1977), 6, 10-11.

<sup>21</sup>Mitch Rohse, “Recommendations for the Role and Structure of State Planning Agencies,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report 462/463 (Chicago: American Planning Association, March 1996), 79-84.

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functions and activities. Legislation to accomplish this was proposed by the Virginia Commission on Population Growth and Development but was never enacted.<sup>22</sup>

Economic development and transportation plans assume this strategic dimension when they focus less on establishing policies and guidelines for the location of new and rehabilitated facilities and more on the overall objectives and direction of programs and the operational capabilities of state agencies to carry them out.

The state's planning agency should be an *independent* agency rather than an office or division within a larger agency.<sup>23</sup> This independence calls for long-term funding, authority to coordinate state agency programs, and interagency linkages.

The state planning agency will need strong linkages to other state agencies that deal with *both* natural resources and development. But locating the agency within a broader natural resources department poses some significant problems. To do so "may hinder the agency's efforts to deal with vital development issues such as affordable housing or public facility planning."<sup>24</sup> Similarly, a state planning agency should not be placed within an economic development department because of the potential conflict between economic development and resource protection issues.<sup>25</sup>

**Table 4-2: Types of State Planning Agencies**

<i>Type of Agency</i>	<i>Appropriate Use</i>
State planning office	Governor wants agency to undertake policy research, state policy planning, and interagency coordination
State planning department	Routine administrative duties such as land-use permitting and regional and local plan certification, as well as duties described for state planning office
State planning commission	Independent body to develop plans, develop broad-based support for planning, advise governor, state agencies, legislature
Cabinet co-ordinating committee	Policy coordination among state department heads and coordinate planning
Department of development	Provide economic development focus and technical assistance to local governments. Planning function may be subordinated to economic development priorities.
Department of environment	Natural resources or environmental protection focus (not recommended as a location of state planning activities)

<sup>22</sup>State of Virginia, HB 1068, 2-5-94, "Virginia Growth Strategies Act."

<sup>23</sup>Rohse, "Recommendations for the Role and Structure of State Planning Agencies," 84.

<sup>24</sup>Id.

<sup>25</sup>Id.

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The model statutes that follow describe five different types of state planning agencies, their functions, powers, and duties, and the type of plans they may prepare. The statutes are also linked to model legislation contained elsewhere in the *Legislative Guidebook*.

It should be emphasized that while state planning systems are usually created by legislation, they do not necessarily mature and come into their own as mechanisms of government overnight. As the commentary above noted, state planning has ebbed and flowed for decades in the U.S. The more highly developed state-backed programs, such as Oregon and Florida, have had the benefit of 10 to 20 years of experience. Moreover, effectiveness of such organizations requires commitment from the governor and the state legislature, even-handed internal management, adequate staffing and other resources, and a willingness to adjust the system as the political, economic, and social environment changes. At its best, as in Oregon, state-mandated, but locally-administered land-use planning results in widely held values about what is important to the citizens of the state. Consensus on and commitment to such goals only occur over the long term. The model legislation below is a framework that may enable such a process to occur. Regardless of what approach and agency the state uses, however, it is important for a state to set goals for itself and to follow up on those goals to see whether they are being implemented.

### STATE PLANNING AGENCY ORGANIZATION

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#### *Commentary: Types of State Planning Agencies*

The alternative types of state planning agencies include the following (see Table 4-2 above):

1. A *state planning office* in the office of the governor, one whose primary activity would be to advise the governor on policy initiatives and coordinate activities of various state agencies. For example, California has an Office of Policy Development and Research, and Maryland has an Office of State Planning.
2. A *line department* whose function is planning. The department, responsible to the governor or to a state planning commission, would also be chiefly responsible for the preparation of certain state plans, as described in the statute and would assist other state departments that have responsibility for functional plans, such as a state department of transportation. If the legislation so provides, the department would carry out a variety of routine activities (it is this line function that distinguishes it from a planning office), such as the issuance of permits, the review of local plans, and the maintenance of geographic information systems.
3. A *state planning commission*. The concept of a state planning commission, an appointed body responsible for all state planning, dates back to the 1930s, as a response to the federally

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established National Planning Board which urged governors to create and staff such boards.<sup>26</sup> The early planning boards, in states like Maryland and Pennsylvania, focused on rural and resource-related problems, reflecting state planning's conservation lineage.<sup>27</sup> A number of states still have state planning commissions. Maryland, for example, recast its state planning commission in 1992 as the "Economic Growth, Resource Protection, and Planning Commission," and gave the commission a number of responsibilities, including the preparation of an annual report to the governor and general assembly on the achievement of state planning goals.<sup>28</sup> New Jersey's State Planning Commission is responsible for overseeing the preparation of the state development and redevelopment plan.<sup>29</sup> Oregon's Land Conservation and Development Commission oversees the state-mandated local land use planning program, adopts statewide planning goals, and reviews local comprehensive plans for compliance with those goals.<sup>30</sup> Where a state does not have a strong tradition of statewide planning and requires an independent body to initiate and gain support for a new program, a state planning commission is a helpful mechanism. Moreover, because the commission will continue through different administrations, it can establish a presence and continuity for planning in the state.

4. The *cabinet coordinating committee* pulls together key departments whose activities have an impact on planning and land use, enabling a governor to speak with a single voice on critical growth and development issues in the state. A secondary purpose of the committee is to resolve

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<sup>26</sup>Wise, *History of State Planning*, 11.

<sup>27</sup>Model legislation drafted in 1935 by Attorneys Edward Bassett and Frank B. Williams proposed a state planning commission. The Bassett/Williams model consisted of a commission of five members. One member was to be the head of the highway department, another was to be head of the state park department, and the remaining three were to be citizen members appointed by the governor. The commission was required to prepare a state master plan and official map and advise governing bodies and planning commissions of counties and municipalities in "accomplishing a coordinated, adjusted and harmonious development of the state." Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States Including Zoning, Subdivision Regulation, and Protection of the Official Map* (Cambridge: Harvard University Press, 1935), 54. Attorney Alfred Bettman proposed a similar model, except that the six-member commission membership included heads of the state departments of highways, public works, health, and agriculture, a member of the faculty of the state university (selected by the governor from a list submitted by the university's president), and one other member to be appointed by the governor. The commission's job was to prepare and adopt a state master plan; to advise and cooperate with municipal, county, regional, and other local planning commissions within the state; and to furnish advice to any state department or officer on any matter relating to state planning. The commission was authorized to prepare and submit to the governor or state legislature drafts of legislation for carrying out the master plan or any part thereof. *Id.*, 110-119.

<sup>28</sup>Md. Code Ann., State Finance and Procurement, §§5-701 to 5-708 (1995). See also Pa. Stat. Ann. §§1049.2 to 1049.3 (1995) (establishment and powers and duties of state planning board).

<sup>29</sup>N.J.S.A. §52:18A-196 *et seq.* (1995 Supp).

<sup>30</sup>Ore. Rev. Stat. §197.303 *et seq.*, esp. §197.040 (1994).

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disputes among state departments on the siting of state and regional public facilities. Under the Delaware state planning act,<sup>31</sup> the governor has created such a council, composed of departments of transportation, agriculture, economic development, budget, natural resources, and environmental control into a cabinet committee on state planning issues.

5. *A department of development.* Some states have departments of development that may also go under the name of department of community affairs or department of commerce.<sup>32</sup> One typical activity of such departments is encouraging economic development through loans and grants, tourism promotion, technical assistance, and aid to firms seeking to locate in the state. Typically, a *division of planning* is located in a department that may have some of the planning functions (e.g., technical assistance, education, data collection and analysis). However, such departments often subordinate planning considerations to those of economic development; if the agency head is drawn from the economic development field, then the department may have an economic development outlook. This is a factor that should be carefully weighed in deciding where to place the planning function in state government.

6. *A department of the environment.* Under this type of agency, the planning function would be a division within a larger department that has environmental or natural resources focus. An example from Britain is the English Department of the Environment (DoE), which combines housing, land-use regulation, and environmental control.<sup>33</sup>

There is no model legislation proposed in this Chapter to establish a department of environment with a planning function within it. The practice of creating environmental “superdepartments” that

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<sup>31</sup>Del. Code Ann, Tit. 29, §9101 (Cabinet Committee on State Planning Issues) (1995).

<sup>32</sup>See, e.g., the Illinois Department of Commerce and Community Affairs whose planning authority is described in, 20 ILCS §605/46.7 (Official state planning agency – acceptance and use of federal funds) and 20 ILCS §605/46.39 (1993) (Planning – funds – cooperative efforts); Ohio Department of Development whose planning authority is described in Ohio Rev. Code §122.06 (1994) (Planning duties).

<sup>33</sup>H.W. Davies, “England,” in *Planning Control in Western Europe* (London, England: Her Majesty’s Stationary Office, 1989), 36. The function of the DoE in the context of mandatory planning has been discussed as follows:

If a state chose to exert a high level of oversight [of local government compliance with state policies related to mandatory planning], the state agency’s responsibilities would follow those of the DoE: issue regulation; provide guidance; call-in applications [for review of development proposals that would otherwise be the responsibility of local government and that substantially depart from a local plan, or have national consequences, such as power plants]; consider appeals; and approve comprehensive plans and zoning ordinances.

Jay Hicks, “Lessons from the British for State Statutory Reform,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 463/463 (Chicago: American Planning Association, March 1996), 69.

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combine environmental protection and natural resource management – a regulatory and service provision focus – has been criticized in the planning literature because of the conflicting internal goals of such agencies and the swings in the policy preferences of the department heads.<sup>34</sup>

The legislative models that follow do not describe the internal organizational structure of the state planning agency. If a state legislature wants a certain area to have a specific institutional emphasis, it can enact a statute that creates divisions within the state planning agency. For example, if the state legislature wanted to ensure that a function of the state planning agency would be to assist the public in obtaining permits from state and local agencies, it could create (as California has done) an office of permit assistance.<sup>35</sup> Similarly, if the legislature decided to emphasize education and training, it could create a special division or even set up an institute for that purpose.<sup>36</sup>

The legislative model establishing a planning division (Section 4-101, Alternative 5) has been drafted to be inserted into a statute establishing a development department. It refers to other statutory sections, which would have to be modified to reflect the division's functions and duties, including planning responsibility. No attempt has been made to describe the functioning of a department of development (which, as noted above, may go by different names).

Note: The term “state planning agency” is shown in brackets. The actual name of the agency should be substituted (e.g., the state planning office).

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<sup>34</sup>E.H. Haskell and V.S. Price, *State Environmental Management: Case Studies of Nine States* (New York: Praeger, 1973), 252-255. The authors also provide two case studies describing early planning reform efforts in Vermont and Maine.

<sup>35</sup>See Cal. Gov't. Code, §65040.9 and §§65922.3 to 65922.5 (1994) for a description of an Office of Permit Assistance and its duties. This office is located within the Office of Planning and Research.

<sup>36</sup>For a description of an independent planning and research institute, with a possible affiliation with a state university, see American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976), §§8-601 to 8-602. The institute is not given the power to prepare comprehensive plans – as that would conflict with the function of the state planning agency – but can conduct long-range research, issue reports, and conduct educational seminars and other programs. *Id.*, §8-602.

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### 4-101 [State Planning Agency] (Five Alternatives)

#### *Alternative 1 – State Planning Office*

- (1) There is established an office of state planning within the office of the governor. The office of state planning shall be under the direct control of the director of the state planning office, who shall be appointed by and serve at the pleasure of the governor. [The director shall have at least a combination of [6] years of undergraduate or graduate education in planning and professional planning experience.]
- (2) The director of the state planning office shall perform all functions and duties as identified in Section [4-102], exercise all powers, assume and discharge all responsibilities, and carry out and achieve all purposes vested by law in the office, including contracting for professional or consultant services in connection with the office.
- (3) The director of the office of state planning is authorized to organize the office into such divisions and units as will best carry out the functions and duties of the office.

#### *Alternative 2 – State Planning Department*

- (1) There is established a state planning department.
  - (2) The head of the state planning department shall be the director of the state planning department. The director shall be appointed by and serve at the pleasure of the [governor *or* the state planning commission]. [The director shall have at least a combination of [6] years of undergraduate or graduate education in planning and professional planning experience.]
- ◆ For the state planning office, the state planning department, and the planning division, the model legislation provides optional language establishing a minimum combination of six years of undergraduate or graduate education in planning and professional experience in planning for the director or deputy director. This experience and education requirement is similar to that required to become a member of the American Institute of Certified Planners, the professional testing and credentialing affiliate within the American Planning Association. While such qualifications may not always be necessary, they may become important when the director is expected to have both a high degree of administrative skill and technical knowledge.
- (3) The following units within the department of state planning are established: [*List divisions within the department*].
  - (4) The director shall appoint the division heads, who shall serve at the director's pleasure.
  - (5) The director shall have the following duties:
    - (a) be the administrative head of the department;

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- (b) oversee the activities of the department in its functions and duties as identified in Section [4-102];
- (c) appoint, reappoint, assign, or reassign all subordinate officers and employees of the department, prescribe their duties, and fix their compensation subject to the [*cite to state personnel relations law*];
- (d) represent the state before any agency of the State or the United States with respect to any matter in connection with the functions and duties of the department as identified in Section [4-102]; and
- (e) provide clerical and support services for [advisory committees *and/or* the state planning commission].

### *Alternative 3 – State Planning Commission; Creation; Powers*

- ◆ The State Planning Commission may be created along with a state planning office, department, cabinet coordinating committee, or a planning division within a development department.

- (1) There is established [in the [state planning agency] *or* in the office of the governor] a state planning commission to consist of [15] members to be appointed as follows:
  - (a) [5] directors of [the following] state departments: [*list specific departments to be represented*]. A director serving on the commission shall not be represented by an official designee. All state department directors, or designees, shall be entitled to receive notice of and attend meetings of the commission and, upon request, receive all official documents of the commission;
  - (b) [4] persons [, not more than [2] of whom shall be members of the same political party,] who shall represent [county and municipal] governments, to be appointed by the governor [with the advice and consent of the senate<sup>37</sup>] for terms of [4] years and until their respective successors are appointed and qualified, except that the first [4] appointments shall be for terms of [1, 2, 3, and 4] years, respectively. [In making these appointments, the governor shall give consideration to recommendations of the state association of counties, the state municipal league, the state association of planners or planning officials, the state association of regional planning agencies, etc.]
  - (c) [6] public members [, not more than [3] of whom shall be of the same political party,] to be appointed by the governor [with the advice and consent of the senate] for terms of [4] years and until their respective successors are appointed and

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<sup>37</sup>This assumes that the state legislature is bicameral. Where there is only one house, substitute the legislature's title for "senate."

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qualified, except that for the first [6] appointments, [1] shall be for a term of [1] year, [1] for a term of [2] years, [2] for a term of [3] years, and [2] for a term of [4] years.

- (2) The governor shall appoint a successor before the expiration of the term of a commissioner who is a representative of county and municipal government or a public member. No commissioner who is a representative of county or municipal government or a public member shall serve more than [2] full terms as a member of the commission. If there is a vacancy for any cause, the governor shall make an appointment that shall become effective immediately for the unexpired term.
- (3) The commission shall meet for the purpose of organization as soon as practicable after the appointment of its members. The governor shall select a chair, who shall serve at the pleasure of the governor, from among the public members [*Alternate: The commission shall annually select a chair from among the public members*], and the members of the commission shall annually select a vice-chair from among the representatives of the public, or the county or municipal representatives. [Eight] members of the commission shall constitute a quorum, and no matter requiring action by the full commission shall be undertaken except upon the affirmative vote of not less than [8] members. The commission shall meet at the call of its chair or upon the written request of at least [8] members. All meetings of the commission shall be open to the public [*or All meetings of the commission shall comply with the state open meetings law as provided in Section [cite to state public meetings statute]*]. Members of the commission are entitled to compensation as provided in [*cite to applicable state statute*].
- (4) The commission shall:
  - (a) prepare and adopt within [36] months after the enactment of this Act, and review every [2] years, and propose amendments to, as necessary, the [state comprehensive plan, state development plan, state biodiversity conservation plan, and other state plans], pursuant to Sections [4-203], [4-204], and [4-204.1];
  - (b) develop and promote procedures to facilitate cooperation and coordination among state, regional and local agencies with regard to the development and implementation of plans, programs, and policies that affect land use, infrastructure, environmental, housing, capital improvement programming, natural hazard mitigation, and economic development issues;
  - (c) prepare a biennial report pursuant to Section [4-104];
  - (d) ensure widespread citizen involvement in all phases of its work;

◆ The following functions are optional.

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- [(e) review and approve regional and local comprehensive plans pursuant to Section [7-402.2]];
- [(f) review, at the request of the governor, the proposed state capital budget and capital improvement program developed pursuant to Section [4-302(1)]];
- [(g) assist in the development and preparation of model planning ordinances to guide state and regional agencies, counties, municipalities, and special districts in implementing the state comprehensive plan, state land development plan, and state biodiversity conservation plan;
- [(h) prepare statewide planning guidelines;]
- [(i) review and recommend to the [director of the state planning agency] the designation of areas of critical state concern pursuant to Section [6-201 *et seq.*;] and
- [(j) sponsor, in conjunction with the [state planning agency], education and training programs in planning and related topics for employees of state, regional, and local agencies and for elected and appointed officials.]

### *Alternative 4 – Cabinet Coordinating Committee*

- (1) A Cabinet Coordinating Committee on State Planning is established and shall serve in an advisory capacity to the governor. The committee shall be composed of the following members, none of whom shall be represented by an official designee:<sup>38</sup>
  - (a) [the director of the department of transportation];
  - (b) [the director of the department of agriculture];
  - (c) [the director of the [department of development *or equivalent agency*]];
  - (d) [the director of the department [of administration *or finance*]];
  - (e) [the director of the department of the environment];
  - (f) [the director of the department of emergency services]; and
  - (g) such other members as the governor may designate.

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<sup>38</sup>The list of state department directors is for illustrative purposes only since departments may have different titles in each state. In some states, for example, the director of the department of emergency services is a division head in a larger department, such as the department of the environment.

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- (2) The governor shall designate one member to serve as chair of the committee.
- (3) The committee shall consider and periodically report to the governor on matters related to the orderly growth, development, and redevelopment of the state and the means of coordination among state departments to achieve those ends. These matters shall include, but shall not be limited to:
  - (a) the management and prudent use of the state's resources, including land, water, air, forest, historic, and scenic resources, wildlife, and energy;
  - (b) the efficient and productive utilization of water resources, including watershed management, maintenance of water quality;
  - (c) the reduction or elimination of long-term risk to people and property from natural hazards;
  - (d) the location and balanced utilization of and need for airport, highway, public transportation, and bicycle facilities;
  - (e) the location and need for sewage, wastewater treatment, solid waste disposal, and electrical generating facilities;
  - (f) the development and location of commerce and industry;
  - (g) the location of and need for state office buildings, colleges and universities, health, welfare, and correctional institutions, and other state facilities;
  - (h) the development and location of housing, and the availability of such housing for low- and moderate-income households;
  - (i) the preservation and efficient utilization of prime agricultural lands;
  - (j) the preservation of historic and scenic resources; and
  - (k) mechanisms of cooperation between and among state agencies, and among federal agencies, state agencies, regional agencies, and local governments.
- (4) The committee shall meet at least [6] times during each calendar year.
- (5) On *[date]* of each year, the committee shall prepare and submit to the governor an annual report of its activities, together with the recommendations for legislative and/or administrative changes it deems desirable. The governor shall review the annual report, and upon approving it, shall transmit the report to the legislature and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

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- (6) The governor [may *or* shall] appoint a planning coordinator who shall supervise the committee professional and clerical staff. The coordinator shall serve at the pleasure of the governor. The staff shall work in cooperation with all federal, state, regional, and local agencies of government, as well as with private organizations and individuals, to obtain all necessary and relevant information for its assignments. In addition to the committee staff, the committee shall be assisted by staff designated by each participating department or agency.

### *Alternative 5 – Planning Division within Department of Development*

- (1) There is established within the [department of development] a division of planning. The division of planning shall be under the supervision of the [deputy director of development for planning], who shall be appointed by and serve at the pleasure of the director of development, and who shall coordinate the activities of the division with other activities within the department. [The [deputy director] shall have at a combination of [6] years of undergraduate or graduate education in planning and professional planning experience.]
- (2) The division shall perform all functions and duties as set forth in Section [4-102].
- (3) The [deputy director of development for planning] is authorized to organize the division of planning into such units as will best carry out the functions and duties of the division.

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### ***Commentary: Functions and Duties of the State Planning Agency***

In establishing or reconstituting a state planning agency, it is extremely important to evaluate the agency's functions and duties and their relation to the agency's position in state government. Where the agency is located within the state administrative structure and what its duties are have often been the keys to its success. The list of functions of a state planning agency that follows has been intentionally drafted to be broad and inclusive and to have linkages with other sections of the model legislation. In some states, these functions might be spread out over several agencies. For example, geographic information systems might be in one agency and coordination with the U.S. Census Bureau in another.

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### **4-102 Functions and Duties of the [State Planning Agency]**

The [state planning agency] shall have the following functions and duties:

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- (1) Planning. The [state planning agency] shall:
  - (a) prepare plans for the state pursuant to Sections [4-203, 4-204, 4-204.1, and 4-207 as applicable];
  - (b) coordinate the plans and programs of all departments, divisions, bureaus, and agencies of state government;
  - (c) harmonize its planning activities with the planning activities of regional agencies and local governments;
  - (d) provide technical assistance in planning to regional agencies and local governments;
  - (e) cooperate with and assist units of the federal government in the execution of their planning functions in order to harmonize their planning activities with the plans for the state;
  - (f) conduct, as necessary, special studies and undertake research; and
  - (g) participate in national, interstate, and regional planning programs.
- (2) Administration, education, and training. The [state planning agency] shall:
  - (a) administer federal and state grant-in-aid programs assigned to the [state planning agency] by statute or executive order;
  - (b) coordinate state programs with the federal government;
  - (c) engage in a program of public information and communication regarding its activities;
  - (d) establish and maintain a statewide program to ensure widespread public participation in state-supported planning programs;
  - (e) provide staff support [and representation on behalf of the governor] to the following commissions and boards pursuant to Sections [cite to applicable Section nos.]: [List commissions and boards];
  - (f) contract with, as necessary, private or nonprofit organizations for assistance in consensus-building in connection with any activity undertaken by the [state planning agency];
  - (g) publish annually a compilation of all state laws and administrative rules related to planning;

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- (h) provide education and training programs in planning and related topics to employees of state, regional, and local agencies and to elected and appointed officials; and
  - (i) perform such other duties, regardless of function, as the governor may assign.
- (3) Information gathering and forecasting. The [state planning agency] shall:
- (a) gather, tabulate, analyze, and periodically publish information and reports on the location and pace of development throughout the state, including, but not limited to population, housing, economic, and building permit data;
  - (b) serve as the state clearinghouse agency responsible for coordinating data collection and data dissemination among the state, regional and other public agencies, local governments, and the private sector;
  - (c) develop and maintain a computerized geographic information system in support of state, regional, and local planning and management activities;
  - (d) cooperate with the Bureau of Census and other federal agencies to improve access to the statistical products, data, and information available from the federal government;
  - (e) annually estimate the resident population for the state and local governments;
  - (f) prepare, at least twice in each decade, a [20]-year population forecast in [5]-year intervals for the state and local governments; and
  - (g) promulgate standard procedures for the establishment of accurate, large-scale base mapping to support local government administrative functions, such as tax assessment, public facility management, and engineering.
- (4) Implementation. The [state planning agency] shall:
- (a) review and approve regional and local comprehensive plans pursuant to Section [7-402.2];
  - (b) prepare the state capital budget and state capital improvement program pursuant to Section [4-301 *et seq.*];
  - (c) administer the areas of critical state concern program pursuant to Section [5-201 *et seq.*];
  - (d) administer the development of regional impact program pursuant to Section [5-301 *et seq.*];

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- (e) establish, by administrative rule, a process by which any individual or organization may obtain an opinion from the [state planning agency] clarifying the application of any goal, policy, or guideline in the state plans, except that the [agency] shall not issue an opinion regarding any petition that seeks either to validate or invalidate a specific code, ordinance, administrative rule, regulation, or other instrument of plan implementation;<sup>39</sup> and
  - (f) initiate programs of dispute resolution.
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### ***Commentary: Rule-Making Authority***

A state planning agency is usually given the authority to promulgate rules and issue orders by statute. The rule-making process often follows a state administrative procedures act that applies to all state agencies.<sup>40</sup> In the absence of a statute establishing a state rule-making process, the process may need to be incorporated into the legislation.

One special aspect of administrative rule making in connection with planning is the need to give advisory information that interprets rules. For example, if a state planning agency is authorized to review and certify local plans for compliance with minimum statutory standards, it will issue rules to explicate what the statutes mean.<sup>41</sup> The agency may also publish guidelines to local governments in the form of sample plan chapters or checklists. However, these guidelines will not have the same force and effect of rules; they will merely indicate different types of alternatives that a local government may wish to pursue and will leave open other options that meet the intent of the rules.<sup>42</sup>

The following section is adapted in part from the American Law Institute's *A Model Land Development Code*.<sup>43</sup>

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<sup>39</sup>This provision is based on N.J.A.C. §§17.32-6.1 to 17.32-6.5, which authorizes the New Jersey State Planning Commission to issue "letters of clarification" interpreting the State Development and Redevelopment Plan.

<sup>40</sup>See, e.g., Uniform Law Commissioners' Model State Administrative Procedures Act (1981) in *Uniform Laws Ann.* 15 (St. Paul: West, 1990).

<sup>41</sup>Wash. Admin. Code, Ch. 365-1993, (Procedural Criteria for Adopting Comprehensive Plans and Development Regulations) (1993); Ga. Admin. Code, Chapter 110-3-2 (Minimum Standards and Procedures for Local Comprehensive Planning) (1992).

<sup>42</sup>See, e.g., Washington State Department of Community Development, Growth Management Division, *Small Communities Guide to Comprehensive Planning: A Model Comprehensive Plan* (Olympia, Wash.: The Department, June 1993); \_\_\_\_\_, *State Review of Local Growth Management Comprehensive Plans* (Olympia, Wash.: The Department, March 17, 1993).

<sup>43</sup>American Law Institute, *A Model Land Development Code* §8-201.

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### 4-103 Authority to Adopt Rules, Issue Orders, and Promulgate Guidelines

- (1) The [state planning agency] shall have the authority to adopt rules and issue orders concerning any matter within its jurisdiction.
  - (2) Rules or orders of the [state planning agency], other than rules concerning its internal organization and affairs, shall be adopted or issued in accordance with the procedures of the [state administrative procedures act] for the adoption of rules or regulations or issuance of orders after a hearing.
  - (3) All rules adopted by the [state planning agency] shall be published in the [name of administrative code or other document].
  - (4) The [state planning agency] shall have the authority to prepare and distribute guidelines in the form of sample ordinances, sample regulations, technical reports, and related advisory information for use by regional agencies, local governments, and other interested parties. These guidelines may provide alternative examples that could meet the intent of rules adopted under this Section, but shall not constitute rules themselves.
  - (5) The [state planning agency] shall not adopt guidelines in lieu of a rule.
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### ***Commentary: Biennial Report***

The following Section mandates that the state planning agency prepare a biennial report assessing statewide trends, issues, and opportunities. The report could also be used as a vehicle to establish quantitative and qualitative benchmarks or evaluation criteria. In addition, the report could also document measures of progress against those benchmarks. The establishment of a unified statewide geographic information system will help states gather information to gauge the impact of state policies. This information will be helpful in monitoring how well new systems are working and in determining whether there should be midcourse corrections. A biennial, rather than an annual, report is recommended to minimize the administrative burden on the state agency in its preparation.

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### 4-104 Biennial Report

- (1) By *[date]* of each even-numbered year, the director of the *[state planning agency]* shall prepare a biennial report to the governor. The report shall: analyze demographic, economic, social, and environmental trends affecting the state; discuss the state's progress in achieving goals and policies in adopted state plans; describe activities carried out by the *[agency]* during the previous *[2]* years; describe activities carried out by regional agencies and local governments in the state pursuant to this Act during the previous *[2]* years; recommend proposed changes in state policies and legislation to carry out state, regional, and local plans prepared under this Act; and provide any other analysis, recommendations, and information that the director deems relevant.
- (2) Every officer, agency, department, or instrumentality of state government, of regional agencies, and of local government shall comply with any request made by the director for advice, assistance, information, or other material in the preparation of this report.
- (3) The director shall send the biennial report in draft form to the governor. The governor shall review the report, and upon approving it, shall transmit the report to the members of the legislature, state agencies, departments, boards and commissions, appropriate federal agencies, and to the chief executive officer of every local government in the state, and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

### STATE PLANS

State plans fall into at least the following categories (see Table 4-3):

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(1) **Strategic futures plan.** These state plans are intended to articulate a “strategic vision” for the state, to identify problems, trends, and opportunities facing the state, and to describe new strategies and programs for achieving that vision. In 1992, Minnesota published such a document, *Minnesota Milestones*, which contains a “shared vision” for the state as well as a statewide report card of social, economic, and environmental indicators.<sup>44</sup> In 1995, its Environmental Quality Board followed up with *Challenges for a Sustainable Minnesota: A Minnesota Strategic Plan for*

**Table 4-3: Typical State Plans and Their Purposes**

<i>Type of Plan</i>	<i>Purpose</i>	<i>Pros</i>	<i>Cons</i>
Strategic futures plan	Provides “vision” of state’s potential destiny, ideas for initiatives	May provide catalyst for statutory change	Commitment to change depends on legislative and gubernatorial commitment
State agency strategic plans of operation	Sharpens agency focus, relationship to client groups	Requires agencies to monitor output, performance	State agencies may resist accountability measures
State comprehensive plan	Integrates goals and policies to coordinate and direct state agency activities	Compels state to engage in broad-brush goal-setting	Goals and policies may be bland, “pie-in-sky”
State land development plan	Establishes goals, policies, and guidelines for lands and types of development having a state interest	State clearly identifies state interests in land development	Local governments may resist state encroachment on their authority
State biodiversity conservation plan	Establishes goals, policies, and guidelines for the protection of living natural resources in a consistent and coherent manner	State clearly identifies state interest in the maintenance of healthy biological system	Plan’s goals and policies may be perceived as regulations

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<sup>44</sup>Minnesota Planning, *Minnesota Milestones: A Report Card for the Future* (St. Paul, Minn.: Minnesota Planning, December 1992).

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*Sustainable Development*, a document intended to move the state “toward development that improves people’s lives over the long term while sustaining the natural resources future generations will need.”<sup>45</sup> The plan identified a series of sustainable development initiatives for the state.

Such plans may be developed by a “state goals” or “futures” commission and will have no binding impact on state operations, although new legislation may be a consequence of recommendations contained in the plans. If a state is initiating state-level planning for the first time, or resuming it after a hiatus, this approach is probably the most appropriate. Several states, including Hawaii and Arkansas, have legislation authorizing a commission to undertake such planning.<sup>46</sup>

(2) **Strategic plans of operation.** These state plans are intended to guide the operation of state agencies, much in the same sense as private-sector strategic planning. Such plans would have statewide applicability, but only for the activities of a particular agency, although the agency would be required to conform its mission to applicable statewide goals and policies contained in other plans. Texas, Florida, and Georgia, for example, have such legislation.<sup>47</sup>

(3) **State comprehensive plans.** These plans provide goals, policies, and objectives for state and other agencies, such as regional agencies and local governments. Such plans are intended to coordinate policy among all levels of government in such areas as economic development, land use, transportation, health, education, public safety, water resources, and intergovernmental relations. Here, the purpose is to infuse plans of other governmental levels with policies that are consistent with those the state desires, presumably to be reflected in their implementation. The plans can be used, for example, to direct state capital budgeting and location decisions. A state planning agency may also evaluate the plans of state and regional agencies and local governments against the goals, objectives, and policies, provided they are sufficiently detailed, and certify them for compliance.

An example of such a plan is the Florida *State Comprehensive Plan*. This plan was initially adopted in 1985 as part of the major reorganization of Florida’s growth management system. The plan consists of a broad range of state goals and implementation policies. It was adopted by the state legislature and appears as Chapter 187 of the Florida Statutes. The plan:

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<sup>45</sup>Minnesota Environmental Quality Board, *Challenges for a Sustainable Minnesota: A Minnesota Strategic Plan for Sustainable Development* (St. Paul, Minn.: The Board, July 1995 Draft), 5.

<sup>46</sup>See, e.g., Ark. Code Ann., Ch. 25 (1993 Supp) (Commission for Arkansas’ Future); Hi. Rev. Stat. Ann., Ch. 22 (1995 Supp) (Commission on the Year 2000).

<sup>47</sup>Texas Gov’t. Code, Ch. 2056 (1995 Supp) (Strategic plans of operation); Fla. Stat. Ann. §§186.021 to 186.022 (1995 Supp) (State agency strategic plans); and Ga. Code Ann. §40-2903 (1995 Supp) (Strategic plans).

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is intended to be a direction-setting document. Its policies may be implemented only to the extent that financial resources are provided pursuant to legislative appropriation or grants or appropriations of any other public or private entities.<sup>48</sup>

A subset of the *State Comprehensive Plan* is the *State Land Development Plan* prepared by the Florida Department of Community Affairs.<sup>49</sup> A form of functional plan, it was intended to build upon and detail related land development goals and policies found in the *State Comprehensive Plan*. The *Land Development Plan*, which was adopted in 1986 and again in 1989 and which was undergoing revision in 1995, has two purposes:

- (1) State agencies are to consider the State Land Development Plan as they prepare their own strategic plans;
- (2) The state's regional planning councils must consider the land development plan in preparing their own "strategic regional policy plans." However, in Florida, these regional plans need not be consistent with the state land development plan but must be consistent with the state comprehensive plan.<sup>50</sup>

In Rhode Island, the Division of State Planning of the Rhode Island Department of Administration has prepared a *State Guide Plan* under the direction of the State Planning Council to provide a foundation for reviewing other plans and proposals for consistency. The *State Guide Plan* is "mandated by law as a means for centralizing and integrating long-range goals, policies, and plans with short-range project plans and with implementation programs prepared on a decentralized basis by the agency or agencies responsible in each functional area."<sup>51</sup> The *State Guide Plan* is used by the Division of Planning to review local plans for consistency with growth management acts. It is not a single document but rather a collection of elements that have been adopted since the 1960s. The plan consists simply of a series of goals, policies, issues to be addressed, and strategies for a variety of functional elements; the *State Guide Plan Overview* provides a summary of the adopted elements under a single cover.

In Maryland, the Planning Act of 1992 requires all local governments to implement through their comprehensive plans a series of seven "visions" – the State's "Economic Growth, Resource

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<sup>48</sup>Fla. Stat. Ann. §187.101(2) (1991). The *State Comprehensive Plan* appears in the Florida statutes rather than as a separate published document.

<sup>49</sup>See Fla. Stat. Ann. §§380.031(17), 186.021, and 186.022 (1991 and 1995 Supp.).

<sup>50</sup>Florida Department of Community Affairs, *1995 Florida Land Plan: The State Land Development Plan, Revised Public Workshop Draft* (Tallahassee, Fla.: The Department, June 1995), 2.

<sup>51</sup>Division of Planning, Rhode Island Department of Administration, *State Guide Plan Overview, Report No. 80* (Providence, R.I.: The Division, October 1992), v.

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Protection, and Planning Policy” – set forth in the Act.<sup>52</sup> It also lists a number of required local plan elements (statement of goals and principles, a land-use element, a community facilities element, a sensitive areas element, and a variety of others).

Some state plans include topics covered in a state comprehensive plan, but also contain a plan map, as a graphic representation of the plan’s policies. The plan map may indicate the extent of urbanization of different parts of the state, sensitive areas that the state may wish to protect (e.g., wetlands, archeological and historic sites, prime farmland, and estuaries), and a hierarchy of urban centers. The most thorough multi-faceted state plan with a plan map has been prepared by the New Jersey State Planning Commission, the *New Jersey State Development and Redevelopment Plan*. It is to be used to guide municipal and county master planning, state agency functional planning, and infrastructure investment decisions. The plan is a *policy guide* and is not intended to be used to formulate codes, ordinances, administrative rules or other regulations. The general plan strategy is to “achieve all state planning goals by coordinating public and private actions to guide future growth into compact forms of development and redevelopment, located to make the most efficient use of infrastructure systems and to support the maintenance of capacities in other systems.”<sup>53</sup> The plan’s contents, especially the plan map, were subjected to a three-stage negotiated, nonbinding “cross-acceptance” process among the commission, county planning commissions, and local governments in which areas expected to urbanize or develop in a certain fashion were identified as “centers” and surrounding “planning areas.”<sup>54</sup>

Connecticut has adopted a state-level *Conservation and Development Policies Plan* which also contains a plan map. The plan, which is authorized by state legislation,<sup>55</sup> was prepared by the state’s Office of Policy and Management (OPM) and was subsequently approved by the legislature. The plan map divides the state into three classes of urban areas, three classes of areas of environmental concern, and two classes of rural areas, with policies applying to each of them. State agencies in Connecticut are required to consider the plan when they undertake agency plans. In addition,

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<sup>52</sup>Md.Code Ann., Art. 66B, §3.06 (Purpose of plan; visions), and Art., State Finance and Procurement, §5-7A-01 (Statement of policy) (1995).

<sup>53</sup>New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton: The Commission, June 12, 1992), 3. Authority for cross acceptance appears in N.J.S.A. §§52:18A-202 to 202.1 (1995 Supp.) The cross-acceptance rules appear in N.J.A.C. §§17:32, Subchapters 3, 4, and 5. For a discussion of the adoption of the New Jersey Plan, see Peter A. Buchsbaum, “The New Jersey Experience,” in Peter A. Buchsbaum and Larry J. Smith, eds., *State and Regional Comprehensive Planning: Implementing New Methods for Growth Management* (Chicago: American Bar Association Section of Urban, State, and Local Government Law, 1993), 176-190; John Epling, “The New Jersey State Planning Process: An Experiment in Intergovernmental Negotiations,” in Jay M. Stein, ed., *Growth Management: The Planning Challenge of the 1990’s* (Newbury Park, Cal.: Sage, 1993), 96-112.

<sup>54</sup>New Jersey State Planning Commission, *Communities of Place*, i-ii, 4-6.

<sup>55</sup>Conn. Gen. Stat. Ann., Ch. 297, Part I (1995).

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agency-prepared plans, when required by state or federal law, are submitted to the OPM in order to be reviewed for plan conformity.<sup>56</sup>

If the cost for a state or federally funded project exceeds \$100,000, state agencies must demonstrate consistency with the plan when acquiring, developing, or improving real property, when public transportation facilities or improvements or facilities are acquired, or when any state grant is authorized for those purposes. In addition, the Secretary of the OPM annually submits to the State Bond Commission, prior to the allocation of bond funds for any of those actions, an advisory statement commenting on the extent to which such action conforms with the plan.<sup>57</sup>

Of the different types of state plans, a plan containing a map is the most difficult to achieve on a centralized basis, particularly in a large, urbanized state, because of the amount of information that must be collected, the many actors involved, the individualized determinations on the delineation of the plan's policies to specific areas, and the perception that the plan is the equivalent of statewide zoning.<sup>58</sup> This type of area-specific planning may be more appropriately or practically undertaken at the regional or local level. Still, the existence of a plan map does give a statewide perspective showing, for example, how plans affecting various regions or that affect certain functions, like transportation, fit together.

### STATE PLANS

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#### *Commentary: State Futures Commission and State Strategic Futures Plan*

The following legislative model describes a state futures commission charged with preparing a state strategic futures plan. In contrast to the state planning commission described above, the futures commission has a somewhat broader composition, involving members of the legislature as well as lay citizens. While such a commission could prepare its report and go out of existence, it may be more effective as an ongoing instrument of state government. The futures plan is a vehicle for

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<sup>56</sup>Id., §16a-31 (Application of plan).

<sup>57</sup>State of Connecticut, Office of Policy and Management (OPM), *Conservation and Development Policies Plan for Connecticut, 1992-1997* (Hartford, Conn.: OPM, 1992), 2.

<sup>58</sup>For a discussion of the fate of such a plan in Vermont and the perception that it would result in statewide zoning, see John DeGrove with Deborah Miness, *The New Frontier for Land Policy: Planning and Growth Management in the States* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1992), 68; see also Richard M. Brooks, "State and Regional Land Use Planning and Controls," in Patrick J. Rohan, *Zoning and Land Use Controls*, 5, §33.03[3][a] (New York: Matthew Bender, 1989 Supp); and Phyllis Meyers, *So Goes Vermont: An account of the development, passage, and implementation of state land-use legislation in Vermont* (Washington, D.C.: The Conservation Foundation, February 1974), 28-33.

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obtaining statewide consensus on where the state should be heading and what actions should be taken to bridge the gap between the reality of the present and the potential of the future. It may result in proposals to revamp state planning laws or to study the issue of planning statute reform more thoroughly (see Chapter 1 of the *Legislative Guidebook*). The model legislation imposes few procedural requirements on the commission other than to complete a plan and involve the state's citizens in so doing. It is adapted from the Arkansas and Hawaii statutes.<sup>59</sup>

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### 4-201 State Futures Commission; Strategic Futures Plan

- (1) There is established a state futures commission. The commission shall be composed of:
  - (a) the speaker of the house of representatives;
  - (b) [4] members of the house of representatives, appointed by the speaker of the house, with no more than [2] members from the same political party;
  - (c) the president pro tempore of the senate;
  - (d) [4] members of the senate, appointed by the president pro tempore of the senate, with no more than [2] members from the same political party; and
  - (e) [5] residents of the state appointed by the governor, except that no resident appointed by the governor shall be a member of the state legislature.
- (2) All nonlegislative appointees shall serve [4] year terms unless they resign or are unable to serve or fail to attend [2] consecutive meetings of the full commission, without providing the chair with a written excuse in advance. When a vacancy occurs on the commission, the chair shall notify the appropriate appointing authority, and the vacancy shall be filled in the same manner as the original appointment. Persons appointed to fill vacancies shall serve the remainder of the unexpired term and shall be eligible for reappointment for one [4] year term. In the event that the vacancy arises as a result of a member missing [2] consecutive meetings, the chair shall also notify that member.
- (3) The commission shall elect a chair and a vice chair from its nonlegislative members to serve for [2] years.

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<sup>59</sup>Ark. Code Ann., Ch. 25 (1993 Supp) (Commission for Arkansas' Future); Haw. Rev. Stat. Ann., Ch. 22 (1995 Supp) (Commission on the Year 2000).

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- (4) The commission shall also elect one of its nonlegislative members to serve [2] years with the chair and vice chair as an executive committee.
- (5) The commission shall meet at least [twice] each year.
- (6) The commission shall, at the recommendation of the executive committee, appoint an executive director. The executive director shall work under the direction and control of the commission. Other members of the staff shall be appointed by and work under the direction of the executive director.
- (7) The state futures commission shall prepare a state strategic futures plan. The plan's purpose shall be to articulate a vision of the potentials for the state and its citizens and to identify means for achieving those potentials.
- (8) In preparing the state strategic futures plan, the commission shall seek the participation of the citizens of the state and shall hold workshops and/or public hearings, and may utilize other appropriate means to involve the citizenry.
- (9) The state strategic futures plan shall contain:
  - (a) a discussion of economic, demographic, sociological, educational, technological, and related trends affecting the state in urban, suburban, and rural areas;
  - (b) a discussion of the state's relevant economic, natural, historical, cultural and scenic resources, environmental, transportation, geographic, technological, and related strengths and weaknesses that distinguish the state from other states;
  - [(c) a discussion of the state's vulnerability to natural hazards and the associated risks to life, property, and state, regional, and local economies;]
  - (d) a discussion of views and comments from citizens that result from the citizen participation process;
  - (e) a statement describing a vision for the state and specific goals related to that vision;
  - (f) detailed strategies and initiatives that will assist the state in achieving that vision, including changes in existing governmental programs and legislation, new governmental programs and legislation, and actions that may be taken by both the private and not-for-profit sectors. The strategies and initiatives may be accompanied by a schedule for implementation; and
  - (g) a system of measurement to identify the extent to which the vision and the specific goals related to that vision are being accomplished.

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- (10) The commission shall complete the plan within [18] months after its initial appointment and, upon reviewing and approving it, shall transmit the plan to the governor and the legislature. Thereafter, the commission shall present additional recommendations to the governor and the legislature by [date] of each [even-numbered] year and shall monitor the state's progress state toward accomplishing the vision and goals. While working in concert with other state agencies, the commission shall have the authority to develop and implement systems for measurement and accountability.
  - (11) In addition to any funds appropriated by the legislature to the commission, the commission may accept funds from any other public or private source.
  - (12) The commission may contract with any public or private entity or any person to assist it in its efforts.
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### ***Commentary: State Agency Strategic Plans of Operation***

The following model statute directs state agencies to prepare strategic plans for their operations.<sup>60</sup> The plans should preferably be linked to a state comprehensive plan (see Section 4-203). The executive office of the governor would be responsible for reviewing the plans, although some other agency, such as an office of budget and management or the state planning agency, could assume this responsibility.

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### **4-202 State Agency Strategic Plan of Operation**

- (1) A state agency shall prepare and adopt a strategic plan for the functional areas covered by its operations. Not later than [March 1] of each [even-numbered year], the agency shall issue a plan covering [4] years beginning on that date.
- (2) The strategic plan of operation shall include:
  - (a) a statement of the mission and goals of the state agency;

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<sup>60</sup>For an excellent example of such a plan, see Florida Department of Community Affairs (DCA), *Building Partnerships for a Sustainable Florida: 1994-1999 Agency Strategic Plan* (Tallahassee, Fl.: DCA, January 1995).

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- (b) an identification of the groups of people served by the state agency, their approximate numbers, and, of those groups, those having priorities for receiving service from the agency, either established by law or by the agency;
  - (c) projections of changes in the character, composition, or size of those groups anticipated during the term of the plan;
  - (d) an analysis of expected changes in the services provided by the agency due to existing, pending, or potential changes in federal or state laws or regulations, or other factors outside of the control of the agency;
  - (e) an analysis of the use of the agency's resources to meet current and future needs, and an estimate of additional resources that may be necessary to meet those needs;
  - (f) a description and a [5]-year schedule of the means and strategies for meeting the agency's needs, including future needs[, an analysis of those means and strategies within the context of goals and policies in the state comprehensive plan described in Section [4-203]], and costs. Means may include organizational or management initiatives, facility or physical infrastructure improvements, or proposals for programs and services. The plan shall indicate the existing statutory authority by which the agency may carry out the means and strategies. If such authority does not exist, the agency may propose additional legislative authority;
  - (g) a description of benchmarks<sup>61</sup> to measure the output or outcome of the agency's efforts;
  - (h) in the years following the first year of its adoption, actual benchmark information from agency operations, so that by its [third edition], the plan and all subsequent editions may provide benchmark information for at least the immediately previous [5] years;
  - (i) an evaluation of the agency's progress in achieving its mission and goals since the previous edition of the plan; and
  - (j) any other information that the agency may determine is needed in the plan.
- (3) The plan shall be prepared in a format and manner prescribed by [the office of the governor *or* the office of management and budget *or* the state planning agency].
- (4) Prior to submission of its plan to the [the office of the governor *or* the office of management and budget *or* the state planning agency], each state agency shall hold public hearings and/or

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<sup>61</sup>For an example of state benchmarks included in a statute, see Ore. Rev. Stat. §184.007 (Biennial benchmarks; priority).

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workshops on the draft plan and shall allow at least a [30]-day period for public comment. A state agency shall publish a notice informing the public of the date, time, and location of the hearings and/or workshops of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [30] days in advance of the hearings and/or workshops.

- (5) Subsequent to the public hearings and/or workshops, the director of the state agency shall submit the plan and a summary of comments received at the hearings and/or workshops to the [office of the governor], which shall review the plans [for consistency with the state comprehensive plan, state land development plan, [and] state biodiversity conservation plan, [and other instructions and directives it may have issued]]. The [office of the governor] shall consider all written comments received in formulating any required revisions. Within [30] days, reviewed plans shall be returned to the agency, together with any required revisions.
- (6) The director of the state agency shall, within [30] days of the return of its state agency plan, incorporate all revisions required by the governor and the director of the state agency shall adopt the plan. The state agency shall then transmit copies of its final plan to the governor and to members of the state legislature and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.
- (7) State agency strategic plans developed pursuant to this Act are not rules and therefore shall not be subject to [*the state administrative procedures act*].

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### ***Commentary: State Comprehensive Plan***

The following statutory model describes a state comprehensive plan whose goals and policies are intended to provide direction to state agencies and, if desired, regional agencies and local governments. The descriptions of background analyses and potential topical areas covered in the plan are drafted to give the state wide berth in designing the plan. State agency strategic plans (see Section 4-202) and the state capital budget (Section 4-301 *et seq.*) are to be linked to the state comprehensive plan.

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### 4-203 State Comprehensive Plan

- (1) The [state planning agency *or* office of the governor *or* state planning commission] shall, within [36] months of the effective date of this Act, prepare, with the involvement of all state agencies and the citizens of the state, a state comprehensive plan.
- (2) The purpose of the state comprehensive plan is to ensure the coordinated, integrated, and orderly social, physical, and economic growth of the state that achieves statewide goals. The plan is to provide a basis for identifying critical issues facing the state, determining state priorities, allocating limited state resources, and harmonizing the plans of various [state *or* state, regional, and local] governmental units.
- (3) In preparing the state comprehensive plan, the [state planning agency *or* office of the governor *or* state planning commission] shall undertake supporting studies that are relevant to the topical areas included in the plan, or may use studies conducted by others concerning the future growth of the state, including, but not limited to:
  - (a) population and population distribution of the state and regions of the state, which may include projections and analyses by age, education level, income, employment, or other appropriate characteristics;
  - (b) natural resources, which may include air, water, open spaces, scenic corridors or viewsheds, forests, soils, rivers and other waters, shorelines, fisheries, wildlife, and minerals;
  - (c) geology, ecology, and other physical factors of the state and regions of the state;
  - (d) agriculture;
  - (e) the use of land and the conversion of nonurban land to urban use;
  - (f) the presence, potential for, and mitigation of natural hazards, including the identification of areas within the state subject to natural hazards;
  - (g) public safety;
  - (h) the economy of the state and regions of the state, which may include amount, type, and general location of commerce and industry and trends and forecasts in economic activity;
  - (i) amount, type, quality, affordability, and geographic distribution of housing and relationship of affordable housing to job sites;
  - (j) existing or emerging technologies in the state and regions of the state;

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- (k) energy, including its type, availability, and use;
  - (l) general location and extent of existing or currently planned major transportation facilities of all modes, and utility, recreational, cultural, and other facilities of statewide significance;
  - (m) governmental organization and intergovernmental relations;
  - (n) elementary, secondary, undergraduate and postgraduate and vocational education, whether public or private;
  - (o) human and social services; and
  - (p) the identification of features of significant statewide architectural, scenic, cultural, historical, or archaeological interest.
- (4) The state comprehensive plan shall be composed of goals and policies that are stated in plain, succinct, easily-understandable words. The goals and policies shall be statewide in scope or interest and shall be consistent and compatible with one another, but may address certain regions of the state provided there is a statewide interest in so doing. The plan shall be a direction setting document, giving policy guidance to state agencies[, regional agencies, and local governments]. The plan shall enumerate goals and policies regarding proposed or foreseeable changes in each of the following areas, based on relevant studies in identified in paragraph (3) above, and shall describe how the selected goals and policies were derived from an assessment of their probable social, environmental, economic, and related consequences:
- ◆ The following list is an example of topical areas that may be covered by a state comprehensive plan.
- (a) agriculture;
  - (b) urbanization;
  - (c) air quality;
  - (d) water quality;
  - (e) natural resources, living and non-living;
  - (f) natural hazards and disasters;
  - (g) historic, scenic, and archaeological resources;
  - (h) economic development;

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- (i) housing, including affordable housing;
  - (j) education;
  - (k) recreational and cultural development;
  - (l) human and social services;
  - (m) public safety;
  - (n) transportation;
  - (o) technological change;
  - (p) governmental organization and intergovernmental relations; and
  - (q) citizen involvement.
- (5) Prior to submission of its plan to the [office of the governor], the [state planning agency *or* office of the governor *or* state planning commission] shall hold public hearings and workshops on the draft state comprehensive plan and shall allow at least a [60]-day period for public comment by citizens, affected public agencies, affected employee representatives, and other interested parties.<sup>62</sup> The [state planning agency *or* office of the governor *or* state planning commission] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.
- [*or*]
- (5) The [state planning agency *or* office of the governor *or* state planning commission] shall conduct public hearings and workshops on the draft plan as provided by Section [4-209].
- (6) Subsequent to the public hearings and workshops, the [state planning agency *or* office of the governor *or* state planning commission] shall submit the draft plan and a summary of comments received at the hearings and workshops to the [office of the governor] for review [for consistency with any instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed draft plan shall be returned to the [state planning

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<sup>62</sup>Federal regulations require a minimum of 45 days for public review and comment “before procedures and any major revisions to existing procedures are adopted”. 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be “proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement.” 23 CFR §450.212(a).

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agency *or* office of the governor *or* state planning commission], together with any required revisions.

- (7) The [state planning agency *or* office of the governor *or* state planning commission]] shall, within [30] days of the return of the draft state comprehensive plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and shall be certified in the manner provided by Section [4-211].
  - (8) The [state planning agency *or* executive office of the governor *or* state planning commission] shall, on a [biennial] basis, review the state comprehensive plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.
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### ***Commentary: State Land Development Plan***

If the state decides that it is going to be directly engaged in land development planning, its interests and objectives must be clearly defined. The state's involvement may be justified if:

1. The state has identified land uses or lands with certain characteristics as having a statewide or regional interest (e.g., wetlands, coastal zones, earthquake fault zones, landslide areas, floodplains, and large-scale developments with multijurisdictional impacts, such as regional shopping centers, sports complexes, and airports). Alternately, the state may have determined that certain local land-use decisions may have tremendous impacts on state facilities, such as state parks, scenic highways, or state-financed highway interchanges;
2. The state wishes to ensure that land-use and related plans of regional agencies or local government reflect applicable state goals, policies, and guidelines through a certification process;
3. The state wishes to set statewide guidelines so that certain classes of land uses develop in a specified way in order to achieve certain objectives, as in setting minimum density ranges for urban development in an effort to prevent or reduce urban sprawl;
4. The state wishes to engage in the direct regulation of land development, as in areas of the state where there are no capable governmental units to undertake such regulation or because of the impact of development on state-owned or state-financed facilities; and/or

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5. The state wishes to plan for lands that it owns or for which it is otherwise responsible.

The model legislation below provides for a state land development plan that establishes goals, policies, and guidelines for these situations.<sup>63</sup> A land-use plan map is not a necessary component of the state land development plan, although the model legislation makes provision for “maps,” should they be desired. Rather, the plan is a framework from which more detailed, site-specific regulations would be crafted, state-level administrative decisions would be made, and regional and local plans would be designed. For example, from a statewide perspective, it may make little difference if an urban growth area boundary is located on one side of a local road or the other; that determination is, generally speaking, a local one (although there might be a state interest if a state route were involved and the ultimate capacity of the road would be affected by the intensity of development along it). On the other hand, the criteria by which such growth areas are mapped and the standards for the intensity or density of land development within the urban growth area would have a statewide applicability and interest.

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### 4-204 State Land Development Plan

- (1) The [state planning agency] shall, within [36] months of the effective date of this Act, prepare a state land development plan.
- (2) The purposes of the state land development plan are to:
  - (a) ensure the orderly planning of lands and categories of development which the state has identified as having a state interest; and
  - (b) provide policy direction for state, regional, and local actions necessary to implement the state comprehensive plan with regard to the physical development of the state.
- (3) In preparing the state land development plan, the [state planning agency] shall undertake supporting studies that are relevant to the subject areas identified in paragraph (5) below, or may use studies conducted by others concerning the future growth of the state, including, but not limited to:
  - (a) population and population distribution of the state and regions of the state, which may include projections and analyses by age, education level, income, employment, or other appropriate characteristics;

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<sup>63</sup>The concept of the state land development plan first appeared in the *ALI Model Land Development Code*, §§8-401 to 8-406.

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- (b) natural resources, which may include air, water, open spaces, scenic corridors or viewsheds, forests, soils, rivers, and other waters, shorelines, fisheries, wildlife, and minerals;
  - (c) geology, ecology, and other physical factors of the state and regions of the state;
  - (d) use of land for various purposes, intensities, housing or population densities, and the rates of conversion of nonurban land to urban use;
  - (e) the identification and extent of land areas within the state subject to natural hazards and the assessment of the degree of risk associated with those hazards;
  - (f) the economy of the state and regions of the state, which may include amount, type, and general location of commerce and industry and trends and forecasts in economic activity;
  - (g) amount, type, quality, affordability, and geographic distribution of housing and relationship of affordable housing to job sites;
  - (h) general location and extent of existing or currently planned major transportation facilities of all modes, and utility, educational, recreational, cultural, and other facilities of statewide significance; and
  - (i) the identification of features of significant statewide architectural, scenic, cultural, historical, or archaeological interest.
- (4) In preparing the state land development plan, the [state planning agency] [shall *or* may] take into account existing adopted plans of state and regional agencies and of local governments to the extent such plans are consistent with or do not conflict with state interests.
- (5) The state land development plan shall consist of goals, policies, and guidelines in text [and maps] relating to the physical development of the state. The plan may contain goals, policies, and guidelines to:
- (a) identify and manage the development of areas of critical state concern pursuant to Section [5-201 *et seq.*];
  - (b) define the categories of development to be classified as developments of regional impact pursuant to Section [5-301 *et seq.*];
  - (c) provide the basis for establishing urban growth areas as defined in Section [6-403(1)(a)] and the minimum standards of land-use intensity and net density within them in order that such growth areas may be delineated in regional and local plans;

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- (d) direct the planning and the development of land in or surrounding state transportation corridors, public transportation corridors, interchanges on limited access facilities, and airports of regional or state significance;
  - (e) identify [a hierarchy of] urban and rural growth centers for the purposes of state infrastructure and other investment;
  - (f) identify actions to improve the ability of the state and other governmental units to prevent or minimize damages from future disasters that affect land and property subject to natural hazards;
  - (g) establish priorities for state acquisition of land and interests in land for natural resources protection, scenic corridor or viewshed protection, open space and recreational needs, water access, and natural hazard mitigation purposes;
  - (h) set forth approaches to establish solutions to the need for affordable housing;
  - (i) provide for the integration of the state's policy for its physical development in the areas of air quality, transportation, and water resources, with particular respect to federal laws and regulations;
  - (j) define specific regional and local levels of responsibility in the preparation of comprehensive plans to ensure consistency of those plans with the state land development plan[, the state biodiversity conservation plan,] and the state comprehensive plan; and
  - (k) manage land that is owned or leased by, or is otherwise under the control of, the state.
- (6) Prior to submission of its plan to the [office of the governor], the [state planning agency] shall hold public hearings and workshops on the draft state land development plan and shall allow at least a [60]-day period for public comment by citizens, affected public agencies, affected employee representatives, and other interested parties.<sup>64</sup> The [state planning agency] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[or]

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<sup>64</sup>Federal regulations require a minimum of 45 days for public review and comment “before procedures and any major revisions to existing procedures are adopted”. 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be “proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement.” 23 CFR §450.212(a).

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- (6) The [state planning agency] shall conduct public hearings and workshops on the draft plan as provided by Section [4-209].
- (7) Subsequent to the public hearings and workshops, the [state planning agency] shall submit the draft plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the draft plan for consistency with the state comprehensive plan[, [and] state biodiversity conservation plan,][and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed draft plan shall be returned to the [state planning agency], together with any required revisions.
- (8) The [state planning agency] shall, within [30] days of the return of the draft state land development plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and shall be certified in the manner provided by Section [4-211].
- (9) The [state planning agency] shall, on a [biennial] basis, review the state land development plan in consultation with governmental agencies, organizations, and persons affected by the plan, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

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### ***Commentary: State Biodiversity Conservation Plan***<sup>65</sup>

Several states, including Florida, Maryland, and New Jersey, have developed statewide biodiversity conservation plans. These state biodiversity conservation plans map important conservation areas throughout the state by considering the full spectrum of species including plants, invertebrates, natural communities (e.g., various types of grasslands, forests, etc.) as well as more traditional targets such as mammals, birds, and other vertebrates. By identifying key wildlife areas across the state, such plans seek to proactively address the most pressing threat to biodiversity in this country, namely the degradation and loss of habitat.<sup>66</sup> Biodiversity plans are becoming more

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<sup>65</sup>The commentary and model statute in this Section were developed with the assistance of Laura Hood Watchman, a conservation biologist with Defenders of Wildlife, in Washington, D.C., and Caron Whitaker, smart growth and wildlife coordinator, National Wildlife Federation, Washington, D.C. Ms. Watchman and Ms. Whitaker also suggested the inclusion of the model statute in the *Legislative Guidebook*.

<sup>66</sup>D.S. Wilcove *et al.*, "Leading Threats to Biodiversity: What's Imperiling U.S. Species," in *Precious Heritage: The Status of Biodiversity in the United States*, B.A. Stein, L.S. Kutner, and J.S. Adams, eds. (New York: Oxford University Press, 2000), 239-254.

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common because improving biological information and geographic information systems (GIS) have allowed states to do regional assessments of biodiversity. Conservation biologists and policy makers alike recognize the need for map-based information on important areas for biodiversity. This information is ideally suited for: (1) guiding open space acquisition; (2) integration with state, regional and local comprehensive plans; (3) improving the process of environmental decision-making (including permit review). A statewide plan provides a framework for consistency in state, local and private land conservation efforts, instead of piecemeal permitting and habitat destruction that nibbles away at important habitat and marginal habitat alike. This large-scale perspective is also necessary for identifying the large areas and wildlife corridors that are needed to maintain biological diversity, as well as areas where development and other activities would have little impact to biodiversity.

Generally, the comprehensive biodiversity planning efforts to date make use of existing biodiversity survey and habitat information. The goal of the plans is to identify a network of locations that best represent the native biodiversity with enough acreage, redundancy and connectivity so as to allow for ecosystems and their species to persist into the future. In each state, a natural heritage program (often located within a state department of natural resources or state fish and wildlife agency) inventories the state for rare species and vegetation types. This information is available to planners from the programs through the Association for Biodiversity Information, a non-governmental organization that supports and binds together the state heritage programs with standard methods.<sup>67</sup> Additional information may be necessary to ensure comprehensive coverage. Information is also available from the federal government, especially the Gap Analysis Program that develops and supplies map-based wildlife habitat information for state conservation planning in each of the 50 states. As of January 2001, 39 state analyses had been completed and the remaining states are all underway.<sup>68</sup> NOAA's Coastal Change Analysis Program also provides habitat data for aquatic and terrestrial species in coastal watersheds, offshore coral reefs, algae, and seagrass beds in the photic zone.<sup>69</sup> The health of these near shore habitats depends in part on the land-use decisions, and therefore should be considered in land use planning. Additional information can be considered, including state biological expert opinion, existing natural areas, recovery and management plans, and other federal datasets (FEMA 100-year flood-plains, National Wetlands Inventory, etc.) are also included.

A major source of maps and information for state biodiversity conservation plans are ecoregional plans that The Nature Conservancy (TNC) is developing throughout the U.S. Ecoregional plans

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<sup>67</sup>See generally B.A. Stein, L.S. Kutner, and J.S. Adams, eds., *Precious Heritage: The Status of Biodiversity in the United States*, (New York: Oxford University Press, 2000), 23-34.

<sup>68</sup><http://www.gap.uidaho.edu>, January 18, 2001. See also U.S. Geological Survey Gap Analysis Program. *A Handbook for conducting Gap Analysis*, <http://www.gap.uidaho.edu/handbook> (version current as of February 24, 2000).

<sup>69</sup>National Oceanic and Atmospheric Administration Coastal Change Program: Guidance for Regional Implementation, <http://www.csc.noaa.gov/crs/lca/protocol.html#c1p2>, January 18, 2001.

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seek to ensure “the long term survival of all viable native species and community types through the design and conservation of portfolios of sites within ecoregions”<sup>70</sup> The plans that TNC offices produce should be valuable resources for planners in that they identify important biological areas using heritage program information and expert biological opinion.

(1) *Florida*. In 1994 Florida’s Game and Freshwater Fish Commission produced a comprehensive state biodiversity plan entitled *Closing the Gaps in Florida’s Wildlife Habitat Conservation System* that not only identified existing conservation lands, but also additional areas that would be necessary to protect the state’s wildlife including rare plants, animals, and vegetation types.<sup>71</sup> In total 33 percent of the state was identified as important conservation areas; two-thirds of the areas were in public ownership. This effort was expanded upon by the Florida Greenways program which focused more on the connectivity of the conservation areas yielding another comprehensive state map, the Florida Ecological Network. This Network displays important conservation and open space areas similar to the Maryland GIA discussed below.<sup>72</sup> Under Florida statute,<sup>73</sup> Florida’s Department of Environmental Protection (DEP) is currently responsible for planning greenways, and the Florida Greenways and Trails Coordinating Council assists and advises DEP.<sup>74</sup> The Greenways program informs the state’s land acquisition efforts; the Florida Forever Act of 1999 provides \$3 billion over 10 years for conservation and recreational lands acquisition.<sup>75</sup>

(2) *Maryland*. Through a combination of mapping, and linking and protecting natural areas, the Maryland GreenPrint program will allow Maryland to preserve a statewide conservation network. Formalized in 2001, the program is scheduled to receive a projected total of \$145 million over five years. The program will also coordinate with the existing land preservation efforts under Maryland’s Program Open Space and Rural Legacy Programs. For the mapping component of the GreenPrint program, the Maryland Department of Natural Resources (DNR) created a Green Infrastructure Assessment (GIA) to identify a network of greenways that serves to link together and protect the most critical remaining lands before they are lost or fragmented. A proactive use of available information developed by different state and federal agencies, the GIA uses GIS and

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<sup>70</sup>C. Groves et al., *Designing a Geography of Hope: A Practitioner’s Handbook for Ecoregional Conservation Planning* (Arlington, Va.: The Nature Conservancy, 2000), iii-v.

<sup>71</sup>J. Cox, R. Kautz, M. MacLaughlin, and T. Gilbert, *Closing the Gaps in Florida’s Wildlife Habitat Conservation System* (Tallahassee, Fl.: Florida Game and Freshwater Fish Commission, 1994).

<sup>72</sup>T. Hctor, M.H. Carr, and P.D. Zwick, “Identifying a Linked Reserve System Using a Regional Landscape Approach: The Florida Ecological Network,” *Conservation Biology*, Vol. 14, no. 4 (1999): 984-1000.

<sup>73</sup>F.S.A. §20.255(2)(a)(6) (West 2000). A similar authority exists with the New Jersey Department of Environmental Protection to administer grants for land acquisition for open space, greenways, and conservation purposes. N.J.S.A. 13:8C-24 (West 2000) (establishing Office of Green Acres).

<sup>74</sup>F.S.A. §260.0142.

<sup>75</sup>F.S.A. §§259.105 *et seq.*

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principles of landscape ecology to identify hubs, nodes, and corridors for protection and/or restoration. The goal of the project is to “identify an ecologically sound open space network, and ultimately, to incorporate the agreed upon network into local land conservation planning”<sup>76</sup>. DNR has conducted workshops with representatives from each county's planning and zoning department, parks and recreation department, and others to review the maps and the GIS model. Because much of the network also serves recreational needs, the Maryland Greenways Commission implements the GreenPrint program.<sup>77</sup>

(3) *New Jersey*. The Landscape Project, initiated by the New Jersey Division of Fish Game and Wildlife's Endangered and Non-game species program in 1994, is an ecosystem-level approach to the long-term protection of rare species and critical habitat throughout the state of New Jersey. The goal of the project is “to protect New Jersey's biological diversity by maintaining and enhancing rare wildlife populations within healthy functioning ecosystems.”<sup>78</sup> The project seeks to make scientifically sound information easily accessible to planning and protection programs throughout the state. The products may serve as the basis for developing habitat protection ordinances, critical habitat zoning, or acquisition and management projects. The project also anticipates their products will reduce endangered and threatened species conflicts through better planning. GIS maps are available for downloading through the New Jersey Department of Environmental Protection web site [www.state.nj.us/dep/gis](http://www.state.nj.us/dep/gis).

(4) *Oregon*. A diverse set of private stakeholders came together to collaboratively develop a statewide strategy for conserving Oregon's biological diversity. The product of those labors is a 1998 publication, *Oregon's Living Landscape*, which describes each one of the state's ecological regions and maps out conservation opportunity areas for the entire state.<sup>79</sup> Although the plan is not state authorized, it does provide a good model state biodiversity conservation plan because of its inclusive process and reliance on existing information and expertise within the state. As a result of the effort, Oregon's governor appointed a task force to work toward implementing the plan in the Willamette Valley, including the city of Portland.

### MODEL STATUTE

Section 4-204.1 below is model statute for a state biodiversity conservation plan prepared by a state department of natural resources, fish and wildlife agency, or other designated state agency. Based in part on the approach in the 1994 Florida report described above, the state plan is intended

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<sup>76</sup>T. Weber and J. Wolf, “Maryland's Green Infrastructure—Using Landscape Assessment Tools to Identify a Regional Conservation Strategy,” *Environmental Monitoring and Assessment*, no. 63 (2000): 265-277.

<sup>77</sup><http://www.dnr.state.md.us/greenways/greenprint>, July 27, 2001. Maps from the Maryland Atlas of Greenways, Water Trails, and Green Infrastructure may be viewed and ordered from this site.

<sup>78</sup><http://www.state.nj.us/dep/fgw/lnscape.htm>. January 19, 2001.

<sup>79</sup>Defenders of Wildlife, *Oregon's Living Landscape: Strategies and Opportunities to Conserve Biodiversity* (Lake Oswego, Ore.: The Author, 1998).

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to identify land areas in the state where actions should be taken to manage and conserve the state's biodiversity resources, in particular to protect key focal species. The model describes a series of underlying studies and analyses that should be undertaken to provide a basis for formulating goals, policies, and guidelines as well as implementing measures. The process for preparing and adopting the plan is similar to that for the state transportation plan (Section 4-205, below) and other plans with statewide application.

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### 4-204.1 State Biodiversity Conservation Plan

- (1) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall, within [24] months of the effective date of this Act, prepare a state biodiversity conservation plan.
- (2) The purposes of the state biodiversity conservation plan are to to identify land areas in the state that must be conserved and managed in order to ensure the long-term survival of the state's biodiversity resources and to propose goals, policies, guidelines, and implementing actions to conserve and manage these resources.
- (3) In preparing the state biodiversity conservation plan, the [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall undertake supporting studies, or may utilize studies conducted by others concerning, but not limited to, the following:
  - (a) mapped and written descriptions of statewide land cover, including an identification of natural vegetation, wetland communities, arid lands, and disturbed land cover;
  - (b) an inventory and assessment of federally [and state] listed endangered and threatened plant and animal species, rare and endemic species, umbrella and indicator species, species that are commercially important in the state, their habitat, including food source, denning and nursery areas, and migratory routes; and changes in their population and habitat, to the extent such information is available;
  - (c) mapped and written descriptions of public lands capable of providing long-term protection for federal [and state] endangered and threatened species, including national parks, forests, preserves, recreation areas, wildlife refuges, and military lands; state parks, preserves, and forests; state-owned wildlife management areas; water management district lands; nature preserves owned by local government; and private lands owned or managed by conservation groups. Such descriptions may include any limitations or threats to the ability of such lands to provide long-term protection for these species, including, but not limited to, outdoor recreation, fire

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- suppression, noise pollution, runoff and sedimentation; and loss of migratory corridors within such lands;
- (d) studies supporting the designation of areas of critical state concern pursuant to Sections [5-201] *et seq.*;
  - (e) description and analysis of factors contributing to the loss of biological diversity, including the species described in subparagraph (b) above; and
  - (f) an analysis of the impact of existing adopted plans of state and regional agencies and of local governments and plans being proposed for adoption to the extent that they affect or may affect biodiversity resources of the state.
- (4) The state biodiversity conservation plan shall consist of:
- (a) summaries of and maps based on relevant studies described in paragraph (3) above;
  - (b) goals, policies, and guidelines that, at a minimum, describe state priorities in managing and conserving biodiversity resources and state coordination of the management of biodiversity resources with efforts of federal and regional agencies and local governments, and of private conservation organizations;
  - (c) the identification of focal species and, in mapped and written form, land areas that are their habitat for the purposes of habitat management and conservation;
  - (d) implementing actions, including, but not limited to, proposals for: changes in state administrative rules and state agency procedures; legislation; design guidelines for state capital projects; acquisition of land and interests in land; transfer of development rights; mitigation banking; other relevant actions by state and regional agencies and local governments, and private organizations and individuals, including measures to manage and conserve the habitat areas (including food source, denning, and nursery areas and migratory routes) of focal species; costs and sources of funding for implementing actions; and the agency or agencies responsible for implementation; and
  - (e) benchmarks by which changes in the state's biodiversity may be monitored over time.
- (5) Prior to submission of its plan to the [office of the governor], the [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall hold public hearings and workshops on the draft state biodiversity conservation plan and shall allow at least a [60]-day period for public comment by citizens, affected public

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agencies, affected employee representatives, and other interested parties.<sup>80</sup> The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[*or*]

- (5) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall conduct public hearings and workshops on the draft plan as provided by Section [4-209].
- (6) Subsequent to the public hearings and workshops, the [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall submit the draft state biodiversity conservation plan and a summary of comments received at the hearings and/or workshops to the [office of the governor], which shall review the draft plan for consistency with the state comprehensive plan [and] state land development plan [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department *or* agency], together with any required revisions.
- (7) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall, within [30] days of the return of the draft state biodiversity conservation plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].
- (8) The [state department of natural resources *or* state fish and wildlife agency *or other designated state agency*] shall, on a [biennial] basis monitor the benchmarks contained in the state biodiversity conservation plan and shall review the plan with state agencies and other agencies, organizations and individuals significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.
- [(9) A state biodiversity conservation plan prepared and adopted pursuant to this Section shall, in and of itself, have no regulatory effect on land areas it identifies as habitat for focal species.]

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<sup>80</sup>Federal regulations require a minimum of 45 days for public review and comment “before procedures and any major revisions to existing procedures are adopted”. 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be “proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement.” 23 CFR §450.212(a).

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- ◆ The state biodiversity conservation plan is not self-executing; it is not a regulation, but is instead a policy document for the guidance of state government action, including specific regulatory and capital project decisions.

### FUNCTIONAL PLANS

Some states will have specialized functional plans dealing with housing (as in New Jersey)<sup>81</sup> or transportation (as in Oregon and Minnesota)<sup>82</sup> that are not prepared by the lead planning agency, but by other boards and departments (such as New Jersey's Council on Affordable Housing and the Oregon State Transportation Commission). Still others may have specialized plans addressing areas such as solid waste.<sup>83</sup> The following sections propose statutory models for transportation, economic development, and different types of housing plans or state approaches that ensure the availability of affordable housing.

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#### *Commentary: State Transportation Plan*

The state transportation plan statutory description has been drafted to be generally consistent with the requirements of the Federal Intermodal Surface Transportation Efficiency Act of 1991 and the subsequent Federal Transportation Equity Act for the 21<sup>st</sup> Century, passed in 1998. The details of the planning requirements are located in federal statutes.<sup>84</sup> Here, however, the model statutory language is primarily directed at describing the contents of the state plan document itself rather than factors that must be taken into consideration when developing the plan and the projects and strategies contained within it, which is the emphasis in the federal statute. Federal statutes do not require inventories of modal and multimodal facilities and population, employment, land-use, and transportation forecasts. Because it is difficult to imagine a transportation plan that does not have

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<sup>81</sup>N.J.S.A. §52:27D-307 (Duties of the Council on Affordable Housing).

<sup>82</sup>Oregon Department of Transportation (ODOT), *Oregon Transportation Plan*, adopted by the Oregon Transportation Commission, September 15, 1992 (Salem: ODOT, Strategic Planning Section 1992); Minnesota Department of Transportation, *Minnesota Statewide Transportation Plan, MnDOT Final Draft* (St. Paul: MnDOT, January 1995). The Oregon Plan is specifically authorized by Ore. Rev. Stat. 184.618 (1993). The Minnesota Plan is authorized by Minn. Stat. 174.03 (1994).

<sup>83</sup>See, e.g., Ohio Rev. Code §3734.50 (state solid waste management plan) (1995); Ind. Stat. Ann. §13-9.5-3-1 *et seq.* (state solid waste management plan) (1995).

<sup>84</sup>The statewide planning requirements appear at 23 U.S.C.A. §135. Federal regulations governing statewide transportation planning are contained in 23 CFR §450.

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these supporting studies, the model statute, in Section 4-205(3), includes them. The model language also assumes the existence of a state comprehensive plan (see Section 4-203) and a process for reviewing functional plans against it. This language can be deleted, should there be no state comprehensive plan.

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### 4-205 State Transportation Plan

- (1) The [state department of transportation] shall, within [24] months of the effective date of this Act, prepare a state transportation plan.<sup>85</sup> With respect to metropolitan areas of the state, the [department] shall prepare the plan in cooperation with metropolitan planning organizations designated for metropolitan areas pursuant to Section 134(b) of Title 23, United States Code. [With respect to areas of the state under the jurisdiction of an Indian tribal government, the [department] shall develop the plan in cooperation with such government and the U.S. Secretary of the Interior.]
- (2) The purposes of the state transportation plan are to:
  - (a) guide, balance, and coordinate transportation activities in the state, in conjunction with other related activities;
  - (b) ensure that transportation planning addresses and maximizes the potential of all existing and developing modes; and
  - (c) provide for convenient accessibility by all citizens to jobs, housing, education, recreation, and other activities and uses.
- (3) In preparing the state transportation plan, the [state department of transportation] shall undertake supporting studies that are relevant to the topical areas included in the plan, or may utilize studies conducted by others concerning, but not limited to, the following:
  - (a) inventories of modal and multimodal transportation facilities and services in the state;
  - (b) forecasts of population, employment, land use, and transportation, by mode, for a [20]-year period; and
  - (c) identification and evaluation of transportation system alternatives with respect to intensity of use, public and private costs, impacts on economic development, land

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<sup>85</sup>The federal statutes impose no deadline for completing a plan; however, if no deadline is imposed, the plan may never be completed.

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use, energy consumption, the environment (including air quality and biodiversity conservation), safety, and consistency with state goals and policies.

- (4) The state transportation plan shall consist of the following elements:
  - (a) a policy element that defines statewide transportation goals and policies. The policy element may address: the coordination of transportation modes; the relationship of transportation to land use, economic development, the environment (including air quality), and energy consumption; the coordination of transportation among federal, state, regional, and local plans; transportation financing and pricing; designation of scenic highways; transportation signage (including signage that directs tourists); context-sensitive highway design; and transportation safety.
  - (b) a system element in text and maps that proposes a coordinated transportation system for the state consisting of a multimodal network of facilities and services to be developed over a [20]-year period for air, rail, state and federal highways, public transit, waterways, ports and waterborne transit, bicycle transportation, pedestrian walkways, and other modes to support the goals and policies in the policy element. The system element shall include summaries of supporting studies identified in paragraph (3) above, an identification of corridors and transportation facilities of statewide significance, and statements of minimum levels of service that describe the performance for each mode in order to meet the goals and policies of the plan.
  - (c) an implementation element that contains a long-range program of actions to achieve statewide transportation goals and policies over the next [20] years. The implementation element may include proposed transportation projects, their priorities and estimated costs, including sources of funding, identification of responsibilities by local units of government or governmental agencies, and public or private providers of transportation, proposals for legislation, and other relevant measures. [The implementation element may be in a form or may include contents to satisfy the requirements for a transportation improvement program as described in Section 135(f) of Title 23, United States Code].
- (5) Prior to submission of its plan to the [office of the governor], the [state department of transportation] shall hold public hearings and workshop] on the draft plan and shall allow at least a [60]-day period for public comment by citizens, affected public agencies, representatives of transportation agency employees, other affected employee representatives, private providers of transportation, and other interested parties.<sup>86</sup> The [department] shall publish a notice informing the public of the date, time, and location of the hearings and

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<sup>86</sup>Federal regulations require a minimum of 45 days for public review and comment “before procedures and any major revisions to existing procedures are adopted”. 23 CFR §450.212(f). Public involvement processes for statewide transportation planning are to be “proactive and provide complete public information, timely public notice, full public access to key decisions, and opportunities for early and continuing involvement.” 23 CFR §450.212(a).

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workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

[or]

- (5) The [department] shall conduct public hearings and workshops on the plan as provided by Section [4-209].
- (6) Subsequent to the public hearings and workshops, the [state department of transportation] shall submit the plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, state land development plan, [[and] state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department], together with any required revisions.
- (7) The [state department of transportation] shall, within [30] days of the return of the state transportation plan, incorporate all revisions required by the [office of the governor]. The plan shall then be adopted in the manner provided by Section [4-210] and shall be certified in the manner provided by Section [4-211].
- (8) The [state department of transportation] shall, on a [biennial] basis, review the state transportation plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.<sup>87</sup>

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### ***Commentary: State Economic Development Plan***

All states undertake economic development to one degree or another. The activity may be centralized in a department of development or similar agency or dispersed through several departments.<sup>88</sup> The state economic development plan described below is a form of strategic planning

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<sup>87</sup>Federal regulations require that the plan “be continually evaluated and periodically updated as appropriate.” 23 CFR §450.216(e).

<sup>88</sup>See Scott A. Woodard, “A Strategic Approach to State Economic Development: The Colorado Experience,” in *Economic Development Strategies for State and Local Governments*, Robert P. McGowan and Edward J. Ottensmeyer, eds (Chicago, Ill.: Nelson-Hall, 1993), 65-73; David K. Hartley, *State Economic Resource Planning: Four State*

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by which the state assesses its strengths and weaknesses with respect to other states and its place within the national economic environment and proposes a series of strategies to encourage job growth and broadened economic opportunity.<sup>89</sup> The plan will likely be prepared by a state department of development, although it could also be prepared by the office of the governor or a special statewide task force created for the purpose.<sup>90</sup>

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### 4-206 State Economic Development Plan

- (1) The [state department of development] shall, within [18] months of the effective date of this Act, prepare a state economic development plan.
- (2) The purposes of the plan are to define the state's role in encouraging job growth, particularly in relation to the availability of housing and transportation, broadening job opportunity, stimulating private investment, and enhancing and balancing regional economies.
- (3) In preparing the state economic development plan, the [state department of development] shall undertake supporting studies that are relevant to the topical areas included in the plan, or may utilize studies conducted by others concerning, but not limited to, the following :
  - (a) job growth or decline by industry sector on a national, statewide, or regional basis;
  - (b) future workforce and skill requirements of existing and potential industries in the state and its regions;
  - (c) population change and characteristics for the state and its regions;

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*Examples, State Planning Series 15* (Washington, D.C.: Council of State Planning Agencies, 1977); Commonwealth of Massachusetts, *Choosing to Compete: A Statewide Strategy for Job Creation and Economic Growth* (Boston, Mass.: Executive Office of Economic Affairs, May 1993); and Minnesota Department of Trade and Economic Development, *Economic Blueprint* (St. Paul, Minn.: The Department, November 1992).

<sup>89</sup>For examples of this type of analysis, albeit at a regional or local scale, see Mary L. McLean and Kenneth P. Voytek, *Understanding Your Economy: Using Analysis to Guide Local Strategic Planning* (Chicago, Ill.: APA Planners Press, 1992); Edward J. Blakely, *Planning Local Economic Development: Theory and Practice*, 2d edition (Thousand Oaks, CA: Sage, 1994).

<sup>90</sup>See, e.g., 20 ILCS §605/46.44 (1993) describing the requirements for an “economic development strategy” for the state to be prepared and regularly updated by the Illinois Department of Commerce and Community Affairs.

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- (d) assessments of the state's locational characteristics with respect to access to transportation to markets for its goods and services, and its natural, technological, educational, and human resources in comparison with other states;
  - (e) the economic value of the state's natural, cultural, historic, and scenic resources to the state's tourism development.
  - (f) patterns of export and import activity for the state and its regions;
  - (g) patterns of private investment or disinvestment in plants and capital equipment in the state and its regions;
  - (h) patterns of unemployment in the state and its regions;
  - (i) opinions of public and private officials, through surveys, public hearings, and other means, as to the appropriate roles of the state in economic development and the state's competitive strengths and weaknesses;
  - (j) assessments of institutional structures within state government for encouraging economic development; and
  - (k) assessments of regulations and permitting procedures imposed by the state upon new development and upon commercial and industrial enterprises and their effects on the cost of doing business as well as their effect on the attraction and retention of jobs and firms in the state.
- (4) The state economic development plan shall consist of summaries of relevant studies described in paragraph (3) above, and goals, policies, and implementing strategies by which state agencies may improve the state's business environment. The implementing strategies shall include, but shall not be limited to, changes in the programs or organization of state agencies, new or amended state legislation (such as changes in state tax policies), state capital investment, partnerships with private, governmental and nonprofit organizations, changes in programs of education and training, and estimates of the costs of such changes, legislation, or programs. The plan shall also propose benchmarks by which changes in the state's economy and factors contributing to economic change can be measured over time.
- (5) Prior to the submission of its plan to the [office of the governor], the [state department of development] shall hold public hearings and workshops on the draft plan and shall allow at least a [60]-day period for public comment [by citizens, affected public agencies, representatives of private and nonprofit organizations, labor unions, educational and training institutions, and other interested parties]. The [department] shall publish a notice informing the public of the date, time, and location of the hearings and workshops and of the availability for inspection or purchase of the draft plan in newspapers of general circulation in the state at least [60] days in advance of the hearings and workshops.

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[or]

- (5) The [department] shall conduct public hearings and workshops on the plan as provided by Section [4-209].
- (6) Subsequent to the public hearings and workshops, the [state department of development] shall submit the plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, state land development plan, [[and] state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department], together with any required revisions.
- (7) The [state department of development] shall, within [30] days of the return of the state economic development plan, incorporate all revisions required by the governor. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].
- (8) The [state department of development] shall, on a [biennial] basis, review the state economic development plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.

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### ***Commentary: State Telecommunications and Information Technology Plan***<sup>91</sup>

Telecommunications and the information revolution are the most significant forces shaping the nation's economy and our communities. New telecommunications technologies and applications are changing how we communicate and how and where we live and work. A comprehensive understanding of them, the industries that provide them, and the government policies and regulations that affect those industries is certainly important for the businesses that rely on them to deliver services and remain competitive. That understanding is also important, however, for elected officials, planners, and citizens who play an active role in determining how telecommunications technologies and industry will affect a community's economic well-being, its architectural, aesthetic, and cultural character, and the day-to-day activities of its citizens.

Historically, telecommunications meant basic services like telegraph, telephone, telex, television, and radio. Until very recently, these services had been regulated by the federal government as monopolies. The presence of the federal government in regulating and directing the industry resulted in telecommunications being largely ignored by local government officials. Local governments dealt with communication firms on a limited basis, such as contracting for use of public rights-of-way and local franchising. Today, telecommunications refers to a diverse industry that has expanded to include telephone service (both local and long distance), wireless, microwave, satellite, cable, video, and, with the addition of the computer, transmission of voice, data, and video along with sophisticated networks of electronic mail, telecommuting, and video conferencing. New technologies are continually being added by a number of industries.

The greatest regulatory change occurred with the passage of the Telecommunications Act of 1996.<sup>92</sup> Prior to this, the industry was guided by the Communications Act of 1934.<sup>93</sup> The 1934 legislation created and maintained protected telecommunications monopolies at both the federal and state levels. Under this earlier legislation, the industry and the resulting monopolies were controlled

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<sup>91</sup>Portions of this Commentary and the model statute that follows are based on "Creating Effective State and Local Telecommunications Plans, Regulations, and Networks: Models and Recommendations" by Barbara Becker, AICP, and Susan Bradbury, in *Modernizing State Planning Statutes: The Growing Smart Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). The preparation of the working paper, the commentary, and the model statute was supported by a grant from the Siemens Corporation. See also the commentary to Section 7-206.1, the telecommunications component of a community facilities element of a local comprehensive plan.

<sup>92</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Act can also be found on the Federal Communications Commission website: [www.fcc.gov/telecom.html](http://www.fcc.gov/telecom.html).

<sup>93</sup>47 U.S.C. §151 *et seq.* (1997).

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and regulated by the Federal Communications Commission (FCC) and state and local public utility commissions (PUCs). These commissions determined through franchises and licensing agreements where companies could provide service, the nature of the services provided, and the rates that could be charged. This created a closely regulated industry, and one with little or no competition. As Congress began to deregulate other industries in the 1980s, it opted to deregulate the communications industry. The antitrust rulings that divested the Bell System and opened the long-distance telephone market to fair competition<sup>94</sup> were really the beginning of a shift toward competition and less government regulation that resulted in the Telecommunications Act of 1996.

The Telecommunication Act of 1996 allows long distance operators, local telephone providers, and cable companies to compete in each other's markets. The Act is primarily focused on introducing competition. The rationale behind the legislation is that competition will result in lower prices and better quality. The full implications of the Act will not be known for some time as the FCC continues to go through the rule-making process that will implement it.

### **THE STATE ROLE: TELECOMMUNICATIONS AND ECONOMIC DEVELOPMENT**

The state is in a unique position in regards to the regulation of, and the promotion of development of, telecommunications within its borders. With modern technology, telecommunications is truly an enterprise that crosses and transcends state boundaries. And though deregulation has occurred to some degree through the Telecommunications Act of 1996, the Federal Communications Commission still has a role in the regulation of telecommunications providers. On the other hand, the placement of telecommunication facilities is a land-use question, within the purview of the local governments. Indeed, the issue of facility placement often becomes highly contested at the local level often over the issue of aesthetics..

Nevertheless, the state has a role to play in the regulation and the development of telecommunications networks. State utility commissions regulate the rate of "natural monopoly" service providers (although some utility regulation is handled by local governments). The state legislature can enact or amend enabling legislation to balance the facilities placement issue. Economic development agencies can enter into partnerships with private telecommunications and computer firms to provide service to those who do not have it and to upgrade service where it exists, thus attracting and encouraging economic growth. Educational agencies can also cooperate with service providers to provide computers and communication access to teachers and students who can use these resources in more engaging and efficient education.

Then, there is the role of the state government as a consumer of telecommunications services and computer equipment and software. Even in the smallest of states, a state government is a large enterprise with executive, judicial, and legislative agencies, all of which have information needs of their own and also the need to share information in a timely manner with other agencies. Some of that demand for computers and telecommunications involves the speedy relay upon demand of vast

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<sup>94</sup>*MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1982), *cert den'd* 464 U.S. 891; *U.S. v. AT&T*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom Maryland v. U.S.*, 460 U.S. 1001 (1983); *U.S. v. Western Electric*, 569 F. Supp. 990 (D.D.C. 1983).

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amounts of information. Some involves making information readily available to those who need it while maintaining those data sources secure from those who do not. And some of that telecommunication service includes the maintenance of reliable and rapid communications among law enforcement, medical, and other emergency management agencies during disasters. The state government needs the latest technology at a reasonable cost in order to carry out the daily tasks of governance.

Several states have already addressed this vital issue through legislation or other programs. Some states have express telecommunications planning requirements. Vermont requires its department of public services to prepare a state telecommunications plan to cover a ten-year period.<sup>95</sup> The Vermont statute covers both private and governmental telecommunications, and requires the telecommunications plan to include a ten-year overview of state growth and development as it relates to telecommunications demand, a survey of the demand of private telecommunications users, an assessment of the existing system, and an evaluation of alternative proposals for improving the system.<sup>96</sup> Alaska has created a telecommunications information council, which is directed to prepare short-range and long-range information systems plans for the state government and to prepare guidelines for state agencies to formulate information systems plans which are to be “in accordance with” the state plans.<sup>97</sup>

In Washington, a Governor’s Telecommunication Policy Coordination Task Force was established by executive order in 1994. The task force was charged with assessing current telecommunications policies and recommending ways that Washington could better attract telecommunications companies and the jobs and services they provide while encouraging the deployment of advanced networks to the state’s businesses and residents. The 11-member task force drew from state executive and legislative branches. It assessed the economic trends affecting growth and development of various sectors of the state telecommunications industry, how the state tax structure may be affecting telecommunications development,<sup>98</sup> and the overall effect of state policies to promote effective use of telecommunications to improve service to the state’s citizens.<sup>99</sup>

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<sup>95</sup>Vt. Stat., tit. 30, § 202d (1997).

<sup>96</sup>Id.

<sup>97</sup>Alaska Stat. §44.19.504 (1997).

<sup>98</sup>Governor’s Telecommunications Policy Coordination Task Force, *Telecommunications Infrastructure in Washington State* (Olympia, Wash.: The Task Force, Office of the Governor, April 1996), [www.wa.gov/ttf](http://www.wa.gov/ttf).

<sup>99</sup>Governor’s Telecommunications Policy Coordination Task Force, *Telecommunications in Washington State: Implementing the Telecommunications Act of 1996 and Tax Alternatives* (Olympia, Wash.: The Task Force, Office of the Governor, January 1997), [www.wa.gov/ttf](http://www.wa.gov/ttf).

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Georgia centralized control and development of telecommunications in one agency, the department of administrative services, which is obligated by law to develop and implement a plan for state government telecommunications.<sup>100</sup> Through that agency, and utilizing revenue from a universal services fund,<sup>101</sup> Georgia operates the Georgia Statewide Academic and Medical System, utilizing satellite links to facilitate teleconferencing, including university courses, public hearings, and telemedicine. Along the same lines, Iowa has created the fiber-optic, state-owned Iowa Communications Network<sup>102</sup>, while North Carolina has the North Carolina Information Highway, an all-fiber, all-digital, high-speed network that is operated as a public-private partnership.<sup>103</sup>

### **A STATE TELECOMMUNICATIONS PLAN**

A telecommunications plan must be flexible and must be reviewed often, due to the improvements in telecommunications and computer technology that occur seemingly daily. It should be prepared both by those knowledgeable in the latest technical innovations and those who must use the system day after day as a practical tool. And it must balance the need of society to promote the latest telecommunications technology with the need to have that technology available to as many users as possible.

The model statute in Section 7-206.1 below describes a state telecommunications and information technology plan. The plan's focus is both upon the state government's internal communications and information technology needs and upon the regulation and development of the commercial or public telecommunications system. The optional phrasing in paragraph (1) allows a state adopting this Section to have the telecommunications and information technology plan prepared by the state department of development, the state planning agency, another state agency more closely related to telecommunications and information technology issues such as the public utilities commission, a committee of experts created for the purpose, or some combination of the above.

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### **4-206.1 State Telecommunications and Information Technology Plan**

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<sup>100</sup>Ga. Code Ann. §50-5-160 *et seq.* (1997).

<sup>101</sup>The universal services fund receives its income from fines and penalties on common carriers. Ga. Code Ann. § 50-5-163.

<sup>102</sup>[www.icn.ia.us/](http://www.icn.ia.us/)

<sup>103</sup>[www.ncih.net/nciin.html/](http://www.ncih.net/nciin.html/)

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- (1) The [state department of development, state planning agency, *or other appropriate state agency*] may prepare a state telecommunications and information technology plan.
- (2) The purposes of the state telecommunications and information technology plan are to:
  - (a) assess short- and long-term telecommunications needs and existing telecommunications infrastructure and services in the state;
  - (b) assess short- and long-term telecommunications and information technology needs of the state government and all agencies thereof;
  - (c) assess the manner in which existing telecommunications and information technology are used by the state government or any agency thereof;
  - (d) encourage investment in the most advanced telecommunications and information technology while protecting the public health, safety, and general welfare;
  - (e) acknowledge the economic development potential of telecommunications and information technology for the state;
  - (f) coordinate state telecommunications and information technology initiatives with other state programs; and
  - (g) provide guidance to local governments in the preparation of telecommunications components of local comprehensive plans pursuant to Section [7-206.1].
- (3) In preparing the state telecommunications and information technology plan, the [state department of development, state planning agency, *or other state agency*] shall undertake supporting studies that are relevant to the topical areas included in the plan. In undertaking these studies, the state may utilize studies conducted or information assembled for the preparation of the state economic development plan pursuant to Section [4-206] or state capital budget and capital improvement program pursuant to Sections [4-301 to 4-304], or may utilize studies conducted by others. The studies may concern, but shall not be limited to, the following:
  - (a) surveys and assessments of future telecommunications needs on a statewide basis based upon projected and desired growth and development, including opinions of public and private officials as to the appropriate role of the state in regulating and promoting telecommunications;
  - (b) an assessment of the existing private telecommunications system on a statewide basis, with an identification of regional differences, if any;
  - (c) surveys and assessments of telecommunications and information technology initiatives undertaken by other states;

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- (d) surveys and assessments of future telecommunication and information technology needs as they relate to both the state government as a whole and all the agencies of the state;
  - (e) an appraisal of the impact of telecommunications on the future location of business and industry within the state;
  - (f) an assessment of existing telecommunications and information technology being utilized by the state government and all agencies thereof, including an appraisal of the compatibility of the technology with presently-utilized technology and foreseeable future improvements in telecommunications and information technology; and
  - (g) an assessment of federal and state statutes and regulations, as well as relevant local ordinances and permitting procedures, that affect private telecommunications firms and their effects on the cost of doing business and on investment in infrastructure, technological advancement, and the provision of universal service.
- (4) The state telecommunications and information technology plan shall consist of summaries of the relevant studies described in paragraph (3) above, and goals, policies, and implementing strategies by which the state and state agencies may improve telecommunications infrastructure and services in order to address the purposes listed in paragraph (2) above.
- (5) The implementing strategies shall include, but shall not be limited to, new or amended state legislation, state capital investment, partnerships with private, governmental, and nonprofit organizations, and estimates of the costs of such changes, legislation, or programs. The plan shall also propose benchmarks by which changes in the state's telecommunication and information technology system can be measured over time. The implementing strategies may include proposals for:
- (a) construction or installation of, or improvements to, the telecommunications facilities and information technology of the state government and state agencies;
  - (b) the enactment of uniform standards for state government telecommunications facilities and information technology;
  - (c) public information programs to market the telecommunications potential of the state for economic development purposes;
  - (d) proposed model goals, policies, and guidelines that local governments may include in a telecommunications component of a community facilities element prepared pursuant to Section [7-206.1];

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- (e) agreements between telecommunications firms and the state or state agencies for use of telecommunication facilities by public safety and emergency management services personnel in the event of disaster; and
  - (f) changes to statutes, regulations, and procedures affecting telecommunications, including, but not limited to, taxation, to enhance investment in telecommunications infrastructure, advance technology, and provide universal service.
- (6) The [department *or* agency] shall conduct public hearings and workshops on the proposed plan as provided by Section [4-209].
- (7) Subsequent to the public hearings and workshops, the [state department of development, state planning agency, *or other state agency*] shall submit the proposed plan and a summary of comments received at the hearings and workshops to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, state land development plan, [[and] state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [department *or* agency], together with any required revisions.
- (8) The [state department of development, state planning agency, *or other state agency*] shall, within [30] days of the return of the state telecommunications and information technology plan, incorporate all revisions required by the governor. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].
- (9) The [state department of development, state planning agency, *or other state agency*] shall, on a [biennial] basis, review the state telecommunications and information technology plan with state agencies significantly affected by the provisions of the particular section under review, and may propose, in writing, amendments to the plan, accompanied by an explanation of the need for such amendments. Such changes shall be approved in the same manner as the adoption of the original plan.
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### ***Commentary: State Housing Plan***

A state housing plan is particularly appropriate when there is a state agency dedicated to housing issues (e.g., a state housing finance agency or state housing department charged with identifying housing needs on a statewide basis and then allocating state resources), although it may also be

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carried out by a state planning agency. California, Georgia, Oregon, and Washington are examples of states that have such plans, and the model legislation below is based on them.<sup>104</sup>

The state housing plan assesses existing housing conditions on a statewide basis and projects future housing needs, especially for affordable housing, in order to assure that a wide variety of housing types is available to accommodate the state's residents. The presence of an adequate supply of housing for all income groups is important to support economic development. Businesses, when they locate or expand, look to the supply of housing for potential workers and having a sufficient supply of housing in all parts of the state is a strategic advantage that favors one state over another.

The state housing plan should identify how the state intends to initiate or make changes to existing programs and may recommend measures to remove regulatory barriers to affordable housing. For example, the plan may propose programs to ensure that middle- and moderate-income workers, such as police officers, firefighters, teachers, and other vital workers are able to find housing near where they work. Additionally, the plan may recommend initiatives that assist low-income elderly people find apartments so that they may live near their children or that help moderate-income young married couples find housing in the community where they grew up. The plan may also serve as a vehicle to distribute federal funds, such as Community Development Block Grant monies, or state funds dedicated to affordable housing purposes.<sup>105</sup> Moreover, the plan may stimulate or inspire other government agencies, such as local governments, to address housing needs.

Housing planning is addressed in other sections of the *Legislative Guidebook*. Section 4-208, Alternative 1 (Model Balanced and Affordable Housing Act), describes a regional fair-share housing system, with the optional involvement of a regional planning agency. Chapter 6, Regional Planning, describes the contents of a regional housing plan, similar to the language below (see Section 6-203). Detailed requirements for local housing planning is also addressed in Chapter 7, Local Planning, Section 7-207.

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<sup>104</sup>Cal. Codes Ann., Health and Safety Code, §§50450 to 50452 (1986 and Pamp. Supp. 1995) (Statewide housing plan); Ga. Code Ann. §8-3-171 (1994) (State housing goal report); Ore. Rev. Stat. §456.572 (1993) (State housing plan); and Wa. Rev. Code. Ann. §43.185B.040 (1995 Pamp. Supp.) (Housing advisory plan).

<sup>105</sup>For an overview of state housing initiatives that examines the growth of state housing programs, including tax exempt financing and the delegation of federal housing subsidies, see Peter W. Salsich, Jr., "Urban Housing: A Strategic Role for the States," *Yale Law and Policy Review* 12 (1994): 93, appearing in Stuart L. Deutsch and A. Dan Tarlock, eds., *Land Use and Environment Law Review – 1995* (Deerfield, Ill: Clark Boardman Callaghan, 1995), 191. Salsich contends that "[s]tate planning programs that fully assess housing trends and needs on a broader base than local plans are critical components of an effective national housing strategy. Housing markets vary from state to state, as well as within areas of particular states. Because of the dynamics of these markets, assessments of housing needs tend to be more accurate if they are made from a perspective that is broader than a local perspective but narrower than a national one." *Id.*, 227-228.

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### 4-207 State Housing Plan; Housing Advisory Committee; Annual Progress Report

- (1) The [state planning agency *or* state department of housing and community development *or* state department of community affairs *or* state department of development *or* state housing finance agency] shall, within [18] months of the effective date of this Act, prepare and adopt, and update and amend every [5] years, a state housing plan.
- (2) The purposes of the state housing plan are to:
  - (a) document the needs for affordable housing<sup>106</sup> in the state, including special needs housing,<sup>107</sup> and the extent to which private- and public-sector programs are meeting those needs;
  - (b) encourage the provision of affordable housing, especially as it relates to the location of such housing proximate to jobsites;
  - (c) encourage the rehabilitation and preservation of affordable housing;
  - (d) identify barriers to the production of affordable housing at the state and local levels of government;
  - (e) develop sound strategies, programs, and other actions to address affordable housing on a statewide basis; and
  - (f) serve as a guide for the allocation of state resources to meet those needs.
- (3) The governor [shall *or* may] appoint a housing advisory committee to the [state planning agency *or* state department of housing and community development *or* state department of community affairs *or* state department of development *or* state housing finance agency] to serve as the [agency *or* department]'s principal advisory body in the preparation of the state housing plan and on housing and housing-related issues. The [agency *or* department] shall

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<sup>106</sup>“Affordable housing” is defined in Section 4-208.3 (Model Balanced and Affordable Housing Act) of the *Legislative Guidebook* as: “[H]ousing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, low-, or very low-income housing, . . . . In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.” For definitions of other categories of housing by income group, see Section 4-208.3.

<sup>107</sup>The households most commonly identified as requiring “special needs” programs include the elderly, the physically and mentally disabled, single heads of households, large families, farm workers and migrant laborers, and the homeless.

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provide administrative and clerical assistance and such other information and assistance as may be deemed necessary by the committee in order for committee to carry out its duties. Members of the committee shall serve without compensation, but shall be reimbursed for travel expenses [as provided by state law].

- ◆ Because it is important to have widespread participation by various groups affected by housing programs, the model legislation includes a housing advisory committee to advise the state agency when it is preparing the plan. Legislation based on this model may also specify the number of committee members, what interests they represent, and their terms. Typical members might include representatives of: the construction industry; home builders; home mortgage lending profession; economic development profession; real estate sales profession; apartment management and operation industry; nonprofit housing development industry; homeless shelter operators; lower-income persons; public housing authorities (both residents and those involved in public housing management); special needs populations; advocacy groups for affordable housing; and local governments in the state.

- (4) The state housing plan shall at a minimum consist of the following:
  - (a) an evaluation of and summary statistics on housing conditions for the state[,] [all substate districts designated pursuant to [Section [6-602]],] [[and] counties] for all economic segments. The evaluation shall include the existing distribution of housing by type, size, gross rent, value, and, to the extent data are available, condition, the existing distribution of households by gross annual income and size, and the number of middle-, moderate-, and low-income households that pay more than [28] percent of their gross annual household income for owner-occupied housing and [30] percent of their gross annual household income for rental housing.
  - (b) a projection for each of the next [5] years of total housing needs, including needs for middle-, moderate-, and low-income and special needs housing in terms of units necessary to be built or rehabilitated for the state[,] [all substate districts designated pursuant to [Section [6-602]],] [[and] counties];
  - (c) a discussion of the capabilities, constraints, and degree of progress made by the public and private sectors in meeting the affordable housing needs and special housing needs of the state;
  - (d) an identification and comprehensive assessment of state and local regulatory barriers to affordable housing, including building, housing, zoning, subdivision and related codes, and their administration;<sup>108</sup>

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<sup>108</sup>The report of the U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, “*Not in My Back Yard*” *Removing Barriers to Affordable Housing* (Washington, D.C.: U.S.G.P.O, 1991) recommended that “each [s]tate undertake an ongoing action program of regulatory barrier removal and reform at the state and local levels.” *Id.*, at 7-6.

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- (e) goals for each of the next [5] years for the production of housing units, both new and rehabilitated, for middle-, moderate-, and low-income and special needs housing for the state, [all substate districts designated pursuant to [Section [6-602],][[and counties];
  - (f) based on an analysis of subparagraphs (4)(a) through (4)(e) above, specific recommendations, policies, programs, and/or proposals for legislation for meeting the affordable housing needs and special housing needs of the state, including, but not limited to:
    - 1. financing for the acquisition, rehabilitation, preservation, or construction of housing;
    - 2. use of publicly owned land and buildings as sites for low- and moderate-income housing;
    - 3. regulatory and administrative techniques to remove barriers to the development and placement of affordable housing and to promote the location of such housing proximate to jobsites;
    - 4. coordination of state initiatives with federal financing programs and the development of an approved housing strategy as provided for in the Cranston-Gonzales National Affordable Housing Act (Section 12701 *et seq.* of Title 42, United States Code), as amended, including a summary table of anticipated funding from each federal program and any state, local, or other resources available to meet matching requirements;
    - 5. stimulation of public and private sector cooperation in the development of affordable housing and the creation of incentives for the private sector to construct or rehabilitate affordable housing;
    - 6. tax, infrastructure financing, and land-use policies and laws; and
    - 7. local opportunities for public housing resident management and ownership.
- ◆ It may also be desirable for the contents of the state housing plan to include proposed annual allocations of monies from state housing trust funds for affordable housing.<sup>109</sup> Such funds may include proceeds from the sale of mortgage revenue bonds, title transfer taxes, mortgage recordation fees, abandoned or unclaimed funds, lottery proceeds, and other revenues.

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<sup>109</sup>See generally David Rosen, *Housing Trust Funds*, Planning Advisory Service Report No. 406 (Chicago: American Planning Association, December 1987).

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### Removing Regulatory Barriers to Affordable Housing

The U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, in 1991, recommended that states initiate actions to promote or encourage certain types of affordable housing options. These measures included amending state zoning enabling acts to: (1) authorize, under appropriate conditions and standards, manufactured housing as a permitted dwelling units under local zoning and prohibit local communities from enacting ordinances forbidding manufactured housing; (2) direct that localities permit, under state standards, accessory apartments as of right (e.g., not as a “conditional use”) in any single-family residential zone in their jurisdiction subject to appropriate design, density, and occupancy standards set forth by the state; and (3) 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 jurisdiction for such uses. The Commission also strongly recommended that states require all local governments to review and modify their housing and building codes and zoning ordinances to permit, under reasonable state-established design, health, density, and safety standards, single-room-occupancy housing. Another Commission recommendation urged state and local governments to develop and implement necessary policy and funding plans to provide and maintain adequate infrastructure in support of affordable housing and growth and to ensure that infrastructure is available in a timely fashion.

SOURCE: U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, *“Not in My Back Yard” Removing Barriers to Affordable Housing* (Washington, D.C.: U.S. GPO, 1991), 7-12 to 7-13.

Typically, housing trust fund monies are used for grants, loans, loan guarantees, and loan subsidies. They may be made available to local governments, local housing authorities, private lenders, and private and nonprofit developers. Because the nature of housing trust funds is unique to each state, statutory language providing for the annual allocations has not been proposed here.

- (5) The [agency *or* department] shall conduct workshops and public hearings on the state housing plan as provided by Section [4-209]. The [agency *or* department] shall seek the advice of the housing advisory committee in assessing comments received at the hearings and workshops.
- (6) Subsequent to the workshops and public hearings, the [agency *or* department] shall submit the plan and a summary of comments received at the workshops and hearings to the [office of the governor], which shall review the plan for consistency with the state comprehensive plan, the state land development plan, [[and] the state biodiversity conservation plan,] [and any other instructions and directives it may have issued]. The [office of the governor] shall

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consider all written comments received when formulating any required revisions. Within [30] days, the reviewed plan shall be returned to the [agency *or* department], together with any required revisions.

- (7) The [agency *or* department] shall, within [30] days of the return of the state housing plan, incorporate all revisions required by the governor. The plan shall then be adopted in the manner provided by Section [4-210] and certified in the manner provided by Section [4-211].
- (8) Each [date], for the year beginning [date], the [agency *or* department] shall submit an annual progress report to the governor and legislature describing measures taken to implement the state housing plan during the previous year, detailing the extent to which the state's affordable housing needs were met during the previous year, and containing other recommendations for meeting those needs.

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### ***Commentary: State Planning For Affordable Housing (Two Alternatives)***

Over the past quarter century, a number of states have adopted statutes and formulated planning approaches to ensure the availability of affordable housing.<sup>110</sup> In contrast to enabling legislation that simply permits and describes local housing planning, these statutes proactively attempt to remove barriers to affordable housing by placing an affirmative responsibility on local governments. These states have defined the provision of such housing as a state interest, beyond mere encouragement, and supervise the housing planning process at the regional and local levels.

This type of legislation generally falls into three general categories: (1) a “bottom-up” approach in which the preparation of housing plans is a collaborative effort between a regional planning agency and member local governments under state supervision; (2) a “top-down” approach in which the state establishes housing goals for individual local governments based on regional needs projections; and (3) an appeals approach based on the existence of a state-level appeals process that provides for an override, either by a court or an administrative body, of local decisions that reject

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<sup>110</sup>For an excellent review of these statutes and programs, see Robert Burchell, David Listokin, and Arlene Pashman, *Regional Housing Opportunities for Lower Income Households: An Analysis of Affordable Housing and Regional Mobility Strategies*, prepared for the U.S. Department of Housing and Urban Development (New Brunswick, N.J.: Center for Urban Policy Research, March 1, 1994)) (discussing regionally and locally-initiated programs as well as those administered by states); John Charles Bogen, “Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction,” *N.C. L. Rev.* 7 (1993), 1573, 1590-1601 (discussing California, New Jersey, Connecticut, Massachusetts, and Oregon); Peter Salsich, Jr., “Urban Housing: A Strategic Role for the States,” *Yale Law and Policy Review* 12 (1994): 94, reprinted in *Land Use and Environment Law Review 1995*, Stuart L. Deutsch and A. Dan Tarlock, eds (Deerfield, Il.: Clark Boardman Callaghan, 1995), 191, 203-209. Professor Salsich notes that “at least seventeen states have enacted legislation encouraging or requiring local governments to engage in formal land use planning that includes affordable housing development as an essential element.” *Id.*, 203. Salsich provides, at 203, n. 58, a complete list of state planning statutes that require or encourage local housing elements. Local housing planning is addressed in Chapter 7, Local Planning, of the *Legislative Guidebook*.

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proposals for affordable housing or that otherwise make their construction uneconomic or infeasible. These three approaches are described more completely in the Note located at the end of this Chapter. The two model statutes that follow are examples of a hybrid “bottom-up/top-down” approach and an appeals approach.

The first model statute is based on statutes from New Jersey and California and a proposal from the U.S. Advisory Commission on Intergovernmental Relations. It establishes a state-level Balanced and Affordable Housing Council to administer, and enforce if necessary, a statewide regional fair-share allocation system for affordable housing. The primary goal of the model statute is to ensure that a wide variety of housing types will be available to accommodate low- and moderate-income households on a regional fair-share basis. Therefore, while the model calls for housing planning for all income groups, its focus is primarily on local efforts to permit and otherwise encourage low- and moderate-income housing. Balancing employment and residential housing opportunities is critical to the state because it lessens traffic congestion, contributes to an improved environment, reduces infrastructure demand, and makes the state more competitive to new and expanded businesses. In addition, the model strives to assure an adequate supply of housing in appropriate locations for persons of all income strata, including teachers, police officers, bank and grocery clerks, waiters and waitresses, and others in middle-, moderate-, and low-wage jobs that are an integral part of the economy.

Two organizational alternatives are provided. Under the first, the Council is responsible for designating housing regions for the state, preparing estimates of present and prospective need for low- and moderate-income housing by region, developing regional fair-share allocations of such needs to local government, and reviewing and approving housing elements of comprehensive plans submitted by local governments.

Under the second alternative, which involves a role for regional planning agencies, the Council also designates housing regions and prepares estimates of present and prospective need. However, the actual allocation of the regional need figures is accomplished by regional planning agencies, using guidelines, data, and suggested methodologies supplied by the Council. When the regional planning agency prepares the regional fair-share allocations, the result is termed a “regional fair-share allocation plan” that is subsequently reviewed and approved by the Council. The allocation plan may be part of the agency’s broader regional comprehensive plan. After a regional planning agency’s regional allocation plan is approved by the Council, the agency may then review and approve housing elements submitted by local governments.

The housing element itself is intended to provide the local government with an analysis of existing and prospective housing needs in the region and set forth implementing measures for the preservation, improvement, and development of housing. In it, the local government identifies how it will address the housing needs for all income groups, especially its regional fair share, and what specific affirmative steps it is going to take, including changes in development regulations to eliminate unnecessary cost generating requirements that can affect the cost of all housing.

The model statute also provides for a mediation process overseen by the Council or the regional planning agency regarding objections to housing elements submitted by local governments for review and approval. Also, under both alternatives, the Council functions as a state-level housing

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appeals board when: (a) a local government does not submit a housing element; (b) when it submits, but does not ultimately obtain approval of a housing element; or (c) when it fails to update the housing element. In the absence of an approved or updated housing element, an applicant seeking approval to build an inclusionary development (which is defined as one with at least 20 percent low- and moderate-income dwelling units) has the right to appeal any denial or approval with conditions by the local government to the Council. The Council, after a hearing on the appeal, may affirm, modify with conditions, or set aside the local government's decision. Thus, the model legislation creates a statutory – as opposed to state constitutional – remedy and incentive for local governments to adopt housing elements and carry out specific proposals contained in them.

While the model statute below draws from the New Jersey Fair Housing Act, it does not incorporate one feature of that state's legislation: a device called the "regional contribution agreement" whereby a certain percentage of low- and moderate-income units can be transferred to a receiving local government upon the payment of fees. Under the New Jersey statute, up to 50 percent of a local government's low- and moderate-income obligation can be transferred to a designated receiving local government in the same housing region by means of a regional contribution agreement and upon payment by the sending local government of a per unit amount established by the state.<sup>111</sup> The contribution agreement has been criticized on the grounds that it allows suburban jurisdictions to partially buy their way out of their regional fair-share obligation, thereby defeating one of the purposes of the statute.<sup>112</sup> On the other hand, it has been commended

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<sup>111</sup>See N.J.S.A. §52:27D-312 (regional contribution agreements) and N.J.A.C. §5:93-6 (regional contribution agreements). The current amount, as of 1995, is at least \$20,000 per unit. N.J.A.C. §5:93-6.4(b). A model regional contribution agreement appears in 5 N.J.A.C., Ch. 93, App. H.

California planning statutes contain a variant on the regional contribution agreement. They authorize a city or county to transfer a percentage of its share of the regional housing needs to another city or county under certain circumstances. These include in part: (1) that the receiving and transferring city and/or county have adopted a housing element in substantial compliance with statutory requirements; (2) that the transfer does not occur more than once in a five-year housing element interval; (3) that, before a city or county may transfer a share of its regional housing needs, it must first have met, in the current or previous housing element cycle, at least 15 percent of its existing share of the region's affordable housing needs in the very low and lower-income category of income groups defined in the statute, but that in no event shall a city or county transfer more than 500 dwelling units in a housing element cycle; and (4) that the transfer shall only be between jurisdictions that are contiguously situated or between a receiving city or county that is within 10 miles of the territory of the community of the donor city or county. The statutes require adoption of certain findings by the transferring and receiving city and/or county, which are reviewed by the council of governments in the housing region or the California Department of Housing and Community Development. The California Attorney General has the authority to enforce the transfer of regional need agreement between the two local governments. Cal. Gov't. Code §65584.5.(a). For a discussion of the California regional fair-share housing planning system, see the Note on State Planning Approaches to Promote Affordable Housing at the end of this Chapter.

<sup>112</sup>See Charles M. Haar, *Suburbs under Siege: Race, Space, and Audacious Judges* (Princeton, N.J.: Princeton University, 1996), 114-115; see also Rachel Fox, "Selling Out of Mt. Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act," *Fordham Urb. L.J.* 16 (1988): 535; Harold A. McDougall, "Regional Contribution Agreements: Compensation for Exclusionary Zoning," *Temple L.Q.* 60 (1987): 665; John Charles Boger, "Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction," *N.C. L. Rev.* 71 (1993): 1571, 1595,

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as a means of allowing suburban subsidies of inner-city housing since it permits affluent portions of the state to contribute money to low-income housing, which otherwise would likely not occur.

The contribution agreement may also be a measure that makes the enactment of a fair-share statute politically more acceptable by suburban communities. Should a contribution agreement provision be included in a statute, contributions should only be accepted by those communities that have low- and moderate-wage jobs in reasonable proximity to housing opportunities. At the same time, receiving communities should not accept contributions if they will result in an undue concentration of low- and moderate-income housing.

The model statute contemplates a full-scale involvement of state, regional, and local government efforts to promote a variety and choice of affordable housing. As an option, however, “simpler” alternatives could be assembled from the components of this model that would only involve regional and local governments, and even local governments alone. For instance, a regional and local model that is based on optional (as opposed to mandated) participation and does not include an enforcement function might only incorporate elements of Sections 4-208.1, .2, .3, .6 (Alternative 1B, excluding the Balanced and Affordable Housing Council, but with the regional planning agency assuming the Council’s duties), .8 (ditto), .9, .10, .11, .12, .13, .14, .15, .21, .22, .23, and .24. Similarly, a community that wished to adopt a fair-share ordinance that describes the local government’s commitment to plan for low- and moderate-income housing, remove impediments to it, and provide for controls on the resale and re-rental of low- and moderate-income dwelling units, might adapt the following provisions: Sections 4-208.1, .2., .3, .9, .21., .22, .23, and .24.<sup>113</sup>

The second model statute pertains to affordable housing appeals. The statute authorizes a state-level procedure through which denials or conditional approvals of low- and moderate-income housing developments by local government may be appealed by applicants. A special housing appeals board or court, in a *de novo* review, may affirm, revise, or modify the conditions of, or add conditions to, decisions made by the local government regarding such developments.

The model statute also allows use of the appeals procedures by an applicant for a development that will be principally devoted to nonresidential uses in a nonresidential zoning district where the applicant proposes that no less than 20 percent of the area of the development or 20 percent of the square footage is to be devoted to low- and moderate-income housing. The statute exempts from its provisions certain categories of local government that have concentrations of lower income households or low- and moderate-income dwelling units or substandard dwellings or which have experienced construction of a certain number of affordable units over a certain time period under the statute.

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<sup>113</sup>Local efforts to plan for housing, including affordable housing, are also addressed in Chapter 7, Local Planning, of the *Legislative Guidebook*, Section 7-207, Housing Element.

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### 4-208 State Planning for Affordable Housing (Two Alternatives)

*Alternative 1 – A Model Balanced and Affordable Housing Act*<sup>114</sup>

#### 4-208.1 Findings and Purposes

The [legislature] finds and declares as follows:

- (1) The primary goal of this Act is to assure the availability of a wide variety of housing types that will cover all income strata and accommodate a diverse population, including growing families, senior citizens, persons and households with special needs, single householders, and families whose children are of adult age and have left the household, with special emphasis and high priority on the provision of low- and moderate-income housing on a regional fair-share basis.
- (2) The attainment of this goal of providing a regional fair share of the need for balanced and low- and moderate-income housing is of vital statewide importance and should be given highest priority by local governments. It requires the participation of state, regional, and local governments as well as the private sector, and the coordinated effort of all levels of government in an attempt to expand the variety of affordable housing opportunities at appropriate locations.
- (3) Balance in employment and residential land use patterns should reduce traffic congestion, contribute to an improved environment through the reduction in vehicle-related emissions, and ensure that workers in this state will have available to them the opportunity to reside close to their jobsites, making the state more competitive and attractive as a location for new or expanded businesses.
- (4) Balanced housing and employment opportunities at appropriate locations should result in reducing the isolation of lower income groups in a community or region, improving the safety and livability of neighborhoods, and increasing access to quality public and private facilities and services.
- (5) State, regional, and local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of a balanced housing stock that will be

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<sup>114</sup>This model was drafted by Peter A. Buchsbaum, a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, and Davis, in Woodbridge, New Jersey, Harvey S. Moskowitz, AICP/PP, a partner in the professional planning consulting firm of Moskowitz, Heyer, and Gruel, in Florham Park, New Jersey, and Stuart Meck, AICP/PP, Principal Investigator, and Michelle J. Zimet, AICP, attorney and Senior Research Fellow, both of the Growing Smart<sup>SM</sup> project.

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affordable to all income levels, especially middle-, moderate-, and low-income households, and meet the needs of a diverse population.

- (6) The [legislature] recognizes that in carrying out this responsibility, each local government must also consider economic, environmental, and fiscal factors and community goals set forth in its local comprehensive plan and must cooperate with other local governments and state and regional agencies in addressing the regional housing needs for middle-, moderate-, and low-income households.

### **4-208.2 Intent**

It is the [legislature's] intent to:

- (1) ensure that local governments recognize their responsibilities in contributing to the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act and that they endeavor to create a realistic opportunity to achieve this goal;
- (2) ensure that local governments prepare and affirmatively implement housing elements in their comprehensive plans, which, along with federal and state programs, will realize the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act;
- (3) recognize that local governments may be best capable of determining which specific efforts will most likely contribute to the attainment of the state's fair-share housing goal identified in Section [4-208.1] of this Act;
- (4) ensure that each local government cooperates with other local and regional governments in order to address the regional housing needs of middle-, moderate-, and low-income persons;
- (5) assist local governments in developing suitable mechanisms and programs to promote and develop a variety of middle-, moderate-, and low-income housing types;
- (6) provide a mechanism whereby low- and moderate-income housing needs may be equitably determined on a regional basis and a fair share of such regional needs may be allocated to local governments by a state administrative agency [and by regional planning agencies];
- (7) encourage state agencies to reward performance by creating linkages between grant-in-aid programs and the provision of opportunities for low- and moderate-income housing by local governments;
- (8) implement programs that will encourage home ownership over a wide range of income levels, especially by middle-, moderate-, and low-income persons;
- (9) provide for a state administrative agency to review and approve local housing elements and provide state funding, when available, on a priority basis to those local governments with approved elements; and

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[or]

- (9) provide for [regional planning agencies] to review and approve local housing elements under the general supervision of a state administrative agency which will provide state funding, when available, on a priority basis to those local governments with approved elements; and
- (10) provide for a state administrative agency to prepare substantive and procedural rules to assist and guide [regional planning agencies and] local governments in carrying out this Act.

### 4-208.3 Definitions

As used in this Act:

- (1) “**Act**” means the Balanced and Affordable Housing Act of \_\_\_\_\_.
  - (2) “**Affordable Housing**” means housing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, low-, or very low-income housing, as defined by paragraphs (13), (14), (15), and (21), below. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.
- ◆ Percentages of gross annual household income, shown in brackets, are for 1995 and were derived from the New Jersey Administrative Code, §5:93-7.4 (1995), for the New Jersey Council on Affordable Housing. These percentages may vary by region of the country or may be influenced by current requirements of various mortgage financing programs, such as those administered by the Federal Housing Administration (FHA), the Federal National Mortgage Association (FNMA), or the Federal Home Loan Mortgage Corporation (FHLMC). Consequently, it may be necessary to modify or update these percentages.
  - ◆ It is the intention that the term “affordable housing” be construed throughout this Act to be synonymous with the term “middle-, moderate-, and low-income housing” and they are used interchangeably throughout this model. By contrast, when the term “low- and moderate-income housing” is used, the intent is to specifically exclude middle-income housing.
- (3) “**Authority**” means the entity designated by the local government for the purpose of monitoring the occupancy, resale, and rental restrictions of low- and moderate-income dwelling units.

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- (4) “**Balanced**” means a recognition of, as well as an obligation to address, the need to provide a variety and choice of housing throughout the region, including middle-, moderate-, and low-income housing.
- (5) “**Council**” means the Balanced and Affordable Housing Council established by this Act which shall have primary jurisdiction for the administration and implementation of this Act.
- (6) “**Density**” means the result of:
- (a) dividing the total number of dwelling units existing on a housing site by the net area in acres; or
  - (b) multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit.

The result is expressed as dwelling units per net acre.

- (7) “**Development**” means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity which alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodland, wetland, endangered species habitat, aquifer, or other resource area, including coastal construction or other activity.
- (8) “**Household**” means the person or persons occupying a dwelling unit.
- (9) “**Housing Element**” means that portion of a local government's comprehensive plan, as identified in Section [4-208.9] of this Act, designed to meet the local government's fair share of a region's low- and moderate-income housing needs and analyze the local government's overall needs for affordable housing.
- (10) “**Housing Region**” means that geographic area determined by the Council that exhibits significant social, economic, and income similarities, and which constitutes to the greatest extent practicable, the applicable primary metropolitan statistical area as last defined and delineated by the United States Census Bureau.

[or]

- (10) “**Housing Region**” means a substate district that was previously designated by the governor pursuant to [Sections 6-601 to 6-602, *or cite to other section of state statutes providing for substate districting delineation*].

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- (11) “**Inclusionary Development**” means a development containing [at least 20 percent] low- and moderate-income dwelling units. This term includes, but is not necessarily limited to, the creation of new low- and moderate-income dwelling units through new construction, the conversion of a nonresidential structure to a residential structure, and/or the gut rehabilitation of a vacant residential structure.
- (12) “**Local Government**” means a county, municipality, village, town, township, borough, city, or other general purpose political subdivision [*other than a council of governments, regional planning commission, or other regional political subdivision*].
- (13) “**Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located. For purposes of this Act, the term “low-income housing” shall include “very low-income housing.”<sup>115</sup>
- (14) “**Middle-Income Housing**” means housing that is affordable for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than [80] percent but does not exceed [*specify a number within a range of 95 to 120*] percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- ◆ While the definitions of low-income and moderate-income housing are specific legal terms based on federal legislation and regulations, this term is intended to signify in a more general manner housing that is affordable to the great mass of working Americans. Therefore, the percentage may be amended by adopting legislatures to fit the state’s circumstances.
- (15) “**Moderate-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (16) “**Net Area**” means the total area of a site for residential or nonresidential development, excluding street rights of way and other publicly dedicated improvements such as parks, open space, and stormwater detention and retention facilities. “Net area” is expressed in either acres or square feet.

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<sup>115</sup>For sources of definitions for low-, moderate- and very low-income households, see 24 CFR §91.5 (Definitions) and 5 N.J.A.C. §5:93-1.3.

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- (17) “**Petition For Approval**” means that petition which a local government files which engages the [Balanced and Affordable Housing Council *or* regional planning agency] approval process for a housing element.
- (18) “**Regional Planning Agency**” means a [*council of governments, regional planning commission, or other regional political subdivision*] with the authority to prepare and adopt a regional comprehensive plan.
- (19) “**Regional Fair Share**” means that part of a region's low- and moderate-income housing units that is allocated to a local government by [the Balanced and Affordable Housing Council *or* a regional planning agency].
- [(20) “**Regional Fair-Share Allocation Plan**” means the plan for allocating the present and prospective need for low- and moderate-income housing to local governments in a housing region that is prepared by a [regional planning agency] using regional need figures provided by the Balanced and Affordable Housing Council.<sup>116</sup>]
- (21) “**Unnecessary Cost Generating Requirements**” mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, oversized water and sewer lines to accommodate future development without reimbursement, and such other requirements as the Balanced and Affordable Housing Council may identify by rule.
- (22) “**Very Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the housing region in which the housing is located.
- ◆ Additional definitions may be needed as the Council develops procedures and programs to implement this statute. Some definitions may be incorporated into the Council’s rules, thereby avoiding the need to amend the statute.

### 4-208.4 Creation and Composition of Balanced and Affordable Housing Council

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<sup>116</sup>See Section 6-201(5)(e), Alternative 2, of the *Legislative Guidebook*, which describes the components of a regional comprehensive plan, including a regional fair-share housing allocation plan. The definition of a regional fair-share allocation plan would only need to be included if the approach selected gives the responsibility of preparing the regional fair-share allocations to a regional planning agency.

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- (1) There is hereby established a Balanced and Affordable Housing Council.
  - (2) The Council shall consist of [15] members to be appointed by the governor. The members shall consist of the following:
    - [(a) The commissioner or director of the Department of Housing and Community Development [*or similar state agency*];]
    - [(b) The director of the State Housing Finance Agency;]
    - [(c) [3] members of a municipal legislative body [*or other elected chief officials of local governments, other than counties*];]
    - [(d) [3] elected chief county executives or legislators;]
    - [(e) [1] resident of low- or moderate-income housing or citizen designated as an advocate for low- or moderate-income persons;]
    - [(f) [4] citizens representing the various geographic areas of the state; and]
    - [(g) [2] representatives of professional and service organizations who are active in providing balanced and affordable housing, including, but not limited to, home building, nonresidential development, banking, construction, labor, and real estate.]
- ◆ A key to a successful balanced and affordable housing council is broad representation by both local officials and persons knowledgeable about building and managing middle-, moderate-, and low-income housing. While this model has the governor making all of the appointments to the Council, in some states, appointments could instead be made by the senate president and speaker of the house. Other designated appointments could include representatives of the state home builders association and/or a state chapter of the American Planning Association. While language has not been provided here, the Act may also indicate whether members should have term limits and how they may be removed.

### **4-208.5 Organization of the Council**

- (1) The Council shall elect its own chair and may create and fill such offices as it determines to be necessary. The Council may create and appoint advisory committees whose membership may consist of individuals whose experience, training, and/or interest in a program, activity, or plan may qualify them to lend valuable assistance to the Council. Members of such advisory bodies shall receive no compensation for their services but may be reimbursed for actual expenses expended in the performance of their duties.
- (2) The Council shall meet at least [4] times each year.

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- (3) All actions of such advisory committees shall be reported in writing to the Council no later than the next meeting or within [30] days from the date of the action, whichever is earlier. The Council may provide a procedure to ratify committee actions by a vote of the members of the Council.

### *Alternative 1A – Strong Council with No Regional Planning Agency Involvement*

#### **4-208.6 Functions and Duties of the Council.**

- (1) The Council shall have the authority and duty to:
  - (a) determine, in consultation with affected agencies, and revise as necessary, housing regions for the state;
  - (b) estimate and revise at least once every [5] years the present and prospective need for low- and moderate-income housing for each housing region in the state;
  - (c) determine the regional fair share of the present and prospective need for low- and moderate-income housing for each local government in each housing region and revise the allocation of the need for each housing region in the state at least once every [5] years;
  - (d) review and approve housing elements submitted by local governments;
  - (e) establish a mediation process by which objectors to a local government's housing element may seek redress;
  - (f) hear and decide appeals on denials or conditional approvals from applicants seeking approval from a local government to construct an inclusionary housing project;
  - (g) adopt rules and issue orders concerning any matter within its jurisdiction to carry out the purposes of this Act pursuant to [*the state administrative procedures act*]; and
  - (h) prepare a biennial report to the governor and state legislature that describes progress in promoting affordable housing in the housing regions of the state.
- (2) The Council may advise state agencies on criteria and procedures by which to reward local governments through the discretionary distribution of grants of state aid when their housing elements are approved pursuant to this Act.<sup>117</sup>

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<sup>117</sup>For an example of a state-level policy that links the award of discretionary state funds with local government housing policies, see Commonwealth of Massachusetts, Executive Order No. 215, “Disbursement of State Development Assistance” (March 15, 1982).

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- (3) The Council shall also take such other actions as may be necessary to carry out the purposes of this Act, including coordination with other federal, state, and local agencies.
- ◆ Alternative 1A is appropriate in those states with either a weak (or nonexistent) county government and/or a weak (or nonexistent) regional planning organization. By contrast, in states that have strong county governments or strong regional councils of government, a regional planning agency can work in tandem with the Council in preparing the regional fair-share allocations and in reviewing and certifying local housing elements. These are discussed below.

### *Alternative 1B – Council and Regional Planning Agency Work in Tandem*

#### **4-208.6 Functions and Duties of the Council and [Regional Planning Agencies]**

- (1) The Council shall have the authority and duty to:
- (a) determine, in consultation with [regional planning agencies and other affected agencies], housing regions for the state, and revise such regions as necessary;
  - (b) estimate the present and prospective need for low- and moderate-income housing for each housing region in the state at least once every [5] years;
  - (c) review and approve regional fair-share allocation plans prepared by [regional planning agencies];
  - (d) hear and decide appeals on denials or conditional approvals from applicants seeking approval from a local government to construct an inclusionary housing project;
  - (e) hear and decide appeals of determinations by [regional planning agencies] pursuant to this Act and the Council's rules;
  - (f) adopt rules and issue orders concerning any matter within its jurisdiction to carry out the purposes of this Act pursuant to [*the state administrative procedures act*];<sup>118</sup>
  - (g) administer grants-in-aid to [regional planning agencies] to carry out their duties under this Act;
  - (h) prepare a biennial report to the governor and state legislature that describes progress in promoting affordable housing in the housing regions of the state;

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<sup>118</sup>For an example of language granting authority to a state planning agency to issue rules and orders, see Section 4-103 of the *Legislative Guidebook*.

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- (i) advise state agencies on criteria and procedures by which to reward local governments through the discretionary distribution of grants of state aid when their housing elements are approved pursuant to this Act; and
  - (j) take such other actions as may be necessary to carry out the purposes of this Act, including coordination with other federal, state, and local agencies.
- (2) [Regional planning agencies] shall have the authority to:
- (a) prepare and submit to the Council at least once every [5] years a regional fair-share allocation plan in accordance with Section [4-208.8] of this Act;
  - (b) review and approve all local government housing elements that meet the requirements of this Act and the rules of the Council;
  - (c) provide for a mediation process by which objectors to a local government's housing element may seek redress, subject to the rules of the Council;
  - (d) provide technical assistance to local governments in the region in the development and implementation of local housing elements;
  - (e) administer federal and state grant-in-aid programs to carry out the purposes of this Act; and
  - (f) take such other actions as may be necessary to carry out the purposes of this Act.

**4-208.7 Appointment of Council Executive Director; Hire by Contracts; Purchases and Leases; Maintenance of Public Records**

- (1) The Council shall appoint an executive director who shall select, hire, evaluate, discipline, and terminate employees pursuant to rules adopted by the Council. The executive director shall also be responsible for the day-to-day work of the Council, and shall manage and supervise employees and consultants hired by contract, except for attorneys retained to provide independent legal counsel and certified public accountants retained to conduct independent audits. The executive director shall serve at the pleasure of the Council.
- (2) The Council may hire by contract mediators and consultants for part-time or full-time service as may be necessary to fulfill its responsibilities.
- (3) The Council may purchase, lease, or otherwise provide for supplies, materials, equipment, and facilities as it deems necessary and appropriate in the manner provided for in rules adopted by the Council.

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- (4) The Council shall keep a record of its resolutions, minutes of meetings, transactions, findings, and determinations, which record shall be public record.
- ◆ As an alternative, a Council may use the rule-making and contract authority provided for by the state's administrative procedures act or procurement laws.

### *Alternative 1A – Action by Council*

#### **4-208.8 Council Designation of Housing Regions; Determination of Present and Prospective Housing Need; Regional Fair-Share Allocations; Adoption of Need Estimates and Allocations**

- (1) The Council shall, within [18] months of the effective date of this Act, designate housing regions for the state, prepare estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years, and prepare regional fair-share allocations of those dwelling units to local governments in each region. The Council may, from time to time, revise the boundaries of the housing regions and shall revise the estimates and allocations at least once every [5] years hereafter. Revisions to the boundaries, estimates, and allocations shall be effected in the same manner as the original adoption.
- (2) In developing the regional estimates, the Council shall consider the availability of public and private financing for housing and the relevant housing market conditions, shall use the most recent data and population statistics published by the United States Bureau of the Census, and shall give appropriate weight to pertinent research studies and reports by government agencies. The Council may utilize the assistance of the [state planning agency *or similar state agency*] in obtaining demographic, economic, housing, and such other data and in developing population, employment, and other relevant estimates and projections.<sup>119</sup>
- (3) In calculating each local government's regional fair share, the Council shall consider, but shall not be limited to, the following factors:<sup>120</sup>
  - [(a) the number of vacant, overcrowded, or substandard housing units;

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<sup>119</sup>For an example of housing need projections, see 5 N.J.A.C., Ch. 93, App. A (Methodology); see also David Listokin, *Fair Share Housing Allocation* (New Brunswick, N.J.: Center for Urban Policy Research, 1976), 48-51.

<sup>120</sup>These factors are only intended to be illustrative. Compare Cal. Gov't. Code, §65584(a) (Regional housing needs), where the factors are included in the statute, with N.J.S.A. §52:27D-307(c)(2) (discussion of adjustment of present and prospective regional fair share). The allocation formulas must be tailored to each state. For an example of an allocation formula that is the result of rule making by a state agency, see N.J.A.C. §5:93-2.1 *et seq.* (Municipal determination of present and prospective Need) and Appendix A. See also David Listokin, *Fair Share Housing Allocation* (New Brunswick, N.J.: Center for Urban Policy Research, 1976) for an early survey of allocation formulas.

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- (b) the number of acres of:
  - 1. vacant residential land;
  - 2. residential land suitable for redevelopment or increased density of development; and
  - 3. nonresidential land suitable, with respect to surrounding or neighboring uses, for residential use;in each local government presently sewerred or expected to be sewerred in the next [5] years;
- (c) commuting patterns within each housing region;
- (d) employment opportunities within each housing region, including the growth and location of moderate- and low-wage jobs;<sup>121</sup>
- (e) the current per capita fiscal resources of each local government, defined by the total [nonresidential] real estate valuation of the local government, plus the total of all personal income, divided by current population;
- (f) the relationship of each local government's median household income to the median household income of the region;
- (g) the existing concentrations of low- and moderate-income households in each housing region;<sup>122</sup>
- (h) the location of urban growth area(s) in an adopted regional comprehensive plan; and<sup>123</sup>
- (i) the existence of an area of critical state concern<sup>124</sup> and any restrictions on development placed on it.]

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<sup>121</sup>Projecting the growth and location of moderate- and low-wage jobs is an important factor in assessing the need and approximate location for low- and moderate-income housing.

<sup>122</sup>It is important that an allocation strategy and a local housing element seek spatial dispersion of low- and moderate-income housing opportunities since they should not add to the concentration of the poor.

<sup>123</sup>See Section 6-201, Preparation of Regional Comprehensive Plan, Alternative 2, of the *Legislative Guidebook* for a treatment of urban growth area designation.

<sup>124</sup>See Section 5-201 *et seq.* of the *Legislative Guidebook*, which addresses areas of critical state concern.

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- (4) The Council shall adopt by rule, either individually or joined in one or more proceedings, designations for housing regions in the state, the estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years, and the regional fair-share allocations of those units to local governments in each region. At least [30] days prior to adoption, the Council shall transmit a copy of the proposed housing regions, as well as the estimates and allocations, to the legislative body of each local government in the state. Any interested party may submit written comments or may present oral testimony to the Council on the proposed rule. Such comments and testimony shall be incorporated into the hearing record. A copy of the adopted rule shall be transmitted by the Council to each local government's legislative body, to persons requesting a copy, and to the [state planning agency *or similar state agency*].

### *Alternative 1B – Action by Council and Regional Planning Agency*

#### **4-208.8 Council Designation of Housing Regions; Preparation of Estimates of Present and Prospective Housing Need; Preparation of Regional Fair-Share Allocation Plan by [Regional Planning Agency]; Adoption of Plan; Review and Approval of Plan by Council**

- (1) The Council shall, within [12] months of the effective date of this Act, designate housing regions for the state and prepare estimates of present and prospective housing needs for low- and moderate-income dwelling units for each housing region for the next [5] years. The Council may, from time to time, revise the boundaries of the housing regions and shall revise the estimates at least once every [5] years hereafter. Revisions to the boundaries and the estimates shall be effected in the same manner as the original adoption.
- (2) In developing the regional estimates, the Council shall consider the availability of public and private financing for housing and the relevant housing market conditions, shall use the most recent data and population statistics published by the United States Bureau of the Census, and shall give appropriate weight to pertinent research studies and reports by government agencies. The Council may utilize the assistance of the [state planning agency *or similar state agency*] in obtaining demographic, economic, housing, and such other data and in developing population, employment, and other relevant estimates and projections.
- (3) The Council shall adopt by rule, either individually or joined in one or more proceedings, the designations for housing regions for the state and the estimates of present and prospective housing needs for low- and moderate-income dwelling units for each region for the next [5] years. At least [30] days prior to adoption, the Council shall transmit a copy of the proposed housing regions and the estimates to each [regional planning agency] and the legislative body of each local government in the state. Any interested party may submit written comments or may present oral testimony to the Council on the proposed rule. Such comments and testimony shall be incorporated into the hearing record. The Council shall transmit a copy of the adopted rule to each local government's legislative body, to persons requesting a copy, and to the [state planning agency *or similar state agency*].

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- (4) The Council shall, within [12] months of the effective date of this Act, provide guidelines, data, and suggested methodologies to each [regional planning agency] in the state in order that each agency may prepare a regional fair-share allocation plan. In developing the guidelines, data, and suggested methodologies, the Council shall consider, but shall not be limited to, the following factors:
- [(a) the number of vacant, overcrowded, or substandard housing units;
  - (b) the number of acres of:
    - 1. vacant residential land;
    - 2. residential land suitable for redevelopment or increased density of development; and
    - 3. nonresidential land suitable, with respect to surrounding or neighboring uses, for residential use;in each local government presently sewered or expected to be sewered in the next [5] years;
  - (c) commuting patterns within each housing region;
  - (d) employment opportunities within each housing region, including the growth and location of moderate- and low-wage jobs;
  - (e) the current per capita fiscal resources of each local government, defined by the total [nonresidential] real estate valuation of the local government, plus the total of all personal income, divided by current population;
  - (f) the relationship of each local government's median household income to the median household income of the region;
  - (g) the existing concentrations of low- and moderate-income households in each housing region;
  - (h) the location of urban growth area(s) in an adopted regional comprehensive plan,<sup>125</sup> and

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<sup>125</sup>See Section 6-201, Preparation of Regional Comprehensive Plan, Alternative 2, of the *Legislative Guidebook* for a treatment of urban growth area designation.

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- (i) the existence of an area of critical state concern<sup>126</sup> and any restrictions on development placed on it.]
- (5) The Council shall adopt criteria for the review and approval of regional fair-share allocation plans prepared and adopted by [regional planning agencies] under this Act.
- (6) Each [regional planning agency] in the state created pursuant to [*citation to statute creating or authorizing regional planning agencies*] shall prepare a regional fair-share allocation plan within [18] months of the effective date hereafter, and shall update and amend the plan at least every [5] years. In preparing the plan, each agency shall use the estimates of present and prospective need adopted by the Council for the region, and may use guidelines, data, and methodologies developed by the Council, or such other data and methodologies, provided that such data and methodologies are supported by adequate documentation, represent accepted planning techniques, and achieve an equitable allocation of need for low- and moderate-income housing to the region's local governments.
- (7)<sup>127</sup> Each [regional planning agency] shall adopt by rule the regional fair-share allocation plan. At least [30] days prior to adoption, the [regional planning agency] shall transmit a copy of the proposed plan to each local government in the region, to the [state planning agency *or similar state agency*], and to the Council. Any interested person may present oral testimony to the [regional planning agency] on the proposed rule. Such comments and testimony shall be incorporated into the public hearing record, in accordance with the provisions of Section [6-105].<sup>128</sup> A copy of the adopted rule shall be transmitted by the [regional planning agency] to each local government's legislative body, to persons requesting a copy, to the [state planning agency *or similar state agency*], and to the Council. In transmitting the rule to the Council, the [regional planning agency] shall petition the Council for review and approval of the plan.
- (8) Upon the receipt of a [regional planning agency's] petition for review and approval of a regional fair-share allocation plan, the Council shall undertake and complete a review of the plan within [90] days of submission of a complete plan. The Council shall approve the plan in writing if it finds that it is consistent with the requirements of this Act and with any rules of the Council. In the event that the Council does not approve the plan, it shall indicate in writing to the [regional planning agency] what changes should be made in the plan in order that the Council may consider it for approval upon resubmission.

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<sup>126</sup>See Section 5-201 *et seq.* of the *Legislative Guidebook*, which addresses areas of critical state concern.

<sup>127</sup>Alternatively, the regional fair-share allocation plan may be publicly reviewed in the manner proposed in Section 6-301, Public Workshops and Hearings, and adopted in the manner proposed in Section 6-303, Adoption of Regional Plans.

<sup>128</sup>Section 6-105 pertains to rule-making authority by the regional planning agency.

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- (9) In the event that a [regional planning agency] does not submit a petition for review and approval of a regional fair-share allocation plan within the period specified in this Act, fails to update the plan at least every [5] years, or fails to make changes as indicated by the Council within [90] days of the Council's decision on its petition and resubmits the plan for review and approval, the Council shall prepare a fair-share allocation plan for the region and shall adopt it in the manner provided for by paragraph (3), above. Upon adoption of the plan for a housing region, the Council may then also assume any duties of a [regional planning agency] as provided by Section [4-208.6(2)] of this Act for that housing region.

### **4-208.9 Contents of a Housing Element**

- (1) The housing element of the local government's comprehensive plan is intended to provide an analysis and identification of existing and prospective housing needs, especially for middle-, moderate-, and low-income housing, in its housing region and to set forth implementing measures for the preservation, improvement and development of housing. The housing element shall include all of the following, none of which may serve as a basis for excusing a local government from fulfilling its regional fair-share obligation:
- (a) an inventory of the local government's housing stock by age, condition, purchase or rental value, occupancy characteristics, and type, including the number of units affordable to middle-, moderate-, and low-income households and the number of substandard housing units capable of being rehabilitated;
  - (b) a projection of the local government's housing stock, including the probable future construction of middle-, moderate-, and low-income housing for the next [5] years, taking into account, but not necessarily limited to, construction permits issued, preliminary as well as final approvals of applications for development, and all lands identified by the local government for probable residential development;
  - (c) an analysis of the local government's demographic characteristics, including but not necessarily limited to, household size, income level, and age of residents;
  - (d) an analysis of the existing and probable future employment characteristics and opportunities within the boundaries of the local government, especially those jobs that will pay moderate or low wages;
  - (e) an analysis of the existing and planned infrastructure capacity, including, but not limited to sewage and water treatment, sewer and water lines, and roads;
  - (f) a statement of the local government's own assessment of its present and prospective housing needs for all income levels, including its regional fair share for low- and moderate-income housing, and its capacity to accommodate those needs. The regional fair share as determined by the [Council *or* regional planning agency] shall form the minimum basis for the local government's determination of its own fair share;

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- (g) an identification of lands within the local government that are most appropriate for the construction of low- and moderate-income housing and of existing structures most appropriate for conversion to, or rehabilitation for, low- and moderate-income housing, including a consideration of lands and structures of developers who have expressed a commitment to provide low- and moderate-income housing and lands and structures that are publicly or semi-publicly owned;
  - (h) a statement of the local government's housing goals and policies;
- ◆ As part of the housing element, the local government can provide for its fair share by any technique or combination of techniques which provides a realistic opportunity for the provision of its fair share. The housing element should contain an analysis demonstrating that it will provide such a realistic opportunity. The local government should review its land-use and other relevant ordinances to incorporate provisions for low- and moderate-income housing and remove any unnecessary cost generating features that would affect whether housing is affordable. The model legislation provides, in (i) below, for the elimination or reduction of unnecessary cost generating features for all housing or affordable housing (on the theory that such action would reduce housing costs overall) or for only inclusionary developments (on the theory that it would ensure project feasibility).
- (i) the text of adopted or proposed ordinances or regulations of the local government that are intended to eliminate or reduce unnecessary cost generating requirements for [all housing *or* affordable housing *or* inclusionary developments]; and
  - (j) the text of adopted or proposed ordinances or regulations of the local government that are intended to provide a realistic opportunity for the development of low- and moderate-income housing. Such ordinances or regulations shall consider the following techniques, as well as others that may be proposed by the local government or recommended by the Council as a means of assuring the achievement of the local government's regional fair share, removing barriers to and providing incentives for the construction of low- and moderate-income housing and generally removing constraints that unnecessarily contribute to housing costs or unreasonably restrict land supply:<sup>129</sup>
    1. expanding or rehabilitating public infrastructure;
    2. reserving infrastructure capacity for low- and moderate-income housing;

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<sup>129</sup>For an interesting and creative statute providing financial incentives to local governments for removing barriers to low- and moderate-income housing (as well as middle-income housing), see Fla. Stat. §420.907 *et seq.* (1995) (State housing incentives partnership), esp. §420.9076 (Adoption of affordable housing incentive plans; committees).

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3. establishing a process by which the local government may consider, before adoption, policies, procedures, ordinances, regulations, or plan provisions that may have a significant impact on the cost of housing;
4. designating a sufficient supply of sites in the housing element that will be zoned at densities that may accommodate low- and moderate-income housing, rezoning lands for densities necessary to assure the economic viability of any inclusionary developments, and giving density bonuses for mandatory set-asides of low- and moderate-income dwelling units as a condition of development approval;<sup>130</sup>
5. establishing controls to ensure that once low- and moderate-income housing is built or rehabilitated through subsidies or other means, its availability will be maintained through measures such as, but not limited to, those that establish income qualifications for low- and moderate-income housing residents, promote affirmative marketing measures, and regulate the price and rents of such housing, including the resale price, pursuant to Section [4-208.22] below;
6. establishing development or linkage fees, where appropriate, authorizing such other land dedications or cash contributions by a nonresidential developer in lieu of constructing or rehabilitating low- and moderate-income housing, the need for which arises from the nonresidential development, generating other dedicated revenue sources, or committing other financial resources to provide funding for low- and moderate-income housing. Such development or linkage fees, land dedications, cash contributions, and dedicated revenue sources may be used for the following activities or other activities approved by the Council: rehabilitation; new construction; purchase of land for low- and moderate- income housing; improvement of land for low- and moderate-income housing; and assistance designed to render units to be more affordable;
7. modifying procedures to expedite the processing of permits for inclusionary developments and modifying development fee requirements, including reduction or waiver of fees and alternative methods of fee payment;
8. using funds obtained from any state or federal subsidy toward the construction of low- and moderate- income housing; and

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<sup>130</sup>While a local government may not want to designate specific sites for low- and moderate-income housing, it is nonetheless important to designate a sufficient supply of sites zoned at appropriate densities to assure an open, competitive land market.

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9. providing tax abatements or other incentives, as appropriate, for the purposes of providing low- and moderate-income housing.

### **4-208.10 Submission of Housing Element to [Council *or* Regional Planning Agency]**

- (1) No later than [date], each local government shall prepare and submit to the [Council *or* regional planning agency] a housing element and a petition for approval in a form prescribed by the Council.
  - (2) The [Council *or* regional planning agency] shall complete the review of the housing element and determine whether to approve the element within [90] days after submission of a complete document. This [90] day period may be extended for an additional [60] days by the written consent of the local government and any objectors involved, or for good reason as determined by the [Council *or* regional planning agency].
- ◆ If a regional planning agency (such as a regional planning commission or council of governments) is in place, then approval of the local government's housing element would be undertaken by the regional planning agency.
  - ◆ The initial years of the fair share program's operation will require closer scrutiny by the reviewing agency. However, as local governments gain experience with the program and demonstrate substantial achievement of goals, as an alternative, the reviewing procedures may be simplified and perhaps replaced by some type of self-certification by the local government. The self-certification process would have to be well-developed to allow for challenges by neighboring or affected jurisdictions and other third parties. In addition, the process would have to incorporate appropriate conflict resolution procedures.

### **4-208.11 Notice of Submission**

- (1) At the time of submission to the [Council *or* regional planning agency], the local government shall provide notice of the submission to all owners of land whose properties are included in the housing element for the development of proposed low- and moderate-income housing.
- (2) In addition, notice shall be provided within [1] week of the date of submission to a newspaper of general circulation in the area in which the local government is located and to all other persons who requested it in writing.
- (3) The notice shall specify that the housing element has been submitted to the [Council *or* regional planning agency] for approval and that all persons receiving a notice shall have the right to participate in the agency's mediation and review process if they object to the plan. The notice shall also specify that copies of the housing element are available for purchase at cost, and shall indicate where they may be reviewed or copied.

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- (4) The notice shall also state that objections to the housing element, or requests to participate in the mediation, must be filed within [30] days of the date of the mailing of the notices.
- (5) If the housing element is a revision of an earlier submission, notice shall also be given to any owners of land whose properties were included in the prior submission but whose properties were omitted from the one currently being proposed.

### **4-208.12      **Objection to Housing Element; Mediation****

- (1) If any person or entity to whom notice is required to be given, or who requests notice, files an objection, the [Council *or* regional planning agency] shall initiate a mediation process in which it shall attempt to resolve the objections to the housing element voluntarily. Any such objection must be filed within [30] days of the date of service of notice of the filing of the petition for approval.
- (2) Objections shall be filed with the [Council *or* regional planning agency] and the local government with as many copies as the Council shall by rule require. The objections shall state with specificity the provisions of the element objected to, and the grounds for the objection to each, and shall contain such expert reports or affidavits as may be needed for an understanding of the objection. In the case of objectors whose lands have not been selected in the element for consideration for low- and moderate-income housing, the objection may also set forth why the lands of the objector are more likely to produce low- and moderate-income housing and either why one or more of the sites proposed by the local government are not realistically likely to produce such housing during the period in which the housing element is in effect or why such sites are not suitable for same.
- (3) The mediation and review shall be conducted by a mediator who is either selected by the parties and approved by the [Council *or* regional planning agency] or appointed by the [Council *or* regional planning agency] from its own staff or from a list of outside mediators maintained by the [Council *or* regional planning agency]. The mediator shall possess qualifications not only with respect to dispute resolution, but also with respect to planning and other issues relating to the siting and development of low- and moderate-income housing. The mediation process shall be confidential so that no statements made in or information exchanged during mediation may be used in any judicial or administrative proceeding, except that agreements reached during the mediation process shall be reduced to writing and shall become part of the public record considered by the [Council *or* regional planning agency] in its review of the housing element.

### **4-208.13      **[Council *or* Regional Planning Agency] Review and Approval of Housing Element****

- (1) The [Council *or* regional planning agency] shall grant its approval of a housing element if it finds in writing that:
  - (a) the element is consistent with the provisions of this Act and rules adopted by the Council;

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- (b) the element provides a realistic opportunity for the development of affordable housing through the elimination or reduction of unnecessary cost generating requirements by existing or proposed local government ordinances or regulations; and
  - (c) the element provides a realistic opportunity for the development of low- and moderate-income housing through the adoption of affirmative measures in the housing element that can lead to the achievement of the local government's regional fair share of low- and moderate-income housing.
- (2) In conducting its review, the [Council *or* regional planning agency] may meet with the local government and may deny the petition or condition its approval upon changes in the housing element, including changes in existing or proposed ordinances or regulations. Any approval, denial, or conditions for approval shall be in writing and shall set forth the reasons for denial or conditions. If, within [60] days of the [Council's *or* regional planning agency's] denial or conditional approval, the local government refiles its petition with changes satisfactory to the [Council *or* regional planning agency], the [Council *or* regional planning agency] shall grant approval or grant approval subject to conditions.
- [3) Upon denying, conditionally approving, or approving a local housing element, the [regional planning agency] shall provide a notice of its actions to the Council within [10] days. Where the [regional planning agency] has approved or conditionally approved a housing element, it shall transmit a copy of the approved element with the notice to the Council.]

### **4-208.14 Adoption of Changes to Development Regulations After Approval**

- (1) Approval of any housing element by the [Council *or* regional planning agency] shall be subject to and conditioned upon the adoption by the local government of all amendments to ordinances or regulations proposed in the housing element by the local government within [90] days of such approval.
- (2) Failure to adopt such changes in the housing element as approved by the [Council *or* regional planning agency] shall render approval of the element null and void and shall subject the local government to the provisions of Section [4-208.16] of this Act.

### **[4-208.15 Quasi-legislative Review]**

- [(1) Review by the [Council *or* regional planning agency] of a local government's housing element shall be considered a quasi-legislative decision of general application, and not a decision in a contested case requiring an adjudicatory hearing with the calling of witnesses, cross-examination, or the use of sworn testimony.
- (2) The [Council *or* regional planning agency] may appoint hearing officers to conduct such fact finding proceedings as may be appropriate in the event that the [Council *or* regional planning

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agency] in its discretion deems it appropriate to undertake more detailed fact finding prior to deciding whether to approve, disapprove, or approve a housing element with conditions.]

- ◆ The purpose of this Section is to avoid lengthy trial type administrative hearings with respect to the approval or disapproval of a housing element. This Section may be omitted if a more formal administrative hearing process is desired.

### **4-208.16 Appeal to Council of Decision Made by a Local Government Regarding an Inclusionary Development When a Housing Element is not Approved or is not Submitted**

- (1) In the event that the [Council *or* regional planning agency] denies approval of a housing element and the local government does not refile a petition for approval of a housing element, or the [Council *or* regional planning agency], upon reviewing a refiled petition, does not grant approval of the element, or a local government fails to submit a housing element for approval by [date], or a local government fails to update a housing element, an applicant seeking approval to build an inclusionary development shall have the right to appeal any denial or approval with conditions by the local government to the Council.
- ◆ The procedures in this Section could also be the responsibility of a separate appeals board or could be handled by a court. For an example of this, see Alternative 2 in Section 4-208, Application for affordable housing development; affordable housing appeals.
- (2) Such an appeal may be taken to the Council within [30] days following receipt of a local government's decision of denial or approval with conditions of a proposed inclusionary development by filing with the Council a petition stating the reasons for the appeal. The petition for appeal shall be considered presumptively valid by the Council and the burden of proof shall be with the local government. Within [10] days following receipt of a petition, the Council shall notify the local government that issued the denial or approval with conditions that an appeal has been filed. The local government shall transmit to the Council within [10] days a certified copy of its decision, the application, and the hearing record for the application, if any.
  - (3) A hearing on the appeal shall be held by the Council within [45] days following receipt of the decision, application, and hearing record. The hearing shall be held on the record, consistent with the [state administrative procedures act]. The Council shall render a written decision on the appeal, stating findings of fact and conclusions of law within [30] days following the hearing, unless such time is extended by mutual consent of the petitioner and the local government that issued the decision. The Council may allow interested parties to intervene in the appeal upon timely motion and showing of good cause.
  - (4) In the case of a denial by the local government, the Council shall consider at the hearing on appeal, but shall not be limited to, the following issues:

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- (a) has the local government previously authorized or permitted the construction of low- and/or moderate-income dwelling units at least equal in number to its regional fair share; and
  - (b) the extent to which the project would cause significant adverse effects on the environment.
- ◆ Whoever promulgates rules for handling these appeals (i.e., the Council or a separate appeals board) should develop a list of evaluation parameters, perhaps in consultation with appropriate state environmental agencies and public health authorities, to determine whether a proposed project will cause “significant adverse effects” on the environment.
  - (5) In the case of approval with conditions by the local government, the Council shall consider at the hearing on appeal, but shall not be limited to, the following issues:
    - (a) whether the conditions are necessary to prevent the project from causing significant adverse effects on the environment; and
    - (b) whether these conditions render the project infeasible. For purposes of this Act, a requirement, condition, ordinance, or regulation shall be considered to render an inclusionary development proposed by a developer that is a nonprofit entity, limited equity cooperative, or public agency infeasible when it renders the development unable to proceed in accordance with the program requirements of any public program for the production of low- and moderate-income housing in view of the amount of subsidy realistically available. For an inclusionary development proposed by a developer that is a private for-profit individual firm, corporation, or other entity, the imposition of unnecessary cost generating requirements, either alone or in combination with other requirements, shall be considered to render an inclusionary development infeasible when it reduces the likely return on the development to a point where a reasonably prudent developer would not proceed.
  - (6) In the case of a denial by the local government, if the Council finds that the local government has not authorized or permitted the construction of low- and/or moderate-income dwelling units at least equal in number to its regional fair share and that the project as proposed would not cause significant adverse effects to the environment, it shall by order vacate the local government's decision and approve the application with or without conditions.
  - (7) In the case of approval with conditions by the local government, if the Council determines that the conditions, if removed or modified, would not result in the project causing significant adverse affect to the environment and that such conditions would otherwise render the construction or operation of the project infeasible, it shall by order modify or remove such conditions so that the project would no longer be infeasible and otherwise affirm the approval of the application.

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- (8) The decision of the Council in paragraph (3) above shall constitute an order directed to the local government and shall be binding on the local government, which shall forthwith issue any and all necessary permits and approvals consistent with the determination of the Council.

### **4-208.17 Review of Decisions of the Council [and Regional Planning Agency]**

- (1) A review of a final determination by a [regional planning agency] shall be taken to the Council within [30] days of the determination and the Council shall conduct a *de novo* review of the matter.
- (2) A review of a final determination of the Council shall be filed with the [appellate court of competent jurisdiction] within [30] days of the determination.
- ◆ The appeal should go to the state's intermediate appellate court. It would thereafter be subject to normal review by the state's appellate court of last resort.

### **4-208.18 Enforcement of Housing Element Requirements**

- (1) Subsequent to the approval of the housing element by the [Council *or* regional planning agency], any person with an interest in land or property that has been identified in a housing element pursuant to Section [4-208.9(1)(f)] of this Act may apply to the Council for such order as may be appropriate in connection with the implementation of the element, or the approval of any application for development of the property for low- and moderate-income housing.
- (2) Such enforcement action may be taken where it is alleged that the local government has failed to implement the element or has conducted the process of reviewing or approving an inclusionary development on the land in such fashion as to unreasonably delay, add cost to, or otherwise interfere with the development of low- and moderate-income housing proposed in the element.
- ◆ Practical experience in New Jersey has shown that low- and moderate-income housing developments, even when included in a duly approved housing element that has dealt with the zoning of a development, become the subject of intense controversy at the time of site plan or subdivision review. To ensure that an approved element is carried out, the Council should have the power to order compliance with the element.

### **4-208.19 Assistance of Court in Enforcing Orders**

- (1) The Council may obtain the assistance of the [trial court] in enforcing any order issued by the Council pursuant to this Act. In acting on any such application for enforcement, the court shall have all powers it otherwise has in addressing the contempt of a court order.

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- (2) In a proceeding for enforcement, the court shall not consider the validity of the Council's order, which may only be challenged by a direct appeal to the [*intermediate appellate court of competent jurisdiction*], in accordance with the provisions of Section [4-208.17(2)] of this Act.

- ◆ An agency's power to enforce its order is important. The agency should therefore have the authority to ensure that its mandates are carried out.

### **4-208.20 Council as Advocate**

The Council may act as an advocate for affordable housing developments in the obtaining of federal, state, regional, or local government development approvals or any other permits, approvals, licenses or clearances of any kind which are necessary for the construction of an affordable housing development.

- ◆ The development may need additional state permits for wetlands, sewers, etc. The agency ought to alert other permitting entities that the affordable housing project is in the public interest so that other permits and approvals may be expedited.

### **4-208.21 Designation of Authority; Controls on Affordability of Low- and Moderate-Income Dwelling Units**

- (1) Each local government whose housing element has been approved by the [Council *or* regional planning agency] shall designate a local authority ("Authority") with the responsibility of ensuring the continued affordability of low- and moderate-income sales and rental dwelling units over time.
- (2) The Authority shall also be responsible for: affirmative marketing; income qualification of low- and moderate-income households; placing income eligible households in low- and moderate-income dwelling units upon initial occupancy; placing income eligible households in low- and moderate-income dwelling units as they become available during the period of affordability controls; and enforcing the terms of any deed restriction and mortgage loan.
- (3) Local governments shall establish a local authority or may contract with a state, regional, or nonprofit agency approved by the Council to perform the functions of the Authority.

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### ***Commentary: Controls on Resales and Re-Rentals***

Affordability controls on resales and re-rentals are needed for several reasons. Affordable housing is often in short supply, so conserving the stock of new and rehabilitated affordable housing through controls serves an important public purpose. When government offers subsidies or other

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incentives to encourage the development of additional affordable housing, unless there are controls on subsequent future sales prices or rent levels, there could be profiteering in the short term on the difference between the below-market subsidized price or rent and the higher prevailing market value or rent of the unit. The controls assure that when the government gives a subsidy, the public in return will receive a benefit in the form of a lasting supply of affordable housing.

The need for affordability controls on resales and re-rentals will obviously vary by community and region of the state.<sup>131</sup> While some housing markets may call for minimal controls, other markets may require controls that are more stringent in terms of length of time and scope. In addition, it is important to re-evaluate the controls as they apply to individual developments on a regular basis to ensure that they remain relevant to market conditions. The imposition of controls could serve as a disincentive to the production of affordable housing because they may limit future flexibility, marketability, and return on investment. Consequently, it may be necessary to link controls on resales and re-rentals with incentives that might include: density bonuses, public contributions or subsidies of infrastructure or land, and expedited permit processing. Subsidies, as used in this model, are specific to the project and do not include such devices as federal home mortgage interest tax deductions. By contrast, a subsidy could include the public assumption of the cost of installing water and sewer lines to the site for a low- and moderate-income housing project or the write-down of land costs.

In imposing controls on rentals and for-sale housing, it is important to recognize the differences between the two types of housing. Rental housing is typically the best alternative for housing people in the very-low-income groups and operators of subsidized housing are accustomed to accepting rent limits. However, rents should periodically be adjusted to reflect changing costs to assure economic and physical viability. In the rental case, the principal public policy objective is assuring an adequate supply of affordable units.

The for-sale case is complicated by a second public policy objective: helping families maintain their status as homeowners. Because homeownership entails many more elements of risk and expense than renting, it involves somewhat different public policy concerns. First, homeownership may not be the best choice for very-low income households. Second, there is a down payment and closing costs that are invested and put at risk. There is a longer lasting risk to good credit and a profound sense of personal failure for the foreclosed owners. There are also the financial burden and risk associated with maintaining a home, especially in facing large, unexpected maintenance items. In addition, locking into homeownership with long-term resale price controls constrains the homeowner's flexibility to respond to job or other life situations. These concerns, together with the public purposes served by homeownership, mean that resale price control terms should be more lenient in order to reward low-income homeowners with some measure of equity appreciation, if only to protect them from returning to renter status.

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<sup>131</sup>Affordability controls may also be supplemented with other direct subsidies such as low interest loans to assist a homebuyer in making a down payment on a dwelling unit. Such a loan would be short term, such as five years, and would be recaptured in order to assist other future homebuyers of low- and moderate-income units.

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One way to temper the effect of resale price controls on the subsidized homeowner is to offer him/her the option of paying the subsidy back (either fully or partially). The purpose of such a payback of subsidy or “recapture” is three-fold: (1) to guarantee that housing remains affordable for a reasonable period; (2) to ensure that the stock of low- and moderate-income housing is not later depleted if the unit is sold at a higher price; and (3) to create a pool of monies that may be used to construct or rehabilitate affordable units. Once the subsidy has been recaptured by the public to be recycled into other assisted housing, the homeowner would be free to sell at market prices and to use the equity toward the next home purchase. Because of the complexity of recapture systems, their design is probably best done as part of an administrative rule-making process as opposed to a state statute.

An example of how recapture might operate: A homeowner buys a subsidized unit and signs a right of first refusal agreement with the local government that gives the government the right to buy back the unit for the subsidized price with adjustments for inflation, broker fees, etc. If the homeowner pays back the full subsidy, the government would not exercise its option and the house could be sold at market value. Alternately, the government could resell the house as an affordable unit to a qualifying low- or moderate-income homebuyer.

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### 4-208.22 Controls on Resales and Re-rentals of Low- and Moderate-Income Dwelling Units

- (1) The provisions of paragraphs (2) through (7) below, and the provisions of Section [4-208.23] below, shall apply to newly constructed, rehabilitated, and converted low- and moderate-income sales and rental dwelling units that are intended to fulfill a local government’s regional fair share obligations, provided that one or more of the following conditions are met:<sup>132</sup>
    - (a) The dwelling unit was constructed, rehabilitated, or converted with assistance from the federal, state, or local government in the form of monetary subsidies, donations of land or infrastructure, financing assistance or guarantees, development fee exemptions, tax credits, or other financial or in-kind assistance; and/or
    - (b) The dwelling unit is located in a development that was granted a density bonus or other form of regulatory incentive in order to provide low- and moderate-income housing; and/or
- ◆ Note that the various devices listed in subparagraphs (a) and (b) correspond to tools that are considered to be “subsidies,” as defined in Chapter 3.

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<sup>132</sup>If none of these conditions is present, then presumably the developer is operating outside of the local government’s affordable housing program provided for under the Act. The developer would therefore not need any of the incentives or subsidies offered by the local government or other agencies.

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- (c) The dwelling unit was built subject to the terms of a local ordinance which requires the construction of low- and moderate-income housing as a condition of development approval.
- (2) In developing housing elements, local governments shall determine and adopt measures to ensure that newly constructed low- and moderate-income sales and rental dwelling units that are intended to fulfill regional fair share obligations remain affordable to low- and moderate-income households for a period of not less than [15] years, which period may be renewed. The Authority shall require all conveyances of those newly constructed low- and moderate-income sales dwelling units subject to this Act to contain the deed restriction and mortgage lien adopted by the Council.<sup>133</sup> Any restrictions on future resale or rentals shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies, as provided for in Section [4-208.23] of this Act.
- (3) Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
- (4) Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
- (5) Dwelling units created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to controls on affordability as delineated in paragraphs (2), (3), and (4) above.
- (6) Affordability controls on owner- or renter-occupied accessory apartments shall be for a period of at least [5] years.
- (7) Alternatives not otherwise described in this Section shall be controlled in a manner deemed suitable to the Council and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.

### **4-208.23 Enforcement of Deed Restriction**

- (1) No local government shall issue a certificate of occupancy for the initial occupancy of a low- or moderate-income sales dwelling unit unless there is a written determination by the Authority that the unit is to be controlled by a deed restriction and mortgage lien as adopted by the Council. The Authority shall make such determination within [10] days of receipt of a proposed deed restriction and mortgage lien. Amendments to the deed restriction and lien shall be permitted only if they have been approved by the Council. A request for an

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<sup>133</sup>A model deed restriction and lien for low- and moderate-income housing appears in 5 N.J.A.C., Ch. 93, App. I.

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amendment to the deed restriction and lien may be made by the Authority, the local government, or a developer.

- (2) No local government shall permit the initial occupancy of a low- or moderate-income sales dwelling unit prior to the issuance of a certificate of occupancy in accordance with paragraph (1) above and with its zoning code and other land development regulations.
- (3) Local governments shall, by ordinance, require a certificate of reoccupancy for any occupancy of a low- or moderate-income sales dwelling unit resulting from a resale and shall not issue such certificate unless there is a written determination by the Authority that the unit is to be controlled by the deed restriction and mortgage lien prior to the issuance of a certificate of reoccupancy, regardless of whether the sellers had executed the deed restriction and mortgage lien adopted by the Council upon acquisition of the property. The Authority shall make such determination with [10] days of receipt of a proposed deed restriction and mortgage lien.
- (4) The mortgage lien and the deed restriction shall be filed with the recorder's office of the county in which the unit is located. The lien and deed restriction shall be in the form prescribed by the Council.
- (5) In the event of a threatened breach of any of the terms of a deed restriction by an owner, the Authority shall have all remedies provided at law or equity, including the right to seek injunctive relief or specific performance, it being recognized by parties to the deed restriction that a breach will cause irreparable harm to the Authority in light of the public policies set forth in this Act and the obligation for the provision of low- and moderate-income housing.
- (6) Upon the occurrence of a breach of any of the terms of the deed restriction by an owner, the Authority shall have all remedies provided at law or equity, including but not limited to, foreclosure, recoupment of any funds from a rental in violation of the deed restriction, injunctive relief to prevent further violation of the deed restriction, entry on the premises, and specific performance.

### **4-208.24 Local Government Right to Purchase, Lease, or Acquire Real Property for Low- and Moderate-Income Housing**

- (1) Notwithstanding any other law to the contrary, a local government may purchase, lease, or acquire by gift, real property and any estate or interest therein, which the local government determines necessary or useful for the construction or rehabilitation of low- and moderate-income housing or the conversion to low- and moderate-income housing.
- (2) The local government may provide for the acquisition, construction, and maintenance of buildings, structures, or other improvements necessary or useful for the provision of low- and moderate-income housing, and may provide for the reconstruction, conversion, or

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rehabilitation of those improvements in such manner as may be necessary or useful for those purposes.

- (3) Notwithstanding the provisions of any other law regarding the conveyance, sale, or lease of real property by a local government to the contrary, a local government's legislative body may, by [ordinance *or* resolution], authorize the private sale and conveyance or lease of a housing unit or units acquired or constructed pursuant to this Section, where the sale, conveyance, or lease is to a low- or moderate-income household or nonprofit entity and contains a contractual guarantee that the dwelling unit will remain available to low- and moderate-income households for a period of at least [15] years.

### **4-208.25 Biennial Report of the Council to Governor and Legislature**

- (1) By [date] of each even-numbered year, the Council shall prepare a report to the governor and legislature. The Council shall report on the effect of this Act on promoting the provision of affordable housing in the housing regions of the state. The report shall address, among other things: local governments with housing elements that have been approved, with or without conditions, or that have not been approved by [the Council *or* a regional planning agency]; the number of low- and moderate income dwelling units constructed, rehabilitated, purchased, or otherwise made available pursuant to this Act; the number and nature of appeals to the Council on decisions of local governments denying or conditionally approving inclusionary developments and the Council's disposition of such appeals; [regional planning agencies with regional fair-share housing allocation plans that have, or have not been approved;] actions that have been taken by local governments to reduce or eliminate unnecessary cost generating requirements that affect affordable housing; and such other actions that the Council has taken or matters that the Council deems appropriate upon which to report. The report may include recommendations for any revisions to this Act which the Council believes are necessary to more nearly effectuate the state's housing goal.
- (2) Every officer, agency, department, or instrumentality of state government, of [regional planning agencies,] and of local government shall comply with any reasonable request by the Council for advice, assistance, information, or other material in the preparation of this report.
- (3) The Council shall send the biennial report to the governor, members of the legislature, state agencies, departments, boards and commissions, appropriate federal agencies, [regional planning agencies], and to the chief executive officer of every local government in the state, and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the state that serve as depositories for state documents.

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### *Alternative 2 – Application for Affordable Housing Development; Affordable Housing Appeals*<sup>134</sup>

#### **4-208.1 Findings**

The legislature hereby finds and declares that:

- (1) there exists an acute shortage of affordable, accessible, safe, and sanitary housing for low- and moderate-income households in the state;
- (2) it is imperative that action be taken immediately to assure the availability of such housing; and
- (3) it is necessary for all local governments in the state to assist in the provision of such housing opportunities to assure the health, safety, and welfare of all citizens of the state.

#### **4-208.2 Purpose**

It is the purpose of this Act to provide expeditious relief from local ordinances or regulations that inhibit the construction of affordable housing needed to serve low- and moderate-income households in this state. The provisions of this Act shall be liberally construed to accomplish this purpose.<sup>135</sup>

#### **4-208.3 Definitions**

As used in this Act:

- (1) “**Affordable Housing**” means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate-, low-, or very low-income housing, as defined by paragraphs (9), (10), and (12), below. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

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<sup>134</sup>This model statute was drafted by Peter A. Buchsbaum, a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, and Davis in Woodbridge, New Jersey, along with additional drafting and material by Stuart Meck, FAICP, Principal Investigator, and Michelle J. Zimet, AICP, Attorney and Senior Research Fellow, for the Growing Smart<sup>SM</sup> project.

<sup>135</sup>The text of this model is drawn from Conn. Gen. Stat. Ann. §8-30g; Mass. Gen. Laws Title 40B §§20 to 23; and Gen. Laws of R.I. §§43-53-1 to 53-8. These statutes, based on the original 1969 Massachusetts Affordable Housing Appeals Act, St. 1969, c. 774, resemble each other.

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- ◆ Note that, for purposes of this model, the term “affordable housing” applies only to very-low-, low-, and moderate-income housing and does not apply to middle-income housing.
  - (2) “**Affordable Housing Developer**” means a nonprofit entity, limited equity cooperative, public agency, or private individual firm, corporation, or other entity seeking to build an affordable housing development.
- ◆ The inclusion of private developers, as well as nonprofit and governmental organizations, in this definition, is necessary to encourage a widespread participation in the development of affordable housing.
  - (3) “**Affordable Housing Development**” means any housing that is subsidized by the federal or state government, or any housing in which at least [20] percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices which preserve them as affordable housing for a period of at least [15] years.<sup>136</sup>
- ◆ The 20 percent standard for what constitutes lower income housing development has been used in New Jersey, particularly the *Mount Laurel II* case.<sup>137</sup>
  - (4) “**Approving Authority**” means the Planning Commission, Zoning Board of [Appeal *or* Adjustment], Governing Body, or other local government body designated pursuant to law to review and approve an affordable housing development.
  - (5) “**Development**” means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity which alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered species habitat, aquifer or other resource area, including coastal construction or other activity.
  - (6) “**Exempt Local Government**” means:
    - (a) any local government in which at least [10] percent of its housing units, at the time an application is made pursuant to this Act, have been subsidized by the federal or state government, or by a private entity, and in which occupancy is restricted or intended for low- and moderate-income households;

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<sup>136</sup>For an excellent example of a deed restriction based on years of successful experience in New Jersey, see 5 N.J.A.C., Ch.93, App. I, which contains the deed restriction for low- and moderate-income housing required by the State Council on Affordable Housing.

<sup>137</sup>*Mt. Laurel II*, 456 A.2d 390 at n.37.

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- (b) any local government whose median household income is, according to most recent census data, less than 80 percent of the median household income of the county or primary metropolitan statistical area as last defined and delineated by the U.S. Bureau of the Census in which the local government is located; or
  - (c) any local government whose percentage of substandard dwelling units in its total housing stock, as determined by the most recently available census data, is more than 1.2 times (120 percent) the percentage of such dwellings in the housing stock for the county or primary metropolitan statistical area in which the local government is located.
- ◆ This definition of “exempt” local governments, found in various forms in the New England statutes, recognizes that certain communities may have already met their burden of providing low- or moderate-income housing. See, for example, Conn. Gen. Stat. Ann. §8-30g(f). The county is suggested as a primary standard of comparison, but metropolitan areas may be substituted in place of a county. Use of an entire state would in most cases be impractical since entire regions of the state may have less than the statewide median income and use of the state as the base would thus exempt them from the applicability of the statute.
- (7) “**Household**” means the person or persons occupying a dwelling unit.
  - (8) “**Local Government**” means the [county, city, village, town, township, borough, *or* other political subdivision] which has the primary authority to review development plans.
  - (9) “**Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located. For purposes of this Act, the term “low-income housing” shall include “very low-income housing.”
  - (10) “**Moderate-Income<sup>138</sup> Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located.

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<sup>138</sup>In some states where there a greater stratification of income and housing, a fourth category may be included entitled “middle-income” that would be defined as households with a gross household income that is greater than 80 percent but does not exceed 95 to 120 percent of the median gross household income for households of the same size within the county or metropolitan area in which the housing is located. See, e.g., 24 CFR §91.5 (Definition s– “Middle-income family”).

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- (11) “**Unnecessary Cost Generating Requirements**” mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, and oversized water and sewer lines to accommodate future development without reimbursement.
- (12) “**Very Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located.

### **4-208.4 Local Government Action on Affordable Housing Applications**

- (1) An affordable housing developer may file an application for an affordable housing development in any nonexempt local government with the Approving Authority, in accordance with a checklist of items required for a complete application previously established by [ordinance *or* rule of *the* Department of Housing and Community Development *or other state agency authorized by statute*].
- (2) The Approving Authority shall review the application in accordance with the standards set forth in Section [4-208.5(1)] below, and shall have the power to issue a comprehensive permit which shall include all local government approvals or licenses, other than a building permit, necessary for the authorization of the affordable housing development. The Approving Authority shall hold at least [1], but no more than [3], public hearings on the proposal within [60] days of receipt of the application and shall render a decision within [40] days after the conclusion of the public hearing(s).
- (3) Failure of the Approving Authority to act within this time frame shall mean that the Authority is deemed to have approved the application, unless the time frame is extended by a voluntary agreement with the applicant.

### **4-208.5 Basis for Approving Authority Determination**

- (1) The Approving Authority shall grant approval of an affordable housing development unless facts produced in the record at the public hearing or otherwise of record demonstrate that the development as proposed:
  - (a) would have significant adverse effects on the environment; or

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- (b) would significantly conflict with planning goals and policies specified in the local government's comprehensive plan, provided they are not designed to, or do not have the effect of, rendering infeasible the development of affordable housing while permitting other forms of housing.
- (2) The Approving Authority may condition the approval of the affordable housing development on compliance with local government development standards, contained in an ordinance or regulation, which are necessary for the protection of the health and safety of residents of the proposed development or of the residents of the local government, or which promote better site and building design in relation to the area surrounding the proposed development, provided that any such ordinances or regulations must be equally applicable to both affordable housing development and other development, and provided that such conditions do not render the affordable housing development infeasible. The Approving Authority shall waive such local government development standards where their application would render the provision of affordable housing infeasible, unless such waiver would cause the affordable housing development to have significant adverse effects on the environment.
- (3) For purposes of this Act, a requirement, condition, ordinance, or regulation shall be considered to render an affordable housing development proposed by an affordable housing developer that is a nonprofit entity, limited equity cooperative, or public agency infeasible when it renders the development unable to proceed in accordance with program requirements of any public program for the production of affordable housing in view of the amount of subsidy realistically available. For an affordable housing development proposed by an affordable housing developer that is a private for-profit individual firm, corporation, or other entity, the imposition of unnecessary cost generating requirements, either alone or in combination with other requirements, shall be considered to render an affordable housing development infeasible when it reduces the likely return on the development to a point where a reasonably prudent developer would not proceed.<sup>139</sup>

### **4-208.6 Appeal to [State Housing Appeals Board *or* Court]**

- (1) An affordable housing developer whose application is either denied or approved with conditions that in his or her judgment render the provision of affordable housing infeasible,

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<sup>139</sup> For an existing statutory definition of “infeasible,” see R.I. Gen. Laws §45-53.4(c), which provides:

“Infeasible” means any condition brought about by any single factor or combination of factors, as a result of limitations imposed on the development by conditions attached to the zoning approval, to the extent that it makes it impossible for a public agency, nonprofit organization, or limited equity housing cooperative to proceed in building or operating low or moderate income housing without financial loss, within the limitations set by the subsidizing agency of government, on the size or character of the development, on the amount or nature of the subsidy, or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the public agency, nonprofit organization, or limited equity housing cooperative.

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may, within [30 or 45] days of such decision appeal to the [State Housing Appeals Board or other state trial court] challenging that decision. The [Board or Court] shall render a decision on such application within [120] days of the appeal being filed. In its determination of any such appeal, the [Board or Court] shall conduct a *de novo* review of the matter.

- ◆ The New England statutes are either silent on the burden of proof before the appeals board, or place the burden of proof on the local government.<sup>140</sup> Given the nature of the interests involved – municipal discretion vs. housing affordability – it is advisable to allow the appeal authority to conduct its own independent *de novo* review of the facts. Whether the applicant or the local government has the ultimate burden of proof is a question of policy for each state to determine as it balances the weight of affordable housing needs against local government planning discretion. Optional language on burden of proof is provided in paragraph (2) below.

- (2) In rendering its decision, the [Board or Court] shall consider the facts and whether the Approving Authority correctly applied the standards set forth in Section [4-208.5] above.

*[add optional additional burden of proof language for (2)]*

[In any proceeding before the [Board or Court], the Approving Authority shall bear the burden of demonstrating that it correctly applied the standards set forth in Section [4-208.5] above in denying or conditionally approving the application for an affordable housing development.]

- (3) The [Board or Court] may affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the Approving Authority. The decision of the [Board or Court] shall constitute an order directed to the Approving Authority, and shall be binding on the local government which shall forthwith issue any and all necessary permits and approvals consistent with the determination of the [Board or Court].
- (4) The [*appellate court of competent jurisdiction*] shall have the exclusive jurisdiction to review decisions of the [Board or Court].

### **[4-208.7 Enforcement]**

[The order of the Board may be enforced by the Board or by the applicant on an action brought in the [*trial court*].]

- ◆ Where a housing appeals board rather than a court is selected, it must be given the authority to enforce its orders.

### **4-208.8 Nonresidential Development as Part of an Affordable Housing Development**

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<sup>140</sup>See Conn. Gen. Stat. Ann. §8-30g(c).

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- (1) An applicant for development of property that will be principally devoted to nonresidential uses in a nonresidential zoning district shall have the status of an affordable housing developer for the purposes of this Act where the applicant proposes that no less than 20 percent of the area of the development or 20 percent of the square footage of the development shall be devoted to affordable housing, except that the applicant shall bear the burden of proof of demonstrating that the purposes of a nonresidential zoning district will not be impaired by the construction of housing in that zoning district and that the health, safety, and welfare of the residents of the affordable housing will not be adversely affected by nonresidential uses either in existence or permitted in that zoning district.
- (2) For purposes of paragraph (1) above, the square footage of the residential portion of the development shall be measured by the interior floor area of dwelling units, excluding that portion which is unheated. Square footage of the nonresidential portion shall be calculated according to the gross leasable area.

### **4-208.9 Overconcentration Of Affordable Housing**

In order to prevent the drastic alteration of a community's character through the exercise of the rights conferred upon affordable housing developers by this Act, the requirements to approve affordable housing developments by a local government as specified in this Act shall cease at such time as:

- (1) the local government fulfills the requirements to become an exempt local government, as defined in Section [4-208.3(6)]; or
  - (2) where the number of units of affordable housing approved and built pursuant to this Act exceeds [\_\_,000] dwelling units over a period of [5] years.
- ◆ Jurisdictions where there is faster growth may experience a rush of affordable housing proposals. To prevent communities from becoming overwhelmed by the prospect that developers may charge out to buy or option land within one community where there is ample vacant land, and seek zoning changes, there should be some upper limit on the amount of housing that can be approved under the special procedures contained in this statute. For example, in New Jersey during the 1980s, some towns were faced with as many as 11 lawsuits by developers.<sup>141</sup> In the Section above, this occurs when the local government meets the requirements for an “exempt local government” in Section 4-208.3(6) or when a statutorily established limit on the number of units of affordable housing over a certain period of time is met.

### **[4-208.10 Housing Appeals Board]**

- [(1) Composition [*describe composition of housing appeals board and terms of members*].]

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<sup>141</sup>See, e.g., *Field v. Franklin Twp.*, 204 N.J. Super. 445, 449 A.2d 251 (1985).

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- ◆ If a housing appeals board, rather than the courts, is selected to administer the statute, the state will have to determine its composition. There should be representation by local and, if appropriate, county interests, by private for-profit and nonprofit developers of affordable housing, by planning interests, and by the public at large. Provided that the interests are reasonably balanced, there is no single correct answer either to the size of the body or the precise breakdown of appointees.<sup>142</sup> If a court is chosen, it should be the trial court of general jurisdiction in the state.

[ (2) Within [3] months after the effective date of this Act, the Housing Appeals Board shall adopt rules and regulations governing practice before it. The Board may adopt [subject to approval of the Department of Housing and Community Development *or other state agency*] such other rules and regulations as it deems necessary and appropriate to carry out its responsibilities under this Act.]

- ◆ The bracketed language in paragraph (2) gives the policy-making arm of the governor some input into substantive regulations. It is expected that general state administrative procedures acts will provide the procedural framework, such as notices, public hearings, publication, etc. for rule making, so that rule-making procedures need not be spelled out in this statute.

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<sup>142</sup>R.I. Gen. Stat. §45-53-7 provides the following board makeup:

Housing Appeals Board – (a) There shall be within the state a housing appeals board consisting of nine (9) members:

### Housing Appeals Board

Represent:

1 district court judge (chair)  
1 local zoning board member  
1 local planning board member  
2 city and town council members  
(plus an alternate) – representing  
municipalities of various sizes  
1 affordable housing developer  
1 affordable housing advocate  
1 director of statewide planning or designee  
1 director of Rhode Island housing or designee

Appointed by:

Chief of district court  
Speaker of the house  
Majority leader of senate  
Speaker of the house  
Majority leader of senate  
(Governor)  
Governor  
Governor  
Self-appointed  
Self-appointed

(b) All appointed [sic] shall be for two (2) year terms, provided, however, the initial terms of members appointed by the speaker of the house and majority leader shall be for a period of one year. A member shall receive no compensation for his or her services, but shall be reimbursed by the state for all reasonable expenses actually and necessarily incurred in the performance of his or her official duties. The board shall hear all petitions for review filed under §45-53-5, and shall conduct all hearings in accordance with the rules and regulations established by the chair. Rhode Island housing [sic] shall provide such space, and such clerical and other assistance, as the board may require.

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### 4-208.11 Publication of List of Exempt Local Governments

The [State Department of Housing and Community Development *or other state agency authorized by statute*] [shall *or may*] annually publish a list of exempt local governments.

### 4-208.12 Effective Date

This Act shall take effect upon its adoption.

## PROCEDURES RELATED TO STATE PLAN MAKING, ADOPTION, AND IMPLEMENTATION

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### *Commentary: Public Review and Hearings*

The model legislation below describes a procedure for public consultation and hearings in the preparation, adoption, and amendment of plans. The procedure requires the state agency to initiate informational meetings shortly after beginning work on the plan and to conduct public hearings once a draft plan has been completed. The workshops and hearings must be preceded by public notice and must be geographically dispersed throughout the state. Alternate language has been provided to authorize use of computer accessible information networks, such as the Internet, as a mechanism for public notice and for distribution of the draft plan. The number of such hearings and workshops may be specified in the statute or left to the discretion of the state agency; as true throughout this *Legislative Guidebook*, the numbers of hearings and workshops proposed below are merely guidelines. While the statute does not provide so, because cost may be a consideration, it is a good practice for the state agency to distribute draft copies of the plan to affected governmental units and statewide interest groups in advance of the public hearings.

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### 4-209 Workshops and Public Hearings<sup>143</sup>

- (1) As used in this Section and Sections [4-210] through [4-212]:

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<sup>143</sup>Portions of this Section pertaining to the form of the notice and submission of written and oral comments and recommendations have been adapted from the ALI, *A Model Land Development Code*, §2-305.

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- (a) “**State Plan**” means any one of the following:
1. the state comprehensive plan pursuant to Section [4-203];
  2. the state land development plan pursuant to Section [4-204];
  3. the state biodiversity conservation plan pursuant to Section [4-204.1];
  4. the state transportation plan pursuant to Section [4-205];
  5. the state economic development plan pursuant to Section [4-206];
  6. the state telecommunications and information technology plan pursuant to Section [4-206.1]; and
  7. the state housing plan pursuant to Section [4-207].
- (b) “**Lead Agency**” means the state agency directed to prepare a state plan pursuant to one of the Sections referenced above.
- (2) Within [90] days of initiating work on a state plan or any amendment to it, the lead agency shall conduct [not less than 4] informational workshops (or other type of public collaborative process that engages citizens in the preparation of plans) at different locations throughout the state. The purpose of these workshops is to inform the public as to the process and schedule for preparing the plan and to solicit public comment on potential goals, policies, guidelines, design alternatives, problems, potential solutions, and implementation measures before a draft of the plan is completed. The lead agency shall give notice by publication in a newspaper that circulates in the area served by the workshop, and may give notice by publication, which may include a copy of the draft plan or amendment, on a computer accessible information network, or by other appropriate means, at least [30] days in advance of the workshop.
- (3) Upon completion of a preliminary draft of the state plan, the lead agency shall conduct [not less than 4] public hearings on the plan at different locations throughout the state. The lead agency shall give notice by publication in a newspaper which circulates in the area served by the hearing, and may give notice by publication, which may include a copy of the draft plan or amendment, on a computer accessible information network or by other appropriate means, at least [30] days in advance of the hearing.
- (4) The notice of each workshop or public hearing shall:
- (a) contain a statement of the substance of the workshop or hearing and a description of the substance of the proposed plan;

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- (b) specify the officer(s) or employee(s) of the lead agency from whom additional information may be obtained;
  - (c) specify a time and place where the work program or draft plan may be inspected before the hearing; and
  - (d) specify the date, time, place, and method for presentation of views by interested persons.
- (5) The lead agency shall provide notice to:
- (a) the chief executive officer of each [regional planning agency] and local government in the area served by the workshop or hearing; [and]
  - (b) the director of every relevant state agency; [and]
  - [(c) any other interested person who, in writing, requests to be provided notice of the workshop or hearing].
- (6) The lead agency shall afford any interested person the opportunity to submit written recommendations and comments in the record of the hearing, copies of which shall be kept on file and made available for public inspection.
- (7) The lead agency may establish additional procedures for the receipt of oral statements.
- (8) The lead agency may prepare written responses to any written recommendations and comments submitted by any interested party. These responses may be included in the final plan document.
- (9) Taking full account of the written and oral testimony presented at the public hearings, the lead agency shall make revisions in the preliminary draft plan as it deems necessary and shall prepare and distribute to all state and regional agencies, local governments, and other interested persons a final draft plan to be considered for adoption. The [adopting body *or* agency *or* person] may modify or amend the final draft plan before adopting it.

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### ***Commentary: Adoption of Plans***

There are several ways in which a plan (and plan amendments) may be adopted at the state level: (1) the governor can adopt it by executive order; (2) the governor can submit the plan to the state legislature and the plan becomes effective after a certain period (e.g., 90 days) unless either house passes a resolution stating in substance that it does not favor the plan; (3) the governor can submit

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it to the state legislature and the plan does not become effective until the legislature adopts it; or (4) if a state department or commission is responsible for preparing the plan, the state department head or commission can adopt the plan (see Table 4-4).

Commentary to the American Law Institute's *A Model Land Development Code* rejected the fourth alternative in which the state agency that prepared the plan – in this case, a State Land Development Plan prepared by the State Land Planning Agency – may also adopt it by administrative rule or regulation:

The initial question [of providing for the adoption of the plan] is whether there should be any legal significance attached to a plan and if so, by whom should the plan be approved. If no legal significance is to be attached to the plan, then the plan is at most a “prestigious” recommendation to legislators and to government officials making land development decisions about how they ought to make decisions which significantly affect the development of the area being planned. A “prestigious recommendation” obviously can become a factor in any political debate or controversy concerning the desirability of the location of a proposed development.

. . . The [State Land Development] Plan involves an expression of a high level of political policy and it is for this reason that the Plan must be consciously related to the political forces of government. It is clear that a recommendation, whether merely “prestigious” or something more, is more powerful if it is approved by someone other than the staff which prepared it.<sup>144</sup>

Some states, however, do authorize the approval of certain types of functional plans by the head of the state agency that prepared the plan, as opposed to a separate body. Examples include Indiana and Ohio (both providing for adoption of a state solid waste management plan by a state environment department head) and Minnesota (providing for the adoption of a state transportation plan by the state transportation commissioner).<sup>145</sup>

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<sup>144</sup>ALI, *A Model Land Development Code*, Note to §8-406, 351.

<sup>145</sup>Ind. Stat. Ann §13-9.5-3-2 (Adoption and implementation of state solid waste management plan) (1994); Ohio Rev. Code §3734.50 (State solid waste management plan; adoption by director of environmental protection) (1995); Minn. Stat. Ann. §§174.01 to 174.03 (Statewide transportation plan) (1986 and 1995 Supp).

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**Table 4-4: Methods of State Plan Adoption and Their Pros and Cons**

<i>Method of Plan Adoption</i>	<i>Pros</i>	<i>Cons</i>
Governor adopts plan by executive order	Provides recognition by governor and cabinet agencies	Excludes state legislature from approval process
Governor submits plan to state legislature; plan becomes effective within certain period unless rejected by either house	Provides review role for legislature, although role is negative	Limits authority of governor
Governor submits plan to state legislature; plan does not become effective until legislature adopts it	Provides review and adoption role for legislature; legislature could ask for changes in plan content	Can lead to stalemate between governor and legislature over details of plan
State board or commission adopts plan	Provides for “prestigious” endorsement of plan by outside, independent body	Excludes governor and legislature from approval process
State agency head adopts plan	Is appropriate when plan is highly technical document and negotiations over content are complex	Excludes governor and legislature from approval process

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### **4-210 Adoption of Plans (Four Alternatives)**

#### *Alternative 1 – By Executive Order*

A state plan or any amendment thereto shall become effective after the governor adopts it by executive order.

#### *Alternative 2 – By Action of the Governor and State Legislature<sup>146</sup>*

- (1) [Upon a recommendation for approval by the state planning commission and submission by the commission of a state plan to the governor for approval,] [t]he governor shall approve or disapprove a state plan or any portion or amendment thereof within [30] days of receipt.
- (2) Upon approving a state plan, the governor shall submit the state plan or amendment to [each house of the] the state legislature. [The plan shall become effective when adopted by the state legislature. *or* The plan shall become effective on the expiration of [90] legislative days or at the end of the legislative session, whichever is earlier, provided that neither house passes a resolution stating in substance that the house does not favor the plan.]
- [(3) In the event that [either house of] the legislature disapproves the plan or amendment in whole or in part, the plan or amendment shall be deemed to be rejected and shall be returned to the lead agency.]

#### *Alternative 3 – By Action of a State Board or Commission*

A state plan or any amendment thereto shall become effective when adopted by affirmative vote of not less than the majority of the entire membership of the [state planning commission] [no later than [30] days] after the final public hearing on the plan by the [commission] at any meeting of the [commission] at which the chair is present.

#### *Alternative 4 – By Action of a State Agency Head*

A state plan or any amendment to it shall become effective when adopted by rule of the director of the lead agency.

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<sup>146</sup> This section is an adaptation of §8-406(2), ALI, *A Model Land Development Code*, 350 (Adoption of State Land Development Plan).

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### ***Commentary: Certification of Plan to State Agencies, Regional Agencies, and Local Governments***

This Section requires the state to transmit an adopted plan and amendments to it to various agencies and officials, deposit copies in state depository libraries, and make them available for sale to the public.

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#### **4-211 Certification of Plan; Availability for Sale**

- (1) Upon the adoption or amendment of a state plan pursuant to Section [4-210 *or cite to applicable Section nos.*], the [governor *or* director of the state agency *or* chair of the commission or board] shall, within [90] days, certify copies of the plan or amendment to:
    - (a) the director of each state agency;
    - (b) the director of each [regional planning agency] in the state;
    - (c) the chief executive officer of each local government in the state;
    - (d) the director of each local government's planning department or, where there is no local planning department, the chair of the local planning commission;
    - (e) each member of the state legislature;
    - (f) the state library and all public libraries in the state that serve as depositories of state documents; and
    - (g) [other interested parties].
  - (2) The [lead agency *or other state agency*] shall make the plan or amendment available for sale to the public at actual cost or a lesser amount.
- ◆ A state may have the equivalent of the Government Printing Office for the central publication of government documents to the public. If not, the agency that prepared the plan should make it available to the public.
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### ***Commentary: Effect of State Plans on State Agencies; Interagency Coordination***

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Once a state plan (whatever the subject area) is adopted, it could have the following effects:

- (1) state agencies would be required to take the state plan and its planning goals “into consideration” when preparing functional plans, when siting, constructing, or reconstructing state facilities, or when making expenditures;
- (2) state agencies would be required to develop, through administrative rule making, a process for ensuring that their plans, proposed capital expenditures, proposed legislation, etc. are consistent with the state plan, and should document their compliance with the state plan. It is not desirable to detail in a statute the internal procedures that an agency might formulate to ensure consistency. The processes for consistency will evolve over time through trial and error. Consequently, state agencies should be given latitude to formulate, refine, and otherwise amend these procedures through administrative rule making;
- (3) state agencies would be required to periodically report on how they are incorporating the state plan’s goals and policies into their routine administrative activities; and
- (4) state agencies would be prohibited from undertaking any project that is inconsistent with an adopted state plan.

The following sections group these approaches under two alternatives: an advisory process; and a process requiring strict consistency. It is important to note that the broader the plan’s scope, the more far-reaching the impacts on state agencies. The State Comprehensive Plan and the State Land Development Plan would have the broadest impacts. The various specialized functional plans focusing on transportation, housing, and economic development would have narrower impacts. When state agencies prepared strategic plans for their operations, they would need to coordinate them with the comprehensive, land development, and functional plans that have statewide operation or applicability.

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### **4-212 Effect of State Plans on State Agencies; Interagency Coordination (Two Alternatives)**

#### *Alternative 1 – Agency Takes State Plan into Consideration<sup>147</sup>*

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<sup>147</sup>This alternative is derived from Conn. Gen. Stat. Ann. §16a-31 (1995 Supp.).

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- (1) Upon certification pursuant to Section [4-211] of a state plan or an amendment to the plan, each state agency shall take the state plan into consideration when preparing any other plan required by state or federal law, undertaking any capital project or development, proposing any budget, and/or maintaining or initiating any program.
- (2) A state agency shall request, and the director [of the state planning agency *or* the office of the governor *or other state agency*] may provide, an advisory report commenting on the extent to which any of the actions specified in paragraph (1) above conforms to the state plan and the director shall provide such other advisory reports as the state agency deems advisable.
- (3) Upon certification of a state plan, each state agency may establish, by rule, additional procedures to ensure the conformance of agency action with the plan.

### *Alternative 2 – Agency Required to Observe Strict Consistency<sup>148</sup>*

- (1) Upon certification pursuant to Section [4-211] of a state plan or an amendment to the plan, no state agency shall prepare any other plan required by state or federal law, undertake any capital project or development, propose any budget, or maintain or initiate any program that is inconsistent with that plan.
- (2) Each state agency shall, within [90] days of the certification of a state plan, establish by rule procedures to ensure the consistency of agency action with the plan.
- (3) Each state agency with authority affecting a state plan shall submit to the [state planning agency *or* office of the governor] within [90] days of the certification of the plan, a written report that addresses how each state agency has incorporated the goals and policies of the plan into its current and intended activities. The state agency shall revise the report as necessary but, in no case, less than once every [2] years.
- (4) The [office of the governor] shall mediate any differences between state agencies regarding the consistency between agency plans, projects, developments, budgets, and programs and the state plan.

### **4-213 [Effect of State Plans on Regional and Local Agencies—See Sections 7-402.1 to 7-402.5]**

### **4-214 [Resolution of Conflict Between State, Regional, and Local Plans; Certification –See Sections 7-402.1 to 7-402.5]**

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<sup>148</sup>This alternative is derived in part from Fla. Stat. Ann. §186.007 (1995 Supp.), the ALI *Model Land Development Code* §12-203, and Council of State Governments, “Comprehensive Planning and Land-Use Regulation Act,” in *Suggested State Legislation 1990*, 49 (Lexington, Ky.: The Council, 1990), 9-28.

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### STATE CAPITAL BUDGET AND CAPITAL IMPROVEMENT PROGRAM

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#### *Commentary: State Capital Budget and Capital Improvement Program*

The following model legislation provides for a state capital budget and five-year capital improvement program to be formulated by the state planning agency under the general direction of the governor. The model also provides for a review role by the state planning commission, where one exists. The budget document may also be linked to the state comprehensive plan and state agency strategic plans where they exist. The capital budget and capital improvement program are then submitted to the state legislature for approval, or approval with modification. The legislative model is based on Texas, Maryland, and New Jersey statutes.<sup>149</sup> The model may need to be adapted by a state to conform to existing budgeting procedures.

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#### 4-301 Definitions

As used in this Act, the following definitions shall apply:

- (1) “**Capital Improvement**” means any building or infrastructure project over \$[,000] that will be owned by the state and purchased or built with direct appropriations from the state, or with bonds backed by the full faith and credit of the state, or, in whole or in part, with federal or other public funds, or in any combination thereof. A project may include construction, installation, project management or supervision, project planning, engineering, or design, and the purchase of land or interests in land.
- (2) “**State Capital Budget**” means the [annual *or* biennial] budget for capital improvements proposed by the governor and adopted by the state legislature.
- (3) “**State Capital Improvement Program**” means the [5]-year schedule of capital improvements for the state, the first [year *or* 2 years] of which is the capital budget. The capital improvement program is a proposed plan of expenditures and, except for the capital

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<sup>149</sup>Texas Code Ann., Gov. Code, Tit. 10, Ch. 2057 (1995 Supp.); Md. Code Ann, State Finance and Procurement, §§3-601 to 3-607 (1995); N.J.S.A. §§40:55D-29 to 40:55D-31 (1995). For a good example of a state capital budget document, see State of Mississippi, *The Governor’s Five-Year Mississippi Capital Improvement Program, Fiscal Years 1991-1995*, submitted by Ray Mabus, Governor (Jackson, Miss: Department of Finance and Administration, January 1, 1990).

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improvements included in the capital budget, shall not constitute an obligation or promise by the state to undertake projects or appropriate funds for any project in years [2 to 5 or 3 to 5] of the schedule.

- (4) “**State Agency**” means any state department, division, office, bureau, board, or commission authorized to expend monies under state law [*or cite to applicable Section no.*].

### **4-302 Submission of State Capital Budget and Capital Improvement Program**

- (1) No later than [*date*] of each [even-numbered] year, the [state planning agency] shall prepare and submit to the governor a proposed state capital budget and capital improvement program document, hereinafter referred to as the “document.”
- (a) The governor shall review the document [and shall refer it to the state planning commission for a recommendation on the necessity, desirability, and relative priority of capital improvement projects by reference to the state comprehensive plan [*and other state plans*] as identified in Section [4-203 and cite to other applicable Section nos.].
- (b) The state planning commission shall make its report to the governor no later than [45] days after the date of transmittal of the document by the governor. The governor shall review such report before approving or revising the document. Upon approving or revising the document, the governor shall submit it no later than [30] days after receipt of the report of the state planning commission to the state legislature for consideration and adoption.
- (c) The legislature may adopt the document as submitted, or with modifications. Where any member of the state legislature proposes to add, by amendment, to the document any capital improvement projects not included in the proposal of the governor, the [state planning agency] shall review such projects for consistency with the state comprehensive plan [*and other state plans*] and against criteria prepared pursuant to Section [4-303(2)] below. The [state planning agency] shall, in writing and within [30] days of the original date of the proposed amendment, recommend to the Governor and legislature as to whether such projects should be included in the document as proposed, or with modifications, before the legislature may adopt the document. The recommendation of the [state planning agency] shall not be binding on the legislature.
- (2) No funds for a capital improvement project shall be encumbered or spent unless the project is included in the adopted capital budget.

### **4-303 Contents of State Capital Budget and Capital Improvement Program**

- (1) The capital improvement program shall include:

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- (a) a description of each capital improvement project, its costs, its sources of funds, its projected year(s) of implementation, its probable annual operating and maintenance costs, its probable revenues, if applicable and a statement of the relationship of the capital improvement to the state comprehensive plan [*and other state plans*] as identified in Section [4-203 *and cite to other applicable Section nos.*];
  - (b) a description of priorities used in selecting and scheduling projects;
  - (c) a projection of available funds for all capital improvements during the [5]-year period;
  - (d) an estimate of indebtedness to be incurred by the issuance of bonds for capital improvements proposed over the [5]-year period; and
  - (e) a summary table showing, by year, beginning fund balances, projected revenues or sources of funds, projected costs of all capital improvements for that year, and ending fund balances.
- (2) The [state planning agency] shall develop and shall periodically revise and publish criteria and related instructions and guidance for the inclusion in the state capital improvement program of proposed capital improvement projects.

### **4-304 Participation by and Cooperation of State Agencies**

- (1) The governor and the [state planning agency] shall solicit proposals for capital improvement projects, advice, and recommendations of each state agency [and the state planning commission] before proposing the state capital budget and capital improvement program.
- (2) The state capital budget and capital improvement program shall be consistent with the state comprehensive plan prepared pursuant to Section [4-203].
- [(3) In formulating the capital budget and capital improvement program, the governor and [the state planning agency] shall take into account any strategic operational plan prepared by the state agency pursuant to Section [4-202].]
- (4) The governor and the [state planning agency] may require a state agency to:
  - (a) submit information, reports, plans, and documentation; and
  - (b) answer inquiries in relation to proposed capital improvement projects.
- (5) All state agencies shall cooperate in the preparation of the state capital budget and capital improvement program.

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### SMART GROWTH ACT

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#### *Commentary: Smart Growth Act*

In 1997, the State of Maryland enacted a “Smart Growth” act<sup>150</sup> aimed at directing new development into “priority funding areas.” Under the statute, state funding of certain growth related projects is prohibited outside of these priority areas. The priority areas must meet state guidelines for intended use (including minimum density requirements) and adequacy of plans for sewer and water systems. Existing communities and areas where economic development is desired are eligible. Counties may also designate growth areas for new residential communities. The priority areas include the state's 154 municipalities, land within the Baltimore and Washington Beltways, 31 enterprise zones, and the locally designated growth areas.

Beginning October 1, 1998, the state is prohibited from funding “growth-related” projects not located in these priority growth areas. State funding is also restricted for projects in communities without sewer systems and in rural villages. The intention is, of course, to channel state monies into areas that are suited for growth and limit development in rural areas by not extending sewers or making transportation improvements that would spur growth. In this way, conversion of rural and agricultural lands to urban uses is slowed or at least actively discouraged through state policy. Local governments and private interests can, of course, spend their own funds outside of these priority growth areas, but they cannot expect state monies for infrastructure.

Other legislation that is part of the “Smart Growth” package is intended to support locally identified development areas. For example, the program facilitates the use of brownfields (abandoned or underutilized industrial sites that are either polluted or perceived to be polluted) through grants, low-interest loans, and limitations on liability in redeveloping those lands. It provides tax credits to businesses creating jobs in a priority funding area. A “Rural Legacy” program also makes state funds available to enable local governments and land trusts to purchase properties, development rights, or permanent easements in order to protect targeted rural greenbelts. The new initiative supplements the Maryland’s agricultural lands preservation program and open space program.

Section 4-401 below is an adaptation, reorganization, and refinement of the Maryland law. The model authorizes the designation of three types of “smart growth areas”: (1) central cities (which are intended to be specifically listed in the statute); (2) areas that have been designated by regional planning agencies or counties, in consultation with municipalities; and (3) other state-designated area that are required to meet certain criteria regarding distress or disinvestment, such as enterprise zones. With regard to areas described in (2), such areas must be served by existing or planned

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<sup>150</sup>Md. Code Ann., State Fin. and Procurement (1999), §§5-B-01 *et seq.*; for a critique of this act, see Douglas Porter, “Maryland’s Smart Growth” Program: An Evaluation of Recommendations, *PAS Memo* (American Planning Association, August 1999), 1-4.

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public or private central water and sewer systems, and must meet certain density (for residential land use) and intensity (for industrial, commercial, and office use) requirements that are contained in the model. The requirements for central water and sewer and density and intensity are intended to ensure that development in such areas is supported by urban services and are relatively compact. Such regionally- or county-designated smart growth areas must be reviewed and certified by the state planning agency before they can become effective, though a regional planning agency may perform a portion of its own review.

The model limits the expenditure of state monies for growth-related projects, which it defines, to smart growth areas. It also defines expenditures for projects and related costs that are not covered by the act, such as minor building expansions and rehabilitation of state facilities and acquisition of conservation easement. Under certain circumstances, as described in paragraph (7), a specific state board may approve funding for a growth-related project that is not located in a smart growth area.

The model act also charges the state planning agency with a variety of duties, including establishing a process for the review of projects for compliance with the act, determining the location of a smart growth area in the case of a dispute, and providing information to the public on the administration of the act.

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### 4-401 Smart Growth Act

- (1) This Section shall be known as the “[*name of state*] Smart Growth Act.”
- (2) The purposes of this Section are to:
  - (a) encourage a pattern of compact and contiguous urban growth in locally designated smart growth areas that have been determined to be most suitable for growth;
  - (b) target funding by the State of certain projects and programs that serve to foster or influence growth in those smart growth areas;
  - (c) ensure that smart growth areas have or are planned to have suitable centralized water and sewer systems to support urban growth;
  - (d) establish a certification process for the designation of smart growth areas before those areas are eligible for certain state funding;
  - (e) require the [state planning agency] to administer the certification process and to review state projects and programs proposed in smart growth areas;
  - (f) stimulate private investment and reinvestment in existing communities and neighborhoods;

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- (g) direct growth away from agricultural land and critical and sensitive areas;
  - (h) use taxpayer dollars in a cost efficient and effective manner; and
  - (i) coordinate state agency decisions and actions to ensure the achievement of the purposes as stated in paragraphs (2)(a) through (h) above.
- (3) As used in this Section:
- (a) “**Average Density**” means: the total number of dwelling units divided by the total acreage of all lots and parcels in the area for which the principal permitted use in the applicable land development regulations is residential, but excluding the acreage of land:
    - 1. dedicated to public use by easement in perpetuity or fee acquisition;
    - 2. dedicated to recreational use;
    - 3. subject to a conservation easement;
    - 4. used for cemetery purposes;
    - 5. identified by a local government as being in a 100-year flood plain or on which development is otherwise prohibited by local land development regulation; and
    - 6. [other].
  - (b) “**Financial Commitment**” means that sources of public or private funds or combinations thereof have been identified which will be sufficient to finance public water or sewer facilities necessary to serve development within a smart growth area 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, provided that public funds shall not include funds provided by the state.
  - (c) “**Funding**” means any form of assurance, guarantee, grant payment, credit, tax credit, or other assistance, including a loan, loan guarantee, or reduction in the principal, obligation, or rate of interest payable on, a loan or a portion of a loan.
  - (d) “**Growth-Related Project**” means only the items set forth below:
    - 1. any major transportation capital project, but excluding project planning and initial project planning;
    - 2. funding by the [department of development *or similar agency*] for:

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- a. [construction or purchase of newly constructed single family homes or purchase of loans for newly constructed single family homes under *[cite to statute]*];
  - b. [acquisition or construction of newly constructed multifamily rental housing under *[cite to statute]*];
  - c. *[cite to statutes authorizing business development loans, grants, or similar programs]*;
3. funding by the [state environmental protection agency] for:
- a. construction of new or expanded water supply and distribution systems under *[cite to statute establishing grant or loan program]*;
  - b. construction of new or expanded wastewater treatment and collection systems under *[cite to statute establishing grant or loan program, including revolving loan funds]*;
4. funding by *[the state building commission, or similar agency]* for leases of property, construction of new or expanded buildings and facilities, or land acquisition for *[list or cite to categories of state agencies or types of activities covered]*; and
5. *[other]*.
- (e) “**Initial Project Planning**” means that portion of project planning that includes:
1. notification of local, state, and federal officials;
  2. initial interagency review;
  3. initial systems planning;
  4. identification of alternatives for the scope and location of the project;
  5. estimates of right-of-way requirements, including available detail regarding specific properties to be affected, and of costs;
  6. public meetings for discussion of 1 to 5 above; and
  7. reports of consultants, if such consultants have been retained for the analysis of alternatives.

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- (f) “**Major Transportation Capital Project**” means any new, expanded, or significantly improved transportation facility or service, including planning, environmental studies, design, right-of-way acquisition, construction, or purchase of essential equipment related to the facility or service.
  - (g) “**Minor Transportation Capital Project**” means any project for the preservation or rehabilitation of an existing transportation facility or service, including the planning, design, right-of-way, construction, or purchase of equipment essential to the facility or service.
  - (h) “**Project Planning**” means the phase in which engineering and environmental studies and analyses are conducted with full participation of the public, in addition to local, state, and federal agencies, to determine the scope and location of a proposed transportation project; and
  - (i) “**Smart Growth Area**” means an area that is:
    - 1. listed under paragraph (4)(a) below;
    - 2. designated under paragraph (4)(b) below; or
    - 3. described in paragraph (4)(c) below.
- (4) The following areas shall be considered smart growth areas under this Section, provided that areas described in paragraph (4)(b) below shall first be certified by the [state planning agency] pursuant to paragraph (9) as meeting the requirements prescribed therein:
- (a) the following central cities [*list central cities in state*]:
    - 1. [*insert name*];
    - 2. [*insert name*]; and
- ◆ If a central city includes within its corporate limits areas not intended for development, as where a nature preserve is completely surrounded by a city, the indication of the city should list the excepted areas.
- (b) an area that has been designated by resolution by the [regional planning agency] or county [legislative body], in consultation with the municipalities located in whole or in part in that region *or* county, which:
    - 1. is served by a public or private central water and sewer system, or combination thereof, or planned to be served by a public water and sewer system for which the [state planning agency] has determined that there is

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- financial commitment to construct within a six-year period from the date of designation; and
2. with respect to that part of the area delineated for residential use or development:
    - a. there is required by the applicable local land development regulations a minimum average density of [6, or *insert number*] dwelling units or more per acre; and/or
    - b. there exists an average density of [6, or *insert number*] or more dwelling units per acre; and
  3. with respect to those parts of the area delineated for industrial, commercial, or office use, there is required by the applicable local land development regulations a minimum floor area ratio of:
    - a. [0.20] for industrial use;
    - b. [0.40] for commercial use; and
    - c. [0.60] for office use; and
  4. has sufficient land area to accommodate the urban growth projected for the smart growth area in the succeeding [5] year period by the regional or county comprehensive plan; and
  5. determined in writing by the [state planning agency], pursuant to paragraph (9) below, to comply with the requirements of paragraphs (4) (b)1 through (4)(b)4 above.
- (c) *[other state-designated areas that are required to meet certain criteria regarding distress and/or disinvestment, such as enterprise zones].*
- (5) Growth-related projects do not include:
- (a) minor transportation capital projects;
  - (b) projects by the [state department of general services, state building commission, or *similar agency*] for maintenance, repair, or renovations to existing facilities, or one-time additions to such facilities that do not increase the total floor area by more than [10] percent of the existing facility;
  - (c) acquisition of land for telecommunications towers, parks, conservation, and open space;

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- (d) acquisition of conservation easements;
  - (e) funding by [name of state agency] for any project financed with the proceeds of revenue bonds issued by [name of state agency] where the [director of agency] determines in writing that the application of this Section would conflict with any provision of federal or state law applicable to the issuance or tax-exempt status of the bonds, conflicts with any provision of any trust agreement between the [name of state agency] and any trustee, or would otherwise prohibit financing of an existing project or financing provided to cure or prevent any default under existing financing; or
- ◆ The state may, under this exception, continue payments on and refinance bonds that were issued to finance projects commenced prior to the adoption of this Section, where such state payment may be otherwise restricted or prohibited by this Section.
- (f) any other project funding or other state assistance not listed under paragraph (3)(d) above.
- (6) Except as otherwise provided in this paragraph and paragraph (7) below, beginning [*insert date*], the state shall not provide funding for a growth-related project if the project is not located within a smart growth area.
- (a) The state may provide funding for a growth-related project not in a smart growth area without complying with paragraph (7) below for:
    - 1. a project that is required to protect public health or safety;
    - 2. a project involving federal funds, to the extent compliance with this Section would conflict or be inconsistent with federal law;
    - 3. a project related to a commercial or industrial activity, which, due to its operational or physical characteristics, shall be located away from other development, including:
      - a. a natural resource-based industry;
      - b. an industry relating to agricultural operations;
      - c. an industry related to forestry operations;
      - d. an industry relating to mineral extraction;
    - 4. a wastewater treatment plant or a water treatment plant, provided that the service area for the plant is contained within and limited to a smart growth area.

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5. a tourism facility or museum that is required to be located away from other development by its necessary proximity to specific and unique historic, natural, or cultural resources.
- (b) No growth-related project shall be approved pursuant to paragraph (6)(a)1 above unless the director of the respective state agency finds in writing that the project is required to protect public health or safety and states in the writing the basis for this finding.
- (7) The state may provide funding for a growth-related project that is not located in a smart growth area if the project is determined by the [*existing state board, such as a controlling board, public works board, or state planning commission*] to comply with the requirements of this paragraph.
  - (a) The [state board] shall approve such a growth-related project if it determines in writing and by a majority vote that:
    1. no reasonably feasible alternatives exist in another location within the county or an adjacent county; or
    2. the growth-related project is a major transportation capital project that satisfies the requirements of paragraph (7)(b) below.
  - (b) The [state board] may approve a major transportation capital project outside a smart growth area, pursuant to paragraph (7)(a) above, if it finds that the project:
    1. does not increase capacity by more than [10] percent, provided that the director of the state department of transportation and the director of the [state planning agency] first make the same determination in writing; and/or
    2. connects two smart growth areas, provided that the director of the state department of transportation and the director of the [state planning agency] first determine in writing that:
      - a. adequate permanent access control or other similar measures are in place to prevent the smart growth areas from developing in such a manner that they merge; and
      - b. the project will prevent development that is inconsistent with the state comprehensive plan and state land development plan; and/or
    3. has the sole purpose of providing control of access by the state department of transportation along an existing highway corridor.

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- (c) When making a written request to the [state board] for the purposes of this paragraph, the applicant shall:
  - 1. demonstrate that no reasonably feasible alternative locations for the growth-related project exist within the county or an adjacent county; or
  - 2. demonstrate in writing that the growth-related project is a major transportation capital project that satisfies the requirements of paragraph (7)(b).
- (d) The [state board] may, at its discretion, require remedial actions to mitigate any negative impacts of the proposed growth-related project.
- (8) The [state planning agency] shall:
  - (a) by administrative rule, and in consultation with the [state planning commission], establish a process for the development, and periodic updating of maps and descriptions of smart growth areas;
  - (b) for smart growth areas designated and submitted by [regional planning agencies] or counties under paragraph (4)(b) and paragraph (9) of this Section, review and determine in writing compliance with the requirements of paragraph (4)(b);
  - (c) in the case of a dispute, determine the location of a smart growth area;
  - (d) establish a process for the review of projects by appropriate state agencies and the [state planning agency] for compliance with this Section;
  - (e) provide to each state agency, as appropriate, and to local governments written and mapped descriptions of the location of smart growth areas; and
  - (f) provide, as necessary, information to the public on the administration of this Section.
- (9) (a) To be eligible for funding of growth-related projects, a [regional planning agency] or county shall submit to the [state planning agency] any smart growth areas that it has designated pursuant to paragraph (4)(b) above, and which are consistent with the comprehensive plans of the region or county and the affected municipalities. The [regional planning agency] or county shall provide to the [state planning agency] all information necessary to show the precise location of the area(s), including maps of the area(s) showing the planning and zoning characteristics of the area(s), including documentation of average density and minimum floor area ratios, applicable land development regulations, a statement by each local government included in a smart growth area of consistency with the applicable local comprehensive plan, and existing and planned centralized water and sewer services, as appropriate.

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- (b) Upon submission of a smart growth area or areas by a [regional planning agency] or county or amendments to a existing regional or county smart growth area or areas, the [state planning agency] shall review, and, within [60 *or* 90] days of submission, determine in writing whether the smart growth area or areas meet(s) the requirements of paragraph (4)(b) above. If the [state planning agency] determines that the area or areas meet such requirements, it shall certify the approval of such areas.
  - (c) Prior to formal submission of a smart growth area, the [regional planning agency] or county may submit the proposed area to the [state planning agency] for informal technical assistance, review and comment, and the opportunity for public review in the manner prescribed by the [state planning agency].
  - (d) The [state planning agency] may enter into agreements with [regional planning agencies] to conduct the review required by subparagraph (b) above, but the responsibility to certify the approval of smart growth areas shall be retained by the [state planning agency] and shall not be delegated.
  - (e) The [regional planning agency] or county shall, at least every [five] years, review its smart growth area designations and determine in writing whether or not they still comply with the requirements of paragraph (4)(b) above. If the [regional planning agency] or county determines that the smart growth areas as currently designated no longer comply with paragraph (4)(b) above, it shall amend the designations appropriately.
- (10) This Section may not be construed to prevent a state agency from providing technical assistance to a local government in an area that is not a smart growth area.

### NOTE 4A – A NOTE ON STATE PLANNING GOALS

State plans address goals through a number of different approaches. State goals may be: (1) included in the legislation as part of a state planning act as is the case in Hawaii, Rhode Island, Vermont, and Washington; (2) developed by an independent process and later adopted by some body or agency (e.g., the governor, the legislature, the state planning agency) by administrative rule, as in Connecticut, Florida, New Jersey, and Oregon, and included in the plan document; or (3) approached as “visions” (e.g., Maryland) or “themes” intermixed with objectives and policies (e.g., Hawaii). (See Table 4-5.)

The process of creating goals often involves a public participation procedure driven by state administration. Oregon’s statewide program for land-use planning, for example, is administered by the Department of Land Conservation and Development (DLCD).<sup>151</sup> As such, the DLCD is

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<sup>151</sup>Ore. Rev. Stat., Ch. 197 (1994).

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responsible for the creation, adoption, and implementation of Oregon's statewide planning goals.<sup>152</sup> Other statewide processes may involve a series of public meetings administered by a specified task force charged with developing a series of statewide visions. The process can be handled by a state agency or delegated to an independent organization that can obtain widespread dialogue and consensus. For example, a university-affiliated local government research institute or a private, nonprofit organization can also have an effective role managing a goal-setting process at

the behest of the government agency. Because they may not be seen as having a direct interest in the outcome of the goal-setting process, they may more easily help participants reach agreement.<sup>153</sup>

There are advantages to goals devised and administered by an independent agency and later enacted as compared to goals included in the original legislation. Having an independent agency develop and review goals provides the goals with an agency that is responsible for them (a "home" – such as the DLCDD). This encourages the agency to demonstrate greater accountability for the ultimate implementation of the goals. Goals contained in a separate document or developed through a rule-making process, rather than sprinkled throughout legislation, also indicate a clear direction or vision for the state. Most important, since state planning goals are often an evolving end, omitting them from the legislation provides states with an opportunity to more easily adapt and/or amend their goals to changing circumstances.

A list of typical subject areas for goals, with sample goals from selected states begins below.

### Setting State Planning Goals in Oregon

**Here's how Arnold Cogan, AICP, former director of the Oregon Department of Land Conservation and Development, recalls the initial efforts in 1974 of setting statewide planning goals:**

The entire process of involving others throughout Oregon was designed to work from the bottom up, providing access for all segments of the public at every step. We took every opportunity to remind citizens that this was one state program that was not coming to them from the top down. We could prove it because we had not yet even furnished our offices adequately, some staff had not even moved in, and yet, our first priority was coming out to the public for advice and counsel. The people of Oregon themselves developed a pride of ownership in the goals they helped to write. Oregonians know the land use program continues to reflect their values and priorities nearly two decades later.

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<sup>152</sup>See Arnold Cogan, "Implementing SB100 – Getting Started" (unpublished manuscript, 1994). The first director of the Oregon Department of Land Conservation and Development, Cogan describes the process of reaching statewide agreement on planning goals.

<sup>153</sup>For a discussion of such organizations, see Judith Getzels, Peter Elliot, and Frank Beal, *Private Planning in the Public Interest: A Study of Approaches to Urban Problem Solving by Nonprofit Organizations* (Chicago: American Society of Planning Officials, October 1975), 66-77 (discussion of Regional Plan Association CHOICES '76 program for the tri-state metropolitan area surrounding New York City); and Bruce T. Levi and Larry Spears, "Public Policy Consensus Building: Connecting to Change for Capturing the Future," *North Dakota L. Rev.* 70 (1994): 311-351 (describing work of North Dakota Consensus Council).

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**Table 4-5: Policy/Plan Context of State Planning Goals**

State	Brief Description/Context of State Goals	Identifying features
<b>Hawaii</b> <i>(Haw. Rev. Stat., Ch. 226)</i>	Hawaii State Plan, enacted as a statute, requires state agencies to conform decisions and other land-related actions to a series of goals, policies and objectives contained in the statute.	Goals enacted as a statute
<b>Vermont</b> <i>(Vt. Stat. Ann. Tit. 24, §4301 et seq.)</i>	Act 200 establishes 12 statewide substantive planning goals.	Mandatory conformance to goals by local governments eliminated in 1989
<b>Florida</b> <i>(Fl. Stat., Chs. 186 &amp; 187)</i>	State Comprehensive Plan, adopted as a statute, establishes state goals and implementation policies for 24 program areas. Plan is required to provide standards and criteria for review and approval of state agency strategic plans and strategic regional policy plans.	Statewide Comprehensive Plan
<b>Georgia</b> <i>(Ga. Code Ann. §50-8-1 et seq.)</i>	Growth Strategies Act requires some 700 local governments to prepare plans that do not necessarily fit in with a state plan or goals, but must address minimum standards. State plan to reflect goals, policies and objectives of local government plans when completed.	“Bottom-up” planning system
<b>Oregon</b> <i>(Ore. Admin. Rules, Ch. 660, Div. 15)</i>	Land Conservation and Development Commission (LCDC) adopts and enforces 19 statewide planning goals, adopted after a complex publication and hearing process, to which local plans must conform.	Goals and funding monitored by LCDC
<b>New Jersey</b> <i>(N.J. Stat. Ann. §§52:18A-196 et seq.)</i>	New Jersey State Development and Redevelopment Plan (the “SDRP”) establishes statewide goals and objectives for 13 program areas. Counties and municipalities negotiate incorporation of goals, objectives, etc., through cross acceptance process.	Divides state into 7 tiers. Uses maps to show locations for growth, development, and redevelopment
<b>Washington</b> <i>(Wash. Rev. Code Ann., Ch. 36.70A)</i>	Growth Management Act requires “growing” counties to prepare comprehensive plans that address 13 statewide goals.	Goals contained within GM Act
<b>Rhode Island</b> <i>(Gen Laws of R.I., Tit. 45, Ch. 22.2)</i>	Comprehensive Planning and Land Use Regulation Act lists 10 state goals with which local comprehensive plans must be consistent.	State also publishes State Guide Plan with goals and policies
<b>Maryland</b> <i>(1992 Md. Gen. Laws Ch. 437)</i>	Planning Act of 1992 requires all local governments to incorporate a series of 7 policy elements (“visions”) set forth in the Act and lists a number of required local plan elements. The same policies adopted in local plans become the State’s “Economic Growth, Resource Protection, and Planning Policy” – criteria used to judge future developments and projects.	Goals defined as “visions” or state “policy”

SOURCE: Adapted from David Callies, “The Quiet Revolution Revisited: A Quarter Century of Progress,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: APA, March 1995), 19-26.

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### LAND USE

- ▣ To promote orderly growth and development that recognizes the natural characteristics of the land, its suitability for use, and the availability of existing and proposed public and/or private services and facilities. R.I. Gen. Laws §45-22.2-3 (1995).
- ▣ To establish a land-use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 3.

### ECONOMIC DEVELOPMENT

- ▣ To provide a strong and diverse economy that provides satisfying and rewarding job opportunities and that maintains high environmental standards, and to expand economic opportunities in areas with high unemployment or low per capita incomes. Vt. Stat. Ann. §4302 (1995).
- ▣ Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, and encourage growth in areas of insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities. Wash. Rev. Code Ann. §36.70A.020 (1995).
- ▣ To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 16.

### HOUSING

- ▣ Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock. Wash. Rev. Code Ann. §36.70A.020 (1995).
- ▣ To promote a balance of housing choices, for all income levels and age groups, and which recognizes the affordability of housing as the responsibility of each municipality and the state. R.I. Gen. Laws §45-22.2-3 (1995).

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▣ To establish and maintain an adequate supply of decent and affordable housing in a suitable living environment for all citizens. Office of Policy and Management, *Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, CT: The Office, n.d.), 54.

▣ The public and private sectors shall increase the affordability and availability of housing for low-income and moderate-income persons, including citizens in rural areas, while at the same time encouraging self-sufficiency of the individual and assuring environmental and structural quality and cost-effective operations. Fla. Stat. Ann. §187.201(5)(a) (1991).

▣ Provide adequate housing at a reasonable cost. New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1992), 10.

### **PUBLIC SERVICES OR FACILITIES, EXCLUDING TRANSPORTATION**

▣ Florida shall protect the substantial investments in public facilities that already exist and shall plan for and finance new facilities to serve residents in a timely, orderly, and efficient manner. Fla. Stat. Ann. §187.201(18)(a) (1991).

▣ Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. Wash. Rev. Code Ann. §36.70A.020 (1995).

▣ To plan and develop a timely, orderly, and efficient arrangement of public facilities and services to serve as a framework for urban and rural development. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 18.

### **TRANSPORTATION**

▣ To provide for safe, convenient, economic, and energy efficient transportation systems that respect the integrity of the natural environment, including public transport options and paths for pedestrians and bicyclers. Vt. Stat. Ann. §4302 (1995).

▣ To provide an integrated, efficient, and economical transportation system which provides mobility, convenience, and safety which meets the needs of all citizens, including transit-dependent and disabled. Office of Policy and Management, *Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, CT: The Office, n.d.), 46.

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▣ Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans. Wash. Rev. Code Ann. §36.70A.020 (1995).

### NATURAL RESOURCE PROTECTION, EXCLUDING AIR QUALITY

▣ To provide for the wise and efficient use of Vermont's natural resources and to facilitate the appropriate extraction of earth resources and the proper restoration and preservation of the aesthetic qualities of the area. Vt. Stat. Ann. §4302 (1995).

▣ To consider the use of resources and the consequences of growth and development for the region and the state, as well as the community in which it takes place. Vt. Stat. Ann. §4302 (1995).

### AIR QUALITY

▣ Florida shall comply with all national air-quality standards by 1987, and by 1992 meet standards more stringent than 1985 standards. Fla. Stat. Ann. §187.201(11)(a) (1991).

▣ To achieve and maintain a quality of air that is protective of public health and welfare and that allows attainment of economic and urban development goals. Office of Policy and Management,

### Policies & Guidelines for State Planning

Goals contained within state plans are very often supported by, or intermixed with, a series of policies, objectives, or guidelines. Three states (Oregon, Florida, and New Jersey) provide ways in which goals may be additionally supported:

#### *Oregon*

After a brief text to help clarify each of Oregon's goals, the Department of Land Conservation and Development prepared a series of guidelines that contain planning principles, followed by a list of implementation measures. For example, goal 14, URBANIZATION, describes a planning guideline to: "designate the amounts of urbanizable land to accommodate the need for further urban expansion, taking into account (1) the growth policy of the area, (2) the needs of the forecast population, (3) the carrying capacity of the planning area, and (4) open space and recreational needs." To encourage implementation, "Financial incentives should be provided to assist in maintaining the use and character of lands adjacent to urbanizable areas."

#### *Florida*

Florida's State Comprehensive Plan, adopted as a statute, clearly states a goal for each program area and lists a number of policies specific to that goal. Two policies falling under the goal of COASTAL AND MARINE RESOURCES are to: (1) "[a]ccelerate public acquisition of coastal and beachfront land where necessary to protect coastal and marine resources or to meet projected public demand," and (2) "[a]void the expenditure of state funds that subsidize development in high-hazard coastal areas."

#### *New Jersey*

New Jersey's State Plan contains eight general goals that provide a context for policy initiatives in an array of substantive areas. Within each substantive area is a listing of policies followed by a brief discussion. For example, under OPEN LANDS AND NATURAL SYSTEMS, policy 9 (Adequate facilities) provides: "Ensure that the character, location, magnitude and timing of growth and development is based on and linked to the availability of adequate recreational and open-space land needed to serve growth and development," and policy 25 (Water quality) states: "Forestry management practices should be designed to protect watersheds, wetlands, stream corridors and water bodies from non-point source pollution and unintended but potentially adverse effects of timber harvesting and deforestation."

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*Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, Conn.: The Office, 1992), 91.

### **ENERGY**

▣ To provide for sustainable and efficient use of energy and natural resources through least-cost planning techniques in order to provide a viable economy, a healthy environment, and a high quality of life. Office of Policy and Management, *Conservation and Development: Policies Plan for Connecticut 1992-1997* (Hartford, CT: The Office, 1992), 37.

▣ Florida shall reduce its energy requirements through enhanced conservation and efficiency measures in all end-use sectors, while, at the same time, promoting an increased use of renewable energy sources. Fla. Stat. Ann. §187.201(12)(a) (1991).

▣ To encourage the efficient use of energy and the development of renewable energy sources. Vt. Stat. Ann. §4302 (1995).

### **AGRICULTURAL AND FOREST LAND PRESERVATION**

▣ To encourage and strengthen agricultural and forest industries. Vt. Stat. Ann. §4302 (1995).

▣ To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 7.

▣ To preserve and maintain agricultural lands. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 6.

### **INTERGOVERNMENTAL RELATIONS**

▣ To promote consistency of state actions and programs with municipal comprehensive plans, and provide for review procedures to ensure that state goals and policies are reflected in municipal comprehensive plans and state guide plans. R.I. Gen. Laws §45-22.2-3 (1995).

▣ Ensure sound and integrated planning statewide. New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1992), 11.

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▣ To establish a coordinated, comprehensive planning process and policy framework to guide decisions by municipalities, regional planning commissions, and state agencies. Vt. Stat. Ann. §4302 (1995).

▣ To encourage and assist municipalities to work creatively together to develop and implement plans. Vt. Stat. Ann. §4302 (1995).

### URBANIZATION

▣ Revitalize the state's urban centers and areas. New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1992), 7.

▣ To plan development so as to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside. Vt. Stat. Ann. §4302 (1995).

▣ Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. Wash. Rev. Code Ann. §36.70A.020 (1995).

▣ Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. Wash. Rev. Code Ann. §36.70A.020 (1995).

▣ To provide for an orderly and efficient transition from rural to urban land use. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 21.

### CITIZEN PARTICIPATION

▣ To encourage citizen participation at all levels of the planning process, and to assure that decisions shall be made by municipalities, regional planning commissions, and state agencies. Vt. Stat. Ann. §4302 (1995).

▣ To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 1.

▣ The achievement of “[a] desired physical environment, characterized by beauty, cleanliness, quiet, stable natural systems, and uniqueness, that enhances the mental and physical well-being of the people.” Haw. Rev. Stat. §226-4 (1995 Supp).

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### *Critical Areas*

- ▣ Florida shall ensure that development and marine resource use and beach access improvements in coastal areas do not endanger public safety or important natural resources. Florida shall, through acquisition and access improvements, make available to the state's population additional beaches and marine environment, consistent with sound environmental planning. Fla. Stat. Ann. §187.201(9)(a) (1991).
- ▣ Florida shall protect and acquire unique natural habitats and ecological systems, such as wetlands, tropical hardwood hammocks, palm hammocks, and virgin longleaf pine forests, and restore degraded natural systems to a functional condition. Fla. Stat. Ann. §187.201(10)(a) (1991).
- ▣ To recognize and protect the unique environmental, economic, and social values of each estuary and associated wetlands; and to protect, maintain, where appropriate develop, and where appropriate restore, the long-term environmental, economic, and social values, diversity and benefits of Oregon's estuaries. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 26.
- ▣ To conserve, protect, where appropriate develop, and where appropriate restore, the resources and benefits of coastal beach and dune areas; and to reduce the hazard to human life and property from natural or man-induced actions associated with these areas. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 33.

### *Downtown Revitalization*

- ▣ In recognition of the importance of Florida's developing and redeveloping downtowns to the state's ability to use existing infrastructure [sic] and to accommodate growth in an orderly, efficient, and environmentally acceptable manner, Florida shall encourage the centralization of commercial, governmental, retail, residential and cultural activities within downtown areas. Fla. Stat. Ann. §187.201(17)(a) (1995).

### *Education*

- ▣ The creation of an educational environment intended to provide adequate skills and knowledge for students to develop their full potential, embrace the highest ideas and accomplishments, make a positive contribution to society, and promote the advancement of knowledge and human dignity. Fla. Stat. Ann. §187.201 (1995).
- ▣ To broaden access to educational and vocational training opportunities sufficient to ensure the full realization of the abilities of all Vermonters. Vt. Stat. Ann. §4302 (1995).

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### *Families*

▣ Florida shall strengthen the family and promote its economic independence. Fla. Stat. Ann. §187.201 (1991).

### *Historic Preservation*

▣ Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance. Wash. Rev. Code Ann. §36.70A.020 (1995).

▣ To identify, protect, and preserve important natural and historic features of the Vermont landscape, including . . . important historic structures, sites, or districts, archaeological sites and archaeologically sensitive areas. Vt. Stat. Ann. §4302(D) (1995).

### *Natural Disasters and Hazards*

▣ To protect life and property from natural disasters and hazards. Department of Land Conservation and Development, *Oregon's Statewide Planning Goals and Guidelines, 1995 Edition* (Salem, Ore.: The Department, 1995), 11.

▣ Require local governments, in cooperation with regional and state agencies, to prepare advance plans for the safe evacuation of coastal residents. Fla. Stat. Ann. §187.201(7)(b)24 (1995).

▣ Require local governments, in cooperation with regional and state agencies, to adopt plans and policies to protect public and private property from the effects of natural disasters. Fla. Stat. Ann. §187.201(7)(b)25 (1995).

### *Property Rights*

▣ Private property shall not be taken for public use without just compensation having been made. The property rights of land owners shall be protected from arbitrary and discriminatory actions. Wash. Rev. Code Ann. §36.70A.020 (1995).

▣ Florida shall protect private property rights and recognize the existence of legitimate and often competing public and private interests in land use regulations and other government action. Fla. Stat. Ann. §187.201 (1991).

Examples of additional subjects of goals contained in statutes and plans nationwide, but not contained in the above categories include:

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- Connecticut: water (supply and management); food production; waste; natural and cultural resources
- Florida: children; the elderly; health; public safety; water resources; hazardous and nonhazardous materials and waste; mining; cultural and historical resources; governmental efficiency; the economy; agriculture; tourism; employment; plan implementation
- Oregon: open spaces; scenic and historic areas; natural resources; recreational needs; Willamette River Greenway; ocean resources
- Rhode Island: resources; open space (recreational); innovative development regulations; data collection and dissemination; comprehensive plan consistency; subsidized housing
- Vermont: recreation
- Washington: permits; natural resource industries; open space and recreation; environment

### **NOTE 4B – A NOTE ON STATE PLANNING APPROACHES TO PROMOTE AFFORDABLE HOUSING**

There are several general approaches that states nationwide have employed to ensure (to varying degrees of success) the availability of housing, especially at appropriate locations in relation to work-sites, for low- and moderate-income households. These efforts have primarily been in the form of either voluntary legislation or court-mandated programs and have assumed three general molds that are described below: “bottom-up” approach; “top-down” approach; and appeals. Whatever the form, however, each method is an attempt to proactively remove barriers to affordable housing and place affirmative obligations on local governments to ensure its provision. In most cases, proactive state involvement has been especially critical as communities are often reluctant to initiate their own efforts to encourage affordable housing.

(1) **Bottom-up Approach.** A bottom-up approach to the provision of affordable housing is one in which the preparation of housing plans is a collaborative effort between a regional planning agency and local governments under state supervision. California is an example of a quasi-bottom-up approach.<sup>154</sup> California statutes require each local government to adopt “a comprehensive, long-term

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<sup>154</sup>Since the California statutes are not strictly vertical (i.e., state-regional-local, the term “quasi” is used). For a critique and analysis of the California housing planning statutes, see Ben Field, “Why Our Fair Share Housing Laws Fail,” in *Santa Clara L. Rev.* 34, no. 1 (1993), 35, in *Land Use and Environment Law Review 1995*, Stuart W. Deutsch and A. Dan Tarlock, eds. (Deerfield, Il.: Clark Boardman Callaghan, 1995), 145. This summary is adapted from Field's analysis, at 148-152.

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general plan,”<sup>155</sup> with seven mandatory plan elements, one of which must address housing. The statute contains detailed requirements for the housing element which has six parts: review of the previous housing element; existing and projected needs assessment; resource inventory; identification of governmental and nongovernmental constraints on housing; quantified housing objectives; and housing programs.<sup>156</sup>

Under the statute, the primary factor in the local government’s housing needs assessment must be the allocation of regional housing needs prepared by regional councils of governments (COGs) under state supervision. To establish this allocation, the California Department of Housing and Community Development (HCD) determines each COG's share of state housing needs for four income categories (very low, low moderate, moderate, and above moderate). Based on data provided by HCD relative to the statewide need for housing, each COG must then determine the existing and projected need for its region. The HCD has 30 days to review the COG's determination “to ensure that it is consistent with the statewide housing need” and may revise the need figure “if necessary to obtain consistency.”<sup>157</sup> The COG must determine, with HCD's advice, each city’s or county’s share. The statute does not spell out the formula the COGs are to use in allocating the need, but instead provides a list of criteria.<sup>158</sup> The COGs design the assumptions and methodologies themselves and submit them to HCD. They also submit their draft allocations for local comment and conduct public hearings on them before they become final. Local governments can then propose revisions to their assessed shares of needs before the allocations become final.<sup>159</sup>

Local governments must then include the COG's share of regional housing need in their individual housing plans.<sup>160</sup> The statutes require that a local governments's housing element identify specific sites to accommodate housing needs for all household income levels and “provide for sufficient sites with zoning that permits owner-occupied and rental multifamily residential use by right, including density and development standards that could accommodate and facilitate the feasibility of housing for very low and low-income households.”<sup>161</sup> Local governments must periodically revise the housing elements as appropriate, but not less than every five years.<sup>162</sup>

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<sup>155</sup>Cal. Gov’t. Code §65302 (1987 and Supp. 1995).

<sup>156</sup>Id. §65583.

<sup>157</sup>Id. §65584(a).

<sup>158</sup>Id.

<sup>159</sup>Id. §65584(c).

<sup>160</sup>Id., §65583((a)(1) (providing that “[t]hese existing and projected needs shall include the locality’s share of the regional housing need in accordance with Section 65584” of the Cal. Gov’t. Code).

<sup>161</sup>Id., §65583(c)(1).

<sup>162</sup>Id., §65588(b).

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HCD has the authority to review local housing elements or amendments to determine whether they “substantially comply” with the statute prior to their adoption by the governmental unit. HCD may submit written comments which the local government may then incorporate into the housing element or amendment.<sup>163</sup> Alternatively, the local government may adopt the draft element or amendment without changes, provided that the legislative body includes in its adopting resolution findings that indicate why it believes the element or amendment “substantially complies” with the statute, despite HCD’s findings.<sup>164</sup> Upon adoption, the local government must send a copy of the element or amendment to HCD.<sup>165</sup>

Beyond this, HCD (and the COGs, for that matter) has no authority to enforce the law, other than providing the advisory analysis of whether the element or amendment complies with the law, or withholding state distributed Community Development Block Grant or other federal monies. While the California statutes do permit private action<sup>166</sup> to compel a local government to meet its legal obligations, according to one analysis, the state courts are often reluctant to intervene in local land use decisions.<sup>167</sup>

As of 1993, 219 of the 527 (42 percent) local governments had housing elements that were in substantial compliance with the requirements of the California statute. One observer noted:

In light of prevalent noncompliance with the housing element law, it is not surprising that localities are not meeting their fair share targets. The failure to meet fair share targets most severely impacts the lower end of the housing market. In 1985, it was established that 600,000 low-income units would be needed by 1990. Only 16 percent, or 97,424, of the needed units were built. Twenty-four percent of California localities did not produce a single low-income housing unit during the five-year period from July 1987 to July 1992. Although localities appear to have been more successful in generating moderate-cost housing developments, there remains a substantial gap between median home prices and incomes of first-time home buyers.<sup>168</sup>

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<sup>163</sup>Id., §§65585(b) to (e).

<sup>164</sup>Id., §65585(f).

<sup>165</sup>Id., §65585(g).

<sup>166</sup>Cal. Gov’t. Code, §§65587(b) and (c). For a discussion of problems in obtaining judicial enforcement under the “substantially complies” standard of compliance in the statute, as well as other obstacles, see Field, “Why our Fair Share Housing Laws Fail,” 157-171.

<sup>167</sup>Id., 164-171.

<sup>168</sup>Id., 155, citing California Coalition for Rural Housing, Local Progress in *Meeting the Low Income Housing Challenge: A Survey of California Communities Low Income Housing Production* (1989), 1, 3, and 4.

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An analysis prepared for the U.S. Department of Housing and Urban Development reached a similar conclusion: “While much has been accomplished,” it found, “the overall California housing planning process – and the local elements, specifically – have made only a start in fully meeting the state's overall housing needs, especially at affordable levels.”<sup>169</sup>

Another example of a more pure form of bottom-up approach is the fair-share model first proposed (but never enacted by any state) by the U.S. Advisory Commission on Intergovernmental Relations in 1975.<sup>170</sup> The ACIR model mandated regional planning agencies to prepare a regional low- and moderate-income housing allocation plan and submit it to an appropriate state administrative agency. However, in contrast to the California approach which incorporated concepts from the ACIR model, no statewide need is computed. Rather, based on the regional estimate of need, each city and county is allocated a fair share of the regional total pursuant to several statutory criteria. The regional plan and allocations must be reviewed annually and revised as necessary. Local governments and the residents must be notified of the proposed plan and allocations. Citizens must be allowed to be present and be heard at a public hearing prior to the plan's adoption by the agency.

The ACIR model permits local governments to grant density bonuses to developers in exchange for making substantial provisions for low- and moderate-income housing. It also provides that proposals for affordable housing projects be filed with the local government which must hold a public hearing on the application and render a decision within a fixed period of time. If the local governments' regional fair-share allocation is not satisfied or reasonably provided for at the time of the hearing, it must approve the application, with or without conditions.

If a project is either denied or approved with conditions, the statute allows the applicant to appeal the local decision to a state planning agency. The issues that may be appealed to the state are limited to: (1) whether the local government has satisfied or provided for the attainment of its regional fair share; and (2) whether conditions attached to the local approval would render the construction or operation of the project economically infeasible. After a formal public hearing, the state agency may vacate the local denial or modify the conditions appropriately. In making its determination, the state agency must also consider the state development plan and any relevant local plans and programs. State agency orders may be enforced by the petitioner, a regional agency, or the state agency.

The ACIR model requires the state housing finance agency to endeavor to satisfy a local government's regional fair share if the state agency determines after a hearing that the local government has not satisfied or is not attempting to satisfy its fair share. The state housing finance agency is authorized to lease space in privately owned dwellings in jurisdictions that fail to meet fair- share allocations.

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<sup>169</sup>Burchell, Listokin, and Pashman, *Regional Housing Opportunities*, 77.

<sup>170</sup>U.S. Advisory Commission on Intergovernmental Relations (ACIR), *ACIR Legislation Program No. 6, Housing and Community Development* (Washington, D.C.: U.S. GPO, December 1975), 137-144. The description of the ACIR legislation is taken from the model statute's summary, 138.

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(2) **Top-Down Approach.** The top-down approach to the provision of affordable housing is one in which the state (often by court mandate) establishes housing goals for individual local governments based on regional needs projections. New Jersey is an example of a state that has adopted a top-down approach. In New Jersey, a specialized state agency, the Council on Affordable Housing (COAH) created by the State's Fair Housing Act of 1985,<sup>171</sup> oversees the affordable housing effort. The New Jersey statute was prompted by the *Mt. Laurel* anti-exclusionary zoning cases decided by the New Jersey Supreme Court in 1975 (*Mt. Laurel I*)<sup>172</sup> and 1983 (*Mt. Laurel II*).<sup>173</sup> The Act was upheld by the New Jersey Supreme Court in 1986 (*Mt. Laurel III*).<sup>174</sup>

In those rulings, the New Jersey Supreme Court held that the state's local zoning statutes had to be read in the context of a state – not federal – constitutional requirement to legislate “for the general welfare.”<sup>175</sup> Local governments that enacted zoning had an obligation to provide realistic opportunities for low- and moderate-income housing. Any zoning ordinance that denied reasonable opportunities to meet the local government's fair share of a region's low- and moderate-income housing need failed the state's constitutional requirements in this regard.

The statute charges COAH with determining housing regions for the state and estimating the present and prospective need for low- and moderate-income housing at the state and regional levels. COAH is to then allocate a fair share to each municipality in the housing region and can make adjustments based on environmental, infrastructure, historic preservation, or other considerations.<sup>176</sup>

Municipalities may then elect to complete housing elements.<sup>177</sup> In the element, municipalities must show how they will address the present and prospective need figures calculated by COAH and identify techniques, including subsidies and amendments to zoning codes, for providing low- and moderate-income housing. A municipality may petition COAH for “substantive certification” of its housing element.<sup>178</sup> COAH can grant substantive certification if the petitioning municipality's housing element is found to “make the achievement of the municipality's fair share of low- and

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<sup>171</sup>N.J.S.A. §52:27D-301 *et seq.* (1986 and Supp. 1995); see Harvey S. Moskowitz, “State and Regional Fair-Sharing Housing Planning,” in *Modernizing State Planning Enabling Legislation: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago, Ill: APA Planners Press, March 1996), 153-157.

<sup>172</sup>*Southern Burlington Co. NAACP v. Twp. of Mt Laurel*, 67 N.J. 151, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808, 96 S.Ct. 18, (1975).

<sup>173</sup>*Southern Burlington Co. NAACP v. Twp. of Mt Laurel*, 92 N.J. 158, 456 A.2d 390 (1983).

<sup>174</sup>*Hills Development Co. v. Twp. of Bernards*, 103 N.J. 1, 510 A.2d 621 (1986).

<sup>175</sup>*Mt. Laurel I*, 336 A.2d at 726.

<sup>176</sup>N.J.S.A. §52:27D-307 (duties).

<sup>177</sup>*Id.*, §52:27D-310.

<sup>178</sup>*Id.*, §52: 27D-314.

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moderate-income housing realistically possible.”<sup>179</sup> The certification may be linked to the adoption of ordinances, such as rezoning to higher densities, that implement the housing element.<sup>180</sup>

Preparation of the housing element and petitioning for substantive certification are voluntary. The primary incentive for substantive certification is protection from the “builder's remedy” contained in the *Mt. Laurel II* decision.<sup>181</sup> The builder's remedy is a legal mechanism by which builder/developers can petition the courts for permission to proceed with an affordable housing development in communities that have previously failed to authorize such housing or have approved only minimal amounts. Substantive certification to a municipality by COAH provides a statutorily created “presumption of validity” against any claim against the local government in an exclusionary zoning lawsuit brought against it.<sup>182</sup>

According to a 1994 analysis by Rutgers University’s Center for Urban Policy Research, the Fair Housing Act and the *Mt. Laurel* rulings have had the following impact in New Jersey:

- Overall, 57,174 affordable housing units have been zoned for, constructed, rehabilitated, or planned for over the period 1987 to 1992. Of these, about 25 percent of this activity has taken place under COAH’s jurisdiction; another 75 percent has been influenced by the presence of COAH or its predecessor, the courts of New Jersey.
- Of the 57,174 units, about 13, 831, or 25 percent, have actually been constructed. Of these, about 53 percent has taken place under COAH’s jurisdiction, and the remaining 47 percent has been influenced by either COAH or the courts.
- Another 40,343 units (75 percent of all affordable housing activity) are zoned or planned for rehabilitation in the future. Of these, 15 percent has taken place under COAH’s jurisdiction and the remaining 85 percent has been influenced by COAH or the courts.
- Over a five-year period, COAH and the courts have overseen or influenced affordable housing at a rate of 11,000 land parcels per year. Over 25 percent of this number annually has come to fruition in the form of developed or rehabilitated housing.<sup>183</sup>

(3) **Appeals Approach.** As its name suggests, an appeals approach to the provision of affordable housing is based on the existence of a state-level appeals process in which a court or a special board reviews local decisions regarding proposed affordable housing developments. Three

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<sup>179</sup>Id., §52: 27D-314(b).

<sup>180</sup>Id.

<sup>181</sup>*Mt. Laurel II*, 456 A.2d at 446-50; see also N.J.S.A. §27D-328 (Denial of builder’s remedy in exclusionary zoning litigation after January 20, 1983; exception; termination).

<sup>182</sup>N.J.S.A. §52:27D-317.

<sup>183</sup>Burchell, Listokin, and Pashman, *Regional Housing Opportunities*, 97. Much of the 1987-1992 activity under the Fair Housing Act, it should be noted, occurred during a severe housing recession.

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New England states, Massachusetts,<sup>184</sup> Connecticut,<sup>185</sup> and Rhode Island,<sup>186</sup> now provide for a direct appeal and override of local decisions which reject or restrict proposals for low- or moderate-income housing. They have each established a procedure by which an appeals board (in Massachusetts<sup>187</sup> and Rhode Island) or a court (in Connecticut) can set aside local zoning decisions blocking housing developments that receive federal or state assistance.<sup>188</sup>

These statutes tend, either explicitly or implicitly, to reverse or shift the burden of proof. The local government must now justify its exclusion of the affordable housing project, or the conditions that make the project economically infeasible, whereas before, developers had the burden of showing why they should be granted relief from zoning requirements.

Shifting the burden of proof in the housing appeals statutes serves several important purposes:

They are strong statements that affordable housing is a state priority to which local governments must be sensitive. They provide teeth for local and regional housing plans without forcing local governments to relinquish control over land development. And they give affordable housing advocates and developers a means to overcome opposition to such housing.<sup>189</sup>

The affordable housing appeals statutes are not planning statutes per se; they require no planning framework at the state, regional, or local levels. However, housing goals may enter into the state appeals process. In Rhode Island, for example, local zoning and other land use ordinances are to be considered “consistent with local needs” if they implement a comprehensive plan with a housing element that provides for low- and moderate-income housing in excess of ten percent of the housing units in the community.<sup>190</sup> Whether the local government meets, or plans to meet, the 10 percent

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<sup>184</sup>Mass. Gen. Laws Ch. 40B, §§20-23 (West 1994).

<sup>185</sup>Conn. Gen. Stat. Ann., Ch. 126a, §8-30(g) (1995 Cum Supp).

<sup>186</sup>R.I. Gen. Laws, Ch. 53, §45-53-1 *et seq.* (1999).

<sup>187</sup>The state and federal constitutional validity of statutes in Massachusetts has been affirmed in several Massachusetts decisions. See, e.g., *Mahoney v. Bd. of Appeals of Winchester*, 366 Mass. 228, 316 N.E.2d 606, appeal dismissed 420 U.S. 903 (1974); *Bd. of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs*, 363 Mass. 339, 294 N.E.2d 393 (1973).

<sup>188</sup>These statutes are discussed in “Housing Appeals Boards: Changing Presumptions about Affordable Housing,” by Peter Salsich, Jr. in *Modernizing State Planning Enabling Legislation: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 159-162.

<sup>189</sup>Salsich, “Urban Housing,” 208-209.

<sup>190</sup>R.I. Gen. Laws, Ch. 53, §45-53-3(b) (1999). See *Curran v. Church Community Housing Corporation*, 672 A.2d 453 (R.I. 1996) (holding that where existing zoning ordinance was outdated and did not conform to town’s recently adopted comprehensive plan, decision of local zoning board of review to approve application for special exception to

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requirement is a standard under which a case is reviewed when a local decision involving an affordable housing project is appealed.<sup>191</sup>

How have these appeals statutes worked? According to Rutgers University's Center for Urban Policy Research (CUPR), under the Massachusetts program, there were 458 comprehensive permit applications for affordable housing filed under the comprehensive permit program between 1969 and 1986. These represented a proposed 33,884 housing units. CUPR, in 1994, placed its "guesstimate" of some 20,000 housing units completed and occupied under the statute since its inception.<sup>192</sup> In Connecticut, the appeals process, in effect since 1989, has led to the local approval statewide of some 250 to 500 affordable housing units by the end of 1993.<sup>193</sup> The Rhode Island statute was enacted in 1991. Its governing regulations were released a year later. From 1992 to 1993, there were only three appeals to the Housing Appeals Board (HAB), one of which was not properly filed and therefore could not be officially be heard by the state, a second that upheld a local community's denial, and a third where the HAB remanded the application to the local zoning board for further review on the issue of traffic safety. As of 1994, there had been no units built under the program.<sup>194</sup>

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build low-and moderate-income housing that would assist town in achieving its plan to have at least 10 percent of its housing inventory consist of low- and moderate-income units in accordance with the state's Low and Moderate Housing Act was fully justified).

<sup>191</sup>R.I. Gen. Laws, Ch. 53, §45-53-6(b)(2) (1991).

<sup>192</sup>Burchell, Listokin, and Pashman, *Regional Housing Opportunities*, 129.

<sup>193</sup>*Id.*, 133.

<sup>194</sup>*Id.*, 136-137.

## STATE LAND-USE CONTROL

This Chapter includes model legislation for: (1) siting state facilities; (2) designating areas of critical state concern; and (3) regulating developments of regional impact (DRIs), which are developments that have multi-jurisdictional impacts.

The model legislation for siting state facilities proposes a uniform process by which state agencies would make decisions on the siting, expansion, or reduction of such facilities based on criteria either promulgated by a state planning agency or included in the statute. The siting process is to balance consideration of state and regional needs for services, accessible, efficient, and cost-effective delivery of such services, and the impacts of such facilities upon surrounding areas and communities. Through such a statute, the state would also ensure public participation in siting decisions.

Under the area of critical state concern statute, the state identifies large tracts of land, both public and private, that are important to the environmental health of the state, or regions of the state, and carefully regulates development within those areas to avoid or minimize conflict with an environmental or natural resource or constraint, public facility or public investment, or historic or archaeological resource that would otherwise result.

For the DRI model, two alternative regulatory structures are proposed that use review criteria promulgated by the state planning agency: (a) the host local government reviews DRIs that are proposed in its jurisdiction; or (b) the regional planning agency (or other agency as designated) reviews DRIs that have been referred to it by the host local government. Provisions for enforcement, amendments, development agreements, and appeals are also included in the model statute.

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### Chapter Outline

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- 5-103 Preparation of Proposed Statement of Needs; State Facilities Map
- 5-104 Submission of Proposed Statement of Needs to State Legislature; Adoption
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### NOTE 5 – A NOTE ON NEW YORK CITY’S “FAIR-SHARE” PROCESS

### Cross-References for Sections in Chapter 5

<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
5-101	5-102 to 5-110, 6-603
5-102	5-101, 5-103 to 5-110
5-103	4-203, 4-204, 4-204.1, 5-101, 5-102, 5-104 to 5-110, 6-602
5-104	4-301 to 4-304, 5-101 to 5-103, 5-105 to 5-110
5-105	4-204, 4-204.1, 5-101 to 5-104, 5-106 to 5-110, 5-201, 6-602
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5-110	5-101 to 5-109
5-201	5-202 to 5-214
5-202	4-204, 4-204.1, 4-210, 5-201, 5-203 to 5-214
5-203	5-201 to 5-202, 5-204 to 5-214, 7-209, 7-210
5-204	5-201 to 5-203, 5-205 to 5-214, 6-107, 7-209, 7-210
5-205	5-201 to 5-204, 5-206 to 5-214
5-206	5-201 to 5-206, 5-207 to 5-214
5-207	5-201 to 5-206, 5-208 to 5-214, 5-309

**Section No. Cross-Reference to Section No.**

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<b>5-208</b>	<b>5-201 to 5-207, 5-209 to 5-214</b>
<b>5-209</b>	<b>5-201 to 5-208, 5-210 to 5-214</b>
<b>5-210</b>	<b>5-201 to 5-209, 5-211 to 5-214, 5-302</b>
<b>5-211</b>	<b>5-201 to 5-210, 5-212 to 5-214, 5-302</b>
<b>5-212</b>	<b>5-201 to 5-211, 5-213 to 5-214</b>
<b>5-213</b>	<b>5-201 to 5-212, 5-214</b>
<b>5-214</b>	<b>5-201 to 5-213</b>
<b>5-301</b>	<b>4-102, 4-204, 4-204.1, 4-210, 5-302 to 5-315</b>
<b>5-302</b>	<b>5-210, 5-211, 5-301, 5-303 to 5-315</b>
<b>5-303</b>	<b>4-204, 4-204.1, 5-301 to 5-302, 5-304 to 5-315</b>
<b>5-304</b>	<b>5-301 to 5-303, 5-305 to 5-315</b>
<b>5-305</b>	<b>5-301 to 5-304, 5-306 to 5-315</b>
<b>5-306</b>	<b>5-301 to 5-305, 5-307 to 5-315</b>
<b>5-307</b>	<b>5-301 to 5-306, 5-308 to 5-315</b>
<b>5-308</b>	<b>5-301 to 5-307, 5-309 to 5-315</b>
<b>5-309</b>	<b>5-301 to 5-308, 5-310 to 5-315</b>
<b>5-310</b>	<b>5-207, 5-301 to 5-309, 5-311 to 5-315</b>
<b>5-311</b>	<b>5-301 to 5-310, 5-312 to 5-315</b>
<b>5-312</b>	<b>5-301 to 5-311, 5-313 to 5-315</b>
<b>5-313</b>	<b>5-301 to 5-312, 5-314 to 5-315</b>
<b>5-314</b>	<b>5-301 to 5-313, 5-315</b>
<b>5-315</b>	<b>5-301 to 5-314</b>

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### SITING STATE FACILITIES

The state, in its capacity to provide for the needs of its citizens, has the power to site state facilities that contribute to the welfare of its citizens. Some state facilities, such as a new museum, office building, or courthouse, are typically hailed by the community receiving them. Others, such as a new hazardous waste treatment or storage facility, mental hospital, or vehicle depot, are generally not welcomed anywhere. Difficulty in siting a state facility occurs when community residents believe that the facility in question places an undesirable group within the community or when the facility houses a use that produces unpleasant or potentially dangerous environmental effects.<sup>1</sup>

#### TYPES OF STATE FACILITIES

For the purposes of this Chapter, “state facility” refers to any type of land use or facility that the state may site, operate, or, in some instances, wholly or partially fund. The term is defined in the model statute, below, as follows:

“**State Facility**” means a land use or facility that provides state services and whose location, significant expansion, or significant reduction in size is subject to the control and supervision by a state agency.... Examples of state facilities include, but shall not limited to the following: libraries, courthouses, recreation areas, group homes, recycling centers, hospitals, landfills, waste treatment centers, and airports. No land use or facility shall be considered a “state facility,” however, unless it meets one of the following two criteria:

- (a) It is operated by the state on property owned or leased by the state that is greater than [*insert figure*] square feet in total floor area; or
- (b) It is used primarily for a program or programs operated pursuant to a written agreement on behalf of the state that derives at least [50] percent and at least [\$250,000] of its annual funding from the state.

Listed on the following page are examples of state facilities, classified according to the degree of contention they tend to provoke. Of course, it is always difficult to generalize about an issue as sensitive as siting state facilities; what is manna to one community may undoubtedly be a poison pill to another.

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<sup>1</sup>Michael Dear, “Understanding and Overcoming the NIMBY Syndrome,” *Journal of the American Planning Association* 58, no. 3 (Summer 1992): 291-292.

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### SITING UNDESIRABLE OR CONTROVERSIAL FACILITIES

While most citizens recognize the intrinsic need for undesirable or controversial facilities, few people want them located within their communities. These facilities, known also as Locally Unwanted Land Uses (LULUs) and Not In My Backyards (NIMBYs), are difficult for a state to site

NONCONTROVERSIAL	SOMETIMES CONTROVERSIAL	CONTROVERSIAL
Administrative Offices	Garages	Airports
Community Centers	Group Homes <sup>2</sup>	Landfills
Courthouses	Highways	Prisons
Day Care Centers	Hospitals	Sewage Treatment Facilities
Libraries	Public Schools	Transfer Stations
Nursing Homes	Recycling Centers	Solid and Hazardous Waste
Parks	Storage Facilities	Disposal Facilities
Playgrounds		
Recreation Areas		
Senior Centers		

because local governments, community groups, and individual citizens usually oppose and fight their siting. Each thinks the facility should be located somewhere else.

In the past, undesirable state facilities were usually sited in communities where residents did not have the political power to stop their siting.<sup>3</sup> Generally, this meant that less affluent, minority neighborhoods bore the brunt of these sitings.<sup>4</sup> The overall impact of this trend was to make these communities even less desirable places in which to live and work. A problem, therefore, is how to achieve an “equitable” distribution of undesirable facilities. Equally important issues, however, are

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<sup>2</sup>The siting of group homes raises many different (primarily legal) issues than does the siting of these other listed state facilities. Under the Fair Housing Act, 42 U.S.C. §3601 *et seq.*, the siting of group homes is protected against discrimination on the basis of race, color, religion, sex, national origin, mental or physical handicap, and families with children under age 18. Legal challenges concerning racial discrimination, equal protection, substantive due process, rights of association, exclusionary zoning, standing, presumptions of validity, and the Americans with Disabilities Act (to name a few) are not uncommon with respect to the siting of congregate living facilities. The U.S. Supreme Court has recently addressed many of these issues in *City of Edmonds v. Oxford House, Inc.*, 115 S.Ct. 1776 (1995) which held that a zoning ordinance that limited the number of unrelated persons who may live together is not exempt from the FHA’s requirement that a municipality make “reasonable accommodations” for handicapped housing.

<sup>3</sup>See Vicki Been, “What’s Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses,” *Cornell Law Review* 78 (Spring 1993): 1002.

<sup>4</sup>*Id.*, 1003, citing Regina Austin and Michael Schill, “Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice,” *Kansas Journal of Law and Public Policy* 1 (1991): 71; and Luke W. Cole, “Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law,” *Ecology Law Quarterly* 19 (1992): 628.

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how to ensure appropriate design accommodations (e.g., landscaping and buffering) once the facility is sited and how to adjust/compensate for economic windfalls and wipeouts created by the siting.

Addressing the first issue of equitable distribution, Law Professor Vicki Been has proposed three “fairness” criteria against which systems for siting or distributing controversial or unwanted land uses may be evaluated.<sup>5</sup>

- **Fairness in the pattern of distribution.** This criteria requires that the benefits and burdens of state facilities be spread out across the state on a per capita or proportional basis.<sup>6</sup>
- **Fairness in the efficiency of the distribution.** This criteria requires that progressive sitings be accomplished in order to eliminate past inequalities of the siting system. (Progressive sitings are those sitings that attempt to correct for past patterns of inequitable sitings.) For example, under this scenario, the practice of siting undesirable facilities in poor or minority neighborhoods would be stopped, and all future undesirable facilities would be sited in neighborhoods that currently have few or no undesirable facilities.<sup>7</sup>
- **Fairness in the procedure by which the distribution was effected.** In order to make the siting process equitable to all parties involved, everyone must be on an equal footing during the process. To accomplish this goal, each community should be as likely as any other to be selected as a site for a potential facility. The process by which the state determines a site should be open and allow for community input. The state should also attempt to provide all interested parties with pertinent information upon which the siting decision will be based. In order to provide for more equality in siting, the state must also provide a framework that eliminates the effects of economic and political power.<sup>8</sup>

As noted above, however, the focus of siting should not be on “equitable distribution” alone. In that vein, additional fairness criteria might also include:

- **Fairness in the award of benefits and compensation.** A system of financial incentives and compensation might be created to offset any negative impacts of the siting and capture any economic windfalls. For example, an increasing number of communities are vying for state facilities like prisons and landfills that years ago most communities resoundingly rejected. Now, many localities are bidding for these facilities due to financial incentives associated with the siting, as well as job possibilities and residual economic growth for the community at large.

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<sup>5</sup>Id., 1028.

<sup>6</sup>Id., 1029.

<sup>7</sup>Id., 1047-48.

<sup>8</sup>Id., 1052-1055.

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- **Fairness in implementing design standards.** In many cases, siting a state facility is less a question of “where” the facility should be located (i.e., the site is chosen due to locational or functional characteristics of the facility, such as service areas or soil types) and more an issue of “how” the siting should accommodate the community in which it is placed.<sup>9</sup> Design standards, such as landscaping, buffering, and other screening requirements, will usually help lessen any negative impacts of the facility on its neighbors.

### APPROACHES TO SITING FACILITIES

There are many methods for siting state facilities that take into account, to varying degrees, the fairness criteria just delineated. These approaches include: (1) point systems, (2) lotteries, (3) auctions, and (4) the fair-share process, each of which is described below. In many cases, these techniques have not yet been implemented by any governmental units; instead, they are simply theoretical creations of commentators interested in promoting more equitable methods of siting state facilities, especially unwanted or controversial ones.

### POINT SYSTEMS

As its name suggests, a point system is a scheme that would assign points to facilities, based primarily on their undesirability.<sup>10</sup> Under a point system, each substate district<sup>11</sup> would be assigned a number of points that must be “used up” by the district. The state would begin the process by siting a facility in a particular district. If the district wanted to avoid the state-mandated site, it could bargain with other districts to exchange the proposed facility for one or more facilities of the same number of points. Transactions would be overseen by the state administrative body responsible for siting the facilities. The theory behind the point system is that districts will focus their energies on determining which facilities they would be willing to accept rather than trying to avoid all sitings.<sup>12</sup>

A variation of this system would be to assign points to existing state facilities that are indicated on a map. In order to promote equity, future sitings would avoid those areas that already have a large number of facilities, or points. For example, a state might only consider site locations within those substate districts that have a point total of 20 or lower until all districts are within a few points of one another. At that time, all districts would once again be eligible for new facilities.

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<sup>9</sup>While some state facilities such as libraries, courthouses, and even prisons, may not necessarily be site-dependent (i.e., they may be located virtually “anywhere”), other facilities like landfills require appropriate environmental features (e.g., soil type) as well as access to rail lines and freeway systems.

<sup>10</sup>Frank Popper, “The Great LULU Trading Game,” *Planning* 58, no. 5 (May 1992): 15-17.

<sup>11</sup>Although not used by Popper, substate districts, (rather than counties or municipalities) are used as the basis for dividing the state into planning regions in this Section of the *Legislative Guidebook*. Because substate districts are created under a process that balances numerous criteria rather than geographic location alone, they should be a more equitable method of dividing the state for the purpose of siting state facilities. For more information about substate districts, see Section 6-602 of the *Legislative Guidebook*.

<sup>12</sup>*Id.*, 16.

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Yet another variation of this system would be to include “desired” state facilities in the point allocation, thereby designing a system of trade-offs. For example, if a substate district wanted a new courthouse, it might have to accept two halfway houses. If the district decided it did not want the courthouse badly enough to accept the halfway houses, both facilities would go to another district.<sup>13</sup>

There are a number of drawbacks to a point system. First, it may be difficult and/or unrealistic to believe that a consensus could be reached over the point values assigned. As described earlier, for different communities, a given type of facility could be either a bane or a boon. And, some facilities are site-dependent as their locations are not interchangeable. Also, in order for bargaining and trading to occur, several sitings must occur concurrently. Finally, an effective point system would require a sophisticated state agency to perform the sitings, coordinate the trades, and maintain the point bank.<sup>14</sup>

### LOTTERIES

Under a lottery system, the state would randomly locate the site for a proposed facility and then enforce its selection by law. (To reiterate, this assumes that the type of facility at issue is not one that is site-dependent.) Once selected for a siting, a community would become exempt from additional forced sitings until all the other suitable sites have been recipients of equivalent types of facilities.<sup>15</sup>

A main advantage of a lottery system is its objectivity and its ability to distribute undesirable facilities on a broader basis. A drawback to a lottery system is that residents may still resort to other legal means to block siting decisions.<sup>16</sup>

### AUCTIONS

Under an auction system, the state would narrow down the site for unwanted or undesirable facilities (e.g., LULUs) to a small number of possible host communities and then require each of those communities to submit a bid that represents the amount of compensation requested by the community in return for accepting the facility. The community with the lowest bid would receive the facility; the compensation would be paid with monies received from the other bidders. Since the compensation for the host community would be funded on a pro rata basis by the combined bids of the other communities, the incentive for a community to raise its bid to avoid a siting is, at least in theory, lessened.

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<sup>13</sup>Id.

<sup>14</sup>Connecticut General Assembly, Legislative Program Review and Investigations Committee, *Siting Controversial Land Uses*, (Hartford, Conn.: The Committee, January 1992), 6. This report rejected the idea of implementing a point system for state sitings of controversial land uses.

<sup>15</sup>Id. See also Vicki Been, “Compensated Siting Proposals: Is It Time to Pay Attention?,” *Fordham Urban Law Journal* 21 (1994): 795.

<sup>16</sup>Id.

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Again, however, this approach does not adequately address the issue of fairness. Because poorer communities will tend to submit bids that are lower than wealthier communities, poorer areas will continue to be candidates for the siting of the most unwanted facilities. Additionally, control over the process by which the initial bidders are chosen may not be equitable. Bidders may not be knowledgeable about the adverse effects of the facility. And, as with the lottery system described above, adverse impacts from the facility may be unknown or unquantifiable, thus making a compensation scheme an inadequate remedy.

A variation on this approach, a two-stage auction, remedies some of these drawbacks. A report from Connecticut describes the two-stage auction process as follows:

In the first stage, each community submits a bid, and one is chosen at random through a lottery process. The bid is announced and a second auction for all but the community whose bid was picked is held. If a lower bid is received during the second-stage auction, that community receives the facility; otherwise, the randomly selected bidder remains the “winner.” Payments to the host community are calculated in the same way, based on first-stage bids.

Since the chances of being selected as a facility site initially are equal, the two-stage auction is more fair to poorer communities. Also, if not selected by the random process, poorer communities could increase their bids during the second stage to reduce their chances of being low-bidder without raising the amount they would be required to pay in host community compensation.<sup>17</sup>

### **FAIR-SHARE PROCESS**

The “fair-share” process is another technique designed to address the disparity of an over-concentration of undesirable facilities in one community. This process was designed by the New York City Planning Commission and delineates specific criteria that city agencies must follow when siting a new city facility, or when expanding, significantly reducing, or closing an existing city facility. For instance, when siting a facility using the fair-share process, an agency would consider: service need, cost-effective delivery of services; effects on neighborhoods; and the geographic distribution of services. These factors are then applied in conjunction with others such as land use, zoning, and compatibility with nearby uses.

New York City has experienced several difficulties with its fair-share program since it was implemented in 1991. For example, the impacts of the process have not been as strong as originally hoped since the process is limited to city sitings and does not take into account those undesirable facilities sited by federal and state agencies. In addition, the process has been difficult to administer due to the relatively short time frame in which siting decisions must occur. A complete description of the New York City Fair Share Process is included in the Note at the conclusion of this Chapter.

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<sup>17</sup>Connecticut General Assembly, Legislative Program Review and Investigations Committee, *Siting Controversial Land Uses*, 6-7.

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### **ALTERNATIVES – COMBINING APPROACHES**

The goal of equitably distributing state facilities may also be pursued in other ways that include combining aspects of the processes described above. In conjunction with implementing a fair-share program, a ranking system might be developed to rate a facility's negative effects on its host community. For example, if a community would more readily accept a homeless shelter than a prison, this preference would be reflected in the ranking system. One way to rank state facilities would be to distribute a survey to all governing bodies in the state that currently have planning and/or zoning powers. Results of the survey would be used to create a hierarchy of unwanted facilities, grouped both by type of use and by the overall undesirability of the facility as compared to other facilities. The map could note the ranking of facilities in the districts and determine, by type or ranking, what districts should be given a certain facility. The downside of this type of approach is that, like the point systems discussed above, it may be difficult to manage, and (as emphasized earlier) very many state facilities are site-dependent. Including these facilities in a ranking system would ultimately undermine that program.

In order to fairly distribute all types of state facilities on a statewide basis, the state could also distinguish facilities that have societal impacts<sup>18</sup> from those that have environmental impacts. Facilities with environmental impacts (e.g., a waste incinerator) are generally more difficult to site and may negatively affect the health of the community more than a group home for recovering alcoholics. While residents of the group home may blend into the community with few (if any) negative effects, no matter how well run, the waste incinerator will increase air pollution and cause health problems to susceptible individuals.

Some consideration should also be given to whether the proposed state facility is designed for the benefit of the area in which it is located or whether it benefits a larger region. In general, districts should be required to accept some state facilities that may not directly benefit their residents, but which the state and society as a whole needs. On the other hand, an argument could be made that districts should not be required to accept a state facility that only benefits another district or region if that facility could be sited in the district or region it will serve.

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## **SITING STATE FACILITIES**

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### ***Commentary: A Model Statute for Siting State Facilities***

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<sup>18</sup>For an analysis of the desirability of societal facilities, see Dear, "Understanding and Overcoming the NIMBY Syndrome," 291-294.

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The model legislation proposed below is similar to that used to enact the New York City fair-share process. One major difference between the two processes, however, is that, under the model legislation, the state legislature appropriates funding for the facilities prior to their siting rather than after.<sup>19</sup> The model legislation also provides for a process that is based on the division of the state into substate districts. The elements of the proposed process are as follows:

1. A state agency prepares a proposed Statement of Needs that describes the facilities it will need in the next two-year period (without identifying a specific location for the facility<sup>20</sup>) and submits the statement to the state planning agency.
2. The state planning agency combines all of the state agencies' Statements of Needs into one and submits its own proposed Statement of Needs and state facilities map, which shows existing state facilities, to the state legislature.
3. The state legislature rejects or adopts, in whole or in part, the proposed Statement of Needs.
4. State agencies then site new state facilities using criteria promulgated by the state planning agency in a process that includes public hearings.

The purpose of presenting the proposed Statement of Needs to the state legislature prior to siting the facilities is twofold. First, since the Statement of Needs is not site-specific (except in the case of a facility's significant expansion or significant reduction), funding for a facility will not (theoretically) be withheld by the state legislature based on its location. Second, the passage of the proposed Statement of Needs, in conjunction with approval of the state capital budget, indicates that the state legislature concurs with the state agency regarding the need for the facility.

As part of the rule-making process, the state planning agency must promulgate the fair-share criteria to be used by the state agencies. Although criteria are included in the model, each state planning agency will have to carefully tailor fair-share criteria for its own state, based on that state's unique concerns and characteristics.

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<sup>19</sup>This provision is modeled after a Connecticut statute for a state facility plan, found at Conn. Gen. Stat. Ann. §§4b-23 (a)-(d).

<sup>20</sup>This model legislation assumes that the location of the state facility is not site-dependent and that the specific location is a factor that can be determined based on several variables. If the state facility were indeed site-dependent (i.e., the facility had to be located at a certain site due to the need for the facility, its specific function and/or its service area), then the purpose of any legislation would most likely be limited to devising techniques for applying a set of windfall or wipeout compensatory methods. See Donald Hagman and Dean Mischynski, eds., *Windfalls For Wipeouts: Land Value Capture and Compensation* (Chicago: American Society of Planning Officials, 1978).

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### *Siting State Facilities - A Model State Facilities Siting Act*

#### **5-101 Purpose<sup>21</sup>**

- (1) The purpose of this Act is to ensure the equitable distribution of state facilities among regions of the state by:
  - (a) siting, significantly expanding, or significantly reducing state facilities in a manner that balances:
    1. considerations of state and regional needs for services;
    2. accessible, efficient, and cost-effective delivery of such services; and
    3. the impacts of state facilities upon surrounding areas and communities, including the impact upon the environment and natural resources.
  - (b) requiring state agencies to identify special criteria for locating, significantly expanding, or significantly reducing state facilities and to make a record of their decision-making process; and
  - (c) ensuring public participation in the process of siting, significantly expanding, or significantly reducing state facilities.

#### **5-102 Definitions**

As used in this Act, the following definitions shall apply:

- (1) **“Proposed State Facility”** means a new state facility to be established as a result of an acquisition, lease, construction, or contractual action, or the substantial change in the use of an existing state facility.
- (2) **“Significant Expansion”** means an addition of real property by purchase, lease, interagency transfer, consolidation, or enlargement that would expand the lot area, floor area, or capacity of a state facility by [25] percent or more and by at least [500] square feet. An expansion of less than [25] percent shall be deemed significant if it, together with expansions made in the prior [three-year] period, would expand the state facility by [25] percent or more and by at least [*insert figure*] square feet.<sup>22</sup>

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<sup>21</sup>This section is based on the “Purpose and Goals” section of New York City Planning Commission, “Criteria for the Location of City Facilities,” (adopted on December 3, 1990).

<sup>22</sup>Id.

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- (3) “**Significant Reduction**” means a surrender or discontinuance of the use of real property that would reduce the size or capacity to deliver service of a state facility by [25] percent or more. A reduction of less than [25] percent shall be deemed significant if it, together with reductions made in the prior [3]-year period, would reduce the state facility by [25] percent or more.<sup>23</sup>
- (4) “**State Agency**” means an agency, board, commission, or other office of the executive branch of state government that has the power to site, significantly expand, or significantly reduce state facilities.
- (5) “**State Facility**”<sup>24</sup> means a land use or facility that provides state services and whose location, significant expansion, or significant reduction in size is subject to the control and supervision by a state agency, as defined in paragraph (4) above. Examples of state facilities include, but shall not limited to the following: libraries, courthouses, recreation areas, group homes, recycling centers, hospitals, landfills, waste treatment centers, and airports. No land use or facility shall be considered a “state facility,” however, unless it meets one of the following two criteria:
- (a) is operated by the state on property owned or leased by the state that is greater than [*insert figure*] square feet in total floor area; or
- (b) is used primarily for a program or programs operated pursuant to a written agreement on behalf of the state that derives at least [50] percent and at least [\$250,000] of its annual funding from the state.
- (6) “**State Facilities Map**” means the state facilities map described in Section [5-103].
- (7) “**Statement of Needs**” means the Statement of Needs described in Section [5-103].
- (8) “**Substate District**” means the geographic area within each set of boundaries delineated by the governor under Section [6-602].

### 5-103 Preparation of Proposed Statement of Needs; State Facilities Map

- (1) Each state agency shall, on a biennial basis and by [*date*], prepare a proposed Statement of Needs for those state facilities that are to be sited, significantly expanded, or significantly reduced within its jurisdiction. The proposed Statement of Needs shall be prepared in a format and manner prescribed by the [state planning agency].

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<sup>23</sup>Id. This is a combination of two definitions in the New York City criteria, one for the reduction of facilities and one for the closure of facilities.

<sup>24</sup>This definition is largely based on the New York City definition of “facility,” as found in New York City Planning Commission, “Criteria for the Location of City Facilities,” (adopted on December 3, 1990).

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- (2) The proposed Statement of Needs shall consist of both text and maps and shall include:
- (a) a description of all state facilities to be sited or significantly expanded by the agency during the next [2] years, but without reference to a specific site or sites where the facility is not yet in existence;
  - (b) any special locational or siting criteria for each state facility or type of facility, in addition to the criteria adopted by the [state planning agency] pursuant to Section [5-105];
  - (c) capital and annual operating cost estimates for each proposed state facility;
  - (d) supporting documentation that shows the state or regional need for the proposed state facility;
  - (e) a statement describing the [consistency of *or* the relationship to] the proposed state facility with the state comprehensive plan pursuant to Section [4-203], the state land development plan pursuant to Section [4-204], [[and] the state biodiversity conservation plan pursuant to Section [4-204.1], [and *other state plans*]<sup>25</sup>; and
  - (f) a description of all proposed significant state facility reductions and closures for the next [2] years.
- (3) Each state agency shall provide the [state planning agency] with information on all existing state facilities in a format and manner prescribed by the [state planning agency] by [date] and in each succeeding [2]-year period. This information shall include:
- (a) the location of the state facility, including county, municipality, street address, or other relevant method of determining exact location;
  - (b) the type, use, or purpose of the state facility, including the number of persons served by the facility;
  - (c) the size of the state facility, including the acreage of the land and descriptions of any buildings, including their square footage;
  - (d) the year of construction of the state facility and any historic characteristics;
  - (e) the area served by the state facility. A state facility may serve only one of the following:
    - 1. all or a portion of a substate district designated pursuant to Section [6-602];

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<sup>25</sup>This information might also appear in the state capital budget and capital improvement program. See Section 4-303(1)(a), Contents of State Capital Budget and Capital Improvement Program, of the *Legislative Guidebook*.

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2. more than one substate district designated pursuant to Section [6-602], but not the entire state; or
  3. the state; and
- (f) all other real property, as described by location and acreage, that is owned by or under the control of the state agency and that is not the site of a state facility, but need not include rights-of-way and easements.
- (4) The [state planning agency] shall prepare by [date] and update biennially a state facilities map drawn to an appropriate scale and divided into substate districts, containing the information described in paragraph (3) above.
  - (5) The [state planning agency] shall review each proposed Statement of Needs submitted by each state agency to ensure that it is prepared in the format and manner prescribed by the [state planning agency].

### **5-104 Submission of Proposed Statement of Needs to State Legislature; Adoption**

- (1) The [state planning agency] shall combine the individual proposed Statements of Needs of all state agencies into its own consolidated proposed Statement of Needs. The [state planning agency] shall then present its proposed Statement of Needs and state facilities map to the state legislature by [date] in conjunction with the state capital budget and capital improvement program prepared pursuant to Sections [4-301 through 4-304].
- (2) The legislature may adopt the proposed Statement of Needs and state facilities map as submitted, or may adopt them with modifications. The adopted document shall be called “The Statement of Needs for the [current biennial period].”
- (3) Within [60] days of the adoption of the Statement of Needs and the state facilities map, the director of the [state planning agency] shall certify copies of the documents to:
  - (a) the director of each state agency;
  - (b) the director of each substate district organization designated pursuant to Section [6-602];

[or]

  - (b) the director of each [regional planning agency];
  - (c) the chief executive officer of each local government in the state;

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- (d) the director of each local government's planning department or, where there is no local planning department, the chair of each local government's planning commission;
  - (e) the state library and all public libraries in the state that serve as depositories of state documents; and
  - (f) other interested parties.
- (4) The director of the [state planning agency] shall make the Statement of Needs and the state facilities map available for sale to the public at actual cost or a lesser amount.

### **5-105 Establishment of Criteria for Siting or Expanding State Facilities**

- (1) Not later than [date], the [state planning agency] shall propose rules that a state agency shall use to site new state facilities and make decisions regarding the significant expansion in the size or capacity of service delivery for existing state facilities.
- (2) The criteria for the siting or significant expansion of state facilities shall be designed to:
- (a) further the fair distribution of state facilities among substate districts, created pursuant to Section [6-602];
  - (b) take into account the burdens and benefits associated with state facilities, consistent with statewide or regional needs for such services;
  - (c) promote the accessible, efficient, and cost-effective delivery of such services; and
  - (d) evaluate the [social, environmental, and economic] impacts of state facilities upon surrounding areas and communities.

[or]

- (2) The criteria for the siting or significant expansion of state facilities shall include, but shall not be limited to, the following:
- (a) whether the siting or significant expansion will result in a more equitable distribution of state facilities or of state facilities of a specific type within the state or whether it will result in an overconcentration of facilities or of facilities of a specific type in a substate district;
  - (b) whether the siting or significant expansion will be compatible with existing facilities, whether governmental or private, within a [one-half mile] radius of the site,

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- (c) the relationship of the siting or significant expansion to other state facilities identified on the state facilities map;
- (d) whether the siting or significant expansion will result in cost-effective delivery of the services the state facility is intended to provide;
- (e) whether the siting or significant expansion will result in a state facility that is accessible and able to satisfy the needs of those it is intended to serve;
- (f) whether the siting or significant expansion is to be located in an area of critical state concern designated pursuant to Section [6-201 *et seq.*];
- (g) whether the siting or significant expansion will be [substantially *or* reasonably] consistent with adopted local government comprehensive plans and/or the adopted regional comprehensive plan;
- (h) whether the siting or significant expansion will be consistent with goals, policies, or guidelines in the state land development plan pursuant to Section [4-204] [and the state biodiversity conservation plan pursuant to [4-204.1]];
- (i) whether the siting or significant expansion will satisfy any special locational or siting criteria established by the Statement of Needs and identified in the state facilities map for this type of state facility;
- (j) whether the siting or significant expansion will cause an economic benefit or detriment to the surrounding community; and
- (k) whether design standards (e.g., landscaping, buffering, and other screening requirements) would be desirable or necessary to mitigate any negative impacts of the state facility on its surrounding community.

- ◆ This latter alternative (i.e., 2(a)-2(k)) is more specific about the criteria that a state might develop. Included as a Note at the end of this Chapter, the New York City criteria are even more detailed in that they differ according to the action being taken (e.g., siting, expanding, closing, or reducing) as well as the type of facility under consideration (e.g., local or neighborhood; regional or citywide; transportation and waste management; residential; administrative offices and data processing). The following optional language mirrors the New York legislation. The criteria that must be applied should vary with the type of facility; this section of the model legislation would have to be carefully tailored to reflect any characteristics of a state facility that are unique to a given area.

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- [(3) In addition to any applicable criteria established in paragraph (2) above, the criteria for the siting or significant expansion of state facilities that have local or neighborhood significance<sup>26</sup> shall be as follows:
- (a) whether the siting or significant expansion is needed in the community or local service delivery district (e.g., as assessed by infant mortality rates; facility utilization rates; emergency response time; parkland/population ratios, etc.);
  - (b) whether the proposed location of the new or expanded state facility is in an area with a low ratio of service supply to service demand; and
  - (c) whether the proposed site is accessible to those it is intended to serve.]
- [(4) In addition to any applicable criteria established in paragraph (2) above, the criteria for the siting or significant expansion of state facilities that have regional significance<sup>27</sup> shall be as follows:
- (a) whether similar facilities, both governmental and private, are distributed fairly throughout the substate district (e.g., as assessed by an examination of the distribution of existing and proposed facilities that provide similar services, and the availability of appropriately zoned sites);
  - (b) whether the state facility would be appropriately sized for its location (e.g., as assessed by identifying the minimum size necessary to achieve efficient and cost-effective delivery of services to meet existing and projected needs); and
  - (c) whether streets and transit are adequate to handle the volume and frequency of traffic to be generated by the siting or significant expansion of the state facility.]
- [(5) In addition to any applicable criteria established in paragraph (2) above, the criteria for the siting or significant expansion of state transportation and waste management facilities shall be as follows:
- (a) whether the siting or significant expansion is appropriately located so as to promote effective service delivery (e.g., as assessed by a determination of whether any alternative site would add significantly to the cost of construction or operation of the facility or would significantly impair effective service delivery); and
  - (b) whether the siting or significant expansion would significantly affect sound levels or odor or air quality on adjacent residential areas (e.g., as assessed by an evaluation of the number and proximity of existing facilities, both governmental and private,

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<sup>26</sup>Examples would include community centers, day care centers, recreation areas, courthouses, and libraries.

<sup>27</sup>Examples would include hospitals, nursing homes, and recycling centers.

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situated within approximately a [one-half] mile radius of the proposed site, which have similar environmental impacts)].

- [(6) In addition to any applicable criteria established in paragraph (2) above, the criteria for the siting or significant expansion of state residential facilities shall be as follows:
- (a) whether there is an undue concentration or clustering of facilities, both governmental and private, that provide similar services or that serve a similar population in the proposed residential area;
  - (b) whether necessary support services for the state facility and its residents are available and provided;
  - (c) whether the state facility, in combination with other similar governmental and private facilities within a [one-half] mile radius, would have a significant cumulative negative impact on neighborhood character;
  - (d) whether the site is well located for efficient service delivery; and
  - (e) whether any alternative sites available in communities with lower ratios of residential facility beds to population than the [community *or* local government] average would add significantly to the cost of constructing or operating the facility or would impair service delivery.]<sup>28</sup>
- [(7) In addition to any applicable criteria established in paragraph (2) above, the criteria for the siting or significant expansion of state administrative office facilities shall be as follows:
- (a) whether the site is suitable to provide cost-effective operations;
  - (b) whether the site is suitable for operational efficiency (e.g., as assessed by factors that include accessibility to staff, the public, and other government entities); and
  - (c) whether the facility can be located or expanded so as to support the development and revitalization of the [local government *or* substate district]'s business district without constraining operational efficiency.]

### **5-106 Establishment of Criteria for Closing or Reducing State Facilities**

- (1) Not later than [date], the [state planning agency] shall propose rules that a state agency shall use to make decisions regarding the closing of, or significant reduction in the size or capacity of service delivery for, existing state facilities.

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<sup>28</sup>Subparagraphs (c) through (e) are most appropriate in community districts with a high ratio of residential facility beds to population.

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- (2) The criteria for the closing or significant reduction of state facilities shall be designed to:
  - (a) evaluate the impact of the closing or reduction on service levels for that facility; and
  - (b) determine whether the closing or reduction would create or significantly increase any existing imbalance among communities for that facility.

[or]

- (2) The criteria for the closing or significant reduction of state facilities shall include, but shall not be limited to, the following:
  - (a) whether the closing or reduction would create or significantly increase any existing imbalance among communities or service levels relative to need,<sup>29</sup> and
  - (b) whether the closing or reduction is consistent with the specific criteria for selecting the facility for closure or reduction as identified in the Statement of Needs.

### **5-107 Publication and Adoption of Rules**

- (1) Not later than [30] days after the filing of the proposed rules, as specified in Sections [5-105 and 5-106] above, the [state planning agency] shall publish a notice of proposed rule-making under the [state administrative procedures act] with regard to such rules. Promptly thereafter, the [state planning agency] shall approve or disapprove with modifications the rules and shall file the rules as prescribed by law.

### **5-108 Notice and Public Hearings**

- (1) Before siting, significantly expanding, significantly reducing, or closing a state facility, a state agency shall hold one or more public hearings on the proposal. At least [30] days before the date of the public hearing, the state agency shall provide written notice of its action by publication in a newspaper that circulates in the area served by the hearing and may also give notice, which may include a copy of the proposal and supporting documents, by publication on a computer-accessible information network or other appropriate means to all interested agencies or entities, to the chief executive officer of each [substate district or regional planning agency] and local government in the area served by the hearing, and to any interested person who, in writing, requests to be provided notice of the proposed action.
- (2) The notice of each public hearing shall:

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<sup>29</sup>Ideally, closings or reductions should occur in areas with high ratios of service supply to service demand.

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- (a) contain a description of the proposal to site, significantly expand, or significantly reduce a state facility;
  - (b) specify the officer(s) or employee(s) of the state agency from whom additional information may be obtained and to whom written comments may be directed;
  - (c) specify a time and place where any documentation regarding the proposal may be inspected before the public hearing; and
  - (d) specify the date, time, place, and method for presentation of views by interested parties at the public hearing.
- (3) The state agency shall afford any interested person, agency, or entity the opportunity to submit written recommendations and comments on the proposed action, copies of which shall be kept on file and made available for public inspection.
- (4) Public hearing(s) shall be conducted in the following manner:
- (a) The hearing(s) shall be chaired by the chief executive officer of the state agency, or his or her designated representative.

◆ This assumes that the chief executive officer has such authority.

- (b) The hearing(s) shall be on the record and a transcribed record shall be kept of all comments made at the hearing(s). A transcribed copy of all comments shall be made available to all interested persons upon request and at actual cost.
- (c) The form of the hearing(s) may be set by the state agency, except that representatives of all opinions regarding the proposed action shall be given an opportunity to make spoken comments.
- (d) Written comments on the proposed action shall also be received at the hearing(s) and shall become part of the record.
- (e) To the extent that it is practicable to do so, the chief executive officer of the state agency may attempt to reconcile persons, agencies, or entities with opposing viewpoints through informal conflict resolution procedures.

### **5-109 Review of Proposal and Decision by State Agency**

The state agency shall make a written decision to site, significantly expand, significantly reduce, or close a facility, based on a review and analysis of the following:

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- (a) the criteria established [by rule by the [state planning agency] pursuant to] [by] Sections [5-105 and 5-106<sup>30</sup>] above;
- (b) any special locational or siting criteria contained in the Statement of Needs;
- (c) any report submitted to it by any other interested person, agency, or entity that contains concerns and recommendations on the impacts of the proposed action, as well as any written and oral testimony presented at a public hearing; and
- (d) any other factor(s) the state agency may deem relevant to the siting decision.

### 5-110 Appeals

*[Any appeals process must be in compliance with the state's administrative procedures act and/or the state's administrative appeals act.]*

- ◆ Chapter 10 of the *Legislative Guidebook*, State and Local Adjudication; Judicial Review, will address various methods for reviewing land-use decisions. Since the siting of state facilities by a state agency differs from other types of land-use decisions (in that the state agency both sites the facility and then authorizes its own siting decision), an additional review process may be warranted. After all, the intent of instituting a fair-share process is to make siting state facilities more equitable and less politically vulnerable.

Connecticut is an example of a state that has addressed this issue by devising an appeals process under which an agency's siting decision is appealed to the governor. The commissioner of public works sites the facilities and then submits a decision to the property review board for review. If the siting decision is rejected by the board, the commissioner notifies the governmental unit, which may then request a modification to its siting request. If the governmental unit's modification is also denied, the governmental unit may appeal to the governor, whose decision is then binding on the parties involved.<sup>31</sup>

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<sup>30</sup>If the criteria in Sections 4-105 and 4-105 were contained in the Act itself, it would not be necessary to promulgate additional criteria by rulemaking

<sup>31</sup>The process described is in Conn. Gen. Stat. §4b-21 (West) which states in pertinent part:

...the governmental unit may, within ten days from the date of notification of such final decision, accept the commissioner's final decision, reject such decision and withdraw its request, or appeal to the governor. Upon such appeal [to the governor], the commissioner [of public works] shall submit a report to the governor stating the [property review] board's conclusions and supporting material therefor and the governmental agency shall submit a report to the governor stating its objections to such decision and its supporting material therefor. The governor shall, within thirty days of the receipt of such reports, make a decision which shall be binding on the parties involved. In the absence of any such appeal

### AREAS OF CRITICAL STATE CONCERN

#### WHAT ARE CRITICAL AREAS CONTROLS?<sup>32</sup>

Critical areas controls establish state-administered programs that (1) identify and designate all large tracts of land that are “critical” to the environmental health of the state, or represent some other critical resource, such as regions of the state that have special historic or archaeological significance or possess scenic beauty; and (2) develop regulations to protect those designated areas from unnecessary exploitation.<sup>33</sup> The state intervenes to protect these areas of critical state interest because local governments may otherwise allow development to occur in order to increase their local tax base, in the process forgetting or ignoring the damage to the environment that results.<sup>34</sup> Many local governments may not have the technical capability or resources to control the complex consequences of development in critical areas. Critical areas problems may also arise in connection with the construction of major public facilities, such as airports, highway interchanges and corridors, or sports complexes. Sometimes local governments approve developments around such areas even though they may be over-intensive and interfere with the purpose for which the public facility is built.<sup>35</sup>

A state that employs the critical areas concept typically carries out its program in one of two ways.

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or withdrawal of request, the decision of the commissioner and the board shall be final and binding upon the governmental unit.

<sup>32</sup>This commentary is adapted, in part, from Stuart Meck, “Model Planning and Zoning Enabling Legislation: A Short History,” and James F. Berry, “Areas of Critical State Concern,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: APA, March 1996), 7-8, 105-109.

<sup>33</sup>For an excellent overview of land-use controls in environmentally sensitive areas, including areas of critical state concern, see Jon A. Kusler, *Regulating Sensitive Lands* (Cambridge, Mass.: Ballinger, 1980). Kusler provides valuable perspectives on program design, definition of areas, formulation of development standards, data gathering, and governmental roles.

<sup>34</sup>Daniel R. Mandelker, *Environmental and Land Controls Legislation* (New York: Bobbs-Merrill, 1976), 66.

<sup>35</sup>Id. Professor Mandelker notes:

For example, over-intensive development near major highway interchanges will attract traffic that crowds highway access and leads to highway congestion, and incidentally increases air pollution because of increased motor vehicle idling time. There is no incentive for local governments to take into account the effect of this development on adjacent public facilities; the state and independent agencies are powerless to override local government authorization of these developments.

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1. The state conducts a study and applies statutory criteria to a particular area to determine whether it satisfies the standards for designation. This mechanism, which involves the establishment of a comprehensive statewide system, is based on the American Law Institute's *A Model Land Development Code*.<sup>36</sup> Several states have employed this approach, including Colorado, Florida, Minnesota, Nevada, Oregon, and Wyoming.
2. The state establishes a special program directed at a certain area of the state (e.g., coastal zones). This has been characterized as an “ad hoc” approach and has been used in states that include California, Massachusetts, New Jersey (for the Pinelands area), New York (for the 6-million-acre Adirondack Park region), North Carolina, and Virginia and Maryland (for the Chesapeake Bay programs).<sup>37</sup>

Once the designation has been made under such programs, the state formulates a comprehensive management plan or specific set of controls to advance or protect state interests. Development in the area is then subject to the management plan and regulations based on the plan or the special set of controls. The state may regulate the development directly or it may delegate authority to local governments that have fulfilled certain requirements (e.g., such as obtaining certification from the state of local development regulations as meeting the objectives of designation) under the statute. The program may also be accompanied by purchase of land and interests in land.

### THE ALI CODE PROPOSAL

The ALI Code authorized a State Land Planning Agency to designate Areas of Critical State Concern for the following:

- (a) an area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment;
- (b) an area containing or having a significant impact upon historical, natural, or environmental resources of regional or statewide importance;
- (c) a proposed site of a new community designated in a State Land Development Plan,<sup>38</sup> together with a reasonable amount of surrounding land; or

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<sup>36</sup>American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976).

<sup>37</sup>L.A. Malone, *Environmental Regulation of Land Use* (Deerfield, Il: Clark Boardman Callaghan, 1994 Supp), §13.01.

<sup>38</sup>The ALI Code defined a State Land Development Plan as a plan in words, map, text, and/or illustration form “setting forth objectives, policies, and standards to guide public and private development of land within the state.” ALI Code, §8-401(1).

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- (d) any land within the jurisdiction of a local government that, at any time more than [3 years] after the effective date of [the] Code, has no development ordinance in effect.<sup>39</sup>

For example, the ALI Code described as a potential Area of Critical State Concern a major highway interchange adjoining a state hospital and located near a wildlife preserve. This area would deserve special regulatory attention to:

insure that land near the interchange is not developed with industrial or commerce uses in a manner that would intrude upon the privacy of the hospital patients or contribute to the pollution of the waters in the wildlife preserve, and these goals might be achieved by restricting the types of development that would be permitted within various segments of the land surrounding the highway interchange.<sup>40</sup>

In such an area, the local jurisdiction could continue to regulate development, but only using development regulations reviewed and approved by the state land planning agency. If a local government failed to submit regulations complying with state standards for the area, the agency could adopt its own regulations applicable to that government's portion of the area.

Regardless of whether the local government or the State Land Planning Agency adopts the regulations, the administration of the regulations is undertaken by the local government's planning agency in the same manner as if the regulations were part of the local development ordinance. In addition, the Code provided a mechanism by which the State Land Planning Agency may appeal any local development decision in an Area of Critical State Concern to a State Land Adjudicatory Board.

The ALI Code did not require that the state adopt any type of plan in order for the state to engage in regulating Areas of Critical State Concern, except as a prerequisite involving land in and around a proposed new community. In such a case, an adopted State Land Development Plan was required because, as was reasoned, “[t]he selection of such a site is likely to have such a major impact on surrounding areas that it should be preceded by the study, and accompanied by the procedural formality required of a State Land Development Plan.”<sup>41</sup> The Code's drafters believed that a state plan was not otherwise necessary as a basis for critical areas designation because the factors that make a given area critical “relate to that area alone and are not necessarily dependent on the relationship of the area to an overall plan or pattern.”<sup>42</sup> Professor Daniel R. Mandelker has commented on this approach:

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<sup>39</sup>ALI, *A Model Land Development Code*, §7-201(3).

<sup>40</sup>Id., 260.

<sup>41</sup>Id.

<sup>42</sup>Id.

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Why this assumption has been made is not clear. Highway interchanges, for example, are part of an overall state highway network that should be included in a functional state highway plan as well as a comprehensive state plan. Any decision on which interchange areas should be designated as critical should be taken in the context of this statewide planning process.<sup>43</sup>

### FLORIDA

Several states<sup>44</sup> have adopted various permutations of the ALI Code, but Florida's approach is closest.<sup>45</sup> The Florida Division of State Planning, in cooperation with local interests, recommends Areas of Critical State Concern to the state Administration Commission (the governor and cabinet) based on historical and environmental factors.<sup>46</sup> The state legislature is given the opportunity under the statute to “reject, modify, or take no action relative to the adopted rule” issued by the Administrative Commission designating the area as one of critical state concern but is not required to approve it.<sup>47</sup> The statute, in effect, gives the legislature a veto power on executive action. Once the area is approved, all regional and state agencies must comply with the rule designating the

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<sup>43</sup>D.R. Mandelker, *Environmental and Land Controls Legislation* (New York: Bobbs-Merrill, 1976), 70. This book contains an extensive critique of the ALI Code critical areas process on pages 66-86, especially on pages 76-86. Mandelker comments that the critical areas process, as proposed in the Code, has a number of implementation problems, which he summarizes as follows:

Some of these problems arise from the geographical extent of critical areas, which are likely to be smaller than the local governments in which they are located. Development policies in critical areas may not be well coordinated with the land development policies in the remainder of the community. Other problems arise from the inability of state critical areas controls to effectively guide local government decisions on specific development applications, and from lack of coordination between critical areas control, and control over public facility siting that is authorized by other provisions of the ALI Code.

<sup>44</sup>See, e.g., Colo. Rev. Stat. §§24-65.1-201, -202 to -502; Minn. Stat Ann. §§116G.01 to .14; Nev. Rev. Stat, §§321.655(2), .755, .770(1)(a); Ore. Rev. Stat. §197.405; and Wyo. Stat. §§9-8-102(a)(i), 9-8-202(a)(ix).

<sup>45</sup>Florida Environmental Land and Water Management Act of 1972, Fla. Stat. §§380.012 *et seq.* For a discussion of other states, see L.A. Malone, *Environmental Regulation of Land Use*, Chap. 13.

<sup>46</sup>Fla. Stat. §§380.05(1) to (2).

<sup>47</sup>Fla. Stat. §380.05(1)(c).

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areas,<sup>48</sup> and local governments have six months to prepare consistent comprehensive plans.<sup>49</sup> Developments of Regional Impact (DRI) within the critical areas may proceed only under local and regional plans and regulations.<sup>50</sup>

Florida's critical areas approach seems to have been relatively successful, having included a variety of wetlands and coastal resources, among others. However, it suffers a serious limitation in that no more than 5 percent of the state's land area may be designated as critical areas at one time.<sup>51</sup> Such limitations on protected land area may be popular among developers and large property owners, but they place artificial constraints on environmental planning.

Florida's success is partly fueled by strong growth management and planning laws not present in most other states, and by strong enforcement provisions that permit judicial review of inconsistent local plans and development projects.<sup>52</sup>

### AD HOC LEGISLATION FOR CRITICAL AREAS

The ad hoc approach has been used with some success by California,<sup>53</sup> North Carolina,<sup>54</sup> and Massachusetts,<sup>55</sup> among others.

One of the earliest (and still the largest) areas designated as of critical state concern is the New York Adirondack Park that encompasses over 6 million acres of public and private lands. Authority for development planning for the park is in the Adirondack Park Agency Act of 1971.<sup>56</sup> The state legislature approved a regional land management plan in 1973 that set permissible densities for development on private lands and provided standards for permitted developments.<sup>57</sup> Applicants for new land uses and development with an impact of regional significance must obtain a permit from

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<sup>48</sup>Id., §380.05(1)(b).

<sup>49</sup>Id., §380.05(5).

<sup>50</sup>Id., §380.06(13).

<sup>51</sup>Id., §380.05(20).

<sup>52</sup>Id., §§380.05(13) and 380.07(2), respectively.

<sup>53</sup>Cal. Govt. Code, §§66800-66801 (Lake Tahoe).

<sup>54</sup>N.C. Gen. Stat., §113A *et seq.* (Coastal zone).

<sup>55</sup>1977 Mass. Acts, Ch. 831 (Martha's Vineyard).

<sup>56</sup>N.Y. Exec. Law, §§800-820. See Malone, *Environmental Regulation of Land Use*, §13.03[1].

<sup>57</sup>N.Y. Exec. Law, §§805-807. See Malone, *Environmental Regulation of Land Use*, §13.03[1]. The Adirondack Park Plan is discussed in Chapter 6, Regional and Interstate Planning, Note on Existing Regional Plans.

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the Adirondack Park Agency.<sup>58</sup> Violators of any section of the act, Agency rules or regulations, or permit conditions are subject to fines of \$500 per day, and the N.Y. Attorney General may seek injunctive relief.<sup>59</sup>

The state of New Jersey protects the ecologically important Pinelands region under the Pinelands Protection Act of 1979.<sup>60</sup> The New Jersey act designates a “preservation area” that receives the highest level of protection and a surrounding “protection area” that acts as a buffer. A Pinelands Commission was created by the act. The commission is responsible for preparing and adopting a comprehensive management plan, making periodic revisions, and identifying land management procedures to protect the area. It is advised by a municipal council (composed of the mayors of municipalities within the area) to which the commission submits revisions of the management plan for review. Local governments submit master plans and zoning ordinances, which must be consistent with the comprehensive management plan.

The Pinelands Protection Act was passed prior to the 1985 State Planning Act.<sup>61</sup> However, the New Jersey State Development and Redevelopment Plan, which is required by the State Planning Act, expressly relies on the plans and regulations of the Pinelands Commission to achieve the state plan’s objectives.<sup>62</sup> The “Resource Planning and Management Map” contained in the state plan demarcates the Pinelands area as well. Thus, despite the ad hoc nature of the legislation establishing the Pinelands critical areas, there is a linkage to a broader policy framework contained in a state plan.

Yet another example of ad hoc legislation to protect critical areas is Virginia's Chesapeake Bay Preservation Act that protects the ecologically vulnerable tidewater region.<sup>63</sup> The Chesapeake Bay Local Assistance Board develops criteria to protect the area and provides assistance to local governments in complying with the act and board regulations and ensuring that local government comprehensive plans are consistent with the act. For their part, municipalities and counties within the tidewater area are required to develop comprehensive plans that establish preservation areas

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<sup>58</sup>The Adirondack Park Agency consists of the state Commissioner of Environmental Conservation, the Secretary of State, the Commissioner of Commerce, and eight members appointed by the Governor and approved by the state senate. N.Y. Exec. Law, §803.

<sup>59</sup>N.Y. Exec. Law, §813.

<sup>60</sup>N.J.S.A., §§13.18A-1-29. The Pinelands include many forest and wetland resources that are also protected under the federal National Parks and Recreation Act, 16 U.S.C., §471i. See Malone, *Environmental Regulation of Land Use*, §13.03[3].

<sup>61</sup>N.J.S.A. §52:18A-196 *et seq.*

<sup>62</sup>New Jersey State Planning Commission, *Communities of Place: The New Jersey State Development and Redevelopment Plan* (Trenton, N.J.: The Commission, June 12, 1993), 84-91 (discussion of the Pinelands’ significance and statement of the state plan’s policies on the Pinelands).

<sup>63</sup>Va. Code §§10.1-2100-2115. See Malone, *Environmental Regulation of Land Use*, §13.03[2].

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within their jurisdictions that comply with the board's criteria. The board is also authorized to develop administrative and legal actions to ensure compliance with the Act.

Maryland, which is also part of the tidewater region, has also created a commission to oversee development in the critical area of the Chesapeake Bay. The Maryland program is, in many respects, more stringent than the Virginia program because it relies less on local action and more on state designation and oversight. Professor Linda Malone has commented on this distinction in her treatise *Environmental Regulation of Land Use*:

By way of comparison to Virginia's program, in Maryland, the *state* has designated an area extending 1,000 feet landward from the shoreline around the entire edge of Maryland's Chesapeake Bay and all its tributaries to the limits of tidal influence for protection. The most stringent provisions of the Maryland statute apply to underdeveloped lands around the Bay, limiting new residential development to an average of one unit per 20 acres. No development that occurs in the undeveloped zones can cause a net reduction in the forest covered area. Although local governments may exclude certain areas that would not be materially improved by participation in the local program, the Maryland Chesapeake Bay critical area commission is responsible for approving any proposed exclusions and developing local implementation plans for any local government that is unable or unwilling to do so itself.<sup>64</sup>

### AREAS OF CRITICAL STATE CONCERN

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#### ***Commentary: Areas of Critical State Concern***

The model legislation that follows is based on the *ALI Model Land Development Code*, the Florida statute, and portions of the New Jersey Pinelands Protection Act but incorporates a number of changes that respond to critiques of the ALI approach and contemporary thinking about environmental regulation of land use.

Under the model:

1. A state must first prepare and adopt a state land development plan that contains goals, policies, and guidelines to provide a framework and priorities for the administration of the

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<sup>64</sup>Malone, *Environmental Regulation of Land Use* (1994 Supp), 13-28 to 13-19, citing Md. Nat. Res. Code, §§ 8-1807, 8-1809(b); Horton, "Remapping the Chesapeake" in *The New American Land* 7, no. 7 (September/October 1987): 13; and Note, "The Chesapeake Bay Preservation Act: Does State Land Use Regulation Protect Interstate Resources?" *William and Mary Law Review* 31 (1990): 735, 753-5.

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program. This plan is described in Section 4-204 of the *Legislative Guidebook*. A state agency – here identified as the state planning agency, although it could be a natural resources agency – is responsible for administering the program. If a state biodiversity conservation plan is authorized, under Section 4-204.1, then such a plan must also be first prepared and adopted.

2. The state planning agency may initiate the process of designation of an area of critical state concern. In addition, any person may request of any other state agency that the agency recommend to the state planning agency that an area be designated as being of critical state concern. Regional planning agencies may also request that the state planning agency initiate the designation process.<sup>65</sup>
3. One optional designation category is described in Section 5-203(3), which addresses areas “containing or having significant impact upon historical or archaeological resources, sites, or districts of statewide or regional importance.” Critical area designation in this context is usually more appropriate for large tracts of land encompassing historical or other similar sites, such as battlefields or historic districts, than for individual buildings and structures, for which conventional historic preservation controls could instead be employed.
4. To minimize the exposure of property to natural hazards, the model, in Section 5-203(1)(e), also provides for the designation of “geologically hazardous areas” and, as an option, “frequently flooded areas.” The intention here is to provide a special set of controls on development in areas subject to seismic and related geologic hazards and more severe incidences of flooding. Development in areas that lie in floodplains can also be addressed through conventional building code and zoning review mechanisms, as part of a community’s participation in the National Flood Insurance Program.<sup>66</sup>
5. The state planning agency is then required to evaluate the merits of the recommended designation using criteria contained in the model statute, assess the proposal against the goals, policies, and guidelines of the state land development plan (and state biodiversity conservation plan, if adopted), and provide written notices to affected parties for written comment.
6. If the state planning agency decides to proceed with the designation, it must prepare a more detailed “draft” proposal. The model statute, in Section 5-205(1)(c), requires that the agency

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<sup>65</sup>Regional planning agencies are to include in their regional comprehensive plan those areas within the region that may be appropriate for nomination as areas of critical state concern pursuant to Sections 6-201(5)(d) and (5)(g)3 of the *Legislative Guidebook*.

<sup>66</sup>For an example of a specialized procedure regulating certain structures vulnerable to earthquakes and tsunamis in Oregon, see Ore. Rev. Stat. §§455.446 to 455.447 and Ore. Admin. Rules §632-05-000 *et seq.*

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must “utilize the best scientific and ecological practices in determining the proposed boundaries and surface areas of the area of critical state concern, including, but not limited to, environmental risk assessment and bioregional planning.” The intention here is to require that the agency employ environmental risk assessment to consider the potential consequences of an action and the relative uncertainties associated with the analysis.

In a typical environmental risk assessment, environmental scientists, planners, consultants, and agency staff characterize the resources at a site, identify all real and potential exposure of plants, animals, and humans to environmental injury, and balance the resulting risk of significant effects on the resources of the proposed area. A bioregional planning approach should ensure that the designation of the area is based on biological regions rather than political boundaries. Because biological regions do not recognize or respect political boundaries, preservation of areas based on political boundaries alone may not provide optimal protection for the organisms within it. “Bioregional planning” is therefore intended to protect entire biogeographical areas that may cut across political boundaries.

7. If the state agency decides not to proceed with the designation at this point, it must prepare a written report containing a concise statement that gives its reasons not to proceed.
8. The draft proposal for designation of an area of critical state concern is then the subject of an on-the-record public hearing. The model statute contains procedures to be followed in conducting the hearing.
9. At the conclusion of the public hearing, the state planning agency may decide to prepare a final proposal, which will form the basis of a rule or some other official action designating the critical area. In some states, the planning agency may be able to make the designation. In others, the governor or legislature may have final authority over designation. The model statute will need to be adapted to reflect these differences among states.
10. As in the ALI Code, affected local governments – those with land located wholly or partially in the area of critical state concern – must submit for approval to the state planning agency existing or proposed land development regulations that are to be consistent with general principles established by the state for guiding development in the area. However, in the model below, local governments that are affected are also required to submit their local comprehensive plans, or amendments to them, that incorporate the designated area for state review and certification. In addition, the state may provide grants to affected local governments for the preparation of new or modified land development regulations and amendments to local comprehensive plans.
11. Until the local government obtains approval of its regulations and plans, the state may directly regulate development in the area of critical state concern under regulations that it

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promulgates. The model statute also authorizes interim regulation of development during the period the designation is under consideration in order to forestall the approval of development permission, other than emergencies or the continuation of certain development projects, that would conflict with the purposes of the designation.

12. If the local government has received approval of its regulations and plans, it may then exercise development control authority in the area of critical state concern. Its decisions, however, may be reviewed, within a limited time period, by the state planning agency. The agency, after a public hearing, may decide to approve, reject, or approve with conditions an application for a development permit, which will then supersede the local decision.
13. The model statute also includes provisions for the withdrawal of areas designated as of critical state concern. A withdrawal is to be treated for all purposes as if it were a recommendation to designate and must follow the same procedures as its initiation.
14. Appeals of decisions by the state planning agency are made under a state administrative appeals act or some other specialized statute for review of such types of decisions. Procedures will also vary from state to state.

Generally, the approach taken in the following model is to ensure a careful and deliberate process for designation. The requirement that a state land development plan precede the initiation of a designation process will help develop a statewide context and consensus on the goals of the program and identify the priorities the state will employ in its administration. In addition, the multistep process leading to designation should assist in coordinating the interests of the various governmental units, private property owners, and others affected by the designation.

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### 5-201 Purposes<sup>67</sup>

The purposes of this Act are to:

- (1) provide a mechanism by which areas containing environmental, natural, historic, or archaeological of critical state concern may be identified and protected from substantial deterioration or loss;
- (2) provide procedures by which areas of critical state concern may be designated; and

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<sup>67</sup>This model was drafted by James F. Berry, an attorney and professor of biology at Elmhurst College in Elmhurst, Illinois.

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- (3) provide a mechanism by which development and economic growth may occur in areas designated as being of critical state concern.

### 5-202 Designation of Areas of Critical State Concern, Generally

- (1) Pursuant to its authority under Section [4-202(4)(c)], the [state planning agency] may [propose the designation of] [*alternative*: by rule designate] specific areas within the state as areas of critical state concern, in accordance with the criteria identified in [Section 5-203] and the procedures specified in Sections [5-204 to 5-207], below.
  - (2) The [state planning agency] may propose the designation of any area of critical state concern only after it has first prepared and adopted a state land development plan pursuant to Sections [4-204] and [4-210] [and a state biodiversity conservation plan has been prepared and adopted pursuant to Sections [4-204.1] and [4-210]].
- ◆ The establishment of areas of critical state concern should be linked to the state land development plan (see Section 4-204) and state biodiversity conservation plan (see Section 4-204.1). In some circumstances, it may also be necessary to tie this to a Section 4-203 state comprehensive plan.

### 5-203 Criteria for Designation of Areas of Critical State Concern

An area of critical state concern may only be designated for the following:

- (1) an area containing or having significant impact upon environmental or natural resources of local, regional, or statewide importance, including, but not limited to, federal or state parks, forests, wildlife refuges, wilderness areas, scenic areas, aquatic preserves, areas of critical habitat for federally and/or state-designated endangered or threatened species, rivers, [frequently-flooded areas<sup>68</sup>], lakes, estuaries, aquifer recharge areas, geologically hazardous areas,<sup>69</sup> and other environmentally sensitive areas in the state, the uncontrolled private or public development of which would cause substantial deterioration or loss of such resources

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<sup>68</sup>Areas that are frequently flooded may typically be governed through conventional floodplain management controls and a critical area designation would be unnecessary. For a good survey of current state practices, see Association of State Floodplain Managers, *Floodplain Management 1995: State and Local Programs* (Madison, Wisc.: The Association, 1996). For an example of state legislative alternatives for implementing the National Flood Insurance Program, see Association of State Floodplain Managers, *Model State Legislation for Floodplain Management: Basic Regulations, Statutes, and Innovative Techniques* (Madison, Wisc.: The Association, 1982).

<sup>69</sup>A good definition of “geologically hazardous areas” is found in Wash. Rev. Code Ann. §36.70A.030(9), which describes them as “areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.”

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or a substantial threat to the public health and safety. Specific criteria that shall be considered in designating an area of critical state concern for such purposes shall include:

- (a) whether the ecological value of the area, as determined by the biological and physical components of the environmental system, is of substantial regional or statewide significance;
  - (b) whether the area contains designated critical habitat of any state or federally designated threatened or endangered plant or animal species [or other species of special state concern];
  - (c) whether the area contains a unique, ecologically sensitive, or valuable ecosystem or combination of ecosystems;
  - (d) whether the area contains plant and animal communities whose loss or decline would negatively affect regional, state, or national biodiversity;
  - (e) whether the area is susceptible to significant natural hazards, including, but not limited to, fires, floods, earthquakes, landslides, erosion, and droughts that would affect existing or planned development within it;
  - (f) whether the area is susceptible to substantial development due to its geographic location or natural aesthetic qualities; and/or
  - (g) whether an existing or planned substantial development within the area will have a significant and deleterious impact on any or all of the environmental or natural resources of the area that may be of regional or statewide importance.
- (2) an area having a significant impact upon or being significantly affected by an existing or proposed major public facility or other major public investment, including, but not limited to, highways,<sup>70</sup> ports, airports, energy facilities, and water management projects. Specific criteria that shall be considered in designating an area of critical state concern for such purposes shall include:
- (a) whether uncontrolled development of the area will have a significant effect upon the major public facility or major public investment; and/or
  - (b) whether the major public facility or major public investment will have a significant effect upon the surrounding area, resulting in uncontrolled development.
- (3) an area containing or having significant impact upon historical or archaeological resources, sites, or districts of statewide or regional importance, the private or public development of

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<sup>70</sup>For example, the state could designate a highway corridor or series of interchange areas as an area of critical state concern.

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which would cause significant deterioration or loss of such resources, sites, or districts. Specific criteria that shall be considered in designating an area of critical state concern for such purposes shall include:

- (a) whether the area is associated with events that have made a significant contribution to state and/or regional history;
- (b) whether the area is associated with the lives of persons who are significant to state and/or regional history; and/or
- (c) whether the area contains distinctive architecture of a type, period, or method of construction of construction, or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components may lack individual distinction; or
- (d) whether the area has yielded, or is likely to yield, significant information or artifacts of state and/or regional historic or archaeological importance.

### **5-204 Initiating the Designation of an Area of Critical State Concern**

◆ The process used to designate an area of critical state concern is described in this Section and the following three Sections.

- (1) The [state planning agency] may initiate the process of designation of an area of critical state concern. Any person may request of any other state agency that the agency recommend to the [state planning agency] that an area be designated as being of critical state concern. Pursuant to Section [6-107(3)(c)], a [regional planning agency] may also recommend to the [state planning agency] any area that lies wholly or partially within its jurisdiction that meets the criteria set forth in Section [5-203] above for designation as an area of critical state concern.
- (2) Upon receipt of a recommendation for designation of an area as an area of critical state concern from any [regional planning agency] or any state agency, the [state planning agency] shall, within [120 days]:
  - (a) evaluate the merits of the recommendation for compliance with the criteria set forth in Section [5-203] for designation as an area of critical state concern;
  - (b) evaluate the consistency of the recommended designation with the goals, policies, and guidelines of the state land development plan [and state biodiversity conservation plan];
  - (c) provide written notice of the recommended area of critical state concern by publication in a newspaper that circulates in the area recommended for designation and may also give notice, which may include a copy of the recommendation and

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supporting documents, by publication on a computer-accessible information network or other appropriate means. The notice shall:

1. contain a description of the total area and boundaries of the proposed area of critical state concern and a general statement of foreseeable impacts on environmental or natural resources, historical and archaeological resources, and/or major public facilities or public investments.
  2. specify the officer(s) or employee(s) of the [state planning agency] from whom additional information may be obtained and to whom written comments may be directed;
  3. specify a time and a place where a copy of the recommendation for designation of an area as an area of critical state concern may be inspected; and
  4. specify a deadline for the submission of written comments.
- (d) The [state planning agency] shall provide notice of the recommendation for designation of an area as an area of critical state concern to:
1. the chief executive officer of each local, regional, or state government or agency whose jurisdiction lies entirely or partially within the recommended area of critical state concern and whose programs and policies would be affected by the proposed designation; and
  2. any other interested person who, in writing, requests to be provided notice of recommendations for designation.

The governments, agencies, and persons to be provided notice, and any other agencies, entities, and persons, may review the recommendation and submit a written report to the [state planning agency] containing its comments and recommendations.

- (3) Upon receipt of a recommendation for designation of an area as an area of critical state concern from a [regional planning agency] or other state agency, the [state planning agency] shall, within [180] days, compile and review all written comments and recommendations received from local, regional, state, and/or federal governments or agencies and private persons or organizations.

### **5-205 Preparation of a Draft Proposal for Designation of an Area of Critical State Concern**

- (1) Following its review of a recommendation for designation of an area as an area of critical state concern received from a [regional planning agency] or any other state agency pursuant to Section [5-204] above, the [state planning agency] shall, within [6 months], prepare a

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written draft proposal for designation of the area of critical state concern. In preparing its draft proposal, the [state planning agency] shall:

- (a) prepare and include concise statements describing the area's compliance with the criteria for designation set forth in Section [5-203];
  - (b) prepare and include concise statements describing the area's consistency with the goals, policies, and guidelines of the state land development plan [and state biodiversity conservation plan];
  - (c) utilize the best scientific and ecological practices<sup>71</sup> in determining the proposed boundaries and surface area of the proposed area of critical state concern, including, but not limited to, environmental risk assessment and bioregional planning;<sup>72</sup> and
  - (d) incorporate those written comments and recommendations received from local, regional, state, and/or federal governments or agencies and private persons or organizations as considered appropriate by the [state planning agency].
- (2) In the case of a decision by the [state planning agency] not to proceed with a proposal for designation of the area of critical state concern, the [state planning agency] shall prepare a written report containing a concise statement describing the reason[s] not to proceed.

### **5-206 Public Hearings on Draft Proposal for Designation of an Area of Critical State Concern**

◆ In many states, rule-making will require an “on-the-record public hearing.” In any event, such public hearings can circumvent later attacks based on a lack of adequate procedural due process.

- (1) The [state planning agency] shall hold at least one public hearing on the draft proposal for designation of an area of critical state concern. Such hearing(s) shall be held at a public facility located within or near the proposed area of critical state concern.
- (2) At least [30] days before the date of the public hearing(s), the [state planning agency] shall provide written notice of the proposed area of critical state concern:
  - (a) by publication in a newspaper that circulates in the area recommended for designation and may also give notice, which may include a copy of the proposal and

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<sup>71</sup>Similar language requiring the use of “best available science” appears in connection with designation and protection of critical areas in Washington State. See Wash. Rev. Code §36.70A.172 (1994).

<sup>72</sup>On environmental risk assessment, see E.C. Palacios, “An Assessment of Relative Risk in Michigan,” *Planning and Zoning News* 10 (August 1992): 5-18; on bioregionalism, see Keene Callahan, “Bioregionalism: Wiser Planning for the Environment?,” *Land Use Law and Zoning Digest* 45 (August 1993): 3-9.

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supporting documents, by publication on a computer-accessible information network or other appropriate means.

- (b) to the chief executive officer of each local, regional, and/or state government or agency whose jurisdiction lies entirely or partially within the geographic area encompassed by the recommended area of critical state concern, and to any other interested person who, in writing, requests to be provided notice of recommendations for designation.
- (3) The public hearing notice shall:
- (a) contain a description of the total area and boundaries of the proposed area of critical state concern and a general statement of foreseeable impacts on environmental or natural resources, scenic resources, historical and archeological resources, and/or major public facilities or public investments;
  - (b) specify the officer(s) or employee(s) of the [state planning agency] from whom additional information may be obtained and to whom written comments may be directed;
  - (c) specify a time and a place where a copy of the proposal for designation of an area as an area of critical state concern may be inspected before the public hearing; and
  - (d) specify the date, time, place, and method for presentation of views by interested persons at the public hearing.
- (4) Public hearings shall be conducted in the following manner:
- (a) The hearing(s) shall be chaired by the [chief executive officer of the state planning agency] [or his or her designated representative].

◆ This assumes that the chief executive officer has such authority.

- (b) The hearing(s) shall be on the record and a transcribed record shall be kept of all comments made at the hearing(s). A transcribed copy of all comments shall be made available to all interested persons upon request and at actual cost.
- (c) The form of the hearing(s) may be set by the [state planning agency], except that representatives of all opinions regarding the draft proposal shall be given an opportunity to make spoken comments.
- (d) Written comments on the draft proposal shall also be received at the hearing(s) and shall become part of the record.

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- (5) The [state planning agency] shall give due consideration to all written and spoken comments received pursuant to this Section. To the extent it is practicable to do so, the [chief executive officer of the state planning agency] may attempt to reconcile persons or entities with opposing viewpoints through informal conflict resolution procedures and may promulgate rules to provide for such procedures.

### **5-207 Final Proposal for Designation of an Area of Critical State Concern**

- (1) The [state planning agency] shall, at its discretion, incorporate all appropriate written and oral comments into a final proposal for designation of an area of critical state concern for final action [and rule-making] by the [state legislature *or* governor *or* agency].
  - (2) The final proposal [and rule] shall set forth the following:
    - (a) a detailed description of the total area and boundaries of the proposed area of critical state concern;
    - (b) the reasons why the particular area proposed for designation is of critical concern to the state and/or region and how it satisfies the criteria for designation set forth in Section [5-203] above;
    - (c) a statement of the harms to be prevented and the advantages to be obtained by the designation of the area;
    - (d) general principles for guiding the development of the area that incorporate the goals, policies, and guidelines of the state land development plan[, state biodiversity conservation plan,] or applicable regional comprehensive plan(s), as appropriate;
    - (e) a description of the types of development that shall be permitted and the general conditions under which they shall be permitted pending the adoption of regulations under Section [5-208] below; and
    - (f) the changes, if any, to the rules [and programs] of state agencies having regulatory authority in the proposed area of critical state concern so as to be consistent with subparagraphs (d) and (e) above.
- ◆ At this point, things may become complicated. For those states in which the legislature has delegated appropriate authority to the state planning agency, the agency has probably fulfilled its obligations and can now proceed with rule-making. In other states, either the legislature itself or the chief executive must make final decisions. In Florida, for example, the legislature must approve designations of areas of critical state concern, since in *Askew v. Cross Key Waterways*, 372 So.2d 913 (Fla. 1978), the Florida Supreme Court held that

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it is unconstitutional for a legislature to delegate that power to the executive branch.<sup>73</sup> Other states, however, may differ in this respect. The language of the model provided here will have to be adapted to fit the particular situation of each state.

### **5-208 Recordation of Designation**

Within [30] days after the effective date of the designation of an area of critical state concern, the [state planning agency] shall record a legal description of the boundaries of the area of critical state concern in the public records of the county or counties in which the area of critical state concern is located.

### **5-209 State and Local Regulation and Local Plans in Areas of Critical State Concern; Availability of Grants to Local Governments**

- (1) Following the adoption of a rule by the [state planning agency *or* governor *or* legislature] designating an area as one of critical state concern, each local government with jurisdiction entirely or partially within the boundaries of the adopted area of critical state concern shall submit to the [state planning agency], within [180] days of adoption of such rule, either:
  - (a) its existing land development regulations and existing local comprehensive plan that are consistent with the principles set forth in the rule designating the area of critical state concern; or

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<sup>73</sup>Florida statutes provide that a proposed rule by the state Administrative Commission must be presented to the Florida legislature as follows:

A rule adopted by the commission pursuant to paragraph (b) designating an area of critical state concern and principles for guiding development shall be submitted to the President of the Senate and to the Speaker of the House of Representatives for review no later than 30 days prior to the next regular session of the Legislature. The Legislature may reject, modify, or take no action relative to the adopted rule. In its deliberations, the Legislature may consider, among other factors, whether a resource planning and management committee has established a program pursuant to s. 380.045 [of the Florida statutes]. In addition to any other data and information required pursuant to this chapter, each rule presented to the Legislature shall include a detailed description of the area of critical state concern, proposed principles for guiding development, and a detailed statement of how the area meets the criteria for designation as provided [in the statute]. (Fla. Stat. §380.05(1)(c).)

In the Florida statutes, there are sections designating specific areas as areas of critical state concern, enacted after the passage of the original statute. See, e.g., Fla. Stat. §380.055 (Big Cypress Area); §380.0551 (Green Swamp Area); §380.0552 (Florida Keys Area); and §380.0555 (Apalachicola Bay Area). See also Ore. Rev. Stat. §§197.405 (3) to (4), which provide that no designation of an area of critical concern shall take effect until it has been submitted to the Legislative Assembly's joint legislative committee on land use and has been approved by the Legislative Assembly, which has the authority to adopt, amend, or reject the proposed designation.

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- (b) new or modified land development regulations and amendments to its local comprehensive plan that are consistent with the principles set forth in the rule designating the area of critical state concern.
- (2) The [state planning agency] shall provide technical assistance and may make grants available to local governments for the preparation of new or modified land development regulations and amendments to local comprehensive plans. The [state planning agency] may make such grants from any state, federal, or other funds that may be appropriated or otherwise made available to it for such purposes.
- (3) The [state planning agency] shall, within [30] days of such submission of land development regulations and local comprehensive plan, provide notice and hold at least one public hearing in accordance with the procedures set forth in Section [5-206] above.
- (4) If, within [60] days of such submission of land development regulations and local comprehensive plan, the [state planning agency] determines that a local government's submission is incomplete or is not consistent with the principles set forth in the rule designating the area of critical state concern, the [state planning agency] shall notify the local government of the reasons that the submission is incomplete or inconsistent.
- (5) The local government shall submit to the [state planning agency], within [180] days of such notice, a revision of its new or modified land regulations and amendments to its local comprehensive plan that are consistent with the principles set forth in the rule designating the area of critical state concern. Revision(s) of new or modified regulations and amendments to a local comprehensive plan shall be reviewed and treated by the [state planning agency] in the same manner as original submissions of new or modified regulations and amendments to a local comprehensive plan as set forth in paragraphs (1) through (4) above.
- (6) If the [state planning agency] determines that the land development regulations and local comprehensive plan or amendments thereto submitted by a local government are consistent with the principles set forth in the rule designating the area of critical state concern, the [state planning agency] shall approve them by order within [60] days of submission.
- (7) If, within [6] months, any local government with jurisdiction within an approved area of critical state concern fails to submit proposed land development regulations and a local comprehensive plan, or fails to revise regulations or amend its comprehensive plan in accordance with this Section, the [state planning agency] shall [by rule]:
  - (a) provide notice and hold at least one public hearing in accordance with the procedures set forth in Section [5-206] above; and
  - (b) adopt land development regulations for the area within the jurisdiction of the local government that may include any type of regulations that could have been adopted by the local government under the provisions of this Section.

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The [state planning agency] may withdraw its land development regulations after the local government has satisfied the requirements of this Section.

### 5-210 Interim Regulation of Development and Plans

- (1) Notice by the [state planning agency] to any local [or regional] government of a [recommended *or* proposed]<sup>74</sup> area of critical state concern designation shall suspend the powers of the local [or regional]<sup>75</sup> government to grant approval of development, as defined in Section [5-302(1)], within its jurisdiction until the area's designation is either adopted or rejected, except that development approval may, with permission of the [state planning agency], be granted for:
  - (a) emergency development within the jurisdiction of the local [or regional] government, including, but not limited to, the construction of roads, utilities, dikes, levees, and other infrastructure; and
  - (b) continuing development projects for which interim or partial permission was granted prior to the date of notice.
- (2) After adoption of the rule designating the area of critical state concern and prior to the approval of local land development regulations and local comprehensive plans, or the adoption of land development regulations by the [state planning agency] pursuant to Section [5-209] above, the local [or regional] government may grant development approval only to the extent specified in the rule.

### 5-211 Development Permission in Areas of Critical State Concern

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<sup>74</sup>The intention here is to prevent an onslaught of development proposals that would conflict with the purposes of critical area designation while the designation process is still underway. Interim regulation is not, however, without pitfalls. If the hiatus on development approval extends for too long, there may be a taking claim for unnecessary delay. There are three choices: (1) interim regulation of development can occur between the time there is a concrete proposal for designation of an area of critical state concern by the state planning agency and the time the proposal is either adopted or rejected; (2) interim regulation of development can occur between the time of the initial recommendation by a state or regional agency and the time the proposal is either adopted or rejected. While the latter may be preferable, the former reduces the amount of time that development is restricted. The third choice is to employ the approach used in Florida:

If an area of critical state concern has been designated under subsection (1) [of Fla. Stat. §380.05] and if land development regulations for the area of critical state concern have not yet become effective under subsection (6) or subsection (8), a local government may grant development permits in accordance with such land development regulations as were in effect immediately prior to the designation of the area as an area of critical state concern. (Fla. Stat. §380.05(17).)

<sup>75</sup>The model reflects the possibility that a regional agency may have the authority to grant some type of development permission in the area of critical state concern.

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- (1) Upon the issuance of an order by the [state planning agency] approving land development regulations and a local comprehensive plan submitted by a local government located entirely or partially within an area designated as one of critical state concern pursuant to Section [5-207] above, the local government thereafter shall, in writing, approve, reject, or approve with conditions development permits, as defined in Section [5-302(3)], within that area in accordance with the regulations, subject to the requirements of this Section.
- (2) A local government that approves, rejects, or approves with conditions a development permit within an area of critical concern shall transmit the complete record of its decision to the [state planning agency] within [7] days of the date of its decision.
- (3) The [state planning agency] may commence review within [15] days after any local approval, rejection, or approval with conditions of such application for a development permit in the area of critical state concern. Such review shall be commenced by the transmission of written notice by certified mail, to the person who submitted the application for development permit and to the local government, of the decision of the [state planning agency] to review the local decision.
  - (a) If the [state planning agency] does not transmit such notice within [15] days of the local decision, then the local decision shall be in full force and effect according to its terms and conditions.
  - (b) The [state planning agency] shall, within [10] days of transmitting such notice, transmit a copy of the record of the local decision to the chief executive officer of each local, regional, and/or state government or agency whose:
    1. physical jurisdiction lies entirely or partially within the geographic area encompassed by the area of critical state concern; and/or
    2. functional jurisdiction or expertise includes or encompasses the area of critical state concern.

The governments or agencies so notified shall then have [15] days to submit to the [state planning agency] any written comments they may have upon the local decision.

  - (c) The [state planning agency] shall, after receipt and due consideration of any written comments pursuant to paragraph (b) above, approve, reject, or approve with conditions an application for a development permit within [45] days of transmitting notice pursuant to paragraph (3) above, provided, however, that such application shall not be rejected or conditionally approved unless the [state planning agency] determines that the proposed development does not conform with the local development regulations in effect for the area [or with the principles set forth in the rule designating the area of critical state concern].

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- (4) Approval, conditional approval, or rejection by the [state planning agency] shall be binding upon the person who submitted such application, shall supersede any local approval, conditional approval, or rejection of any such development permit, and shall be subject only to judicial review as provided for in Section [5-214] below.
- (5) When the [state planning agency] has not, pursuant to Section [5-208(4)], approved by order land development regulations and a local comprehensive plan submitted by a local government for an area of critical state concern that is entirely or partially within its boundaries, the [state planning agency] may, in writing, approve, reject, or approve with conditions a development permit within that area in accordance with development regulations for the area adopted pursuant to Section [5-208(5)].

### **5-212 Amendment of Regulations and Plans**

- (1) Amendments to local land development regulations and local comprehensive plans that apply within an approved area of critical state concern may be adopted by the local government only upon the issuance of an order by the [state planning agency].
- (2) The [state planning agency] shall issue such order in the same manner as was exercised for the approval of the original regulations and plans.

### **5-213 Withdrawal of Areas of Critical State Concern**

- (1) No area of critical state concern or portion thereof may be withdrawn from such status except upon a showing by the [state planning agency] that the criteria set forth in Section [5-203] above, no longer apply to the area.
  - (2) Any [regional planning agency] or any other state agency may recommend to the [state planning agency] that any area of critical state concern or portion thereof that has been adopted by rule under Section [5-207] be withdrawn as an area of critical state concern. The recommendation to withdraw shall be treated for all purposes as if it were a recommendation to designate, and the procedures set forth in Sections [5-204 to 5-207] shall be followed.
  - (3) Upon the date of withdrawal [by rule] of any area of critical state concern or portion thereof, all regulations shall revert back to local, [regional], and state governments with jurisdiction over the area in the same manner as if the area of critical state concern designation had never existed.
- ◆ As in Section 5-207, above, this withdrawal process will only work in those states where the designation is made by the state planning agency. Where the legislature (or the governor) makes the designation, the process would have to go back through the legislature (or the governor) to de-list the area, although the state planning agency would still initiate the recommendation.

### **5-214 Judicial Review of Agency Decisions**

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Appeals of decisions by the [state planning agency] to:

- (1) propose the designation or withdrawal of an area of critical state concern;
- (2) approve or adopt local plans and land development ordinances or amendments thereto applicable within an area of critical state concern; or
- (3) approve, reject, or approve with conditions any proposed development within an area of critical state concern;

shall proceed according to the provisions of the [*state administrative appeals act*].

- ◆ As in Section 5-207 above, the issue becomes complicated where the state legislature, rather than the state planning agency, performs the actual designation.

### DEVELOPMENTS OF REGIONAL IMPACT

#### WHAT IS A DRI?

Developments of regional impact (DRIs) are projects that have impacts that extend beyond local government borders or that affect more than one community. Such developments are also sometimes referred to as activities of state concern or of metropolitan significance. These developments raise issues of intergovernmental coordination, the adequacy of local permitting procedures, and the application of measures to mitigate any adverse effects on neighboring communities.

Eight states<sup>76</sup> have enacted legislation that sets forth specific standards and review procedures to address concerns regarding DRIs. Each state that has done so has devised its own definitions, review procedures, and mitigation requirements. Most existing programs owe their heritage to the American Law Institute's (ALI) *A Model Land Development Code*, which provided the first model legislation for DRIs and for developments of regional benefit (DRBs) (see further description below).

#### THE ALI CODE AND ITS LEGACY

Article 7 of the ALI Code established the DRI procedure as a means for allowing state and regional agency involvement in development matters that have effects beyond local borders. The

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<sup>76</sup>See Colorado (Colo. Rev. Stat. Ann. §24-65-101 (1990 and 1995 Cum. Supp.)); Florida (Fla. Stat Ann. §380.06 (1988 and 1996 Pamph. Supp.)); Georgia (Ga. Code §50-8-7.1(b)(3) (1989)); Massachusetts (Cape Cod Commission Act, enacted by Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990, §§12, 13); Maine (Me. Rev. Stat. Ann. Tit. 38, Art. 6 §481 *et seq.* (1989 and 1993 Cum. Supp.)); Minnesota (Minn. Stat. Ann. §473.173 (1994 and 1996 Cum. Supp.)); Vermont (Vt. Stat. Ann. Tit. 10, Ch. 151, §6081 *et seq.*); and Washington (Wash. Rev. Code Ann. §36.70A.350 (New Fully Contained Communities) and §36.70A.360 (Master Planned Resorts)) (1996 Cum. Supp.).

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Code was drafted in a manner that recognized that most land-use matters were of only local concern and that states would participate only in those limited types of decisions affecting important state or regional interests.<sup>77</sup>

The ALI Code defined DRIs as development projects that, “because of the nature or magnitude of the development or the nature or magnitude of [its] effect on the surrounding environment, are likely in the judgment of the State Land Planning Agency to present issues of state or regional significance.”<sup>78</sup> The ALI Code also provided rules for determining when a development is a DRI. Factors to be considered when designating a development as a DRI included the creation or alleviation of environmental problems, such as water pollution or noise, the amount of pedestrian or vehicular traffic likely to be generated, the number of persons likely to be residents, the size of the site to be occupied, the likelihood that additional development would be generated, and the unique qualities of particular areas of the state where the development is proposed. The Code also set forth: a provision that the DRI review procedure could be applied only in jurisdictions with an adopted land development ordinance; special development procedures; and a benefit-detriment test to be applied before a permit could be issued for a DRI.

Using the same criteria, the Code also included provisions for reviewing and approving DRBs.<sup>79</sup> At the time of application for a development permit, a developer could request that the project be treated as a DRB even if it was not otherwise included within a DRI category, and then follow the special DRI procedures. The purpose was to allow a developer – whose proposed project could be rejected by a local government – to take advantage of a review procedure that considers regional benefits.

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<sup>77</sup>American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976). Commentary on Art. 7, 248-254.

<sup>78</sup>ALI Code, Art. 7, §7-301(1); 269.

<sup>79</sup>Developments of regional benefit are defined in the ALI Code to include:

- (a) development by a governmental agency, other than the local government that created the Land Development Agency or another agency created solely by that local government;
- (b) development that will be used for charitable purposes, including religious or educational facilities, and that serves or is intended to serve a substantial number of persons who do not reside within the boundaries of the local government creating the Land Development Agency;
- (c) development by a public utility if the development is or will be employed to a substantial degree to provide services in an area beyond the territorial jurisdiction of the local government creating the Land Development Agency; and
- (d) development of housing for persons of low and moderate income.

ALI Code, Art. 7, §7-301(4).

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In its review of DRIs and DRBs, the local land development agency had to determine whether the “probable net benefit” from a proposed development would exceed its “probable net detriment.” This benefit-detriment analysis would be made using criteria specified in the Code that included factors that were relevant not just to the local jurisdiction, but to the surrounding areas. The intent was to ensure that extralocal interests also receive consideration in the development review process. The local land development agency had to make its decision in writing, and the decision could be appealed to a special land court called the State Land Adjudicatory Board.

The Code did not require that there be a state land development plan or any overarching state policies in order for a state to engage in regulating DRIs. However, Article 7 of the Code did provide for the establishment of a State Land Planning Agency and directed it to undertake statewide planning studies, including the preparation of a land development plan, and to engage in rule-making.

### EXPERIENCE WITH THE ALI MODEL

Florida and Colorado are the only states to have adopted and used major portions of the ALI Code. However, to a more limited extent, the Code’s DRI provisions (and the regulations governing areas of critical state concern) (see Section 5-201 *et seq.*) have also been adopted in some form by Georgia, the Cape Cod Commission, and the Martha's Vineyard Commission.

### FLORIDA

In 1972, Florida became the first state to adopt Article 7 of the ALI Code.<sup>80</sup> Mirroring the Code, the Florida statutes require state and regional review of DRIs, in addition to local government analysis and approval of developments that have been identified as DRIs. Projects that have generally fallen under this classification are large residential developments (ranging from 250 to 3,000 dwelling units), power plants, and shopping centers. Thresholds are established by statute for 14 land-use categories to help define which projects fall under DRI purview.

The DRI review process can be initiated by either the developer or the local government. A developer can request a prompt determination from the state Department of Community Affairs as to whether a project meets DRI qualifications, and, if so, whether it would be excluded from DRI review because he or she has vested rights. The department is required to respond via a “binding letter of interpretation” within 60 days. The local government, the regional agency, and the developer are all bound by the state’s interpretation.

Once a project is designated as a DRI, the local government and the regional agency each begin their own review. The regional agency prepares a report and recommendations on the regional impacts of the proposed development, using the criteria for measuring benefits and detriments as set forth in the statute.<sup>81</sup> These criteria include consideration of factors (again, both negative and

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<sup>80</sup>Fla. Stat. Ch. 380, esp. §380.06 (Developments of regional impact)..

<sup>81</sup>For similarities of criteria, compare Fla. Stat. §380.06(2)(a) with ALI Code, Art. 7, §7- 402. See also John DeGrove, *Land, Growth and Politics* (Chicago: Planners Press, 1984), 119.

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positive) that include the development's effect on the environment, the economy, public facilities (including sewer, water, and transportation networks), the jobs/housing balance, energy consumption, and other factors that the regional agency deems appropriate. The local government reviews projects according to its existing land development regulations.

Local governments are responsible for ultimately deciding whether to issue a development order allowing a DRI to proceed. The local government must consider the report and recommendations of the regional agency concerning the potential regional impacts of a project but is not required to abide by those recommendations. The local government must also consider whether the project interferes with the achievement and objectives of the state land development plan and whether the project is consistent with its own local land development regulations. The owner, the developer, and the state Department of Community Affairs may appeal the local government's decision to the state Land and Water Adjudicatory Commission (Florida's land court). Until 1993, regional agencies were also empowered with this appeal privilege. The legislature removed that authority in part to streamline the review process; the regional agency's role in DRI review is now primarily to act as a coordinator.

Over the nearly 25-year life of the program, the Department of Community Affairs has developed separate rules and review procedures for several types of DRIs.<sup>82</sup> These include the following: a conceptual agency review procedure; a "comprehensive application" for proposals that include two or more DRIs; special rules for downtown development authorities acting as DRI applicants; and the Florida Quality Developments (FQD) program. A developer can elect to undergo the FQD program if his or her development site contains significant environmentally sensitive lands (e.g., wetlands, beaches, and coastal areas) and if a significant portion of the site will be set aside for permanent protection from development.

### **CAPE COD COMMISSION IN MASSACHUSETTS**

The Cape Cod Commission became authorized to review DRIs with the passage of the Cape Cod Commission Act in 1990.<sup>83</sup> (The Martha's Vineyard Commission has been authorized to review DRIs since 1974.) Both programs are based on Article 7 of the ALI Code.

As with other DRI programs, the Cape Cod Commission established thresholds relating to size and potential impact to determine which projects should be considered DRIs. (A discussion about designating thresholds appears later in this Chapter.) In summary, these thresholds are as follows:

- (1) any proposed demolition or substantial alteration of an historic structure or archaeological site;

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<sup>82</sup>For examples of the review procedures, see, e.g., Fla. Stat. §§380.06(9) (conceptual agency review); 380.06(21) (comprehensive application); 380.06(22) (downtown development authority application); and 380.61 (Florida Quality Developments program).

<sup>83</sup>Cape Cod Commission Act, enacted by Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990 (§12(c)(1-8)).

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- (2) the construction of a bridge or roadway that would provide direct access to a waterway;
- (3) residential projects greater than 30 acres or 30 dwelling units; and
- (4) commercial developments of at least 10,000 square feet, whether it be new construction, an addition, or a use change.<sup>84</sup>

The review process begins when a developer brings a proposal to a local government for review. If the proposal meets the criteria for a DRI, the local government refers the application to the Cape Cod Commission for review. The Commission notifies the applicant that the project will be reviewed according to DRI standards. At that point, the local review process is suspended while the application is under consideration by the Commission. The Commission then schedules a public hearing, which must take place within 60 days of the submission of the application.

The Commission and its staff review the application and may approve, approve with conditions, or disapprove DRIs. The Commission review process is guided by the goals of the act and by the regional policy plan, which focus on issues that include water quality, traffic circulation, historic values, affordable housing, and economic development. Specifically, the act directs the Commission to consider the following questions in evaluating a proposed DRI:

- (1) Is the probable benefit from the proposed development greater than the probable detriment?
- (2) Is the proposed development consistent with the regional policy plan and the local comprehensive plan of the municipality in which it is located?
- (3) Is the proposed development consistent with municipal development bylaws? Or, if it is inconsistent, is the inconsistency necessary to enable a substantial segment of the population to secure adequate opportunities for housing, conservation, environmental protection, education, recreation, or balanced growth?
- (4) Is the proposed development located within a designated district of critical planning concern? And, if so, is it consistent with the rules and regulations established for such districts?<sup>85</sup>

After receiving approval of a DRI from the Commission, the developer must then complete the local government's review and permitting procedures.

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<sup>84</sup>Id.

<sup>85</sup>Districts of critical planning concern are areas containing significant natural, coastal, scientific, cultural, architectural, archaeological, historic, economic, or recreational resources. Section 10, Cape Cod Commission Act, enacted by Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990 (§12(c)(1-8)).

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When the Cape Cod Commission Act was first enacted, developers had to navigate through the Massachusetts Environmental Protection Act (MEPA) process, receive all the necessary state approvals, and then contact the Cape Cod Commission for an additional list of assessments and data-gathering demands that had to be completed as a condition of development approval. Now, information-gathering requirements and impact assessments required under MEPA and DRI review processes are combined into a joint review/scope study that fulfills the requirements of both acts. If an application is denied by the Commission, the project is essentially dead, unless the developer decides to appeal. Projects that are approved are then returned to the local government's jurisdiction and subject to local development review procedures.

There are two types of exemptions that developers can file for under the Commission's DRI rules – a Standard Exemption (Section 12(k) of the Act) or a Hardship Exemption (Section 23 of the Act). The first type of exemption may be used where the developer can show that the location, character, and/or environmental effects of the proposed development are such that it will not create impacts outside the municipality in which it will be located. In other words, while some developments may meet the thresholds to be designated as a DRI, their impacts may not be regionwide. For example, a 30-acre development that is proposed for subdivision into three 10-acre parcels may qualify for such an exemption. The Commission is also authorized to grant the second type of exemption, in whole or in part and with appropriate conditions, where developers can prove that a literal enforcement of the act would involve substantial hardship (financial or otherwise) and that desirable relief could be granted without substantial detriment to the public good and without nullifying or significantly derogating the intent of the act.

The act also provides an appeals mechanism for cases in which the developer disputes the finding that the development meets the DRI criteria or believes that the rules were applied improperly. Appeals must be made to either the superior court or the court of Barnstable County within 30 days after the Commission has notified the developer of its decision.

In 1994, four years after implementing DRI regulations, the Cape Cod Commission convened a task force to review several operations of the Commission and to make recommendations as to how they could be improved.<sup>86</sup> The major conclusion drawn by the task force was that decisions were being made on a case-by-case basis, with no clear policy guidance or uniform application of rules. Specifically, the task force concluded that the DRI process was actually working at cross purposes with the Cape Cod Economic Development Council in that the DRI process was viewed by many as cumbersome and might be scaring off potential business and industries. As a result of the task force's findings, the Commission and the Economic Development Council adopted a joint statement outlining their dual roles in environmental preservation and job creation, and have since made efforts to establish a procedure to coordinate their efforts.

The task force also found that development proposals of similar type and scale were not always treated uniformly. The task force thus recommended, and the Commission subsequently adopted, an ordinance that clearly defines all DRI thresholds, all performance standards that may be applicable to various types of DRIs, and the methods for calculating mitigation requirements.

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<sup>86</sup>Report of the Cape Cod Commission Regulatory Review Task Force, September 7, 1994.

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### VERMONT

Enacted in 1970, Vermont's Act 250 established a project review process in which certain types of land development and land subdivision require approval by state-created district environmental commissions.<sup>87</sup> Because Vermont is largely rural, a project does not have to be very large to meet Act 250's criteria for what constitutes a development with greater than local impact. For example, all housing projects of 10 or more units and all commercial and industrial projects larger than 10 acres are subject to the regional review.

A district commission must measure each proposed development against 10 major criteria and 11 subcriteria. Generally, the commission must find that a proposed development will not cause: pollution; erosion; unreasonable traffic congestion; or school overcrowding. In addition, the development must not have an adverse effect on either scenic or natural beauty or historic sites, and must conform with any statewide plans adopted under Act 250, as well as any locally adopted plan, capital program, or municipal bylaw.<sup>88</sup>

The Act 250 review process has been criticized over the years for being piecemeal and for lacking a planning context. This reproach stems from the fact that the state land-use plan required under the Act was never prepared, and, thus, decisions have been made on a project-by-project basis. Further, the Act 250 process has not been integrated into Act 200, the statewide growth management program passed in 1988. For example, the regional planning agencies that prepare comprehensive plans under Act 200 are different entities than the nine district environmental commissions that conduct Act 250 review.

On the positive side, the appointment of lay people to the regional commissions is regarded as the program's strongest point. And, although most of the development applications reviewed by the district environmental commissions have been approved, most have had substantial conditions attached to their approval as a means of mitigating potential negative impacts.<sup>89</sup>

### METROPOLITAN COUNCIL OF THE TWIN CITIES

The Minnesota legislature adopted legislation in 1967 that gave the Metropolitan Council the authority to review projects of regionwide significance.<sup>90</sup> The process is very different than the ALI-based model described above. It is essentially a mediation and dispute resolution mechanism for local governments within the region to use if residents believe that they would be negatively affected by the impacts of a proposed project in a neighboring community.

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<sup>87</sup>Vt. Stat. Ann. Tit. 10, §6046. See also Thomas R. Melloni and Robert I. Goetz, "Planning in Vermont" in P.A. Buchsbaum and L.J. Smith, eds., *State and Regional Comprehensive Planning* (Chicago: American Bar Association, 1993), 156-74.

<sup>88</sup>Vt. Stat. Ann., Tit. 10, Ch. 151, §§6086(a)(9)(A)-(L).

<sup>89</sup>John DeGrove, *Land, Growth, and Politics* (Chicago: Planners Press, 1984), 75.

<sup>90</sup>Minn. Stat. §473.173.

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The Metropolitan Council forms a significance review committee (a new committee is convened for each project) that evaluates projects according to whether they will “substantially impact” service levels of major transportation facilities, local or regional sewer and stormwater plans, open space and recreational resources, as well as other (primarily environmental) considerations. The significance review committee determines whether to review the project itself or defer to a mediator’s or administrative law judge’s review and decision. The reviewing entity is charged with submitting a report to the full Council that must include findings of the effects of the development and propose remedies. There are three potential outcomes of the Council’s actions: either the developer agrees to the required remedies; the local or regional facility plan is amended to accommodate the proposed development; or the development proposal is suspended by the Council for a one-year period of time.

According to the Metropolitan Council staff, in the history of the significance review process, approximately 20 developments have been subject to the Council’s review process. The Mall of America in south suburban Bloomington, a National Basketball Association basketball arena in downtown Minneapolis, and a large bingo and casino gaming facility in south suburban Prior Lake are examples of the types of projects that have been subject to review.

### **CRITICISMS OF EXISTING DRI PROGRAMS**

The two primary criticisms with existing DRI programs are: (1) the subjective nature of the thresholds used to determine which projects are DRIs (discussed below); and (2) the lack of connection to a larger planning process. In Vermont and Florida, for instance, the DRI processes were precursors to larger state growth management programs, and they still operate outside those mechanisms. In effect, policy is being made and remade anew with each DRI review rather than having been made and then applied to all projects. In his planning law treatise, the late Vermont Law School Professor Norman Williams, Jr., illustrates how this missing connection manifests itself in the review of large projects. In his analysis of the criteria used by district environmental commissions to evaluate development proposals, Williams noted that the criteria were “so vague as to provide practically no serious guidance for an administrative agency making decisions thereunder.”<sup>91</sup>

But simply stating that the DRI review decisions must be based on a plan is no guarantee that it will happen. For instance, the Vermont State Land Use Plan, which was to provide guidelines for those persons reviewing large-scale projects in the state, was never prepared. And in Florida, the State Comprehensive Plan was adopted 10 years after the DRI process got underway. So, although the Florida DRI rules state that DRI decisions must be based on the plan, that has not transpired.

### **DESIGNATING THRESHOLDS**

The standards and criteria that a state planning agency uses to define which developments are DRIs vary widely from to state to state. For example, in some Florida counties, the smallest

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<sup>91</sup>Norman Williams, *American Land Planning Law* 5, §160.28 (Deerfield, Ill.: Clark Boardman Callaghan, 1985), 682.

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residential DRI is 250 dwelling units.<sup>92</sup> By contrast, in areas of Vermont, the DRI process is activated by any housing development consisting of at least 10 dwelling units.<sup>93</sup> The Cape Cod Commission reviews as a DRI any wholesale, business, office, or industrial development of 10,000 square feet or more.<sup>94</sup> Georgia's threshold for similar facilities is 250,000 square feet.<sup>95</sup> For each land use to which a DRI threshold is applied, the threshold must be set at the point at which that land use has an extralocal effect. For example, simply because a building is large does not necessarily mean it will have a multijurisdictional impact or even a negative impact. A 75,000-square-foot storage facility will obviously have a differing impact on the surrounding area than a 75,000-square-foot discount retail store. For that matter, a 75,000-square-foot storage facility may have the same impact on the surrounding area as a 10,000-square-foot discount retail store. The point being, of course, that a state planning agency must use more than numbers alone to establish thresholds.

DRI thresholds also need to vary according to jurisdiction size. For the same reasons that impacts will vary from state to state, they will vary from region to region within a state. Georgia established DRI thresholds for 13 types of development in three population categories. In the Atlanta region, the DRI threshold for housing developments is 500 new units or lots; in smaller metropolitan areas, it is 400 units or lots; and, in rural areas, the threshold is only 250 units.

Florida's statute provides general standards and criteria but does not set specific thresholds for DRI determination. Instead, it charges the state planning agency in its rule-making authority with establishing thresholds that local governments or the state planning agency can use to determine whether a development is a DRI. Massachusetts includes the thresholds in its legislation.<sup>96</sup>

### PERIODIC REVIEW OF THRESHOLDS

Deriving and applying thresholds to determine which projects will be subject to DRI review is the most contentious aspect of DRI programs. A state that adopts a DRI program should be prepared to periodically revisit the thresholds to ensure that developments with similar impacts are being treated fairly and equally. The goal, of course, should be to treat projects with similar impacts in a like manner. As described above, the level of specificity used to establish thresholds for what constitutes a DRI varies greatly from state to state and from region to region. Those standards have been criticized for being both arbitrary and rigid. This suggests that the state planning agency should be flexible in setting the thresholds and prepared to modify them where necessary.

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<sup>92</sup>Fla. Admin. Code, Ch. 28-24.010. Developments Presumed to be of Regional Impact.

<sup>93</sup>Vt. Stat. Ann. Tit. 10, Ch. 151 §§6081-6091.

<sup>94</sup>Cape Cod Commission Act §12(c)(6).

<sup>95</sup>*Procedures and Guidelines for the Review of Developments of Regional Impact*, Georgia Department of Community Affairs, November 1991.

<sup>96</sup>See Cape Cod Commission Enabling Regulations Governing Review of Developments of Regional Impact.

### DEVELOPMENTS OF REGIONAL IMPACT

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#### *Commentary: Procedures for Regulating Developments of Regional Impact*

In the model that follows, the DRI program is intended to be used within the framework of several key policy and regulatory functions, including: (1) a state plan or a set of state goals for planning and land development; (2) regional plans and goals; and (3) local plans and land development regulations, especially those that address multijurisdictional issues.

There are eight main steps in the model DRI regulatory process:

1. The state planning agency adopts rules regarding developments of regional impact. These rules are based on goals, policies, and guidelines in a state land development plan, prepared pursuant to Section 4-204 of the *Legislative Guidebook*, and a state biodiversity conservation plan pursuant to Section 4-204.1 if one exists. The rules address the following:
  - a. Categories or types of development that are presumed to have regional impacts;
  - b. Roles and responsibilities of state, regional, and local agencies;
  - c. Application requirements;
  - d. Criteria and procedures for reviewing, approving, or denying DRI applications; and
  - e. Standards for exemptions from DRI rules.
2. A developer applies for a development permit from a local government having jurisdiction. The host local government will make a determination and notify the developer whether the proposed project meets or does not meet the criteria for a DRI.
3. If the proposed development constitutes a DRI, the model provides two alternatives:
  - a. The host local government accepts the application; or
  - b. The host local government refers the application to the regional planning agency for review as a DRI. The regional planning agency will in all likelihood impose additional application requirements (e.g., a DRI application form) above what was required in the developer's initial application to the host local government.

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4. The primary reviewing agency is required to send copies of the DRI application to all interested agencies and entities.
5. Depending on the alternative selected in (3), the review of the DRI is conducted by the local government or the regional planning agency. The DRI is reviewed according to the standards established by the state planning agency in its rule-making procedures.
6. The primary reviewing agency gives notice and holds public hearings on the proposed DRI.
7. Subsequent to the public hearing, and after consideration of all comments, reports, and recommendations from interested parties and entities, the primary reviewing agency makes a decision to approve the DRI, approve it with conditions, or deny the application for development.
8. The decision may be appealed to the court of competent jurisdiction.

### **KEY FEATURES OF THE MODEL**

The model statute that follows recommends that a DRI program be made a component of an integrated state, regional, and local planning and development control system. The goals of the DRI program and outcomes of DRI reviews should therefore be based on sound planning goals and policies. For example, statewide policies to discourage urban sprawl, encourage compact urban form, and ensure that infrastructure is in place concurrently with the demands of new growth and development can be implemented via the criteria used to review DRIs, at least to the extent to which proposed developments affect such policies. The presence and recognition of plan policies in the review process can lend credibility to the decision makers and improve predictability for the developers.

The model legislation does not provide specific thresholds for states to adopt to define DRIs since this process would be more appropriately created by a state in its own administrative rule-making process. As described above, each state that currently has a DRI program has found it necessary to vary the thresholds and make continuous adjustments to those thresholds in order to accurately address development trends and project impacts. The model does include a provision that allows for thresholds to differ according to community size and location. It also provides for the agency charged with determining whether a project qualifies as a DRI to balance qualitative judgment with quantitative thresholds.

### **DESIGNATING THE REVIEW AGENCY**

A major issue encountered by each state designing a DRI program is deciding which level of government is the appropriate agency to conduct the primary review and approval of the DRI application. The ALI Code establishes the local government (using its “Special Development

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Procedures”<sup>97</sup> as the primary reviewing and permitting agency for DRIs.<sup>98</sup> Such is the case, therefore, in Florida, which used the ALI Code as a model. An alternative, used in Cape Cod and Martha's Vineyard, is for a regional planning agency to conduct the review and either approve, approve with conditions, or deny a permit to a DRI development. Whichever approach is adopted, the primary reviewing agency should employ state-established criteria to evaluate the impacts of a proposed development and set forth conditions under which it may be approved or denied.

To be effective, review and approval authority should reside with the agency that has the power to make policy decisions regarding development patterns and to prepare and adopt a plan that is consistent with state, regional, and local goals (to the extent that they exist). In addition, the statute must also set forth what other levels of government and agencies will be required or allowed to review the DRI application and to make recommendations to the primary reviewing agency. Such recommendations are typically advisory only, but the statute may vary as to whether the comments of other agencies must be formally acknowledged. At a minimum, the primary reviewing agency should be required to provide a written acknowledgment of the recommendations of other agencies in its final decision.

The regional planning agency contemplated by the model will vary in form from state to state. For example, the Cape Cod Commission is a special agency created by the state legislature for a specific geographical area. Florida and Georgia have regional planning agencies that serve planning functions in the statewide growth management program and conduct advisory reviews of DRI proposals. Other states may determine that counties should serve as the regional planning agency for the local governments located within their boundaries.

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### 5-301 Statement of Purpose; Source of Authority

- (1) The purpose of this Act is to ensure that, for developments of regional impact (DRIs), regional and extra-jurisdictional impacts and interests will be identified and addressed by:
  - (a) providing a special intergovernmental review procedure that allows state, regional, and local agencies whose plans, programs, and policies affect or are affected by developments to participate in decision making with regard to those developments;
  - (b) ensuring public participation in the process of reviewing development proposals;
  - (c) requiring agencies responsible for approving such developments to make a record of their decision based on an analysis of the regional and/or extra-jurisdictional impacts or consequences; and

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<sup>97</sup>ALI Code, Art. 2, §2-201.

<sup>98</sup>Id., Art. 7, §7-303.

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- (d) ensuring that developments with extra-jurisdictional impacts are reviewed according to state and regionwide policies concerning [urban sprawl; environmental quality; historic preservation; safety from impacts of natural hazards; balancing jobs and housing; housing affordability; and/or provision of infrastructure].
- [(2) Pursuant to its authority under Section [4-102(4)(d)], the [state planning agency] may adopt rules to administer the DRI program in accordance with the standards, criteria, and thresholds identified in Section [5-303] below, provided, however, that the agency first prepares and adopts a state land development plan pursuant to Sections [4-204 and 4-210][and a state biodiversity conservation plan is prepared and adopted pursuant to Sections [4-204.1] and [4-210].]]

### 5-302 Definitions

As used in this Act, the following definitions shall apply:

- (1) “**Development**” means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity that alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered species habitat, aquifer, or other resource area, including coastal construction or other activity.
- (2) “**Development of Regional Impact**” or “**DRI**” means any development that, because of its character, magnitude, or location, would have substantial effect upon the health, safety, or welfare or more than one [county, city, town, or other political subdivision].
- (3) “**Development Permit**” means any building permit, zoning permit, plat approval, rezoning, certification, variance, or other action having the effect of allowing development as defined in this Section.
- (4) “**Host Local Government**” means the local government:
  - (a) in which the land on which a proposed development of regional impact is located; and
  - (b) that would have authority to exercise final development approval if the proposed development were not a development of regional impact.
- (5) “**Interested Agency or Entity**” means any state, regional, and/or local government or agency whose jurisdiction lies entirely or partially within the geographic area encompassed by the proposed development of regional impact and whose programs and policies would be affected by the proposed development.

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- (6) “**Primary Reviewing Agency**” means the [regional planning agency] or host local government that has the authority under this Act to review a development of regional impact, hold public hearings on the proposed development, coordinate the involvement of other interested persons, agencies, or entities that are participants in the review, and issue a decision whether to approve, approve with conditions, or deny an application for a development of regional impact.

### 5-303 Statewide Standards, Criteria, and Thresholds

- (1) The [state planning agency] shall promulgate by rule thresholds that shall be used to determine which land uses (and at what size, scale, nature, characteristics, etc.) shall be designated a development of regional impact (DRI) and undergo DRI review. Such rules shall be based on goals, policies, and guidelines established in the state land development plan [and state biodiversity conservation plan].
- (2) In adopting thresholds under this Act, the [state planning agency] shall include in its consideration:
- (a) the impact of a proposed development on the environment and natural resources of the state or region, including, but not limited to, air, ground, surface water supply and quality, coastal areas, air quality, endangered or threatened species habitats, open space, scenic resources, agriculture, and aquaculture;
  - (b) the impact of a proposed development on the built environment of the state or region, including but not limited to, historical, cultural, architectural, archaeological, and recreational resources;
  - (c) the impact of a proposed development on the existing capital facilities of affected local governments and special districts and the extent to which new capital facilities will be required to serve the proposed development;
  - (d) the amount of vehicular and pedestrian traffic likely to be generated;
  - (e) the number of persons likely to be residents, employees, or otherwise present on site;
  - (f) the size of a proposed development site;
  - (g) the size of structure(s) to be constructed on site;
  - (h) the likelihood that a proposed development will stimulate additional development in the surrounding area;
  - (i) the unique qualities of a site;

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- (j) the likelihood that a proposed development will be affected by or will affect natural hazards;
- (k) the extent to which a proposed development would create an additional demand for energy; and/or
- (l) other factors of state, regional, and/or local concern.

- ◆ Using the thresholds, a state planning agency may wish to develop a list of development activities that will be presumed to be DRIs, and a second list of development activities that will be presumed not to be DRIs. For example, the Cape Cod Commission's enabling regulations for DRIs state that repairs and alterations of single-family dwellings or accessory structures do not have significant impacts outside the municipality in which they are located and, therefore, are presumptively not DRIs. A project that is presumed not to be a DRI (according to the list) may nonetheless be subject to DRI approval if the host local government, in its analysis of the proposed development, determines that the proposed development will have regional impacts. For those projects that are not included on either list, the host local government will have to make an independent determination of DRI status.

### 5-304 Variations in Thresholds

- (1) In its rule making, the [state planning agency] may vary the thresholds by locality, taking into account factors that include population and development characteristics (e.g., urban, suburban, or rural).
- (2) A [regional planning agency *or* local government] may petition the [state planning agency] to increase or decrease a numerical threshold as applied to a given locality.

### 5-305 Determination of DRI Status

Using the thresholds established by the [state planning agency] pursuant to Sections [5-303 and 5-304] above, the host local government shall determine whether a proposed development is a development of regional impact (DRI) and will be subject to DRI review.

- ◆ Some jurisdictions may prefer that the [state planning agency] make the determination of DRI status rather than the host local government. This may impart a greater perception of impartiality.

### 5-306 Submittal of DRI Application (Two Alternatives)

*Alternative 1 – Host Local Government as Primary Reviewing Agency*

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- (1) After the host local government has determined that a proposed development is a development of regional impact (DRI) pursuant to Section [5-305] above, the developer shall file an application with the host local government for development approval as a DRI.<sup>99</sup> The DRI application shall be in addition to any other applications for development approval required by the host local government's own land development regulations.
- ◆ DRI application requirements will vary by state and will include forms, notifications, determination of completeness, checklists, etc.
  - (2) Upon receipt of an application for a proposed DRI, the host local government shall determine whether additional information is necessary to assess the impact of the proposed development and may request such information from the developer.
  - (3) When a DRI application is filed with a host local government, the host local government shall also send copies of the application to the [regional planning agency], the [state planning agency], and other interested agencies and entities.
  - (4) The host local government may request the assistance of the [regional planning agency *and/or* state planning agency] in its review of a DRI application.
- ◆ Host local governments with limited staff and resources may find it helpful or necessary to seek the technical assistance of larger agencies while not relinquishing authority or control over the DRI application review procedure.
  - [(5) A developer who is required to file for a permit under [*the state environmental protection act*] may elect to undergo a joint application and review procedure with the host local government and the [state department of environmental protection].<sup>100</sup>

### *Alternative 2 – Regional Planning Agency as Primary Reviewing Agency*

- (1) After the host local government has determined that a proposed development is a development of regional impact (DRI) pursuant to Section [5-305] above, the developer shall file an application with the host local government for development approval as a DRI. The host local government shall then refer the application to the [regional planning agency] for

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<sup>99</sup>The state planning agency, through rule making, would establish the contents of the standard DRI application form. Examples of submission requirements might include: the applicant's own assessment of the regional impacts of the proposed development; the number of copies of development plans; the names and addresses of adjoining property owners; the location of existing and proposed utilities needed to serve the proposed development; and information concerning the proposed uses, such as number of employees and residents.

<sup>100</sup>States that have a state-level environmental policy act in place when the DRI program is enacted are strongly urged to combine data gathering and review and analysis proceedings for both requirements into a joint process. Chapter 12 of the *Legislative Guidebook* provides model legislation on integrating the local planning and land development regulation system with a state environmental policy act.

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its review.<sup>101</sup> The [regional planning agency] review of the proposed DRI shall not excuse the proposed development from review and compliance with the host local government's own land development regulations.

- (2) When a DRI application is filed with a [regional planning agency], the [regional planning agency] shall also send copies of the application to the [state planning agency] and other interested agencies and entities.
- (3) The [regional planning agency] may request the assistance of the [state planning agency] and the host local government in its review of a DRI application.
- [(4) A developer who is required to file for a permit under *[the state environmental protection act]* may elect to undergo a joint application and review procedure with the [regional planning agency] and the [state department of environmental protection].]
- (5) Within [14] days of receiving a referral of a proposed DRI, the [regional planning agency] shall notify the developer of its intent to review the proposed project as a DRI.

- ◆ Regardless of which entity (i.e., the host local government or the regional planning agency) is charged with making the final decision to approve or deny a proposed DRI, the entity should focus its review on the multijurisdictional impacts of the proposed DRI and the conformance of the project to any state, regional, and local plans. Furthermore, the extent to which a primary reviewing agency is required to formally address the concerns of other interested persons, agencies, or entities or simply take them under advisement must be made clear.

### **5-307 Review and Recommendations of Interested Agencies and Entities**

Any interested agency or entity may review the application for a proposed DRI using the same standards and criteria established in Sections [5-303 and 5-304] above and may submit a written report to the primary reviewing agency containing its concerns and recommendations. Although this report shall be advisory only, it must be considered by the primary reviewing agency in its review of the DRI application and acknowledged in its final decision issued pursuant to Section [5-309] below.

### **5-308 Notice and Public Hearings**

- (1) The primary reviewing agency shall hold a public hearing on the application for a DRI approval. Such hearing shall be held at a public facility located within the boundaries of the host local government.

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<sup>101</sup>The regional planning agency may also require the developer to complete a formal DRI application form to supplement the initial application that was referred from the host local government.

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- (2) At least [30] days before the date of the public hearing, the primary reviewing agency shall provide written notice of the proposed DRI by publication in a newspaper that circulates in the area proposed for development and may also give notice, which may include a copy of the proposal and supporting documents, by publication on a computer-accessible information network or other appropriate means to all interested agencies or entities, and to any interested person who, in writing, requests to be provided notice of proposed DRIs.
- (3) The notice of each public hearing shall:
  - (a) contain a description of the total area and boundaries of the proposed DRI, and a general statement of foreseeable impacts on environmental or natural resources, scenic resources, historic and archaeological resources, and/or major public facilities or public investments;
  - (b) specify the officer(s) or employee(s) of the primary reviewing agency from whom additional information may be obtained and to whom written comments may be directed;
  - (c) specify a time and place where a copy of the DRI application may be inspected before the public hearing; and
  - (d) specify the date, time, place, and method for presentation of views by interested persons at the public hearing.
- (4) The primary reviewing agency shall afford any interested person, agency, or entity the opportunity to submit written recommendations and comments on the proposed DRI, copies of which shall be kept on file and made available for public inspection.
- (5) Public hearings shall be conducted in the following manner:
  - (a) The hearings shall be chaired by the chief executive officer of the primary reviewing agency or his or her designated representative.

◆ This assumes that the chief executive officer has such authority.

- (b) The hearing shall be on the record and a transcribed record shall be kept of all comments made at the hearing. A transcribed copy of all comments shall be made available to all interested persons upon request and at actual cost.
- (c) The form of the hearing(s) may be set by the primary reviewing agency, except that representatives of all opinions regarding the DRI application shall be given an opportunity to make spoken comments.
- (d) Written comments on the DRI application shall also be received at the hearings, and shall become part of the record.

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- (6) To the extent that it is practicable to do so, the chief executive officer of the primary reviewing agency may attempt to reconcile persons, agencies, or entities with opposing viewpoints through informal conflict resolution procedures.

### **5-309 Review of DRI Application**

- (1) The primary reviewing agency shall review proposed DRIs in accordance with the following criteria:
- (a) Whether the proposed DRI is consistent with this Act and with the state land development plan, [state biodiversity conservation plan,] regional comprehensive plan, plans of any interested agencies or entities, and comprehensive plan and land development regulations of the host local government;
  - (b) Whether the proposed DRI will have a favorable or adverse impact on:
    - 1. the environmental, agricultural, historical, scenic, and/or cultural resources of the region and local government;
    - 2. air quality, water quality, erosion, flooding, and safety issues related to natural hazards;
    - 3. the regional and local economy;
    - 4. existing public facilities, including, but not limited to, roads, sewers, sewage treatment plants, stormwater management facilities, water supply and treatment plants, and educational facilities, as well as those facilities that are planned for construction in the succeeding [5] years;
    - 5. the ability of people to find adequate housing that is reasonably accessible to places of employment;
    - 6. the supply and distribution of low- and moderate-income housing for the region and local government;
    - 7. historical settlement patterns of the region and locality, including population, density, and development characteristics (e.g., urban, suburban, or rural); and
    - 8. any area of critical state concern, designated pursuant to Section [5-207].
  - (c) Whether the natural environment, including the potential for natural hazards, would have an adverse effect on the proposed DRI.

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- (2) The primary reviewing agency shall also review and consider any report submitted to it by any other interested person, agency, or entity that contains concerns and recommendations on the impacts of the proposed development.

### 5-310 Issuance of Decision

- (1) Within [60] days after the public hearing, the primary reviewing agency shall render a written decision containing findings and approving, approving with conditions, or denying the development permit for the proposed DRI. Such [60]-day period may be extended by mutual agreement of the primary reviewing agency and the developer.
- (2) In its decision to approve a development permit for a proposed DRI, the primary reviewing agency may specify conditions to be met by the developer for the purpose of minimizing any negative economic, social, and/or environmental impacts and may also require the developer to modify a project to specifically address the concerns and recommendations contained in reports received from other interested agencies and entities pursuant to Section [5-307] above.
- (3) The decision of the primary reviewing agency shall also acknowledge any concerns and recommendations contained in reports received from any interested agency or entity that were not incorporated in the primary reviewing agency's final decision.
- (4) The primary reviewing agency shall not approve a DRI application that does not make adequate and timely provision for those public facilities needed to accommodate the impacts of the proposed development.
- (5) The primary reviewing agency shall file its written decisions with the [clerk of the host local government *or* secretary of the regional planning agency] and shall provide copies to the developer,<sup>102</sup> [*list other parties who should receive copies*].
- (6) Within [14] days of rendering its decision, the primary reviewing agency shall publish a notice containing a summary of its decision in a newspaper that circulates in the area affected by the decision and may publish a notice, which may include a copy of the decision and supporting documents, on a computer-accessible information network or by other appropriate means.

### 5-311 Amendments

Any proposed change to a previously approved DRI that, in the opinion of the primary reviewing agency creates, or has a likelihood of creating, an additional regional impact or a type of regional impact not previously considered and reviewed by the primary reviewing agency shall constitute a

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<sup>102</sup>Upon receipt of written approval of a DRI, the developer may be required to secure any necessary permits (e.g., building, environmental, etc.) required by the host local government or any state, regional, or other local agency with jurisdiction, to the extent that these permits have not been consolidated into DRI approval.

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substantial deviation from the approved DRI and shall subject the development to repeat the entire DRI approval process.

### 5-312 Enforcement

The primary reviewing agency may enforce any decision, condition, and/or restriction it may impose upon a DRI by recording a certificate of noncompliance with the recorder of deeds of the county or counties in which the development is located. The primary reviewing agency shall commence such other actions or proceedings as it may deem necessary to enforce its decisions, conditions, and/or restrictions.

### 5-313 Exemptions

The [state planning agency] shall establish procedures for standard and hardship exemptions from this Act:

- (a) Standard Exemption. A developer may apply to the primary reviewing agency for an exemption from DRI review if he or she believes that the location, character, and/or environmental effects of the proposed development will prevent it from having any significant negative impacts on areas located outside the host local government.
- (b) Hardship Exemption. The primary reviewing agency may grant an exemption from the terms and provisions of this Act where it finds that a literal enforcement of the provisions of this Act would cause substantial hardship, financial or otherwise, to the developer and that desirable relief may be granted without substantial detriment to the public good and without nullifying or significantly derogating the intent or purpose of this Act.

### 5-314 Development Agreements

The primary reviewing agency may enter into a development agreement regarding the DRI with a DRI developer pursuant to Section [8-701 or cite to another Section authorizing development agreements for regional planning agencies].<sup>103</sup> A [regional planning agency] that is a primary reviewing agency is a “local government” for purposes of Section [8-701].

- ◆ Section 8-701 of the *Legislative Guidebook* authorizes local governments to enter into binding development agreements regarding development and land use.

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<sup>103</sup>For a description of a development agreement statute, see John Delaney, “The Developer's/Landowner's Perspective of Planning Law Reform,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers*, Planning Advisory Service (PAS) Report 462/463 (Chicago: APA, March 1996), 31-37.

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### 5-315 Appeals

Appeals of decisions by the primary reviewing agency to designate a proposed development as a DRI or to approve, reject, or approve with conditions a development that has been designated as a DRI shall proceed according to the provisions of the [*cite to state administrative appeals act*].

- ◆ The issue of who has standing to appeal a decision regarding a DRI should be resolved by the individual states, in accordance with each state's appeals legislation. Interested parties would likely include the following: the developer, the host local government, the regional planning agency, the state planning agency, transportation agencies, environmental protection and management agencies, land owners, adjacent units of government, and neighboring land owners. The issue of standing is, by nature, very sensitive because of the potential for excluding legitimately interested parties.

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### NOTE 5 – A NOTE ON NEW YORK CITY’S “FAIR-SHARE” PROCESS

On December 3, 1990, the New York City Planning Commission adopted a new “fair-share” process for siting city facilities<sup>104</sup> that went into effect on July 1, 1991. The adoption of this process was mandated in the new City Charter approved by the voters in 1989.<sup>105</sup> The reason for the incorporation of the fair-share concept into the new charter was to redress the disparity of an overconcentration of undesirable facilities in certain neighborhoods.<sup>106</sup>

The process, devised by the city planning commission, sets forth the criteria that city agencies are to follow when siting a new facility or significantly expanding, significantly reducing, or closing an existing facility.<sup>107</sup> The process covers all types of city facilities, (i.e., both desired and contentious) but does not apply to the siting of facilities by private entities, state or federal agencies, or entities that have been established by state law.<sup>108</sup> The city, however, may consider the locations of these facilities when siting city facilities.<sup>109</sup>

When a city agency uses the criteria to site a facility, the agency must balance considerations that include service need, cost-effective delivery of services, effects on neighborhoods, and the broad geographic distribution of services.<sup>110</sup> These factors are applied in conjunction with other factors such as land use, zoning, and compatibility with nearby uses. All permit requirements continue to apply to the site.<sup>111</sup>

### HOW THE FAIR-SHARE PROCESS WORKS

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<sup>104</sup>New York Department of City Planning, “Locating City Facilities: A Guide to the ‘Fair Share’ Criteria,” (New York: N.Y.: The Department, June 1991), 1.

<sup>105</sup>William Valletta, “Siting Public Facilities on a Fair Share Basis in New York City,” *The Urban Lawyer* 25, no. 1 (Winter 1993): 1, n. 3. This article states “...New York City undertook the drafting of a new City Charter in 1989 after the U.S. Supreme Court ruled that its historic governing body, the Board of Estimate, was unconstitutional under the one-person, one-vote doctrine.” The mandate to develop the fair-share criteria is found at N.Y.C. Charter §203(a) (1989).

<sup>106</sup>Valletta, “Siting Public Facilities on a Fair Share Basis in New York City,” 2.

<sup>107</sup>New York Department of City Planning, “Locating City Facilities: A Guide to the ‘Fair Share’ Criteria,” 3.

<sup>108</sup>*Id.*, 5.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*, 6.

<sup>111</sup>*Id.*

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The fair-share process was created to address the issue of site selection and takes place prior to any of the city's Uniform Land Use Review Procedures (ULURP).<sup>112</sup> The fair-share process incorporates two related elements, the Statement of Needs and the fair-share criteria. The Statement of Needs is a document that describes all of the city agencies' requests for new facilities, in addition to any closures or reductions of facilities. The Statement of Needs contains "...as much programmatic data as possible and information about the criteria by which a site is to be chosen. Agencies are encouraged to identify the borough, and, if possible, the community board(s) in which a site would be sought."<sup>113</sup> The Statement of Needs covers a two-year period and includes a map of the location of all city property, including any restrictions on the use of a given parcel of property. The main purpose of the Statement of Needs is to give communities warning that they may be targeted for a particular facility.

The fair-share criteria, created by the planning commission, require that each agency "...must make use of the fair share criteria, make a record of its consideration, and offer justification whenever its proposal or recommendation for a site is inconsistent with the criteria."<sup>114</sup> Different types of facilities must meet different criteria and follow separate procedures. The former General Counsel of the New York City Department of Planning, William Valletta, noted that, in general, consideration of the following factors is required when siting all city facilities, except offices and data processing centers:

1. the compatibility of the facility with existing city and noncity facilities in the immediate area;
2. the extent to which neighborhood character would be adversely affected by a concentration of city and noncity facilities;
3. the suitability of the site to provide cost-effective delivery of intended services;
4. the consistency with any specific criteria for the facility identified in the Statement of Needs; and
5. the consistency with any existing neighborhood or borough plan.<sup>115</sup>

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<sup>112</sup>N.Y.C. Charter §197-c.

<sup>113</sup>Valletta, "Siting Public Facilities on a Fair Share Basis in New York City," 5.

<sup>114</sup>Id., 8, citing N.Y.C. Charter §§204(a); 204(e)(2); 204(f); and 204(g)(1).

<sup>115</sup>Valletta, "Siting Public Facilities on a Fair Share Basis in New York City," 12-13 (citations omitted). Valletta wrote: "The intent of fair share is to regulate the process, make it more open, and bring into it previously unenfranchised participants. It rests on the hope that by making more people responsible parties in the deal-making, the public perception of illegitimacy will be lessened." Id., 20.

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### **DIFFICULTIES WITH NEW YORK CITY'S FAIR-SHARE PLAN**

The fair-share process was implemented in 1991 and critiqued by the New York City Department of Planning four years later in Spring 1995.<sup>116</sup> Those concerns identified in the assessment that are applicable to the implementation of a state-level fair-share process are described below, as are some potential solutions to the difficulties identified:

1. The New York City fair-share process is limited to city sitings.<sup>117</sup> Unwanted facilities sited by federal and state agencies and private entities are not subject to the fair-share criteria and therefore weaken the impacts of the city's fair-share process. This problem may be resolved by including an analysis of other facilities in the area, whether or not they are operated by the state, in fair-share criteria promulgated by the state planning agency.
2. The process is difficult to administer because of the short time frame. The assessment recommended that the fair-share process become a two-year, rather than a one-year, process.<sup>118</sup> This would be administratively easier and provide all participants of the process with a respite from siting decisions. In addition, the budget process could be tied to the siting process, thus further simplifying the process for state agencies.

### **UNEXPECTED OUTCOMES**

Sometimes a fair-share approach can lead to unexpected outcomes due to the need to examine alternatives. In New York City, a plan was proposed to put sludge plants in more affluent boroughs, while avoiding communities that already had more than their fair share of such facilities. Although local opposition stalled the plan, during the process of siting, it was discovered that it would be cheaper for the city to ship dewatered sludge out-of-state for beneficial reuse.<sup>119</sup> This alternative benefitted the environment as well as the residents of the city. Siting unwanted land uses in more affluent communities might result in a more extensive effort to investigate and consider possible alternatives. Also, in the long run, siting processes and decisions may force technological solutions to some problems – if no one wants to deal with the community and health impacts of certain noxious uses, alternatives will have to be developed.

Because the fair-share process involves community involvement and often the “policing” of facilities put into “hostile” neighborhoods, residents’ questions concerning the proposed facility should be carefully answered during the siting process. Concerns can then be dealt with by all

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<sup>116</sup>New York City Department of City Planning, “Fair Share: An Assessment of New York City’s Facility Siting Process,” (New York, N.Y.: The Department, Spring 1995).

<sup>117</sup>Id., 14.

<sup>118</sup>Id., 29-30.

<sup>119</sup>New York City Department of City Planning, “Fair Share: An Assessment of New York City’s Facility Siting Process,” 20.

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parties. Occasionally, even after a facility is in use, residents may discover that their initial fears about their new neighbors were not quite so well-founded. After fighting the siting of a shelter for homeless families, for example, some New York City residents became involved in the design of the facility and its programs prior to the shelter's opening. According to a New York City Department of City Planning study, "seeking to peacefully integrate the shelter and its residents into the community, neighbors offered recommendations for social and educational programs and volunteered to staff them."<sup>120</sup> By reacting in a proactive manner, the neighbors were able to improve their position (by implementing their concerns in a constructive manner) as well as the situation of the residents of the facility (by providing for additional programs for the residents).

### NEW YORK CITY'S FAIR-SHARE CRITERIA

#### Article 4: Criteria for Siting or Expanding Facilities

- 4.1 The sponsoring agency and, for actions subject to the Uniform Land Use Review Procedure (ULURP) or review pursuant to Section 195 of the Charter, the City Planning Commission, shall consider the following criteria:
- 4.1 (a) Compatibility of the facility with existing facilities and programs, both city and non-city, in the immediate vicinity of the site.
  - 4.1 (b) Extent to which neighborhood character would be adversely affected by a concentration of city and/or non-city facilities.
  - 4.1 (c) Suitability of the site to provide cost-effective delivery of the intended services. Consideration of sites shall include properties not under city ownership, unless the agency provides a written explanation of why it is not reasonable to do so in a particular instance.
  - 4.1 (d) Consistency with the locational and other specific criteria for the facility identified in the Statement of Needs or, if the facility is not listed in the Statement, in a subsequent submission to a Borough President.
  - 4.1 (e) Consistency with any plan adopted pursuant to Section 197-a of the Charter.

#### 4.2 Procedures for Consultation

In formulating its facility proposals, the sponsoring agency shall:

- 4.2 (a) Consider the Mayor's and Borough President's strategic policy statements, the Community Board's Statement of District Needs and Budget priorities, and any published Department of City Planning land use plan for the area.

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<sup>120</sup>Id., 21.

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- 4.2 (b) Consider any comments received from the Community Boards or Borough Presidents and any alternative sites proposed by a Borough President pursuant to Section 204(f) of the Charter, as well as any comments or recommendations received in any meetings, consultations or communications with the Community Boards or Borough Presidents. If the Statement of Needs has identified the community districts where a proposed facility would be sited, then, upon the written request of the affected Community Board, the sponsoring agency should attend the Board's hearing on the Statement. If the community district is later identified, then the sponsoring agency shall at that point notify the Community Board and offer to meet with the board or its designee to discuss the proposed program.

### Article 5: Criteria for Siting or Expanding Local/Neighborhood Facilities

- 5.1 The sponsoring agency and, for actions subject to ULURP or review pursuant to Section 195 of the Charter, the City Planning Commission, shall consider the following criteria:

5.1 (a) Need for the facility or expansion in the community or local service delivery district. The sponsoring agency should prepare an analysis which identifies the conditions or characteristics that indicate need within a local area (e.g., infant mortality rates, facility utilization rates, emergency response time, parkland/population ratios) and which assesses relative needs among the communities for the service provided by the facility. New or expanded facilities should, whenever possible, be located in areas with low ratios of service supply to service demand.

5.1 (b) Accessibility of the site to those it is intended to serve.

### Article 6: Criteria for Siting or Expanding Regional/Citywide Facilities

- 6.1 The sponsoring agency and, for actions subject to ULURP or review pursuant to Section 195 of the Charter, the City Planning Commission, shall consider the following criteria:

6.1 (a) Need for the facility or expansion. Need shall be established in a citywide or borough-wide service plan or, as applicable, by inclusion in the city's ten-year capital strategy, four-year capital program, or other analysis of service needs.

6.1 (b) Distribution of similar facilities throughout the city. To promote the fair geographic distribution of facilities, the sponsoring agency should examine the distribution among the boroughs of existing and proposed facilities, both city and non-city, that provide similar services, in addition to the availability of appropriately zoned sites.

6.1 (c) Size of the facility. To lessen local impacts and increase broad distribution of facilities, the new facility or expansion should not exceed the minimum size necessary to achieve efficient and cost-effective delivery of services to meet existing and projected needs.

6.1 (d) Adequacy of the streets and transit to handle the volume and frequency of traffic generated by the facility.

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### 6.4 Transportation and Waste Management Facilities

Transportation and waste management facilities...are subject to the following criteria in addition to those stated in Article 4 and Sections 6.1, 6.2 and 6.3.

- 6.41 The proposed site should be optimally located to promote effective service delivery in that any alternative site actively considered by the sponsoring agency or identified pursuant to Section 204(f) of the Charter would add significantly to the cost of construction or operating the facility or would significantly impair effective service delivery.
- 6.42 In order to avoid aggregate noise, odor, or air quality impacts on adjacent residential areas, the sponsoring agency and the City Planning Commission, in its review of the proposal, shall take into consideration the number and proximity of existing city and non-city facilities, situated within approximately a one-half mile radius of the proposed site, which have similar environmental impacts.

### 6.5 Residential Facilities

Regional or city-wide residential facilities...are subject to the following criteria in addition to those stated in Article 4 and Sections 6.1, 6.2 and 6.3.

- 6.51 Undue concentration or clustering of city and non-city facilities providing similar services or serving a similar population should be avoided in all residential areas.
- 6.52 Necessary support services for the facility and its residents should be available and provided.
- 6.53 In community districts with a high ratio of residential facility beds to population, the proposed siting shall be subject to the following additional consideration:
  - 6.53 (a) Whether the facility, in combination with other similar city and non-city facilities within a defined area surrounding the site (approximately a half-mile radius, adjusted for significant physical boundaries), would have a significant cumulative negative impact on neighborhood character.
  - 6.53 (b) Whether the site is well located for efficient service delivery.
  - 6.53 (c) Whether any alternative sites actively considered by the sponsoring agency or identified pursuant to Section 204(f) of the Charter which are in community districts with lower ratios of residential facility beds to population than the citywide average would add significantly to the cost of constructing or operating the facility or would impair service delivery.

### Article 7: Criteria for Siting or Expanding Administrative Offices and Data Processing Facilities

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7.1 The sponsoring agency and the City Planning Commission shall consider the following criteria:

- 7.1 (a) Suitability of the site to provide cost-effective operations.
- 7.1 (b) Suitability of the site for operational efficiency, taking into consideration its accessibility to staff, the public and/or other sectors of city government.
- 7.1 (c) Consistency with the locational and other specific criteria for the facility stated in the Statement of Needs.
- 7.1 (d) Whether the facility can be located so as to support development and revitalization of the city's regional business districts without constraining operational efficiency.

### Article 8: Criteria for Closing or Reducing Facilities

8.1 The sponsoring agency shall consider the following criteria:

- 8.1 (a) The extent to which the closing or reduction would create or significantly increase any existing imbalance among communities or service levels relative to need. Whenever possible, such actions should be proposed for areas with high ratios of service supply to service demand.
- 8.1 (b) Consistency with the specific criteria for selecting the facility for closure or reduction as identified in the Statement of Needs.

8.2 In proposing facility closings or reductions, the sponsoring agency shall consult with the affected Community Board(s) and Borough President about the alternatives within the district or borough, if any, for achieving the planned reduction and the measures to be taken to ensure adequate levels of service.<sup>121</sup>

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<sup>121</sup>New York City Planning Commission, "Criteria for the Location of City Facilities," (adopted on December 3, 1990).

## CHAPTER 6

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# REGIONAL PLANNING

This Chapter proposes statutory alternatives for the formation and organizational structure of regional planning agencies. The model legislation describes a full range of functions and duties for such agencies. It details the contents of regional comprehensive and functional plans (such as those for housing and transportation) and procedures for their adoption. A special feature of this Chapter is model language for the designation of urban growth areas within a regional comprehensive plan. The Chapter also proposes a variety of implementation tools, including the review of plans of state agencies, local governments, and special districts and of major capital projects of extra-jurisdictional or regional significance. Further, the Chapter includes model legislation for agreements between the regional planning agency and other governmental units to implement regional plans. Finally, a model statute is provided for the designation of the regional planning agency as a substate district organization.

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### Chapter Outline

#### ORGANIZATIONAL STRUCTURE

- 6-101 Creation of [Regional Planning Agency]; Boundaries of [Regional Planning Agency]; Interstate Regional Planning (Two Alternatives)
- 6-102 Composition of [Regional Planning Agency]; Finances; State Representation; Representation of Federal Military Installations [and Facilities] (Two Alternatives)
- 6-103 Voting; Provision for Proportional Voting
- 6-104 Chair; Other Officers and Committees; Frequency of Meetings; Reports of Committees
- 6-105 Rule-Making Authority (Two Alternatives)
- 6-106 Appointment and Responsibilities of Executive Director; Contracts, Purchases, and Leases
- 6-107 Powers and Duties of a Regional Planning Agency
- 6-108 Biennial Report

#### PLAN PREPARATION

- 6-201 Preparation of Regional Comprehensive Plan (Two Alternatives)
- 6-201.1 Urban Growth Areas [Optional]
- 6-202 Preparation of Regional Functional Plans
- 6-203 Regional Housing Plan
- 6-204 Regional Transportation Plan

#### PROCEDURES FOR PLAN REVIEW AND ADOPTION

- 6-301 Workshops and Public Hearings (Two Alternatives)
- 6-302 [Resolving Potential Conflicts Among State, Regional, and Local Plans—See Sections 7-402.1 to 7-402.5]
- 6-303 Adoption of Regional Plans
- 6-304 Certification of Regional Plan; Availability for Purchase
- 6-305 Adoption of Plans by Local Governments, Special Districts, and Other Governments

#### RELATIONSHIPS AND AGREEMENTS WITH OTHER UNITS OF GOVERNMENT

- 6-401 Effects of Regional Plans on State Agencies, Local Governments, and Special Districts; Review of Plans and Major Capital Projects of Extra-jurisdictional or Regional Significance

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**6-402 Regional Planning and Coordination Agreements**

**6-403 Urban Service Agreements**

### MISCELLANEOUS PROVISIONS

**6-501 Withdrawal from [Regional Planning Agency]**

**6-502 Dissolution of [Regional Planning Agency]**

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### DESIGNATION OF REGIONAL PLANNING AGENCY AS SUBSTATE DISTRICT ORGANIZATION

**6-601 Delineation of Substate Districts**

**6-602 Designation of Substate District Organization**

**6-603 State Agency Use of Substate District Boundaries**

**6-604 Effect of Designation on Substate District Organization**

**Table 6-1 Some Pros and Cons of Urban Growth Areas**

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### NOTE 6A – A NOTE ON WEIGHTED VOTING PROCEDURES

### NOTE 6B – A NOTE ON URBAN GROWTH AREAS AND REGIONAL PLANNING

### NOTE 6C – A NOTE ON EXISTING REGIONAL PLANS

### Cross-References for Sections in Chapter 6

<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
<b>6-101</b>	<b>6-102 to 6-107, 6-501 to 5-503, 6-601 to 6-604</b>
<b>6-102</b>	<b>6-101, 6-103 to 6-108</b>
<b>6-103</b>	<b>6-101 to 6-102, 6-104 to 6-108</b>
<b>6-104</b>	<b>6-101 to 6-103, 6-105 to 6-108</b>
<b>6-105</b>	<b>6-101 to 6-104, 6-106 to 6-108</b>

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<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
6-106	6-101 to 6-105, 6-107 to 6-108
6-107	5-204, 5-302 et seq., 6-101 to 6-106, 6-108, 6-201 to 6-203, 6-301 to 6-304, 6-401, 6-604
6-108	6-101 to 6-107
6-201	4-208.8 (Alternative 1B), 5-204, 6-201.1, 6-403, 7-204, 7-204.1, 7-402.1 to 7-402.2
6-201.1	4-204, 6-201, 7-204, 7-204.1
6-202	6-201
6-203	4-207, 4-208, 6-203, 7-207
6-204	4-205, 6-201, 7-205
6-301	6-201 to 6-204
6-302	[See Sections 7-402.1 to 7-402.5]
6-303	6-201 to 6-204, 6-304
6-304	6-201 to 6-204, 6-303
6-305	
6-401	5-301 et seq, 7-402.1 to 7-402.2, 7-402.4
6-402	6-201, 6-303 to 6-304, 6-403
6-403	4-204, 6-201, 6-201.1
6-501	6-101 et seq.
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6-503	6-101 et seq.
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6-603	6-101 et seq., 6-601 to 6-602, 6-604
6-604	6-101 et seq., 6-601 to 6-603

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### THE EVOLUTION OF REGIONAL PLANNING IN THE UNITED STATES

#### WHAT IS REGIONAL PLANNING?

Regional planning is planning for a geographic area that transcends the boundaries of individual governmental units but that shares common social, economic, political, cultural, and natural resources, and transportation characteristics.<sup>1</sup> A regional planning agency prepares plans that serve as a framework for planning by local governments and special districts.

Throughout the United States, there are regional planning agencies that are either voluntary associations of local governments or are mandated or authorized by state legislation (e.g., the Metropolitan Council in the Twin Cities or the Metropolitan Service District in Portland, Oregon).

These exist for purposes of: undertaking plans that address issues that cut across jurisdictional boundaries; providing information, technical assistance, and training; coordinating efforts among member governments, especially efforts that involve federal funding; and providing a two-way conduit between member governments and the state and federal agencies. Regional planning agencies may also serve as a forum to discuss complex and sometimes sensitive issues among member local governments and to try to find solutions to problems that affect more than one jurisdiction. Sometimes these organizations have direct regulatory authority in that they not only prepare plans, but also administer land-use controls through subdivision review and zoning recommendations, review proposals for major developments whose impacts may cross jurisdictional borders, and review and certify local plans. And, in some cases, they directly implement the regional plan, as in the operation of regional transit systems.

States authorize the establishment of these regional planning agencies in different ways. In some parts of the country, the regional agencies take their structure from general enabling legislation (e.g., for regional planning commissions or councils of government). In other places, they are the product of intergovernmental or joint powers agreements, as in California, or interstate compacts, as with

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#### Reasons for Regional Planning

- Provision of technical assistance to local governments.
  - Maintenance of forum for exploring and resolving intergovernmental issues.
  - Development of regional plans to guide, direct, and/or coordinate local planning.
  - Articulation of local interests and perspectives to other levels of government.
  - Establishment of two-way conduit between local governments and other agencies.
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<sup>1</sup>See, e.g., Alfred Bettman, "How to Lay Out Regions for Planning," in *Planning Problems of Town, City, and Region: Papers and Discussion* (Baltimore, Md.: Norman, Remington, 1925), 287-301; John Friedmann, "The Concept of a Planning Region – The Evolution of an Idea in the United States," in John Friedmann and William Alonso, eds., *Regional Development and Planning: A Reader* (Cambridge, Mass.: MIT Press, 1964), 497-518.

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the Delaware Valley Regional Planning Commission in the Philadelphia, Pennsylvania/Camden, New Jersey, area, or the Tahoe Regional Planning Agency in Nevada and California. In some states, regional agencies are created by special state legislation that applies only to one particular agency (e.g., the Northeastern Illinois Planning Commission in the Chicago area, or the Cape Cod Commission in Massachusetts). In still others, they may exist as private, voluntary organizations that seek to provide a regional perspective through independently prepared plans and studies. Examples of such agencies are the Regional Plan Association in New York City and Bluegrass Tomorrow in the Lexington, Kentucky area.

### THE ORIGINS OF REGIONAL PLANNING AGENCIES

The first regional planning agency with planning powers was the Boston Metropolitan Improvement Commission created by the Massachusetts legislature in 1902. Seven years later, in 1909, the Commercial Club of Chicago, a private organization, financed the preparation of the Plan of Chicago, which was completed by a team headed by Chicago architects Daniel H. Burnham and Edward H. Bennett. The plan placed the City of Chicago in a regional context and contained regional proposals for parks and transportation.<sup>2</sup>

From 1913 to 1915, when the state legislature repealed the statute creating it, Pennsylvania authorized the establishment of a Suburban Metropolitan Planning Commission. Within a 25-mile radius of Philadelphia, the commission could levy assessments and prepare comprehensive plans for highways, parks and parkways, sewerage and sewage disposal, housing, sanitation and health, civic centers, and other functional areas.<sup>3</sup> The commission had the authority to make recommendations to governmental units on a wide variety of issues, including “the distribution and relative location of all public buildings, public grounds, and open spaces devoted to public use, and the planning, subdivision and laying out for urban uses of private grounds brought into the market from time to time.”<sup>4</sup>

The major regional planning effort of the 1920s – and for many years afterwards – was the *Regional Plan for New York and Environs*, financed by the Russell Sage Foundation and prepared by an advisory committee. Work began on the plan in 1921 and was completed in 1929. The eight-volume document covered a 5,528-square-mile area with 500 incorporated bodies. Even by today’s standards, the Regional Plan is an impressive work. It contained regionwide proposals for transportation, land use, and public facilities, as well as specific design proposals for New York City. After its publication, the advisory committee issued periodic reports on its implementation.

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<sup>2</sup>Daniel H. Burnham and Edward H. Bennett, *Plan of Chicago* (New York: DaCapo Press, 1970, reprint of 1909 edition), esp. Chs. III, IV, and V.

<sup>3</sup>This statute appears in Frank B. Williams, *The Law of City Planning and Zoning* (New York, N.Y.: MacMillan, 1922), 594-597.

<sup>4</sup>*Id.*, 596.

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In 1922, the first metropolitan area planning commission was established in Los Angeles to advise the County Board of Supervisors on planning for the county and on approving subdivisions. In 1923, the Ohio General Assembly enacted the first enabling legislation for regional planning commissions. That legislation, which was drafted by Cincinnati attorney Alfred Bettman, was to provide the model for the regional planning provisions of the *Standard City Planning Enabling Act* (see below), on whose advisory committee Bettman would become a member. The same year, the Chicago Regional Planning Association, a quasi-public organization, and the Allegheny County Planning Commission (Pittsburgh) were created.

### **THE SCPEA: MODEL LEGISLATION FOR REGIONAL PLANNING**

The *Standard City Planning Enabling Act* (SCPEA), drafted by an advisory committee to the U.S. Department of Commerce and published in 1928, contained model legislation for regional planning. The SCPEA authorized the planning commission of any municipality or the county commissioners of any county to petition the governor to establish a planning region and create a planning commission for that region. The governor was to hold at least one public hearing before making a determination to grant the application, define the region, and appoint the regional planning commission.<sup>5</sup>

Under the SCPEA model, the regional planning commission was composed of nine members, all of whom would be appointed and removed by the governor. The commission had the authority to prepare, adopt, and amend a “master regional plan for the physical development of the region.”<sup>6</sup> After adopting the plan, the regional planning commission was required to certify it to the governor, to the planning commission of each municipality in the region, to the council of each municipality that did not have a planning commission, to the county commissioners of each county located wholly or partially in the region, and to other organized taxing districts or political subdivisions wholly or partially included in the region.

Adoption of the regional plan by the municipal planning commission was optional; however, once the regional planning commission adopted it, the plan would have the same force and effect as a plan made and adopted locally. In addition, the municipal planning commission, “[b]efore adopting any amendment of the municipal plan which would constitute a violation of or departure from the regional plan certified to the municipal planning commission,” was required to submit the amendment to the regional commission. The regional commission would then “certify to the municipal commission its approval, disapproval or other opinion concerning the proposed amendment.”<sup>7</sup>

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<sup>5</sup>Advisory Committee on City Planning and Zoning, *A Standard City Planning Enabling Act* (Washington, D.C.: U.S. GPO, 1928), §26.

<sup>6</sup>*Id.*, §28.

<sup>7</sup>*Id.*, §29.

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Once the regional plan was adopted by the regional planning commission, no street, park, or other public way, ground, or open space; no public building or other public structure; and no public utility, whether publicly or privately owned or operated, could be constructed or authorized in unincorporated territory until the project was submitted to and approved by the regional planning commission. However, the planning commission's disapproval could be overruled by the body or officer having authority to determine the location, character, or extent of the improvement, provided that, in the case of a board, commission, or body, not less than two-thirds of its membership voted to do so and provided a statement of reasons for such overruling in the minutes of records of the body or officer.<sup>8</sup>

One analyst of this period observed that:

By the end of the 1920's, metropolitan and county planning was a major topic of concern among professional planners. Many city planning commissions found that central city development plans ignored the surrounding local governments and that regional planning and cooperative political solutions were required. Some saw the need for an agency empowered to take an overall view of serious problems besetting the entire metropolitan area.<sup>9</sup>

### **REGIONAL PLANNING DURING THE DEPRESSION AND WAR YEARS**

The federal government, through the National Planning Board (later the National Resources Committee) in the Department of the Interior, provided the major push for metropolitan, regional, state, and interstate planning. The federal government supported the creation of the Pacific Northwest Regional Planning Commission, a four-state body covering Idaho, Montana, Oregon, and Washington, and the New England Regional Planning Commission, which included Massachusetts, Vermont, Rhode Island, Connecticut, and Maine.<sup>10</sup> It backed a bistate St. Louis Regional Planning Commission, which it hoped would provide a model for similar efforts elsewhere in the U.S. It also supported the use of interstate compacts, in the words of a report by one federal agency, "as a means of solving regional problems wherever this procedure is found to be feasible."<sup>11</sup>

By the end of the 1930s, according to a report of the U.S. Advisory Commission on Intergovernmental Relations, federal support had greatly expanded metropolitan and regional planning:

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<sup>8</sup>Id., §30.

<sup>9</sup>U.S. Advisory Commission on Intergovernmental Relations (ACIR), *Regional Decision Making: New Strategies for Substate Districts; Substate Regionalism and the Federal System, Vol. 1* (Washington, D.C.: U.S. GPO, October 1973), 54.

<sup>10</sup>National Resources Committee, *Regional Factors in National Planning* (Washington, D.C.: U.S. GPO, December 1935), 117-135.

<sup>11</sup>Id., x.

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In 1934, there were only 85 metropolitan and county planning bodies and 23 regional planning agencies in existence. By January 1937, there were 506 metropolitan multicounty and county planning agencies, of which at least 316 were official public bodies. Two years later, metropolitan planning agencies or regional planning boards, commissions, or associations were operating in at least 30 major cities. In addition to these metropolitan developments, by the close of the decade areawide planning had also been extended to a number of small urban areas and several nonmetropolitan regions.<sup>12</sup>

Of note during World War II was the formation of privately financed regional planning councils in San Francisco, St. Louis, Boston, Cincinnati, and Kansas City. In Pittsburgh, the Allegheny Conference on Community Development was established in 1945. Its membership drew from leaders in business, labor, and government, and it emerged as a prime mover in the transformation of Pittsburgh in the postwar era.<sup>13</sup>

### REGIONAL PLANNING IN THE POSTWAR PERIOD

In the 1950s, federal aid for comprehensive planning became available with the enactment of Section 701 of the Housing Act of 1954. This statute provided monies for local planning and planning for metropolitan areas by official regional or metropolitan planning agencies.

According to a study by the U.S. Advisory Commission on Intergovernmental Relations, at least 13 states passed regional planning enabling acts in the three years following the enactment of the 1954 Housing Act. This set the stage for a tremendous increase in the number of multijurisdictional planning organizations. During this period, according to the ACIR, the legislatures of at least nine of these states enacted legislation requiring or permitting the establishment of planning agencies for entire urbanized areas. The statutes usually authorized the agencies to apply for and receive federal grants. Some states adopted specific statutes that created planning commissions for certain metropolitan areas. By the beginning of the 1960s, some two-thirds of the nation's metropolitan areas were engaged in some type of areawide planning.<sup>14</sup>

Complimenting the "701" program was the Federal-Aid Highway Act of 1962. This statute required a "cooperative, comprehensive, and continuous" planning process as a prerequisite for federal financial assistance for interstate highway development in metropolitan areas. The act required regional transportation plans in urban areas with populations more than 50,000 as a condition to construction funds. In contrast to the "701" grants, which split cost evenly with local governments, the Highway Act provided matching grants of 70 percent of the cost of preparing the necessary studies.

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<sup>12</sup>ACIR, *Regional Decision Making*, 55.

<sup>13</sup>Judith Getzels, Peter Elliott, and Frank Beal, *Private Planning for the Public Interest: A Study of Approaches to Urban Problem Solving by Nonprofit Organizations* (Chicago, Ill.: American Society of Planning Officials, October 1975), 10-19. See also Jeanne R. Lowe, *Cities in a Race with Time* (New York, N.Y.: Random House, 1967), 110-163.

<sup>14</sup>ACIR, *Regional Decision Making*, 57-58.

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In some parts of the U.S., metropolitan transportation planning was assigned to a special commission or entity. This was the case, and still is, in Boston, San Francisco, and Chicago. In others, the transportation planning function was assumed by a regional planning commission or metropolitan councils of government (COG), which were voluntary alliances of local governments formed to undertake planning or any type of joint governmental activity that its members could agree upon.

One of the earliest studies of COGs was conducted in 1962 by the American Society of Planning Officials (ASPO), one of APA's predecessor organizations. The study examined eight councils. It observed that the agencies were operating without an overall metropolitan government that would carry out any plans they might propose. As a consequence, the agencies

must rely on persuasion to convince numerous local governments that joint area-wide action is necessary – a method not notable for its past successes . . . .

Probably the most important advantage of the voluntary governmental council is its acceptability to local political leaders. No change in government structure is necessary and there is no transfer of power from local units to a larger agency. The council is easily set up and established by the local governments themselves. Membership is voluntary and the organization is flexible and adaptable to many situations.<sup>15</sup>

During the 1960s and 1970s, the nation was almost completely covered by multistate river basin and economic development commissions and by metropolitan and nonmetropolitan regional councils. The expansion of COGs, prompted by the availability of federal funding, was dramatic. In 1961, for example, there were only 36 COGs, including 25 among the 212 metropolitan areas. By 1966, this number included 119 councils, of which 71 were metropolitan. By 1971, there were 247 metropolitan areas, and all of them had official regional planning, mostly under elected COGs. By 1978, there were 649 councils in the U.S. Of these, 292 were in metropolitan areas.<sup>16</sup>

Four federal laws were responsible for this expansion, and they were all enacted in a watershed year of 1965. The Housing and Community Development Act of 1965 made regional councils eligible for planning funds. The Public Works and Economic Development Act of 1965 provided funding for multicounty economic development districts and authorized the establishment of federal multistate economic development commissions. The Appalachian Regional Development Act established the multistate Appalachian Regional Commission, which accomplished its work through multicounty development districts. Finally, the Water Resources Planning Act of 1965 authorized

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<sup>15</sup>James G. Schrader, *Voluntary Metropolitan Governmental Councils*, Information Report No. 161 (Chicago: American Society of Planning Officials, August 1962), 13.

<sup>16</sup>Urlan A. Wannop, *The Regional Imperative: Regional Planning and Governance in Britain, Europe, and the United States* (London, England: Jessica Kingsley Publishers, 1995), 385.

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the establishment of federal multistate river basin commissions.<sup>17</sup> Under Circular A-95, promulgated by the U.S. Office of Management and Budget, regional agencies received authority to review applications for federal assistance for compliance with regional and local plans. In addition, regional agencies began to prepare regional water-quality management plans under Section 208 of the federal Clean Water Act of 1972.

Bruce McDowell of the U.S. Advisory Commission on Intergovernmental Relations observed:

This explosion of “areawide” regional councils and the multistate river basin and economic development regions occurred because of very intentional and systematic federal action which drew in the states as well as local governments. In the cases of the areawide councils, the federal actions included establishing 39 grant programs designed to require and fund regional planning, and direct appeal to the governors of all 50 states to establish statewide systems of substate districts to systematize the administration of the federal programs supporting regional councils. And many of the states did so.<sup>18</sup>

### NEW ROLES FOR REGIONAL AGENCIES

Between 1960 and 1980, there were a number of studies that proposed new roles and authority for regional planning entities. These studies also called for changes in state statutes. Their chief recommendations are summarized below.

1. **ASPO Connecticut Report.** In 1966, ASPO, assisted by the Chicago law firm of Ross, Hardies, O’Keefe, Babcock, McDugald & Parsons, produced a report entitled *New Directions in Connecticut Planning Legislation*. The report, prepared for the Connecticut Development Commission, recommended major changes in the Connecticut planning statutes. Its major recommendation regarding regional planning agencies was an extension of their jurisdiction to review matters that may have regional significance, such as decisions involving property within specified distances from state highways, and development affecting the region, such as water, sewerage, and utility projects. The regional agency would still not be given veto power over local decisions. If a local or state agency took action contrary to a regional planning agency’s recommendation pursuant to a referral, that agency would be required to state in writing the reasons that had led it to a different conclusion. But if the regional agency chose not to comment on a proposal, such an action would be neutral, rather than constitute a project endorsement.

The ASPO report also recommended amending the state statutes to define a regional plan as distinct from a local plan. “The statute should direct the *regional* plan to cover *regional* facilities,”

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<sup>17</sup>Bruce D. McDowell, “The Evolution of American Planning,” in *The Practice of State and Regional Planning*, Frank So, Irving Hand, and Bruce D. McDowell, eds. (Washington, D.C.: American Planning Association in cooperation with the International City Management Association, 1986), 56.

<sup>18</sup>Bruce D. McDowell, “Regionalism: What It Is, Where We Are, and Where It May Be Headed,” a speech given to the 1995 Annual Conference of the Virginia and National Capital Area Chapters of the American Planning Association, Falls Church, Va. (December 4, 1995), 2.

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noted its authors, “and, especially, to give attention to regional resource and conservation problems.”<sup>19</sup>

**2. 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*. The Commission’s charge, among other things, was to examine “state and local zoning and land use laws, codes, and regulations to find ways by which States and localities may improve and utilize them in order to obtain further growth and development.”<sup>20</sup> To date, the study, with its wide-ranging scope, is one of the most comprehensive and thorough in terms of examining authority of governments to plan and regulate development.

Two Commission proposals to broaden choice in the location of housing called for regional approaches:

(1) Enactment of state legislation requiring multi-county or regional planning agencies to prepare and maintain housing plans. These plans would ensure that sites are available for development of new housing of all kinds and at all price levels. In the absence of a regional planning body – given the broader-than-local nature of the plan and the importance of political approval of such plans – the state government should assume responsibility for the necessary political endorsement of the plan.

(2) Amendment of state planning and zoning acts to include, as one of the purposes of the zoning power, the provision of adequate sites for housing persons of all income levels. The amendments would also require that governments exercising the zoning power prepare plans showing how the community proposes to carry out such objectives in accordance with

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<sup>19</sup>American Society of Planning Officials (ASPO), *New Directions in Connecticut Planning Legislation: A Study of Connecticut Planning, Zoning and Related Statutes* (Chicago, IL: ASPO, February 1966), 166. The ASPO report recommended that the definition of a regional plan be amended to include the following: (1) conservation and management of water resources, including ground and surface supply, pollution abatement, flood control, and watershed protection; (2) abatement of air pollution; (3) conservation of land resources, including forest, wetlands, wildlife refuges, and seashore; (4) population and general housing types in the several parts of the region; (5) regional facilities, such as major commercial centers, regional parks, transportation, industrial parks, sewerage, and other facilities that would serve the region rather than a single municipality; and (6) a statement of objectives, policies and standards on which recommendations are based. Requiring the factual basis on which policies and standards were derived, wrote ASPO, “will facilitate review of plans by interested public or private group[s] and help them gauge the reasonableness of regional planning proposals. In addition, this requirement will focus attention on development policies underlying specific development proposals such as those for regional land use.”

<sup>20</sup>National Commission on Urban Problems, *Building the American City: Report of the National Commission on Urban Problems to Congress and to the President* (Washington, D.C.: U.S. GPO, 1968), vii.

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county or regional housing plans. This would ensure that, within the region as a whole, adequate provision is made for sites for all income levels.<sup>21</sup>

**3. ACIR Report on Substate Districting.** In 1973, the U.S. Advisory Commission on Intergovernmental Relations published *Regional Decision Making: New Strategies for Substate Districts*. This report assessed the effectiveness of regional councils of local elected officials and substate planning and development districts. The report contained a number of recommendations for the federal, state, and local levels of government. The recommendations for state governments are especially relevant to the Growing Smart<sup>SM</sup> legislation. The ACIR recommended that states establish a formal procedure for the delineation and revision of the boundaries of substate districts. It called for a process involving the governor and units of general local government in a substate region, which would result in the governor's designation of a single "umbrella multi-jurisdictional organization" or UMJO in each region, with such designation conferring the legal status of an agency of local governments.<sup>22</sup>

The UMJO's membership should be at least 60 percent local elected officials. The ACIR proposed that such organizations have a voting formula that involved the application of the one-government, one-vote principle in most voting matters, but permitted certain larger local jurisdictions to overrule this procedure on certain issues – such as actions that would affect the finances and operations of constituent local governments – and employ a proportionate, population-weighted rule. The UMJO would be responsible for the adoption and publication of regional policies or plans and of a program for their implementation.<sup>23</sup>

The ACIR called for the UMJO to review and approve, in the context of adopted regional plans and policies, all proposed major capital facility projects of state departments and agencies scheduled for location in the UMJO's region. Similarly, the UMJO would have the authority to review and comment on major capital projects proposed by local governmental units. The ACIR proposed conferring on the UMJO "a policy controlling role" over multijurisdictional special districts operating within the UMJO's region. "The emphasis on a single functional purpose," wrote the ACIR, "often results in decisions which have side effects on other areawide policies, programs, and jurisdictions. *For this reason, a generalist-oriented and dominated multipurpose regional agency must have authority not only to plan, but also to set basic policy for special districts that transcend city and county boundaries*"<sup>24</sup> [emphasis supplied]. Means for securing policy control over the special district, according to the ACIR, included: appointment of the special district's policy board by the regional council; review and approval of the district's budgets and basic policies; assignment

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<sup>21</sup>Id., 242.

<sup>22</sup>ACIR, *Regional Decision Making*, 354.

<sup>23</sup>Id.

<sup>24</sup>Id.

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to the council of the power to halt temporarily or permanently any proposed district project; and empowering the council to serve as the special district's fiscal agent for bonding.<sup>25</sup>

The UMJO could provide member governments with technical assistance and promote interlocal problem solving and contracting. Financing of the regional agency's operations was to come from member governments under a mechanism authorized in enabling legislation and from state funds.<sup>26</sup>

The ACIR recommendations were later translated into model legislation. A portion of this legislation has been adapted for Sections 6-601 to 6-604, below, which deal with designation of substate districts and substate district agencies.<sup>27</sup>

**4. ALI Model Land Development Code.** The American Law Institute's (ALI) *A Model Land Development Code* (1976) specifically rejected the establishment or designation of regional planning agencies as having a role in a statewide land development planning and regulation system. Instead, the Code proposed the creation of regional planning divisions of a state land planning agency with regional advisory committees to advise the director of the state agency (see commentary to Section 6-101 below).

The drafters of the ALI Code were highly skeptical of the potential for regional planning under voluntary associations of elected officials and questioned whether they could provide an independent perspective. "The more that metropolitan agencies have been asked to review functions that bring them into potential conflict with local governments, the more the structural weaknesses of such organizations become apparent," they wrote.<sup>28</sup> The drafters quoted one critic of the system's effectiveness:

[The COG] receives its legitimacy from its member governments – but those governments do not seem to want the COG to emerge as a force different and distinct from the sum of its governmental parts. Member governments do not generally see the COG as an independent source of regional influence, but rather as a service giver, a coordinator, a communications forum, and an insurance device for the continued flow of federal funds to local governments.<sup>29</sup>

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<sup>25</sup>Id., 360.

<sup>26</sup>Id.

<sup>27</sup>U.S. Advisory Commission on Intergovernmental Relations, "An Act Providing for Designation of Uniform Substate Districts and Coordination Thereof," in *ACIR State Legislative Program: Local Government Modernization* (Washington, D.C.: U.S. GPO, November 1975), 119-132.

<sup>28</sup>American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia, Pa.: ALI, 1976), Note to §8-102, 312.

<sup>29</sup>ALI, *A Model Land Development Code*, 311-312, quoting Melvin Mogulof, "Regional Planning, Clearance, and Evaluation: A Look at the A-95 Process," in *Journal of the American Institute of Planners* 37 (1971): 419.

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Because of these and other political factors, COGs, wrote the Code’s drafters, “engage in passive, consensus planning, giving each local government whatever it wants, regardless of the effect on the region,” resulting in the “absence of regional planning that really faces tough issues.”<sup>30</sup>

As a consequence of this skepticism, the Code required that the basic land planning power “remain at the state level to be delegated by the State Land Planning Agency to the regional divisions or withdrawn therefrom as the state agency sees fit.”<sup>31</sup> The ALI Code saw this as “essential to enable the coordination of regional land planning with other state activities and to ensure that regional land planning carries the weight and authority of the state government.”<sup>32</sup> The Code noted that this would eliminate a “key defect” in most metropolitan planning agencies, which was “the absence of close ties to a governing body and ‘a strong chief executive who is able to override the contenders and force resolution of disagreements.’”<sup>33</sup>

### REGIONAL PLANNING IN THE 1980S AND BEYOND

In the 1980s, the federal government withdrew almost entirely from its support of regional planning. “Of the 39 programs designed and enacted during the preceding two decades to promote regional organization,” wrote Bruce McDowell, “only one – metropolitan transportation planning – remained relatively unscathed by this sudden reversal of federal policy.”<sup>34</sup> In the multistate programs, which had created most river basin and economic development regions, the federal government withdrew funding and the organizations died. Only multistate agencies created by federal law or interstate compact survived. The federal economic development programs, through

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<sup>30</sup>ALI, *A Model Land Development Code*, 312.

<sup>31</sup>Id., 316.

<sup>32</sup>Id.

<sup>33</sup>ALI, *A Model Land Development Code*, 316- 317, quoting Melvin Levin, “Planners and Metropolitan Planning,” in *Journal of the American Institute of Planners* 33 (1967 ): 80. See also Richard F. Babcock, “Let’s Stop Romancing Regionalism,” in *Billboards, Glass Houses and the Law and Other Land Use Fables* (Colorado Springs, Colo.: Shepard’s, 1977), 11-23. The late Chicago land-use attorney Richard F. Babcock saw regional planning agencies as “political bastards, the offspring of a loveless dalliance between cynics and dreamers, with no general government willing to acknowledge more than a foster parent relationship.” Id., at 15. Babcock, who chaired the ALI committee that oversaw the development of the Code and served as the governor’s appointee on the Northeastern Illinois Planning Commission, believed that only the state had sufficient independence and power to require the resolution of metropolitan planning conflicts: “The governor can – if anyone can – compel operating agencies such as the highway department and the state housing authority to recognize in their programs the inescapable interdependence of each with the other. The governor has a broad constituency that permits him to take greater political risks than would be ventured by any mayor or other local representative on a regional commission. If any agency can act as broker between central city and suburb – and perhaps none can – it will be the state. If any negotiation of our bitter metropolitan conflicts is foreseeable, it can occur in our reapportioned and increasingly responsible state legislatures, not in some politically irresponsible regional institution.” Id., at 17. Babcock’s views, of course, colored the approach taken in the ALI Code.

<sup>34</sup>McDowell, “Regionalism, What It Is,” 3.

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the Economic Development Administration, and the Appalachian programs managed to continue, but in greatly abbreviated form.

A number of states – Connecticut, Florida, Georgia, Kentucky, and Virginia, among them – provided state support for regional planning agencies that replaced the lost federal funds. Florida, in 1972 with the enactment of the Environmental Land and Water Management Act, and Georgia, in 1989 with the Georgia Planning Act, strengthened the authority and responsibility for the agencies in statewide growth management systems. Florida’s regional planning councils were required to prepare regional policy plans, review developments of regional impact, and establish mediation and arbitration processes to resolve regional disputes. Under the new Georgia act, the regional planning agencies were recast as “regional development centers” and were given powers similar to the regional councils in Florida. Massachusetts enacted one of the most progressive special purpose regional planning statutes in the nation when it passed, in 1989, special legislation establishing the Cape Cod Commission with broad powers to plan and regulate development in an area of statewide significance.

Regional planning agencies responded to the federal cutback, in some cases, by becoming more entrepreneurial. They undertook joint purchasing programs, forecasting, data collection and dissemination, arranged training, operated programs such as regional ambulance services, or provided consultant planning services to member governments.<sup>35</sup>

Where are regional planning agencies headed? The ACIR’s Bruce McDowell suggests that one role of such agencies is the development of “negotiated policies and programs.” Regional planning agencies, he observes, are “negotiating bodies” and provide “forums for mediating disputes, finding solutions to tough problems, and working out agreements, and developing cooperative action.”<sup>36</sup> A British planning professor, Urlan A. Wannop, predicts that giving regional planning agencies “real duties in planning and implementation” in a statewide growth management system of the type enacted in Florida and elsewhere will make them effective, offering a promise of reinvigorating them.<sup>37</sup> Allan Wallis, an assistant professor of public policy at the University of Colorado at Denver, suggests that, in the current fluid environment, solutions to regional problems will evolve from an identification of “strategic interests over which coalitions already have formed.” Thus, there will be no single solution or approach that will work in every region, even if the problems are, in Wallis’ words, “fairly generic and common to most other large metropolitan areas.” Developing out of the perception of the regional problems and the legitimacy of the coalitions that defined them, the

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<sup>35</sup>Wannop, *The Regional Imperative*, 288.

<sup>36</sup>Bruce D. McDowell, “Regional Councils Then, Now, and in the Future,” a speech to the Board of Directors Retreat, Economic Development Council of Northeastern Pennsylvania (October 7, 1993), in *Regionalism: Shared Decision Making: A Background Reader* (Richmond, Va.: Commission on Population Growth and Development, July 1994), 4.

<sup>37</sup>Wannop, *The Regional Imperative*, 292, citing John M. DeGrove, “Regional Agencies as Partners in State Growth Management Systems,” *Proceedings of the Joint ACSP and AESOP International Congress*, Oxford, UK (July 1991).

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particularized governance structures that result to address those problems “will be highly idiosyncratic, reflecting, as they should, such unique circumstances as local political culture.”<sup>38</sup>

William R. Dodge, former executive director of the National Association of Regional Councils and a consultant on regional excellence, observes:

Regional agencies are undertaking new activities for private and civic sectors. They often provide technical support for developing regional economic development plans and have assisted in creating regional civic leagues and college/university regional studies centers. Now, regional planning agencies are bringing public, private and civic sectors together to address common regional challenges, in regional visioning processes and regional leadership forums. Regional planning agencies now serve federal, state and local governments, as well as the private and civic sectors, and often weave together their interests and resources in collaborative strategies to address regional challenges. Regions are experimenting with new models for governing themselves – for integrating transportation, land use, air and water quality, and other planning; negotiating the regional compacts for shaping equitable growth; and developing new public/private/civic partnerships for governing the regional commons – all of which will have an impact on regional planning agencies.<sup>39</sup>

### ORGANIZATIONAL STRUCTURE

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#### *Commentary: Regional Planning Agencies*

Regional councils or some type of regional planning organization representing local governments operate in all states except Hawaii, Alaska, and Rhode Island, according to the National Association of Regional Councils (NARC). Regional planning in the U.S. is made institutionally complex by the federal requirement that a metropolitan planning organization (MPO) oversee transportation planning. The MPO may be separate from the established regional planning agencies – the situation in several metropolitan areas including Boston, Chicago, and San Francisco – or governed by a special policy committee inside the agency. Where the MPO is separate from the regional agency

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<sup>38</sup>Allan D. Wallis, “Inventing Regionalism: A Two-Phase Approach,” *National Civic Review* 83, no. 4 (Fall/Winter 1994): 447, 450; see also William R. Dodge, “Regional Problem Solving in the 1990s: Experimentation with Local Governance for the 21st Century,” *National Civic Review* 79, no. 4 (July-August 1990): 354-366; Patricia S. Atkins and Laura Wilson-Gentry, “An Etiquette for the 1990s Regional Council,” *National Civic Review* 81, no. 4 (Fall-Winter 1992): 466-487; Symposium issue on the future of regional governance, Janis Purdy, ed., *National Civic Review* 85, no. 2 (Spring-Summer 1996).

<sup>39</sup>William R. Dodge, letter dated Sept. 10, 2001 to William R. Klein, Director of Research, American Planning Association.

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that addresses other planning, the two entities typically enter into an agreement to coordinate transportation planning with the planning of land use, air and water quality, and related issues. (Current federal requirements for regional transportation planning are discussed in the commentary to Section 6-204 below.)

Twenty-five states have “wall-to-wall” regional councils. Regional councils in at least 10 other states serve from 75 to 90 percent of all local governments. For the remainder, except for four, reports NARC, councils cover from 60 to 74 percent of all local governments. New Jersey does not have state-designated regional councils. Three councils, two of them MPOs and one a regional planning agency headquartered in Princeton, serve areas of the state. Alaska has divided the state into regions for economic development purposes, but no formal regional agencies exist. In Montana, there are no state-designated regional planning councils, but there are a number of regional planning commissions.<sup>40</sup>

There are at least five possible structures for regional planning agencies:

1. **Regional Planning Commission.** Regional planning commissions may be single county, multicounty, or composed of multiple jurisdictions, depending on the geographic extent and population of the region. Typically, their governing board is composed of citizens who are appointed by local governments, although elected officials may also serve. They are primarily established to prepare plans, provide technical assistance to member governments, and, in some cases, administer development regulations (such as reviewing and approving subdivision plats). Interstate regional planning commissions cover portions of multistate areas, most typically metropolitan areas. In Ohio, such regional planning commissions are the result of special enabling legislation.<sup>41</sup> In Philadelphia, the Delaware Valley Regional Planning Commission, whose jurisdiction covers portions of New Jersey and Pennsylvania, was created by a special interstate compact approved by Congress.<sup>42</sup>

2. **Council of Governments.** While they may undertake planning, councils of governments (COGs) are somewhat different than regional planning commissions in that they can also carry out virtually any service delivery activity that a member government can undertake, provided the membership agrees that the COG should do so. For example, a council could operate a regional wastewater treatment plant or a regional ambulance service if the members permit. The governing structure of a COG typically involves appointed representatives from member governments but may

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<sup>40</sup>National Association of Regional Councils (NARC), *Directory of Regional Councils in the United States* (Washington, D.C.: NARC, April 1995), 3.

<sup>41</sup>Oh. Rev. Code §§713.30-713.34 (1994). The Ohio law permits creation by agreement of a board of county commissioners and the legislative authority of a municipality with such boards and authorities of adjoining states. An interstate regional planning commission may also be created by compact which must be reviewed by the attorneys general of the states included in the region and approved and signed by the governors of such states. §713.30.

<sup>42</sup>Delaware Valley Urban Area Compact, P.L. 1974, c.193.

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include others, such as representatives of economic development organizations in the region. A variation includes a COG whose representatives are from local governments and from the state.

In Florida, for example, regional planning councils include representatives of member counties and other local general purpose governments in the geographic area covered by the regional planning council as well as representatives appointed by the governor from the geographic area covered by the council. The governor also appoints, as ex officio nonvoting members, representatives of several state departments.<sup>43</sup> The Metropolitan Washington Council of Governments includes one member of the Maryland General Assembly and one member of the Virginia General Assembly, representing portions of the Washington, D.C., metropolitan area. Both are selected every two years by separate caucuses of the members of the council from those legislative bodies.<sup>44</sup>

In some states, like Michigan, Ohio, and North Carolina, COGs are creatures of special enabling legislation.<sup>45</sup> In others, like California, they are established through a joint powers agreement.

**3. Regional Advisory Committee.** The American Law Institute's *Model Land Development Code* rejected the creation of independent regional planning agencies. Instead, it proposed the optional establishment of regional planning divisions for portions of the state. The divisions could be delegated all or a portion of the authority of the state planning agency and would exercise that authority subject to the planning agency's oversight. The governor could also create regional advisory committees and could delegate all or a portion of the powers of the regional planning division to the committees. The committees were also charged with advising the state planning director.<sup>46</sup> The ALI model of regional advisory committees to a state planning agency has not been adopted anywhere in the country.

**4. Regional Allocation Agency.** Economist Anthony Downs, in his 1994 book, *New Visions for Metropolitan America*, proposed the creation of regional allocation agencies.<sup>47</sup> The regional allocation agency would be responsible for allocating federal funds within various program areas either to local governments or to households, service delivery agencies, or other recipients. At the outset, Downs wrote, the agency would be responsible for allocating federal funding for transportation, environmental control, housing, urban planning, education, welfare, and health care.

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<sup>43</sup>Fla. Stat. Ann. §186.504 (West 1987 and Supp.1995).

<sup>44</sup>By-Laws of the Metropolitan Washington Council of Governments, §5.02(e) (December 14, 1988).

<sup>45</sup>Mich. Comp. Laws Ann. §124.651 *et seq.* (1991); Oh. Rev. Code, Ch. 167 (1994); N.C.G.S. §160A-470 *et seq.* (1989).

<sup>46</sup>American Law Institute, *A Model Land Development Code*, Note to §8-102, 306-319.

<sup>47</sup>Anthony Downs, *New Visions for Metropolitan America* (Washington, D.C.: Brookings Institution and Lincoln Institute of Land Policy, 1994), 176-179.

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Within each categorical program, the regional agency would have to develop an allocation plan that addresses the needs and capacities of all potential recipients on an areawide basis and show how it was meeting those needs for persons living in all parts of the metropolitan area.

Examples of such agencies – although they might not reflect all of Downs’ criteria – would include the Metropolitan Service District or “Metro” in Portland, Oregon, and the Metropolitan Council in the Twin Cities in Minnesota.<sup>48</sup>

According to Downs, governing members of the agency could be elected by the residents of the entire metropolitan area (as in Portland), appointed by the governor (as in the Twin Cities), or appointed by the local governments in the region. Once chosen, the members of this agency may delegate some of their powers to existing organization, appoint subagencies to handle funds within each program category, or use any other administrative methods they selected.

With respect to growth management activities, Downs proposed that a single government agency – either at the state level or regional (including county) level – be empowered to review all local land-use plans. The agency would check the plans’ consistency with state planning goals – adopted by the state legislature and applicable to all communities in the state – and their consistency with each other, and suggest revisions where inconsistencies of either type are found. Downs contended that the agency must have the power to withhold its approval of local plans and that withholding it should carry significant penalties in the form of ineligibility for various types of state financial assistance. “In some cases,” he wrote, “the agency should have the power to override local government decisions, such as zoning decisions that prevent the creation of low-cost housing. Most often, however, the agency would simply request the local government to revise its plans and repeat the process until final approval is obtained.”<sup>49</sup> In order to ensure consistency of state functional plans with local government plans and with each other, the same agency that performed the local plan review would also coordinate activities of state transportation departments, utility regulation departments, environmental protection departments, and other agencies.

**5. Special Purpose Regional Agencies.** Several states have special purpose regional agencies with the authority to plan and control development in environmentally sensitive areas or areas having statewide resource significance. Examples of such long-standing organizations include the Pinelands Commission in New Jersey, the Cape Cod and Martha’s Vineyard Commissions in Massachusetts, the San Francisco Bay Conservation and Development Commission in California, the Adirondack Park Agency in New York, and the bi-state Tahoe Regional Planning Agency in California and Nevada, which is the result of a compact.<sup>50</sup>

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<sup>48</sup>Ore. Rev. Stat. Ch. 368 (1993); 1992 Metro Charter; Mn. Stat. Ann., Ch. 186 (1994 and Supp. 1995).

<sup>49</sup>Downs, *New Visions for Metropolitan America*, 180.

<sup>50</sup>See N.J.S.A. §13.18A-1 *et seq.* (Pinelands Commission); Commonwealth of Massachusetts, Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990 (Cape Cod Commission Act); Commonwealth of Massachusetts, Ch. 637 of the Acts of 1974 (Martha’s Vineyard Commission); Cal. Gov’t. Code, §65500 *et seq.* (San Francisco Bay Conservation and Development Commission); N.Y. Executive Law, Art. 27 (Adirondack Park Agency Act, 1990); Nev.

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The last two alternatives, the regional allocation agency and the special purpose regional agency, require specialized drafting that takes into account regional and local political traditions and the issues that brought about the need for the agency. In the case of the regional allocation agency, the legislation must go beyond regional planning and into the area of restructuring metropolitan governance, which is emerging as one of the major governance challenges of the new century.

The models that follow address the first two types of regional planning agencies: regional planning commissions and councils of governments, as they are the most common in the country. They are adapted from legislation from Florida, Wisconsin, Massachusetts, Ohio, North Carolina, Georgia, and Michigan.<sup>51</sup> The term, “regional planning agency,” is used throughout in brackets, but drafters may wish to substitute some other term such as “regional planning commission,” “regional council of governments,” or “regional council.”

Under the model legislation, a regional planning agency can have the planning responsibilities of a regional planning commission and the service provision responsibilities of a council of governments. Various organizational options are also provided including: (a) a voluntary regional agency versus a regional agency mandated by state statute for each substate district; and (b) a structure to be determined by agreement of member governments versus a mandated structure composed of local elected officials, appointees of the governor (often representing interest groups), and state agency representatives serving in an *ex officio*, nonvoting capacity.

A related issue is whether membership by local governments will be mandated; the model legislation provides alternative language for this, based on the Florida and Georgia legislation. In Florida, membership by counties in regional councils is mandated by statute, but municipal government membership is not required.<sup>52</sup> By contrast, in Georgia all local governments must be members of a regional development center (RDC), the state’s term for a regional planning agency. Georgia, through its department of community affairs, also provides funding support for the RDC.<sup>53</sup> This suggests that where state law mandates local participation in the regional agency (and hence local costs), the state must be prepared to assume a portion of the burden of financing its operation. The model legislation below also contains provisions for partial state funding of regional planning agencies.

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Rev. Stat. §277.200 (Tahoe Regional Planning Compact); Cal. Gov’t Code §66801 (Tahoe Regional Planning Compact).

<sup>51</sup>Fla. Stat. Ann. §186.503 *et seq.* (1987 and Supp 1995) (Regional planning councils); Wi. Stat. Ann. §66.945 (1990) (Regional planning commissions); Mass. Gen. Laws Ann., Ch. 40B, §§1-8 (1994) (Regional planning); Oh. Rev. Code, Ch. 167 (Regional councils of government) and §713.21 *et seq.* (Regional planning commissions) (1994) (Regional councils of government); N.C.G.S., Art. 19 (Regional planning commissions) and Art. 20, Part 1, §160A-470 *et seq.* (Councils of government) (1990); Code of Ga., Tit. 50, Ch. 8, Art. 2 (1994) (Regional development centers); Mi. Comp. Laws Ann., §124.653 *et seq.* (1991) (Metropolitan councils) and §125.12 *et seq.* (1986) (Regional planning commissions).

<sup>52</sup>Fla. Stat. Ann. §186.504 (4) (West 1987 and Supp. 1995).

<sup>53</sup>Ga. Code. Ann. §50-8-33 (1989).

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*There is no ideal form for a regional planning agency. The approach taken here, therefore, resists endorsing one, leaving that option up to local officials in the region and the state legislature.*<sup>54</sup> For that reason, the model legislation does not propose metropolitan or regional “superagencies” or new forms of regional governance, although this may always be an alternative.<sup>55</sup> Economist Anthony Downs has commented that regional growth management policies do not have to be administered “through a single agency acting as a regional policy czar.” Instead, he wrote, it might be desirable to have different growth management policies run by different local and regional agencies that are organized in ways best suited to their individual tasks, “as long they are linked through formal and informal coordination.”<sup>56</sup>

As a practical matter, the formal organizational structure of a regional planning agency is less important than the powers and duties that it has, the clarity with which those powers and duties are described, how effectively those powers and duties are actually carried out, and its actual – as opposed to theoretical – relationships with implementing local governments and special districts and with public, private, and civic organizations. Conceivably, a regional planning commission whose representatives are lay citizens appointed by their local governments and who are their region’s leaders could have just as much informal independence, influence, and authority as the Twin Cities Metropolitan Council, whose board members are appointed by the governor, or the Portland, Oregon, Metropolitan Service District, whose board members are elected. *In adapting these models to local conditions, drafters must look at the desired outcomes of planning and consider modifying the authority of existing agencies **before** deciding to create new ones.*

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### **6-101 Creation of Regional Planning Agency; Boundaries of Regional Planning Agency; Interstate Regional Planning (Two Alternatives)**

#### *Alternative 1 – Voluntary Creation of Regional Planning Agency*

- (1) A [regional planning agency] may be created by agreement after adoption of a resolution by 2 or more legislative bodies of any local governments that want to create a [regional planning agency]. The agreement shall specify the area in which the powers and duties of

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<sup>54</sup>For a discussion of the question of support for strong planning roles by regional government, see Mark Baldassare, et al., “Possible Planning Roles for Regional Government: A Survey of City Planning Directors in California,” *Journal of the American Planning Association* 62, no. 1 (Winter 1996): 17-28.

<sup>55</sup>For an argument favoring metropolitan government or reorganization under a variety of structures, see David Rusk, *Cities Without Suburbs* (Washington, D.C.: Woodrow Wilson Center Press), 91-119.

<sup>56</sup>Downs, *New Visions for Metropolitan America*, 182.

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such a [regional planning agency] shall be exercised and shall provide for procedures for the amendment of the area and for the addition of other local governments [and may provide for the addition of other governmental units].

[or]

A [regional planning agency] may be established in the following manner:

- (1) Upon petition in the form of a resolution by the legislative body of a local government and the holding of a public hearing on such petition, the governor, or such state agency or official that the governor designates, may create a [regional planning agency]. If the petition is joined in by the governing bodies of all the local governments in the proposed region, including the [legislative body of the county], part or all of which is located in the proposed region, the governor may dispense with the public hearing. The governor may give notice by mail at least [30] days in advance to the clerk of each local government in the proposed region.
- (2) If the governor finds that there is a need for a [regional planning agency] and if the governing bodies of local governments located within the proposed region, which include more than 50 percent of the population [and equalized assessed valuation of the region as determined by the last previous equalization of assessments], consent to the formation of such [regional planning agency], the governor may create the [agency] by order and designate the area and boundaries of the [agency]'s jurisdiction, taking into account patterns of urban and rural development, distribution of population, patterns of transportation (including regional commuting), interrelatedness of social and economic problems, historic, scenic, and natural resources, and geographic or topographic features.

[or]

- (2) The legislative body of a county and the legislative body of a municipality located within such county may cooperate with other such counties and municipalities of this state and of any adjoining state to create by agreement an interstate [regional planning agency], whenever such local governments comprise a region that would benefit from cooperative regional planning.
- (3) An interstate [regional planning agency] may also be created by compact through appropriate action of the legislative bodies of counties and municipalities in this state, by resolution, ordinance, or otherwise pursuant to law, in agreement with the appropriate authorities of the political subdivisions of other states included in the region.
- (4) Any such compact shall specify:
  - (a) its purposes and duration;
  - (b) the extent of the region;

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- (c) the precise organization and composition of the [regional planning agency];
  - (d) the manner of financing the operations of the [agency] and maintaining a budget for the purposes thereof;
  - (e) provisions for the partial or complete termination of the compact; and
  - (f) any other matters deemed necessary and proper.
- (5) No such compact shall be in force and effect until it has been reviewed and approved by the attorneys general of the states included in the region to determine whether the compact is in proper form and compatible with all state and federal laws<sup>57</sup> and until it has been approved by the legislatures and governors of such states.

### *Alternative 2 – Mandated Creation of Regional Planning Agency*<sup>58</sup>

- (1) Where the governor has delineated substate districts pursuant to Sections [6-601 to 6-602], there shall be created in each district a [regional planning agency] within [1] year from the effective date of this Act.
- (2) Only one [agency] shall exercise the powers and duties granted herein within the geographic boundaries of any one substate district.

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### ***Commentary: Composition of Regional Planning Agency***

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<sup>57</sup>The Constitution requires congressional approval for interstate compacts. See U.S. Const., Art I, §10, Cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign power”). See also Stephen D. Galowitz, “Interstate Compacts and Affordable Housing,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 147-151; Frederick L. Zimmerman and Mitchell Wendel, *The Interstate Compact Since 1925* (Chicago: The Council of State Governments, 1951), 30-42; Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* (Carbondale, Ill.: Southern Illinois University Press, 1971). Congress has, however, preapproved certain types of compacts, such as those for transportation planning for multistate metropolitan regions. See 23 U.S.C.A. §134(d)(2) (authorizing two or more states to enter into agreements or compacts, not in conflict with any law of the United States, for cooperative efforts and mutual assistance for metropolitan transportation planning activities).

<sup>58</sup>This alternative is linked to Alternative 2 – Mandated Composition and Membership of Regional Planning Agency by Local Elected Officials, Appointees of the Governor, and State Agency Representatives in Section 6-102.

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Membership in regional planning agencies is either permissive or mandated, based on whether the agency itself is a voluntary association of governments or mandated by state government. In either case, the membership needs to include representatives of local and state governments and private and civic sectors. Local elected officials represent at least a majority of the voting members on the governing board. Voting representation is usually extended to private and civic representatives, either selected by elected local officials or community groups. State governments have ex-officio members, usually state legislators or representatives of state government agencies. Federal government agencies often have ex-officio members. The number of voting members can vary from less than a dozen to over a hundred, but should be large enough to represent the full range of regional interests. Regional planning agencies often have the flexibility to add or change members to accommodate new membership needs, as long as the local elected officials retain a majority vote on the governing body

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### **6-102 Composition of [Regional Planning Agency]; Finances; State Representation; Representation of Federal Military Installations [and Facilities] (Two Alternatives)**

#### *Alternative 1 – Permissive Composition and Membership of Regional Planning Agency*

- (1) The number and qualifications of the voting representatives of member local governments of any [regional planning agency], their terms, [compensation, if any,] and method of appointment and removal shall be such as determined and agreed upon by the cooperating legislative bodies. [Representatives shall serve [with *or* without] compensation, and may be reimbursed for expenses incurred in the performance of their duties on the [agency] pursuant to rules adopted by the [agency].]
- (2) Any representative of a member local government on a [regional planning agency] may hold any other appointive or elective public office. After creation of a [regional planning agency], any local government in the region, upon the resolution of its legislative body, may apply for admission to the agency. Upon an affirmative vote of a majority of the [regional planning agency]'s membership, the local government shall become a member thereof. [After creation of a [regional planning agency], school districts, special districts, other units of government in the region, and Indian tribes<sup>59</sup> may also participate in the [regional planning agency], upon such terms, including contributions to the [agency]'s expenses, as may be agreed upon by the cooperating legislative bodies.
- (3) The proportion of the expenses of the [regional planning agency] to be borne respectively by the local governments cooperating in the establishment and maintenance of the [agency] shall be as determined and agreed upon by the cooperating legislative bodies, which are hereby authorized to appropriate their respective shares of such expenses. [The sums so

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<sup>59</sup>For a discussion of the sovereign authority of Indian tribes, see Alan Sweeney, “Tribal Land-Use Power: A Primer for Planners,” *PAS Memo* (Chicago: American Planning Association, May 1996).

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appropriated shall be deposited into the treasury of the county in which the greater portion of the population of the region is located, and shall be paid out on the certificate of the [regional planning agency] and the warrant of the [county auditor *or* other county fiscal officer] for the purposes authorized by this Act.]

- [(4) The state [may *or* shall] be represented as an ex officio member of each [regional planning agency]. In such instances, the governor shall appoint an employee from the [state planning agency], who shall represent the state in the deliberations of the [agency]. The state [shall *or* shall not] be a voting member of the [regional planning agency] or any committee of the [agency].]
- [(5) Whenever there is located, either wholly or partially, within the region, a federal military installation [or other federal facility] having a resident population of at least [500] persons according to the most recent available federal decennial census, the [regional planning agency] may, by a majority vote of its members, offer the commanding officer of the installation [or chief executive officer of the federal facility] the privilege of membership for the installation [or facility], with the commanding officer, [chief executive officer,] or the officer's designee serving as the representative to the [agency]. Upon the acceptance by the commanding officer [or chief executive officer] of this offer, the federal military installation [or federal facility] shall be deemed to be an ex officio member of the [agency], and shall have the same rights and obligations as other local governments.]

- ◆ The language in paragraph (5) would permit membership on the regional planning agency by a federal military base or other federal facility, such as a national park or national forest.

### *Alternative 2 – Mandated Composition and Membership of Regional Planning Agency by Local Elected Officials, Appointees of the Governor, and State Agency Representatives.*<sup>60</sup>

- (1) All local governments located in a region shall be members of a [regional planning agency] and shall pay a pro rata share of the costs of membership in the [agency]. Each local government shall appoint 1 voting representative, who is an elected official of that local government, to serve on the [agency]. At least [51 percent *or* two-thirds] of the representatives serving on the [agency] shall be local elected officials.
- (2) The governor shall appoint the remaining portion of the voting members on the [regional planning agency], subject to confirmation by the senate. No two appointees of the governor shall have their places of residence in the same county until each county within the region is represented by the governor's appointee to the [agency]. Nothing contained in this Section shall deny the option of appointing either locally elected officials or lay citizens, provided that at least [51 percent *or* two-thirds] of the [regional planning agency] is composed of local elected officials.

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<sup>60</sup>This section is linked to Alternative 2 – Mandated Creation of Regional Planning Agency in Section 6-101.

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- (3) In addition to voting members appointed pursuant to paragraph (2) above, the governor shall appoint the following ex officio nonvoting members to each [regional planning agency]:
- [(a) a representative of the state planning agency;]
  - [(b) a representative of the state department of transportation;]
  - [(c) a representative of the state department of environmental protection; and]
  - [(d) a representative of [*other appropriate state agencies, such as the state emergency management agency or the state housing agency*].]
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### ***Commentary: Voting***

An ongoing issue for some regional planning agencies is the matter of voting. Most regional agencies are structured and expected to function like a senate, with each member community having an equal vote. As noted earlier in this Chapter, the U.S. Advisory Commission on Intergovernmental Relations proposed in the 1970s that regional agencies have the option of allowing proportionate-population weighted voting in certain issues, such as actions that would affect the finances and operations of constituent local governments. As regional agencies move into areas that are less advisory and more legislative, such as ranking transportation projects for a metropolitan area or approving policies that have distributional consequences, a weighted voting mechanism, either mandatory or optional, may be desirable. Indeed, a number of regional agencies (e.g., the San Diego Association of Governments, the Southeast Michigan Council of Governments, the Puget Sound Regional Council, the Denver Regional Council of Governments, the Tampa Bay Regional Planning Council, the Metropolitan Washington Council of Governments, and the Miami Valley (Ohio) Regional Planning Commission) have various forms of weighted voting based on a jurisdiction's proportion to the total regional population.<sup>61</sup> A 1994 ACIR analysis of 86 metropolitan planning organizations (MPOs) that undertake regional transportation planning found population-

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<sup>61</sup>See U.S. Advisory Commission on Intergovernmental Relations, *MPO Capacity: Improving the Capacity of Metropolitan Planning Organizations to Help Implement National Transportation Policies*, A-130 (Washington, D.C.: U.S. GPO, May 1995), 34, 40-41 (discussion of prevalence of weighted voting among a sample of MPOs); National Association of Regional Councils, (NARC), *Regional Council Representation and Voting: A Guide to Issues and Alternatives* (Washington, D.C.: NARC, March 1979) (discussion of policy issues and court decisions relevant to regional council voting and representation).

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weighted voting in 18 MPOs in 10 states and the District of Columbia.<sup>62</sup> MPOs are often part of regional planning commissions or councils of governments, thereby following the voting practices of those organizations.

The drafting of a weighted or proportional voting procedure will be unique to the individual state or region. Consequently, the model legislation below does not endorse a specific approach and only directs the regional agency in its bylaws to provide for an alternate voting system. Examples of such bylaws are discussed in a Note at the end of this Chapter.

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### **6-103 Voting; Provision for Proportional Voting**

- (1) Each [representative of a governmental unit or agency *or* representative of a member local government] shall be entitled to 1 vote in the governing body of the [regional planning agency], except as provided in paragraph (2) below.
- (2) The [agreement establishing *or* bylaws of] the [regional planning agency] shall provide for an alternate weighted voting procedure based on population that [any representative of a governmental unit or agency *or* any representative of a member local government *or* 2 or more representatives of member local governments] may call into effect.

### **6-104 Chair; Other Officers and Committees; Frequency of Meetings; Reports of Committees**

- (1) Each [regional planning agency] shall elect its own chair, may elect an executive committee, and may create and fill such offices as it determines to be necessary.
- (2) The [agency] may create and appoint advisory committees whose membership may consist of individuals whose experience, training, or interest in a program, activity, or plan may qualify them to lend valuable assistance to the [agency]. Members of such advisory committees shall receive no compensation for their services but may be reimbursed for actual expenses incurred in the performance of their duties.
- (3) The [agency] may authorize the executive committee to act on its behalf in all matters, including the approval of contracts, pursuant to rules adopted by it, except that the executive committee shall not adopt rules, appoint, evaluate, or terminate an executive director, adopt an annual budget and work program, approve the initiation of a lawsuit, adopt regional plans, create advisory committees or appoint members to them, or elect members of the executive committee.

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<sup>62</sup>Seth Benjamin, John Kincaid, and Bruce D. McDowell, "MPOs and Weighted Voting," *Intergovernmental Perspective* 20, no. 2 (Spring 1994): 31. The states are Arizona, California, Colorado, Delaware, Michigan, Missouri, North Carolina, Ohio, Tennessee, and Washington.

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- (4) The [agency] shall meet at least [4] times each year.
  - (5) All actions of committees shall be reported in writing to the [agency] members no later than the next [agency] meeting or within [30] days from the date of the action, whichever is earlier. The [agency] may provide a procedure to ratify committee actions by a vote of the representatives.
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### ***Commentary: Rule-Making Authority***

The legislation should give the regional planning agency the authority to adopt rules. Such rules would ordinarily deal with routine matters, such as a quorum, call of meetings, order of business, and parliamentary procedure. However, as a regional planning agency's responsibilities grow and its tasks become more complex, a more formal rule-making authority may become necessary. For example, if the regional agency regulates developments of regional impact, then it would need to adopt substantive rules for that purpose, much like state environmental protection agencies. The model legislation provides two alternatives to address each of these situations.

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### **6-105 Rule-Making Authority (Two Alternatives)**

#### *Alternative 1 – Simple Rule-Making Authority*

- (1) The [regional planning agency] shall adopt rules for the transaction of business.

[or]

- (1) The [regional planning agency] shall have the authority to adopt rules concerning any matter within its jurisdiction, provided, however, that no rule shall be adopted until the [agency] has held a public hearing on the proposed rule.
  - (2) No rule shall become effective until it has been adopted by the affirmative vote of not less than the majority of the entire membership of the [regional planning agency] who are entitled to vote.
  - (3) All rules adopted by the [regional planning agency] shall be public records.
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- (4) The [regional planning agency] shall keep a record of its resolutions, minutes of meetings, transactions, findings, and determinations, which record shall be public record.

### *Alternative 2 – Detailed Rule-Making Authority*

- (1) The [regional planning agency] shall have the authority to prepare and adopt rules concerning any matter within its jurisdiction.
- (2) No rule shall be adopted until the [regional planning agency] holds a public hearing on the proposed rule, publishes a notice of proposed rule making in a newspaper of general circulation in the region at least [30] days in advance of the public hearing, and provides notice of proposed rule making to the chief executive officer of each local government, special district, and other organized taxing districts or political subdivisions located wholly or partly in the region.
- (3) The notice of proposed rule making shall:
  - (a) contain a statement as to the substance of the proposed rule;
  - (b) specify the officer(s) or employee(s) of the [regional planning agency] from whom additional information may be obtained;
  - (c) specify a time and place where the proposed rule may be inspected before the hearing; and
  - (d) specify the date, time, and place of the public hearing, and the method for presentation of views and comments.
- (4) The [regional planning agency] shall afford any interested person the opportunity to submit written and oral comments in the record of the hearing on the proposed rule.
- (5) *[Use same language as Alternative 1, Paragraph (2).]*
- (6) *[Use same language as Alternative 1, Paragraph (3).]*
- (7) *[Use same language as Alternative 1, Paragraph (4).]*

### **6-106 Appointment and Responsibilities of Executive Director; Contracts, Purchases, and Leases**

- (1) The [regional planning agency] shall appoint an executive director, who shall select, hire, evaluate, discipline, and terminate employees pursuant to rules adopted by the [agency], be responsible for the day-to-day work of the [agency], and manage and supervise employees and experts and consultants hired by contract, except for attorneys retained to provide independent legal counsel and for certified public accountants retained to conduct independent audits. The executive director shall serve at the pleasure of the [agency].

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- (2) The [agency] may hire by contract experts and consultants for part-time or full-time service as may be necessary to fulfill its responsibilities.
  - (3) The [agency] may purchase, lease, or otherwise provide for supplies, materials, equipment, and facilities as it deems necessary and appropriate in the manner provided in rules adopted by the [agency].
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### *Commentary: Powers and Duties of a Regional Planning Agency*

More than the organizational form, the powers and duties assigned to a regional planning agency will determine its ultimate role. Drafters would be best advised to concentrate their initial energies on defining these powers and duties before moving on to structure.

There are four categories of powers and duties: (1) planning, information-gathering, and forecasting; (2) administration, education, and training; (3) implementation; and (4) service provision. The exact mix of powers and duties of a regional planning agency will depend on the degree to which the state legislature and the local governments want an activist agency with strong authority to coordinate and implement its plans as well as provide direct service.

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### **6-107 Powers and Duties of a [Regional Planning Agency]**

A [regional planning agency] shall have the following powers and duties necessary to carry out the purposes and provisions of this Act, including, but not limited to:

- (1) Planning. The [regional planning agency] shall:
  - (a) prepare and adopt plans for the region pursuant to Sections [6-201 to 6-203 and 6-301 to 6-304];
  - (b) coordinate its planning activities with the planning activities of state agencies, local governments, special districts, and private and civic organizations in the region;
  - (c) provide, upon request, technical assistance to local governments, special districts, and other governmental units in the region, including assistance in developing local comprehensive and other plans and implementing measures as well as in planning for natural disasters and post-disaster redevelopment;

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- (d) cooperate with and assist units of the federal government in the execution of their planning function to coordinate their planning activities with the plans for the region as described in Sections [6-201 to 6-203];
  - (e) conduct, as necessary, special studies and undertake research;
  - (f) participate in interstate, regional, and national planning programs that are relevant to the region; and
  - (g) review local comprehensive and other plans for consistency with the regional comprehensive plan and other regional plans pursuant to Section [6-401];
  - (h) gather, tabulate, analyze, and periodically publish information and reports on the location and pace of development throughout the region, including, but not limited to population, housing, economic, and building permit data, and cooperate with the [state planning agency] in this duty so as to minimize duplication;
  - (i) assess and report on, as necessary, the region's risk from natural hazards, including potential vulnerability of the region's buildings, structures, infrastructure, and health and human services to such hazards, and the implications of those risks to regional and local planning;
  - (j) serve, in cooperation with the [state planning agency], as the regional clearinghouse agency responsible for coordinating data collection and data dissemination among the state, the private sector, local governments, and special districts;
  - (k) maintain, as necessary, a computerized geographic information system or support, as necessary, local governments and special districts, in this duty;
  - (l) cooperate with the Bureau of the Census and other federal agencies to improve access to statistical productions, data, and information available from the federal government;
  - (m) prepare, at least twice in each decade, a [20]-year population forecast in [5]-year intervals for the region and its local governments, and cooperate with the [state planning office] in this duty so as to minimize duplication; and
  - (n) maintain a current inventory of local comprehensive plans, zoning ordinances, subdivision regulations, historic preservation and design review ordinances, and other land development regulations for all local governments in the region.
- (2) Administration, education, and training. The [regional planning agency] shall:

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- (a) administer federal and state grant-in-aid programs and other sources of revenue delegated or assigned to the [regional planning agency] by statute, executive order, or administrative rule;
  - (b) coordinate regional programs with the federal government;
  - (c) engage in a program of public information and communication regarding its activities;
  - (d) establish and maintain a regional program to ensure widespread public participation in its planning programs;
  - (e) have the power to contract with, as necessary, private or nonprofit organizations for assistance in building consensus in connection with any activity undertaken by the [regional planning agency];
  - (f) provide, as desired by its members, education and training programs in planning, public administration, and related topics to employees of local governments and special districts and to elected and appointed officials and cooperate with the [state planning agency] in the provision of such programs;
  - (g) have the power to sue and be sued;
  - (h) have the power to retain, employ, and remove employees, consultants, agents, and attorneys, consistent with its adopted administrative, personnel, and budgetary procedures;
  - (i) prepare and adopt an annual operating and capital expenditure budget and work program and have the power to expend such budgeted monies;
  - (j) have the power to apply for and receive state, federal, and private grants and loans;
  - (k) have the power to adopt rules pursuant to Section [6-105];
  - (l) have the power to lease and purchase real property; and
  - (m) prepare a biennial report, pursuant to Section [6-108] below.
- (3) Implementation. The [regional planning agency] shall:
- [(a) review, [and] comment on, [and] [certify] local plans pursuant to Sections [6-302 and 6-401];]
  - [(b) review and comment on proposed state plans pursuant to Sections [6-302 and 6-401];]

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- [(c) nominate properties as areas of critical state concern pursuant to Section [5-204];]
- [(d) enter into regional planning and coordination agreements pursuant to Section [6-402];]
- [(e) convene parties to formulate urban services agreements pursuant to Section [6-403];]
- [(f) participate in the development of regional impact review (DRI) process pursuant to Section [5-301 *et seq.*];]
- [(g) establish, by rule pursuant to Section [6-105], a process by which any individual or organization may obtain an opinion from the [regional planning agency] clarifying the application of any goal, policy, or guideline in the regional comprehensive plan or any regional functional plan, except that the [agency] shall not issue an opinion regarding any petition that seeks either to validate or invalidate a specific code, ordinance, administrative rule, regulation, or other instrument of plan implementation;
- [(h) review proposals for the formation of special districts that would operate within its boundaries and, within [30] days, submit a report on the areawide significance of the proposed formation to the referring local government(s);]
- [(i) review and approve any plans of special districts operating within its boundaries that have an areawide impact [pursuant to Section [6-401]],<sup>63</sup>]
- [(j) review and comment upon all applications submitted by state agencies, local governments, special districts, and private nonprofit organizations within its boundaries for a loan or grant from a federal department or agency for programs and purposes required by federal law or regulation as to whether the application is consistent with its adopted regional comprehensive plan and any adopted regional functional plan pursuant to Section [6-604(3)];]
- [(k) review any major capital facilities projects proposed by any state, agency, local government, or special district to be located within the region's boundaries pursuant to Section [6-401];]
- [(l) administer dispute resolution and conflict resolution programs; and]
- [(m) have the powers of a local planning commission where the local government, by mutual agreement, transferred or delegated to the [regional planning agency] all or

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<sup>63</sup>This function, as it applies to projects of a special district, may not be necessary if a development of regional impact review (DRI) process is in place in the region that addresses capital projects.

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part of the functions, powers, or duties that the local planning commission may perform.]

(4) Service Provision. The [regional planning agency] may:

- ◆ The service provision powers and duties in paragraph (4) of this Section are appropriate only if the regional planning agency has expressly been created to provide services as well as engage in regional planning. Service activities have been traditionally carried out by councils of governments or regional agencies created under joint powers agreements. Through such agreements, the authority of the participating local governments is delegated to a public agency created under the agreement.<sup>64</sup>

- (a) act as the administrator of a joint exercise of powers agreement entered into pursuant to [the state statute authorizing interlocal contracts or agreements] if requested by the parties to the agreement;

[or]

- (a) exercise any powers that are exercised, or capable of being exercised by, its member governments and desirable for dealing with problems of mutual concern to the extent that such powers are specifically delegated to it by resolution of the governing board of each of the member governments which are affected thereby;
- (b) perform any regional function or activity upon the affirmative vote of a majority of the member local governments, [exclusive of appointees of the governor].<sup>65</sup> The governments must represent at least [60] percent of the region's population, as determined by a formula specified in the [bylaws or agreement establishing the agency]. To finance the function or activity, the [agency] may impose user charges and issue and sell revenue bonds in accordance with procedures prescribed in [insert appropriate state statutory citation], and may accept grants from federal, state, and local governments;
- (c) perform, by contract, the purchasing of supplies, services, materials, and equipment on behalf of any [governmental unit] participating in the [agency] or on behalf of any other political subdivision; and

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<sup>64</sup>See, e.g., Cal. Gov't. Code, §6500 *et seq.* (1995) (joint powers agreements); and N.C.G.S., §160A-460 *et seq.* (1995) (interlocal agreements).

<sup>65</sup>Where the regional planning agency's board consists of representatives of local government and appointees of the governor, the governor's appointees would not participate in the vote because the issue of service provision is a matter of local, rather than state, concern.

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- ◆ Service activities are carried out for state governments by councils of governments or regional agencies, and increasingly, for private and civic organizations, such as providing secretariats for regional economic development alliances, regional leadership training programs, and regional leadership forums.
  - (d) promote cooperative arrangements among its members, and between its members and other agencies of local or state governments (whether or not located within the state), and the federal government.

### **6-108 Biennial Report**

- (1) Within [6] months of the end of the fiscal year of each even-numbered year, the executive director of the [regional planning agency] shall prepare a biennial report to the agency's members. The report shall discuss, for the 2 previous years, the [agency]'s activities in preparing and implementing regional plans, describe other activities, provide such other information that may be relevant to the [agency]'s duties and functions, and present the [agency]'s financial statements.<sup>66</sup>
- (2) The executive director shall send the biennial report to all member governmental units of the [regional planning agency] and to the [state planning agency], and shall make the report available to the public. Copies shall be deposited in the state library and shall be sent to all public libraries in the region that serve as depositories for state documents.

## PLAN PREPARATION

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### ***Commentary: Regional Comprehensive Plan***

One of the main purposes of regional planning agencies is to prepare and adopt a regional comprehensive plan that is intended to address facilities or resources that affect more than one jurisdiction. It is to provide a framework or, in the words of one early planner, a “skeleton” for local comprehensive planning.<sup>67</sup> Consequently, a regional comprehensive plan should not have the same level of detail as a local plan. Indeed, it is probably undesirable for a regional comprehensive plan

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<sup>66</sup>Audited financial statements are typically available several months after the end of a fiscal year.

<sup>67</sup>Thomas Adams, *Outline of Town and City Planning* (New York, N.Y.: Russell Sage Foundation, 1935), 295.

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to incorporate all local plans, including detailed land use, unless that detail is somehow necessary to carry out the plan's purposes.<sup>68</sup>

Legislation describing a regional comprehensive plan may be of two types:

1. A broadly drafted description written to enable the regional planning agency to undertake any type of regional planning desired by its members and to respond to various federal and state programs calling for such planning. Such a description of a regional plan is appropriate when the state simply wants to authorize regional planning that is to be advisory. Alternative 1, below, is an example of such legislation.
2. A more tightly drafted description with specific components, and perhaps even formats, to ensure that certain goals and policies are addressed by the regional planning process. This approach is preferable when the regional comprehensive plan is intended to be used in connection with a vertically and horizontally integrated state/regional/local planning system, in which various levels of government adjust their planning to coordinate with and account for plans of another governmental level. Alternative 2, below, is a more focused and directive example and defines the plan's substantive contents as well as its relationships with the adopted plans of other governmental units.

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### **6-201 Preparation of Regional Comprehensive Plan (Two Alternatives)**

#### *Alternative 1 – Regional Comprehensive Plan as an Advisory Document*

- (1) A [regional planning agency] shall, with the involvement of the region's local governments, special districts, and citizens, prepare and adopt, and may, from time to time, amend a regional comprehensive plan.
- (2) The purpose of the regional comprehensive plan is to guide the coordinated, orderly, and harmonious development of the region and to advise the [regional planning agency], the region's local governments, and special districts in the performance of their functions and duties as to extra-jurisdictional and regional interests and issues.
- (3) In preparing the regional comprehensive plan, the [regional planning agency] shall undertake supporting studies that are relevant to topical areas included in the plan. In undertaking these studies, the [regional planning agency] may use studies conducted by others. The supporting studies shall concern the future growth of the region, including, but not limited to:

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<sup>68</sup>An example would be if the regional comprehensive plan called for high-density development around transit stops and the plan map showed detailed land-use concepts for all such areas.

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- (a) population and population distribution of the region and local governments within the region, which may include projections and analyses by age, education level, income, employment, or other appropriate characteristics;
  - (b) natural resources, which may include air, water, open spaces, scenic corridors and viewsheds, forests, soils, rivers and other waters, shorelines, fisheries, wildlife, and minerals;
  - (c) the economy of the region, which may include amount, type, general location, and distribution of commerce and industry within the region, the location of regional employment centers, and trends and projections of economic activity;
  - (d) amount, type, quality, affordability, and geographic distribution of housing among local governments in the region;
  - (e) general location and extent of existing or currently planned major transportation facilities of all modes, and utility, educational, recreational, cultural, and other facilities of statewide or regional significance;
  - (f) geology, ecology, and other physical factors of the region, including land areas in the region subject to natural hazards;
  - (g) the identification of features of significant statewide or regional architectural, scenic, cultural, historical, or archaeological interest;
  - (h) amount, type, location, and quality of agricultural lands; and
  - (i) amount, type, and general location of industrial, commercial, residential, and other land uses.
- (4) In preparing the regional comprehensive plan, the [regional planning agency] shall take into account adopted plans of state, regional, and other agencies (including special districts), and of local governments within the region.
- (5) The regional comprehensive plan may consist of text, maps, plats, graphs, and charts that shall show the [regional planning agency]'s goals, policies, guidelines, and recommendations to guide the physical development of the region. It may include, but shall not be limited to:
- (a) the general location, character, and extent of main highways and expressways, bridges, and viaducts; parks; parkways; recreation areas; sites for public buildings, structures, and other public places and areas; airports; waterways; routes or sites for public transit, including multi-modal facilities; and main and interceptor sewers, water conduits, and other public utilities, whether privately or publicly owned;

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- (b) the general location of land areas subject to natural hazards or containing historic or scenic resources;
- (c) areas for industrial, commercial, residential, agricultural, and other land uses; and
- (d) a long-range program for implementing the plan's recommendations, including estimates of costs, identification of responsibilities by local governments or other governmental agencies, proposals for legislation, and other relevant measures.

### *Alternative 2 – Regional Comprehensive Plan as a Document to Integrate State, Regional, and Local Interests*

- (1) The [regional planning agency] shall, with the involvement of the region's local governments, special districts, and citizens, prepare and adopt, and update and amend, at least every [5 or 10] years, a regional comprehensive plan. The regional comprehensive plan shall be consistent with the state comprehensive plan, the state land development plan [and the state biodiversity conservation plan].
- (2) The purposes of the regional comprehensive plan are to:
  - (a) provide a mechanism by which the goals, policies, and guidelines in the state [*name of plan*] are interpreted and applied to the region and its local governments;
  - (b) provide a coordinating regional framework for local comprehensive planning and planning by special districts in the region;
  - (c) take into account adopted plans of local government to the extent that they affect state, extra-jurisdictional, or regional interests; [and]
  - (d) provide a unified physical design for the development of the region[. or ;]
- ◆ The following provisions, from Paragraphs (2)(e) to (2)(n), are optional as they contain statements regarding desired regional development form, or particular interests to be addressed or protected. Such statements may instead be addressed in the goals and policies of the regional comprehensive plan itself.
  - [(e) encourage a pattern of compact and contiguous growth to be guided into urban and rural growth centers [designated in accordance with the goals, policies, and guidelines in the state land development plan];]
  - [(f) direct growth to where infrastructure capacity is available or committed to be available in the future;]

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- [(g) support development patterns that discourage long-distance, single-occupant automobile commuting and encourage transit or other nonautomobile-oriented transportation;]
  - [(h) ensure the availability of housing with a range of types and affordability to accommodate persons and families of all income levels and in locations that are convenient to employment and quality public and private facilities;]
  - [(i) promote the development of new employment in areas that are convenient to existing housing and public transportation facilities;]
  - [(j) protect agricultural lands;]
  - [(k) conserve and manage natural resources, living and non-living, and the mineral resources base;]
  - [(l) conserve features of significant statewide or regional architectural, scenic, cultural, historical, or archaeological interest;]
  - [(m) ensure the adequate provision of employment opportunities and the economic health of the region; and]
  - [(n) protect life and property from the effects of natural hazards and disasters.]
- (3) In preparing the regional comprehensive plan, the [regional planning agency] shall undertake supporting studies that are relevant to topical areas included in the plan. In undertaking these studies, the [regional planning agency] may use studies conducted by others. The supporting studies shall concern the future growth of the region, including, but not limited to:
- ◆ Include language from Alternative 1, Section (3), but substitute the following for subparagraphs (a), (c), and (i):
    - (a) population and population distribution of the region and local governments within the region, which may include analyses by age, household size, education level, income, employment, or other appropriate characteristics, and which shall include [20]-year projections by [5]-year increments;  
...
    - (c) the economy of the region, which may include amount, type, general location, and distribution of commerce and industry within the region, the location of regional employment centers, and which shall include analyses of trends and projections of economic activity;  
...

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- (i) the amount, type, intensity or density, and general location within the region of various types of land uses and [20]-year projections of land uses for the region and for local governments located in the region by [5]-year increments. Such forecasts of land uses shall be divided into categories of intensity and net density, and shall be allocated, as appropriate, to urban growth areas as defined in Section [6-402(2)(a)].
- (4) In preparing the regional comprehensive plan and any amendments to it, the [regional planning agency] shall take account of and shall seek to harmonize the needs of the region as a whole, the adopted comprehensive plans of local governments, adopted functional plans of other governmental agencies in the region, and the adopted plans of the state.
- (5) The regional comprehensive plan shall provide for, address, and include, but need not be limited to the following:
  - (a) a statement of the economic, demographic, and related assumptions used and alternative assumptions considered and rejected in the preparation of the regional comprehensive plan;
  - (b) a statement of the relationship of the regional comprehensive plan to the state [*insert name of plan*] and to adopted comprehensive plans of local governments in the region;
  - (c) a statement, with supporting analysis, of regional goals, policies, and guidelines for the following:
    1. urbanization and management of the urban growth area;
    2. housing, including minimum net housing densities;
    3. transportation for all modes;
    4. regional public facilities, utilities, and services, excluding transportation;
    5. conservation and protection of the region's critical natural (both living and non-living), historic, and scenic resources;
    6. agriculture;
    7. economic development;
    8. natural hazards and disasters, including measures or proposals to mitigate the effects of natural hazards and disasters;
    9. human and social services; and

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10. any other goals, policies, and guidelines deemed appropriate and important by the [regional planning agency].
- (d) an identification, with supporting analysis, of lands within the region that may be appropriate for nomination as areas of critical state concern pursuant to Section [5-204];
- [(e) a regional fair-share allocation plan as described in Section [4-208.8, *Alternative 1B*];]
- (f) a statement describing [a hierarchy of] urban and rural growth centers in the region;
- (g) a regional comprehensive plan map that shows:
  1. urban growth area boundaries as defined in Section [6-402(2)(b)] for the region to permit the urbanization of the region at appropriate minimum land-use net densities and intensities [as specified in the state land development plan] for a period of not less than [20] years and to provide for urban services as defined in Section [6-402(2)(c)];
  2. existing and proposed transportation and other public facilities and utilities of extra-jurisdictional or regionwide significance;
  3. areas within the region that may be appropriate for nomination as areas of critical state concern pursuant to Section [5-204];
  4. areas within the region subject to natural hazards;
  5. [a hierarchy of] urban and rural growth centers; and
  6. any other matters of regional significance that can be graphically represented.
- (h) a long-range program of implementation for the regional comprehensive plan that includes:
  1. a [20]-year schedule of proposed transportation and other public facilities and utilities of extra-jurisdictional or regionwide significance. The schedule shall include a description of the proposed public facility or utility, an identification of the governmental unit to be responsible for the facility or utility, the year(s) the facility or utility is proposed for construction or installation, an estimate of costs, and sources of public and private revenue for covering such costs;

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2. proposed development criteria to be incorporated into plans of local governments and special districts and performance standards to measure the achievement of the regional comprehensive plan by local governments and special districts;
  3. a statement of the criteria and procedures that the [regional planning agency] will use in monitoring and evaluating the implementation of the plan by local governments, special districts, and the state;
  4. a statement of measures describing the ways in which state and/or local programs may best be coordinated to promote the goals and policies of the regional comprehensive plan;
  - [5. proposals for model ordinances and agreements that may be enacted by local governments and special districts; and]
  - [6. recommendations for further legislation at the state or local levels as may be necessary to fully implement the regional comprehensive plan.]
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### ***Commentary: Urban Growth Areas***

Urban growth areas are a regional land-use planning tool used to influence the spatial structure or pattern of development within a region and communities within it. The *Legislative Guidebook* introduces the concept of an urban growth area boundary in Section 6-201, Alternative 2.. In addition this Chapter contains an extensive research note on the mechanics of urban growth area boundaries and regional planning. The note also discusses the manner by which land-use needs may be projected and areas for future urban growth may be selected. Finally, the materials in this Section require the adoption of a land market monitoring system, including an ongoing process to evaluate amendments to the urban growth area. These topics are discussed in Section 7-204.1, Land Market Monitoring System.

### **WHAT IS THE PURPOSE OF URBAN GROWTH AREAS AND WHO HAS THEM?**

Urban growth areas are devices to achieve or ensure urban containment by promoting compact and contiguous development patterns. These are patterns that can be efficiently served by public services and that preserve open space, agricultural land, and environmentally sensitive areas that may not be suitable for intensive development. Several states now either require or authorize urban growth area planning in various ways.

*Oregon.* Oregon's statewide planning program requires all cities in the state to establish in their local comprehensive plans urban growth boundaries to "identify and separate urbanizable land from rural land" for a 20-year planning period. The boundaries are drawn and amended based on a series

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of factors in the state's adopted planning goals that relate to urbanization.<sup>69</sup> The state's housing goals require that buildable lands – lands in urban and urbanizable areas that are suitable, available, and necessary for residential use – must be inventoried. Local plans “shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.”<sup>70</sup>

*Washington.* In Washington, all counties that are either required or choose to plan under the state statutes (the Growth Management Act) must designate urban growth areas within their comprehensive plans.<sup>71</sup> Under the statute, an urban growth area is one “within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included in an urban growth area. An urban growth area may include more than a single city. . . .”<sup>72</sup> Like Oregon, the Washington statute requires that the growth area include densities and land areas sufficient to accommodate urban growth for the succeeding 20-year period.

*Maine.* Maine requires local comprehensive plans to identify both growth areas (“those areas suitable for orderly residential, commercial and industrial development forecast over the next 10 years”) and rural areas (“those areas where protection should be provided for agricultural, forest, open space, and scenic lands within the municipality”).<sup>73</sup> The statute requires each municipality to establish for the growth areas standards and timely permitting procedures and to ensure that needed public services are available.

*Minnesota.* Minnesota, in its voluntary “Community-Based Planning” statute, authorizes the designation of urban growth areas in a city or county comprehensive plan. The statute describes an urban growth area as “the identified area around an urban area within which there is a sufficient supply of developable land for at least a prospective 20-year period, based on demographic forecasts and the time reasonably required to effectively provide municipal services to the identified areas.”

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<sup>69</sup>Department of Land Conservation and Development (DLCD), *Oregon's Statewide Planning Goals & Guidelines* (Salem, Ore.: DLCD, 1995), 21 (Goal 14: Urbanization).

<sup>70</sup>*Id.*, 17 (Goal 10: Housing).

<sup>71</sup>Wash. Rev. Code §§36.70A.106 (1) and 36.70A.040 (1998).

<sup>72</sup>*Id.*, §36.70A.106(1).

<sup>73</sup>Maine Stat. Art. 30A, §4326.3A(1) - (2) (1998). The statute provides that a municipality “is not required to identify growth areas for residential growth if it demonstrates that is not possible to accommodate future residential growth in these areas because of severe physical limitations, including, without limitation, the lack of adequate water supply and sewage disposal services, very shallow soils or limitations imposed by protected natural resources; or it demonstrates that the municipality has experience minimal or no residential development over the past decade and that this condition is expected to continue over the 10-year planning period.” *Id.*

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<sup>74</sup> The statute requires that, after an urban growth area has been identified in a city or county plan, the city must initiate a negotiation process, in coordination with the county, that leads to “an orderly annexation agreement with the townships containing the affected unincorporated lands located within the identified urban growth area.”<sup>75</sup>

*Maryland.* In 1997, Maryland passed a “Smart Growth” act<sup>76</sup> aimed at directing new development into “priority funding areas” that are automatically designated in the statute or may be designated by a county at its own initiative. The county-designated areas must meet specified use, water and sewer service, and residential density criteria. Under the statute, the state will give priority in funding projects with state money in these growth areas as well as existing municipalities and industrial areas. Beginning October 1, 1998, the state is prohibited from funding “growth-related” projects not located in these priority growth areas. State funding is also restricted for projects in communities without sewer systems and in rural villages. The intention is, of course, to channel state monies into areas that are suited for growth and limit development in rural areas by not extending sewers or making transportation improvements that would spur growth. In this way, conversion of rural and agricultural lands to urban uses is slowed, or at least actively discouraged through state policy.

In contrast to the other statutes, the Maryland program is incentive-based. The statute does not restrict the location of private sector or county development, only commitment of state funds. However, because it deals with minimum density requirements and public water and sewer service to support development, it is a form of urban growth area planning.

*Tennessee.* In 1998, Tennessee enacted a statute whose purpose is to create a “comprehensive growth policy for the state” that incorporates the designation of urban growth boundaries for municipalities and planned growth areas for unincorporated areas.<sup>77</sup> The statute establishes in each county a coordinating committee consisting of representatives of the county, municipalities, utilities, boards of education, and chamber of commerce.<sup>78</sup> In the alternative, if the population of the largest municipality in the county is at least 60 percent of the county population, the coordinating committee may be the county planning commission and the local planning commission of that municipality.<sup>79</sup> Each committee must develop a growth plan for its county by January 1, 2000, including, with recommendations from the municipalities, urban growth boundaries for each

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<sup>74</sup>Minn. Stat. §462.353, subdiv. 18 (1997).

<sup>75</sup>Id., §462.3535, subdiv. 5.

<sup>76</sup>The “Smart Growth” legislation is S.B. 389 (1997 Regular Session). Language relating to “priority funding areas” appears in Md. Ann. Code, Art. – State Finance and Procurement, subtit. B and 7-314(o) (1997).

<sup>77</sup>State of Tennessee, 100th Gen’l Assembly, Senate Bill 3278 (passed 5-1-98, approved 5-19-98), Sec. 3.

<sup>78</sup>Id., Sec. 5(a)(1).

<sup>79</sup>Id., Sec. 5(a)(9).

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municipality in the county.<sup>80</sup> The proposed growth plan must first undergo at least two public hearings after due notice, and does not take effect unless ratified by the county legislative body and by the individual municipalities.<sup>81</sup>

If the county or any municipality rejects the proposed growth plan, it must state its reasons for rejection and the coordinating committee must reconsider its decision.<sup>82</sup> If a county or municipality declares that there is an impasse in the ratification process, the Secretary of State appoints a three-member dispute resolution panel.<sup>83</sup> The panel can impose a growth plan if its recommended solutions are rejected, and the cost of the dispute resolution process can be assessed against a party acting in bad faith or putting forth frivolous objections.<sup>84</sup> Judicial review of the urban growth boundary by the county chancery court is available to any landowner or resident of the county, as well as to the county and municipalities, and the review is a de novo review in which the challenger must show by preponderance that the growth plan is “arbitrary, capricious, illegal, or ... characterized by an abuse of official discretion.”<sup>85</sup> All such reviews commenced against the same proposed growth plan must be consolidated in a single civil action.<sup>86</sup>

Once a growth plan is ratified, all land use decisions must be consistent with the plan.<sup>87</sup> A growth plan stays in effect for up to three years, absent a showing of “extraordinary circumstances.”<sup>88</sup> The plan must indicate urban growth boundaries, planned growth areas, and rural areas.<sup>89</sup> An urban growth boundary must encompass the contiguous territory of a municipality, an area sufficient for 20 years of predicted growth, and territory in which the municipality is better able to provide urban services than other municipalities.<sup>90</sup> It must be based on population growth

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<sup>80</sup>Id., Sec. 5(a)(4).

<sup>81</sup>Id., Sec. 5(a)(3), (4).

<sup>82</sup>Id., Sec. 5(b)(1).

<sup>83</sup>Id., Sec. 5(b)(1), (2).

<sup>84</sup>Id., Sec. 5(b)(3), (4).

<sup>85</sup>Id., Sec. 6(a), (b).

<sup>86</sup>Id., Sec. 6(b).

<sup>87</sup>Id., Sec. 8.

<sup>88</sup>Id., Sec. 5(e)(1).

<sup>89</sup>Id., Sec. 5(a)(2).

<sup>90</sup>Id., Sec. 7(a)(1).

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projections, a projection of infrastructure costs, and a land-demand projection.<sup>91</sup> At least two public hearings must be held before an urban growth boundary can be ratified.<sup>92</sup> The county can create planned growth areas, which are similar to areas inside urban growth boundaries and are subject to the same requirements, except that planned growth areas must be outside any urban growth boundary and any municipality.<sup>93</sup> Any territory that is not within an urban growth boundary or planned growth area can be designated as a rural area, which is intended to be used for the next 20 years for agriculture, forestry, wildlife preservation, recreation, or other low-density uses.<sup>94</sup>

After a municipality has an urban growth boundary in place, it can annex only territory within that boundary, but the municipality is expressly authorized to amend the UGB, under the same procedure as the enactment of a growth plan, to include the territory that is to be annexed.<sup>95</sup> New municipalities can be created only in planned growth areas, and the county must approve the municipal borders and urban growth boundary before any vote on incorporation can be held.<sup>96</sup>

*Other.* In addition to these state-authorized efforts there have been local initiatives of various types in California, Colorado, and Florida.<sup>97</sup> Since 1959, the City of Boulder, Colorado, has had some form of urban service area – lines containing the limits of various types of urban services that take into account the desired service level and available funding. Boulder’s program, administered jointly with Boulder County, has incorporated annual limitations on the number of building permits issued for residential use, a technique intended to control its rate of growth.<sup>98</sup> Boulder’s planning director, Peter Pollock, AICP, has described the urban service area concept there as defining “that part of the Boulder planning area where the City of Boulder already provides a full range of urban services or will provide services upon annexation. Land outside of the service area boundary

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<sup>91</sup>Id., Sec. 7(a)(2).

<sup>92</sup>Id., Sec. 7(a)(3).

<sup>93</sup>Id., Sec. 7(b).

<sup>94</sup>Id., Sec. 7(c).

<sup>95</sup>Id., Sec. 12(c), (d).

<sup>96</sup>Id., Sec. 13(a)(1), (d)(1).

<sup>97</sup>Arthur C. Nelson and James B. Duncan, with Clancy J. Mullen and Kirk R. Bishop, *Growth Management Principles and Practices* (Chicago: APA Planners Press, 1995), 77-80 (describing urban service area in Sacramento County California, urban service boundary in San Jose, California, urban growth area in Larimer County, Colo., and urban growth boundary in Dade (Miami) and Orange County (Orlando), Fla.); see also Jim Sayer, “Bound for Success: California Communities and Urban Growth Boundaries,” *Lusk Review* 4, No. 1 (Spring/Summer 1998): 54-63 (discussion of council-initiated and citizen-initiated urban growth boundaries in California and criticizing lack of statewide framework for undertaking them).

<sup>98</sup>For a discussion of the Boulder program, see Eric Damian Kelly, *Managing Community Growth, Policies, Techniques, and Impacts* (Westport, Conn.: Praeger, 1993), 54-64.

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remains in the county at rural densities until the city and county joint agree to bring the property into the service. Land can also be ‘moved’ out of the service area.”<sup>99</sup>

Pollock also observes that, because of the tremendous job growth in the City of Boulder itself, and its limitations on residential growth, there has been a spillover housing demand in small outlying communities. The residential growth has occurred in communities without jobs and sales tax base. “This regional imbalance between jobs and housing has created tremendous problems with traffic congestion, lack of affordable housing, and school facility needs.”<sup>100</sup> Pollock concedes that the Boulder system has its pluses and minuses:

On the good side, it has allowed Boulder to determine its own ideal city size, with consideration of how much congestion is tolerated, what sized city leads to a high quality of life, and what is sustainable over time. On the bad side, it holds Boulder back from capturing some of the benefits that additional development could bring, such as more affordable housing and less dependence on the automobile by building mixed use, transit-oriented neighborhood centers.<sup>101</sup>

Lexington-Fayette County, Kentucky, has employed the urban service area concept in its planning since 1958, the result of an agreement between the city and the county. The effort was the first in the nation. According to its 1988 plan, the urban service area concept “delineates the location of urban growth by dividing the county into an Urban Service Area where development is encouraged and a Rural Service Area where urban oriented activities are not permitted.”<sup>102</sup> The program was “designed to protect productive agricultural and horse farm lands, while also encouraging efficient development patterns.”<sup>103</sup> The urban service area is to be reviewed every five years. The most recent update was concluded in 1996 and resulted in the addition of approximately 5,330 acres immediately adjacent to the existing urban service area.<sup>104</sup>

### WHAT ARE THE PROS AND CONS OF URBAN GROWTH AREAS?

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<sup>99</sup>Peter Pollock, “Controlling Sprawl in Boulder: Benefits and Pitfalls,” *Land Lines: Newsletter of the Lincoln Institute of Land Policy* (Cambridge, Mass., January 1998): 1-3, at 2.

<sup>100</sup>*Id.*, 2.

<sup>101</sup>*Id.*, 2-3.

<sup>102</sup>*The 1988 Comprehensive Plan: Growth Planning System*, as adopted by the Lexington-Fayette County Planning Commission (Lexington, Ky.: Lexington-Fayette Urban County Government, May 25, 1988), 3.

<sup>103</sup>Nelson and Duncan, *Growth Management Principles and Practices*, 80.

<sup>104</sup>Siemon, Larsen, and Marsh, *Expansion Area Master Plan*, adopted by Lexington-Fayette County Urban County Planning Commission (Lexington, Ky.: Lexington-Fayette Urban County Government, Department of Housing and Community Development, July 18, 1996), 7.

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Like any device that affects the supply of a good or service in the face of a shifting demand, urban growth areas (UGAs) have impacts, either intended or unanticipated. Table 6-1 summarizes a number of pros and cons of urban growth areas drawn from a review of the literature on urban growth areas. The impacts, of course, will depend on the political leadership of the area or region, the nature and robustness of the regional economy, the quality and rigor of the underlying planning, the regularity with which the urban growth areas are revisited, and the relations among local units of government in the relevant region as well as those with the state.

There have been a number of studies of the impact of urban growth areas in Oregon and Washington.<sup>105</sup> A 1991 study of four areas in Oregon (Bend, Brookings, Medford, and Portland) conducted for the Oregon Department of Land Conservation and Development found that urban growth could be largely contained within urban growth boundaries (UGBs). In the Portland area only 5 percent of residential growth occurred outside the UGB. But in the Bend area 57 percent of the residential development occurred outside the UGB, in the Brookings area 37 percent, and in the Medford area 24 percent. Indicators of livability – although the study admitted they were incomplete – suggested some areas for concern: traffic congestion and real housing prices increased in all case study areas, but air quality improved. Though parkland was being acquired in some case study areas, the amount of developed parkland was probably not increasing as fast as population, the study showed. Moreover, fast-growing communities, the study found, appeared to be able to fund their sewer and water needs, but not their street and road needs. Actual developed densities within the UGBs varied considerably among the four case studies. The report recommended an extensive series of measures to improve the operation of UGBs, including minimum densities (in addition to maximums) in residential zones, strict schedules and unambiguous standards for UGB expansion, state programs to assist with the funding of local public services, and the prohibition or limitation of non-farm dwellings in exclusive farm or forest zones.<sup>106</sup>

A 1991 study conducted by 1000 Friends of Oregon and the Home Builders Association of Metropolitan Portland examined the implementation of Oregon’s statewide housing goal in the Portland area through the metropolitan housing rule for the Portland area, adopted by the Oregon

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<sup>105</sup>For a digest of studies that look at the impact of growth controls generally, including urban growth areas, on property values, see Gerrit Knaap, “The Determinants of Residential Property Values: Implications for Metropolitan Planning,” *Journal of Planning Literature* 12, no. 3 (February 1998): 267-282, esp. 275-276. Concludes Professor Knaap: “In sum, research on the effects of growth controls within metropolitan areas has consistently shown that growth controls increase property values in growth control communities. Whether such effects reflect the creation of amenity creation or constraints in supply, however, remains uncertain. Most likely, growth controls within metropolitan areas shift the demand for land from one part of the metropolitan area to another. In some places, local governments have been able to mitigate the effects of growth controls on housing affordability by adopting affordable housing programs. Research on the effects of growth controls on housing affordability has produced conflicting results. . .” *Id.*, at 276.

<sup>106</sup>ECO Northwest with David J. Newton Associates and MLP Associates, *Urban Growth Management: Case Studies Report*, prepared for Oregon Department of Land Conservation and Development (DLCD) (Salem, Or.: DLCD, January 1991), v-vii. See also Robert L. Liberty, “Oregon’s Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States,” *Environmental Law Reporter News and Analysis* XXII, no. 5 (June 1992): 10367-10391, esp. 10375 to 10379 (evaluation of success of Oregon’s urban containment policy).

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Land Conservation and Development Commission (Ore. Admin. Rules §660-07-000 *et seq.*). That rule requires local plans to provide adequate land zoned for needed housing types and to ensure that land within the metropolitan Portland UGB accommodates the region's population growth. Under the rule, each of the region's three counties and 24 cities must develop plans that allow for a new construction mix that includes at least 50 percent multifamily or attached single-family units and that allow development to occur at certain minimum target housing densities. This ranges from 10 dwelling units per buildable acre in the City of Portland to 6 to 8 dwelling units per buildable acre in suburban areas. The study found that the rule resulted in increasing the availability of affordable housing and making homeownership more attainable by diversifying the stock of single-family housing sites to include smaller lots. Further, the rule's implementation reduced the amount of land consumed by development during the 1985-89 study period. Had planned residential development occurred in the urban growth area at lower pre-housing-rule densities, it would have consumed an additional 1,500 acres of planned residential land – an area over two square miles in size. “Due to this savings in land area,” the study concluded, “an additional 15,000 housing units can be built within the UGB. In short, combining Portland urban growth boundary *and* ‘pro-housing’ policies helps manage growth and promote affordable housing development.”<sup>107</sup>

A comprehensive 1992 assessment of the Oregon program by Professors Gerrit Knaap and Arthur C. Nelson concluded that: (1) UGBs facilitated intergovernmental coordination among cities, counties, and state agencies; (2) UGBs affected current land values (generally higher inside the boundary than outside) and allocation; and (3) UGBs had limited ability to manage urban growth (Knaap and Nelson noted that while development at urban densities had been contained within UGBs, development densities within them were lower than planned and development densities outside UGBs were higher than planned).<sup>108</sup>

A 1996 study by the Portland State University Center for Urban Studies, commissioned by Don Morrisette, an elected member of the Portland Metro council and a home builder, examined the impact of the Portland UGB on the metropolitan housing market as part of the discussion over expanding the UGB. The report was intended to influence the amount of land added to the growth area. The report also critiqued the Metro's analyses and models supporting different growth scenarios and suggested a series of different assumptions. The report pointed out that housing prices in the Portland area were rising more rapidly than the rest of the nation. It noted that the median price home had risen from being 19 percent below the average of U.S. Metro areas in 1985 to 6 percent greater by 1994. The average price home in the Portland area rose from being 22 percent cheaper than the U.S. average to 7 percent greater by 1995. Over the period 1990-95, the report

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<sup>107</sup>1000 Friends of Oregon and the Home Builders Association of Metropolitan Portland, *Managing Growth to Promote Affordable Housing: Revisiting Oregon's Goal 10, Executive Summary* (Portland, Ore.: 1000 Friends of Oregon, September 1991), 10 (emphasis in original).

<sup>108</sup>Gerrit Knaap and Arthur C. Nelson, *The Regulated Landscape: Lessons on State Land Use Planning from Oregon* (Cambridge, Mass.: Lincoln Institute of Land Policy, 1992), 66-68. See generally Chapter 2, Urban Growth Boundaries and Urban Growth Management, for a summary of relevant studies on urban growth areas conducted in Oregon.

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said, the average home price had risen by 33 percent in real terms and the median price home had risen by 30 percent in real terms over the period between 1990 and 1994.<sup>109</sup> However, the report, which did not contain any examination of the Portland economy during the analysis period, cautioned:

Admittedly, there are many causes of housing price inflation: the Urban Growth Boundary's impact *is only one cause* [emphasis supplied]. Land is only one of many inputs in the construction of a home. Other factors that can explain some of the housing price growth over the past 5-6 years include employment growth, real wage growth, net migration to the region, declining interest rates, and declining property tax rates (relative to local government service levels). Yet the ability of housing supply to moderate these demand pressures is affected by the growth boundary and the supply of land.<sup>110</sup>

A 1997 study by the Washington Center for Real Estate Research of Washington State University examined the impact of urban growth area designation on Clark County, Washington, immediately to the north of Portland, Oregon, across the Columbia River and considered part of the Portland-Vancouver, Washington, consolidated metropolitan area. Vancouver and other incorporated areas of Clark County established final urban growth areas in 1994. The study theorized that there would be significant and positive residential lot price effects resulting from the implementation of the Washington Growth Management Act (GMA) of 1990 and that the price effects would occur both inside and outside the urban growth areas.

The study stated that previous research had demonstrated that once urban growth controls are applied uniformly across a jurisdiction, residential lot and house prices experience significant inflation:

The study found an overall lot price increase of 35.5 percent after implementation of urban growth areas. Lot prices increased slightly higher within the urban growth area (38.7 percent) compared to all lots examined. A significant outside/post urban growth area lot price increase was not substantiated by the data. In this final case prices seemed higher, but a limited number of observations limited the statistical robustness of the model.<sup>111</sup>

The study observed:

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<sup>109</sup>Portland State University Center for Urban Studies, *Impact of the Urban Growth Boundary on Metropolitan Housing Markets* (Portland, Ore.: The Center, May 10, 1996), 2-3 to 2-4. For a discussion of the debate over expanding the urban growth boundary in the Portland area, see Alan Ehrenhalt, "The Great Wall of Portland" *Governing* 10, no. 8 (May 1997): 20-24.

<sup>110</sup>Id.

<sup>111</sup>Washington Center for Real Estate Research, Washington State University, *Urban Growth Areas and Lot Price: Clark County, Washington, Executive Summary* (April 1997), <http://cbeunix.cbe.wsu.edu/~wcrer/rsrchgc.htm>.

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One implication of this study is that implementation of the GMA, particularly the component of [the] GMA which establishes urban growth areas as part of local comprehensive plans, may be incompatible with one goal of the law, "[to] encourage the availability of affordable housing to all economic segments of the population . . ." Based on an average lot price of \$43,282 prior to establishment of the final UGA in Clark County, the county-wide increase of 35.5% in price after UGA implementation translated into a \$15,365 increase in the price of a typical lot. This increase in price is sufficient to deny access to new housing to many consumers. In addition, as lot prices increase builders often feel compelled to build more costly homes on the lots to keep the land component of total housing cost within normal ranges. Further, as higher lot prices impact the overall local housing economy, the price of existing homes may also increase.<sup>112</sup>

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<sup>112</sup>Id.

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**Table 6-1: Some Pros and Cons of Urban Growth Areas**

***Pro***

Can ensure more compact development.  
May encourage retention and reuse of existing buildings, including those of historic significance.

Reflects preference for urban-type, higher density development. Reduces “urban sprawl.”

Can ensure housing diversity through careful forecasting and land allocation to meet market demand in the planning period.

If drawn on a metropolitan basis, can spread benefits (and costs) of growth among central cities, inner ring of mature suburbs, developing suburbs, and rural areas beyond.

Can limit the conversion of prime agricultural land outside urban growth boundary to urban use.

Can protect agricultural land from conflicts with urban uses – e.g., hog feed lots next to subdivisions.

Establishes predictability as to where urbanization will occur in advance, directing private investment.

Matches urbanization with new infrastructure and promotes reuse of existing infrastructure. Facilitates mass transit because of higher densities.

Appropriate for metropolitan areas and jurisdictions within them.

***Con***

Requires increases in housing density and land-use intensity that may meet with homeowner opposition.

May run counter to consumer preference for low-density development. There is no agreement on what “urban sprawl” is.

Increases in land and housing costs may occur if land supply and market changes are not monitored

If drawn for either a single or scattered group of local governments, growth may be shifted from one part of one community in the urban area to another community or may bypass the enacting community and jump outward to the next tier of vacant, but developable land.

Requires strong controls or incentives on use of agricultural land outside urban growth boundary that may engender political opposition by farming interests.

There may be no market for agricultural products. Land that is restricted to agricultural use may only have value for development. Urban growth may “leak” into rural areas because no other economically viable options are available.

May prompt political opposition from communities that want little or no growth.

Requires local government to invest in infrastructure even if ability to generate additional taxes is limited. Absent changes in taxation authority or state grants, will necessitate impact fees and user charges.

May be burdensome for small freestanding communities not subject to metropolitan influence. Complexity of system to maintain urban growth areas may not yield commensurate benefits in absence of metropolitan growth pressure.

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### THE MODEL STATUTE

The following Section provides optional statutory language to further guide the process of designation of urban growth areas as part of the preparation of a regional (or county) comprehensive plan, and that would apply to municipalities (as well as other local governments, if applicable) in the regional or county planning agency's jurisdiction. It is based in part on the Washington state statute and administrative rules.<sup>113</sup>

The model language places the overall responsibility for the designation at the regional or county level; if there is no regional planning agency in place then one will need to be created or the authority will instead rest with the county planning agency. Whether or not urban growth areas are allowed by a state is a policy judgment on behalf of the state legislature and/or the local governments in a region.<sup>114</sup> **There are clearly costs and benefits to the use of urban growth areas and there can be a fair degree of debate on whether they should be employed and in what manner. However, if they are, the *Guidebook* advocates having one agency with a multi-jurisdictional perspective overseeing the designation process, rather than a collection of local governments individually determining growth boundaries on an ad hoc, uncoordinated basis. Developing an overall regional growth strategy first will enable each local government to develop a growth strategy that is consistent with the regional strategy as well as with the growth strategies of neighboring jurisdictions.**

Absent a regional (or county) framework, the consequence of either a single or scattered group of local governments initiating urban growth areas on their own will likely result in a situation where:

- (a) growth is simply shifted away from one part of one community in the urban area to another community in the area; or
- (b) growth may bypass the enacting community and jump outward to the next tier of vacant, but developable land.

Moreover, a regional urban growth area framework spreads the benefits of the system among the central cities, the inner ring of developed and mature suburbs, developing suburbs, and the rural areas beyond. Under this optional Section:

1. If a state has adopted a state land development plan that provides standards and criteria for the establishment of urban growth area boundaries (see Section 4-204), the regional (or county) comprehensive plan must incorporate those standards and criteria. If not, then the

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<sup>113</sup>Wash. Rev. Code §37.7A.110 (1997); Wash. Admin. Code §365-194-335 (1993).

<sup>114</sup>An argument against urban growth areas may be that they would not be particularly workable in rural areas with diffuse population and no real urban centers. A state legislature may wish to adapt this model by authorizing urban growth areas only in counties that are part of metropolitan areas, but not in nonmetropolitan counties.

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regional or county planning agency is free to develop its own boundaries, consistent with the other requirements of the statute.

2. The regional or county planning agency must consult with municipalities and other local governments in its planning jurisdiction concerning the designation of urban growth areas. Each municipality must be included in an urban growth area, but such an area may also include more than one municipality. This is intended to ensure that urban development is supported by the kind of urban services typically provided by a municipal government.

The type of local government that would have a role in the designation process will vary by state. For example, in parts of the country, where towns or townships have authority over land use in unincorporated areas but lack the full range of municipal powers, they would be participants in the discussion over the location and extent of urban growth areas. In some states, such as Virginia and Maryland, counties have powers that are similar to or identical with municipalities. The Section that follows would need to be modified to reflect the role of counties in such situations.

3. If an agreement is reached with a municipality concerning the location and size of the urban growth area, then the regional or county planning agency incorporates or adopts that designated urban growth area into its regional or county comprehensive plan. The municipality must also incorporate the urban growth area into its own local comprehensive plan.
4. If no agreement is reached, the regional or county planning agency must state in writing its determination regarding the designation of the urban growth area. The municipality may then appeal that determination to a state comprehensive plan appeals board (see Sections 7-402.1 and 7-402.3) or other entity. However, the municipality must first follow any procedures for dispute resolution under rules promulgated by the state planning agency.
5. After the urban growth areas have been designated and incorporated into regional and local plans, the regional or county planning agency, municipalities, and other affected local governments **must then:**
  - (a) **establish and maintain a land market monitoring system (see Section 7-204.1, Land Market Monitoring System, in Chapter 7); and**
  - (b) **periodically review – at least on a five-year basis (and more often as necessary) – the growth area and consider amendments to such a growth area to ensure there is an adequate supply of buildable land.**

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The urban growth area designation process, it must be emphasized, is not to be employed by an individual municipality (or other local government) without the framework provided by a regional or county planning agency as described below. **THIS IS IMPORTANT: The provisions of Section 6-201.1 for establishing urban growth areas are only to be used if these conditions are met.**

In addition to criteria for the general designation and priority of designation of urban growth areas, Section 6-201.1 includes language authorizing the establishment of an urban growth area in unincorporated territory to allow for the establishment of a new fully contained community that will be supported by urban services.

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### 6-201.1 Urban Growth Areas [Optional]

- (1) A [regional *or* county planning agency] [shall *or* may] designate urban growth areas pursuant to this Section, Section [6-201, *Alternative 2*], Section [7-402.2], and Section [7-204.2].
- (2) The purposes of an urban growth area are to:
  - (a) provide a mechanism whereby a [regional *or* county] planning agency and the local governments within its planning jurisdiction may coordinate the location and extent of urban growth;
  - (b) ensure a pattern of compact and contiguous urban growth;<sup>115</sup>
  - (c) encourage preservation and adaptive reuse of historic buildings;
  - (d) protect agricultural and forest lands, scenic areas, and other natural resources, living and non-living, from urban development;
  - (e) identify where urban services are being or will be provided;
  - (f) direct growth to where infrastructure capacity is available or committed to be available in the future;
  - (g) ensure that an adequate supply of buildable land for at least [20] years is provided; and

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<sup>115</sup>For an analysis of the impact that Oregon's statewide land-use planning system has had on development patterns, see Jerry Weitz and Terry Moore, "Development Inside Urban Growth Boundaries: Oregon's Evidence of Contiguous Urban Form," *Journal of the American Planning Association* 64, no. 4 (Autumn 1998): 424-440.

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- (h) ensure a variety of affordable housing types at varying densities;
- (3) Each municipality shall be included within an urban growth area. However, an urban growth area may contain more than one municipality, as determined by the [regional *or* county planning agency] based on factors affecting the municipalities in common that may include, but shall not be limited to, [any goals, policies, and guidelines in the state land development plan pursuant to Section [4-204(5)(c).] topography, rates of growth, degree of existing urbanization, and sharing of and/or efficiency in providing urban services.
- (4) An urban growth area may also include unincorporated territory, but only if such territory:
  - (a) already has urban growth located on it;
  - (b) will be, or may easily be, provided with urban services [under an urban service agreement pursuant to Section [6-403]]; or
  - (c) has been or is proposed to be designated as a new fully contained community pursuant to paragraph (8) below.
- (5) In designating any urban growth areas, each [regional *or* county planning agency] shall use the following general procedure, but may adopt additional procedural rules to ensure and enhance a cooperative effort among local governments within its planning jurisdiction, provided that such additional rules do not conflict with this procedure and any rules adopted by the [state planning agency]:
  - (a) The [regional *or* county planning agency] shall consult with all municipalities [and other local governments *such as boroughs, towns, or townships*] located within its planning jurisdiction concerning the designation of urban growth areas and shall ensure early and continuous public participation in the designation process pursuant to Section [6-301] and Section [7-401], respectively;
  - (b) Each municipality shall propose to the [regional *or* county planning agency] the designation of an urban growth area that shall include the area within its municipal boundary and that may include additional unincorporated areas contiguous to its municipal boundary;<sup>116</sup>
  - (c) The [regional *or* county planning agency] shall attempt to reach agreement with each municipality located within its planning jurisdiction on the location and size of the urban growth area;

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<sup>116</sup>The authority of a municipality to plan extraterritorially varies among the states. For example, a municipality may have the power to review and approve subdivisions within a certain radius of its boundaries for consistency with a thoroughfare plan and municipal engineering and design requirements.

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- (d) If an agreement is reached with a municipality, the [regional *or* county planning agency] shall incorporate and adopt that designated urban growth area into its [regional *or* county] comprehensive plan and shall delineate an urban growth boundary on the plan map pursuant to Section [6-201(5)(g)1; *Alternative 2*]. The municipality [as well as each local government included in a designated urban growth area] shall also incorporate and adopt the urban growth area into its own local comprehensive plan and shall delineate an urban growth boundary on the generalized composite comprehensive plan map pursuant to Section [7-201(8) above] and on the future land-use plan map pursuant to Section [7-204(6)(c)7] above.
  - (e) If the [regional *or* county planning agency] does not reach an agreement with a municipality within its planning jurisdiction on the designation of the urban growth area, the [regional *or* county planning agency] shall state in writing its determination regarding the designation of the urban growth area and the basis for that determination. The municipality may appeal the [regional *or* county] planning agency's determination to the [state comprehensive plan appeals board *or other entity*] pursuant to Section [7-402.3] below, provided however, that the municipality shall first follow any procedures for dispute resolution under any rules promulgated by the [state planning agency] pursuant to paragraph (10) below.
- (6) Any urban growth area established pursuant to this Section shall meet the following criteria:
- (a) The urban growth area(s) in a [region *or* county] shall contain land areas and minimum densities and intensities of land uses sufficient to accommodate [between [115] percent and [125] percent of] the urban growth that the [regional *or* county planning agency] has projected to occur in the [region *or* county] for the succeeding [20]-year period; and
- ◆ The numbers in brackets regarding the additional percentage of land areas that are necessary to accommodate urban growth are guidelines that are intended to ensure that there is a sufficient supply of vacant land inside the urban growth area boundary. The provision of additional land may thereby allow the efficient and competitive functioning of the real estate market and prevent landowners from monopolizing large parcels of vacant land, consequently driving up land prices. Depending on the type of system used to project urban growth and land supply needs, it may not be necessary to incorporate the bracketed percentages in the statute.
- (b) The urban growth area(s) shall contain those lands designated for land uses that are allocated to the urban growth area by the projections in the [regional *or* county] comprehensive plan pursuant to Section[ [6-201(3)(i)]; *Alternative 2*]. The densities and intensities of those land uses shall be stated in the [regional *or* county] comprehensive plan pursuant to Sections [[6-201(5)(c) and (g)]; *Alternative 2*] [and shall be as specified in the state land development plan pursuant to Section [4-204(5)(c)]]].

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- (7) A [regional *or* county planning agency] shall observe the following sequence in designating land for urban growth in an urban growth area established pursuant to paragraph (6) above:
- (a) first, those land areas that are already characterized by urban growth and that have adequate existing urban services;
  - (b) second, those land areas primarily characterized by urban growth that are or will be served adequately by a combination of existing and future urban services provided by public or private entities [under an urban service agreement pursuant to Section [6-403]]; and
  - (c) third, those remaining land areas that are primarily vacant that will be served adequately by future urban services provided by public or private entities [under an urban service agreement pursuant to Section [6-403]].
- (8) In addition to following the sequence set forth in paragraph (7) above to designate land for urban growth, a [regional *or* county planning agency] may also, after consulting with municipalities and other local governments within its planning jurisdiction, establish by rule a process to designate an urban growth area in unincorporated territory in order to allow for the establishment of a new fully contained community, provided that the following criteria are satisfied:
- (a) the planning for such a community complies with all other requirements of this Act, including the establishment of minimum land-use densities and intensities;
  - (b) a mix of uses is provided for in order to offer jobs, housing (including affordable housing), and retailing to residents of the new community;
  - (c) the urban growth in such a fully contained community will be supported by urban services; and
  - [(d) *add other criteria, as desired*].<sup>117</sup>
- (9) The [regional *or* county planning agency] [,] [and] any municipality [, and any other applicable local government] that is included in a designated urban growth area shall:
- (a) establish and maintain a land market monitoring system pursuant to Section [7-204.1];<sup>118</sup>

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<sup>117</sup>For example, the Washington state statutes provide “New fully contained communities may be approved outside established urban growth areas only if a county reserves a portion of the twenty year population projection and offsets the urban growth area accordingly.” Wash. Rev. Code. §36.70A.350(2) (1996).

<sup>118</sup>Section 7-204.1 describes a land market monitoring system and the procedures for reviewing the urban growth area and determining whether the growth area needs to be amended.

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- (b) evaluate the need to amend such urban growth area, the [regional *or* county] comprehensive plan, the local comprehensive plan, and the land development regulations of the affected local government:
  - 1. at least every [5] years; and/or
  - 2. when such urban growth area does not contain sufficient buildable lands to accommodate residential, commercial, and industrial needs for the next [20] years, as found pursuant to Section [7-204.1(5)].
- ◆ Subparagraph (b) requires that the urban growth area as well as the underlying comprehensive plans and local land development regulations be reevaluated at least every five years, and more often when the urban growth area has an insufficient supply of buildable lands to meet foreseeable needs.
  - (c) take other necessary implementing actions, including, but not limited to, restrictions on the provision of urban services, to ensure that urban growth occurs within the urban growth area.
- (10) Pursuant to Section [4-103], the [state planning agency] may adopt rules and, upon adopting rules, prepare and distribute guidelines in order to further implement this Section. These rules may include procedures for dispute resolution regarding the designation of urban growth areas.
- (11) The urban growth area shall be amended in the same manner as the original designation pursuant to this Section.
- (12) Pursuant to [Section 7-402.3], any municipality [or other local government] may appeal the written determination of a [regional or county planning agency] designating a proposed urban growth area under subparagraph (5)(e) above.

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### ***Commentary: Preparation of Regional Functional Plans***

Regional planning agencies may also prepare regional functional plans to cover topics like parks and open space, bikeways, water, sanitary sewerage and sewage treatment, water supply and distribution, solid waste, airports, libraries, communications, and other facilities. Rather than drafting legislation specific to each function, the approach taken below is to provide a generic statute for all types of functional plans. The model is based on Minn. Stat. Ann. §473.146, which describes policy plans for different functions overseen by the Metropolitan Council in the Twin Cities.

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### **6-202 Preparation of Regional Functional Plans**

- (1) The [regional planning agency] [shall *or* may], with the involvement of the region's local governments, special districts, relevant interested groups, and citizens, prepare and adopt, and update and amend at least every [5 *or* 10] years, regional functional plans for the following services and facilities [*list functional areas (e.g., water, sewer, transportation, housing, solid waste, open space and parks, historic preservation, and flood control)*], provided however that no such functional plan shall be adopted until the [regional planning agency] has first adopted a regional comprehensive plan. Such plans shall provide additional goals, policies, guidelines, and supporting analyses that detail, and that are consistent with, the adopted regional comprehensive plan.
- (2) Each functional plan shall include, to the extent appropriate for the services and facilities covered:
  - (a) a forecast of change for a [20]-year period in the need for the services and facilities for the region and by subareas of the region as a consequence of change in population, households, employment, development patterns, or other relevant factors;
  - (b) a statement, with supporting analysis, of issues, problems, needs, and opportunities with respect to the services and facilities covered;
  - (c) a statement of existing capacities, where appropriate, of the services or facilities, and a statement of the [regional planning agency]'s goals and policies with respect to the facilities and services that addresses the areas and populations to be served, the levels, distribution, and staging in time of services, and a general description of the facility systems required to support the services, and other similar matters;

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- (d) a map showing existing and future service areas for the services or facilities covered;
  - (e) an identification of providers, whether public or private, of the relevant services or facilities in the region;
  - (f) a statement of the fiscal implications of the functional plan, including existing and additional financial resources, if any, that may be required to effectuate the [regional planning agency]'s goals and policies. This may include amendments to a long-range program of implementation in the regional comprehensive plan [as required by [Section 6-201(5)(h)] above]; and
  - (g) a statement describing the consistency of the functional plan with other goals and policies contained in the adopted regional comprehensive plan and the other functional plans, including the location of service areas for existing and proposed public services and facilities in relation to urban growth areas.
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### ***Commentary: Regional Housing Plan***

The following Section describes the components of a regional housing plan that parallel the requirements of the state housing plan in Section 4-207 of the *Legislative Guidebook*. While the regional comprehensive plan, as described in Section 6-201 above, does call for studies of the “amount, quality, affordability, and geographic distribution of housing among local governments in the region,” (paragraph (3)(d)) and proposes the statement of regional goals, policies, and guidelines for “housing, including minimum net housing densities,” (paragraph (5)(c)(2) of Alternative 2) the housing plan proposed below is more specific. It emphasizes the forecasting of housing need for the region, especially affordable housing, and the preparation of a long-range program of implementation describing actions that various agencies can take to meet those housing needs. Like the state housing plan, the regional housing plan is intended to propose new programs or change existing programs related to housing and to stimulate or inspire other governmental agencies and nonprofit and for-profit agencies to address housing needs.

The regional housing plan may also be linked to the regional fair-share allocation plan described in Section 4-208.8, Alternative 1B, of the *Legislative Guidebook* as part of the Model Balanced and Affordable Housing Act.

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### **6-203 Regional Housing Plan**

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- (1) The [regional planning agency] [shall *or* may], with the involvement of the region's local governments, special districts, affected state agencies, home builders, developers, contractors, labor and other groups, nonprofit providers of housing, and citizens, prepare, adopt, review, and amend on a [5 *or* 10]-year basis a regional housing plan. The housing plan shall be consistent with the adopted regional comprehensive plan [and with the state housing plan].
  - (2) The purposes of the regional housing plan are to:
    - (a) document the needs for housing in the region, including affordable housing, and the extent to which private- and public-sector programs are meeting those needs;
    - (b) provide the framework for and facilitate planning for the housing needs of the region, including the need for affordable housing, especially as it relates to the location of such housing proximate to jobsites;
    - (c) identify barriers to the production of housing, including affordable housing, and
    - (d) develop sound strategies, programs, and other actions to address needs for housing, including affordable housing.
  - (3) In preparing the regional housing plan, the [regional planning agency] shall undertake supporting studies that are relevant to the topical areas included in the plan. In undertaking these studies, the [regional planning agency] may use studies conducted by others. The supporting studies shall include, but shall not be limited to, the following:
    - (a) an evaluation of and summary statistics on housing conditions for the region for all economic segments. The evaluation shall include the existing distribution of housing by type, size, gross rent, value, and, to the extent data are available, condition, the existing distribution of households by gross annual income and size, and the number of middle-, moderate-, and low-income households that pay more than [28] percent of their gross annual household income for owner-occupied housing and [30] percent of the gross annual household income for rental housing;
    - (b) a projection for each of the next [5] years of total housing needs, including needs for middle-, moderate-, and low-income and special needs housing in terms of units necessary to be built or rehabilitated within the region;
- ◆ Households most commonly identified as requiring “special needs” programs include the elderly, the physically and mentally disabled, single heads of household, large families, farm workers and migrant laborers, and the homeless.
- (c) an analysis of the capabilities, constraints, and degree of progress made by the public and private sectors in meeting the housing needs, including those for affordable housing and special needs housing, within the region; and

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- (d) an identification and comprehensive assessment of state and local regulatory barriers to affordable housing, including building, housing, zoning, subdivision, and related codes, and their administration.
- (4) The regional housing plan shall consist of the following:
- (a) a policy element that defines regional housing goals, policies, and guidelines, including numerical goals for each of the next [5] years for the production of housing units, both new and rehabilitated, for middle-, moderate-, and low-income households and special needs housing within the region. The policy element shall include summaries of supporting studies as identified in paragraph (3) above.
  - (b) amendments, as appropriate, to a long-range program of implementation in the regional comprehensive plan [as required by Section [6-201(5)(h)]] that describe actions that the state legislature, state agencies, the [regional planning agency], local governments, special districts, home builders, developers, nonprofit providers of housing, and others may take over the next [5] years to meet regional housing goals. Such amendments may include, but shall not be limited to, proposals for:
    - 1. financing for the acquisition, rehabilitation, preservation, or construction of affordable housing;
    - 2. use of publicly owned land and buildings as sites for low- and moderate-income housing;
    - 3. regulatory and administrative techniques to remove barriers to the development of affordable housing at all levels of government and to promote the location of such housing proximate to jobsites;
    - 4. use of federal funds and any state, local, or other resources available for affordable housing;
    - 5. stimulation of public- and private-sector cooperation in the development of affordable housing, and the creation of incentives for the private sector to construct or rehabilitate affordable housing;
    - 6. changes in state or local tax, infrastructure financing, and land-use policies, procedures, statutes and/or ordinances to encourage or support affordable housing. This may include the designation of a sufficient number of sites zoned at densities that may accommodate affordable housing at locations that are accessible to existing or proposed employment concentrations in the region;
    - 7. local opportunities for public housing resident management and ownership;

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8. expansion or rehabilitation of public infrastructure to support housing, especially affordable housing; and
9. a description of the means by which the [regional planning agency] will ensure that a variety of housing types, at appropriate locations with respect to existing and proposed jobsites, will be made available to accommodate low- and moderate-income households.

[(5) The regional housing plan [shall *or* may] include a regional fair-share allocation plan pursuant to Section [4-208.8, *see Alternative 1B*.]

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### ***Commentary: Preparation of Regional Transportation Plan***

Federal involvement in regional transportation planning dates back to 1962 when Congress enacted the Federal Aid Highway Act<sup>119</sup> that authorized such planning for metropolitan areas. In 1991, Congress passed the federal Intermodal Surface Transportation Efficiency Act (ISTEA), which changed the approach by which states and metropolitan areas plan for transportation needs. This was followed by the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) in 1998, which revamped ISTEA.<sup>120</sup> These federal laws emphasize increasing spending on mass transit, improving the performance of the existing road network, mitigating congestion, and encouraging alternative forms of transportation, including bicycling and walking. They also stress designing highways that are sensitive to their context, designating and protecting scenic highways, and improving transportation through enhancements. They moved the focus from developing a transportation system based on moving vehicles from one place to another to a process to facilitate access for people and the movement of goods consistent with desired land-use patterns.

Under federal law, all urbanized areas over 50,000 population must have a metropolitan planning organization (MPO) to carry out the transportation planning process and prepare a long-range plan.<sup>121</sup> The governor and the jurisdictions within metropolitan areas designate the organization and its boundaries. The MPO's boundaries are to encompass the urbanized area and the contiguous area to be developed within 20 years. For areas designated as nonattainment areas for ozone or carbon monoxide under the act, the boundaries of the metropolitan area must at least include the boundaries of the nonattainment area, but if the U.S. Environmental Protection Agency expands the

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<sup>119</sup>P.L. 87-866.

<sup>120</sup>The Federal Transportation Equity Act for the 21<sup>st</sup> Century can be found on the U.S. Department of Transportation's web site: [www.dot.gov/tea21/legis.htm](http://www.dot.gov/tea21/legis.htm).

<sup>121</sup>23 U.S.C §§134(b), (g)(1), and (g)(2).

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nonattainment area, the MPO's jurisdiction may also expand as well, if the governor and MPO can agree on the boundary change.<sup>122</sup> New MPOs, however, will address nonattainment areas as appropriate.

According to the U.S. Advisory Commission on Intergovernmental Relations (ACIR) (which no longer exists), there are 339 recognized MPOs responsible for the transportation planning required to keep regions eligible for federal highway, transit, and surface transportation funds. MPOs may be, as noted earlier, separate organizations from regional planning agencies. In the 1970s, about 75 percent of MPOs were staffed by metropolitan regional councils. That ratio is changing, and, according to ACIR, only about 44 percent are currently staffed by regional councils. Some are staffed by individual cities, counties, or city-county planning commissions, or they are independent entities having only MPO responsibilities.<sup>123</sup> Some regions have multiple MPOs, instead of a single MPO, which complicates the region-wide coordination of transportation planning.

The federal legislation requires that the MPO planning process consider projects and strategies that address seven factors listed in the statutes.<sup>124</sup> The projects in the transportation plan must be consistent with the state implementation plan for air quality. In addition, the planning for transportation improvements must be financially realistic. Projects that are listed in the transportation plan and the transportation improvement program (TIP) for each metropolitan area – a three-year schedule of projects that represents the MPO's priorities for federal projects – can be included “only if full funding can reasonably be anticipated to be available for the project within the time period contemplated for completion . . .”<sup>125</sup> However, the financial plan for the transportation and TIP may include, for illustrative purpose only, additional projects that would be included for federal funding if reasonable additional resources were available.<sup>126</sup>

Few states have complementary state statutes describing in specific terms the contents of regional transportation plans of the type contemplated by federal law. One exception is California, whose statutes, amended in 1993, define the contents of a regional transportation plan. This plan is to include: (1) a policy element, which considers important transportation issues and the desired short- and long-range transportation goals; (2) an action element, which describes the programs and actions necessary to implement the plan, assigns responsibilities to carry them out, and identifies programs

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<sup>122</sup>Id., §134(c).

<sup>123</sup>U.S. Advisory Commission on Intergovernmental Relations, *MPO Capacity: Improving the Capacity of Metropolitan Planning Organizations to Help Implement National Transportation Policies*, A-130 (Washington, D.C.: U.S. GPO, May, 1995), 33-34.

<sup>124</sup>23 U.S.C. §134(f). For an excellent discussion of how MPOs responded to the original ISTEA legislation, see Daniel Carlson, with Lisa Wormser and Cy Ulberg, *At Road's End: Transportation and Land Use Choices for Communities* (Washington, D.C.: Island Prerss, 1995).

<sup>125</sup>23 U.S.C. §134(h)(3) (D).

<sup>126</sup>23 U.S.C. §134(h)(30)(iv).

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designed to manage congestion; and (3) a financial element, which summarizes the cost of plan implementation, and compares these costs to a realistic projection of available revenues.<sup>127</sup>

In a Growing Smart<sup>SM</sup> working paper,<sup>128</sup> Attorneys Robert H. Freilich and S. Mark White suggest four approaches at the state and (more important) the regional level for transportation planning.

1. **Status Quo (Demand Responsive).** This approach does not attempt to directly control land-use decisions, at least from a state or regional perspective. The location, magnitude, and timing of transportation improvements are directed primarily to areas of future expected high demand. In most areas, this means that new roadways are constructed in growing suburban areas, thereby encouraging development to move spatially outward and to deconcentrate.

2. **Congestion or Capacity Responsive.** This approach attempts to direct development away from areas of high congestion and into areas in which transportation improvements are underutilized. As with the demand-responsive regime, the result may be to force new development away from the urban core or developed areas, and towards areas in which sparse development patterns have resulted in high service levels.

3. **Mitigation Responsive.** This approach, favored by economists, requires those who place demands on the transportation network to assume the burden of addressing impacts through mitigation or monetary exactions. This approach was recently championed by economist Anthony Downs in *Stuck in Traffic*, in which he advocates congestion pricing (payment of user charges for the use of the transportation facility, especially when at its highest peak system usage), and is discussed in an APA PAS Report, *The Transportation/Land Use Connection*.<sup>129</sup>

4. **Coordinated Transportation/Land-Use Planning.** This is the most proactive of the alternatives and involves the greatest degree of up-front planning. In essence, this approach identifies a desired urban form and desired transportation network, and attempts to strike a balance between the two. Transportation decisions are based on the effect of new capacity on the desired urban form, and the desired urban form is influenced by the availability of existing capacity and the ability or inclination to expand into new areas. They are also influenced by the mobility

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<sup>127</sup>Cal. Gov't. Code, §65081 (1995).

<sup>128</sup>Robert Freilich and S. Mark White, "State and Regional Roles in Transportation and Land Use," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report Nos. 462/463 (Chicago: American Planning Association, March 1996), 127-131.

<sup>129</sup>Anthony Downs, *Stuck in Traffic: Coping with Peak-Hour Traffic Congestion* (Washington, D.C. and Cambridge, Mass: The Brookings Institution and the Lincoln Institute of Land Policy, 1994), 129-169; and Terry Moore and Paul Thorsnes, *The Transportation/Land Use Connection*, Planning Advisory Service Report No. 448/449 (Chicago: American Planning Association, January 1994), Ch. 4.

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expectations and access needs of the traveling public, recognizing that capacity of physical facilities alone is not an adequate measure of transport supply.

The model legislation below is intended to parallel, but not duplicate in substantive terms, the requirements of ISTEA and its successor, TEA-21. Instead, it provides language that will enable the regional planning agency (if it is also the MPO) to address the four approaches described above. In particular, the model emphasizes the preparation of underlying studies about the supply of and demand for transportation that would support either the mitigation responsive or coordinated transportation/land-use approaches. The resulting transportation plan is also intended to mesh with an existing regional comprehensive plan. For example, the transportation improvement program requirement of federal legislation would be incorporated into the regional plan's implementation framework as a plan amendment.

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### 6-204 Regional Transportation Plan

- (1) The [regional planning agency]<sup>130</sup> [shall *or* may], with the involvement of the region's local governments, special districts, affected state agencies, public and private providers of transportation, and citizens, prepare, adopt, review, and amend, on a [3- *or* 5-]year<sup>131</sup> basis a regional transportation plan. The transportation plan shall be consistent with the adopted regional comprehensive plan [and with the state transportation plan].
- (2) The purposes of the regional transportation plan are to guide, balance, and coordinate transportation activities in the region, in conjunction with other related activities such as land-use planning and economic development, and to ensure that transportation planning addresses and maximizes the potential of all existing and developing transportation modes and facilitates the efficient movement of people and goods.
- (3) In preparing the regional transportation plan, the [regional planning agency] shall undertake supporting studies that are relevant to the topical areas included in the plan. In undertaking these studies, the [regional planning agency] may use studies conducted by others. The supporting studies shall include, but shall not be limited to, the following:

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<sup>130</sup>Here, it is assumed that the regional planning agency, or a committee of the regional planning agency, will be a metropolitan planning organization responsible under federal law for undertaking transportation planning.

<sup>131</sup>Federal regulations require that the transportation plan be "reviewed and updated at least triennially in nonattainment and maintenance areas [for air quality] and at least every five years in attainment areas to confirm its validity and its consistency with current and forecasted transportation and land-use conditions and trends and to extend the forecast period." 23 CFR §450.322(a).

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- (a) inventories of modal and multimodal transportation facilities and services in the region;
  - (b) forecasts and evaluations of population, employment, land use, and transportation, by mode, for a [20]-year period;
  - (c) identification and evaluation of transportation system alternatives with respect to intensity of use, public and private costs, impacts on economic development, land use, energy consumption, the environment (including air quality), and safety, and consistency with goals and policies identified in the regional comprehensive plan;
  - (d) identification and evaluation of the impact on the region of policies and programs that affect the supply of transportation or transportation congestion, as appropriate, including, but not limited to, addition of high occupancy vehicle lanes to existing roads, the construction of new roads with high occupancy vehicle lanes, building new transit systems or improving existing transit systems, improving traffic operations through signalization and other means, and removing traffic accidents rapidly from roadways;
  - (e) identification and evaluation of the impact on the region of policies and programs that affect the demand for transportation or transportation congestion, as appropriate, including, but not limited to, staggering work schedules, encouraging people to work at home, encouraging ridesharing, instituting peak-hour tolls on major thoroughfares or other congestion pricing measures, clustering high-density housing near transit station stops, concentrating employment in areas of new growth, imposing a tax on parking in areas of high parking demand, and increasing densities in transportation corridors; and
  - (f) any other studies that may be required by federal law or regulations.
- (4) The regional transportation plan shall consist of the following elements:
- (a) a policy element that defines regional transportation goals and policies. The policy element may address: coordination of transportation modes; the relationship of transportation to land use, economic development, the environment (including air quality), and energy consumption; the coordination of transportation among federal, state, regional, and local plans; transportation financing and pricing; transportation safety, and the equity of transportation services across the communities of the region.
  - (b) a system element in text and maps that proposes a coordinated and integrated transportation system for the region consisting of a multimodal network of facilities and services to be developed over a [20]-year period for air, rail, state and federal highways (including scenic highways), public transit, waterways, ports and waterborne transit, bicycle transportation, pedestrian walkways, and other modes to

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support the goals and policies identified in the policy element. The system element shall include summaries of supporting studies identified in paragraph (3) above, an identification of corridors (including scenic corridors) and transportation facilities of statewide, regional, or extra-jurisdictional significance, and statements of minimum levels of service that describe the performance for each mode in order to meet the goals and policies of the plan.

- (c) amendments, as appropriate, to a long-range program of implementation in the regional comprehensive plan [as required by Section [6-201(5)(h)]] that describe actions that the [regional planning agency], local governments, public and private providers of transportation, state agencies, and other affected agencies can take over the next [20] years to achieve regional transportation goals and policies. [Such amendments may be in a form or include contents to satisfy the requirements for a transportation improvement program as described in Section 134(h) of Title 23, United States Code.<sup>132</sup>]

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<sup>132</sup>For an example of a state statute that defines a “congestion management program” to be prepared for every county that includes an urbanized area and subsequently to be incorporated into the regional agency’s transportation improvement program required under federal law, see Cal. Gov’t. Code, §65088 *et seq.* (1994).

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### PROCEDURES FOR PLAN REVIEW AND ADOPTION

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#### *Commentary: Public Review and Hearings on Regional Plans (Two Alternatives)*

The following alternative sections are a parallel to the procedures set forth in Section 4-209 for the adoption of state plans. They describe an informal workshop intended to alert the public at an early stage about how the regional planning agency intends to prepare a regional plan and engage their views as well as a more formal hearing at which members of the public comment on a draft plan proposed for adoption. Alternative 2 provides language that would permit the agency to give notice through a computer-accessible information network, such as the Internet or some other type of electronic bulletin board. It is conceivable that regional plans could be made available on such networks as a file for downloading and subsequent review by interested citizens.

There are many ways to obtain ongoing citizen participation as part of the preparation of regional plans.<sup>133</sup> The term “workshop,” in particular, should be construed broadly. A workshop could be a meeting of a small focus group intended to develop specific goals and policies or charettes to address the graphic presentation of a plan’s design recommendations. It could also be a “town hall” meeting that is broadcast on television throughout the region. The regional agency could employ a neutral facilitator to help participants identify problems and define potential solutions. Developments in computer technology and telecommunications make it possible to hold such meetings on-line or on interactive cable television, with the opportunity to express opinions on various alternatives. Public opinion polling and use of focus groups are other techniques that may be employed. However, particular approaches to citizen participation should be shaped not by legislation, but by the needs, issues, and political traditions of the region. The model provisions that follow simply provide a framework for what is to occur, but the specifics rely on the imagination of those engaged in the preparation of regional plans.

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#### **6-301 Workshops and Public Hearings (Two Alternatives)**

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<sup>133</sup>For a discussion of citizen participation practices and techniques as applied to regional transportation planning see, e.g., Phil Braun, et al., *ISTEA Planner’s Workbook* (Washington, D.C.: Surface Transportation Policy Project, October 1994), Ch.1; *Community-Based Planning Under ISTEA* (Washington, D.C.: Bicycle Federation of America, 1993); see generally William R. Potapchuck, “New Approaches to Citizen Participation: Building Consent,” *National Civic Review* 80, no. 2 (Spring 1991): 158-168; Lenneal J. Henderson, “Metropolitan Governance: Citizen Participation in the Urban Federation,” *National Civic Review* 79, no. 2 (March-April 1990):105-117; Georgia A. Persons, “Defining the Public Interest: Citizen Participation in Metropolitan and State Policy Making,” *National Civic Review* 79, no. 2 (March-April 1990): 118-131.

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### *Alternative 1 – Simple Procedure*<sup>134</sup>

- (1) Before initiating work on the regional comprehensive plan, any regional functional plan, a regional housing plan, [a regional fair share allocation plan,] a regional transportation plan, or amendments to any plan, the [regional planning agency] shall publish notice. The agency may also hold workshops on the plan or amendment, provided that it publishes notice of the date, time, and place of the workshop at least [30] days in advance.
- (2) The [regional planning agency] shall hold a public hearing on a proposed regional comprehensive plan, any functional plan, or a proposed amendment to any plan at a date, time, and place in the region determined by the [agency]. Not less than [30] days before the hearing, the [regional planning agency] shall publish a notice stating the date, time, and place of the hearing, and the place where the proposed plan or amendment may be examined by any interested person prior to the hearing, and where copies of the proposed plan or amendment may be obtained or purchased. All notices shall be published in a newspaper or newspapers having general circulation in the region.
- (3) At the hearing, the [agency] shall permit interested persons to present their views orally or in writing on the proposed plan or amendment, and the hearing may be continued from time to time.
- (4) After the hearing, the [regional planning agency] may revise the proposed plan or amendment, giving appropriate consideration to all comments received.

### *Alternative 2 – Detailed Procedure*<sup>135</sup>

- (1) Within [90] days of initiating work on the regional comprehensive plan, any regional functional plan, a regional housing plan, [a regional fair share allocation plan,] a regional transportation plan, or on an amendment to any plan, the [regional planning agency] shall conduct at least [2] public information workshops or other type of public collaborative process within the region. The purposes of the workshops are to inform the public as to the process and schedule for preparing the plan or amendment and to solicit public comment and response on potential goals, policies, guidelines, priorities, design alternatives, problems, potential solutions, and implementation measures before a draft of the plan or amendment is completed. The [agency] shall give notice by publication in a newspaper that circulates in the area served by the workshop and may give notice, which may include a copy of the

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<sup>134</sup>This procedure is adapted from Minn. Stat. §473.146, Subd. 2 and 2a (1992) (hearings prior to adoption of policy plans for metropolitan agencies).

<sup>135</sup>Parts of this section dealing with the form of the notice and submission of written and oral comments and recommendations have been adapted from the American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976), §2-305.

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draft plan or amendment, by publication on a computer-accessible information network, or by other appropriate means at least [30] days in advance of the workshop.

- (2) Upon completion of a preliminary draft of the plan or amendment, the [regional planning agency] shall conduct [not less than 2] public hearings on the plan or amendment at different locations in the region. The [agency] shall give notice by publication in a newspaper that circulates in the area served by the hearing and may give notice, which may include a copy of the draft plan or amendment, by publication on a computer-accessible information network or by other appropriate means at least [30] days in advance of the hearing.
- (3) The notice of each workshop or public hearing shall:
  - (a) contain a statement of the substance of the workshop or hearing, and a description of the substance of the proposed plan or amendment;
  - (b) specify the officer(s) or employee(s) of the [agency] from whom additional information may be obtained;
  - (c) specify a time and place where the work program or draft plan or amendment may be inspected before the hearing; and
  - (d) specify the date, time, place, and method for presentation of views by interested persons.
- (4) The [agency] shall provide notice to the chief executive officer of each special district, local government in the area served by the workshop or hearing, the [state planning agency], [other state agencies whose functions are related to the purpose of the workshop or hearing], [alternatively: the director of the state agency designated by the governor to serve as the distributor of regional plans and amendments to all state agencies], and to any other interested person who, in writing, requests to be provided notice of the workshop or hearing.
- (5) The [agency] shall afford any interested person the opportunity to submit written recommendations and comments in the record of the hearing, copies of which shall be kept on file and made available for public inspection.
- (6) The [agency] may establish additional procedures for the receipt of oral statements.
- (7) The [agency] may prepare written responses to any written recommendations and comments submitted by any interested party. These may be included in the final plan or amendment document.
- (8) Taking full account of the written and oral testimony presented at the public hearings, the [agency] shall make revisions in the preliminary draft plan or amendment as it deems necessary and shall prepare and distribute to all local governments and special districts in the region, [state planning agency], [other state agencies or the director of the state agency

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designated by the governor to serve as the distributor of regional plans and amendments to all state agencies], and other interested persons a final draft plan or amendment to be considered for adoption. The [regional planning agency] may modify or amend the final draft plan or amendment before adopting it.

### **6-302 [Resolving Potential Conflicts Among State, Regional, and Local Plans—See Sections 7-402.1 to 7-402.5]**

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#### ***Commentary: Adoption of Regional Plans***

In contrast to adoption of state plans, there are few, if any, realistic institutional alternatives for the adoption of regional plans. The provision below is similar to Alternative 3 in Section 4-210 of the *Legislative Guidebook*. The language requires the full regional planning agency to act on the plan, not a committee of the agency.<sup>136</sup> Adoption of a regional plan is a significant action that should not be delegated to a subordinate group, such as an executive committee, which does not fully represent the regional interests in the agency. Further, the chair, and not another officer of the agency, must preside at the meeting when the plan is adopted. This is to ensure continuity in the discussion of the plan and its amendments, and fix responsibility for orchestrating that discussion on one public official. This language also requires action on the plan within a certain period after the final public hearing by the regional planning agency. This places an obligation on the regional planning agency to make a decision on the plan. If it decides to delay the decision, amend the final draft plan, and then vote on it, it must do so within that time period, or it must hold another public hearing.

It should be noted that if there are strong disagreements over the adoption of a regional plan by the local governments and other entities affected by that plan, a regional planning agency has the authority to administer dispute resolution and conflict resolution programs under Section 6-107(3)(1) and to adopt rules governing such programs pursuant to Section 6-105.

The model also provides for the adoption of functional plans, such as transportation plans, that have been approved by another regional agency, such as a special district or metropolitan transportation commission. While another organization may approve the functional plan, the plan, under this model, will not become effective for the region until adopted by the regional planning agency.

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<sup>136</sup>For an interesting decision in which an executive committee of a regional planning commission, but not the full membership, adopted a regional land-use plan contrary to the requirements of a state statute, and, as a consequence, an appeals court found the plan had no effect, see *State ex rel Barbuto v. Ohio Edison Co.*, 16 Oh. App. 2d. 55, 241 N.E.2d 783 (1968), aff'd 16 O.S.2d. 54, 242 N.E.2d 562 (1968). The court held that the regional planning commission could not delegate the responsibility of officially adopting a plan.

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### 6-303 Adoption of Regional Plans

- (1) A regional comprehensive plan, any regional functional plan, a regional housing plan, [a regional fair share allocation plan,] a regional transportation plan, or an amendment to any plan shall become effective when adopted by the affirmative votes of not less than the majority of the entire membership of the [regional planning agency] [no later than [30] days] after the final public hearing on the plan or amendment by the [agency] at any meeting of the [agency] at which the chair is present. The action taken shall be recorded on the adopted plan by the identifying signature of the chair.
- (2) Where a regional transportation plan, other functional plan, or amendment thereto affecting the region has been approved by a public agency other than the [regional planning agency], it shall not become effective for the region until the [regional planning agency]'s membership adopts the plan or amendment in the manner provided in this Section.

### 6-304 Certification of Regional Plan; Availability for Purchase

- (1) Upon the adoption or amendment of any regional plan pursuant to Section [6-303], the [chief executive officer] of the [regional planning agency] shall, within [90] days, certify copies of the plan or amendment to:
  - (a) the director of each relevant state agency [*alternatively*: the director of state agency designated by the governor to serve as the distributor of regional plans and amendments to all state agencies];
  - (b) the director of each adjoining [regional planning agency];
  - (c) the chief executive officer of each local government, special district, and other organized taxing districts or political subdivisions located wholly or partially in the region;
  - (d) the director of each local government's planning department or, where there is no local planning department, the chair of the local planning commission in the region;
  - (e) each member of the state legislature, U.S. House of Representatives, and U.S. Senate representing all or a portion of the region;
  - (f) the state library and all public libraries in the region that serve as depositories of state documents; and
  - (g) other interested parties [including federal agencies as necessary].

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- (2) The [chief executive officer] shall make the plan or amendment available for purchase by the public at actual cost or a lesser amount.

### **6-305 Adoption of Plans by Local Governments, Special Districts, and Other Governments**

- (1) Any governmental unit in the region, including local governments, special districts, school districts, and other governmental authorities, to which the [regional planning agency] has certified a copy of a regional plan, may adopt so much of the plan, part, amendment, or addition as falls within the jurisdiction of the governmental unit or, in the case of a local government, as part of the local government's comprehensive or functional plan, and, when so adopted, it shall have the same force and effect as though made and prepared, as well as adopted, by the governmental unit.

## **RELATIONSHIPS AND AGREEMENTS WITH OTHER UNITS OF GOVERNMENT**

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### ***Commentary: Reviewing Plans and Major Capital Facility Projects***

When a regional plan is adopted, ideally there should be a mechanism to ensure consistency of action by various units of government and agencies and private entities operating within the region. One alternative is a process of review and approval of local plans administered by the state planning agency, in which consistency with state and regional plans and plans of adjoining governmental units would be addressed.<sup>137</sup> This alternative approach is addressed in Sections 7-402.1 to 7-402.2 of the *Legislative Guidebook*.

Another alternative is a process in which the regional planning agency reviews plans of local governmental units, special districts, and state agencies operating in the region. Under this approach, the regional agency, after adopting a regional comprehensive plan or any other regional functional plan, would then adopt rules for review of local or other plans affecting the region for consistency with regional plans. The model statute, below, follows this approach, but leaves the specific details to the regional agency since those details will reflect the individual issues and concerns in the region.

The regional agency is authorized to comment on the plans and recommend revisions to them. Local governments, special districts, and state agencies would be required to consider the

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<sup>137</sup>See Nancy E. Stroud, "State Review and Certification of Local Plans," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1.*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 85-88.

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recommendations and make a decision on whether to modify the plan to include these proposed revisions before adopting the plan. The model legislation permits the local government, special district, or state agency to reject all or part of the recommended revisions, provided it does so by a two-thirds vote that applies to each disputed revision, and, in the case of state agencies, only with the written concurrence of the governor. If the local government, special district, or agency rejects the revisions recommended by the regional planning agency, it must indicate in a statement to be included in the plan its reasons for the rejection. The comments and recommended revisions of the regional agency must appear as a comment section in the plan.<sup>138</sup>

Apart from the review of plans, the other area of importance is the review of major publicly funded capital facility projects having an extra-jurisdictional or regional impact. The model legislation gives the authority to the regional planning agency to review such projects, preferably when they are in the pre-engineering or early design stages, that are sponsored by local governments, special districts, public utilities (whether publicly or privately owned), and state agencies.<sup>139</sup> An example of the type of conflict that might be resolved through such a review would be a proposed regional trunk sewer that would extend beyond an urban growth area boundary designated in the regional comprehensive plan, thereby opening new areas for development. In its review, the regional planning agency would observe this problem and resolve it through consultation with the sponsoring governmental unit, before detailed design of the sewer even got underway.

This approach, however, is not without its potential pitfalls and some commentators have questioned whether autonomous or semiautonomous state agencies will comply with regional planning agency advice and comments on proposed public works projects.<sup>140</sup> Presumably, local governmental units and special districts that had entered into regional planning and coordination agreements with the regional planning agency under Section 6-402 would have identified

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<sup>138</sup>This approach is an adaptation of procedures in: *A Standard City Planning Enabling Act*, §28, drafted by the Advisory Commission on City Planning and Zoning, U.S. Department of Commerce (Washington, D.C.: U.S. GPO, 1928); a model “County and Regional Planning Enabling Act” drafted by Attorney Alfred Bettman and appearing in *Model Laws for Planning, Cities, Counties, and States, Harvard City Planning Studies VII*, by Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten (Cambridge, Mass.: Harvard University Press, 1935), 93-98, esp. §9 (Legal Status of Plan); Fl. Stat. Ann. §186.508 (1995) (state review of regional plans); and U.S. Advisory Commission on Intergovernmental Relations, “An Act Providing for Designation of Uniform Substate Districts and Coordination Thereof,” in *ACIR State Legislative Program: Local Government Modernization*, M-93 (Washington, D.C.: U.S. GPO, November, 1975), 122-132.

<sup>139</sup>An alternative to this approach is review of *both* publicly funded and private projects of regional or metropolitan impact. For example, under Minn. Stat. §473.173 and Minn. Rules §5800.0010 *et seq.*, the Metropolitan Council for the seven-county Twin Cities area has established standards, guidelines, and procedures for determining whether any proposed project is of metropolitan significance. The intent is to “assure that the total effect of a proposed project alleged to be of metropolitan significance is considered and the orderly economic development of the area is promoted. . . [The rules state that it is not the Metropolitan Council’s intent to use the procedures] to stop development, but rather to work out differences among parties and arrive at consensus.” Minn. Rules §5800.0010 (1989).

<sup>140</sup>See, e.g., Melvin Levin, “Planners and Metropolitan Planning,” in *Journal of the American Institute of Planners* 33 (1967): 79-80.

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predicaments like this well in advance by being aware of the contents of the various regional plans and their effects on the design of capital projects.

Regional planning agency review of large-scale public and private developments is also covered in Sections 5-301 *et seq.* on developments of regional impact (DRI). If a DRI process is in place at the regional level that addresses proposed publicly sponsored developments, language in the following section pertaining to “proposed major capital projects of extra-jurisdictional or regional significance” should be omitted. Section 7-402.4 provides an alternate approach for review of significant state, special district, and school district projects that are not included in state-approved regional plans.

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### **6-401 Effects of Regional Plans on State Agencies, Local Governments, and Special Districts; Review of Plans and Major Capital Facility Projects of Extra-jurisdictional or Regional Significance**

- (1) Upon the adoption of a regional comprehensive plan or any regional functional plan, each [regional planning agency] shall, within [90] days, adopt rules for reviewing local plans and plans of special districts and state agencies and proposed major capital projects of regional significance for consistency with the regional comprehensive plan and any regional functional plans.
- (2) Where a [regional planning agency] has adopted a regional comprehensive plan or any regional functional plan, each local government and special district located within the region and each state agency operating within the region shall submit to the [agency] for review, comment, and recommendation its proposed comprehensive plan, or any other proposed plans, or proposed plan amendments, which, in the judgment of the [agency], affect, or are affected by, the regional comprehensive plan or any regional functional plan. A county government may submit a plan that includes the plans of other local governments. The [regional planning agency] shall consider this to be a consolidated plan and shall waive the submission requirements for the units included. The [agency] shall have [30] days from the date of the submission of a plan to conduct its review and make written comments and recommendations for revisions, during which period the local government, special district, or state agency shall take no action to adopt or otherwise implement the plan.
- (3) Where the [regional planning agency] has recommended a revision or revisions to the proposed plan or amendment of a local government, special district, or state agency in order to be consistent with the regional comprehensive plan or any regional functional plan, the local government, special district, or state agency shall consider the revisions and shall either:
  - (a) make the recommended revision or revisions to the plan; or

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- (b) indicate in a statement to the [regional planning agency], to be included in the plan, its reasons for rejecting the revision or revisions as recommended by the [regional planning agency].
- (4) The comments and recommendations for revisions of the [regional planning agency] shall be included in the plan or amendment in a comment section. Nothing in this Section shall preclude the local government, special district, or state agency from adopting or rejecting any or all of the recommended revisions before its adoption of the plan or amendment. However, should the local government reject any proposed revision, it shall do so only by a vote of not less than two-thirds of the membership of its legislative body for each revision. Should the special district reject any proposed revision, it shall do so only by a vote of not less than two-thirds of the membership of its governing board. Should the director of the state agency reject any proposed revision, the director shall do so only with the written concurrence of the governor. If the state agency is a board or commission, it shall reject a proposed revision only by a vote of not less than two-thirds of its membership and with the written concurrence of the governor.
- [(5)<sup>141</sup> Where a [regional planning agency] has adopted a regional comprehensive plan or any regional functional plan, each local government, special district, or public utility, whether publicly or privately owned, located within the region, and each state agency operating within the region shall submit to the [regional planning agency] for review all proposed major capital facility projects.<sup>142</sup> The [agency] shall advise the local government, district, utility, or state agency within [30] days from the date of submission as to whether the proposed project has extra-jurisdictional or regional significance. If it lacks extra-jurisdictional or regional significance, the [agency] shall certify this finding. If the proposed project has extra-jurisdictional or regional significance, the [agency] shall determine in writing whether the project is consistent with the regional comprehensive plan or any regional functional plan and whether it is properly coordinated with other existing or proposed projects in the region. If the [agency] finds the proposed project is inconsistent with the regional comprehensive plan or any regional functional plan or lacks proper coordination, it shall notify the local government, district, utility, or state agency in writing as to the inconsistencies and lack of coordination. The local government, district, utility, or state agency shall resolve all inconsistencies and problems of coordination to the [agency]'s satisfaction before it initiates the project.<sup>143</sup> The inclusion of a major capital facility project in the regional comprehensive plan or in any regional functional plan shall constitute evidence of consistency.]

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<sup>141</sup>The activities in this paragraph are duplicated in part in Section 6-604(4), which deals with the effect of designating a substate district organization on state agencies.

<sup>142</sup>Preferably, this review should occur before final architectural, engineering, or related designs are completed so as to prevent the expenditure of substantial amounts of money on design work.

<sup>143</sup>“Initiation,” in this context, refers to the preparation of final architectural, engineering, or related designs and may also refer to the actual bidding out of the project.

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### ***Commentary: Agreements with Other Governmental Units***

The model legislation below authorizes the regional planning agency to enter into written agreements with other governmental units as a means of implementing regional comprehensive plans and regional functional plans and monitoring the results of plans. These agreements may address the delegation of responsibility for different types of functional planning and the provision of urban services consistent with regional plans.

Sections 6-402 and 6-403 below are based on two Oregon statutes. Under Ore. Rev. Stat. §195.020 *et seq.*, counties, which exercise some of the regional planning functions throughout most of the state, and cities must enter into cooperative agreements with each special district that provides an urban service within an urban growth boundary. The agreement must describe the responsibilities of the governmental unit in comprehensive planning, including plan amendments, periodic review of and amendments to land-use regulations, and the provision of urban services. Under Ore. Rev. Stat. §195.060 *et seq.*, providers of urban services – local governments, special districts, and public utilities – must enter into urban service agreements that describe how they will provide such services to areas within an urban growth boundary identified in a municipal or county comprehensive plan.

One substantial example of how this might be done appears in the San Diego Association of Governments (SANDAG) *Regional Growth Management Strategy* (1993). The strategy contains standards, objectives, and recommended actions for nine quality-of-life factors: air quality, transportation/congestion management, water-quality management, sewage disposal, sensitive lands and open space preservation and protection, solid waste management, hazardous waste management, adequate housing, and economic prosperity. The strategy contains a self-certification process for determining local and regional agency consistency. Through the completion of a checklist contained in the *Strategy* document, local governments indicate to SANDAG the degree to which implementing measures contained in the strategy are being carried out by different units of government.

This checklist and self-certification process would be part of an agreement that the regional planning agency entered into with local governments. It would be the local government's responsibility, under the agreement, to complete the checklist each year and submit it to the regional agency.<sup>144</sup>

Note: In the following sections, where there is no regional planning agency, the county can assume the same role with respect to the formulation of the agreements.

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<sup>144</sup>See San Diego Association of Governments (SANDAG), *Regional Growth Management Strategy* (San Diego, Ca.: SANDAG, January 1993), Appendix 2 (Self-Certification Process and Schedule).

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### 6-402 Regional Planning and Coordination Agreements

- (1) Within [6] months of the adoption of the regional comprehensive plan and the certification of the plan to local governments and to special districts, the [regional planning agency] shall enter into a cooperative agreement with each local government or special district that provides an urban service within an urban growth area shown in the regional comprehensive plan.
- (2) As used in this Section and in Section [6-403] below, the following definitions shall apply:
  - (a) “**Urban Growth Area**” means an area delineated in an adopted [regional *or* county] comprehensive plan [in accordance with the goals, policies, and guidelines in the state land development plan, prepared pursuant to Section [4-204]] within which urban development is encouraged by delineation of the area, compatible future land-use designations, and implementing actions in a local comprehensive plan, and outside of which urban development is discouraged. An urban growth area shall allow existing or proposed land uses at minimum densities and intensities sufficient to permit urban growth that is projected for the [region *or* county] for the succeeding [20]-year period and existing or proposed urban services to adequately support that urban growth.
  - (b) “**Urban Growth Area Boundary**” means a perimeter drawn around an urban growth area.
  - (c) “**Urban Services**” mean those activities, facilities, and utilities that are provided to urban-level densities and intensities to meet public demand or need and that, together, are not normally associated with nonurban areas. Urban services may include, but are not limited to: the provision of sanitary sewers and the collection and treatment of sewage; the provision of water lines and the pumping and treatment of water; fire protection; parks, recreation, and open space; streets and roads; mass transit; and other activities, facilities, and utilities of an urban nature, such as stormwater management or flood control.
- (3) The cooperative agreement between the [regional planning agency] and a local government shall:
  - (a) describe the process the local government will use to involve the [regional planning agency] in local comprehensive planning, including review of plans and plan amendments for consistency with adopted regional plans and amendments to land-use regulations to the extent that such plans and amendments affect extra-jurisdictional or regional interests;

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- (b) describe the responsibilities of the [regional planning agency] in participating in local comprehensive planning, including review of plans and plan amendments for consistency with regional plans and amendments to land-use regulations to the extent that they affect extra-jurisdictional or regional interests;
  - (c) establish the role and responsibilities of each party to the agreement with respect to local government approval of developments having extra-jurisdictional or regional impact;
- ◆ If there is a development of regional impact process at the regional level, then paragraph (c) would not be a topic that is necessary to include in the agreement.
- (d) establish the role and responsibilities of the local government with respect to the interests of the [regional planning agency] including, where applicable, review of capital projects having an extra-jurisdictional or regional impact, the provision of urban services as described in Section [6-403], the purchase of real property, including rights-of-way and easements, and the achievement of performance standards contained in the regional comprehensive plan;
  - (e) require a biennial report by the local government to the [regional planning agency] and by the [regional planning agency] to the local government concerning activities carried out pursuant to the agreement during the previous [2] years; and
  - (f) describe any other duties and responsibilities as may be agreed upon by the parties.
- (4) The cooperative agreement between the [regional planning agency] and a special district shall:
- (a) describe how the [regional planning agency] will involve the special district in regional planning;
  - (b) describe the role and responsibilities of the special district in regional planning, including preparation or involvement in the preparation of regional functional plans for the services that the special district provides;
  - (c) establish the role and responsibilities of the special district with respect to the interests of the [regional planning agency] including, where applicable, review of capital projects having an extra-jurisdictional or regional impact, the provision of urban services as described in Section [6-403], the purchase of real property, including rights-of-way and easements, and the achievement of performance standards contained in the regional comprehensive plan;
  - (d) specify the local governments and special districts that shall be parties to an urban services agreement under Section [6-403];

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- (e) require a biennial report by the special district to the [regional planning agency] and by the [regional planning agency] to the special district concerning activities carried out pursuant to the agreement during the previous [2] years; and
  - (f) describe any other duties and responsibilities as may be agreed upon by the parties.
- (5) The [regional planning agency] shall review in writing each cooperative agreement at least every [5] years or upon the adoption or amendment of a regional comprehensive plan or regional functional plans to ensure that it is consistent with adopted regional goals and policies. The [regional planning agency] may also amend the agreement from time to time, with the consent of the other party or parties thereto.

### **6-403 Urban Service Agreements**

- (1) Each [regional planning agency] shall have the responsibility for convening representatives of all local governments, special districts, public utilities, whether publicly or privately owned, and other entities that provide, or declare an interest in providing, an urban service inside an urban growth area shown in an regional comprehensive plan. A [regional planning agency] may establish 2 or more subareas inside an urban growth area for the purpose of such agreements. A [regional planning agency] may provide or contract with others to provide technical assistance, mediation, or dispute resolution services in order to assist the parties in negotiating such agreements.
- (2) Local governments, special districts, and public utilities, whether publicly or privately owned, and other entities that provide an urban service to an area within an urban growth area with a population greater than [2,500] persons shall enter into urban service agreements that:
- (a) specify whether the urban service will be provided by one local government, special district, or public utility or by a combination of 2 or more local governments, special districts, or public utilities;
  - (b) set forth the functional role of each service provider in the future provision of the urban service;
  - (c) determine by map the future service areas for each provider of the urban service, provided, however, that no future urban service is to be provided to an area not within an urban growth boundary shown in the regional comprehensive plan;
  - (d) assign responsibilities for planning and coordinating the provision of the urban service with other urban services, for the planning, constructing, and maintaining of service facilities, and for the managing and administration of provision of services to urban users;

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- (e) define the terms of necessary transitions in the provision of urban services, ownership of facilities, annexation of service territory, transfer of monies or project responsibility between one urban service provider and another, and the merger of urban service providers or other measures for enhancing the cost efficiency of providing urban services; and
  - (f) establish a process for the review and modification of the urban service agreement. Each agreement shall be reviewed by parties to the agreement at least once every [5] years.
- (3) The parties to an urban service agreement shall consider the following factors in establishing the agreement:
- (a) the financial, operational, and managerial capacity to provide the service;
  - (b) the effect on the cost of the urban service to the users of the service, the quality and quantity of the service provided, and the ability of urban service users to identify and contact service providers for assistance;
  - (c) physical factors related to the provision of the urban service;
  - (d) the feasibility of creating a new entity for the provision of the urban service;
  - (e) the elimination or avoidance of unnecessary duplication of facilities;
  - (f) economic and demographic trends and projections relevant to the provision of the urban service;
  - (g) the allocation of charges among urban service users in a manner that reflects the difference in the costs of providing services to the users;
  - (h) the equitable and reasonable allocation of costs between new development and existing development; and
  - (i) economies of scale in providing the urban service.
- (4) Urban service agreements entered into pursuant to this Section shall provide for the continuation of an adequate level of urban services to the entire area that each provider services. If an urban service agreement calls for significant reductions in the territory or district in which services are provided, the urban service agreement shall specify how the remaining portion of the territory or district is to receive services in an affordable manner.
- (5) In entering into an urban service agreement, local governments, special districts, public utilities, and other entities that provide urban services shall consider the agreement's effect on the financial integrity and operational ability of each service provider and its protection

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of the solvency and commitments of affected service providers. When an urban service agreement provides for the elimination, consolidation, or reduction in size of a service provider, the urban service agreement shall address:

- (a) the capital debt of the provider and the provider's short- and long-term finances;
  - (b) rates; and
  - (c) employee compensation, benefits, and job security.
- (6) Whether the requirements of paragraphs (2) to (5) of this Section are met by a single urban service agreement among multiple providers of a service, by a series of agreements with individual providers, or by a combination of multiprovider and single-provider agreements shall be a matter of local discretion.
- (7) Local governments, special districts, public utilities, and other entities that provide urban services shall enter into urban service agreements by *[date]*. After that date, no local government, special district, public utility, or entity that provides an urban service shall extend that service to an area not previously served, unless it has become a party to an agreement entered into pursuant to this Section.

### MISCELLANEOUS PROVISIONS

#### **6-501 Withdrawal from [Regional Planning Agency]**

- ◆ This section is inapplicable where membership by local government is mandated by statute.

Any participating unit of government may withdraw from membership in the [regional planning agency] at the end of any fiscal year, provided that the following conditions are met:

- (1) Adoption, at least [6] months prior to the end of the [regional planning agency]'s fiscal year, of a resolution by a majority of the membership of the governing body of the governmental unit requesting withdrawal from membership;
- (2) Provision of written notice to the [regional planning agency], accompanied by a certified copy of the resolution; and
- (3) Payment, or provision for payment, regarding any obligations of the governmental unit to the [agency] or its creditors, including its allocated share of the contractual obligations of the [agency] continuing beyond the effective date of its withdrawal.

#### **6-502 Dissolution of [Regional Planning Agency]**

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- ◆ This section is inapplicable where membership in the regional planning agency is mandated by statute and there is no local agreement establishing the agency.

The agreement establishing the [regional planning agency] shall provide for the manner of its dissolution, should it become necessary, provided that all outstanding indebtedness or obligations of the [agency] have been paid and all unexpended funds have been returned to the local governments, other governmental agencies, and private organizations or individuals that supplied them, or that adequate provision has been made therefore.

[or]

Upon receipt of certified copies of resolutions recommending the dissolution of a [regional planning agency] adopted by the legislative bodies of a majority of the local governments in the region, and upon a finding that all outstanding indebtedness or obligations of the [agency] have been paid and all unexpended funds have been returned to the local governments, other governmental agencies, and private organizations or individuals that supplied them, or that adequate provision has been made therefore, the governor shall issue a certificate of dissolution of the [agency] which shall thereupon cease to exist.

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### *Commentary: State Aid to Regional Planning Agencies*

A number of states, among them, Alabama, Florida, Georgia, Kentucky, North Carolina, and Texas, provide direct financial support to regional planning agencies.<sup>145</sup> Where the state mandates the creation of a regional planning agency and mandates the membership of local governments as well as representation by appointees of the governor, state financial support is especially appropriate. The following Section provides alternative formulas for state aid.

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#### **6-503 State Aid to [Regional Planning Agency]**

- (1) Each [regional planning agency] shall be eligible for state financial assistance from funds appropriated by the [legislature] to the [state planning agency *or other appropriate state agency*] for this purpose. Financial assistance shall be an annual grant of [331/3 *or* 50]

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<sup>145</sup>The extent of state aid to areawide planning agencies in the early 1990s is discussed in a draft report prepared for the U.S. Advisory Commission on Intergovernmental Relations by Dr. Patricia Atkins of the National Association of Regional Councils, *Decade of Change* (unpublished manuscript, May 27, 1993).

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percent of local contributions to the annual budget of the [agency] but shall be subject to the availability of funds as appropriated by the [legislature].

- (2) The [regional planning agency] shall receive [3] percent of all state revenue-sharing funds distributed to local governments within the region pursuant to [citation to appropriate state law].<sup>146</sup>

[or]

- (1) The [state planning agency] shall establish by rule a minimum funding level for [regional planning agencies], conditioned upon the amount of state funds appropriated, and a supplemental funding formula to be used for the distribution of available state funds in excess of the minimum funding amount. To be eligible for the minimum funding amount, each [regional planning agency] must assess and collect annual dues in the amount of [stipulate amount in dollars or cents] for each resident in each county within the region, based on the most recent estimate of county population from the U.S. Bureau of the Census.
- (2) To be eligible for any supplemental funding, each [regional planning agency] shall be required to match the amount of the supplemental funds on a dollar-for-dollar basis. For the purpose of computing matching funds, it shall use only its revenues in excess of the amount required for the minimum funding amount.<sup>147</sup>

### DESIGNATION OF REGIONAL PLANNING AGENCY AS SUBSTATE DISTRICT ORGANIZATION

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#### *Commentary: Designation of Regional Planning Agency as a Substate District Organization*

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<sup>146</sup>This alternative is adapted from, “An Act Providing An Umbrella Multijurisdictional Organization for [Name] Region With Authority To Deliver Services Under Certain Circumstances,” appearing in U.S. Advisory Commission on Intergovernmental Relations, *ACIR State Legislative Program: Local Government Modernization*, M-93 (Washington, D.C.: U.S. GPO, November 1975), 148.

<sup>147</sup>This alternative is adapted from Ga. Code. Ann. §50-8-33(2) (1994), which provides for state funding for regional development centers.

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A number of states delineate the boundaries of substate districts and designate substate districting organizations within them. For example, North Carolina accomplishes this through executive order.<sup>148</sup> Virginia, Kentucky, and Georgia are examples of states where the power to designate districts is authorized by statute.<sup>149</sup> These substate districts, in many cases, were established to respond to federal mandates in the 1970s for multijurisdictional planning that involved local governments and special purpose agencies and to undertake regional reviews of applications for federal assistance as an A-95 clearinghouse, a reference to the federal Office of Management and Budget Circular that set up the review process and has since been replaced by a Presidential executive order.<sup>150</sup> In addition, they are intended to provide a two-way conduit to the state for local government views – a single point of contact that state agencies may use in formulating programs with an intergovernmental dimension. In some states, the substate districts are economic development entities, a vehicle for assisting businesses in locating within the region through technical assistance and data collection and analysis.

The legislation below, based on a model originally developed by the U.S. Advisory Commission on Intergovernmental Relations,<sup>151</sup> formalizes the process of substate districting by placing responsibility on the governor to delineate substate districts according to statutory criteria, designate or stimulate the creation of a substate district organization where one does not exist, and periodically consider revisions to district boundaries. State agencies would be required to use the district boundaries in administration, planning, environmental permitting, and other activities, to the extent possible. Designated organizations would be responsible for all federally assisted multi-jurisdictional planning in the district, review of applications for federal assistance, and review of proposed state capital improvements for consistency with regional plans. Existing regional planning agencies are therefore given, in the Sections below, a preference in the designation of substate district organizations.

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<sup>148</sup>State of North Carolina, Office of the Governor, Executive Order No. 25, “Regional Policy for North Carolina” (February 21, 1986).

<sup>149</sup>Code of Va. §2.1-391 (1994) (Duties of state department of planning and budget relative to review and approval of all substate district systems boundaries), §§15.1-1403 to 15.1-1417 (Planning districts); Code of Ga. §5-8-32 (1994) (Establishment of regional development centers); Ky. Rev. Stat. §§147A.050-147A.125 (1994) (Area development districts).

<sup>150</sup>The A-95 Circular has been replaced by Presidential Executive Order No. 12372 of July 14, 1982, Federal Register 47, no. 137, July 15, 1982.

<sup>151</sup>U.S. Advisory Commission on Intergovernmental Relations, “An Act Providing for Designation of Uniform Substate Districts and Coordination Thereof,” in *ACIR State Legislative Program: Local Government Modernization*, M-93 (Washington, D.C.: U.S.GPO, November, 1975), 122-132.

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### 6-601 Delineation of Substate Districts

- (1) The governor [may *or* shall] divide the state into substate districts for planning, administration, development, and other regional purposes [by [date]].
- (2) Prior to the delineation of any district boundary, the governor shall make any necessary studies and surveys, consult with appropriate state officials and agencies, and convene meetings of local elected officials. The governor shall hold at least [1] public hearing in each proposed substate district, notice of which shall be published in one or more newspapers of general circulation in the proposed substate district at least [30] days in advance of the hearings. [The governor may delegate the responsibilities of making studies and surveys, consulting with state officials and agencies, convening meetings of local elected officials, and holding hearings to the director of the state planning agency [and other appropriate state agencies].]
- (3) In defining the districts, the governor shall take into account the following criteria:
  - (a) patterns of urban and rural development;
  - (b) distribution of population;
  - (c) patterns of transportation, including regional commuting;
  - (d) interrelatedness of social, economic, and environmental problems;
  - (e) boundaries of existing [regional planning agencies] and state planning and administrative units;
  - (f) interstate relationships and metropolitan area boundaries (to the maximum extent possible, no county, metropolitan area, or local government may be divided when forming a district);
  - (g) geographic and topographic features
  - (h) historic, scenic, and natural resources, living and non-living; and
  - (i) preferences of affected local governments as expressed through resolutions adopted by legislative bodies.
- (4) Within [1 year] of the effective date of this Act, the governor shall report to the legislature and shall certify to the [secretary of state] the boundaries of each substate district. At the same time, the governor shall notify the governing body of each local government, appropriate special districts, and the [regional planning agency], should one exist.

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- (5) After each decennial census and when local governments representing at least 60 percent of a district's population so request through the adoption of resolutions by their legislative bodies, the governor shall reconsider the delineation of substate district boundaries and may make appropriate adjustments pursuant to the criteria and procedures set forth in paragraphs (2) through (4) of this Section.

### **6-602 Designation of Substate District Organization**

- (1) The governor shall designate a single substate district organization in each substate district. [This designation shall follow completion of any necessary studies and surveys, and consultation and meetings with appropriate local elected officials and their respective state associations, and the holding of at least [1] public hearing in each substate district, notice of which shall be published in one or more newspapers of general circulation in the proposed substate district at least [30] days in advance].
- (2) The governor may designate existing regional planning agencies organized pursuant to Sections [6-101 *et seq.*], including those covering interstate areas, as substate district organizations. Where the governor intends to designate an interstate [regional planning agency] as a substate district, the governor shall notify the governor(s) of the affected states of that intention at least [60] days in advance of a decision on designation for comments and advice.
- (3) If the governor finds that:
  - (a) no [regional planning agency] exists in a substate district;
  - (b) the existing [agency] does not have the basic powers, functional responsibilities, membership, staff, geographic scope, or other factors necessary to accomplish the purposes of this Act; or
  - (c) the existing [agency] is not willing to serve as the substate district organization;then the governor may convene a meeting of elected officials representing each local government within the district to organize a new regional body or reconstitute and reorganize an existing regional body, which the governor shall then designate as the substate district organization.
- (4) If a single local government encompasses and is the major direct provider of services for [all or 90 percent] of the geographic area and population within a substate district, the governor shall designate the local government as a substate district organization.

### **6-603 State Agency Use of Substate District Boundaries**

- (1) Each state agency that divides the state for purposes of planning, administration, service delivery, environmental permitting and control, economic development, and emergency

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management shall conform its boundaries to those of the substate districts, except as provided in paragraph (3) of this Section.

- (2) The governor shall monitor the boundary conformance process and shall allow the agencies involved sufficient time to comply. In all cases, agencies shall conform within [2] years of the effective date of this Act.
- (3) If a state agency, due to the unique nature of its clientele or functional responsibilities, cannot efficiently and effectively conform to the substate district boundaries, the chief executive officer of the agency may petition the governor for permission to maintain separate boundaries. Such a petition shall be accompanied by appropriate studies and surveys. The governor may grant the exception only if compliance would be clearly detrimental to the achievement of the agency's purposes as balanced against the desirability of uniform district boundaries for state-supported services and activities. Where exceptions are granted, the governor may require that the state agency compile all data for research, analysis, budgeting, and reporting purposes on the geographic patterns of the official substate districts where these districts are basic statistical units in a statewide information system.

### **6-604 Effect of Designation on Substate District Organization**

- (1) The substate district organization shall be the authorized agency in each district to receive federal grants-in-aid for areawide planning, coordination, and development purposes.
- (2) All state agencies shall use the substate district organization in each region for any areawide planning, coordination, and districting activities in which they engage, except those state agencies exempted from conforming to substate district boundaries under Section [6-603(3)] above. Where this Act provides for substate district review of state agency projects, state agencies shall develop, by administrative rule, procedures for such review.
- (3) The substate district organization shall review all applications submitted by local governments, special districts, and private nonprofit organizations within its boundaries for a loan or grant from a federal department or agency for programs and purposes required by federal law or regulation so as to determine whether the application is consistent with its regional comprehensive plan or regional functional plan.
- (4)<sup>152</sup> The substate district organization shall review any proposed state major capital facilities project to be located within its boundaries. The organization shall advise the state agency within [30] days from the date of submission as to whether the project is consistent with the regional comprehensive plan or any regional functional plan and whether it is properly coordinated with other existing or proposed projects in the region. If the organization finds that the proposed project is inconsistent with the regional comprehensive plan or regional

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<sup>152</sup>This paragraph duplicates, in part, Section 6-401(4), which deals with regional planning agency review of major publicly funded capital projects of extra-jurisdictional or regional significance.

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functional plan or lacks proper coordination, it shall so notify the state agency in writing as to the basis of the conflict and lack of coordination. The state agency shall resolve all inconsistencies and problems of coordination to the organization's satisfaction before it initiates the project.

### **NOTE 6A – A NOTE ON WEIGHTED VOTING PROCEDURES**

This Note provides three examples of regional planning agency bylaws or constitutions that have mandatory or optional weighted voting procedures. Where the procedures are optional, representatives may activate the procedure simply by calling for it. These procedures and the weighting will vary depending on whether the agency has representation from jurisdictions that are not general purpose units of local government (e.g., special districts like metropolitan transportation authorities or school districts) or representation either by members of the state legislature or appointees of the governor. For instance, the nongovernmental representatives of the Miami Valley Regional Planning Commission have a vote, as do the governor's appointees to the Tampa Bay Regional Planning Council in Florida. For the Metropolitan Washington Council of Governments, members of the Virginia and Maryland legislatures have a vote; however, if a weighted vote is called, they cannot participate.

#### **Miami Valley Regional Planning Commission (Dayton, Ohio) Constitution and Bylaws**

##### Voting

1. Members of the Commission shall be entitled to cast the following number of votes on matters coming before the Commission at meetings thereof:
  - Members appointed by a city: one vote for each 50,000 residents or fraction thereof
  - Members appointed by a village: one vote
  - Members appointed by a township: one vote for each 50,000 residents or fraction thereof located in the unincorporated area
  - Members appointed by a county: one vote, plus one vote for each 50,000 residents or fraction thereof located in unincorporated areas of nonparticipating townships
  - Each nongovernmental member: one vote
2. Except where otherwise specified herein, at any meeting of the Commission at which a quorum shall be present, the action of members casting a majority of all votes cast shall constitute official action by the Commission.
3. A roll call vote will be taken upon the request of any commission member.

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4. On issues for which the Chair, acting in consultation with the Executive Director, shall deem that it is desirable to obtain a vote of the full Commission membership, a vote by mail may be conducted, using a mailing list which exactly corresponds to the current official roll of voting members.

### **Tampa Bay Regional Planning Council (Tampa, Florida)**

#### 2H-1.004 – Membership and Voting

- (4)(a) For the general conduct of business, each member government shall have an equal vote which shall be one for each representative, except as provided below.
  - (b) Prior to a vote and upon the call of three representatives, a weighted vote shall be taken by role call. The total weighted vote shall consist of the member governments' vote and the Governor's appointees' vote. The member governments' vote shall be two-thirds of the total vote and shall be apportioned among the member governments' representatives in the same proportion as the member governments' population bears to the total population of the region, provided, however, that no portion of the population shall be represented by more than one member government.
  - (c) The Governor's appointees' vote shall be one-third of the total vote and shall be apportioned among the Governor's appointed representatives in the same proportion as the appointed representative's county of residence's population bears to the total population of the region.

### **Metropolitan Washington Council of Governments (Washington, D.C.) Bylaws**

- 5.06 When a quorum of the board is present at any meeting, the vote of a majority of the Board members shall decide any question before the meeting, except when a weighted vote is invoked as follows.
  - (a) On a vote on any matter before the Board of Directors, weighted voting may be called for by any two (2) members present and representing two or more participating local governments represented on the Board.
  - (b) Any question for which weighted voting has been called shall be determined by the majority of the weighted votes allocated to the members of the participant governments present and voting. For this purpose, each participating government shall have one vote for each 25,000 population, and the next major succeeding portion thereof in the jurisdiction of the participating government, except that any participating government which has a population of less than 25,000 shall have one vote. For the purpose of weighted voting, the population assigned to each participating local government shall be the population used for fee assessment purposes under Section 11.03 [of the bylaws].
  - (c) Representatives of any participating local government having two or more members on the Board of Directors may divide their aggregate votes between or among them.

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- (d) Board members from the Virginia General Assembly and the Maryland General Assembly shall be excluded from any weighted vote. On a vote for which weighted voting has not been called, they shall each be entitled to one vote, and it shall be counted to determine if a majority vote has been attained on the question before the membership.

### NOTE 6B – A NOTE ON URBAN GROWTH AREAS AND REGIONAL PLANNING

This Chapter, in Section 6-201, Alternative 2, and in Section 6-201.1, introduces the concept of the **urban growth area** as a device for determining the spatial structure of the region and overall land-use density or intensity. It is an instrument for “urban containment planning” intended to promote compact and contiguous development patterns that can be efficiently served by public services and to preserve or protect open space, agricultural land, and environmentally sensitive areas.

An urban containment program:

consists of a perimeter drawn around an urban area, within which urban development is encouraged and outside of which urban development is discouraged. Urban containment lines are generally designed to accommodate projected growth over a specified time period, typically 10 to 20 years.

Land outside urban containment boundaries is generally restricted to resource uses and to very-low-density residential development ranging from one unit per 10 acres to one unit per 20 acres or more in prescribed and carefully restricted areas. The extension of utilities, especially wastewater service, is generally prohibited outside the boundary. Within urban containment boundaries, development is generally encouraged, often with density bonuses and, occasionally, with minimum density requirements. Land within an urban containment boundary, but outside the city limits, is often subject to contractual city/county agreements governing development standards and timing of annexation and utility extension.<sup>153</sup>

This note addresses only the technical issues of urban growth boundaries, and presumes that policy issues of the appropriate scale and location of growth have already been addressed in the public process.

### Definitions

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<sup>153</sup> Arthur C. Nelson, James B. Duncan, with Clancy J. Mullen and Kirk Bishop, *Growth Management Principles and Practices* (Chicago, Ill.: APA Planners Press, 1995), 73-74; see also Gerrit Knaap and Arthur C. Nelson, *The Regulated Landscape: Lessons on State Land Use Planning from Oregon* (Cambridge, Mass: Lincoln Institute of Land Policy, 1992), Ch. 2; V. Gail Easley, *Staying Inside the Lines: Urban Growth Boundaries*, Planning Advisory Service Report No. 440 (Chicago: American Planning Association November 1992); ECO Northwest with David J. Newton Associates and MLP Associates, *Urban Growth Management Study: Case Studies Report*, prepared for the Oregon Department of Land Conservation and Development (Salem, Ore: ECO Northwest, January 1991).

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The Washington statutes provide a good contemporary definition of what constitutes an urban growth area. In Washington, all counties that are either required or choose to plan under the state statutes must designate urban growth areas within their comprehensive plans.<sup>154</sup> Under the statute, an urban growth area is one

within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included in an urban growth area. An urban growth area may include more than a single city. . . .

. . . [T]he urban growth areas in the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county for the succeeding 20-year period. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. . . .

Urban growth should be located first in areas already characterized by urban growth that have public facility and service characteristics to serve such development, and second in areas that will be served by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. Further, it is appropriate that urban government services be provided by cities, and urban government services should not be provided in rural areas.<sup>155</sup>

### **Urban Growth Area Boundaries as Regional Planning Instruments**

To serve as an effective device for containing urban growth, urban growth boundaries must play a central role in the development of regional plans.<sup>156</sup> The construction of an urban growth area boundary, for example, helps regional planning agencies and local governments form consistent expectations about the rate and character of future urban growth; helps to establish a consensus among regional and local governments about where future urban growth will take place; and facilitates regional agencies and local governments in coordinating their efforts to manage and accommodate such growth. These important benefits can be realized by completing the following steps:

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<sup>154</sup>Wash. Rev. Code Ann. §§36.70A.106(1) and 36.70A.040 (1995 Supp).

<sup>155</sup>Id., §36.70A.106(1)-(3) (1995 Supp).

<sup>156</sup>See generally Gerrit J. Knapp and Lewis D. Hopkins, “The Inventory Approach to Urban Growth Boundaries,” *Journal of the American Planning Association* 67, no. 3 (Summer 2001): 314-326.

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(1) **Develop a population and employment forecast for the urban area or region.** The process of delineating urban growth area boundaries begins by developing a population and employment forecast for the entire urban area. At a minimum, population forecasts must be disaggregated by household size, and employment forecasts must be disaggregated into commercial and industrial sectors. The regional planning agency can develop the forecasts itself or may obtain them from state agencies or national forecasting firms. In preparing or obtaining the forecasts, the agency should ensure that they are consistent with larger supra-regional economic and demographic forecasts.

(2) **Develop regional density targets or minimums and public service standards.** The regional urban growth boundary must be based on carefully chosen targets or minimums for residential and employment densities and standards for public service. Regional residential density targets or minimums (measured in terms of dwelling units per acre), for example, must be based on housing plans or assumptions about housing development that provide for a range of housing alternatives. Commercial and industrial employment density targets (measured in terms of the number of employees per acre) must reflect carefully considered plans for regional economic development. Public service standards may be expressed through such measures as acres of parks and open space per capita, minimum sizes for or acreage per capita of schools, fire and police stations, and health care facilities, and miles of road network per acre. Alternately, they may also be expressed as a percentage of total urban land.

(3) **Estimate residential and nonresidential land required to accommodate future urban growth.** A series of calculations – greatly simplified here for the purposes of illustration – shows how land requirements can be calculated using regional population and employment density targets and infrastructure service standards.<sup>157</sup>

*Calculations for residential land.* Assume that, over a period of 20 years, the population of a hypothetical region is projected to rise from 200,000 to 225,000 persons, an increase of 25,000 or 12.5 percent. Projected occupancy is 2.5 persons per dwelling unit on the average for the period.

If the density target or minimum for the urban growth area in the regional comprehensive plan is set at six dwelling units per net acre, the land for residential purposes that would need to be set aside would be calculated as follows:

$$(25,000 \text{ persons projected population growth}) / (2.5 \text{ persons per dwelling unit}) / (6 \text{ dwelling units per net acre}) = 1,667 \text{ net residential acres}$$

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<sup>157</sup>For an additional discussion of these steps and others related to the methodology of designating boundaries, see V. Gail Easley, *Staying Inside the Lines*, 6-9. In addition to analyses based on land area, growth capacity analysis should include analyses of infrastructure capacity. See also Eric Damian Kelly, *Planning, Growth, and Public Facilities: A Primer for Local Officials*, Planning Advisory Service Report No. 447 (Chicago: American Planning Association, September 1993).

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As illustrated in the above equation, residential land requirements depend critically on the target or minimum for residential density. If the net density target is increased to 10 units per net acre, the amount of residential land necessary for the 20-year period would drop to 1,000 acres, a reduction of about 40 percent.

*Calculations for industrial land.* Calculations of industrial employment requirements can be based on targets for industrial employment density. Such targets should be based on employment densities in the types of industries the region seeks or expects to attract. For example, assume that industrial employment growth projected for the community equals 1,000 employees over the forecast period (primarily in electronics) and that the industrial employment density in the (electronics) industry equals 20 employees per net acre. Using this information, industrial land requirements can be calculated as follows:

$$(1,000 \text{ employees in projected industrial employment growth}) / (20 \text{ industrial employees per net acre}) = 50 \text{ industrial acres}$$

*Calculations for commercial land.* Calculations for commercial land requirements can be based on target employment densities, just as industrial land requirements. Commercial employment densities may, however, vary extensively by location and type of commercial land use. Office employment densities in central cities, for example, are likely to exceed retail employment densities in suburban malls. Therefore, it may be preferable to calculate requirements for commercial land based on employment forecasts for and employment densities in specific commercial sectors and urban locations.

*Calculations for public and institutional land.* Public and institutional land requirements can be based on national or regional public service standards. A national service standard for neighborhood parks, for example, is approximately one to two acres per 1,000 population. If the regional agency chooses the higher service standard of two acres per 1,000 population, the land required for public parks can be calculated as follows:

$$(25,000 \text{ persons in projected population growth}) \times (.002 \text{ acres of park per person}) = 50 \text{ acres of parkland}$$

*Alternate approaches.* There are alternate ways to project nonresidential land-use needs, although they do not have the precision of projections based on forecasts of economic activity or assumptions about standards for public and institutional land. Under such approaches, nonresidential land absorption is calculated by conducting a historical analysis of the relationship between population and nonresidential land absorbed or nonresidential land use as a proportion of total land use in the region. The resulting ratios – either per capita or a percentage – are used to determine additional nonresidential land.

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For example, assume that, historically, nonresidential land uses, including commercial, industrial, institutional, park and recreation, and other public uses, including rights-of-way, accounted for between 48 and 58 percent of the land uses in the region, with the remainder for residential land uses.<sup>158</sup> Using 52 percent for residential land uses and 48 percent for nonresidential land uses, and applying it to projected residential land uses at six dwelling units per net acre, total nonresidential acreage for the urban service area can be computed as follows:

$$\frac{(\text{Projected residential land use})/(\text{percentage of residential land use to total land uses}) \times (\text{Percentage of nonresidential land use to total land use})}{1} = \text{Nonresidential land use in acres}$$

Substituting the figures used in the example in “Calculations for residential land” (above), the formula yields:

$$(1,667 \text{ acres} / 52 \text{ percent}) \times (48 \text{ percent}) = 1,539 \text{ acres}$$

In this alternate approach, a market factor is also applied to ensure there is a sufficient supply of vacant land inside the urban growth area boundary to allow the efficient and competitive functioning of the real estate market and to prevent landowners from monopolizing large parcels of vacant land, thereby driving up land prices.<sup>159</sup> Applying this factor results in the calculation of an additional amount of developable land beyond what residential and nonresidential land-use projections yield. For example, assume that the market factor is 16 percent.<sup>160</sup> If land absorbed for residential and nonresidential uses totals 3,206 acres (1,667 acres for residential and 1,539 acres for nonresidential), application of the 16 percent market factor would require an additional 513 acres, for a total of 3,719 acres over the forecast period.

**(4) Identify potential for infill and redevelopment within existing urbanized areas.** Encouraging infill and redevelopment is critical for successful urban containment planning. Identifying potential for infill and redevelopment within existing urbanized areas requires a detailed analysis of land use and land-use potential within each jurisdiction in the region. At a minimum, such analysis requires the identification of vacant developable land. The potential of such land can be determined by examining the proposed use of the land in local comprehensive plans. Vacant land

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<sup>158</sup>See Christopher Harris, “Bringing Land-Use Ratios Into the ‘90s,” *PAS Memo* (August 1992).

<sup>159</sup>For a discussion of the market factor and considerations in determining what percentage it should be in the calculation, see V. Gail Easley, *Staying Inside the Lines*, 10.

<sup>160</sup>Note that there can be a considerable degree of debate about what percentage the market factor is. Depending on the pace of economic growth, the market factor may vary considerably. In a fast-growing regional economy, the factor may need to be larger than in a slow-growing economy. In any case and regardless of the methodology used to forecast land use needs, constant monitoring of the amount of developable or redevelopable land within the urban growth area boundary is necessary to ensure the success of the program.

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zoned for residential use, for example, should be considered as potential for accommodating future residential growth. The assessment of potential for redevelopment requires a similar but more difficult process. Specifically, it requires identifying land that is currently in one use but planned for a more intensive use. Land currently in single-family use but zoned for multiple-family use, for example, should also be considered as suitable for accommodating future residential growth.

**(5) Identify environmentally sensitive and undevelopable land outside existing urbanized areas.** Before demarcating areas for future urban growth, the regional planning agency must identify those areas outside existing urban areas that should not be designated for urban use or intensive development. These lands include environmentally sensitive areas, such as wetlands, threatened and endangered species habitats, and shorelands, and resource areas, such as prime agricultural land. These also include areas that are difficult to develop due to physical attributes, such as steep slope or natural hazards (e.g., potential for landslides or flooding). (These areas, however, could be used to satisfy park and open space requirements).

**(6) Identify areas for future urban growth.** Once the technical tasks of estimating land necessary to accommodate future urban growth and identifying areas where growth can be accommodated are done, the potentially difficult task of selecting areas for future urban growth begins. Three outcomes are possible:

- (a) In the unlikely event that estimated land requirements equal land available for development and redevelopment within existing urban areas, and that planned densities in local comprehensive plans meet regional density targets or minimums, the urban growth area boundary can simply be drawn around the area contained in the local comprehensive plans.
- (b) If land available for development or redevelopment exceeds estimated land requirements, local governments can designate less land for urban use or experience idle land use within the planning period.
- (c) In the most likely event that estimated land requirements exceed land available for development or redevelopment, then growth will have to be accommodated by increasing planned densities or intensities, by expanding the area of urban development, or by some combination of both.

Participants in the process – regional agencies, local governments, special districts, and lay citizens, among them – should be prepared to undergo several iterations of discussions on where and how growth should be accommodated before arriving at a firm location for urban growth area expansion. It is through these discussions, however, that the major benefits of growth management and regional planning are realized.

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While urban growth areas could conceivably be implemented individually by local governments, the existence of a regional framework will ensure that the effort will be more effective and equitable. Absent a regional framework, as proposed here, the consequence of single or scattered urban containment programs by one or several local governments means that: (a) growth will simply be shifted from one part of one community in the urban area to another community in the area; or (b) growth may bypass the enacting community and jump outward to the next tier of vacant but developable land.<sup>161</sup> Further, a regional urban growth area framework spreads the benefit of the system among central cities, the inner ring of developed and mature suburbs, developing suburbs, and the rural areas beyond.

### **Relationship to State Land Development Plan**

If the state has adopted a state land development plan that provides standards and criteria for the establishment of urban growth area (see Section 4-204), the regional comprehensive plan must incorporate those standards and criteria.<sup>162</sup> For example, the state could describe standards for locating the boundary lines. It might provide either a range of minimum densities (in terms of net dwellings units per acre) or land-use intensities to be provided within the growth area. The urban growth area, as delineated in the regional comprehensive plan, would follow the state locational standards and incorporate the density range. In turn, if there is a system in place where the regional planning agency reviews local comprehensive plans for consistency with the regional comprehensive plan, the regional agency would look to determine: (a) whether the local plan's urban growth area corresponds with that of the regional comprehensive plan; and (b) whether the local plan has provided densities and land-use intensities consistent with those in the regional comprehensive plan.

### **Adjustment of Urban Growth Area**

Periodically, the regional planning agency may need to adjust the urban growth area. In 1995, Oregon amended its planning statutes to provide for a formal procedure, including specific analytical techniques, to do so. Ore. Rev. Stat. §197.295, which addresses buildable land available in an urban growth boundary,<sup>163</sup> provides in part:

- (3) As part of its next periodic review pursuant to [state statutes] . . . or any other legislative review of the urban growth boundary, a local government shall.

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<sup>161</sup> See, e.g., Emily Narvaes, "Boulder Decides to Go Even Slower than Usual," *Planning* 61, no. 12 (December 1995): 22-23. According to Narvaes, in Boulder, Colorado, a town that imposed urban growth area boundaries in the 1970s, "More people are coming into the city than out to work each day, according to city planners, partly because long-time limits on residential growth have driven up housing prices – and pushed many Boulder workers to live in outlying communities." *Id.*

<sup>162</sup> An example of detailed guidelines for delineating urban growth area boundaries is found in Wash. Admin. Code §365-195-335. These rules implement the state's Growth Management Act.

<sup>163</sup> This statute provided the basis for Section 7-204.1 (Land Market Monitoring System).

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- (a) Inventory the supply of buildable lands within the urban growth boundary;
  - (b) Determine the actual density and the actual average mix of housing types of residential development that have occurred since the last periodic review or five years, whichever is greater; and
  - (c) Conduct an analysis of housing need by type and density ranges, in accordance with ORS 197.303 and statewide planning goals and rules relating to housing, to determine the amount of land needed for each needed housing type for the next 20 years.
- (4) If the determination required by subsection (3) [above] of this section indicates that the urban growth boundary does not contain sufficient buildable lands [which are defined in the statute as “lands in urban and urbanizable areas that are suitable, available and necessary for residential uses” and include “both vacant land and developed land likely to be redeveloped”] to accommodate housing needs for 20 years at the actual developed density that has occurred since the last periodic review, the local government shall take one of the following actions:
- (a) Amend its urban growth boundary to include sufficient buildable lands to accommodate housing needs for 20 years at the actual developed density during the period since the last periodic review or within the last five years, whichever is greater. As part of this process, the amendment shall include land reasonably necessary to accommodate the site of new public school facilities. The need and inclusion of lands for new public school facilities shall be a coordinated process between the affected public school districts and the local government that has the authority to approve the urban growth boundary;
  - (b) Amend its comprehensive plan, functional plan, or land-use regulations to include new measures that demonstrably increase the likelihood that residential development will occur at densities sufficient to accommodate housing needs for 20 years without expansion of the urban growth boundary. A local government or metropolitan service district that takes this action shall monitor and record the level of development activity and development density by housing type following the date of the adoption of the new measures; or
  - (c) Adopt a combination of the actions described in paragraphs (a) and (b) of this subsection.

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- (5) Using the analysis conducted under subsections (3)(c) of this section [of the statute], the local government shall determine the overall average density and overall mix of housing types at which residential development of needed housing types must occur in order to meet housing needs over the next 20 years. If that density is greater than the actual density of development determined under subsection (3)(b) of this section, or if that mix is different from the actual mix of housing types determined under subsection (3)(b) of this section, the local government, as part of its periodic review, shall adopt measures that demonstrably increase the likelihood that residential development will occur at the housing types and densities and at the mix of housing types required to meet housing needs over the next 20 years.
- (7) . . . Actions or measures [under subsections (4) or (5)], or both, may include but are not limited to:
- (a) Increases in the permitted density on existing residential land;
  - (b) Financial incentives for higher density housing;
  - (c) Provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer;
  - (d) Removal or easing of approval standards or procedures;
  - (e) Minimum density ranges;
  - (f) Redevelopment and infill strategies;
  - (g) Authorization of housing types not previously allowed by the plan or regulations; and
  - (h) Adoption of an average residential density standard.

The approach taken in these amendments is useful for any state or regional planning agency intending to identify urban growth areas in plans or to periodically revise the location of the boundaries and the extent of the land area within them, and to compare the nature of the development that is actually occurring with what was proposed.

### **NOTE 6C – A NOTE ON EXISTING REGIONAL PLANS**

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This Note outlines six recent regional plans and the legislation that prescribes their contents.<sup>164</sup> It is intended to offer a snapshot of regional planning practices in various states. Table 6-2 summarizes what the legislation authorizing the plan calls for and indicates whether the legislative requirements were fulfilled in that plan.

### **Florida: South Florida Regional Planning Council**

Florida has established regional planning councils for the entire geographic area of the state. In essence, this is a form of substate districting. State statutes requires each council to prepare a “strategic regional policy plan.” Florida Statutes §186.507 and Chapter 27E-5.004 of the Florida Administrative Code require strategic regional policy plans to address a number of subject areas, including affordable housing, regional transportation, economic development, natural resources, emergency preparedness, and significant regional resources and facilities. Regional planning agencies in Florida provide technical assistance and information, provide information, and review developments of regional impact.

The South Florida Regional Planning Council, in Hollywood, covers a region consisting of Broward, Dade, and Monroe Counties. The Council is made up of 13 local government officials, six gubernatorial appointees, and four ex officio members. It has prepared a plan centered around the required subject areas in the statute. The plan also contains a section describing implementation strategies for the plan. The heart of the plan lies in its series of strategic regional goals, benchmarks /indicators, and regional policies.

The state statutes do not require absolute consistency between the state comprehensive plan and the strategic regional policy plan. The executive office of the governor, under Florida Statutes §186.508, reviews the proposed regional plan and recommends revisions to the regional council. However, under this section, “nothing . . . shall preclude . . . a council from adopting or rejecting any or all of the revisions as part of its plan prior to the effective date of the plan.” Whether or not the council agrees with them, the governor’s recommended revisions must appear in a comment section in the plan.

### **Oregon: Portland Metro**

Voters in the three-county region (Washington, Multnomah, and Clackamas Counties) surrounding Portland, Oregon, authorized by referendum in 1979 a metropolitan service district. Metro, as the district is called, is governed by 12 officials directly elected from districts in the metropolitan area. Metro provides technical assistance and information, has binding review authority over local plans, and operates certain regional services such as the zoo, the Oregon convention center, and solid waste management activities. Oregon statutes also permit the voters

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<sup>164</sup>See generally Frank S. So, Irving Hand, and Bruce D. McDowell, *The Practice of State and Regional Planning* (Washington, D.C.: American Planning Association, 1986), Chs. 6 and 7 (discussion of preparation and implementation of regional plans). For a good review of contemporary regional plans with both national examples and examples from the four-county area around Portland, Oregon, see Architectural Foundation of Oregon, *An Inventory of Regional Plans* (Portland, Ore.: The Foundation, December, 1992).

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of such a district to frame a charter. Adopted on November 3, 1992, the current charter calls for the Metro to adopt a regional framework plan.

Under the charter, the framework plan is to: (1) describe its relationship to a “future vision” statement for the region, to be drafted by a special commission appointed by the Metro board (that statement is a “conceptual statement that indicates population levels and settlement patterns that the region can accommodate within the carrying capacity of the land, water and air resources [of the Portland area], and its educational and economic resources, and that achieves a desired quality of life”); (2) comply with applicable Oregon statewide planning goals; (3) be subject to compliance acknowledgment – a form of state certification – by the Oregon Land Conservation and Development Commission or its successor; and (4) be the basis for coordination of local comprehensive plans and implementing regulations.<sup>165</sup>

The regional framework plan was adopted in 1997, providing detailed goals and policies on land use, transportation, parks and open space, water management, and natural hazards, as well as implementation measures including but not limited to an urban growth boundary and regional review of local comprehensive plans. The 2040 Framework Plan was preceded by the 2040 Growth Concept, establishing a general policy direction for managing growth in the next 50 years – through the year 2040, as the name implies. The growth concept was adopted by the Metro in December 1994 and served as a guide for developing the regional framework plan, an updated regional transportation plan, and changes to local comprehensive plans. While the concept did not delineate the specifics of exactly when, how, or where growth may occur in the region, it applied the policy groundwork laid out in previously developed regional urban growth goals and objectives to explain or discuss several “concepts” (e.g., green corridors, intermodal facilities, transportation demand management and pricing strategies, etc.) that should be pursued. It also recognized that additional planning is needed to test the growth concept and determine implementation actions.

### **California: San Diego Association of Governments**

In California, regional planning exists through one of two mechanisms, both of which derive from state statutes: (1) the creation of a regional planning district, whereby the preparation of a regional plan is required;<sup>166</sup> and (2) the use of a joint powers agreement to create an independent planning agency and subsequent plan.<sup>167</sup>

In the San Diego metropolitan area, the joint powers agreement was used to form the San Diego Association of Governments (SANDAG) that represents 18 cities and one county. The board consists of representatives of those governmental units. The current joint powers agreement lists the issues that SANDAG’s regional planning must address (see Table 6-1). SANDAG’s authority includes technical assistance, information management, and administration of a self-certification

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<sup>165</sup>1992 Metro Charter, §5.

<sup>166</sup>Cal. Gov’t. Code, §65060 *et seq.* (Regional planning districts) (1995).

<sup>167</sup>*Id.*, §6400 *et seq.* (Joint powers agreements) (1995).

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process by local governments for compliance with the regional plan (see the discussion in the commentary to Section 6-402 of the *Legislative Guidebook*).

SANDAG's main document, the *Regional Growth Management Strategy* (1993), establishes a framework for managing growth in the region. As discussed earlier in the commentary to Section 6-402, a distinguishing component of the strategy is a self-certification process for determining consistency between local and regional agencies. The checklist is to be used by local governments to monitor implementation of the recommended actions and the achievement of the standards and objectives. Governmental units complete the checklist each year and return it to SANDAG.

### **Massachusetts: Cape Cod Commission**

In 1990, the Commonwealth of Massachusetts passed “An Act Establishing the Cape Cod Commission.”<sup>168</sup> The legislation is a special act applying only to Barnstable County. The Commission, headquartered in Barnstable, is to serve as the regional planning and land-use commission for the county. The Commission consists of 15 representatives of the county’s towns, one county commissioner, one Native American, one minority member appointed by the board of county commissioners, and one minority member appointed by the governor. It has authority to prepare and oversee the implementation of a regional land-use policy plan for all Cape Cod, to recommend for designation specific areas of critical planning concern, to review and regulate developments of regional impact, and to review local plans for consistency with the regional land-use policy plan.

The Act details the contents of the regional policy plan. The plan establishes review and regulatory policies for developments of regional impact and a framework for the preparation and review of local town comprehensive plans. Additionally, it identifies key resources of regional concern – such as aquifer recharge areas, shellfish habitat areas, and historic village centers – that may deserve special recognition and protection.

### **Minnesota: Twin Cities Metropolitan Council**

The Metropolitan Council for the seven-county Twin Cities area in Minnesota was established in 1967 by the state legislature. The Council membership consists of representatives of 16 districts appointed by the governor. Its authority includes preparation of regional plans, binding review of local plans and developments of regional significance, technical assistance, and regional services management, including transit, solid waste, airports, and regional sports facilities. In contrast to

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<sup>168</sup>Commonwealth of Massachusetts, Cape Cod Commission Act, Chapter 716 of the Acts of 1989 and Chapter 2 of the Acts of 1990, §7.

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states where regional plans are generally specified as part of separate legislation or a charter, Minnesota statutes prescribe the specific contents of regional plans for the Metropolitan Council, the regional planning agency for the Twin Cities area. In perhaps the most comprehensive legislation addressing the content of regional plans, the Minnesota statutes require the Metro Council to:

prepare and adopt . . . a comprehensive development guide for the metropolitan area. It shall consist of policy statements, goals, standards, programs and maps prescribing guides for an orderly and economic development, public and private, of the metropolitan area. The comprehensive development guide shall recognize and encompass physical, social or economic needs of the metropolitan area and those future developments which will have an impact on the entire area including, but not limited to, such matters as land use, parks and open space land needs, the necessity for and location of airports, highways, transit facilities, public hospitals, libraries, schools and other public buildings.<sup>169</sup>

The Metro Council's current edition of the development guide is called the *Regional Blueprint*. The *Blueprint* identifies the Urban Service Area, representing the area where a full range of metropolitan systems (sewers, highways and transit, parks and airports) are to be provided along with local service systems. The *Blueprint* also designates a series of seven communities as freestanding growth centers that are physically separated from the larger urban service area of undeveloped land. In addition to the development guide, the Minnesota statutes describe a variety of functional plans dealing with water, solid waste, airports, and other metropolitan systems. The statutes require Metro Council regional policy plans (including various functional plans) to include statements that address topics described in Table 6-2.<sup>170</sup>

### **New York: Adirondack Park Agency**

In 1971, the New York state legislature passed the Adirondack Park Agency Act to “insure optimum overall conservation, protection, preservation, development, and use of . . . the Adirondack Park.”<sup>171</sup> In contrast to the other regional entities discussed above, it is a state agency with authority over a specific region of New York. The legislation defines the makeup and functions of the agency. The governing board consists of five park residents and three other private citizens appointed by the governor. It authorizes the agency, based in Ray Brook, to develop two plans for the lands within the park: (1) the State Land Master Plan for the park's publicly owned lands, and (2) the Land Use and Development Plan for the park's privately owned lands.

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<sup>169</sup>Minn. Stat. Ann, § 473.145 (1994).

<sup>170</sup>Id., §473.146 (1994).

<sup>171</sup>Adirondack Park Agency Act, New York Executive Law, Art. 27, §801 (1990).

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The State Land Master Plan categorizes sections of the State Forest Preserve (the public lands) according to their resource characteristics, patterns of use, and abilities to withstand additional recreation activity. This plan guides the direct management of state lands within the park. The Land Use and Development Plan for the private lands classifies private lands into six intensity classes according to their ability to withstand development without significant adverse environmental impacts. Through this latter plan, the agency engages in direct regulation of private land, including issuance of building permits outside of areas designated as “hamlets.”

## CHAPTER 6

**Table 6-2: Regional Plans and Their Contents**

<b>Regional Planning Agency/Plan</b>	<b>Authority</b>	<b>Contents of Plan as Described in Legislation</b>
		<input type="checkbox"/> Indicates description is provided for in legislation <input checked="" type="checkbox"/> Indicates legislative requirement is satisfied in the plan <input checked="" type="checkbox"/> Indicates provision is not called for in legislation, but is included in plan
Strategic Regional Policy Plan for South Florida (1995)	Florida Statutes, §186.507 (1995) and Florida Administrative Code, 27E-5.004 (1995)	<input checked="" type="checkbox"/> executive summary <input checked="" type="checkbox"/> vision statement <input checked="" type="checkbox"/> trends and conditions statement <input checked="" type="checkbox"/> discussion of strategic regional subject areas (land use and public facilities, natural resources of regional significance, economic development, regional transportation, affordable housing, emergency preparedness) <input checked="" type="checkbox"/> goals <input checked="" type="checkbox"/> policies <input checked="" type="checkbox"/> coordination outline <input checked="" type="checkbox"/> regionally significant resources and facilities <input checked="" type="checkbox"/> glossary
Cape Cod (Mass.) Commission Regional Policy Plan (1991)	Cape Cod Commission Act, Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990	<input checked="" type="checkbox"/> growth policy for the county <input checked="" type="checkbox"/> regional goals for each issue area (land use /growth management, natural resources, economic development, community facilities and services, affordable housing, open space and recreation, historic preservation/community character) <input checked="" type="checkbox"/> policy for coordinating regional and local planning efforts <input checked="" type="checkbox"/> identification of the county's critical resources and management needs (including coastal, historical resources, available open space, etc)
Metro (Oregon) 2040 Framework (1997)	1992 Metro Council Charter	<input type="checkbox"/> regional transportation and mass transit systems <input type="checkbox"/> management and amendment of the urban growth boundary <input type="checkbox"/> protection of lands outside the urban growth boundary for natural resource future urban or other uses <input type="checkbox"/> housing densities <input type="checkbox"/> urban design and settlement patterns <input type="checkbox"/> parks, open spaces, and recreational facilities <input type="checkbox"/> water sources and storage <input type="checkbox"/> coordination of policies <input type="checkbox"/> planning responsibilities mandated by state law

## CHAPTER 6

Regional Planning Agency/Plan	Authority	Contents of Plan as Described in Legislation
Metro Council (Minnesota) Regional Blueprint (1994)	Minnesota Statutes, §§ 473.145 to 473.146	<p><i>Development guide shall include:</i></p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> compilation of policy statements</li> <li><input checked="" type="checkbox"/> goals</li> <li><input checked="" type="checkbox"/> standards</li> <li><input checked="" type="checkbox"/> programs</li> <li><input checked="" type="checkbox"/> maps</li> <li><input checked="" type="checkbox"/> action steps divided into five strategy areas (economic, reinvestment, building stronger communities, environmental, guiding growth)</li> </ul> <p><i>Specific/functional regional plans shall include:</i></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> forecasts of changes</li> <li><input type="checkbox"/> issues, problems, and needs</li> <li><input type="checkbox"/> goals, objectives, and priorities</li> <li><input type="checkbox"/> policies</li> <li><input type="checkbox"/> fiscal implications</li> <li><input type="checkbox"/> standards, criteria, and procedures</li> <li><input type="checkbox"/> matters that must be addressed in implementation of the plan</li> <li><input type="checkbox"/> relationship of the policy plan to other policy plans</li> <li><input type="checkbox"/> relationships to other plans</li> <li><input type="checkbox"/> additional general information as necessary</li> </ul>

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Regional Planning Agency/Plan	Authority	<b>Contents of Plan as Described in Legislation</b> <input type="checkbox"/> Indicates description is provided for in legislation <input checked="" type="checkbox"/> Indicates legislative requirement is satisfied in the plan <input checked="" type="checkbox"/> Indicates provision is not called for in legislation, but is included in plan
San Diego Association of Governments (California) Regional Growth Management Strategy (1993)	Joint Powers Agreement (1990)	<p><i>SANDAG must address the following planning issues:</i></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> quality-of-life standards and objectives</li> <li><input type="checkbox"/> holding capacities</li> <li><input type="checkbox"/> growth rate policies</li> <li><input type="checkbox"/> growth phasing</li> <li><input type="checkbox"/> regional land-use distribution</li> <li><input type="checkbox"/> growth monitoring</li> <li><input type="checkbox"/> open space preservation</li> <li><input type="checkbox"/> regional arterials</li> <li><input type="checkbox"/> transportation system and demand management</li> <li><input type="checkbox"/> siting and financing regional facilities</li> <li><input type="checkbox"/> fiscal abilities and responsibilities</li> <li><input type="checkbox"/> consistency of regional and local plans</li> <li><input type="checkbox"/> regional growth management strategy</li> </ul> <p><i>Regional Growth Management Strategy includes:</i></p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> standards, objectives, and recommended actions for air quality, transportation/congestion management, water, sewage disposal, sensitive lands and open space preservation and protection, solid and hazardous waste management, housing, and economic prosperity</li> <li><input checked="" type="checkbox"/> local and regional consistency checklist</li> </ul>
Adirondack Park (New York) State Land Master Plan (1991)	Adirondack Park Agency Act, §§ 805 and 816, New York Executive Law, Art. 27 (1990)	<p><i>State Land Master Plan:</i></p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> classifies state lands and provides general guidelines and criteria for the management and use of lands within such classifications</li> </ul> <p><i>Land Use and Development Plan:</i></p> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> describes land use areas by intensity classes and includes a map applying these classifications to private properties</li> </ul>

## CHAPTER 7

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# LOCAL PLANNING

Chapter 7 provides the authorizing legislation for planning at the local level of government. It is divided into four parts. The first part addresses the role of the planning function in local government – how the “local planning agency” is established, what its relationship with the legislative body and chief executive officer should be, and what are its powers. Several alternatives are advanced for the structure of a local planning commission. This part also provides a role for neighborhood planning councils and independent neighborhood and community organizations.

The second part details the contents of a local comprehensive plan in terms of a mandatory set of elements (if the decision is made to mandate local planning) and optional elements. The section also describes different subplans that are focused on specific areas, like neighborhoods, transit stops, and redevelopment areas. In addition, the text includes model language that describes systems for land market monitoring to ensure an adequate supply of buildable land. Such a system would be required if the local comprehensive plan contains urban growth areas, which are described in Chapter 6, Regional Planning.

The third part sets forth procedures for plan review, adoption, and amendment. The plan review component contains an optional procedure for state approval of regional and local comprehensive plans, with an appeal to a state comprehensive plan appeals board. Municipalities would also be able to appeal to the board urban growth area designations by a regional or county planning agency if agreement cannot otherwise be reached. Another innovative feature of this part is its express provision for public collaborative processes in plan-making that goes beyond the simple requirement of the single public hearing advocated in Section 8 of the *Standard City Planning Enabling Act* (1928). It offers a model statute to guide local governments in ensuring that the plan preparation process engages the general public.

The fourth part describes measures that carry out the plan and monitor its implementation, including corridor mapping and local capital budgeting. The section also includes a description of agreements with other governmental units and nongovernmental organizations, which are identified in the local comprehensive plan as having implementation responsibilities. It also provides for the establishment of benchmarking systems to measure and track performance in achieving the goals of local plans.

## CHAPTER 7

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### Chapter Outline

#### GENERAL PROVISIONS

- 7-101 Definitions
- 7-102 Establishment of Local Planning Agency
- 7-103 Powers of Local Planning Agency
- 7-104 Rule-Making Authority

#### ORGANIZATIONAL STRUCTURE

- 7-105 Establishment of Local Planning Commission
- 7-106 Powers and Duties of Local Planning Commission
- 7-107 Annual Reports of Local Planning Agency and Local Planning Commission
- 7-108 Designation of Neighborhoods
- 7-109 Neighborhood Planning Councils
- 7-110 Neighborhood and Community Organizations; Recognition

#### PLAN PREPARATION

- 7-201 Local Comprehensive Plan, Generally; Purposes
- 7-202 Specification for Plan Elements and Supporting Studies; Economic, Demographic, and Related Assumptions; Mandatory and Optional Elements; Opt-Out Provisions; Joint Plan or Plan Element Preparation

#### LOCAL COMPREHENSIVE PLAN ELEMENTS

##### Required Elements or Elements that Are Required but with an Opt-Out Provision

- 7-203 Issues and Opportunities Element
- 7-204 Land-Use Element
  - 7-204.1 Land Market Monitoring System [Optional, but Required if Urban Growth Areas Are Required]
- 7-205 Transportation Element
- 7-206 Community Facilities Element
  - 7-206.1 Telecommunications Component
- 7-207 Housing Element (Two Alternatives)
- 7-208 Economic Development Element [Opt-Out Provision Applies]
- 7-209 Critical and Sensitive Areas Element [Opt-Out Provision Applies]
- 7-210 Natural Hazards Element [Opt-Out Provision Applies]
- 7-211 Program of Implementation

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### Optional Elements

- 7-212 Agriculture, Forest [, and Scenic] Preservation Element
- 7-213 Human Services Element
- 7-214 Community Design Element
- 7-215 Historic Preservation Element
- 7-216 [Other]

### Subplans

- 7-301 Neighborhood Plan
- 7-302 Transit-Oriented Development Plan
- 7-303 Redevelopment Area Plan
- 7-304 [*Other Subplans – for Future Expansion*]

### PROCEDURES FOR PLAN REVIEW, ADOPTION, AND AMENDMENT

- 7-401 Public Participation Procedures and Public Hearings
- 7-402.1 Comprehensive Plan Appeals Board
- 7-402.2 Review and Approval of Regional and Local Comprehensive Plans and Significant Amendments
- 7-402.3 Appeal of Determination Regarding Urban Growth Area Designation
- 7-402.4 State[,][and] Special District[, and School District] Projects Not Included in Approved Regional and Local Comprehensive Plans; Review by Comprehensive Plan Appeals Board
- 7-402.5 Submission of Plans Under This Act; Withholding of Grant Money
- 7-403 Adoption of Local Comprehensive Plans
- 7-404 Certification, Filing, and Recordation of Local Comprehensive Plans; Availability for Purchase; Computer Access to Plans
- 7-405 Amendment of Local Comprehensive Plans
- 7-406 Periodic Review and Revisions of Local Comprehensive Plans and Land Development Regulations

### IMPLEMENTATION; AGREEMENTS WITH OTHER GOVERNMENT AND NONPROFIT ORGANIZATIONS

- 7-501 Corridor Map
- 7-502 Local Capital Improvement Program; Adoption of Local Capital Budget
- 7-503 Implementation Agreements
- 7-504 Benchmarks; Reporting Requirements

**Table 7-1 Voluntary Planning Organizations**

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<b>Table 7-2</b>	<b>Organizing for Neighborhood Planning</b>
<b>Table 7-3</b>	<b>Local Comprehensive Plan Elements in Model Statutes</b>
<b>Table 7-4</b>	<b>Some Pros and Cons of Mandatory Local Planning</b>
<b>Table 7-5</b>	<b>Summary of State Statutory Requirements for Comprehensive Plans</b>

### NOTE 7A – A NOTE ON NEIGHBORHOOD PLANS

#### Appendix – List of Neighborhood Plans Reviewed (by Chronology)

### NOTE 7B – A NOTE ON COMPREHENSIVE PLANNING REQUIREMENTS IN STATE STATUTES

### Cross-References for Sections in Chapter 7

<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
7-101	All Sections in Ch. 7
7-102	7-103, 7-104, 7-105, 7-107, 7-204.1, 7-406, 7-501, 7-402, 7-504, Chapter 7 generally
7-103	7-102, 7-104, 7-105, 7-107, 7-204.1, 7-406, 7-501, 7-402, 7-504, Chapter 7 generally
7-104	7-102, 7-103
7-105	7-106
7-106	7-102, 7-105, 7-107, 7-301, 7-302, 7-303, 7-401
7-107	7-102, 7-103, 7-106, 7-504
7-108	7-109, 7-110, 7-301, 7-401
7-109	7-108, 7-110, 7-301, 7-401
7-110	7-108, 7-109, 7-110, 7-301, 7-401
7-201	2-102, 4-207, 4-208, 6-201, 6-203, 7-202 to 7-216, 7-301 to 7-302, 7-401 to 7-406, Ch. 12
7-202	7-201, 7-202 to 7-216, 7-301 to 7-302, 7-401 to 7-406, Ch. 12
7-203	7-201 to 7-202, 7-204, 7-208, 7-401
7-204	4-204, 5-204, 6-201, 6-201.1, 7-201 to 7-202, 7-204.1, 7-205, 7-206, 7-209, 7-211, Ch. 12
7-204.1	6-201, 6-201.1, 7-204
7-205	6-204, 7-205, 7-211, 7-302, 7-501, 7-503, Ch. 12
<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
7-206	7-204, 7-206.1, 7-211

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7-206.1	4-206. 1, 7-202, 7-206, 7-211
7-207	4-207, 4-208, 6-203, 7-208, 7-211, Ch. 12
7-208	4 -206, 7-202, 7-203, 7-204, 7-207, 7-211, 14-201
7-209	5-203, 5-204, 7-202, 7-204, 7-205, 7-206, 7-210, 7-211, 7-504
7-210	5-203, 5-204, 7-202, 7-211
7-211	6-402, 7-201 to 7-210, 7-212 to 7-214, 7-301 to 7-303, 7-502, 7-503, 7-504
7-212	7-204, 7-211, 7-503
7-213	7-211, 7-503
7-214	7-211
7-215	5-203, 5-204, 7-211
7-301	7-106, 7-108 to 7-110, 7-211
7-302	7-205, 7-106, 7-211
7-303	7-106, 7-211, 7-503
7-401	7-106, 7-108 to 7-109, 7-110, 7-201 to 7-203
7-402.1	7-402.2 to 7-402.5
7-402.2	4-202, 6-305, 6-305, 7-402.1, 7-402.3 to 7-402.5, 7-403
7-402.3	6-201, 6-201.1, 7-402.1 to 7-402.3, 7-402.4 to 7-402.5
7-402.4	7-402.1 to 7-402.3, 7-402.5
7-402.5	7-402.1 to 7-402.4
7-403	5-101 <i>et seq.</i> , 5-201 <i>et seq.</i> , 5-301 <i>et seq.</i> , 7-402.2, 7-404 to 7-405, 7-501
7-405	7-403, 7-405
7-406	7-102 to 7-103, 7-201 to 7-202, 7-204.1, 7-405, 7-504, 8-102, 8-103, 8-601, 8-602, 10-201 <i>et seq.</i>
7-501	7-205, 7-403
7-502	7-211
7-503	7-205, 7-211, 7-212, 7-213, 7-303
7-504	7-107, 7-109, 7-110, 7-211, 7-406

## WHY SHOULD LOCAL GOVERNMENTS PLAN?

## CHAPTER 7

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This Chapter provides the authorizing legislation for planning at the local level of government – how local governments organize to plan, what plans should contain, and the processes for adopting them.<sup>1</sup> It is noteworthy that, throughout the United States, even where state statutes do not require planning, local governments of all sizes continue to plan on their own. This underscores how widespread the recognition of the benefits derived from such planning has become. While each local government may have a special set of reasons in undertaking the preparation of plans, several of the most frequently-mentioned include:

- ◆ Local planning draws the attention of the local legislative body, appointed boards, and citizens to the community’s major development problems and opportunities – whether they be physical, environmental, social, or economic. A plan gives elected and appointed officials in particular an opportunity to back off from their preoccupation with pressing, day-to-day issues and to clarify their ideas on the kind of community they are trying to create by their many specific decisions. The local planning process provides a chance to look broadly at programs a local government may initiate regarding housing, economic development, provision of public infrastructure and services, environmental protection, and natural and manmade hazards and how they relate to one another. A local comprehensive plan represents a “big picture” of the community, one that can be related to the trends and interests of the broader region as well as the state in which the local government is located.<sup>2</sup>
- ◆ Local planning is often the most direct and efficient way to involve the members of the general public in describing the community they want. The process of plan preparation, with its attendant workshops, questionnaires, meetings, and public hearings, permits two-way communications between citizens and local government officials as to a vision of the community

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<sup>1</sup>Note: The model legislation in this Chapter assumes the existence of a state planning agency (described in Chapter 4, State Planning) and/or a regional planning agency (described in Chapter 6, Regional Planning). The nature of the relationships between state and regional planning agencies and local governments will vary considerably. For example, on the simplest level, that relationship may be technical assistance by the state or regional agency to the local government. Or, there may be a state and/or regional plan that has an advisory (e.g., nonbinding) status with respect to local planning. On the other hand, the relationship may extend to a mandatory review and certification by the state and/or regional planning agency of the local government's plans for consistency with state and/or regional goals and policies and state statutes and administrative rules. (See Sections 7-402.1 to 7-402.2, which establish a procedure for state review and approval of local comprehensive plans.) The state or regional planning agency may also have other powers of intervention in local land-use decision-making when such decisions affect state or regional interests (see Section 4-208, State Planning for Affordable Housing, and Chapter 5, State Land-Use Control). Finally, in the area of transportation planning, there may be a metropolitan planning organization (MPO) whose role it is to formulate a long-range regional transportation plan as a requirement of ensuring continuing federal funding for transportation improvements in the region (the MPO may also be a regional planning agency as well). Many of the projects in the regional transportation plan will evolve out of local planning efforts (see Section 6-204, Regional Transportation Plan).

<sup>2</sup>Alan Black, “The Comprehensive Plan,” in *Principles and Practice of Urban Planning*, William I. Goodman and Eric C. Freund, eds. (Washington, D.C.: International City Management Association, 1968), 360.

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and the details of how that vision is to be achieved. In this respect, the plan is “a blueprint of values” that evolves over time.<sup>3</sup>

- ◆ Local planning results in the adoption of a series of goals and policies that, ideally, should guide the local government in administering regulations like zoning and subdivision controls, in the location, financing, and sequencing of public improvements in the community, and in guiding redevelopment efforts. In so doing, it may also provide a means of coordinating the actions of many different agencies within the local government itself.

Apart from these reasons from the local government perspective, local planning also has direct benefits to the private sector.

- ◆ Because planning results in a statement of how the local government intends to act over time with respect to its physical development and redevelopment in terms of public investment and execution of land development controls, the “private land owner may shape his own plans in the plastic stage when they have not yet crystallized” in the words of one writer.<sup>4</sup> A plan sends signals by providing a “prophecy of public reaction” to specific development proposals, which ultimately influences complimentary private investments.<sup>5</sup>
- ◆ The predictability that a plan offers by its requirement of information-gathering and analysis ensures (hopefully) that what a local government does is based on facts, not “haphazard surmises.” It thus provides a measure of consistency to governmental action, a “guard against the arbitrary” that “diminishes the problems of discrimination, the granting of special privileges, and the denial of equal protection of the laws.”<sup>6</sup>

Finally, from the standpoint of the state itself, it is desirable that local governments plan. State facilities like freeway interchanges and parks are affected by what local governments authorize to occur around them. A local government can allow development that is either compatible or incompatible with such state investments. Typical state interests – like protection of wetlands, preservation of coastal areas and farmland, and provision of affordable housing – are directly influenced by what local governments do. While states do not, in all instances, attempt to directly influence the substantive content of plans or their implementation, the preparation of such plans does provide an opportunity for such interests to be raised so that local governments can address them

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<sup>3</sup>Charles M. Haar, “The Master Plan: An Impermanent Constitution,” *Law and Contemporary Problems* 20, no. 3 (Summer, 1955), 359.

<sup>4</sup>Id., 363

<sup>5</sup>Id., 362.

<sup>6</sup>Id., 365-66.

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in a positive and proactive manner. The mere fact that a local government might consult with the state transportation or natural resources department in a plan's preparation is a way in which state interests may be articulated and accommodated.

Where should the planning organization in local government be located? How should its powers be defined and described? The planning organization is an inherently unusual agency since it incorporates both *line* (providing direct service to the public) and *staff* (providing advice to the executive branch and analysis across line departments) functions. These functions may be performed by *separate divisions* in one office (e.g., a long-range planning division as well as a current short-range planning division – incorporating permit issuance, zoning, and subdivision). The planning organization or department may report to either the local chief executive, an independent planning commission, or the legislative body itself. It may also be part of a community development department that includes engineering, building, housing, and environmental code enforcement, as well as federal Community Development Block Grant administration. When the planning organization is fulfilling a staff function (such as preparing long-range plans, advising on policy, or conducting research), it is typically serving a diverse constituency that includes the chief executive officer, the legislative body, the individual line departments, and the planning commission itself.<sup>7</sup> Sometimes a local government will obtain technical planning services through contracts with regional planning agencies, other local governments, and planning consultants.

Over the years, model statutes and journal articles have proposed a wide variety of approaches for establishing the planning function in local government.

(1) **Standard City Planning Enabling Act (SCPEA).** The SCPEA, drafted by an advisory committee of the U.S. Department of Commerce in the 1920s, proposed the creation of an independent municipal planning commission, to be composed of nine members, including the mayor, one of the administrative officials of the municipality selected by the mayor, a member of the council selected by the council itself, and six other persons who were to be appointed by the mayor, if the mayor was elected.<sup>8</sup> The terms of the appointed members were six years. If the mayor was not elected, then the council would select the remaining six members. Commission members were to receive no compensation for their work.

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<sup>7</sup>Linda C. Dalton, "Politics and Planning Agency Performance: Lessons from Seattle," *Journal of the American Planning Association*, 51, no. 2 (Spring 1985):189-190, citing James A. Spencer, "Planning Agency Management," in *The Practice of Local Government Planning*, edited by Frank So, Israel Stollman, Frank Beal, and David S. Arnold (Washington, D.C.: International City Management Association), 84, and John Friedman, "A Response to Altschuler: Comprehensive Planning as a Process," *Journal of the American Institute of Planners*, 31, no. 3 (August 1965): 195. See generally Beverly Moss Spatt, *A Proposal to Change the Structure of City Planning: Case Study of New York City* (New York: Praeger, 1971), ch. 1.

<sup>8</sup>Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (Washington, D.C.: U.S. GPO, 1928), Tit. 1, §§2-11 (hereinafter referred to as "SCPEA"). The main provisions of the SCPEA were directed at establishing a municipal planning function, but not at establishing a comparable structure for unincorporated areas, such as in counties or townships. The act did, however, authorize regional planning commissions.

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Under the SCPEA, the planning commission was the municipal planning agency. It had the authority to hire staff and contract with city planners, engineers, and other consultants to carry out its responsibilities. The expenditures for its activities, exclusive of gifts, were to be within the amounts appropriated for the purpose by the council, which was to provide the funds, equipment, and accommodations for the commission's work.<sup>9</sup>

A note to the SCPEA indicated that the number of members on the planning commission could range widely. States “may prefer to adopt a more elastic provision, as, for instance, from 5 to 11 members, thus giving the council of each municipality some leeway to be varied somewhat according to the size of the municipality.”<sup>10</sup>

On the question of whether to include the mayor, the SCPEA's authors wrote, “there is a decided difference of opinion.”<sup>11</sup> The central issue was whether the planning commission was to include a person who would represent the municipal administration on the commission. According to the SCPEA, if the mayor were the chief executive officer, then the mayor should sit on the commission. On the other hand, if there were a city manager instead of a mayor, then the city manager should fill that slot.

The SCPEA also endorsed the view that, in a community where the mayor served as both the chief elected official and the chief executive officer, the mayor is in a position to become the leader in administrative policies and is therefore the “logical liaison officer between planning and administration and between planning and the public.”<sup>12</sup> Consequently, the mayor “is the official who in turn is in the best position to give planning the necessary prestige with the public and the council.”<sup>13</sup>

The SCPEA did not specify which administrative official of the municipality should sit on the commission; the official selected could vary upon the circumstances. In some cities, it could be the city engineer; in others it could be the chairman of the park board. What was important, noted the SCPEA's authors, was to ensure that either a substantial majority or two-thirds of the commission be composed of members who were not regular elected or appointed officials and who had no official functions other than those of planning. This position stemmed from the SCPEA's philosophy that the responsibility of preparing a plan was a long-range effort that would cover the incumbency of many successive elected officials. Therefore, the commission had to be predominately composed of lay officials “who should be free from the pressures of purely current problems.”<sup>14</sup>

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<sup>9</sup>Id., Tit. I, §5,

<sup>10</sup>Id., n. 12.

<sup>11</sup>Id., n. 13.

<sup>12</sup>Id.

<sup>13</sup>Id.

<sup>14</sup>Id., n. 10.

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The SCPEA's authors maintained that elected officials and administrative officers, because of their preoccupation with pressing current problems, could not be expected to provide leadership in long-range thinking. Therefore, the chairman, “generally the outstanding personality of the commission,” should be chosen from the citizen members and not the ex officio members.<sup>15</sup>

Similarly, the SCPEA's authors believed that having a member of the city council on the planning commission would be “highly desirable” to ensure that the city’s chief legislative body “feel[s] that it has an integral part of the work of city planning.”<sup>16</sup> Having council representation on the commission was all the more important because of a provision in the SCPEA that authorized the council to overrule the planning commission's disapproval of specific public improvements and street locations.

The SCPEA’s authors viewed service on the planning commission to be a part-time effort. Thus, no compensation should be necessary, since “there is nothing in city planning experience hitherto to indicate that compensation is needed to obtain men [sic] of the necessary qualifications and enthusiasm.”<sup>17</sup>

In addition, the SCPEA's authors resisted the imposition of professional qualifications for the planning commission members, stating that “capacity for leadership in city planning, rather than any particular type of technical or professional training, constitutes the best qualification.”<sup>18</sup> Interestingly, the SCPEA’s authors specifically did not recommend that the planning commission members be electors of the municipality. In fact, they categorically rejected it. The SCPEA's authors noted that often a person who is “well adapted” for service on a planning commission may reside in some nearby suburb “and has large business interests in the municipality in question.”<sup>19</sup>

The SCPEA limited the planning commission's responsibilities to “make and adopt a master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission's judgment, bear relationship to the planning of such municipality.”<sup>20</sup> After the master plan was adopted, the commission gained review powers over streets, squares, parks, or other public ways, public buildings or structures, and public utilities, whether publicly or privately owned. The SCPEA gave the commission the power to promote public interest in the plan and publish and distribute it. The planning commission could also serve as the zoning commission (but not the board of zoning adjustment), which would formulate a zoning code for the community and

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<sup>15</sup>Id., n. 22.

<sup>16</sup>Id., n. 15.

<sup>17</sup>Id., n. 18.

<sup>18</sup>Id., n. 16.

<sup>19</sup>Id.

<sup>20</sup>The contents of the plan, as described in the SCPEA, are discussed in the commentary to Sections 7-201 *et seq.*

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advise the council on zoning matters. Once the planning commission had adopted a major street plan, it became responsible for drafting regulations governing land subdivision within its jurisdiction and subsequently reviewing subdivisions. It also could then formulate, for approval by the council, a plat of the area that it recommended to be reserved for future acquisition of public streets in order to prevent the construction of buildings in lands reserved for such streets.

There is a substantial body of literature critiquing the provisions of the SCPEA. Some concerns, relating to the preparation and adoption of plans and their relationship to implementation, are addressed later in this Chapter. Others, on organizational and compositional issues, are discussed below.

*Exclusion of elected officials from plan-making.* A feature of the SCPEA, as noted, was a planning commission dominated by lay appointed officials. Only the planning commission had the authority to develop and adopt the master plan (although this was to change with the advent of planning departments that reported to the chief executive officer), employ a planning staff, and contract with consultants. With the exception of its power to adopt the official map or plat of land to be reserved for future acquisition for public streets, the legislative body – though it had a representative on the planning commission – was largely shut out of the plan-making process. Elected officials were to refer planning matters to the commission for clear-headed, nonpartisan advice. Indeed, the planning commission could limit legislative options. For example, commission disapproval of the location, character, and extent of a proposed public improvement could be overridden only by a two-thirds vote of the council. These exclusions and limitations reflected the philosophy of the municipal reform movement in the United States of the 1920s, which generally distrusted elected officials. In the view of one historian, “The planning commission was . . . the guardian of the plan and the nonpolitical champion of the people's interest, from time to time putting thoughtless or rascally politicians on the spot.”<sup>21</sup>

David W. Craig, the former city solicitor for the City of Pittsburgh, argued in a famous 1963 speech that the planning commission should be abolished and that its planning functions purposely transferred to the governing body because it was elected officials, rather than an independent board, that had the authority to carry out the plans. Elected officials, he said, could be sold on the idea of planning after they saw it demonstrated in independent hands and thus could be trusted to use planning techniques as instruments of executive and legislative decisionmaking. “[T]he history of the planning board as an institution,” he said, “has shown it first to be an initiator, then a demonstrator, then a stimulator, and sometimes a gadfly, but the later years have seen its effectiveness grow pale beside the real effectiveness that can be demonstrated by executive and legislative officials willing to plan and implement those plans.”<sup>22</sup>

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<sup>21</sup>Mel Scott, *American City Planning Since 1890* (Berkeley: University of California Press, 1971), 193. See also John Howard, “In Defense of Planning Commissions,” *Journal of the American Institute of Planners*, 17, no. 2 (Spring 1951): 89-94.

<sup>22</sup>David W. Craig, “Pomeroy Memorial Lecture: A Plea for the Eventual Abolition of Planning Boards,” in *Planning 1963* (Chicago: American Society of Planning Officials, 1963), 70.

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Craig's brief for the abolition of planning boards was endorsed in a 1964 article in the *Journal of the American Institute of Planners* by Peter H. Nash and Dennis Durden.<sup>23</sup> Nash and Durden maintained that the original role of the independent planning board was heavily weighted toward the endorsement of the concept of planning itself. Later, they said, the planning board became the planner's "civic godparent . . . and the independent board became the guardian of 'the plans'."<sup>24</sup> They added:

As guardians and endorsers of the early plans, boards had almost no responsible opposition. They sponsored and endorsed a path of growth which sought to achieve fairly general goals by extinguishing blatant abuses. Alternative plans of development were rarely expressed. The choice was between the City Plan (which implied "progress" and a better life) or an unplanned method of growth (which the board was convinced led to civic damnation, abuses of resources and lost opportunities). Both the boards and the planner tended to present issues in black and white terms, which leading citizens could easily endorse.<sup>25</sup>

Nash and Durden believed that as planning became established in a community, there was less of a need for the endorsement function. Many of the activities carried out by the planning board were executive in nature (as examples they cited the opening or closing of a street) and could be assumed by a planning director who dealt directly with the legislature through the chief executive. "There is no reason," they wrote, "why professional planners cannot meet with legislators in special sessions to give them the same detailed data as were received by members of the planning board...."<sup>26</sup>

Nash and Durden thus favored replacing the independent planning boards with a wide range of independent task forces that would work directly with the professional planning staff in a strictly advisory capacity. Appointments would be made by the chief executive officer with the advice and consent of the legislative body. Each separate task force would tackle one planning problem in a sequence determined by the planning director and/or the chief executive officer, and produce alternate workable solutions. The final decision as to the alternative to be implemented would rest with the legislature.

The advantages of this approach, they wrote, included an enlarged range of available citizen talent, especially by top professionals and key executives who would otherwise be reluctant to serve on a planning board because of time commitments, and a "built-in safeguard against fossilization"

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<sup>23</sup>Peter H. Nash and Dennis Durden, "A Task-Force Approach to Replace the Planning Board," *Journal of the American Institute of Planners* 30, no. 1 (February 1964): 10-22.

<sup>24</sup>Id., 11.

<sup>25</sup>Id.

<sup>26</sup>Id., 12.

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because the task forces would be created and disbanded as routine procedure when needs develop or their work is completed.<sup>27</sup>

In the alternative, Nash and Durden wrote, the planning board could be reconstituted on the basis of expertise (rather than endorsement or representativeness or civic reputation). In this context, the board would become an advisor to the professional planner and the legislators, with a valuable service to contribute.

*Elitism.* The concept of the planning commission has its roots in the belief of elites, predominately composed of business leaders. Indeed, the commentary to the SCPEA says as much. Harvey Moskowitz, a planning consultant, undertook a study of planning boards in New Jersey in early 1981 and 1982. The study covered 393 of the state's 557 boards (70.6 percent of the state, with 2,063 individual responses) approximately 45 percent of all planning board members in New Jersey. The characteristics examined included age, sex, race, education, occupation, employer, family income, marital status, number of dependent children, and housing tenure. Moskowitz found that, based on the characteristics he analyzed, planning board members differ from the general population and are drawn from an elite strata of the population. Planning board members were predominately white, male, working in the professions or as managers, with median family incomes considerably above the median family income of the general population. The research also revealed that planning board members were long-term residents of their municipalities, married, owned their own homes, and had dependent children at home.<sup>28</sup> He observed that "the original concept [of the planning commission] was elitist by design in the hope that by having men of wealth and independence administer planning, it would be divorced from the then [in the 1910s and 1920s] prevailing politics of corruption."<sup>29</sup> In a subsequent article on the study, Moskowitz reflected:

In a sense, it is reassuring that planning board members are by and large a highly educated group, with traditional roots in the community and with the resources needed to spend the time and energies in order to undertake their critical work. The disturbing aspects, of course, are that many groups are not represented on boards. In almost 25 years of working with local planning boards, I can only recall, to the extent that I was aware, two renters on boards. (The survey confirmed that only 4.3 percent of all planning board members are renters.) *Nonwhites continue to be significantly underrepresented, and while women have expanded their role in local planning, they still represent the exception on the board. By far the most obvious omission are lower income groups and blue collar workers. What the findings clearly suggest, at least from one perspective, is a need for appointing authorities to reach*

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<sup>27</sup>Id., 19.

<sup>28</sup>Harvey S. Moskowitz, *Planning Boards in New Jersey: Current Realities and Historical Perspectives* (unpub. Ph.D. dissertation, Rutgers University, New Brunswick, N.J., 1983), ii.

<sup>29</sup>Id., 269.

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*out to broaden the base to allow for a greater diversity of views on local planning boards.*<sup>30</sup>  
[Emphasis supplied.]

A 1987 study by the American Planning Association drew similar conclusions about the composition of planning commissions. The national survey revealed, based on 4,380 questionnaires, that nearly eight out of ten commissioners were men; more than nine out of ten were white, although in large cities the ratio was closer to seven out of ten; and almost eight out of ten were 40 years old or older. Most planning commissioners were either businessmen or are engaged in real estate, education, engineering, or law. More than one out of ten were retired.<sup>31</sup>

(2) **Alfred Bettman, Model Acts.** Alfred Bettman, the Cincinnati attorney who served on the advisory committee that drafted the *Standard City Planning and Zoning Enabling Acts*, in 1935 drafted a model municipal planning enabling act that closely tracked the provisions of the SCPEA, including the independent planning commission as the official planning agency.<sup>32</sup> In a commentary to the act, Bettman recognized the possibility that, in the larger cities, a better approach than the independent planning commission (with authority over staff) might instead “be the creation of a planning department which, while independent of the departments which construct public works or determine or regulate public or private land uses, is a department headed, liked other departments, by a permanent paid official.”<sup>33</sup> Bettman felt that a planning department accountable to the chief executive of the local government was worthy of consideration at the time, but that “there has been as yet little experience in the United States with that type of planning agency” to justify the wholehearted support for it in a model statute<sup>34</sup> The independent commission, he said, “may be needed transitionally, at least, for the establishment in any municipality of a tradition of using planning methods as an habitual part of municipal practice.”<sup>35</sup>

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<sup>30</sup>Harvey S. Moskowitz, “Who Plans? A Look at Who Sits on New Jersey Planning Boards,” *Newsletter of the New Jersey Chapter of the American Planning Association* 2, no. 2 (Winter 1994): 2. See also *The Planning Commission as Viewed by Planning Directors*, Planning Advisory Service Report No. 200 (Chicago: American Society of Planning Officials, July 1965), 2 (noting that occupational, as opposed to ethnic, civic, or geographic balance is the most frequently sought balance on a planning commission).

<sup>31</sup>Welford Sanders and Judith Getzels, *The Planning Commission: Its Composition and Function, 1987*, Planning Advisory Service Report No. 400 (Chicago: American Planning Association, 1987), 4-6.

<sup>32</sup>Alfred Bettman, in Edward Bassett, Frank B. Williams, Alfred Bettman, and Robert Witten, *Model Laws for Planning Cities, Counties and States Including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935).

<sup>33</sup>*Id.*, 60.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

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(3) **Robert A. Walker, *The Planning Function in Urban Government*.** Political scientist Robert A. Walker extensively reviewed the operations of planning commissions and other planning agencies in 37 cities in the United States as part of his study, *The Planning Function in Urban Government*, published in 1941 and reissued in a second edition in 1950.<sup>36</sup> Walker concluded that the independent, unpaid citizen planning commission “is not satisfactorily executing the planning function at the present time.”<sup>37</sup> Walker felt that the planning commission, whose members were drawn primarily from business executives and from those professions closely identified with construction (i.e., realtors, architects and engineers), generally lacked influence in their communities. “Commission members,” he wrote, “have a limited social outlook and a wholly inadequate grasp of planning. Many of the original pioneers in the field have passed on, and later appointees frequently lack the basic interest and enthusiasm of those leaders.”<sup>38</sup>

Walker felt that planning commission’s autonomy and amateur character limited its effectiveness. “The watchdog role which many of the commissions appear to have adopted in lieu of a spirit of co-operation has been a source of friction and antagonism to public officials, interfering with the wholehearted acceptance of the planning function.”<sup>39</sup>

The failure of many planning agencies to find an active role in urban government, said Walker, “is undoubtably due to the emphasis which has been placed upon guaranties of independence from political influence as distinguished from a more relevant emphasis upon usefulness and cooperation.”<sup>40</sup> Instead, Walker favored attaching planning as a staff function of the executive officer of the local government where he believed it would be more effective.<sup>41</sup> The chief executive, he maintained, was assuming an increasing importance in city government, with greater responsibility for coordinating government functions.

(4) **ALI Code.** The American Law Institute's *A Model Land Development Code* authorized the local government to designate “the local governing body or any committee, commission, board or

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<sup>36</sup>Robert W. Walker, *The Planning Function in Urban Government*, 2d ed. (Chicago: University of Chicago Press, 1950).

<sup>37</sup>Id., 333.

<sup>38</sup>Id.

<sup>39</sup>Id.

<sup>40</sup>Id., 334.

<sup>41</sup>It is worth noting that placing the planning function in the executive office is no guarantee of its effectiveness. Linda C. Dalton provides an interesting account of the failure of the City of Seattle’s Office of Policy Planning in the executive department because of poor technical performance, inexperienced staff, inability to manage citizen participation processes, and tension between it and other line departments as well as the city council, which was engaged in a struggle with the mayor over the office’s priorities. Linda C. Dalton, “Politics and Planning Agency Performance: Lessons from Seattle,” *Journal of the American Planning Association* 51, No. 2 (Spring 1985): 189-199, esp. 194-198.

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officer of the local government” as the “land development agency.”<sup>42</sup> The Code's drafters reasoned that the local government “should have wide discretion in determining the agency best qualified to regulate land development under the conditions existing in the local community, and the land development agency so designated should determine its own internal organization and the extent to which it delegates power to other committees, boards or officers.”<sup>43</sup> Consequently, the Code dispensed with describing a planning commission or board, a board of zoning appeals, or other adjudicative body. The Code also contained no standards that a local adjudicatory board or officer would utilize in reviewing appeals from determinations made in the administration of local development decisions. The public would be protected, the Code's drafters contended, not by any “rigid mold” for the internal structure of the land development agency, “but by requiring full disclosure to the public of whatever internal organization is established and designed to ensure fair treatment of all parties appearing before it.”<sup>44</sup>

One state, Florida, has employed the ALI Code's approach with respect to the establishment of the local planning agency. Florida does not dictate the structure or organization of the local planning agency. Rather, the state statute provides:

The governing body of each local government, individually or in combination [with other local governments] . . . shall designate and by ordinance establish a “local planning agency,” unless the agency is otherwise established by law. The governing body may designate itself as the local planning agency . . . The agency may be a local planning commission, the planning department of the local government, or other instrumentality, including a countywide planning entity established by special act or a council of local government officials . . .<sup>45</sup>

Once the governing body designates the local planning agency, it must notify the state land planning agency of the designation. The local planning agency is responsible for preparing the local comprehensive plan or plan amendments and for making recommendations regarding the adoption or amendment of the plan to the governing body.

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<sup>42</sup>American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976), §2-301(1).

<sup>43</sup>Id., Note to §2-301, 71-72.

<sup>44</sup>Id., 72.

<sup>45</sup>Fla. Stat. Ann. §163.3174(1) (West 1996).

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### MODELS FOR ORGANIZING THE PLANNING FUNCTION

The models that follow (Sections 7-101 to 7-107) describe the organizational structure and distribution of power for planning in local government, including organization structures for neighborhood planning (Sections 7-108 to -110). Like the ALI Code, they first require the local legislative body to designate a “local planning agency” in order to undertake planning. However, the selection and organizational form of the planning agency is the local government’s decision; the philosophy of the model statute is that the local government should be given as much flexibility as possible in structuring the planning function. Section 7-102 directs the legislative body to designate either the local planning commission, a planning department, a community development department, or such other instrumentality other than itself as the local planning agency.<sup>46</sup> Creation of a local

**Table 7-1: Voluntary Planning Organizations**

Type	Appropriate Use
Local planning commission	Local government wants permanent lay body to advise on planning issues, champion or endorse plans, mediate development issues, and serve as buffer with public.
Advisory task force	Local government wants broad representation of interests or high level expertise for specific plans or projects.
Neighborhood planning council	Local government wants to establish permanent bodies to serve as “voice of the neighborhoods.”
Neighborhood or community organization	Local government wants to recognize role of independent organizations that represent diverse (and sometimes conflicting) interests.

<sup>46</sup>While it is certainly possible for a legislative body to designate itself as the local planning agency (as well as assume the full responsibilities of the local planning commission), in practice it is rarely done because of the need for planning expertise and because of the other competing demands on the legislative body’s time. If the legislative body is the local planning agency, it will have the full burden of dealing with all planning issues on top of the host of other political, financial, and administrative issues matters it must face. The risk is that planning issues will get less attention than they may deserve with an overworked legislative body. Moreover, while the consideration and adoption of plans is a policy-making or legislative function, the administration of plans and regulations is typically thought of as a policy-effectuation or executive function. The self-designation of a legislative body as the local planning agency will blur the distinction between the two functions, involving the legislative body in the minutiae of development reviews and other administrative or executive activities. Consequently, it is not recommended that enabling legislation authorize self-designation. Still, under these model statutes the legislative body will continue to have final authority over key decisions

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planning commission can be optional or mandatory and task forces may instead fulfill some of the advisory and citizen involvement functions.<sup>47</sup>

### GENERAL PROVISIONS

#### 7-101 Definitions

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

**“Adequate Public Facilities”** mean capital improvements that have the capacity to serve development without decreasing levels of service below [locally *or* regionally] established minimums.

**“Affordable Housing”** means housing that has a sales price or rental amount that is within the means of a household that may occupy middle-, moderate-, or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

**“Agriculture”** or **“Agricultural Use”** means the employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops, or feeding (including grazing), breeding, managing, selling, or producing livestock, poultry, fur-bearing animals or honeybees, or by dairying and the sale of dairy products, by any other horticultural, floricultural or viticultural use, by animal husbandry, or by any combination thereof. It also includes the current employment of land for the primary purpose of obtaining a profit by stabling or training equines including, but not limited to, providing riding lessons, training clinics and schooling shows.

**“Agricultural Land”** means land on which the land use of agriculture occurs.

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such as local comprehensive plan adoption, development code enactment, zone changes, and capital budget approval.

<sup>47</sup>As an example of a combination of a planning department and advisory task force, see Vt. Stat. §4321 (b) (1996), which provides:

In any urban municipality, the legislative body may create a planning department headed by a planning director as a substitute for a planning commission, and, in that event all of the powers and duties of planning commissions set forth herein shall be exercised by such planning director, subject to such regulations as that executive body shall from time to time specify . . . In such event, that legislative body may further create an advisory planning council, which shall only function in an advisory capacity to the planning director in the exercise of his powers and duties, and shall have such other functions as that legislative body shall, by resolution, assign to such council.

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**“Appointing Authority”** means the legislative body, the chief executive officer, or other elected or appointed official(s) of the local government with the power of appointment and removal of members of boards and of agency or department directors.

**“Aquifer”** means a subsurface geologic deposit capable of providing a sufficient quantity of potable water.

**“Benchmark”** means a performance-monitoring standard that allows a local government to periodically measure the extent to which the goals and policies of a local comprehensive plan are being achieved.

**“Benchmarking System”** means a process to regularly collect, monitor, and analyze data on the achievement of the goals and policies of a local comprehensive plan.

**“Buildable Land”** mean land within urban and urbanizable areas that is suitable, available, and necessary for residential, commercial, and industrial uses, and includes both vacant land and developed land that, in the opinion of the local planning agency, is likely to be redeveloped.

**“Carrying Capacity Analysis”** means an assessment of the ability of a natural system to absorb population growth as well as other physical development without significant degradation.

**“Community Development Department”** means a department of a local government whose functions may include, but shall not be limited to, planning and land development control, building and housing code enforcement, engineering, inspection, administration of federal and state grants, and other related activities, and whose director is accountable to the chief executive officer of the local government or to the legislative body.

**“Comprehensive Plan, Local”** means the adopted official statement of a legislative body of a local government that sets forth (in words, maps, illustrations, and/or tables) goals, policies, and guidelines intended to direct the present and future physical, social, and economic development that occurs within its planning jurisdiction and that includes a unified physical design for the public and private development of land and water.

◆ Note that the “local comprehensive plan” is intended to “direct” development, rather than to “guide” it. Under the approach used in the *Legislative Guidebook*, the plan, once adopted by the local government, assumes an important policy-setting role in controlling the timing, character, and location of development and in formulating implementation measures.

**“Concurrent”** means that adequate public facilities and/or transportation demand management strategies are in place when the impacts of development occur, or that a governmental agency and/or developer have

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made a financial commitment at the time of approval of the development permit so that the facilities or strategies are completed within [2] years of the impact of the development.<sup>48</sup>

**“Corridor Preservation Restriction”** means a deeded conservation restriction that conveys, for compensation, the right to wholly or partly prohibit development on reserved land for a limited time period stated in the restriction, not exceeding [10] years.

**“Critical and Sensitive Area”** means lands and/or water bodies that:

- (a) provide protection to or habitat for natural resources, living and non-living; or
- (b) are themselves natural resources;

requiring identification and protection from inappropriate or excessive development.

**“Density”** or **“Net Density”** means the result of:

- (a) dividing the total number of dwelling units existing on a housing site by the net area in acres; or
- (b) multiplying the net area in acres times 43,560 square feet per acre and then dividing the product by the required minimum number of square feet per dwelling unit.

“Density” or “Net Density” is expressed as dwelling units per acre or per net acre.<sup>49</sup>

**“Element”** means a discrete part of a local comprehensive plan that addresses a distinct topic, such as land use, transportation, housing, or a program of implementation.

**“Floor Area”** means the gross horizontal area of a floor of a building or structure measured from the exterior walls or from the center line of party walls. “Floor Area” includes the floor area of accessory buildings and structures.

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<sup>48</sup>As a practical matter, it is often difficult for public facilities to be designed, bid, and built so that they are available for use at the time the impacts of a development occur. Moreover, it may be better to see exactly what the impact from the development is rather than what it is predicted to be before constructing new facilities or implementing strategies. Consequently, permitting a completion period of up to two years for facilities and strategies may be desirable.

<sup>49</sup>Net density is used in the *Legislative Guidebook* in preference to gross density for two reasons. First, net density more accurately reflects the number of dwelling units that are either built or likely to be built on privately owned land because it removes from the calculation any publicly owned land and improvements. Second, the use of net density in a land use element of a local comprehensive plan allows an accurate determination of consistency with zoning code requirements, which apply only to privately owned land by specifying minimum area per dwelling unit. It would be very difficult to make a determination of consistency between a land-use plan map that delineates future residential uses on the basis of *gross density* with a zoning ordinance that instead addresses *net density* and could lead to later disputes (and litigation) over interpretation of the relationship between a plan map and a zoning designation or proposed zoning map amendment.

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**“Floor Area Ratio”** means the sum of floor areas of all floors of buildings or structures on a lot divided by the area of the lot.

**“Forest”** means a tract or tracts of contiguous trees or tree stands.

**“Forest Land”** means land on which the land use of forestry occurs.

**“Forestry”** or **“Forest Operations”** means the growing or harvesting of tree species used for commercial or related purposes.

**“Geographic Information System”** or **“GIS”** means computer software programs that allow the analysis of data or databases in which location or spatial distribution is an essential element, including, but not limited to land, air, water, and mineral resources, the distribution of plant, animal, and human populations, real property interests, zoning and other land development regulations, and political, jurisdictional, ownership, and other artificial divisions of geography.

**“Intensity”** means any ratio that assesses the relative level of activity of a land use, including, but not limited to, a floor area ratio, building coverage ratio, or impervious surface ratio.<sup>50</sup>

**“Household”** means the person or persons occupying a dwelling unit.

**“Human Services”** mean activities to help meet the health, welfare, employment, or other basic needs of society or groups in society, such as the poor, the elderly, the disabled, and youth.

**“Land Development Regulations”** mean any zoning, subdivision, impact fee, site plan, corridor map, floodplain or stormwater regulations, or other governmental controls that affect the use, density, or intensity of land.

**“Legislative Body”** means the governing body of a local government with the power to adopt ordinances, regulations, and other documents that have the force of law.

**“Level of Service”** means an indicator of the extent or degree of service provided by, or proposed to be provided by, a public facility based on and related to the operational characteristics of the facility. “Level of service” shall indicate the capacity per unit of demand for each public facility.

**“Local Planning Agency”** means an agency designated or established as such by the legislative body, which may be constituted as a local planning commission, a community development department, a planning department, or some other instrumentality as having the powers of Section [7-103] of this act..

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<sup>50</sup>See, e.g., Lane Kendig, *New Standards for Nonresidential Uses*, Planning Advisory Service Report No. 405 (Chicago: American Planning Association, December 1987).

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**“Local Capital Budget”** means the budget for local capital improvements adopted by a local legislative body by ordinance for each fiscal year. A local capital budget is also the first year of the local capital improvement program.

**“Local Capital Improvement”** means any building or infrastructure project that has a life expectancy of [10 *or insert other number*] or more years and is over \$[ ,000] [*or an amount established by the local government’s legislative body by ordinance*] that will be owned and operated by or on behalf of a local government and purchased and/or built in whole or in part, with federal, state, or local funds, including bonds, or in any combination thereof. A project may include the collective costs for construction, installation, project management or supervision, project planning, engineering or design, and the purchase of land or interests in land that are expended over one or more years.<sup>51</sup>

**“Local Capital Improvement Program”** or **“CIP”** means the [5]-year schedule of local capital improvements for a local government. The local capital improvement program is a proposed plan of expenditures and, except for the capital improvements included in local capital budget, shall not constitute an obligation or promise by the local government to undertake projects or appropriate funds for any project in years 2 to 5 of the schedule.

**“Local Planning Commission”** means a board of the local government consisting of such [elected and appointed *or appointed*] members whose functions include advisory or nontechnical aspects of planning and may also include such other powers and duties as may be assigned to it by the legislative body, pursuant to this act.

**“Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.

**“Middle-Income Housing”** means housing that is affordable for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 80 percent but does not exceed [*specify a number within a range of 95 to 120*] percent of the median gross household income for households of the same size within the housing region in which the housing is located.

- ◆ While the definitions of low-income and moderate-income housing are specific legal terms based on federal legislation and regulations, this term is intended to signify in a more general manner housing that is affordable to the great mass of working Americans. Therefore, the percentage may be amended by adopting legislatures to fit the state’s circumstances.

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<sup>51</sup>This definition takes into account the fact that a capital improvement project may take several years to complete, beginning with preliminary design, final engineering, and then construction.

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**“Moderate-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.

**“Mass Transit”** means a public common carrier transportation system for people and having established routes and fixed schedules or availability.

**“Natural Resources”** mean air, land, water, and indigenous plant and animal life of an area.

**“Net Area”** means the total area of a site for residential or nonresidential development, excluding street rights-of-way and other publicly-dedicated improvements such as parks, open space, and stormwater detention and retention facilities. “Net area” is expressed in either acres or square feet.

**“New Fully Contained Community”** means a development proposed for location outside of existing designated urban growth areas and that will be characterized by urban growth.

**“Non-profit Conservation Organization”** means an entity that holds, in fee simple or in easement, land for conservation purposes.

**“Planning Department”** means a department of a local government whose functions may include, but shall not be limited to, planning and land development control and whose director is accountable to the chief executive officer of the local government [or to the legislative body *or some other body such as the local planning commission*].

**“Telecommunications”** means any origination, creation, transmission, emission, storage-retrieval, or reception of signs, signals, writing, images, sounds, or intelligence of any nature, by wire, radio, television, optical, or other means.

**“Telecommunications Facility”** means any facility that transmits and/or receives signals by electromagnetic or optical means, including antennas, microwave dishes, horns, or similar types of equipment, towers or similar structures supporting such equipment, and equipment buildings.

**“Transportation Demand Management Strategies”** mean actions designed to change travel behavior to improve the performance of transportation facilities without increasing the capacity of such facilities. Examples may include, but shall not be limited to, the use of alternative modes, work-hour changes, ridesharing, vanpool programs, tolls, congestion or peak-hour pricing, changes in parking policies, telecommuting, trip-reduction ordinances, and other measures intended to reduce the number of drive-alone vehicle trips.

**“Transportation Facilities”** mean any capital improvement, including public transit, that moves or assists in the movement of people or goods, but excluding electricity, sewage, and water systems.

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**“Transportation Needs”** mean estimates of the movement of people and goods that are typically based on projections of future travel demand.

**“Transportation Performance Measures”** mean criteria that allow the assessment of how well the mobility of people and goods is being accommodated by the transportation system and/or specific modes. Examples include, but shall not be limited to: vehicle miles traveled per capita, vehicle hours traveled per capita, average vehicle operating speed, average vehicle occupancy, and ratios of volume to capacity.<sup>52</sup>

**“Transportation System Management Measures”** mean techniques for increasing the efficiency, safety, capacity, or level of service of a transportation facility without increasing its size. Examples include, but shall not be limited to, traffic signal installation and improvements and traffic control devices, such as medians, parking removal, channelization, bus turn-outs, access management, ramp metering, and restriping of high occupancy vehicle lanes.

**“Urban Growth”** means development that makes intensive use of land for the location of buildings, other structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, fiber, or other agricultural products, or the extraction of mineral resources and that, when allowed to spread over wide areas, typically requires urban services.

**“Urban Growth Area”** means an area delineated in an adopted [regional *or* county] comprehensive plan [in accordance with the goals, policies, and guidelines in the state land development plan, prepared pursuant to Section [4-204]] within which urban development is encouraged by delineation of the area, compatible future land-use designations, and implementing actions in a local comprehensive plan, and outside of which urban development is discouraged. An urban growth area shall allow existing or proposed land uses at minimum densities and intensities sufficient to permit urban growth that is projected for the [region *or* county] for the succeeding [20]-year period and existing or proposed urban services to adequately support that urban growth.

**“Urban Growth Boundary”** means a perimeter drawn around an urban growth area.

**“Urban Services”** mean those activities, facilities, and utilities that are provided to urban-level densities and intensities to meet public demand or need and that, together, are not normally associated with nonurban areas. Urban services may include, but are not limited to: the provision of sanitary sewers and the collection and treatment of sewage; the provision of water lines and the pumping and treatment of water; fire protection; parks, recreation, and open space; streets and roads; mass transit; and other activities, facilities, and utilities of an urban nature, such as stormwater management or flood control.

**“Vision”** means the overall image in words that describes what the local government wants to be and how it wants to look at some point in the future and that has been formulated with the involvement of citizens.

**“Visioning”** means the process by which a local government, with the involvement of citizens, characterizes the future it wants, and plans how to achieve it.

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<sup>52</sup>See the discussion of transportation performance measures in Section 7-205 (Transportation element) below.

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**“Vision Statement”** means the formal expression of its vision that depicts in words and images what the local government is striving to become and that serves as the starting point for the creation and implementation of the local comprehensive plan.

**“Watershed”** means the land area(s) that contribute surface runoff or drainage to a fresh or coastal water system or body.

**“Wellhead Protection Area”** means the land area(s) that provide recharge to a pumping public or private drinking water supply well.

### **7-102 Establishment of Local Planning Agency**

- (1) The legislative body of each local government shall designate and establish by ordinance a “local planning agency,” unless the agency is otherwise established by law. The legislative body shall designate the local planning commission, a planning department, a community development department, or such other instrumentality other than itself as the local planning agency. The legislative body shall designate by ordinance those functions, powers, and duties that shall be performed by such local planning agency.
- ◆ The local planning agency has both line and staff functions in that it is charged with carrying out routine activities as well as coordinating the efforts of other local government departments. In contrast, the local planning commission, as described in Sections 7-105 and 7-106, is an advisory body with little or no final decision-making authority and no staff for which it is responsible. As paragraph (1) above provides, it is possible that the local planning commission can be designated as the local planning agency or that some of the powers of the local planning agency – especially those relating to certain types of development review (e.g., review of site plans and subdivisions) where public comment is thought to be desirable – can be assigned to the commission.
- (2) For the administration of the local planning agency, the appointing authority may appoint a director of planning who shall be, in the opinion of the appointing authority, qualified by education and experience in planning for the duties of the position. The ordinance establishing the local planning agency, as provided for in paragraph (1) above, shall include minimum education and experience requirements for the director of planning. The director of planning shall be in charge of the administration of the agency and shall exercise the powers and be subject to the duties that are granted or required of a local planning agency by this Act.
- (3) The solicitor for the local government, an attorney appointed by the solicitor, or an attorney appointed by the legislative body or the chief executive officer, shall serve the local planning agency as a legal advisor.

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- (4) The legislative body shall appropriate funds for salaries and expenses necessary in the conduct of the work of the local planning agency and the local planning commission, if one exists, and shall also establish, with the advice of the director of planning, a schedule of application and related administrative fees to be charged by the local government for development permits.
- (5) To accomplish the purposes and activities authorized by this Act, the local planning agency, with the approval of the legislative body and in accord with the fiscal practices thereof, may expend all sums so appropriated and other sums made available for use from fees, gifts, state or federal grants, state or federal loans, and other sources, and may enter into agreements with state agencies, regional planning agencies, local governments, other units of government, planning consultants, engineers, architects, landscape architects, land surveyors, attorneys, and other persons or organizations for the provision of planning and other services.
- (6) Within [60] days of the enactment of an ordinance designating and establishing of a local planning agency or any amendments thereof, the legislative body shall notify the [state planning agency] in writing of such designation and shall provide the [state planning agency] with a copy of the ordinance. The state planning agency shall maintain a directory of local planning agencies within the state and shall revise it annually.

### **7-103 Powers and Duties of Local Planning Agency**

- (1) The local planning agency shall have such powers and duties, as described in paragraph (2) below, as may be necessary to enable it to fulfill its functions, promote local planning, and carry out the purposes of this Act. The powers and duties of the agency shall be based on the grant of authority contained in the ordinance enacted pursuant to Section [7-102]. above. The assignment of such powers and duties may be varied by the legislative body, depending on factors that include, but are not limited to:
  - (a) the size of the local government;
  - (b) the composition and organization of the agency;
  - (c) the size of the agency's staff and other available resources from the local government;
  - (d) the relationship between the planning agency, [the local planning commission,] and the legislative body; and
  - (e) the types of land development regulations authorized by law.
- (2) The powers and duties of a local planning agency may include, but shall not be limited to, the following:

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- (a) prepare, review, maintain, implement, monitor, and periodically update the local comprehensive plan, and conduct ongoing related research, data collection, mapping, and analysis;
- ◆ Plan preparation, whether or not it is mandated by the state, may be overseen by the planning commission, by a task force of the planning commission, or by an advisory group that is appointed by the legislative body. For local planning agency responsibilities regarding comprehensive planning, see Sections 7-201 and 7-202.
- (b) prepare, review, maintain, monitor, and periodically update and recommend to the [local planning commission and] legislative body land development regulations and the zoning map, and conduct ongoing related research, data collection, mapping, and analysis;
- (c) prepare, review, maintain, administer, monitor, and periodically update and recommend to the [local planning commission and] legislative body special district and small area plans, including neighborhood plans, transportation corridor plans, central business district plans, and transit-oriented development plans, and conduct ongoing related research, data collection, mapping, and analysis;
- (d) present any local comprehensive plan, land development regulations, or special district or small area plans for consideration by the [local planning commission and the] legislative body and make recommendations to the [local planning commission and the] legislative body on proposed amendments to such plans or regulations;
- (e) prepare, or assist in the preparation of, the capital improvement program and annual capital budget for the local government;
- (f) in the performance of its functions and with the consent of the owner, enter upon any land to make examinations and surveys and place and maintain necessary monuments and markers thereon;
- (g) provide support to boards, commissions, committees, departments, and advisory task forces of the local government as necessary and assist with a variety of planning-related projects that may be conducted by any other local government department, such as: building, housing, engineering, and environmental codes; emergency management; environmental studies; public land acquisition and sales; public safety; urban renewal projects; human and social services; renewable energy sources; and capital projects;
- (h) administer land development regulations, including: providing advice and recommendations to officers and bodies that make land-use decisions; and drafting reports and recommendations to the local planning commission, the legislative body, and/or the mayor or chief executive officer of the local government. Administration

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of land development regulations may include, but shall not be limited to, reviewing and approving development permit applications, reviewing [and approving or approving with conditions, on behalf of the local government] proposed land subdivisions, site plans, and planned unit developments, and reviewing proposed text and zoning map amendments as assigned to the local planning agency by the legislative body;

- ◆ The bracketed language in subparagraph (h) gives the local planning agency the authority to approve, as well as review, proposed land subdivisions, site plans, and planned unit developments without additional approval by the legislative body or local planning commission, where one is established. In some communities, the legislative body may have the final say on such developments. In others, the planning commission itself may function in an administrative capacity and have review and final approval authority. See the discussion of this issue in the commentary to Section 7-106(2)(i) below with respect to the powers and duties of a local planning commission.
  - (i) inform and educate the public on issues relating to planning and development;
  - (j) analyze, project, and distribute relevant data to other local government departments concerning planning and development programs;
  - (k) maintain a geographic information system [that may also include a land market monitoring system pursuant to Section [7-204.1]];
  - (l) serve as the liaison for the local government to other national, state, regional, and local planning agencies;
  - (m) participate and collaborate with other government units in national, interstate, regional, or long-range studies and other joint plans;
  - (n) authorize or provide training and continuing education for its employees;
  - (o) provide orientation training and continuing education for members of the local planning commission, if one exists, pursuant to Section [7-105(8)]
  - (p) prepare an annual report pursuant to Section [7-107]; and
  - (q) perform such other duties as may be assigned or referred to it from time to time by the legislative body, the mayor, the chief executive officer of the local government, the local planning commission, or by general or special law.
- (3) All studies, plans, reports, and related materials prepared by the local planning agency shall be public records, unless specifically exempted by [*cite to state public records statute*].

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### 7-104 Rule-Making Authority

- (1) The local planning agency shall have the authority to adopt procedural rules concerning any matter within its jurisdiction, provided, however, that no procedural rule shall be adopted until the agency has held a public hearing on the proposed rule.<sup>53</sup>
  - (2) No procedural rule shall become effective until it has been approved by the legislative body of the local government.
  - (3) All procedural rules adopted by the local planning agency shall be public records.
- ◆ The local planning agency's rule-making authority is limited to the formulation of procedural rules in order to avoid conflicts with the local legislative body over the content of matters that would otherwise be covered by substantive rules. A substantive rule is the administrative equivalent of a statute, compelling compliance with its terms on the part of those within the agency scope of influence. Such rules are issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations.<sup>54</sup> By contrast, procedural rules are rules that are necessary and proper for an agency to carry out its tasks, such as the rules for the form of notices to the public or application forms for development permission. Because all matters that are substantive would be found in development regulations, such as zoning and subdivision codes (which would be adopted by the local government's legislative body), it is therefore unnecessary to give the local planning agency substantive rule-making authority.

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<sup>53</sup>Both the local planning agency and local planning commission have identical authority to adopt procedural rules with the approval of the legislative body. See Section [7-106(2)(o)].

<sup>54</sup>Bernard Schwartz, *Administrative Law* (Boston: Little, Brown, 1976), 153.

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### ORGANIZATIONAL STRUCTURE

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#### *Commentary: Local Planning Commission*

Under Section 7-105, a local planning commission, where it is established, may assume one of several organizational forms, the composition of which can differ depending on the degree of diversity of occupation and viewpoints that are desired by the state legislature. The alternatives that are posed for a planning commission's composition in Section 7-105 are intended to respond to the criticism, discussed above, that many commissions are not representative of broader interests in the community (such as renters, low-and-moderate income persons, and local businesspersons who may live elsewhere). While the establishment of local planning commission is optional, **it is still the preference of the *Legislative Guidebook* that the statute require that one be created** (see Section 7-105(1) below). Local planning commissions have made a valuable contribution to local governments in the United States during this century. They can serve in a lay advisory capacity for planning that can compliment and inform the efforts of the legislative body and they can act as the internal advocate and developer of external constituencies in local government for long-range thinking and innovative approaches. As Harvey Moskowitz, a New Jersey planning consultant, has observed, the local planning commission can also provide

a buffer between the elected official and the electorate. Controversial issues can be discussed in front of an appointed board without fear of offending voters. It [the commission] allows the elected officials to "see which way the wind is blowing." In addition it provides support for the elected official against pressure groups. It is not uncommon for governing bodies to use the recommendation of the planning board as the basis for or against certain legislation or projects. "We would have liked to build the playground in the south ward, but the planning board recommended the north side instead."

. . . [It was Moskowitz's experience that] planning board members, even in the highly technical aspects of the field such as subdivision or site plan review, do provide valuable insight from their own detailed knowledge of where development takes place, and indeed, with those planning board members who have managed to acquire some of the technical knowledge, can provide other perspectives that the professional sometimes overlooks.<sup>55</sup>

The local planning commission, he writes, may also provide a buffer to the members of the planning staff, allowing them to focus on long-term projects and goals and to remain "relatively immune from

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<sup>55</sup>Harvey S. Moskowitz, *Planning Boards in New Jersey*, 20, 284.

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short-term emergencies which in fact do not prove to be emergencies and given sufficient time eventually disappear.”<sup>56</sup>

Section 7-105 also mandates an open selection process for planning commission members and requires the local planning agency to conduct both initial and ongoing training and continuing education programs for commissioners. The programs are to provide members with an understanding of the local government’s plans, the commission’s authority and responsibility under state statutes and local laws, parliamentary procedures, the development process, the relationship of local planning activities to other governmental units, and current issues in planning and land development.

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### **7-105 Establishment of Local Planning Commission**

- (1) The legislative body of each local government [shall *or* may] establish a local planning commission consisting of [*insert number, such as: not less than 5; 5; 7; 9; etc.*] members.
- (2) The composition of the local planning commission shall be as follows:
  - ◆ The following language provides three options for the composition of a planning commission: (1) a commission consisting of all appointed citizen members; (2) a commission consisting of appointed members and elected officials; (3) a commission consisting of appointed members, the local government’s administrative officials, and elected officials.

Within Alternative 1B, there is language to ensure the diversity of viewpoints on the appointed commission by authorizing membership of “constituency representatives,” who may or may not be residents of the local government.<sup>57</sup> As commentary to the *Standard City Planning Enabling Act*, discussed above, noted, persons who own or operate businesses within the local government (as well as persons who are employees of such businesses) may have knowledge or leadership skills that would benefit the local government and consequently the SCPEA did not require

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<sup>56</sup>Id., citing Alan Jacobs, *Making City Planning Work* (Chicago: American Society of Planning Officials, 1978), 309.

<sup>57</sup>For example, North Carolina allows nonresidents to be appointed to planning boards if the governing body so desires. N.C.G.S. §160A-60 (1996). Another example of “constituency representatives” is the Cape Cod Commission which includes one minority and one Native American member among its 19 representatives. Section 3(b), Cape Cod Commission Act, enacted by Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990.

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planning commission members to be electors.<sup>58</sup> This is especially true in small developing suburban communities with a commercial/industrial employment base. In addition, according to surveys conducted by Planning Consultant Harvey Moskowitz, also discussed above, persons representing certain interests, such as renters (who are, it should be noted, also residents of the local government) and lower-paid blue-collar workers, may go unrepresented on the local planning commission. Finally, a planning commission may also need to have a “regional” perspective for purposes of coordination. Just as regional planning commissions have representation from member local governments, the model legislation below, in both Alternatives 1B and 3, requires that one of the commission members be a member or professional employee of the regional or county planning commission, who need not be a resident of the local government.

*Alternative 1A – All appointed citizens; no constituency representatives.*

[insert number] at-large members who are bona fide residents of the local government.

[or]

*Alternative 1B – All appointed citizens; constituencies represented*

(a) [insert number] at-large members who are bona fide residents of the local government, at least [1] of whom lives [or will represent the viewpoint of those who live] in rental, affordable, or multifamily housing;

◆ The bracketed language above is targeted to those small communities where the number of persons who live in rental, affordable, or multifamily housing is limited and where residents may not be willing to volunteer.

(b) [insert number] constituency representatives who need not be residents of the local government, but who shall represent the following interests:

1. developer or builder of residential or nonresidential development who conducts business within the local government; and/or
2. owner, operator, or employee of a business or commercial activity within the local government[. or , and]

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<sup>58</sup>The presence of representatives of local business interests, whether they are residents or not, is especially important to the credibility of the local planning commission in the development of plans and regulations. For example, even if the chief executive officer of the largest business in the community is not a resident, he or she would have a real, substantial interest in the activities of the commission over time (as well as useful knowledge to contribute) and should have the opportunity to serve, unfettered by a local residency requirement.

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- [(c) [1] member or professional employee of a [regional planning agency] or county planning commission, who need not be a bona fide resident of the local government.]<sup>59</sup>

### *Alternative 2 – Appointed members and elected officials*

- (a) the mayor or chief executive officer[, or his or her designee];
- (b) [*insert number*] member[s] of the legislative body selected by a simple majority vote of all members present where there is a properly constituted quorum; and
- (c) [*insert number*] at-large members, who are bona fide residents of the local government.

### *Alternative 3 – Appointed members, administrative officials, and elected officials*

- (a) the mayor or chief executive officer[, or his or her designee];
  - (b) [*insert number*] member[s] of the legislative body selected by a simple majority vote of all members present where there is a properly constituted quorum;
  - (c) [*insert number*] administrative official[s] of the local government selected by the mayor or chief executive officer;
  - [(d) [1] member or professional employee of a [regional planning agency] or county planning commission, who need not be a bona fide resident of the local government;] and
  - (e) [*insert number*] at-large member[s], who are bona fide residents of the local government.
- (3) If any at-large member of a local planning commission who is subject to the residency requirement of paragraph (2) above, subsequently ceases to reside in such local government, his or her membership shall automatically terminate.
  - (4) Members of a local planning commission may hold any other public office [, unless prohibited by a municipal charter].

[or]

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<sup>59</sup>Subparagraph (c) must be tailored to each state. In most parts of the U.S. there are county and/or regional planning agencies. If the local government is a county, then a person representing the regional planning agency would sit on the county planning commission.

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- (4) At-large members and constituency representative members of a local planning commission shall not hold any other public office[, *other than membership on the board of zoning appeals, Land-Use Review Board, or other boards such as an historic and architectural preservation or design review commission for which membership would not be an incompatible office*].
- ◆ Nationally, state enabling acts impose diverse membership restrictions and do not disclose a consistent policy or pattern<sup>60</sup> and thus such limitations may simply be a matter of taste or philosophy. An early model planning commission act by Attorneys Edward M. Bassett and Frank B. Williams did not impose a limitation on membership.<sup>61</sup> In contrast, a model by Attorney Alfred Bettman stated that “none of the appointive members [of the municipal planning commission] shall hold any other public office or position in the municipality, except that one of them may be a member of the board of zoning appeals,” but also provided that the chief executive and a member of the legislative authority should also serve on the commission.<sup>62</sup>
  - ◆ If it is desired that the local government be given the authority to appoint members who serve as alternates, then the following language based on N.J.S.A. 40:55D-23.1 (1997), either in connection with a subparagraph (the case of Alternative 1A) or as its own subparagraph (the case in Alternatives 1B, 2, and 3) may be added:
    - [(X) The legislative body may, by ordinance, provide for the appointment to the local planning commission of not more than 2 alternate members. Alternate members shall be at-large members, who are bona fide residents of the local government. Alternate members shall be designated at the time of appointment as “Alternate No. 1” and “Alternate No. 2.” The terms of the alternate members shall be for 2 years, provided, however, that the terms of the alternate members first appointed are staggered, so that the initial term of Alternate No. 1 is 2 years and the initial term of Alternate No. 2 is 1 year. A vacancy occurring otherwise than by expiration of term shall be filled by the appointing authority for the unexpired term only. Alternate members may participate in discussions of the proceedings, but shall not vote except in the absence or disqualification of a regular member. A vote shall not be delayed in order that a regular member may vote instead of an alternate member. In the event that a choice is to be as to which alternate member is to vote, Alternate No. 1 shall vote, except

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<sup>60</sup>Robert M. Anderson, *American Law of Zoning*, 3d, Vol. 4, (Deerfield, Ill.: Clark Boardman Callaghan, 1986) §23.20 (Qualifications for membership; incompatible offices), 204.

<sup>61</sup>Edward M. Bassett and Frank B. Williams, in Edward Bassett, Frank B. Williams, Alfred Bettman, and Robert Witten, *Model Laws for Planning Cities, Counties and States Including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935), 39.

<sup>62</sup>Alfred Bettman, in Edward Bassett, Frank B. Williams, Alfred Bettman, and Robert Witten, *Model Laws for Planning Cities, Counties and States Including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935), 76.

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when unable due to absence or disqualification. Alternate members shall be otherwise subject to all other requirements of this [Section *or* Act].]

- (5) All members of the local planning commission shall have voting privileges.
- (6) Public solicitations for applications for membership for all positions on the local planning commission other than those of [*insert applicable categories (e.g., the mayor, administrative officials, members of the legislative body, members or professional employees of the regional planning agency, or members or professional employees of the county planning commission)*] shall be advertised in a newspaper of general circulation in the local government and posted in a publicly accessible area in the offices of the mayor or chief executive officer of the local government, the personnel or human resources office, if one exists, and in the offices of the local planning agency. The application period shall remain open for at least [2] weeks after the date of publication. The appointing authority shall only make appointments from such applications, without respect to the political affiliations of the applicants.
- (7) In local governments having an elected mayor or chief administrative officer, members of the local planning commission shall be appointed by the mayor or chief administrative officer [with the consent of the legislative body of the local government]. In other local governments, the members shall be appointed by the legislative body.
- (8) Prior to assuming responsibilities on a local planning commission, all newly appointed members shall participate in an orientation training program designed by the local planning agency. All other planning commission members shall be required to fulfill a planning commission continuing education requirement on an annual basis, as designed by the local planning agency.
  - (a) The purpose of the orientation training and continuing education programs shall include, but not be limited, to providing planning commission members with an understanding of the local government's plans, the commission's authority and responsibility under state statutes and local laws, parliamentary procedures, the development process, the relationship of local planning activities to other governmental units, and current issues in planning and land development.
  - (b) In developing the orientation training and continuing education programs, the local planning agency may use available information and materials from the [state planning agency], the [regional planning agency], and any state or national associations of professional planners or planning officials, of local governments, and of homebuilders and developers, as well as the local government's own plans and land development regulations and applicable state laws and administrative rules and related materials.

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- ◆ This language requires the local planning agency to develop an orientation training and continuing education program for planning commission members.<sup>63</sup> The purpose of the program is to familiarize members with the commission's procedures, applicable laws of the local government, state laws and administrative rules, plans, and related technical aspects of planning. This will ensure that each commission member understands the broad policy and regulatory context in which the commission functions as well as follows appropriate procedures in conducting hearings and meetings and in making decisions. State and regional planning agencies and professional associations, such as the American Planning Association, university-based institutes of government/urban affairs centers, and state planning official associations typically offer such training. In addition, training materials may be available on video and audio cassettes.

- (9) Members of a local planning commission holding office on the effective date of this Act shall continue to serve for the remainder of their respective terms. In the initial appointments under this Act, a majority of the total membership of the commission shall be appointed for [2] years and the remaining members for [4 or 5 or 6] years. Thereafter, members shall be appointed for a term of [3 or 4 or 5 or 6] years. Members may be eligible for an unlimited number of terms [, unless prohibited by municipal charter].

*[add, if relevant to elected official or appointed administrative officials – See Alternatives (2) and (3) in Paragraph (2) above]*

The term of a member who is an elected official shall correspond to his or her respective official tenure. The term of an administrative official selected by the mayor or chief executive officer shall terminate either at the will of, or with the tenure of, the mayor or the chief executive officer selecting him or her.

- (10) All vacancies on the local planning commission shall be filled in the same manner as the initial appointment. Vacancies on the commission shall be filled within [30 or 45] days by the appropriate appointing authority. If the authority fails to act within that time, the appointing authority may authorize the planning commission to fill the vacancy.
- (11) Any member of a local planning commission may be removed by the appropriate appointing authority, after a public hearing, for inefficiency, neglect of duty, malfeasance in office, or undisclosed conflict of interest. The appropriate appointing authority shall file a written statement describing the reasons for such removal.

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<sup>63</sup>For a discussion of a 2001 Kentucky law (H.B. 55) that requires orientation and continuing education for planning commissioners, members of boards of adjustment, and professional planning staff, see Marshall Slagle, FAICP, "Kentucky Enacts Continuing Education Requirements for Planning Officials: The Inside Story," *Land Use Law & Zoning Digest* 53, No. 9 (Sept. 2001): 11-12.

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- (12) The compensation and expenses of the local planning commission and its staff shall be paid as directed by the legislative body. Members may also be reimbursed by the legislative body for any expenses incurred in the performance of their duties.

[or]

- (12) All members of the local planning commission shall serve as such without compensation. However, members may be reimbursed by the legislative body for any expenses incurred in the performance of their duties.
- ◆ This model takes the view, also incorporated into the SCPEA,<sup>64</sup> that compensation for a planning commission is inappropriate because of the potential for abuse (e.g., planning commission members, paid on a per meeting basis, schedule additional meetings beyond periodic business meetings) and because of the belief that service on the commission should remain voluntary. As Alfred Bettman wrote, “This form assumes the unpaid citizen, who has his own vocation, will be able and willing to give the necessary amount of time, to acquire a quantity of special knowledge, and to exercise a degree of independence of the regular administrative and legislative officials,” adding that this approach, especially in a large city “may not be generally attainable in real life.”<sup>65</sup> However, where service on a planning commission requires attendance at weekly meeting that extend far into the day or evening, in order to dispose of routine business (so much so that commission members may neglect their full-time vocation), then compensation, on a limited basis, may need to be considered. Alternately, if they become burdensome, the planning commission’s responsibilities in reviewing individual developments may be reduced or eliminated and assigned to a professional planning staff.
- (13) The local planning commission shall elect its chairperson and secretary from among its at-large [and constituency representative] members and shall create and fill such other of its offices as it may determine. [However, no elected official or administrative officer of the local government may serve as chairperson.] The term of office of the chairperson shall be [1 or 2] year[s], with eligibility for reelection.<sup>66</sup>

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<sup>64</sup>SCPEA, Tit. I, §3 provides that “All members of the commission shall serve as such without compensation.” Commentary to the SCPEA indicated that “In some States it is the practice to allow a fee for the attendance at such meetings. This seems neither necessary or desirable, though if desired, such a provision can be easily inserted.” Id., at n. 18.

<sup>65</sup>Alfred Bettman, in Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Witten, *Model Laws for Planning Cities, Counties and States Including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935), 60. See also Robert M. Anderson, *American Law of Zoning*, 3d ed, Vol. 4, (Deerfield, Ill.: Clark Boardman Callaghan, 1986) §23.24 (discussion of expenses and compensation of members of a planning commission).

<sup>66</sup>The SCPEA in §4 recommended a term of 1 year for its chairman, with eligibility for reelection.

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- ◆ The bracketed second sentence follows the SCPEA’s practice of selecting the chair from the appointed citizen members.<sup>67</sup> If it is desired that elected or administrative officials should serve as chairperson, then this language may be omitted. Alternately, this section can be redrafted to authorize the mayor, chief executive officer, or legislative body to appoint the chairperson and secretary as well as other officers.

(14) The local planning commission shall hold at least [1] regular meeting in each [month *or* quarter of each calendar year]. *or* [The local planning commission shall conduct regular meetings as it deems necessary for the transaction of its business, but there shall be at least [4 *or* 6 *or* 12] meetings annually.] The schedule for regular meetings shall be expressed in the procedural rules of the commission. Special meetings shall be held at the call of the chairperson who shall give written [and oral] notice to all members at least [7] days prior to the meeting, which notice shall contain the date, time, and place of the meeting, and the subject(s) which shall be discussed. The planning commission shall also hold at least [1] formal joint business meeting with the legislative body on an annual basis.

(15) A simple majority of the total membership of the local planning commission shall constitute a quorum. A simple majority vote of all members present where there is a properly constituted quorum shall be necessary to transact any business of the commission[, except that a vote of a simple majority of the total membership shall be necessary for a recommendation to the legislative body regarding the adoption or amendment of the local comprehensive plan [or any other plan]].

- ◆ Note: if comprehensive plan is not mandated, then omit last clause in brackets.

(16) No member of a local planning commission shall appear for or represent any other person, firm, corporation, or entity in any matter pending before the planning commission [or zoning board of appeals or historic preservation commission on which he or she is a member]. In addition, no member of the planning commission shall participate in the hearing or decision of the commission upon any matter in which he or she is directly or indirectly interested in a personal or financial sense. Such member shall disclose the nature of the interest, shall disqualify himself or herself from voting on the question, and he or she shall not be counted for the purpose of a quorum. In the event of such disqualification, such fact shall be entered in the minutes and records of the commission.

- ◆ The *Standard Zoning Enabling Act* and the *Standard City Planning Enabling Act* did not address the problem of conflicts of interest. A number of states have enacted legislation for this

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<sup>67</sup>SCPEA, Tit. I, §4 (“The commission shall select its chairman from amongst its appointed members. . .”).

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purpose.<sup>68</sup> Others rely on general governmental ethics and conflict of interest statutes that provide a basis for regulating various types of conflicts by public officials. At least 19 states have statutes that prohibit participation by local officials in decisions in which they or a particular associate have a financial interest.<sup>69</sup> While beyond the scope of the *Legislative Guidebook*, an alternative approach is to require elected and appointed officials to complete an annual disclosure form. Such an approach would require general legislation, not just legislation that pertains to officials involved in planning and land development control.

- (17) The local planning commission shall adopt procedural rules<sup>70</sup> for the transaction of its business and shall keep minutes and records of all proceedings, including regulations, transactions, findings, and determinations, and the number of votes for and against each question. However, no procedural rule shall become effective until adopted by the legislative body, subsequent to a public hearing. The minutes and records shall also indicate whether any member is absent or disqualified from voting. The minutes and records shall, immediately after adoption, be filed in the office of the commission. If the commission has no office, such records shall be filed in the office of the clerk of the legislative body. A transcript of the entire proceedings of matters before a planning commission, including any findings of fact, votes, and supporting documents shall be provided at actual cost to any requesting party. The transcript and supporting documents shall constitute the official record of the planning commission.
- (18) All members of a local planning commission shall, before entering upon their duties, qualify by taking the oath of office prescribed by [cite to applicable section of state constitution or local charter] before any judge, notary public, clerk of a court, or justice of the peace within the district or county in which they reside.

### **7-106 Powers and Duties of Local Planning Commission**

- (1) The general purposes of the local planning commission established pursuant to Section [7-105] above, are to promote the benefits of planning, to encourage public interest in planning, [to prepare or cause to be prepared, plans for the local government,] to receive and make recommendations on public and private proposals for development, and to advise and

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<sup>68</sup>See, e.g., Ind. Code Ann. §§36-7-4-223 and 36-7-4-909 (1996) (regulating planning commission and board of adjustment conflicts); N.H. Rev. Stat. Ann. §673.14 (1996) (regulating zoning board of adjustment, building code board, planning board, and historic district commission conflicts of interest); and N.J.Stat. Ann. §40-55D-23(b) (1996) (regulating planning board conflicts of interest).

<sup>69</sup>Mark Dennison, “Dealing with Bias and Conflicts of Interest,” *Zoning News* (Chicago: American Planning Association, November 1994), 4. This article includes a citation list of the aforementioned 19 states.

<sup>70</sup>For an outline of what such rules should contain, see David J. Allor, “Keeping Things in Order: Planning Commission By-Laws,” *Planning Commissioner’s Journal*, no. 14 (Spring 1994): 15-19.

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counsel the legislative body, other local government boards and commissions, and the local planning agency on planning-related matters.

- (2) The local planning commission shall therefore have such powers as may be necessary to enable it to fulfill its functions, promote local planning, and carry out the purposes of this Act. Such powers and duties shall include the following:
- ◆ Subparagraphs (a) through (e) are especially relevant for states that mandate local comprehensive plans. Where the local planning commission is also the local planning agency as authorized in subparagraph (i), then its powers must also include the ability to prepare, or cause to be prepared, the local comprehensive plan. Language for this function is shown in brackets in subparagraph (a).
    - (a) [prepare or cause to be prepared,] give notice regarding, hold public hearings on, and recommend the adoption or amendment of a comprehensive plan for the local government, including special district and small area plans, and have the general responsibility for the conduct of the comprehensive planning program;
    - (b) adopt procedural rules designed to provide effective public participation in the comprehensive planning process pursuant to Section [7-401], subject to Section 7-105(17);
    - (c) monitor and oversee the effectiveness and status of the local comprehensive plan and recommend to the legislative body such changes to the plan as may be required from time to time;
    - (d) review proposed land development regulations, related technical standards and codes, and amendments thereto, and make recommendations to the legislative body [as to the consistency of the proposal with the adopted local comprehensive plan] and other related matters;
    - (e) consult and advise with public officials and agencies, public utility companies, civic, educational, professional, and other organizations, and with citizens in relation to protecting and carrying out the adopted local comprehensive plan;
    - (f) make such surveys, analyses, researches, special studies, and reports as are generally authorized or requested by the legislative body, the mayor, or the chief executive officer;
    - (g) make inquiries, investigations, and surveys concerning the needs and resources of the local government with reference to its physical, economic, and social growth and development, that include, but are not necessarily limited to, the following areas: land use and land-use regulation, including signage; transportation facilities; public facilities (e.g., recreation areas, utilities, schools, fire stations, police stations, etc.);

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blighted areas; housing; environmental protection; natural and scenic resource conservation; disaster prevention; historic preservation; stormwater management; and economic development. Assemble, analyze, and make recommendations concerning the data thus obtained and assist in the formulation of plans to address such needs and for the conservation, utilization, and development of such resources;

- (h) hold public hearings on the proposed annual capital budget and capital improvement program for submission to the legislative body [*or other designated official or agency*];

◆ Subparagraph (h) assumes that the capital budget and capital improvement program will be prepared by another agency of the local government, such as the planning department or a budget office.

- (i) submit an advisory opinion and recommendation on all zoning matters referred to it under the provisions of the land development regulations and report on any other matter referred to it by the legislative body, the mayor, the chief executive officer, and/or the appointing authority;

- (j) [submit an advisory opinion and recommendation to the legislative body on *or* review and approve, approve with conditions, or deny] any preliminary or final plan or plat of subdivision referred to it under the provisions of the land development regulations;

◆ In some states, the local planning commission functions in an administrative capacity and is the final approval authority for subdivisions, site plans, and planned unit developments.<sup>71</sup> This reflects the influence of the *Standard City Planning Enabling Act* that, in §§13-16, gives the commission the authority to adopt regulations governing the subdivision of land and to approve subdivisions on behalf of the municipality, including acceptance of a bond to ensure construction of required public improvements. Bracketed language in subparagraph (j) allows the planning commission to have either advisory or final approval authority on proposed land subdivisions.

- (k) in the performance of its functions and with the consent of the property owner, enter upon any land and make examinations and surveys and place and maintain necessary monuments and markers thereon;

- (l) elect a chairperson and a secretary and create and fill such other offices as it may determine it requires;<sup>72</sup>

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<sup>71</sup>See, e.g., R.I. Gen. Laws, §§45-23-41, 45-23-43 (1996).

<sup>72</sup>This subparagraph should be eliminated if it is desired that the chairperson and other officers of the commission are to be appointed by the mayor, chief executive officer, or legislative body.

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- (m) serve as the local planning agency if so designated by the legislative body pursuant to Section [7-102];
  - (n) create, with the approval of the legislative body, advisory task forces for the preparation of plans and other planning activities, [and recommend to the legislative body candidates for such task forces,] the members of which shall be appointed by local legislative body;
- ◆ Many local planning activities, such as the preparation of local comprehensive plans, are now often supplemented by advisory task forces. The purpose of such task forces, as noted in the *Journal of the American Institute of Planners* article by Peter H. Nash and Dennis Durden discussed above, is to provide additional expertise and fresh perspectives to the planning process, especially from people who would otherwise be reluctant to serve on the planning commission because of time commitments as well as to give a broader base of support or endorsement for resulting recommendations. Optional language giving the commission the authority to recommend candidates to the local legislative body is included. Of course, the local legislative body may always create such temporary bodies to advise it, with or without the planning commission's recommendation.
- (o) contract with urban and regional planners, engineers, architects, landscape architects, and other consultants for such services as it may require, subject to the approval of the legislative body, local government attorney, or some other local government official or agency as designated by ordinance;
  - (p) adopt procedural rules for the transaction of its business, subject to Section [7-105(17)];<sup>73</sup>
  - (q) conduct regular meetings as it deems necessary for the transaction of its business, and conduct special meetings held at the call of the chairperson;
  - (r) keep a public record of its activities, including resolutions, transactions, findings, and determinations pursuant to Section [7-105(17)], and file an annual report with the legislative body pursuant to Section [7-107] below;
  - (s) receive, hold, and expend funds appropriated to it by the legislative body, as well as other sums made available for use from fees, gifts, state or federal grants, state or federal loans, and other sources;

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<sup>73</sup>The local planning agency has the same authority to adopt procedural rules under Section 7-104. If the local planning commission is also the local planning agency then it would use that Section.

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- (t) cooperate with other commissions and with other public agencies of the local government, other local governments, regional authorities, special districts, state, and United States regarding matters related to its responsibilities;
- (u) authorize the attendance or participation by its members of local government planning conferences or meetings of planning institutes or hearings upon pending local government planning legislation; and
- (v) perform any other functions, duties, and responsibilities as may be assigned to it from time to time by the legislative body, mayor, chief executive officer, or by general or special law.

### **7-107 Annual Reports of Local Planning Agency<sup>74</sup> and Local Planning Commission**

- (1) Within [3] months of the end of each fiscal year of the local government, the director of planning of the local planning agency shall prepare an annual report to the legislative body and the chief executive officer. The report shall summarize the agency's work of the preceding year, including implementation of an adopted local comprehensive plan, provide any information or data that may be required by other governmental agencies, and shall recommend programs, plans, and other measures for future action. The report shall also provide such other information that may be relevant to the agency's powers and duties, including progress in achieving any benchmarks identified in an adopted local comprehensive plan or in any other adopted plan or in carrying projects or duties previously assigned to it. The report shall be published and made available to the public.
- (2) Within [3] months of the end of each fiscal year of the local government, the local planning commission shall prepare an annual report to the legislative body and the chief executive officer. The report shall summarize actions taken by the planning commission during the preceding year, including the number of development proposals and plans reviewed, and shall recommend programs, plans, and other measures for future action. It may also monitor progress on implementation of programs, plans, and other measures on which it has acted. The report shall also provide such other information that may be relevant to the local planning commission's powers and duties. The report shall be published and made available to the public. The local planning agency shall provide assistance to the local planning commission in the preparation of the commission's annual report.

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### ***Commentary: Neighborhood Designation, Neighborhood Planning Councils, Neighborhood and Community Organizations***

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<sup>74</sup>For a discussion of such reports, see Megan S. Lewis, "The Year in Review: Annual Reports of Planning Departments," *PAS Memo* (Chicago: American Planning Association, October 1996): 1-4.

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Renewed interest in neighborhood planning and development has been sparked by both the desires of citizens nationwide to assert greater control in their immediate environs as well as a shift in the emphasis of governmental programs towards a decentralized and targeted approach to allocation.<sup>75</sup> Federally-sponsored block grants and empowerment zones, along with public-private partnerships, incorporate a citizen participation component that ideally combines top-down and bottom-up planning techniques with inclusive, listening-oriented leadership. Citizens may speak through non-governmental, neighborhood-based organizations (e.g., independent neighborhood councils, community development corporations, nonprofit housing organizations, etc.).

Contemporary neighborhood planning may be of three types: (1) locally-sponsored citywide planning programs; (2) independently-organized efforts by indigenous neighborhood or community organizations; and (3) federally-sponsored community development programs.<sup>76</sup> Of the three, the first two types lend themselves to the drafting of model statutes for use either at the state or local level. Such statutes, where they exist, may also have implications for the third type, since they will create a structure through which federally-sponsored programs may be administered. The first two approaches are discussed below.

(1) **Locally-sponsored citywide programs.** Neighborhood planning programs of this type have several common characteristics that must be considered in drafting legislation: (1) types of mechanisms to identify what the relevant “neighborhood” is and to establish its boundaries; (2) a definition of a role for the neighborhood planning process to enable local government/ neighborhood collaborative action to be taken; (3) technical and financial resources form a long-term partnership between the local government and neighborhood and community organizations; and (4) shorter and more detailed time frames for implementation than comprehensive planning. The intention is to balance citywide planning goals and policies with “an all-inclusive and meaningful citizen oriented process” that identifies neighborhood priorities and issues and reconciles conflicts between the two, where they exist.<sup>77</sup> Plans resulting from such an effort can conceivably become the blueprint for all local government, non-profit, and community revitalization efforts.<sup>78</sup>

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<sup>75</sup>This commentary is based, in part, on “Implementing Local and Neighborhood Plans Through Neighborhood-Based Organizations,” by Peter W. Salsich, Jr., appearing in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). Research for this paper as well as the drafting of the model statutes related to neighborhood planning were supported in part by a grant from the Annie E. Casey Foundation of Baltimore.

<sup>76</sup>William M. Rohe and Lauren B. Gates, *Planning with Neighborhoods* (Chapel Hill, N.C.: University of North Carolina Press, 1985), 4-5.

<sup>77</sup>Wendelyn A. Martz, *Neighborhood-Based Planning: Five Case Studies*, Planning Advisory Service Report No. 455 (Chicago: APA Planners Press, 1995), 3-6.

<sup>78</sup>Moustafa Mourad, “Community Collaboration: The Power of a Neighborhood Planning Process,” *Cost Cuts* (published by the Enterprise Foundation) 13, nos. 3 and 4 (1996): 8-9.

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A number of states and cities have established programs that have formalized the role of neighborhoods in the planning process. The examples below involve planning processes that have supporting statutes or ordinances.

*Minnesota.* Minnesota statutes authorize first class cities (Minneapolis and St. Paul) to establish neighborhood revitalization programs (NRPs) and expend funds generated by tax increment financing for those programs.<sup>79</sup> Neighborhood planning workshops organized by city officials are responsible for preparing neighborhood action plans. These workshops must be conducted in such a way that available resources, information, and technical assistance are presented to interested persons in the neighborhood.

NRP cities must establish a policy board made up of representatives of governmental agencies within the city, such as the city council, county board, school board, city-wide library and park board, the mayor or his designate, and representatives from the city's house of representatives and state senate delegations. The policy board may also include representatives of city-wide community organizations, neighborhood organizations, business owners, labor, and neighborhood residents, when invited by the governmental members of the policy board.

The policy board is delegated the authority to enter into contracts and expend funds, and is authorized to enter into agreements with governmental agencies and with non-governmental organizations represented on the policy board for services required to implement the NRP plan. Plans prepared by neighborhood planning workshops are submitted to the policy board which has jurisdiction to review, modify, and approve. The policy board forwards its recommendations for final action to the governing bodies of the governments represented on the policy board. Final approval is given by the governing bodies that have programmatic jurisdiction over specific aspects of the plan.

*Atlanta.* The Atlanta City Code directs the department of budget and planning to designate Neighborhood Planning Units (NPU), defined as “geographic areas composed of one (1) or more contiguous neighborhoods” that are based on criteria established by the department and approved by the city council. NPUs may comprise as many, or as few, neighborhoods as practicable and may cross council district boundaries. In designating NPUs, the department must consider the existing boundaries of citizens’ organizations and must establish a process for neighborhood boundary change. A neighborhood planning committee is established within each NPU with authority to “recommend [to any body or official with final decision-making authority] an action, a policy or a comprehensive plan. . . on any matter affecting the livability of the neighborhood.” Voting membership is open to all residents over 18 and all organizations owning property or having a place of business or profession within the NPU.<sup>80</sup>

*District of Columbia.* The District of Columbia code authorizes the creation of advisory neighborhood commissions (ANCs) following the receipt of a petition signed by five percent of the registered voters in a previously designated neighborhood commission area. Commission members

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<sup>79</sup>Minn. Rev. Stat. §469.1831 (1996).

<sup>80</sup>Atlanta City Code, §§6-3011 - 6-3019.

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are chosen in non-partisan elections which are administered by the D.C. Board of Elections and Ethics. ANCs have the authority to employ staff and receive and expend public funds for public purposes within the area. They are organized to give advice on matters of public policy, including planning, streets, recreation, social services programs, health, safety, and sanitation in the neighborhood commission area. The statute requires the D.C. government to allot funds to the ANCs from District general revenues, with the amount of the funds allocated based on the population ratio of the neighborhood to the District. The District Council is required to establish procedures and guidelines for handling funds and accounts and for employing people, which are to replicate the regular budgetary and auditing procedures and the employee merit system of the District as far as practicable.<sup>81</sup>

The District of Columbia code also provides for neighborhood planning councils (NPCs), two per election ward, with jurisdictional boundaries drawn by the mayor through rulemaking after each decennial census. The NPCs are to be approximately equal in population. NPC elections are held in even-numbered years on a date set by the mayor by rulemaking. NPCs have the authority to participate in the development, implementation, and evaluation of programs for children and youths.<sup>82</sup>

*New York City.* In New York City, Community Planning Boards (CPBs) have had an advisory land-use role mandated by the city charter since 1961.<sup>83</sup> CPBs participate in the Uniform Land Use Review Procedure (ULURP), administered by the City Planning Commission for major building and improvement projects, and all proposed land uses that do not have “as of right” status under the city's zoning code. Extensive technical and environmental reviews are conducted, as well as community review, before the planning commission makes its recommendation for final action by the city council.<sup>84</sup>

**(2) Independently-organized efforts by indigenous neighborhood organizations.** Neighborhood planning efforts in this second category are not boards or commissions of the local government. Rather, they may be business, civic, or neighborhood development groups with interests in broader efforts to maintain or revitalize the neighborhood.<sup>85</sup> Good examples are civic

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<sup>81</sup>D.C. Code, §§1-251 to 1-270.

<sup>82</sup>Id., §§1-2601 to 1-2611.

<sup>83</sup>N.Y.C. Charter §197c.

<sup>84</sup>Id.; see also James W. Lowe, “Examination of Governmental Decentralization in New York City and a New Model for Implementation,” *Harvard Journal on Legislation* 27, no. 1 (1990): 173, 220-221.

<sup>85</sup>See Benjamin B. Quinones, “Redevelopment Redefined: Revitalizing the Central City with Resident Control,” *University of Michigan Journal of Law Reform* 27, nos. 3 & 4 (1994): 689, esp. 756-7, n. 252 (discussion of governing structure of Dudley Street Neighborhood Initiative in Boston, Massachusetts); Frank J. Costa, Gail Gordon Sommers, and Brian J. Sommers, “University Park Neighborhood Association: A University-Community Partnership, in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998).

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groups that are set up to look after the economic well-being of the central business district. Alternately, they may be informal bodies that spring out of a neighborhood response to a given issue, such as a rezoning or the location of a public facility, focusing on excluding perceived threats to the neighborhood, the extreme of which is the “not-in-my-backyard” (NIMBY) syndrome.

Commenting that while it is a “fact of life” and that traditional participation by neighborhood organizations has been “highly informal and disorganized,” the American Law Institute's *Model Land Development Code* proposed a mechanism to confer some official status on such groups in the land development process. It authorized “qualified neighborhood organizations” to participate in the development process if the proposed organization had articulated boundaries for its area of operation, represented more than half of the adults residing within the boundaries as evidenced by membership rosters, has at least 50 members, and at least 50 percent of the area of land within the boundaries is developed for residential use. The intent of the designation was to give such groups the right to participate in administrative hearings, request and receive notices of pending land-use proposals, and bring judicial proceedings concerning land development and enforcement orders. Planning legislation may typically give only owners of property within a certain distance of a particular development proposal the ability to participate in administrative hearings (such as those for variances and conditional use permits), but this right is often not extended to organizations. The designation would eliminate any question of standing of such organizations to participate in such decision-making and was also intended, in the ALI's words, to reduce the “erratic participation [of such groups] in the existing process.”<sup>86</sup>

The model statutes that follow are intended to provide a formal organizational structure for neighborhood planning in local government, whether by public or private groups that represent neighborhood or community interests. Section 7-108 establishes a procedure by which a local legislative body may designate neighborhood boundaries. Section 7-109 authorizes the creation of neighborhood planning councils in such designated neighborhoods to advise the local government's legislative body, planning commission, and other boards and commissions and describes a variety of advisory powers that a council may implement.<sup>87</sup>

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<sup>86</sup>American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976), §2-307, 86-89.

<sup>87</sup>See, e.g., Howard W. Hallman, *The Organization and Operation of Neighborhood Councils: A Practical Guide* (New York, NY: Praeger Publishers, 1977).

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Section 7-110 is an adaptation of the ALI Code's approach. Because it focuses on private groups, whether non-profit or for-profit, it operates independently of any type of formal, local government-established planning process. Groups that are "recognized" under this model statute may obviously perform planning activities on their own, such as raise money to prepare a plan that could later be adopted by the local government but, as private organizations, do not need any express governmental authorization to do so.

One problem, of course, is that by granting standing to neighborhood and community groups, the legislative body may institutionalize opposition to any proposals for change in the neighborhood that require action by the local government in some way. By recognizing such groups, the local government is cloaking them with a collective authority and a power that they would not have otherwise had (other than the power of individual members would have as voters or property owners). This is the dark side of "reducing erratic participation." Thus, the decision to recognize such groups in a formal manner is at bottom a political one. Still, the model statute attempts to offset problems that may result when a small coterie of angry individuals dominate a neighborhood or community organization by requiring full participating membership be open at least to all registered voters within its boundaries (as one alternative) and by establishing minimum numbers of members (here, at least 50), thus ensuring a spectrum of views.

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**Table 7-2: Organizing for Neighborhood Planning**

<b>Approach</b>	<b>Use When</b>
Neighborhood planning council	The local government desires a formal, permanent institutional role for neighborhoods that will provide ongoing advice to the legislative body, its agencies, and boards.
Neighborhood or community organization recognition	The local government desires to give diverse private neighborhood organizations an independent status outside of the government structure.

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### 7-108 Designation of Neighborhoods

- (1) The legislative body of a local government may divide all or a portion of the geographic area within the local government into designated neighborhoods through the establishment of boundaries in the manner provided for in this Section.
- (2) Designation of a neighborhood or alteration of boundaries of a previously-designated neighborhood may be initiated by the legislative body itself, by the local planning agency,

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by the local planning commission, or by any private person or organization residing or conducting business within the proposed neighborhood by contacting the legislative body and requesting such designation or alteration in writing.

- (3) After the designation or boundary alteration process has been initiated and prior to the actual delineation or alteration of any neighborhood boundary, the legislative body, or any department, agency, or task force appointed by the legislative body, shall, as appropriate, conduct relevant studies, consult with neighborhood or business groups, administrative officials of the local government, and other public or nonprofit agencies, and shall convene public informational meetings.
- (4) The legislative body shall hold at least [1] public hearing in each proposed designated neighborhood, notice of which shall be published in one or more newspapers of general circulation in the proposed neighborhood at least [30] days in advance of the hearing.
- (5) In delineating neighborhood boundaries, the legislative body shall take into account, but shall not be limited to, the following criteria:
  - (a) patterns of development, including property lines;
  - (b) physical boundaries such as landforms, water bodies, or major thoroughfares;
  - (c) population distribution and/or other socio-economic and cultural factors;
  - (d) census tract boundaries;
  - (e) political boundaries, such as wards or precincts;
  - (f) character of residential and non-residential buildings, such as buildings of a certain architectural style or period of construction;
  - (g) existing boundaries of elementary and secondary schools' attendance zones;
  - (h) any recommendations for neighborhood boundaries contained in the local comprehensive plan;
  - (i) the existence of neighborhood organizations and any preferences that may be expressed by resolution of their governing boards; and
  - (j) the attitude of residents of proposed neighborhoods, as expressed through surveys or other means.
- (6) Any action by the legislative body in designating a neighborhood or altering the boundaries of a previously-designated neighborhood shall be by ordinance, provided that before the legislative body acts, it shall first refer the matter to the planning commission, if one exists,

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or local planning agency for a recommendation in writing. If the planning commission or local planning agency does not make a written recommendation within [30] days after the matter has been referred to it, the legislative body may then take action.

- (7) At least once after each decennial census, the local legislative body shall reconsider the delineation of neighborhood boundaries and may alter them pursuant to the criteria and procedures set forth in this Section.

### **7-109 Neighborhood Planning Councils**

- (1) Upon receiving a petition signed by at least [10] percent of the registered voters in a neighborhood that has been designated pursuant to Section [7-108] above, the legislative body of a local government may, by ordinance, establish a neighborhood planning council for that neighborhood for the purposes of paragraph (2) below. Before establishing any neighborhood planning council, however, the legislative body shall first enact, by ordinance, uniform procedures and requirements for: the appointment and removal of neighborhood planning council members; qualifications to serve as a member of a council (provided that such qualification requirements ensure the participation of, wherever possible, homeowners, renters, business owners, representatives of neighborhood institutions, persons under age 19, and persons over age 64); terms of council members; notice of meetings; and such other matters as may be necessary to carry out the purposes of paragraph (2) below. The legislative body may vary by designated neighborhood the number of members who may serve on a neighborhood planning council and the composition of individual councils.
  - (2) A neighborhood planning council established under this Section may:
    - (a) advise and assist the legislative body, the local planning commission, and the local planning agency in the formulation of plans affecting the designated neighborhood;
    - [(b) develop and propose, for consideration by the legislative body and the local planning commission, neighborhood plans, as described in Section [7-301] below, affecting the designated neighborhood, under rules and guidelines adopted by the local planning agency;]
- ◆ Some local governments may want to authorize the neighborhood planning councils to prepare plans for consideration by the local legislative body. For example, the City of Seattle has adopted such a program, which includes grants to neighborhood groups.<sup>88</sup> The Seattle Planning Department issues neighborhood planning guidelines to describe in detail how to create a neighborhood plan.

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<sup>88</sup>Seattle Planning Department, *Toward a Sustainable Seattle: A Plan for Managing Growth, The Mayor's Recommended Comprehensive Plan, Neighborhood Planning Element* (Seattle, Wash.: The Department, March 1, 1994), 10 (discussion of neighborhood initiated plans and neighborhood matching funds).

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- (c) review, comment, and make recommendations on applications for proposed developments that are located within the designated neighborhood and under consideration by the legislative body or by any board or commission of the local government where such application requires a public hearing pursuant to state statute or local ordinance;
  - (d) review, comment, and make recommendations on any local capital improvement proposed to be undertaken by the local government that would affect the designated neighborhood;
  - (e) review, comment, and make recommendations on ordinances or rules that are existing or under consideration by the legislative body or by any board or commission of the local government that affect or would affect the designated neighborhood;
  - (f) review, comment, and make recommendations to any governmental agency, or nonprofit or for-profit organization that is considering actions that affect or would affect the designated neighborhood; and
  - (g) hold public workshops and meetings on matters affecting the designated neighborhood.
- (3) A neighborhood planning council established under this Section shall adopt rules for the conduct of its business. All rules adopted by a neighborhood planning council shall be public records.
  - (4) A neighborhood planning council shall keep a record of its findings, resolutions, recommendations, transactions, and minutes of meetings, which record shall be public record.
  - (5) All meetings of a neighborhood planning council shall be open to the public.
  - (6) In order to pay the expenses of supporting any neighborhood planning councils established under this Section, the legislative body of a local government may appropriate monies out of its general fund.

### **7-110 Neighborhood and Community Organizations; Recognition**

- (1) [In addition to establishing neighborhood planning councils pursuant to Section [7-109] above,] [T]he legislative body of a local government may, by ordinance, recognize a neighborhood or community organization for the purposes of paragraph (2) below.
- (2) A neighborhood or community organization recognized under this Section may:

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- (a) participate in administrative hearings pursuant to Section [10-207(5)], administrative appeals pursuant to Section [10-209(1)(b)] and [10-302(3)(b)], and judicial review pursuant to Section [10-607(5)]; and

◆ Note that the right to participate is “pursuant to” the relevant Sections. These Sections typically impose further prerequisites upon participation by a neighborhood or community organization, such as being aggrieved or adversely affected.

- (b) request and receive notices under Sections [7-401(4)], [8-103(6)], [8-106(3)(c)], [10-206(1)], and [10-210(3)(b)].

- (3) The legislative body may enact an ordinance recognizing a neighborhood or community organization under this Section if it finds that:

- (a) the neighborhood or community organization has filed an application with the local government showing:

1. its proposed boundaries, which encompass, at least in part, land within the jurisdiction of the local government,
2. the name and address of its representative or office for the receipt of notices and other communications, and
3. the names and addresses of its officers and directors.

- (b) the neighborhood or community organization represents more than [half] of the persons 18 years or older residing within its boundaries, for all or at least [6] months of the calendar year, such representation to be shown by membership or other evidence such as surveys or census data satisfactory to the legislative body;

- (c) the neighborhood or community organization demonstrates that it has at least [50] members;

- (d) at least [50] per cent of the area of the land within the boundaries of the neighborhood or community organization is developed for residential use [or is available for residential use under the existing development controls]; and

- [(e) full participating membership in the neighborhood or community organization shall be open to all registered voters within its boundaries and may, if the organization so decides, also be open to all persons owning property or businesses within its boundaries or who work at businesses within its boundaries.]

[or]

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- [(e) full participating membership in the neighborhood or community organization shall be open to all registered voters within its boundaries and to all persons owning property or businesses within its boundaries or who work at businesses within its boundaries].
- (4) The legislative body shall not refuse to recognize a neighborhood or community organization as a representative of a particular area merely because one or more other recognized neighborhood or community organizations also represent part or all of the same geographic area as long as each complies with the requirements of this Section.
- (5) The legislative body may delegate to an officer of the local government the responsibilities for receiving applications for initial recognition and for notifying recognized neighborhood or community organizations of the necessity for renewal, as provided for in paragraph (6) below.
- (6) The legislative body shall establish an interval of time after which recognitions under this Section shall expire unless renewed, which interval shall not be less than [2] years or greater than [5] years. The legislative body shall give notice to the neighborhood or community organization of the necessity for renewal not more than [6] months nor less than [3] months prior to the expiration date. Renewal shall be approved by the legislative body in the same manner as the initial application.
- (7) A neighborhood or community organization recognized under this Section shall not constitute a board, commission, agency, or representative of the local government that has recognized it.

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### THE LOCAL COMPREHENSIVE PLAN

While several states had adopted legislation authorizing the creation of city or county planning commissions with the authority to adopt a master or comprehensive plan by the mid-1920s,<sup>89</sup> it was not until the publication of the *Standard City Planning Enabling Act* (SCPEA) in 1928 that the concept of such a long-range plan received a formal endorsement in a statutory model. Under the SCPEA, the principal function of the municipal planning commission was to prepare and adopt a “master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission’s judgment, bear relation to the planning of the municipality.”<sup>90</sup> The SCPEA’s drafters wrote that they deliberately avoided an “express definition” of a master plan, preferring instead provisions “which illustrate the subject matter that a master plan should consider.”<sup>91</sup> According to the act:

Such plan, with the accompanying maps, plats, charts, and descriptive matter shall show the commission’s recommendations of said territory, including, among other things, the general location, character and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways, playgrounds, square, parks, aviation fields, and other public ways, grounds and open spaces, the general location of public buildings and other public property, and the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power, and other purposes; also the removal, relocation, widening, narrowing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings, property, utilities, or terminals; as well as a zoning plan for the control of the height, area, bulk, location, and use of buildings and premises.<sup>92</sup>

Underlying the plan was to be a series of “careful and comprehensive surveys and studies of present conditions and future growth of the municipality and with due regard to its relation to neighboring territory.”<sup>93</sup> As work on the whole master plan progressed, the SCPEA permitted the planning commission to adopt and publish “a part or parts” that could govern one or more major

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<sup>89</sup>See Frank B. Williams, *The Law of City Planning and Zoning* (New York: MacMillan, 1922), Note I, General Planning Laws in the United States, 576-605 (examples of early city planning legislation from California, Minnesota, New Jersey, New York, Pennsylvania, as well as charter provisions from Cleveland, Ohio).

<sup>90</sup>Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (SCPEA) (Washington, D.C.: U. S. GPO, 1928), §6.

<sup>91</sup>SCPEA, n. 32.

<sup>92</sup>SCPEA, §6. For an analysis of the language in this section, contending that it is vague, see Charles Haar, “The Master Plan: An Impermanent Constitution” *Law and Contemporary Problems* 20, No. 3 (Summer 1955): 367-373.

<sup>93</sup>Id.

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sections or divisions of the municipality or one or more of the functional areas to be included in the plan. The commission could also “from time to time amend, extend, or add to the plan.”<sup>94</sup>

As proposed in the SCPEA, the master plan really had three functions: (1) a coordinative device for the siting and construction of public works (including public utilities); (2) a means for proposing a “plan” for the regulation of land use through zoning controls; and (3) a mechanism for coordinating the design of subdivisions and the construction of streets and related improvements. Once the commission adopted the master plan, or a part addressing a division of the municipality or a functional area, proposed public improvements had to be referred to the commission.<sup>95</sup> Commission disapproval of the location, character, and extent of such improvements could only be overridden by a two-thirds vote of the city council. The “zoning plan” provision in the description of the master plan was in fact a precursor to the contemporary land-use element (see below) of a comprehensive plan – a general schematic to control public and private land uses and their character, intensity, and location. The street plan could be adopted separately and, once that happened, the planning commission could then regulate subdivisions. In addition, the street plan was used to design a detailed plat showing the land which the commission recommended to be reserved for public streets. This plat, after adoption by the city council, was intended to control private building in the bed of mapped but unopened streets<sup>96</sup> and to prevent building on lots that had no access to a publicly-approved street.<sup>97</sup>

### CRITICISMS OF THE SCPEA

The SCPEA and its companion, the *Standard State Zoning Enabling Act* (SZA), have been the subject of much criticism in planning literature. These criticisms may be summarized as follows:

(1) **Optional plan-making; ambiguous plan description.** Planning was permissive, rather than mandatory under the SCPEA; it did not require the preparation of master plans or the updating of those plans with any frequency. Nor were sanctions imposed for failure to plan. Plans could be adopted on a piecemeal basis. The SCPEA did not describe fundamental or indispensable elements of a master plan.<sup>98</sup> Indeed, it avoided an express definition, as noted, giving only examples of the

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<sup>94</sup>Id.

<sup>95</sup>Id., §10.

<sup>96</sup>Id., §§21-25.

<sup>97</sup>Id., §19.

<sup>98</sup>While planning was not required, it is arguable that the shopping list of plan elements was mandatory, under §6 of the SCPEA. Note Daniel R. Mandelker and Roger Cunningham: “These elements were made mandatory – ‘Such plans . . . shall show’ [citing language from §6] – but no substantive policies were stated in the statute and the linkages among the elements were left to the planning process to determine. Consequently the statute failed to provide a structure for the planning process or to suggest how the plan elements might be linked and grouped to comprise an integrated planning product.” Daniel R. Mandelker and Roger A. Cunningham, *Planning and Control of Land Development: Cases and Materials* (New York: Bobbs-Merrill, 1979), 73.

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subject matter to be included in a plan. Consequently, according to one planning historian, “[c]ountless cities produced lopsided plans omitting some of the essential community facilities and almost none included the full complement of utilities.”<sup>99</sup>

(2) **Exclusion of elected officials from plan-making.** A feature of the SCPEA was a lay appointed planning commission, discussed above. Only the planning commission had the authority to develop and adopt the master plan and employ a planning staff. With the exception of its power to adopt the map showing proposed streets, the legislative body was largely shut out of the plan-making process. Elected officials were to refer planning matters to the commission for clear-headed, non-partisan advice. These exclusions and limitations reflected the philosophy of the municipal reform movement in the U.S. in the 1920s.

(3) **Confusion of land-use element with zoning plan.** The SZEAL required that zoning regulations be “in accordance with a comprehensive plan.” It did not define what a “comprehensive plan” was, but in a footnote 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.”<sup>100</sup> Both acts used the term “zoning plan” to describe a map of zoning districts developed as part of the proposed regulatory scheme. The SCPEA included a “zoning plan” as an 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 component of the master plan. As a result, the SZEAL language “thus encouraged overall zoning unsupported by a thoughtfully prepared general plan for the future development of the city.”<sup>101</sup> Professor Daniel R. Mandelker has speculated that “[p]erhaps the zoning plan requirement reflected the decision to publish the zoning act before the planning act. Modern planning legislation does not usually require a zoning plan but does require a land use element.”<sup>102</sup>

Another view is that the practice in the 1920s was to prepare a detailed zoning plan as part of the the comprehensive plan. City Planning Consultant Harland Bartholomew, in a paper to the National Conference on City Planning in New York in 1928, “What is Comprehensive Zoning?” described the underlying qualitative and quantitative study and analysis of city growth that should precede the preparation of a zoning plan. Referring to the “in accordance with a comprehensive plan” and related language in the SZEAL, Bartholomew catalogs a series of considerations and issues stemming from the act’s language that could well be a work program for a contemporary

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<sup>99</sup>Mel Scott, *American City Planning Since 1890* (Berkeley, Cal.: University of California Press, 1971), 244.

<sup>100</sup>Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (SZEAL) (Washington, D.C.: U.S. GPO, 1926, rev’d ed.), §3 and n. 22.

<sup>101</sup>Mel Scott, *American City Planning*, 195.

<sup>102</sup>Daniel R. Mandelker, *Land Use Law*, 3d ed. (Charlottesville, Va.: Michie, 1993), §3.07.

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comprehensive plan.<sup>103</sup> Bartholomew's paper supports the notion that, at a minimum, the zoning plan was to have been grounded in technical reports that documented its rationale. In a 1929 text, *Our Cities To-Day and To-Morrow: A Survey of Planning and Zoning Progress in the United States*, Theodora Kimball Hubbard and Henry Vincent Hubbard, honorary librarian of the American City Planning Institute and Norton Professor of Regional Planning at Harvard University, respectively, confirms the approach described by Bartholomew. The Hubbards listed zoning as one of the six main elements of a comprehensive city plan.<sup>104</sup>

### **MODEL LAWS BY BASSETT AND WILLIAMS AND BETTMAN**

Harvard University Press published *Model Laws for Planning Cities, Counties, and States, Including Zoning, Subdivision Regulation, and Protection of Official Map* in 1935. Its authors were Edward M. Bassett, Frank B. Williams, and Alfred Bettman. Bassett and Bettman were, of course, on the advisory committee that drafted the SZA and the SCPEA.

The model planning acts drafted by Bassett and Williams together and by Bettman alone tended to track the language in the SCPEA. Both models provided that the master plan should be adopted by the planning commission.<sup>105</sup> The Bassett/Williams model was emphatic that the plan's "purpose and effect shall be solely to aid the planning board in the performance of its duties."<sup>106</sup> The Bettman model, however, was somewhat more expansive in its scope by adding to the plan's coverage of

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<sup>103</sup>Harland Bartholomew, "What is Comprehensive Zoning?" in National Conference on City Planning, New York, *Planning Problems of Town, City and Region: Papers and Discussions* (Philadelphia, Pa.: Wm. F. Fell, 1928), 47-71. Bartholomew listed the following in "Studies to Be Made in Advance of the Preparation of a Zoning Ordinance": existing uses of land and buildings; new buildings erected by five-year periods; building heights; lot widths; front yards; population density; population distribution; topography; computation of areas for different land uses. Id., at 50. He added: "In addition to these studies there should be available a major street plan, a transit plan, a rail and water transportation plan; in other words, a comprehensive city plan. Without such a comprehensive city plan, the framers of the zoning plan must make numerous assumptions regarding the future of the city in respect to all of these matters without the benefit of detailed information and study. Zoning is but one element of a comprehensive city plan. It can neither be completely comprehensive nor permanently effective unless undertaken as part of a comprehensive plan." Id. "Two fundamental considerations," Bartholomew said, would also need evaluation: "1. How much area is needed for each broad type of use and how shall it be arranged or balanced in any given community? 2 What regulations are needed in the several use districts to afford good relations between the individual structures?" Id., at 51.

<sup>104</sup>Theodora K. Hubbard and H.V. Hubbard, *Our Cities To-Day and To-Morrow: A Survey of Planning and Zoning Progress in the United States* (Cambridge, Mass.: Harvard University Press, 1929), 109-10, which discusses what comprehensive plans should include.

<sup>105</sup>Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States, Including Zoning, Subdivision Regulations, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935), 39-47, 76-80 (municipal planning acts).

<sup>106</sup>Id., 40. Bassett's views on the master plan were further amplified in his book, *The Master Plan* (New York: Russell Sage Foundation, 1938). For a critique of Bassett's views, see Charles M. Haar, "The Content of the General Plan: A Glance at History," *Journal of the American Institute of Planners* 21, no.23 (Spring-Summer 1955): 66-70.

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“the general location, character, layout and extent of community centers and neighborhood units; and the general character, extent, and layout of the replanning of blighted districts and slum areas.”<sup>107</sup>

Bettman was later to reverse himself on the question of “no express definition” of a master plan in a statute. In 1945, under the sponsorship of the American Society of Planning Officials, one of APA’s predecessor organizations, he published a draft of a model urban development act which included an express definition of what by that time had been rediscovered as the essential physical elements with which a plan must deal. The definition read:

The planning commission is . . . directed to make . . . a master plan of the municipality . . . which shall include at least a land-use plan which designates the proposed general distribution and general locations and extents of uses of the land for housing, business, industry, communication and transportation terminals, recreation, education, public buildings, public utilities and works, public reservations and other categories of public and private uses of the land.<sup>108</sup>

It is notable that in this definition the term “zoning plan” does not appear. Instead, the term “land-use plan” is the new minimal formulation of the master plan.

### SECTION 701 PLANNING

A major influence in the approach to local plan-making was the administrative guidelines for the now-defunct urban planning assistance program (under Section 701 of the Housing Act of 1954, as amended) by the U.S. Department of Housing and Urban Development and its predecessor agencies. This program provided aid to local governments as well as state and regional planning agencies over a 27-year life span.<sup>109</sup> In order to qualify for federal urban renewal aid – and later, for other grants, a local government had to prepare a plan consisting of land-use and housing elements at a minimum, as well as circulation, public utilities, and community facilities elements.<sup>110</sup>

### CHAPIN, *URBAN LAND USE PLANNING*

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<sup>107</sup>Bassett, *et al.*, *Model Laws*, 77.

<sup>108</sup>Alfred Bettman, *City and Regional Planning Papers*, Arthur C. Comey, ed (Cambridge, Mass.: Harvard University Press, 1946), 263-264, quoted in T.J. Kent, Jr., *The Urban General Plan* (Chicago: APA Planners Press, 1990, reprint of 1964 edition), 62.

<sup>109</sup>For a history of this program, see Carl Feiss, “The Foundations of Federal Planning Assistance,” *Journal of the American Planning Association* 51, no. 2 (Spring 1985): 175-184.

<sup>110</sup>The statute was amended several times. See 40 U.S.C. §§461(c) and (m) (1976) quoted in Mandelker and Cunningham, *Planning and Control of Land Development*, 81-82, describing the Section 701 program as it existed in the mid-1970s.

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Also influential was *Urban Land Use Planning* by University of North Carolina at Chapel Hill Planning Professor F. Stuart Chapin, Jr. The 1957, 1965, 1979, and 1995 editions of the book were a widely used text and reference by planners. The contribution of this book is discussed in the commentary to the land-use element, Section 7-204, below.

### **KENT, *THE URBAN GENERAL PLAN***

The next major rethinking of the comprehensive plan concept was in 1964 with the publication of *The Urban General Plan* by T.J. Kent, Jr., a professor of city planning at the University of California at Berkeley. Based in part on his experience in California, Kent described the general plan as:

the official statement of a municipal legislative body which sets forth its major policies concerning desirable future physical development; the published general-plan document must include a single, unified general physical design for the community, and it must attempt to clarify the relationships between physical-development policies and social and economic goals.<sup>111</sup>

Kent stated that the general plan should have five physical elements: (1) land use, which he termed the “working-and-living areas section” because this phrase “emphasizes basic human activities rather than the convenient but frequently misleading method of simply classifying the way land is used;” (2) circulation, primarily concerned with the street and highway system and the public transportation routes and stations; (3) community facilities, dealing with the variety of public activities that involve physical development, such as schools, parks, playgrounds, and civic centers; (4) civic design, focusing on the major physical features and the policy decisions of the plan that are the result of aesthetic judgments; and (5) utilities, such as water supply, drainage, sewage disposal and other utility systems insofar as the other physical elements of the plan depend on them. Kent contended that cities may have need for other elements in addition to these five, such as those dealing with special sections of a community like a waterfront or areas around public institutions such as colleges and universities.<sup>112</sup>

He favored a general plan document that included “a comprehensive large-scale drawing of the general physical design of the whole community and a written summary describing the major policies and proposals of the plan.”<sup>113</sup> He also advocated a statement of community goals, “including a description of the primary and secondary social and economic roles that a city is to play in the region.”<sup>114</sup> The plan document typically included, he said, overviews of population, the local

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<sup>111</sup>Kent, *The Urban General Plan*, 18.

<sup>112</sup>Id., 18-19.

<sup>113</sup>Id., 19.

<sup>114</sup>Id.

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and regional economy, the geographic setting, and the historical development of the community. He added that the plan document also needed to assess the community's present conditions and point out major problems and issues. "The opportunities and needs of the future should be discussed. Assumptions and forecasts should be stated," he said.<sup>115</sup> The plan document should also be long-range, with a horizon of 20 to 30 years.

Kent crystallized a refinement of the local comprehensive plan by explicitly defining what a plan and its elements were. But as important was his belief that the principal client of the plan was the legislative body, not the planning commission. "The general plan," he wrote, "is first and foremost an instrument through which the city council considers, debates, and finally agrees upon a coherent, unified set of general long range policies for the physical development of the community. The general plan should be designed, therefore, to facilitate the work of the councilmen [sic] as their attempt to focus their attention on the community's major development problems and opportunities."<sup>116</sup> In formulating the plan, the council's advisors should present alternatives (as well as the consequences that flow from each alternative) that are available to the community so the council could select from among them. Kent contended that this was not done often enough. "Too many professionals make their own selection of an alternative and present it to the council as a single firm recommendation."<sup>117</sup>

Kent also advocated an annual review and amendment of the plan and a major reconsideration of the entire plan document every ten years. The review and amendment process should be timed just prior to consideration of the annual budget, he said. This brings about "a natural focus on questions of physical development policy [by the council] shortly before they must make decisions on financial policy concerning the allocation of funds for capital improvements." The procedure also "helps place the principal controversial issues of the preceding year in perspective and encourages the leaders of the council to set their sights on the major steps to be taken during the coming year to carry out the plan. Finally, an annual review and amendment process responds to the criticism that plans date quickly and become "an actual detriment to those working to bring about improvements to the physical environment."<sup>118</sup>

The 10-year reconsideration – at a scale to match the original preparation of the plan – was necessary because many long-range trends and issues would not be discernible at the annual review. Indeed, he said, it was necessary from time to time for planners and citizen policy makers to "step back from, re-examine, and recreate their basic physical development policies."<sup>119</sup>

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<sup>115</sup>Id.

<sup>116</sup>Id., 66.

<sup>117</sup>Id., 67.

<sup>118</sup>Id., 68.

<sup>119</sup>Id., 69.

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More recent approaches to the local comprehensive plan and influences on its preparation are discussed in the commentary to the land-use element in Section 7-205 below.

### **GROWING SMART<sup>SM</sup> MODELS FOR A LOCAL COMPREHENSIVE PLAN**

In the model legislation that follows (Sections 7-201 *et seq.*), the local comprehensive plan is cast as a series of required and optional elements. The required elements include two “bookends:” an issues and opportunities element intended to set the stage for the preparation of other elements; and a program of implementation that proposes measures and assigns responsibility for carrying out the plan. The other required functional elements are for land use, transportation, community facilities (which includes utilities), and housing as well as economic development, critical and sensitive areas, and natural hazards (the local government may opt out of preparing these elements if circumstances may not justify them). In addition, the model statutes include a variety of optional elements.

Several themes run through the model comprehensive planning legislation:

(1) **Greater detail in plan element specifications.** The *Legislative Guidebook’s* introduction observes that many planning and zoning enabling acts lack a good description of comprehensive and functional plans. While a sketchy outline of what may be in a plan may be adequate in theory for legislation, in practice such abbreviated statutes do not provide sufficient guidance to local governments to devise a *good* plan, as opposed to a *minimally-effective* one. When a statute is not precise on the nature of the plan, it may be difficult for a local government to prepare the plan document. The statutes’ chief users will be laypersons – elected and appointed officials – (as well as planners and other professionals) who ought to be able to pick up the statutes and understand what kind of plan document is called for. Consequently, the model legislation errs on the side of detail in characterizing what a plan should contain. Detailing the types of analyses that must underpin plans and describing the substantive

**Table 7-3: Local Comprehensive Plan Elements in Model Statutes**

<i><b>Mandatory</b></i>
Issues and Opportunities
Land Use
Transportation
Community Facilities
Housing
Program of Implementation
<i><b>Mandatory with Opt-Out Alternative</b></i>
Economic Development
Critical and Sensitive Areas
Natural Hazards
<i><b>Optional</b></i>
Agriculture, Forest, and Scenic Preservation
Human Services
Community Design
Historic Preservation
Subplans (as needed)

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contents of plan elements are two ways of ensuring that thorough, systematic, and useful documents will result from the planning process.<sup>120</sup>

The descriptions of the local comprehensive plan and its elements in the *Guidebook* has been written so that different sizes of local governments, or those at different stages in their lifecycle, can benefit from its provisions. Still, some local governments may place emphasis on certain elements that are relevant to them.

For example, in large central cities and mature, inner-ring suburbs the land-use element may focus on reuse and redevelopment. The local planning agency may also decide to formulate separate subplans for neighborhoods and redevelopment areas. The transportation element may propose few new streets. Instead, measures to enhance efficient use of existing streets as well as increased mass transit may be important. Similarly, the community facilities element may stress repair and replacement of existing facilities. The housing element may focus on the needs of existing residents and especially on rehabilitation of existing housing stock. Economic development efforts will be directed at retention of existing businesses as well as attraction of new ones. In this regard, the local government may also be concerned about establishing job retraining programs. Historic preservation

– because there may be a large stock of older buildings with some historic significance – may also receive priority attention.

By contrast, developing communities will be concerned with the transition of undeveloped land into developed sites through the land use element. In that context, there may be greater emphasis on preservation of agricultural and forest lands and protection of critical and sensitive areas. The transportation element's attention may be directed, in part, on identifying the location of and standards for new streets. The community facilities element's orientation will be on construction of new facilities, such as water and wastewater plants and schools, and purchase of new park sites. The housing element would focus on not only the needs of existing residents, but those expected to reside in the community, particularly as to whether the housing stock was balanced for all income groups, especially low- and moderate-income households. Economic development planning will typically be aimed at attraction of new businesses and industries. Some historic areas may exist, but a community may decide that it wants to establish design standards for certain areas through the community design element.

**(2) Regional context for preparing plans.** Consistent with T.J. Kent's proposal in *The Urban General Plan*, the plan descriptions, especially in Sections 7-203 to 7-204, call for supporting analyses and projections to be conducted in the context of what is occurring in the surrounding

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<sup>120</sup>An alternative approach is to draft a description of a comprehensive plan and its elements in general terms, with the belief that an administrative agency, such as a state planning office or department of community affairs, will have the authority to detail the statute through rules and guidelines. While this may be preferable in terms of flexibility, one cannot be certain that it will always occur. See the discussion of this issue in the commentary to the transportation element, Section 7-205 below. On the question of what is a good plan, see generally William C. Baer, "General Plan Evaluation Criteria: An Approach to Making Better Plans," *Journal of the American Planning Association* 63, no. 3 (Summer 1997): 329-344.

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region. The plan element descriptions provide for express linkages with a regional comprehensive plan (where such a plan has been prepared) and its supporting economic, demographic, and related projections.

(3) **Integration among plan elements.** Just as the model legislation calls for planning to be done in the broader context of the surrounding region, it also suggests that the individual plan elements be consistent with one another by sharing common assumptions. This is especially important as individual plan elements are updated at different points in time. For example, sewage treatment plants proposed in the community facilities element would be designed around the same forecasts for population and job growth that are used in the land-use element. Similarly, the analysis of transportation needs in the transportation element ought to be derived from the assumptions about development patterns in the land-use element. The assumptions about needed housing ought to be reflected in the mix of dwelling unit types and densities shown in the land-use element.

(4) **Establishment of citizen participation processes.** The model statutes direct the establishment of formal citizen participation processes to inform plan-making, but leave the exact design of that process to the local government (see Section 7-203, Issues and Opportunities Element, and Section 7-401, Public Participation Procedures and Public Hearings). As the commentary to Section 7-401 observes, the traditional approach has been to have a required public hearing, but that sole opportunity for input is often inadequate for building the necessary consensus to give the plan an independent legitimacy, especially in addressing complex, controversial public issues where multiple interests are at stake. In an article in the *Journal of the American Planning Association*, Judith Innes, a professor of city and regional planning at the University of California at Berkeley, argues, in a review of several case studies about public participation in plan-making, that “consensus building, properly designed, can produce decisions that approximate the public interest.”<sup>121</sup> Consensus building in local planning is important, she says, because it broadens understanding about consequences of plan proposals, beyond the intuitive knowledge and experience of planners. It is also important because it confers new authority on participants, such as residents or businesses from neighboring jurisdictions who would otherwise have little legitimacy in local planning decisions, thus “shift[ing] long-standing power relationships and perhaps making the [local government] the arena for conflicts that now take place at the state or regional level.”<sup>122</sup> When plans are the result of consensus building, she says, they are much more likely to be implemented. Thus, through both the preparation of the Issues and Opportunities element and the express requirement that the local government adopt citizen participation procedures before plan-making commences, the model statutes incorporate the perspective advocated by Innes.

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<sup>121</sup>Judith E. Innes, “Planning Through Consensus Building: A New View of the Comprehensive Planning Ideal,” *Journal of the American Planning Association* 62, no. 4 (Autumn 1996): 460-472, at 469. This article is a response to the classic critique of city planning by Political Scientist Alan Altshuler, *The City Planning Process: A Political Analysis* (Ithaca, N.Y.: Cornell University Press, 1965), in which Altshuler challenged the legitimacy and effectiveness of comprehensive planning and of planners’ expertise.

<sup>122</sup>Innes, “Planning Through Consensus Building,” 469.

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(5) **Assumption of on-going evaluation and periodic revision – a continuing planning process.** As noted, the SCPEA (and planning statutes based on it) provided for the amendment of the local plan, but did not dictate the interval in which this was to occur. To some extent, this has resulted in an impression of planning “as a child of architecture. . . ‘to be for a static city to be built all at once and to be preserved indefinitely without change.’”<sup>123</sup> In order to avoid a comprehensive plan that dates quickly after adoption and that is perceived as an inflexible document, the model legislation below (see Sections 7-405 and 7-406) adopts T.J. Kent’s view, discussed above, that the local government must conduct an ongoing evaluation of the plan, at regular intervals (at least every five years, but as often as once a year) with periodic revisions (at least every ten years) to account for changes in its underlying demographic, economic, and environmental assumptions.

(6) **The need to understand the functioning of the regional and local land market.** The model statutes stress that local comprehensive planning should consider the impact on the supply and demand for land at the local and regional level (see Sections 7-204, 7-204. 1, and 7-406). A plan is only as good as the information upon which it is based. As a practical matter, local plans, in influencing the location, timing, and amount of growth, do in fact manage the land market. In order for such planning to be realistic, the local government must obtain feedback on the operation of the land market so that it can periodically update its projections, and the plans that are the result of those projections.

(7) **Importance of the taking issue.** The model legislation attempts to account for the impact of the taking issue – the problem under the Fifth Amendment of the U.S. Constitution when a plan or a regulation deprives a landowner of reasonable economic use of his or her property – through clarification of the public purpose and related planning rationale behind any regulatory measures that severely limit use of land and through cautious drafting. A good example is the corridor map provision in Section 7-501. The model statute first requires that the corridor map, a device that reserves land for the construction of transportation facilities, must be based on the local comprehensive plan, and especially with the thoroughfare plan; no local government can adopt a corridor map unless it has first adopted a local comprehensive plan with a thoroughfare plan. Moreover, if the landowner then applies for a permit for development on the reserved land, there must be a hearing, and the reviewing body (e.g., the planning commission) can choose from a series of alternatives in determining whether or not to approve the permit. For example, the body can recommend approving the permit, approving it with conditions, eliminating or altering the reservation, or taking the right-of-way by eminent domain. Thus, the legislation asks that the local government be very clear and consistent in determining the need for the reservation through long-range planning and give the landowner the benefit of the doubt when it comes to resolving the question of whether the reserved land will in fact be needed for a public purpose.

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<sup>123</sup>American Law Institute (ALI), *A Model Land Development Code* (Philadelphia: ALI, 1976), Commentary to Art. 3, 115, citing Robert Mitchell, “A New Frontier in Metropolitan Planning,” *Journal of the American Institute of Planners* 2, (1961): 169, 170.

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### **(8) Preference for mandatory planning.**

Some 24 states have some form of mandatory planning for state or regional agencies or local governments.<sup>124</sup> These states include, for example, California, Delaware, Florida, Kentucky, Minnesota, North Carolina, Oregon, Rhode Island, and Washington. Planning can be required for local governments that are in certain areas of the state (as in North Carolina, which mandates land-use planning for 20 coastal counties<sup>125</sup>) or that meet certain population size or growth rate thresholds (as in Washington<sup>126</sup>). Some states go so far as to have a certification process for local plans that indicates that the plans have satisfied statutory criteria or administrative rules.<sup>127</sup>

The new planning mandates, one commentary has noted, “are state responses to shortcomings in local planning,” in part because “local plans often fail to address key issues, such as the overall growth patterns, economic development, and affordable housing.”<sup>128</sup> They are also a means by which states ask local governments to incorporate state goals into local land-use policy (e.g., Maryland, Oregon, and Florida) to ensure that the two levels of government are not working at cross purposes.

The decision to mandate planning for local governments is, at bottom, a political one and has a variety of advantages and disadvantages (see Table 7-1).<sup>129</sup> But one nationwide study that looked at mandatory planning from the particular perspective of natural hazards found that where states required local governments to prepare comprehensive plans, “plans have more substantive factual

### **Should Planning be Mandated?**

**Here’s what the Directorate, the Growing Smart<sup>SM</sup> project advisory committee, said on the question of whether comprehensive planning should be mandated by statute:**

Planning is essential and should be required at all levels of government where land-use decisions will be made.

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<sup>124</sup>Rodney L. Cobb, “Mandatory Planning: An Overview,” *PAS Memo* (Chicago: American Planning Association, February 1994), 1.

<sup>125</sup>N.C. G.S. §113A-109 (1996).

<sup>126</sup>R.C.W. §36.70A.040 (1996).

<sup>127</sup>See Nancy Stroud, “State Review and Certification of Local Plans” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 85-88 (discussing mandatory certification in Oregon, Washington, Florida, and Rhode Island, and incentive-based certification in Maine, Vermont, and Georgia).

<sup>128</sup>Cobb, “Mandatory Planning,” 1.

<sup>129</sup>For a rigorous debate over the mandatory local planning question see “Should state government mandate local planning? . . . Yes” by Daniel R. Mandelker and “Should state government mandate local planning? . . . No” by Lawrence Susskind in *Planning* 44, no. 6 (July 1978): 14-22.

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underpinning, goals tend to be stated more clearly, and in states such as Florida, there is a strong emphasis on implementation that substantially strengthens the role of planners and other policy makers and the planning function. . . The data suggest that state planning mandates do make a difference in improving the amount, character, and quality of planning and therefore are worthy of consideration by other states.”<sup>130</sup>

Consequently, while the models that follow do permit individual states to make a decision whether or not to mandate planning by local government and to what degree, it is likely that such a mandate will result in better plans as well as better implementation.

### **ARE ALL LOCAL COMPREHENSIVE PLAN ELEMENTS NEEDED?**

As noted above, the *Legislative Guidebook* lays out a full complement of plan elements, but all local governments in a state may not need the kind or level of direction contemplated in these models. A number of factors will enter into the decision, including: (a) the priorities of the state legislature and its willingness to provide financial assistance for planning; (b) the capacity of state officials to administer the statutes and provide guidance to local governments; (c) the general authority of particular local governments; and (d) the technical and financial capacity of local governments to prepare plans (or the ability to supplement capacity).

Different classes or types of local governments may have different levels of authority. For example, a local government may have authority under state law to enact zoning, but subdivision responsibility is that of a county or regional planning agency. Consequently, the requirements for local thoroughfare planning in the transportation element may need to be modified. Alternately, some local governments may have the authority to operate water and sewer systems, but others may not. This will affect what is contained in the community facilities element.

In some states, elements that are suggested as optional or subject to an opt-out procedure (e.g., economic development) may be a high priority for the state legislature. States may wish to make opt-out elements completely mandatory, or limit the use of the opt-out mechanism in some specific manner. For example, a state with an ocean coast and a strong interest in preserving its ecosystem could provide that a coastal county or municipality cannot opt out of the critical and sensitive areas element even if they have fewer than five acres of such area. Similarly, agriculture and forest preservation may also be a high priority as well, particularly in metropolitan areas where loss of farmland is pronounced.

Finally, there is the question of detail in the statutes. As the commentary to Section 7-205, Transportation Element, notes below, a state may prefer to detail the statute through administrative rulemaking and guidance rather than to include the specifics suggested by the model statute. This requires, however, a capacity at the state level to draft such rules and provide technical assistance in interpreting them.

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<sup>130</sup>Raymond J. Burby, et al., “Is State Mandated Planning Effective?” *Land Use Law & Zoning Digest* 45, no. 10 (October 1993): 3-9, at 8-9; see also Raymond J. Burby and Peter J. May, *Making Governments Plan: State Experiments in Managing Land Use* (Baltimore, Md.: Johns Hopkins, 1997).

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**Table 7-4: Some Pros and Cons of Mandatory Local Planning**

<i>Issue</i>	<i>Pros</i>	<i>Cons</i>
General	<p>Has been found to increase the quality of local plans and commitment to implementation on the</p> <p>Provides rational basis for land-use regulations</p>	<p>Unless supported by statewide consensus and incentives, may cause backlash on the acceptability of planning.</p> <p>Intrudes on “home rule” prerogatives, if state grants such authority.</p>
Uniformity	<p>Provides minimum standards as to what constitutes a good plan and how to prepare one. Addresses issues such as affordable housing and environmental protection, which are sometimes ignored.</p>	<p>Planners cannot agree on what constitutes a good plan. May produce plans that are not tailored to needs of individual local governments, which vary by size, growth rate, and degree of urbanization.</p>
Integration	<p>Provides mechanism to integrate state policies, where they exist, with local planning; also provides means by which plans of adjoining local governments are taken into account. Protects local government against arbitrary action when state agencies must sive plan, state agency options are then limited.</p>	<p>Local planning is viewed as a local matter, and required integration with state policies and plans of adjoining local governments may impinge on local decision-making. Where local planning requires state agencies to comply with an adopted comprehensive plan, state agency options are then limited.</p>
Predictability	<p>Can increase developer and citizen certainty about which land is available for development. Some state programs with mandatory local planning have successfully focused on streamlining and creating appeal mechanisms, with time limits for governmental action</p>	<p>Developers may dislike local governments designating which lands are available for development. May raise developers’ fears about negative aspects of planning such as red tape, regulatory delays, and litigation. Advance designation of land for development invites opposition.</p>
Cost	<p>Planning before you act will save money in the long run through the thoughtful examination of alternatives and the scheduling of improvements.</p>	<p>Unless backed by state grants, mandatory planning may cost local governments a lot of money in the short term that could be used for other purposes.</p>

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### THE LOCAL COMPREHENSIVE PLAN

#### 7-201 Local Comprehensive Plan, Generally; Purposes

##### *Alternative 1 – Local Comprehensive Plan as an Advisory Document*

- (1) The legislative body of a local government [may *or* shall] cause to be prepared, adopt, and, from time to time, amend, a local comprehensive plan.
- (2) The purpose of the local comprehensive plan is to direct the coordinated, efficient, and orderly development of the local government and its environs that will, based on an analysis of present and future needs, best promote the public health, safety, morals, and general welfare.

##### *Alternative 2 – Local Comprehensive Plan as a Document to Integrate State, Regional, and Local Interests*

- (1) The legislative body of a local government shall, within [36] months of the effective date of this Act, cause to be prepared and shall adopt a local comprehensive plan, which plan shall be updated and amended at least once every [5] years. The local comprehensive plan shall [be consistent with *or* be coordinated with *or* conform to] the state comprehensive plan [, the state land development plan,] and any applicable regional comprehensive and functional plan.
- (2) The purpose of the local comprehensive plan is to direct the coordinated, efficient, and orderly development of the local government and its environs that will, based on an analysis of present and future needs, best promote the public health, safety, morals, and general welfare. More specifically, the plan shall:
  - (a) provide a mechanism by which the goals, policies, and guidelines in the state comprehensive plan, the state land development plan, and any applicable regional comprehensive and functional plan are interpreted and applied to the local government and its environs;
  - (b) have regard for those state interests identified in Section [2-102];<sup>131</sup>

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<sup>131</sup>Section 2-102 describes a series of statewide planning interests that *all* governments must take into account when exercising authority under this Act. For example, Section 2-102(1) includes “the promotion of the public health, safety, morals or general welfare *of the state*” and Section 2-102(6) cites the “adequate provision of a full range of housing opportunities for persons of all income levels” (emphasis supplied). The objective of this language is to ensure that a balance is achieved between the social, economic, and cultural well-being of people, communities, and the environment.

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- (c) take into account adopted plans of contiguous local governments to the extent that they affect state, regional, or extrajurisdictional interests;
  - (d) provide a unified physical design for the development areas within the jurisdiction of the local government;
- ◆ The following provisions, from subparagraphs (2)(e) to (2)(r), are optional as they contain statements regarding desired development form or particular interests to be addressed or protected. Such statements, where applicable, may instead be addressed in the goals and policies of the local comprehensive plan itself.
- [(e) encourage a pattern of compact and contiguous growth [to be guided into urban or rural growth centers] [designated in accordance with the goals, policies, and guidelines in the state land development plan and in any applicable regional comprehensive plan];]
  - [(f) establish acceptable level of service and/or performance measures for transportation and community facilities and ensure the adequate and timely provision of those facilities in order to support existing and planned development;]
  - [(g) direct growth to where infrastructure capacity is available or committed to be available in the future and provide an adequate supply of buildable land for at least [20] years;]
  - [(h) support development patterns that encourage multimodal transportation options;]
  - [(i) promote the availability of housing with a range of types and affordability to accommodate persons and households of all types and income levels and in locations that are convenient to employment and quality public and private facilities, and encourage the development of housing that will meet the housing needs identified in any state and/or regional housing plan prepared pursuant to Sections [4-207; 4-208; or 6-203];]
  - [(j) promote the adequate provision of employment opportunities and the economic health of the region and the local government;
  - [(k) promote the development of new employment in areas that are convenient to existing housing and public transportation facilities;]
  - [(l) protect prime agricultural lands from encroachment by urbanization;]
  - [(m) protect state, regional, and local areas of critical environmental concern;]
  - [(n) conserve and manage natural resources and the mineral resources base;]

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- [(o) promote energy conservation;]
- [(p) conserve features of significant architectural, scenic, cultural, historical, or archaeological interest;]
- [(q) promote good civic design;]
- [(r) protect life and property from the effects of natural hazards, such as flooding, winds, wildfires, and unstable lands; and]
- (s) take into consideration such other matters that may be logically related to or form an integral part of a plan for the coordinated, efficient, and orderly development of the local government.

### **7-202 Specifications for Plan Elements and Supporting Studies; Economic, Demographic, and Related Assumptions; Mandatory and Optional Elements; Opt-Out Provisions; Joint Plan or Plan Element Preparation**

- (1) In preparing the local comprehensive plan, the local planning agency shall undertake supporting studies that are relevant to required or optional elements included in the plan. In undertaking these studies, the local planning agency may use studies conducted by others concerning the future development of the local government.
- (2) The local comprehensive plan shall include, at a minimum, the following required elements:
  - (a) an issues and opportunities element;
  - (b) a land-use element;
  - (c) a transportation element;
  - (d) a community facilities element;
  - (e) a housing element; and
  - (f) a program for the implementation of the local comprehensive plan.
- ◆ The selection of which elements are mandatory is based on a determination that a local comprehensive plan, regardless of the location or type of community, really would not be complete without *each* of these sections.
- (3) The local comprehensive plan shall also include the following required elements, except as provided in paragraph (5) below:
  - (a) an economic development element;

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- (b) a critical and sensitive areas element; and/or
  - (c) a natural hazards element.
- ◆ The model language is drafted, in paragraph (5) below, with an opt-out provision for three discrete mandatory elements. The opt-out provisions are meant to ensure that for those communities where certain natural or economic conditions are prevalent, that these issues are addressed. Since these issues are not applicable to every community nationwide, they are included here as mandatory, with an opt-out feature.
- (4) The local comprehensive plan may also include, but shall not be limited to, the following optional elements:
    - (a) an agriculture, forest [, and scenic] preservation element;
    - (b) a human services element;
    - (c) a community design element;
    - (d) a historic preservation element;
    - (e) subplans for special planning districts and small areas,<sup>132</sup> including but not limited to neighborhood plans, transit-oriented development plans, and redevelopment area plans; and/or
    - (f) [other].
- ◆ The optional elements are those elements that a local government may or may not include in its local comprehensive plan, depending on the nature of the community and the amount of time and money available for preparation of its plan. A local comprehensive plan should be deemed “complete,” however, even without the inclusion of any of these optional elements.
- (5) A local government may opt out of preparing any of the elements identified in paragraph (3) above if the legislative body adopts a resolution that finds, in writing, that:
    - (a) in the case of the economic development element, the amount of land used and/or available for commercial and/or industrial development within the jurisdiction of the

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<sup>132</sup>For a discussion of small area planning see Kaiser, Godschalk, and Chapin, *Urban Land Use Planning*, 4th ed., 458- 460. They describe it as “the process of developing detailed plans for sub-areas of the jurisdiction, based on the overall land use plan as well as discourse with local interests to set specific community development objectives.” *Id.*, at 458.

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local government are/is not significant and/or that economic development is not a priority for the local government;

- (b) in the case of the critical and sensitive areas element, the amount of land area within the jurisdiction of the local government that potentially constitutes a critical or sensitive area is less than [five] acres or that such land has previously been designated an area of critical state concern pursuant to Sections [5-207] and [5-208];
- (c) in the case of the natural hazards element, the probability of exposure to natural hazards within the jurisdiction of the local government is not significant; and/or
- (d) [other].

Such finding shall be based upon reasonable evidence specifically referred to in the finding and consistent with the rest of the local comprehensive plan.

- (6) In order to provide consistency within a local comprehensive plan, all required and optional elements included in a plan shall be based on the same economic, demographic, and related assumptions and data developed by or for the local government.
- ◆ Paragraph (6) ensures that, for example, the community facilities element, which includes proposals for sewage treatment plants, would employ the same assumptions as the land-use element in terms of the population or type of nonresidential land uses to be served. This requirement is intended to prevent a sewage treatment plant from being designed for one projected population while the land-use element is formulated for another.
- (7) Each element shall contain a statement explaining how it relates to other elements.
- ◆ For example, the transportation element should identify positive and negative impacts on: local land-use patterns (including existing and proposed population densities, intensities, and housing and employment patterns), environmental quality, energy use and resources, existing transportation facilities, and the local government's fiscal capabilities.
- (8) The local comprehensive plan shall include a comprehensive plan map at a suitable scale that is a generalized composite of proposals and recommendations contained in all required and optional elements.
  - [(9) Where the [regional planning agency] has adopted a regional comprehensive plan, the local government shall use the regional comprehensive plan's economic, demographic, and related assumptions and data, pursuant to Section [6-201(5)(a), *Alternative 2*], as well as regional plan's economic, population, and land-use projections, pursuant to Section [6-201(3)(a), (c), and (i), *Alternative 2*] in the preparation of the local comprehensive plan.]

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- ◆ Bracketed language is intended to ensure consistency of the assumptions contained in an adopted regional comprehensive plan in a planning system whose goal is to integrate state, regional, and local interests. Under this approach, local governments in a region would use the same assumptions and projections that the regional planning agency employs in developing the regional comprehensive plan. It will probably be desirable for the regional planning agency to establish an internal process while the regional plan is being prepared by which such projections are reviewed by affected local governments, who would be given the opportunity to critique the assumptions and methodologies and offer alternative projections.

[(10) The local comprehensive plan shall [conform to *or* be consistent with *or* be coordinated with] the state comprehensive plan[, state land development plan,] and the applicable regional comprehensive and functional plans and shall be coordinated with the local comprehensive plans of adjoining local governments in order to minimize intergovernmental conflict. To that end, it shall contain a statement describing its relationship to the state comprehensive plan, the regional comprehensive plan, and the local comprehensive plans of adjoining local governments.]

(11) A local unit of government may enter into an agreement with any other local government or governments to jointly prepare a local comprehensive plan or plan element that will include the land area included in their respective jurisdictions, with the costs for the preparation of such a plan or plan element to be shared by the participating governmental units on a proportional basis.

### Required Elements

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#### ***Commentary: Issues and Opportunities Element***

Increasingly, contemporary comprehensive plans are initiated or assisted by a community-wide visioning process, a intensive citizen participation effort designed to produce statements of what the community wants to become.<sup>133</sup> A visioning process is intended to allow a community to help better understand the values and concerns of its citizens and use them as a basis for planning, highlight the trends and forces that are affecting the community, articulate a big-picture view to guide short-term decisions and long-term initiatives, and develop programs to achieve its vision.<sup>134</sup> These visioning

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<sup>133</sup>For a critical discussion of the topic, see Robert Shipley and Ross Newkirk, "Visioning: Did Anybody See Where It Came From?" *Journal of Planning Literature* 12, no. 4 (May 1998): 407-416.

<sup>134</sup>See, e.g., Oregon Visions Project, Oregon Chapter, American Planning Association, *A Guide to Community Visioning: Hands-On Information for Local Communities* (Portland, Ore.: Oregon Visions Project), 7.

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processes frequently use public or town meetings, focus groups, questionnaires, newsletters, visual preference testing, charettes, and computers to engage citizens in identifying problems and opportunities facing their community and depict a formal expression of an overall image of what a community wants to be and how it wants to look at some point in the future. Indeed, many modern plans include the term “vision” in their titles and/or include an account of the steps followed in the development of the visioning processes.<sup>135</sup>

Despite the popularity of “visioning,” it is generally absent from existing state enabling legislation (see, however, the Florida example in the footnote below).<sup>136</sup> Section 7-203 calls for the

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<sup>135</sup>For examples of such plans or reports about visioning processes, see, e.g., Kezziah Watkins, *The Voices of Vail Comprehensive Report* (Colorado Springs, Colo.: Kezziah Watkins for the City of Vail, September 1996); Gresham 2002 Action Planning Committee, *Final Gresham 2002 Action Plan* (Gresham, Ore.: The Committee, December 1992); Grand Traverse 20/20 Steering Committee, *Summary Report: Results of Information Obtained at Grand Traverse 20/20 Futuring Sessions and Summary Conference* (Traverse City, Mich.: The Committee, May 1991); Hillsborough County City-County Planning Commission, *A Vision for the Future of Our Community* (Tampa, Fla.: The Commission, September 1993); *Citizens of Lower Yakima Valley with Yakima County Planning Department, Focus 2010 Planning for Yakima County's Next 20 Years: Lower Valley Visioning Report* (Yakima, Wash.: The Department, January 1992); Joseph Pobiner Consulting, *Goals for Canyon – A Vision for the Future (and Echo from the Past: City of Canyon, Texas Visioning and Goal Development)* (Grapevine, Tx.: Joseph Pobiner, June 25, 1993); Morgantown Area Chamber of Commerce, *Vision 2000 for a Greater Morgantown Area* (Morgantown, W. Va.: The Chamber, July 1992); City of Greenville, *Horizons: Greenville's Community Plan* (Greenville, N.C. The City, January 9, 1992); Allegheny County, *Allegheny County 2001* (Pittsburgh, Pa.: Allegheny County Planning Department, May 1992); and City of Everett, *Everett 2000: Vision, Goals & Action: A Guide to Everett's Preferred Future in the 21st Century as Envisioned by its Citizens* (Everett, Wash.: The City, 1991). See generally Jason Woodmansee, “Community Visioning: Citizen Participation in Strategic Planning,” *MIS Report* 26, no. 3 (Washington, D.C.: International City/County Management Association, March 1994); Steven C. Ames, “Community Visioning: A Tool for Managing Change,” *PAS Memo* (Chicago: American Planning Association, July 1996); Carolyn Kennedy, “Comprehensive Plans: Making the Vision Come True,” *PAS Memo* (Chicago: American Planning Association, July 1992); William R. Klein, *et al.*, “Visions of Things to Come,” *Planning* 59, no. 5 (May 1993): 10-15; Oregon Visions Project, Oregon Chapter, American Planning Association, *A Guide to Community Visioning: Hands-On Information for Local Communities* (Portland, Ore.: Oregon Visions Project, 1993); and Steven C. Ames, *Charting a Course for Corvallis: A Case Study of Community Visioning in Oregon* (Portland, Ore.: Steven C. Ames, for the Oregon Visions Project, American Planning Association, Oregon Chapter, May 1989).

<sup>136</sup>The Florida planning statutes provide:

Each local government is encouraged to articulate a vision of the future physical appearance of its community as a component of its local comprehensive plan. The vision should be developed through a collaborative planning process with meaningful public participation and shall be adopted by the governing body of the jurisdiction. Neighboring communities, especially those sharing natural resources or physical or economic infrastructure, are encouraged to create collective visions for greater-than-local areas. Such collective visions shall apply to each city or county only to the extent that each local government chooses to make them applicable. . . . When a local vision of the future has been created, a local government should review its comprehensive plan, land development regulations, and capital improvement program to ensure that these instruments will help move the community toward its vision in a manner consistent with this act and with the state comprehensive plan.

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visioning process to be incorporated into the comprehensive plan as an “issues and opportunities element” which will result in the preparation of a vision statement. How citizens will be involved is left up to the local government to determine. The plan element gives some examples of involvement techniques and factors to be examined in the visioning process. Otherwise it does not stipulate the procedures to be followed, although the element is to contain a statement summarizing those procedures, adopted by the local government pursuant to Section 7-401 (Public Participation Procedures and Public Hearings), as well as any actions resulting from them. What is important is that at the end of the process the local government will have agreed on some central orchestrating themes or concepts that will inform other plan elements and implementing actions.

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### **7-203 Issues and Opportunities Element**

- (1) A local comprehensive plan shall contain an issues and opportunities element that shall serve as a source of direction in preparing other required and/or optional elements of the plan.
- (2) The purposes of the issues and opportunities element are to:
  - (a) articulate the values of the citizens and others affected by the local comprehensive plan so that the local government may interpret and use those values as a basis and a foundation for its planning efforts;
  - (b) identify the major trends and forces affecting the local government and its citizens;
  - (c) state a vision<sup>137</sup> or compilation of visions for the local government based on, among other factors, the values articulated in (a) above and the major trends and forces identified in (b) above, as well as the preferences of the legislative body;
  - (d) serve as a series of guiding principles and priorities to implement the vision(s); and
  - (e) link the vision statement with other applicable goals, policies, guidelines, and implementation measures of the local government.
- (3) In preparing the issues and opportunities element, the local planning agency shall identify its primary characteristics (such as geography, natural resource base, susceptibility to natural hazards, population, demographics, major employers, labor force, political and community institutions, housing, transportation, educational resources, and cultural and recreational

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Fla. Stat. §163.3167(11) (1996).

<sup>137</sup>See the definitions of a “vision,” “visioning,” and “vision statement” in Section 7-101 above.

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resources) and shall conduct research and data collection to determine current and projected trends and their potential impacts. The local planning agency may also conduct surveys, form task forces, undertake visioning activities with citizens, and/or hold public workshops to identify issues and opportunities, tangible and intangible assets that make the local government unique and desirable,<sup>138</sup> liabilities and potential threats to the quality of life of the local government,<sup>139</sup> and other indications of significant trends and forces affecting the local government and its citizens.

- (4) The issues and opportunities element shall contain the following:
  - (a) a vision statement;
  - (b) a description of the major trends and forces considered by the local government in formulating that statement, including the impact of forecasted changes in the surrounding region during the planning period;
  - (c) a report of the major opportunities and advantages as well as disadvantages for growth and development that affect the local government, including specific areas within its jurisdiction;
  - (d) an account of the major problems currently or potentially facing the local government during the next [5]-year period;
  - (e) a statement summarizing public participation procedures adopted by the local government pursuant to Section [7-401] below and any actions taken as a result of those procedures; and
  - (f) a summary of the anticipated implications of the local government's selected vision for other required and/or optional elements of the local comprehensive plan, including the potential changes in implementation measures.
- (5) Examples of topics that may be specifically addressed in the issues and opportunities element include: employment opportunities; technological change; housing; education; and recreational resources.
- (6) The issues and opportunities element [may *or* shall] also contain an alternate vision statement that documents any visions that were considered and rejected by the local government in the formulation of its local comprehensive plan.

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<sup>138</sup>Examples of such assets include: natural features; historic landmarks; public or private institutions, cultural traditions; major attractions or employers; and commercial or community centers that act as gathering places.

<sup>139</sup>Such threats may include general threats such as crime and pollution as well as unique or specific threats such as natural hazards or regional economic changes, like the closing of a major employer.

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### *Commentary: Land-Use Element*<sup>140</sup>

The land-use element is a fundamental component of the local comprehensive plan, one that shows general distribution, location, and characteristics of current and future land uses and urban form.<sup>141</sup> The contents of and approach to the contemporary land-use element have been shaped by a number of writings and concepts.

(1) **Chapin, *Urban Land Use Planning***. In its four editions beginning in 1957, F. Stuart Chapin, Jr.'s *Urban Land Use Planning* framed the general techniques that many planners use in formulating the land-use plan. While the four editions differ to the extent that they reflect the increasing use of computer technology in plan making through data collection and modeling, the central contribution of this book (now coauthored with Edward Kaiser and David Godschalk) to the land-use design process defined a methodology of five tasks for developing a land-use plan:

- Task 1. Derive locational requirements for the land use sector of concern. This involves determining principles and standards for locating a particular land use or facility.
- Task 2. Map the suitability of land uses for a particular use based on the locational requirements derived in Task 1.
- Task 3. Estimate the space requirements for the land user projected over time.
- Task 4. Analyze the holding capacity of the suitable land supply in terms of dwelling units, households, number of employees, or acres of the particular land use.

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<sup>140</sup>Portions of this commentary appear in different form in "Toward Model Statutes for the Land-Use Element: An Assessment of Current Requirements and Practice," by Dr. Gerrit Knaap, in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). Dr. Knaap was a Senior Research Fellow on the Growing Smart<sup>SM</sup> project.

<sup>141</sup>For descriptions of land-use elements in state statutes or administrative rules, see, e.g., Cal. Gov't Code §65302 (a) (1996); Fla. Stat. §163.3177(6) (a) (1996); Fla. Admin. Code § 9J-5.006(1994); Rules of Ga. Dept. of Comm. Affairs, §11-3-2.04(f) (1992); Id. Stat. §67-6508 (e) (1996); Ky. Rev. Stat. §100.187(3); (1996) N.J. Stat. Ann. §40:55D-28(b)(2); Minn. Stat. §462.352, subd. 6 (1996); Miss. Code §17-1-1 (ii) (1996); R.I. Gen. Laws, §45-22.2-6(B) (1996). Ore. Dept. of Land Conservation and Development, *Oregon's Statewide Planning Goals & Guidelines*, 1995 ed., Goal 2: Land-use planning (1995); Vt. Stat. §4382(a)(2) (1996); Ut. Code §10-9-302(2)(a) (1996); R.C.W. 36.70A.070(1); Wash. Admin. Code §365-195-305 (1996). See generally Ore. Admin. Rules. Ch. 660 (1996).

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Task 5. Determine alternative spatial arrangements of land classes or land uses.<sup>142</sup>

The planner may go through this sequence several times and the tasks may be approached in different order as well as concurrently for different uses, with feedback between the tasks until an acceptable land-use design is reached that may be gauged against a set of objectives. Together, these five tasks emphasize documenting the basis on which land uses are forecast and located through the articulation of principles and standards. They are intended to establish a structure and a rationality for the planning process, one in which various assumptions could be tested and retested against planning goals. The resulting design is to be a match of locational criteria and projected space needs for different users of land with land supply. Other plans, such as transportation or community facilities, as well as regulations are to be based on the land-use design.

(2) **McHarg, *Design with Nature*.** Landscape Architect Ian MchHarg's *Design with Nature* (1969) added to the techniques of land-use planning the organization and interpretation of environmental information (e.g., soil characteristics, geologic features, existing vegetation, wildlife habitats, slope, etc.) into a series of graphic map overlays to determine whether the land was compatible for broad categories of land uses. In the MchHarg approach, the land is analyzed for its intrinsic suitability; areas with development constraints or having high resource values (e.g., significant forests, areas of steep slopes, aquifer recharge areas, prime agricultural land) are first eliminated as candidates for urbanization. Other land areas without critical environmental or resource protection qualities are set aside for urbanization.<sup>143</sup> MchHarg's approach was later incorporated by Kaiser, Godschalk, and Chapin under the term "land classification" planning which "concentrates future development into a few well-defined areas and delineates other areas where development should not occur"<sup>144</sup> (see below).

(3) **American Law Institute, *A Model Land Development Code*.** In contrast to Kaiser, Godschalk, and Chapin and MchHarg, the ALI Code (1976) did not prescribe a land-use planning technique. Instead, the Code addressed the question of how to define a land use element in a statute, which the Code called a "local land development plan." Under the Code, such a plan was to be a statement of objectives and programs to guide the public and private development of land within the local government's planning jurisdiction. The statement could be in the form of words, maps, illustrations or other media of communication. The land development plan was to be based on a series of problem-oriented planning studies that addressed such factors as population, geology, housing, natural resources, and the amount, general location, and interrelationship of different categories of land use. The plan was to project trends based on those studies. Finally, the plan had to contain a short-term program of public actions to be taken within a period of one to five years in

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<sup>142</sup>Edward J. Kaiser, David R. Godschalk, and F. Stuart Chapin, Jr., *Urban Land Use Planning*, 4th ed. (Urbana, Ill.: University of Illinois Press, 1995), 279-287.

<sup>143</sup>Ian MchHarg, *Design with Nature* (New York: Doubleday/Natural History Press, 1971), 153-161.

<sup>144</sup>Kaiser, Godschalk, and Chapin, *Urban Land Use Planning*, 290.

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order to achieve objectives, policies, and standards stated in the plan. The short-term program was also to indicate the types of future programs to be undertaken after that period.<sup>145</sup>

The ALI Code emphatically rejected mandatory planning as a prerequisite for exercising land development control powers.<sup>146</sup> Instead, local governments that adopted plans received certain supplemental powers such as special procedures for regulating planned unit developments, and the reservation of land for future acquisition by public agencies. Also, the ALI Code did not require that the land development plan take into account the plans of adjoining local governments or of the state or regional planning agencies.

### LAND-USE PLAN PROTOTYPE

In addition to these conceptual influences on the land-use element, planning practice in the U.S. produced a number of different prototypes since the 1970s, characterized by Edward Kaiser and David Godschalk in an article in the *Journal of the American Planning Association*.<sup>147</sup> They note that these four plan styles are not mutually exclusive and that communities often combine aspects of each into a hybrid plan.

*Land-use design plan.* The land-use design plan is the most common of the four prototypes and is a direct descendent of the Section 701 plans of the 1950s and 1960s, described above. Shaped by the writings of F. Stuart Chapin and T.J. Kent, the key component of such plans are land-use maps that depict present and future land uses according to traditional land use categories. Modern versions also contain mixed use and environmental land-use categories and explicitly address contemporary issues such as affordable housing, environmental conservation, and public facility needs. The award-winning *Howard County, Maryland, General Plan* (1990), provides a prime example of this

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<sup>145</sup>ALI, *A Model Land Development Code*, §§3-101-3-105, 122-134. An earlier effort that reflected antecedent concepts to those contained in the ALI Code was *New Directions in Connecticut Planning Legislation: A Study of Connecticut Planning, Zoning and Related Statutes* by the American Society of Planning Officials (ASPO) (Chicago: ASPO, February 1966). The ASPO Connecticut report proposed that, as a precondition to the exercise of development control powers, Connecticut communities should have a development program approved by the state, the elements of which should be specified in a statute. The program would have three components: (1) locally-approved major development policies that the community seeks to carry out through land-use controls, a capital improvement program, and other means; (2) a locally-approved capital improvement program; and (3) evidence of the availability of adequate professional assistance to administer local land use regulations. Two types of policies for (1) would be required: 1. general municipal development policies, such as those dealing with the timing and character of anticipated development, principles governing the generalized location of anticipated development, and the relationship between development and public improvements; and 2. a listing of the major policies applied by the governing body in drafting and revising the zoning map and drafting and revising any map that accompanies the development policies. Id., 33, 35.

<sup>146</sup>For a criticism of this aspect of the ALI Code, see George M. Raymond, "New? Yes. . . More Effective? No," in 1971 *Land Use Controls Annual* (Chicago: American Society of Planning Officials, 1971): 47-54.

<sup>147</sup>The discussion of land-use plan prototypes is abstracted from Edward J. Kaiser and David R. Godschalk, "Twentieth Century Land Use Planning: A Stalwart Family Tree," *Journal of the American Planning Association* 61, no. 3 (Summer 1995): 365-385, esp. 371-377.

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planning prototype.<sup>148</sup> The land-use map in this plan divides the county into residential, commercial, office, industrial, mixed use, institutional, rural residential, rural conservation, and environmental protection areas.

*The land classification plan.* The land classification plan, like the design plan, is spatially specific and map oriented. Unlike the design plan, however, the land classification plan focuses less on development type than on development timing; it is less precise about the pattern of land uses within areas designated for development, which results in a kind of silhouette of urban form. This type of plan was influenced by McHarg's *Design with Nature*, as noted above, and was institutionalized in the Hawaii state land use management program, which dates from 1961, Oregon's 1973 statewide land-use planning act, and Washington's growth management acts of 1990 and 1991. Under this approach:

areas specified for urban growth are called by various names: urban areas, urban transition areas, development areas, or planned development areas, for example. Areas where development should not occur for environmental reasons are called conservation areas, open space, or areas of critical environmental concern, among other names. Still other areas, which are less environmentally critical but not suitable for immediate development, are often called rural areas.

These areas are intended for agricultural or forestry activities. Some parts of the rural district may be intended as permanently hands-off for urban development. Other parts may be intended only as off limits for urban development for a time until more land for urbanization is required.<sup>149</sup>

The Hawaii land-use law divides the state into four categories: urban, rural, conservation, and agriculture; amendments to these boundaries are left to a state land-use commission. For each class of land there are state regulations prohibiting certain uses and proscribing certain development practices. Counties, as opposed to the state, control land use in the "urban district," which constitutes about five percent of the land area in Hawaii.<sup>150</sup> The Hawaii system is a form of broad-brush state zoning.

A central organizing tool of the Oregon and Washington systems, urban growth areas, are also a form of land classification planning. They indicate where urban development may and may not take place, usually for a 10- to 20-year period. More complex versions of the urban growth area may include short- and long-range growth contours or boundaries. Urban growth areas are designated most appropriately on a regional basis; they are addressed extensively in a research note at the end of Chapter 6.

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<sup>148</sup>Howard County, Md. Department of Planning and Zoning, *The 1990 General Plan . . . a six point plan for the future* (Ellicott City, Md: The Department, 1990).

<sup>149</sup>Kaiser, Godschalk, and Chapin, *Urban Land Use Planning*, 290.

<sup>150</sup>David L. Callies, "The Quiet Revolution Revisited: A Quarter Century of Progress," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 19, citing Haw. Rev. Stat. §205 *et seq.*

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*The verbal policy plan.* The verbal (or written) policy plan, unlike the design and classification plans, has a policy rather than a spatial orientation. Such plans feature a set of policy statements and typically do not contain a future land-use map. Policy statements written in such plans typically specify conditions under which development may occur, rather than the locations that development may occur.<sup>151</sup> Although used by a variety of governments, the verbal policy plan is most commonly used by regional and state governments where the geographic scope of the plan precludes detailed mapping of land uses and where development policies tend not to be parcel specific. The award-winning Calvert County, Maryland comprehensive plan (1983) provides a good example of a verbal policy plan.<sup>152</sup> Although the plan explicitly addresses the physical development of specific areas of the county, it does not contain a land-use map.

*The development management plan.* The development management plan is the most detailed and intricate of the four prototypes. Such plans often contain coordinated programs of action for specific agencies, and usually for short-term periods. Because development and administrative regulations are included, as in the Sanibel, Florida Plan (1981), development management plans are more like zoning ordinances than traditional land-use plans.<sup>153</sup> Unlike policy plans which specify conditions under which development can take place, management plans specify when and where government actions will take place. Such plans combine policy, spatial, and time-related actions of government in a proactive way. By specifying when and where specific infrastructure investment will occur, for example, the plan provides a framework for development decision making and closely links plans with plan implementation. Kaiser and Godschalk classify the 1976 ALI Code proposal discussed above as a form of development management planning because it consciously retains an emphasis on physical development but stresses a short-term program of action, rather than a long-term, mapped goal form.

Beginning in the 1970s and extending to 1990s, note Kaiser, Godschalk, and Chapin, contemporary land-use planning experienced other influences that did not affect the form of plan-making as much as the substance. Among them:

- federal devolution and deregulation, which has resulted in more responsibility but fewer federal dollars for local planning and infrastructure and “fiscalization,” in which local governments have scrutinized all of their capital expenditures for possible recapture from developers or other benefitting groups;

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<sup>151</sup>The omission of a plan map is problematic. For a case study of a mapless policy plan in King County, Washington, see Daniel R. Mandelker, *The Zoning Dilemma* (New York: Bobbs-Merrill, 1971).

<sup>152</sup>Calvert County, Md., *Comprehensive Plan, Calvert County Maryland* (Prince Frederick, Md: Calvert County, 1983).

<sup>153</sup>City of Sanibel, Fla., *Comprehensive Land-use Plan* (Sanibel, Fla.: The City, 1981); see also John Clark, *The Sanibel Report: Formulation of a Comprehensive Plan Based on Natural Systems* (Washington, D.C.: The Conservation Foundation, 1976).

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- growth management initiatives, by which states or local governments attempt to control the pace as well as the location and type of development and ensure that it is supported by adequate public facilities at the time of development impact;
- increased recognition of the relationship between land use and environmental quality, resulting in more sophisticated environmental quality monitoring, the setting of more precise performance standards, and the development of new environmental impact methods;
- outright opposition to development by sophisticated citizen groups and the use of alternative dispute resolution mechanisms to find away around the impasses that public conflict creates; and
- changes in communications technology that have released both the corporate headquarters and the individual household from dependence on an urban location, diffusing population and employment to small cities, towns, and rural areas.<sup>154</sup>

### **A HYBRID APPROACH FOR A LAND-USE ELEMENT**

The model statute for a land use element below contains aspects of both the land-use design plan and the land classification plan. It calls for a land-use element that is based on a variety of studies, such as analyses of population, economic activity, natural resources, and inventories of existing land uses. A plan map is to show future land uses and, where designated in the regional comprehensive plan, urban growth areas. The future land-use allocations on the plan map must be supported by land-use projections that are either: (a) linked to population and economic forecasts made in the context of the surrounding region or (b) tied to assumptions contained in the regional comprehensive plan. The intent is to ensure that the plan is realistic and takes into account demographic and economic trends affecting the local government and the region around it. The element must state the assumptions (in terms of net density, intensity, other standards or ratios, or other spatial requirements or physical determinants) used in the land-use forecasts. It must also show lands that have development constraints, such as those subject to natural hazards (e.g., flooding, unstable soils) or that either have been designated as an area of critical state concern or nominated as such in a regional comprehensive plan (see Section 5-201 *et seq.*), where such a plan and process exists. The land-use element is also to contain a description of various other alternative land-use designs that were considered and rejected in its preparation.

As conceived here, the land-use element, in conjunction with the issues and opportunities element are really the keystones of the local comprehensive plan, with other required and optional elements integrated into both the vision of what the local government wants to be and the means by which to do it. For example, a local government that determines, through a visioning process, that

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<sup>154</sup>Kaiser, Godschalk, and Chapin, *Urban Land Use Planning*, 18-25.

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it hopes to become a regional development center in a metropolitan area, will need to make decisions to allocate land uses of sufficient density and intensity to make that occur. It must provide supporting systems for vehicles and mass transit, provide community facilities to service the land uses and make the area attractive. It must also initiate programs so that a desired mix of housing that meshes with the type of jobs that it expects will locate there. Finally, it must undertake economic development measures (e.g., job training, tax abatement, tax increment financing, establishment of economic development agencies) that will put the community on the road to achieve that vision.

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### 7-204 Land-Use Element

- (1) A land-use element shall be included in the local comprehensive plan.
- (2) The purposes of the land-use element are to:
  - (a) translate the vision statement contained in the issues and opportunities element described in Section [7-203] above into physical terms, to the extent possible;
  - (b) provide a general pattern for the location, distribution, and characteristics of the future land uses within the jurisdiction of the local government over a [20]-year planning period;
  - (c) serve as the element of the local comprehensive plan upon which all other elements, other than the issues and opportunities element, shall be based; and
  - [(d) integrate any urban growth areas designated pursuant to Section [6-201.1] and any existing or proposed areas of critical state concern, as identified in the regional comprehensive plan, with the location, distribution, and characteristics of future land uses within the jurisdiction of the local government.]
- (3) The land-use element shall be in both textual and map form.
- (4) In preparing the land-use element, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies shall concern factors affecting existing and future land uses that are located:
  - (a) within the jurisdiction of the local government;
  - (b) within areas that are currently served by the local government;

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- (c) within areas that are likely to be part of the areas served by the local government within the [20]-year planning period or are likely to undergo development in connection with or as a consequence of development within the jurisdiction of the local government; and
  - [(d) within areas that are likely to be annexed by the local government within the [20]-year planning period.]
- (5) These supporting studies shall include, but shall not be limited to, inventories, analyses, and projections of:
- (a) population and population distribution, which:
    - 1. may include analyses by age, household size, education level, income, employment, or other appropriate characteristics; and
    - 2. shall include [20]-year projections in [5]-year increments. [The population projections shall be made in the context of relevant projections for the region of which the local government is a part and shall include a statement of assumptions for birth rate, mortality rates, immigration, and outmigration for the projection period. *or* The land-use element shall employ those population projections for the local government contained in the regional comprehensive plan pursuant to Section [6-201(3)(a), *Alternative 2*].]
  - (b) the economy, which:
    - 1. may include the amount, type, general location, and distribution of commerce and industry, and the location of major employment centers within the jurisdiction of the local government; and
    - 2. shall include analyses of trends and projections of economic activity such as jobs and income levels for commerce and industry located within the local government [made in the context of analyses of trends and projections for the region of which the local government is a part *or* based on such analyses and projections contained in the regional comprehensive plan for the local government pursuant to Section [6-201(3)(a), *Alternative 2*]] and analyses of trends and projections in the ratio of jobs to dwelling units within the local government;
  - (c) natural resources, which:
    - 1. may include air, water, open spaces, forests, water bodies, shorelines, fisheries, wildlife, and minerals; and

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2. shall include geology, soils, or other physical factors of the local government, including land areas in the local government that are subject to natural hazards (such as flooding, high winds, unstable soils, or wildfires), that are in slopes of [25] percent or more, or that otherwise have significant constraints on their development.
- [(d) areas that have been included in the regional comprehensive plan as appropriate for nomination as areas of critical state concern pursuant to Sections [5-204] and [6-201(5)(g)3, *Alternative 2*] or that have been designated as an area of critical state concern pursuant to Sections [5-207]] and [5-208];
- (e) areas or specific buildings or sites of local architectural, scenic, cultural, historic, or archaeological interest [that are not included in subparagraph (d) above];
- (f) an inventory, in both narrative and tabular form, of the amount, type, intensity and/or net density of existing land uses. The inventory [may contain the following land-use categories *or* shall use categories that have been established by rule of the [state planning agency]]:
1. agricultural;
  2. residential, organized into general categories of net densities;
  3. commercial, organized into general categories of intensities;
  4. industrial, organized into general categories of intensities;
  5. transportation and transportation facilities, both public and private;
  6. education, both public and private;
  7. parks and recreation, both public and private;
  8. forest and silviculture;
  9. governmental buildings and facilities, other than transportation, education, public utilities, and parks and recreation;
  10. public utilities;
  11. vacant and undeveloped lands; and
  12. water bodies.

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- (g) an identification, in map form, of land areas in the local government's planning jurisdiction that are served by public water and sewer lines;
- (h) an analysis and evaluation of the following:
  - 1. patterns of existing land uses, based on the inventory identified in subparagraph (f) above;
  - 2. trends in the supply, demand, and price of land [as determined through the establishment of land market monitoring system pursuant to Section [7-204.1] below];
  - 3. trends and events that have shaped the development of land in the local government, such as the construction of major public transportation facilities, water and sewer facilities, and other community facilities, annexations, large-scale private land developments, and purchases of land for open space, parks, and recreation purposes;
  - 4. other trends and events that may affect future development and redevelopment patterns, including land ownership patterns;
  - 5. the type, location, and quality of agricultural lands;
  - 6. the ability of existing transportation, water supply, treatment and distribution, wastewater treatment and collection, and other community facilities that have been or are being inventoried pursuant to Sections [7-205(4)(b)] and [7-206] below to accommodate additional residential, commercial, industrial, and other development over the [20]-year planning period with existing capacities. Such analysis and evaluation shall include a statement of the criteria or level-of-service standards that are used to determine facility capacities.
  - 7. the need for redevelopment, including the renewal of blighted areas and the elimination or reduction of uses that are inconsistent with the dominant character of existing land uses or future land uses within the jurisdiction of the local government.
- (i) [20]-year projections of the following future land uses in [5]-year increments:
  - 1. residential land uses based on the population projections developed pursuant to subparagraph (a)2 above. The residential land-use projections shall include a statement of the assumptions of net densities that [have been applied *or* are part of the regional comprehensive plan's land-use forecasts prepared pursuant to Section [6-201(3)(i)]];

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2. commercial and industrial land uses based on the projections of economic activity developed pursuant to subparagraph (b)2 above. The commercial and industrial land-use projections shall include a statement of land-use intensities (e.g., employees per acre or floor area ratios) or other spatial requirements that [have been applied *or* are part of the regional comprehensive plan’s land-use forecasts prepared pursuant to Section [6-201(3)(i)]]; and
  3. land uses, other than residential, commercial, and industrial. Such projections shall include a statement of the public service standards (e.g., acres of parkland per 1,000 persons), other ratios of land absorption or intensity, or other spatial requirements or physical determinants that [have been applied *or* are part of the regional comprehensive plan’s land-use forecasts prepared pursuant to Section [6-201(3)(i)]]].
- ◆ Residential, commercial, industrial, and many public facility land uses can be projected so that the forecast results in relatively finite numbers of additional acres needed. However, as Kaiser, Godschalk, and Chapin observe in the 1995 edition of *Urban Land Use Planning*, space standards (such as number of acres per household or per person) are generally not relevant for open space that is intended to protect natural processes, avoid exposing development to natural hazards, or shape urban form: “The amount of open space required for those conservation purposes is primarily the result of the pattern of physical determinants (e.g., how much land is in floodplains, or wetlands) coupled with the particular standards to be applied (e.g., more land would be in a hundred year floodplain than in a fifty-year floodplain.”<sup>155</sup> For environmentally sensitive areas, they comment, ecological principles may also suggest minimum acreage for certain wildlife and plant communities or in certain patterns of open space, such as arranging the space in corridors “so that wildlife can move within and between territories.”<sup>156</sup>
  - ◆ It is important that the land-use element not only statistically projects land-use needs (especially residential, commercial, and industrial uses) that are sufficient for the recommended 20-year period, but also designates them as well on the future land-use plan map (see subparagraph (6)(c) below). Adopting a “wait-and-see” posture by not designating developable areas in excess of actual demand creates problems in the effectuation of the plan. For example, if the local government has failed to map needed land uses, then there may be difficulty in determining whether applications for zoning changes for uses that the plan recognizes will be needed are consistent in terms of location and character with what the land-use plan map shows. Further, if the land-use plan map (as well as the zoning map) fails to show adequate areas for the projected land uses, then when the local land market heats up during economic booms and

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<sup>155</sup>Kaiser, Godschalk, and Chapin, *Urban Land Use Planning*, 303.

<sup>156</sup>*Id.*

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increases demand for certain land use categories, land supply will not have expanded in response and land price inflation may occur. Moreover, when the plan only partially maps projected future land-uses, the owners of the properties in the designated areas may enjoy a publicly-created land monopoly with attendant higher prices; one consequence is that they may keep the land off the market to bid up the price. If the plan only designates one area for a regional shopping center and that area is clearly a property under a single ownership, then the value of that land will increase as there are no alternative sites. Full or substantial designation of projected future land uses should ensure diversity of land holdings so that land ownership monopolies do not result in undue land price increases.

- (6) Based on the studies undertaken pursuant to paragraphs (4) and (5) above, the land-use element shall provide for, address, and include, but need not be limited to, the following:
  - (a) an existing land-use map or maps series at a suitable scale based on the inventory described in paragraph (5)(f) above;
  - (b) a statement, with supporting analysis, of land-use goals, policies, and guidelines regarding the general distribution, location, and characteristics of future land uses, including land uses in areas that may be redeveloped;
- ◆ The intent is that the land-use element address both developing communities and fully developed communities, such as central cities and suburbs. Consequently, the element must address “areas that may be redeveloped.” Section 7-303 describes a redevelopment area plan that would provide details for such areas.
  - (c) a future land-use plan map or map series at a suitable scale that shows for the [20]-year planning period:
    - 1. general locations of future land uses by net density, intensity, or other classifications;
    - 2. the boundaries of the area(s) to which sewer and water services are expected to be provided within time frames specified in the land-use or community facilities element;
    - [3. areas that have been included in the regional comprehensive plan as appropriate for nomination as areas of critical state concern pursuant to Sections [5-204] and [6-201(5)(g)3, *Alternative 2*], that have been designated as an area of critical state concern pursuant to Sections [5-207] and [5-208], or that have been otherwise identified by the local government as critical and sensitive areas];

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4. areas or specific buildings or sites of local architectural, scenic, cultural, historic, or archaeological interest [that are not included in subparagraph (c)3 above];
5. the boundaries of areas that may be designated for the future preparation of subplans, such as central business districts or neighborhoods, transportation corridors, transit-oriented development areas, or redevelopment areas;
6. a delineation of land areas that may be subject to natural hazards, such as flooding, high winds, unstable soils, or wildfires, that have slopes of [25] percent or more, or that otherwise have significant constraints on their development;
7. a delineation of any areas proposed for redevelopment; and
- [8. urban growth areas, designated pursuant to Section [6-201.1].]

◆ The phrase “general locations of future land uses . . .” in subparagraph (c)1 above is important to retain. The depiction of land uses should be general in order to avoid what Professor Daniel R. Mandelker has called “the holdout problem” in zoning decisions.<sup>157</sup> When a future land use plan map designates specific sites for certain uses (e.g., a shopping center or apartments), it will confer on the owners of those sites a distinct monopoly-like benefit. If a developer secures a substantial zoning change where the plan precisely shows an intense land use, the local government will be hard put in the interim to decide how to treat additional applications for similar developments. The developer may keep that land off the market in the hope of significant appreciation of the property. Some developers, Mandelker points out, may be willing to wait longer than others because they have different expectations of return on their investment. Therefore, it is important that the plan map be much less specific than a zoning map in order to give the local government flexibility so that no one land owner can gain a monopoly over the development of projected land uses through holdouts. It may also be desirable to have locational policies and criteria in the plan text itself to provide guidance in such situations.

- (d) a narrative that describes how the selected future land-use pattern, as shown on the future land-use plan map identified in subparagraph (c) above, results in the application of the goals, policies, and guidelines identified in subparagraph (b) above;
- (e) an analysis, in both textual and tabular form, of the projected [20]-year build-out of the selected future land-use pattern in terms of alternate probabilities regarding dwelling units, employment, economy, and acreages; and

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<sup>157</sup>See the discussion of this issue in Daniel R. Mandelker, *The Zoning Dilemma* (New York: Bobbs-Merrill, 1971), 50-51, 93.

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- (f) a description in textual and/or map form of the various other alternative future land-use design schematics or concepts and assumptions that were considered in the preparation of the land-use element, and an explanation of why each of these alternatives was rejected.

[or]

- (f) an environmental evaluation of the land use, housing, transportation, and community facilities elements of the local comprehensive plan prepared pursuant to Section [12-101, *Alternative 1*].

- ◆ The exact language of subparagraph (f) above will depend on which type of environmental analysis option is selected. At a minimum, a statement of alternative development patterns examined in the plan's preparation should be set forth in the plan. The first example, a description in textual and/or map form of the various other alternative future land use design schematics or concepts and assumptions that were considered" is one basic approach. The second, "an environmental evaluation," described in Chapter 12, Integrating State Environmental Policy Acts With Local Planning, is still another. Chapter 12 also offers two other alternatives of increasing technical and procedural rigor.

- (7) The land-use element shall set forth in the long-range program of implementation required by Section [7-211] below, those actions that may be needed to achieve the selected future land-use pattern and the goals, policies, and guidelines contained therein.

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### ***Commentary: Monitoring Land Markets***<sup>158</sup>

Land supply and demand information is the missing link in many critical local development decisions made by public policymakers and development interests. Public policies regulating the amount of land available for development made without the benefit of an accurate land inventory can have disastrous effects on the price of raw land if public policy regulates growth too rigidly. In addition, the government pays more for public facilities when infrastructure is not properly sized due to uncertain knowledge about the actual supply of buildable land. At the same time, imperfect information concerning land supply and availability multiplies the risk of private development decisions. Such risk and uncertainty make development more expensive because greater risk projects require higher investor returns. Market uncertainty limits competition as fewer developers are willing to invest time and money in the process. As each decision maker adds safety factors to compensate for missing information, consumers pay more for housing and affordable housing possibilities shrink.

Government planning policies, in influencing the location, timing, and amount of growth within their jurisdictions, influence a land market rather than simply propose an end-state spatial plan. Government interests in managing land markets focus on the achievement of public goals, but the public sector must also work in constructive partnership with the private sector to assure the availability of sites and facilities needed for a healthy economy. Good land management can assure public and private economies. Poor land management, in contrast, can result in unacceptable public costs involving infrastructure and environmental damage and private costs in the form of rapid residential land price inflation, which may affect the ability to purchase or rent housing when it outpaces the growth in personal income.

Public policies must seek to balance market supply-and-demand dynamics. Such balancing can occur only if government monitors land markets so that it can periodically adjust its forecasts of

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<sup>158</sup>This commentary and portions of the following model statute are based on a working paper, "Land Supply Monitoring Systems," by Professor Scott Bollens of the University of California at Irvine, that appears in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). On the subject of land supply monitoring, see generally David Godschalk, Scott Bollens, John Hekman, and Mike Miles, *Land Supply Monitoring: A Guide for Improving Public and Private Urban Development Decisions* (Boston: Oeslschlager, Gunn, and Hain, 1985); Scott Bollens and David Godschalk "Tracking Land Supply for Growth Management," *Journal of the American Planning Association* 53, no. 3: 315-27 (1987); Susan C. Enger, *Providing Adequate Urban Area Land Supply* (State of Washington, Department of Community Development, Growth Management Division, 1992); and Larz T. Anderson, *Seven Methods for Calculating Land Capability/ Suitability*, Planning Advisory Service Report No. 402 (Chicago: American Planning Association, 1987). For an example of a regional geographic information system that could be used for land market monitoring, see Southern California Association of Governments, About ACCESS, World Wide Web, [http://www.scag.org/public\\_docs/d62.htm](http://www.scag.org/public_docs/d62.htm).

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urban space and facility needs. Unless policymakers understand market dynamics, governments can cause land supply shortages by adopting excessive development regulations, causing needless delays in reviewing development proposals, and setting overly tight restrictions (such as through urban growth areas) on the size of areas designated for urban development. When land supply is constrained, development is redirected to less-restrictive markets or land price is inflated. As a result, local housing prices tend to rise and/or development patterns are distorted.

Advantages of access to accurate and timely land market information include:

- ◆ Public land-use policies and regulations that account for their impacts on land inventories;
- ◆ Factual bases for balancing goals of affordable housing, economic development, resource protection, and orderly growth;
- ◆ Private development feasibility studies and development proposals that are based on realistic market data;
- ◆ Credible common databases for development feasibility analyses and negotiations between public and private sectors;
- ◆ Improvements in efficiency and effectiveness of public investment decisions affecting development; and
- ◆ Improvements in the quality and timing of private development projects as project risk and uncertainty are attenuated.

While some local governments have initiated the creation of land market monitoring systems voluntarily, others have been prompted by state statute to do so. California, for example, requires a housing element in local general plans that must include “an inventory of land suitable for residential development, including vacant sites and sites having potential for redevelopment, and an analysis of the relationship of zoning and public facilities and services to these sites.”<sup>159</sup> Oregon calls for all local governments to “inventory the supply of buildable lands within the urban growth areas” as part of a periodic review of the local comprehensive plan and conduct an analysis of whether there are sufficient residential lands to meet long term housing needs.<sup>160</sup>

In 1997, the state of Washington amended its growth management laws to require a county-level “review and evaluation program” to “determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets,

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<sup>159</sup>Cal. Gov’t Code §65583(a)(3) (1996).

<sup>160</sup>Ore. Rev. Stats. §197.296(3)(a) (1996).

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and objectives contained in the countywide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities.”<sup>161</sup> The review is aimed at determining whether there is sufficient suitable land to accommodate the projected population for the county. The statute calls for an analysis of the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of the comprehensive plan or the last periodic evaluation of the plan. If the evaluation demonstrates an inconsistency between what has occurred since the adoption of countywide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans, as well as state planning goals and requirements, the county and its cities are to adopt and reasonably implement measures that are reasonably likely to increase consistency.<sup>162</sup> The program is to occur every five years and is to encompass land uses and activities both within and outside of urban growth areas through the annual collection of data on urban and rural land uses, development, critical areas, and capital facilities to the extent necessary to determine the quality and type of land suitable for development, both for residential and employment-based activities.<sup>163</sup>

### A MODEL STATUTE

Section 7-204.1 below establishes the framework for a land market monitoring system by which land would be inventoried and evaluated as to whether it was buildable by a regional or county planning agency and municipalities (as well as other local governments). **This Section is required if there are urban growth areas that have been designated in connection with Section 6-201.1.** The model statute calls for a periodic review of the availability of buildable land within the municipalities’ urban growth areas in order to avoid some of the problems of land supply constraint identified above. The Section describes how residential, commercial, and industrial lands are to be analyzed in order to determine whether the urban growth area should be expanded; under this Section, municipalities as well as other local governments may propose to the regional or county planning agency the amendment of the urban growth area. Alternatively, municipalities could consider other measures (such as modification of development regulations) that could be put into effect that would result in more compact development that would consume less land as the community grows. Apart from the connection to the designation of urban growth areas, the information for the monitoring system could be highly useful in formulating the land-use element itself.

Note that there are several choices in creating the system: (1) a regional or county planning agency could establish the system independently or on behalf of municipalities and other local governments within its planning jurisdiction; (2) a municipality could also establish the system on

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<sup>161</sup>Wash. Rev. Code §36.70A.215(1)(a) (1997).

<sup>162</sup>Id., §36.70A.215(3) to (4).

<sup>163</sup>Id., §36.70A.215(2)(a).

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its own if it were required to include an urban growth area in its local comprehensive plan; and (3) any other local government that was not required to have an urban growth area could at least establish the land market monitoring system. As a practical matter, a cooperative regional program of monitoring would probably be the soundest approach in metropolitan area, with some type of allocation of responsibilities between the regional or county planning agency and the local governments within its planning jurisdiction. This arrangement is difficult to provide for in a statute and some flexibility must be provided. The model statute below assumes that both the regional and county planning agency and local planning agency would be involved in the establishment and maintenance of the monitoring system.

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### **7-204.1 Land Market Monitoring System [Optional, but Required if Urban Growth Areas Are Required]**

- (1) Any [regional *or* county planning agency] that includes an urban growth area in its regional comprehensive plan and/or any municipality [and each local government *such as boroughs, towns, or townships*] that is required to employ an urban growth area in a local comprehensive plan pursuant to Section [6-201.1] above shall establish a land market monitoring system.<sup>164</sup> A [regional *or* county planning agency] [shall *or* may] establish, by [implementation] agreement, a land marketing monitoring system for municipalities [and other local governments] within its planning jurisdiction and may assume the responsibilities of a local planning agency for the purposes of this Section.
- (2) Any [regional *or* county planning agency] or local government that is not required to employ an urban growth area may elect to establish a land market monitoring system pursuant to this Section and may inventory the supply of buildable lands pursuant to paragraph (4)(a) below. For the purposes of this Section, a local government may also enter into an [implementation] agreement with the [state planning agency], a [regional *or* county planning agency], another local government, a special district, or a private vendor to establish a land market monitoring system.<sup>165</sup>
- (3) The purposes of the land market monitoring system are to:
  - (a) periodically inventory the supply of buildable lands for the [region *or* county] and the municipality [or other local governments] to determine its adequacy;

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<sup>164</sup>The requirement to establish and maintain a land market monitoring system may also be a requirement for other types of growth management systems, such as annual permit limits.

<sup>165</sup>Preferably the land market monitoring system should be established at the regional or county level.

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- (b) evaluate the impact of the goals and policies of the [regional *or* county planning agency and the municipality [or other local governments] on the prices and supply of and demand for buildable land;
  - (c) propose changes, if necessary, that will ensure the supply of buildable land within the planning jurisdiction of the [regional *or* county planning agency] and municipality [or other local government] meets projected needs for residential, commercial, and industrial development, and supporting public and community facilities in the land-use element of the local comprehensive plan; and
  - (d) provide information to the public on the operation of the land market within the [regional *or* county planning agency's] and the municipality's [or other local government's] jurisdiction.
- (4) Using a geographic information system as part of the periodic review required by Section [7-406] below, the local planning agency and/or the [regional *or* county planning agency] on at least a [5]-year basis:<sup>166</sup>
- (a) shall inventory the supply of buildable lands within the urban growth area. The agency or agencies may also inventory any other buildable lands within the local government's jurisdiction. The agency or agencies shall use the following criteria in determining whether land is buildable:
    - 1. whether the land is vacant [or, in the opinion of the local planning agency and/or [regional *or* county planning agency]] or underutilized (i.e., developed at less than the density or intensity allowed by the applicable zoning classification) and likely to be redeveloped];<sup>167</sup>

◆ Note that there can be a fair degree of debate over whether land is “underutilized” and “likely to be redeveloped.” There may be many reasons that land is underutilized (e.g., preferences of

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<sup>166</sup>It is possible that the inventorying of buildable land can occur more often than every five years and, indeed, could occur on an ongoing basis using computerized geographic information systems.

<sup>167</sup>The Metro in Portland, Oregon, uses a sophisticated geographic information system (GIS) to evaluate the infill or redevelopment potential of properties in the buildable lands inventory. The system identifies tax lots that are underutilized through the application of screening factors that include the size of the lot, existing building coverage, and neighborhood context (whether redevelopment has been occurring in the vicinity that may be the result of upzoning, thereby increasing property values). For example, the system could identify a one-acre parcel on which there is a single-family home that occupies only ten percent of the lot and where there has been extensive redevelopment activity in a 500-foot radius. Telephone interview by Stuart Meck, Principal Investigator, Growing Smart<sup>SM</sup> project, with Mary A. Weber, Senior Program Supervisor, Growth Management Services, Metro, May 13, 1998. Obviously any system that assesses redevelopment potential will involve judgment and continuing refinement. There will be a continuing debate over whether the assessment is accurate. For more information on Metro's GIS system, see its website: [www.metro-region.org](http://www.metro-region.org).

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the owner, the need for environmental remediation, the state of the local real estate market, hostility of adjoining property owners to proposed land-use change, etc.). Consequently, communities that decide to include such land in the inventory of buildable land should be conservative in their assessment regarding whether such land should be considered a significant component of supply.

2. whether the land is zoned for residential, commercial, or industrial use;
  3. whether the land has physical constraints (such as excessive slopes, floodplains, wetlands, or environmental contamination, or is in a critical and sensitive area or in an area of critical state concern) that would prevent its development, either in whole or in part; and
  4. whether the land is provided with central water and sewer and has access to a publicly dedicated street.
- (b) may conduct surveys of landowners and developers regarding their intentions to develop over the next [5] years and may monitor, on a per acre or other basis, patterns of changes in the prices of buildable lands over the previous [5] years;
  - (c) may evaluate the effectiveness of any previous amendments to the local comprehensive plan and/or land development regulations made pursuant to subparagraph (5)(b) below;
  - (d) shall determine the actual density and actual average mix of housing types and the actual intensities and actual average mix of types or categories of commercial and industrial land use that have occurred since the last periodic review or previous [5] years;
  - (e) shall analyze housing need by type and density ranges and commercial and industrial land-use needs by category or types and intensities [in accordance with any minimum standards of land-use intensity and net density contained in a state land development plan pursuant to Section [4-204(5)(c)]] and/or in the regional comprehensive plan pursuant to Section [6-201(5)(c) and (g)]; determine the land needed for each housing type and commercial and industrial land use by category or type for the next [20] years; and compare that amount against the supply of buildable land. Such an analysis may take into account any information from surveys of landowners' or developers' intentions to develop over the next [5] years and patterns of changes in the prices of buildable lands over the previous [5] years; and
  - (f) shall prepare a summary report to be included in the review of the local comprehensive plan pursuant to Section [7-406].

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- (5) If, after reviewing the inventories, determinations, and analyses pursuant to paragraph (4) above, the legislative body of the municipality [or other local government] determines that the urban growth area does not contain sufficient buildable lands to accommodate residential, commercial, and industrial needs for the next [20] years, then the legislative body shall take one of the following actions:
- (a) propose to the [regional *or* county planning agency] that it amend the urban growth area in the regional comprehensive plan in the manner provided in Section [6-201.1] to include sufficient buildable lands to accommodate residential, commercial, and industrial needs for the next [20] years at the actual developed density or intensity during the period since the last periodic review or within the last [5] years, whichever is greater. As part of this review, the amendment shall include additional lands that are sufficient and reasonably necessary for public and community facilities or services, including transportation, to support residential, commercial, and industrial needs. After the [regional *or* county planning agency] has amended the urban growth area in the regional comprehensive plan, the municipality [or other local government] shall also incorporate and adopt the urban growth area into its own local comprehensive plan and shall delineate an urban growth boundary on the generalized composite comprehensive plan map pursuant to Section [7-201(8) above] and on the future land-use plan map pursuant to Section [7-204(6)(c)7];
  - (b) amend its local comprehensive plan and/or land development regulations to include measures that will demonstrably increase the likelihood that residential development will occur at densities and types sufficient to accommodate housing needs, and that commercial and industrial development will occur at intensities and mix of types or categories sufficient to accommodate commercial and industrial needs, for the next [20] years without expansion of the urban growth area; or
  - (c) adopt a combination of actions described in subparagraphs (a) and (b) above
- (6) Using the analysis conducted under subparagraph (4)(e) above, the local planning agency and/or [regional *or* county planning agency] shall determine the overall average density and the overall mix of housing types at which residential development must occur in order to meet housing needs, and the intensities and mixes of types or categories at which commercial and industrial development must occur in order to meet commercial and industrial needs, over the next [20] years. If that overall density or intensity is greater than the actual density or intensity as determined under subparagraph (4)(d), or if those mixes are different than the actual mixes as determined under subparagraph (4)(d) above, then the legislative body of the [municipality][or other local government] shall adopt measures that will demonstrably increase the likelihood that residential development will occur at densities and at the mix of types sufficient to accommodate housing needs, and that commercial and industrial development will occur at intensities and at the mix of types and categories sufficient to accommodate commercial and industrial needs, for the next [20] years.

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- ◆ Paragraph (5) involves a determination of whether or not the urban growth area contains sufficient buildable land to meet the projected residential, commercial, and industrial needs (as well as lands for supporting uses) for the next 20 years. Paragraph (6) examines whether the projected density or intensity of development is greater than the actual density or intensity, or whether the projected mix of uses is different than the actual mix of uses. The local government has a choice of whether or not to propose the urban growth area's expansion or to take other measures that will have the effect of increasing the capacity of buildable land.

- (7) Measures or actions under paragraphs (5) and (6) may include, but are not limited to:<sup>168</sup>
  - (a) increases in the permitted density of existing residential land and in intensity of existing commercial and industrial lands in a zoning ordinance;<sup>169</sup>
  - (b) financial incentives for higher density housing;
  - (c) reduction of on-site parking requirements in a zoning ordinance;
  - (d) reduction of yard requirements in a zoning ordinance;
  - (e) provisions permitting additional density or intensity beyond that generally allowed in the particular zoning district(s) in exchange for amenities and features provided by the developer;
  - (f) minimum density or intensity requirements in a zoning ordinance;
  - (g) redevelopment, infill, or brownfields strategies;
  - (h) authorization of housing types or site planning techniques in a zoning ordinance that were not previously allowed by the local comprehensive plan or zoning ordinance
  - (i) authorization of changes in the zoning use classification, including the employment of mixed use zones; and

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<sup>168</sup>For a compendium of these techniques, see Metro Regional Services, *Livable Communities Workbook: A Guide for Updating Local Land-Use Codes* (Portland, Ore.: Metro Regional Services, January 1988) (includes actual examples of development code changes adopted by communities in the Portland area).

<sup>169</sup>As a practical matter, it must be acknowledged that there may be political resistance to increasing densities or intensities in a zoning ordinance that will make this particular action difficult. In addition, even if political resistance can be overcome, there is no guarantee that the market will respond with higher density housing products or more land-intensive commercial and industrial products. For a discussion of the experience in Portland, Oregon, see Alan Ehrenhalt, "The Great Wall of Portland," *Governing* 10, no. 8 (May 1997): 20-24, esp. 24 (describing homeowner resistance to "first wave of increasing urban density").

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- (j) changes in standards for public and community facilities or services, including transportation, that require the use of less land.
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### ***Commentary: Transportation Element***<sup>170</sup>

The *Standard City Planning Enabling Act* of 1928 addressed transportation issues in two ways. First, it authorized the municipal planning commission to make a “master plan,” with “accompanying maps, plats, charts and descriptive matter” that showed “the commission’s recommendations for the development of said territory, including, among other things, the general location, character, and extent of streets, viaducts, subways, bridges, waterways, water fronts, boulevards, parkways . . . aviation fields, and other public ways, . . . public utilities and terminals, whether publicly or privately owned or operated for . . . transportation . . . ; also the removal, relocation, widening, narrowing, vacating, or abandonment, change of use or extension of any of the foregoing ways. . . .”<sup>171</sup> Once the commission had adopted the plan then “no street . . . or other public way . . . or public utility [which would include transportation utilities] could be constructed or authorized without the commission’s support (although an override by the city council was possible with a two-thirds vote).

Second, as noted above, adoption of a “street plan” by the planning commission activated the commission’s power to review subdivisions; thereafter, no subdivision could be filed or recorded unless the planning commission approved it.<sup>172</sup> The subdivision regulations adopted by the commission could provide for “the proper relationship of streets in relation to other existing or planned streets and to the master plan.”<sup>173</sup>

While the description of the master plan in the SCPEA seemed to call for a broader consideration of transportation modes, as a practical matter, the street or thoroughfare plan – sometimes called the circulation element and designed to accommodate the movement of people and goods within a local government – still serves as a basis for many local comprehensive plans. Often, these thoroughfare plans assumed that car and projected new lanes or roadways would adequately serve and reinforce

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<sup>170</sup>This commentary is based in part on “Toward a Model Statutory Plan Element: Transportation,” by Jerry Weitz, AICP, in *Land Use Law & Zoning Digest* 49, no. 2 (February 1997): 3-9. This article also appears in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2* (Chicago: American Planning Association, September 1998).

<sup>171</sup>SCPEA, §6. Under the SCPEA, a public utility could include railroads and street railways. Commentary to the act noted that “the location of the street railroads of the city bears as intimate and important a relation to the location of business, industrial, and residential districts as does the location of the streets themselves.” *Id.*, n. 37.

<sup>172</sup>*Id.*, §13.

<sup>173</sup>*Id.*, §14.

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the land use and other elements of the local comprehensive plan over 20- to 30-year periods. But this assumption often proved dubious. Roadways typically fill to capacity soon after reconstruction, thereby creating the need for even more roadways.<sup>174</sup> The failure of this single mode of transportation to accommodate needs often resulted not only in traffic congestion but in compromises to other proposals in the local comprehensive plan, such as policies to preserve prime farmland, encourage efficient overall land-use patterns, and maintain economically viable central business districts. Complicating this was a failure of interim reviews that could have led to corrections to the failing transportation elements.

Transportation planning doctrine of the 1970s introduced shorter-range approaches. One of them was transportation systems management in which governmental units attempted to increase the efficiency, safety capacity, or level of service of a transportation facility without increasing its size (e.g., traffic signal installation and improvements, and traffic control devices such as installing medians and removing parking).

The 1980s brought the concept of transportation demand management (TDM) as an alternate response to growth management and traffic congestion problems. TDM emphasized actions designed to change travel behavior in order to improve the performance of transportation facilities without expanding road capacity. Examples include non-capital approaches like ride-sharing, work-hour changes, tolls, congestion or peak-hour pricing, and vanpool programs.<sup>175</sup>

As noted in Chapter 6, Regional Planning, a major shift for transportation planning was the passage, in 1991, of the Federal Intermodal Surface Transportation Efficiency Act (ISTEA), followed by the enactment in 1998 of the Federal Transportation Equity Act for the 21st Century (TEA-21). Aimed at states and metropolitan area transportation planning, this legislation makes a connection between transportation and air pollution, emphasizing increased use of mass transit, improving the performance of the existing road network, mitigating congestion, encouraging context-sensitive highway design, and encouraging alternative forms of transportation, including bicycling and walking.

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<sup>174</sup>Economist Anthony Downs called this the “triple convergence” phenomenon of equilibrium, which makes traffic congestion a ubiquitous problem that is next to impossible to solve. It means that, as a local government completes a highway capacity improvement, the new capacity gets swamped in a short period of time because three streams converge: (1) people who traveled at earlier or later periods now use the highway; (2) people traveling other modes, such as transit, now find it quicker to drive; and (3) those who found alternative routes earlier will now also use the expanded capacity of the highway because it is faster. Anthony Downs, *Stuck in Traffic: Coping with Peak-Hour Traffic Congestion* (Cambridge, Mass: Brookings Institution and Lincoln Institute of Land Policy, 1992), 27-28. See also Terry Moore and Paul Thorsnes, *The Transportation/Land Use Connection*, Planning Advisory Service Report No. 448/449 (Chicago: American Planning Association, 1994), 2-3.

<sup>175</sup>See Genevieve Guiliano and Martin Wachs, “Transportation Demand Management as Part of Growth Management,” in *Growth Management: The Planning Challenge of the 1990's*, Jay M. Stein, ed. (Newbury Park, Calif.: Sage Publications, 1993), 162-164; Deborah L. Johnson, “Suggestions for Model Transportation Demand Management Legislation,” in *Modernizing State Planning Legislation: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 133-146.

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*Approaches to guiding local transportation planning.* There are currently two principal approaches that states use to guide local transportation planning: *by law*; or *by rule*. California and Rhode Island provide examples of simple (and traditional) requirements for a circulation element of a local comprehensive plan, specified in a general law without providing details for such plan elements in administrative rules.<sup>176</sup> Other states (e.g., Florida, Georgia, Oregon, and Washington) direct a state department or commission to prepare and adopt local planning requirements in the form of administrative rules.

*Organization of transportation content vis-a-vis the local comprehensive plan.* State administrative rules for local transportation plans vary with respect to how transportation planning is integrated in the local comprehensive plan. Specifically, there are four alternatives, in order of highest complexity and priority placed on transportation. First, state legislators can require a transportation system plan with its own elements, as does Oregon (Ore. Admin. Rules §660-12-015), separate from but integrated with the comprehensive land-use plan.<sup>177</sup> Second, local transportation planning can require multiple transportation elements of a comprehensive plan. For example, Florida's administrative rules require all local plans to include elements for traffic circulation (Fla. Admin. Code §9J-5.007) and concurrency management for transportation and other facilities and services (Fla. Admin. Code §9J-5.0055). Comprehensive plan in Florida for local governments with populations of 50,000 or more must have plan elements for mass transit (Fla. Admin. Code §9J-5.009) and for ports, aviation, and related facilities (Fla. Admin. Code §9J-5.009). Third, local transportation planning can be specified as a single "circulation" or transportation element of a comprehensive plan; California (noted above), Florida (for urbanized areas of metropolitan planning organizations, see Fla. Admin. Code §9J-5.019), Rhode Island (noted above), and Washington (Wa. Admin. Code §365-195-300) all practice this approach. Fourth, local transportation planning can be required as a component to the community facilities element of the comprehensive plan, as does Georgia (Rules of the Ga. Department of Community Affairs, Ch. 110-3-2.04).

Decisions about how the transportation plan fits organizationally within the local comprehensive plan reflect the amount of priority that legislators place on that planning function and, hence, the amount of effort and resources put into that work. The first three alternatives described are suitable in terms of the priority they give to transportation; the choice probably depends on political acceptability. Georgia's approach (the fourth alternative) may offer a model for conservative states

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<sup>176</sup>Cal. Gov't Code §65302(b) (1996); R.I. Gen. Laws §45-22.2-5(H) (1996).

<sup>177</sup>Oregon's rule elevates transportation planning to system plan status (with its own "elements"), while other states require one or more transportation elements of a local comprehensive plan. There are as many as nine required elements of local and regional transportation system plans, depending on the population of the urban area, as follows: (1) determination of transportation needs; (2) road plan (arterials, collectors, and standards for local street layout); (3) public transportation plan; (4) bicycle and pedestrian plan; (5) air, rail, water, and pipeline transportation plan; (6) transportation system management and demand management plan (for urban areas greater than 25,000 persons); (7) a parking plan in MPO areas; (8) policies and land use regulations for implementing the transportation system plan; and (9) transportation financing program (for urban areas greater than 2,500 persons). Ore. Admin. Rules §660-12-020.

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without traditions of planning, but it does not confer transportation planning with the status it deserves.

### **A MODEL TRANSPORTATION ELEMENT**

In the model statute that follows, transportation is given an “element” status and is described in the detail that is characteristic of some state administrative rules. Adoption of planning standards or guidelines via administrative rule may be desirable (in terms of flexibility), but one cannot assume in drafting model statutes that an administrative agency will also be created that will have the authority to adopt local planning standards through rulemaking, based on a skeleton outline of substantive content.

With the intent of ensuring some degree of multi-modal planning at the local level that is reflective of ISTEAs and TEA-21, the model legislation for the transportation element calls for the inclusion of several “components” dealing with: (a) traffic circulation; (b) mass transit; (c) ports, aviation, and railways; (d) recreational and pedestrian traffic (e.g., bicycling and walking); and (e) off-street parking. These components would not be necessary for every local government, as commentary below notes. It is also important to note that the model language looks at transportation as a service supporting people and their activities, and not an end in itself. The model statute, in Section 7-205(2), also states that the element is to be “coordinated with state and regional transportation plans, including those required by federal law.”

Transportation performance measures are used in the transportation plan element (see paragraph (2)(d)). Establishing performance measures for transportation consistent with those required by the element must recognize:

- (a) different levels of analysis require different performance measures. Some measures are well suited to individual facilities, others to travel corridors, and still others to regional networks;
- (b) different purposes and uses require different performance measures. One set of measures may be appropriate for design and traffic operations, another for congestion management, and a third for growth management purposes;
- (c) the experience of the traveler is what counts. Thus, for example, average travel speed on a facility is a better performance measure than the volume/capacity ratio to which average travel speed relates;
- (d) where modal options exist, mobility – which means the ease with which individuals can move about – must be measured in multi-modal terms. This may be accomplished with combined highway-transit-pedestrian measures or separate measures for different modes;
- (e) accessibility – the ease with which desired activities can be reached from any location – must be accounted for at some level of analysis. Accessibility (not mobility) ultimately determines the choice of destination and the time spent in travel; and

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(f) the simpler and more understandable performance measures are, the more useful they will be to decision makers.

Of the various types of performance measures, two can clearly and easily be made operational for systemwide goals. One is to minimize vehicle miles traveled (VMT) or VMT per capita within the region or local government. VMT was selected in the Federal Clean Air Act as the principal travel measure for air-quality planning in high ozone and carbon monoxide. VMT is directly influenced by land-use configurations and transportation systems design and modal mix. If development is compact and uses are mixed, VMT will be low. If the road network provides direct connections, VMT will be low. If transit and ridesharing are well used, VMT will be low.

Another worthy goal is to minimize vehicle hours traveled (VHT) or VHT per capita within the region or local government. VHT has one big advantage over VMT. It accounts for the degree of congestion; all else being equal, the more congested roads are, the more hours of travel will be logged. Mobility – as it has been defined above – is embodied in VHT but not VMT.<sup>178</sup>

The model statute also provides an express air quality linkage with local planning.<sup>179</sup> Under its provisions, when the planning area for the local government is within a national ambient air quality standards non-attainment area, the element must also address the relationship of proposed corrective measures to air quality improvement for ozone, carbon monoxide and/or particulate matter. The model also describes a number of prototypical actions that may be incorporated into the long-range program of implementation.

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### 7-205 Transportation Element

(1) A transportation element shall be included in the local comprehensive plan.

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<sup>178</sup>This discussion of transportation performance measures has been abstracted from Reid H. Ewing, “Beyond Speed: The Next Generation of Transportation Performance Measures,” in *Performance Standards for Growth Management*, Douglas R. Porter, ed., Planning Advisory Service Report No. 461 (Chicago: American Planning Association, February 1996), 32-34.

<sup>179</sup>The Federal Clean Air Act Amendments of 1990 require states to integrate their air quality and transportation planning processes by establishing better coordination between those planning processes and setting a firm schedule. ISTEA strengthened those reforms by requiring that regional transportation plans prepared by metropolitan planning organizations (MPOs) and state transportation plans be consistent with state air quality plans.

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- (2) The purposes of the transportation element are to provide and encourage a safe, convenient, efficient, and economical multimodal transportation system that is adequate to serve local transportation needs, that serves, supports, and reinforces the future land uses as shown on future land-use plan map or map series, and that is coordinated with state and regional transportation plans, including those required by federal law. In order to achieve these purposes, the transportation element shall:
- (a) consider all pertinent modes of transportation, including mass transit, air, water, rail, private vehicle, bicycle, and pedestrian;
  - (b) accommodate the special needs of the transportation disadvantaged;
  - (c) establish the framework for the acquisition, preservation, and protection of existing and future rights-of-way from building encroachment; and
  - (d) [incorporate any adopted *or* adopt] transportation performance measures that gauge mobility in multimodal terms where modal options exist and that ensure that adequate public transportation facilities will be provided to serve, support, and reinforce the future land uses as shown in the land-use plan map[, which standards shall be regionally coordinated].
- (3) The transportation element shall be in both map and textual form.
- (4) To the maximum extent possible, the transportation element shall attempt to integrate transportation modes in order to offer people choice in mobility. Therefore, the transportation element shall include several components, each of which shall enable the local government to consider the full range of issues posed by the construction, improvement, maintenance, and operation of present and prospective transportation facilities and their relationship to each other. Each component identified in paragraph (5) below shall contain the following type of information:
- (a) a description, in map and narrative form, of the location of planned facilities, services, and major improvements;
  - (b) an inventory and general assessment of existing and committed transportation facilities and services by function, type, capacity, and condition that includes information regarding:
    - 1. the capacities of existing and committed facilities;
    - 2. the degree to which those capacities have been reached or surpassed on existing facilities and whether or not the mobility for people and goods can be provided on other modes without adding additional capacity; and
    - 3. the assumptions on which those capacities have been determined.

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- (c) an evaluation of the general physical and operational condition of each transportation facility, including whether or not such facilities can continue to be used during and after natural hazards;
- (d) an identification of the provider of each transportation facility or service; and
- (e) an identification of any proposals or recommendations in a relevant state or regional transportation plan or other functional plan, and a statement of their relationship to the component.

◆ Subparagraph (e) is intended to ensure that the local government coordinates the transportation element with any applicable state or regional transportation plan and related plans.

- (5) The transportation element shall, at a minimum, include the following components identified in subparagraphs (a) and (d) and, where applicable for the local government based on characteristics such as population growth, extent of urbanization, and transportation forecasts, shall also include the components identified in subparagraphs (b), (c), and (e), provided however that any local government that is located in a Metropolitan Area as defined by the U.S. Bureau of the Census must include (b) in its transportation element:

◆ The transportation element needs to be flexibly written to account for the diversity of local government settings in a state. Thus, each state will need to modify paragraph (5) to establish criteria for activation of the requirement for the additional plan components. For example, a small, inland, rural community of 2,000 that lacked rail access would obviously not need to address port facilities and rail terminals as part of its element.

- (a) a traffic circulation component that identifies, provides for, or contains:
  - 1. an analysis of system expansion needs and transportation system management needs, including inventories of roads, forecasts, and studies of:
    - a. the existing traffic circulation levels of service and/or other transportation performance measures and system needs, based upon existing design capacities, land-use assumptions employed in estimating travel and average daily trips, peak-hour travel patterns, accident frequency data, and population densities;
    - b. the projected traffic circulation levels of service and/or other transportation performance measures and system needs for at least [10 *or* 20] years, based upon the future land uses shown on the land-use plan map; and
    - c. an identification and analysis of the adequacy of routes for mass evacuation in the case of a natural disaster that are related to the

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major thoroughfare plan described in subparagraph (5)(a)(3) below.<sup>180</sup>

2. an analysis of alternative transportation demand management strategies;
3. a thoroughfare plan that:
  - a. contains the general locations and extent of existing and proposed streets and highways by type, function, and character of improvement (e.g., collector roads, arterial roads, limited and controlled access facilities, and the number of traffic lanes for each roadway);
  - b. designates maintenance responsibility for these existing and proposed streets and highways;
  - c. includes specifications regarding the removal, relocation, widening, narrowing, acquisition, preservation, protection, vacation, abandonment, and change of use or extension of any public ways, including rights-of-way, viaducts, and grade separations;
  - d. includes recommendations on street or highway standards, building line setbacks, and control of access as well as measures to enhance joint use of transportation corridors, including integration of context-sensitive highway design and provisions for alternative modes of transportation;<sup>181</sup>
  - e. contains specific actions and requirements for bringing into compliance any facilities or services that do not satisfy an adopted transportation performance measure; and
  - f. serves as a basis for the corridor map, prepared and adopted in accordance with Section [7-501] below.

- (b) a mass transit component that identifies, provides for, or contains:

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<sup>180</sup>Alternatively, such information on mass evacuation routes may also be provided in a natural hazards element as described in Section 7-209.

<sup>181</sup>For a discussion of the evolution of street standards in the United States and their impact on neighborhood character and livability, see Michael Southworth and Eran Ben-Joseph, *Streets and the Shaping of Towns and Cities* (New York: McGraw-Hill, 1997).

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1. an analysis of mass transit system needs and transportation system management needs, including inventories of existing mass transit routes, forecasts, and studies of:
  - a. the existing mass transit and system needs, based upon such factors as the number of vehicles, vehicle miles traveled, vehicle hours traveled, service frequency, peak- hour capacities, ridership, revenue by mode, percent of auto ownership, and population characteristics of users of mass transit, including the transportation disadvantaged; and
  - b. the projected mass transit levels of service and/or other transportation performance measures and system needs for at least [10 or 20] years, based upon future land uses shown on the future land-use plan map and major mass transit trip generators and attractors shown on the existing land-use map.
2. an analysis of alternative transportation demand management strategies; and
3. a mass transit plan<sup>182</sup> that:
  - a. contains the general locations of mass transit routes and service areas;
  - b. identifies mass transit rights-of-way and exclusive mass transit corridors;
  - c. identifies existing and proposed terminals, transfer stations, and related transportation facilities or services, including any proposed improvements or expansions, including areas where there are opportunities for multi-modal integration such as transit stops, train stations, or highway interchanges;
  - d. designates maintenance responsibility for existing mass transit facilities and services;
  - e. contains specific actions and requirements for improving operations, making available alternative transportation modes, or bringing into compliance any facilities or services that are below an established level of service and/or other transportation performance measures; and

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<sup>182</sup>See generally Alan Black, *Urban Mass Transportation Planning* (New York: McGraw Hill, 1995).

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- f. considers measures to manage or control land uses and natural resources located adjacent to mass transit facilities.
- (c) a port, aviation, and railway component that identifies, provides for, or contains:
  - 1. the locations of existing and proposed ports, harbors, airports, high-speed rail lines, rail lines, and related transportation facilities, including any proposed improvements or expansions and any adopted transportation performance standards; and
  - 2. measures for the management or control of land uses and natural resources located adjacent to major land, air, and water terminals, including those that involve the cooperation of adjoining or affected local governments.
- (d) a bicycle and pedestrian traffic component that identifies, provides for, or contains:
  - 1. the locations of existing and proposed bicycle facilities, sidewalks, exercise and hiking trails, and riding facilities;
  - 2. recommendations for standards for such bicycles and pedestrian facilities; and
  - 3. programs or actions to promote the use of bicycles and walking.
- (e) an off-street parking facilities component that identifies, provides for, or contains the locations of existing and proposed offstreet parking facilities for motor vehicles and bicycles.
- (6) If the planning area for the local government is within a national ambient air quality standards nonattainment area, compliance with the Federal Clean Air Act (Section 4201 *et seq.* of Title 42, United States Code) is required. The following information may therefore be included in the transportation element as applicable to locally generated mobile sources of air pollutants:
  - (a) a map of the area designated as a nonattainment area for ozone, carbon monoxide, and/or particulate matter (PM-10);
  - (b) a discussion of the severity of any violations contributed by transportation-related sources that are causing nonattainment; and
  - (c) a discussion of measures that shall be implemented consistent with the state implementation plan for air quality and that will be included in the program of implementation described in paragraph (8) below.

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- (7) For each component addressed in the transportation element, an evaluation of financial considerations shall be included that contains:
- (a) an analysis of funding capability, including existing as well as probable alternative funding sources and mechanisms;
  - (b) a multiyear financing plan based on the needs of, the timing for, and the rough cost estimates of, planned transportation facilities and improvements identified in the individual components of the transportation element; and
  - (c) if probable funding falls short of meeting identified needs, an analysis of how additional funding shall be obtained, or how land-use assumptions shall be reassessed to ensure that level of service standards will be met.
- (8) The transportation element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] below. These actions may include, but shall not be limited to, proposals for:
- (a) land development regulations that prohibit development approval if the development causes the level of service of an individual transportation facility to decline below the transportation performance measures adopted in the transportation element, unless transportation improvements or strategies (e.g., increased mass transit service, improved facilities for pedestrians and bicycles, transportation demand management strategies, or transportation systems management measures) to accommodate the impacts of development are made concurrent with the development;
  - (b) land development regulations that protect or enhance transportation facilities, corridors, and sites to ensure that they can fulfill their identified functions (e.g., access control measures, design guidelines, and coordinated development review processes);
  - (c) additional detailed subplans;
  - (d) transportation-related capital improvements or operating expenditures that carry out the multiyear financing plan developed pursuant to subparagraph (7)(b) above;
  - (e) modifications to the corridor map made pursuant to Section [7-501] below;
  - (f) context-sensitive highway design;
  - (g) measures to achieve federal and/or state ambient air quality standards if the local government is within a national ambient air quality standards nonattainment area; and

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- (h) any implementation agreements between the local government and other local governments or between the local government and other transportation providers that are entered into pursuant to Section [7-503] below.
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### ***Commentary: Community Facilities Element***

The term “community facilities” includes the physical manifestations – buildings, land, interests in land (e.g., easements), equipment, and whole systems of activities – of governmental services on behalf of the public. It may include facilities that are operated by public agencies as well as those that are owned and operated by private (for-profit or nonprofit) enterprise for the benefit of the community.<sup>183</sup> Some have a direct impact on where development will occur and at what scale; water and sewer lines are good examples of this. Other community facilities may address immediate consequences of development; a stormwater management system, for example, deals with the impact of changes in the runoff characteristics of land as a consequence of development. Still other facilities are necessary for the public health, safety and welfare, but are more supportive in nature. Examples in this category would include police and fire facilities, general governmental buildings, parks, and elementary and secondary schools. A final group includes those facilities that contribute to the cultural life or physical and mental health and personal growth of a local government's residents (e.g., hospitals, clinics, libraries, and arts centers).

Most state planning statutes address in some manner the provision of community facilities (see the Note on comprehensive planning requirements in state statutes at the end of this Chapter). The model that follows draws on statutes and administrative rules from Florida, Georgia, Kentucky, Oregon, Rhode Island, Washington, and Vermont.<sup>184</sup> It describes which community facilities are to be included in the element. It asks that the local government inventory and assess their condition and

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<sup>183</sup>Frank So, "Governmental and Community Facilities," in *Principles and Practice of Urban Planning*, William I. Goodman and Eric C. Freund, eds. (Washington, D.C.: International City Management Association, 1968), 208.

<sup>184</sup>Fl. Stat. §§163.3177 (3)(a) and (6)(c) (1995) ; Fl. Admin. Code §§9J-5.011 and 9J-5.016 (1995); Rules of the Georgia Dept. of Community Affairs, §110-3-.04(5)(d)(1992); Ky. Rev. Stats. §100.187(4) (1996); Ore. Admin. Rules. Ch. 66, Div.11 (1985); R.I. Gen. Laws §45-22,2-6(F)(1996); Wash. Rev. Code §§36.70A.070(3) to (4) Wash. Admin. Code §§365-195-315 and 365-195-2320; Vt. Stats. §§4382(4) and (6) (1997). The description of the “master plan” in §6 of the *Standard City Planning Enabling Act* (SCPEA) also contains a listing of a variety of community facilities.

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adequacy, and propose a range of facilities that will support the development pattern contemplated in the land-use element, including those that it might otherwise deem desirable (e.g., museums and botanical gardens) and that would come under its regulatory authority (e.g., a privately-operated gas distribution company). Under this model, the local government would adopt level-of-service requirements and locational guidelines to help in responding to growth and change in the community and to aid in siting facilities.

Some community facilities may be operated by public agencies other than the local government. Such agencies may serve areas that are not coterminous with the local government's boundaries. Independent school districts, library districts, and water utilities are good examples of this. Because such arrangements differ widely, even within the same state, the model statute does not address all possible variations. In some large communities, these agencies may have their own internal planning capabilities. In others, the local planning agency will need to assist or coordinate with the outside agency or even directly serve as its planner to meet the requirements of the model.

As noted, certain community facilities, like private hospitals, universities, colleges, state agency offices, and privately operated public utilities may have an impact on the local government, even though they are not operated by a public agency or by the local government itself. Paragraph (7) provides an optional means by which the interests of such institutions can be taken into account by the local government while the community facilities element is being prepared or after the element has been initially adopted as a plan amendment. The advantage of such a process is that it enables the local government to begin discussion with the private operator or owner or state agency before facility expansions or new capital projects are actually undertaken.

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### 7-206 Community Facilities Element

- (1) A community facilities element shall be included in the local comprehensive plan.
- (2) The purposes of the community facilities element are to:
  - (a) provide for community facilities that are necessary or desirable to support the future land-use pattern proposed in the land-use element of the local comprehensive plan and to meet projected needs of the local government and its residents or over which the local government exerts control or authority in their location, character, extent, and timing;
  - (b) establish levels of service for such community facilities so they will meet the needs and requirements of the local government and its residents;
  - (c) ensure that such community facilities are provided in a timely, orderly, and cost-effective manner, including the optimization of the use of existing facilities as an alternative to expansion or new construction; and

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- (d) coordinate with other local governments, special districts, school districts, and state and federal agencies on the provision of community facilities that have multi-jurisdictional impacts.
- (3) For the purposes of this Section, community facilities shall include, but shall not be limited, to the following publicly operated facilities or public utilities within the jurisdiction of the local government, and may also include those community facilities described in paragraph (7) below:
- (a) water, including sources, treatment, storage, pumping, and primary distribution;
  - (b) wastewater, including treatment and primary collection;
  - (c) stormwater, including major drainageways (i.e., major trunk lines, streams, ditches, pump stations, and retention and detention basins) and outfall locations;
  - (d) solid waste, including landfills, incinerators, and transfer stations;
- ◆ Many states have separate legislation that will address local solid waste planning as well as permitting for solid waste facilities that will be supervised by the state. In such cases, this language should be adapted to integrate the requirements of those statutes.
- (e) public elementary and secondary schools, and may also include post-secondary and adult education and vocational training facilities;
  - (f) parks and recreation, including local parks and recreational facilities, such as community centers, swimming pools, and gymnasiums.
  - (g) local public libraries and other cultural facilities, such as museums, theatres, amphitheatres, auditoriums, and botanical gardens;
  - (h) public safety, including police or sheriff, jail, fire protection, and emergency medical services (EMS) facilities;
  - (i) hospitals and public health facilities, such as clinics or community health centers;
  - (j) general government, such as city halls or municipal, town, or township buildings, court houses, maintenance and storage buildings and yards, and garages, and
  - (k) gas, electric, steam, and other public utilities not addressed above, except however, that telecommunications facilities shall be addressed pursuant to Section [7-206.1] below.
- (4) The community facilities element shall contain the following:

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- (a) an inventory and general assessment of all the significant existing community facilities that support the land-use element and/or over which the local government exerts regulatory authority.
  - 1. The inventory shall include an identification of the entity having operational authority for the facility; the geographic service area of the facility; the design capacity of the facility, as appropriate; the current demand on the facility capacity, as appropriate; and the level of service provided by the facility. Where community facilities are shared, each local government shall indicate the proportional capacity of the systems allocated to serve its jurisdiction.
  - 2. The general assessment shall include an evaluation of the performance of existing facilities, based on best available data, of the condition and expected life of the facilities, and of facility capacity surpluses and deficiencies for each facility's service area.
  - 3. To the extent possible, the general assessment shall consider measures of optimizing the utilization of existing facilities (e.g., multipurpose facilities, and increased productivity or increased or changed operating hours) as an alternative to expansion and/or new construction.
  - 4. The general assessment may also include an evaluation of the annual energy consumption of significant existing community facilities and measures for reducing such energy consumption that may be included in the program of implementation required by Section [7-211] below;
- (b) a statement of goals, policies, and guidelines, regarding the general distribution, location, and characteristics of community facilities within the local government's jurisdiction, including a statement of levels of service for each type or category of community facility;
- (c) a description of existing community facilities or proposed capital improvement projects for community facilities that are necessary or desirable to support the land-use element and to meet projected needs of the local government or over which the local government exerts regulatory authority,<sup>185</sup> including a map that shows the project's general location or service area, and a statement of the entity that will or may have operational authority over the community facility. Such capital improvement projects shall be included in the program of implementation required by Section [7-111] below; and

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<sup>185</sup>This would include community facilities not operated by the local government but that it must review and approve, such as private hospitals.

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- (d) a summary map that shows the general location of existing or proposed community facilities that is at the same scale as the future land-use map required by Section [7-204(6)(c)] above.
  - (5) For each category of community facility in paragraph (3) above, the community facilities element shall include an evaluation of financial considerations that contains:
    - (a) an analysis of funding capability, including existing as well as probable alternative funding sources and mechanisms;
    - (b) a multiyear financing plan based on the needs of, the timing for, and the rough cost estimates of, planned community facility projects;
    - (c) if probable funding falls short of meeting identified needs, an analysis of how additional funding shall be obtained or an appraisal of other means by which level of service standards will be met.
  - (6) The community facilities element shall contain actions to be incorporated into the long-range program of implementation required by Section [7-211] below. These actions shall cover a period of [20] years.
  - (7) To ensure compatibility with the local comprehensive plan, a local government may allow any state agency or private owner or operator of a community facility or facilities that are located or proposed to be located within the jurisdiction of the local government to propose, pursuant to rules adopted by the local planning agency, such facilities for inclusion in the community facilities element. In promulgating rules for this purpose, the local planning agency may require the state agency or private owner or operator to:
    - (a) complete an inventory and general assessment of each existing community facility as described in subparagraph (4)(a) above;
    - (b) provide a statement of levels of service for the facility as described in subparagraph (4)(b) above; and
    - (c) complete a description of the existing community facility or proposed capital improvement project as described in subparagraph (4)(c) above.
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### *Commentary: Telecommunications*<sup>186</sup>

Local governments have traditionally dealt with the impact of telecommunications facilities on land use through zoning and with the terms and conditions under which telecommunications services are provided through the granting and monitoring of franchises for such services as cable television. When the federal government took the lead on telecommunications regulation through interstate commerce with the Communications Act of 1934, it left the placement of the accompanying infrastructure, such as utility poles, to local and state discretion.<sup>187</sup> Even as the infrastructure needs of various forms of telecommunications have changed, local entities have retained that control. Historically, most communities have supported monopolization of telecommunications services by companies in order to avoid the duplication of infrastructure that would be necessary to accommodate competing companies, each of which would require its own facilities, and to promote the economic efficiencies that may be achieved by economies of scale.

Local governments have addressed telecommunications infrastructure by focusing on aesthetics and safety. In the evolution of community controls, the multi-tiered utility poles and the networks of wires built in the 1930s were soon deemed unsightly, and communities moved to regulate their placement, later requiring newer developments to install utilities underground and thus out of sight. By the 1950s, the changes in telecommunications technology that now required the construction of major towers complicated the issue of infrastructure placement since freestanding towers, unlike most utility poles, were not located in rights-of-way. Ultimately, communities amended existing zoning regulations to address the concerns caused by the new infrastructure.

Major structures like towers and poles were not the only issues. With the increasing popularity of television, roof-top antennas and, later, satellite dishes had to be addressed. The proliferation of antennas and then dishes forced communities to put into place restrictions on their height and placement or sometimes prohibit their use entirely. Homeowner associations sought to restrict these facilities in individual developments through association bylaws and deed restrictions.

For many years, it was possible to build transmission towers in relatively out-of-the-way locations, minimizing the conflict between them and residential uses. Unfortunately, as communities expanded, neighborhoods got built close to towers. The resulting conflict often meant

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<sup>186</sup>This commentary and the model statute that follows are based in part on “Creating Effective State and Local Telecommunications Plans, Regulations, and Networks,” by Barbara Becker, AICP, and Susan Bradbury, in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). The preparation of the working paper, the commentary, and the model statute was supported by a grant from the Siemens Corporation. See also the commentary to Section 4-206.1, State Telecommunications and Information Technology Plan.

<sup>187</sup>See Robert A. Heverly, “Dealing with Towers, Antennas, and Satellite Dishes,” *Land Use Law & Zoning Digest* 48, no. 11 (November 1996): 3; Stanley D. Abrams, “Update on the 1996 Telecommunications Act: Personal Wireless Services,” *Land Use Law & Zoning Digest* 50, no. 4 (April 1998): 3

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new zoning restrictions, changing existing towers from a permitted use to a nonconforming use. Consequently, proposals for new towers had to go through a special use permit process.<sup>188</sup>

Advances in telecommunications technology in the last few decades have intensified these conflicts because some of the new services offered, like personal pagers and cellular phones, need numerous towers and relay stations to deliver services effectively. This need, along with the growth in firms generated by the provisions of the federal Telecommunications Act of 1996 that promote competition,<sup>189</sup> has put tremendous pressure on planners to come up with solutions that respond to community concerns while addressing these technical requirements, particularly concerning tower siting. The competition provisions of that act mandate that, if a community allows one company to build a tower, it cannot force that company to share its infrastructure with another competitor. At the same time, if every company builds its own infrastructure in a community, a local government could easily be overwhelmed by towers, dishes, and antennas. Local officials and planners grapple with architectural, aesthetic, and cultural community character issues while trying to promote efficient, reliable, and cost-effective services for citizens and businesses, and to realize the economic development opportunities evident in the growth of these new businesses.

The key to prudent control over the placement of telecommunications infrastructure, while playing a role in fostering competition and effective service, is good planning. Under the Telecommunications Act, local governments have been asked to share in the responsibility of enhancing competition within the industry. The Act also reaffirms the right of local government to control siting, construction, and modification of telecommunications facilities, to manage public rights-of-way, and to receive fair and reasonable compensation for the use of those public rights-of-way. The door seems open to opportunities for local governments to work with the telecommunications industry to secure agreements that are advantageous to citizens and businesses, that still comply with the provisions of the 1996 Act, and that promote growth and competition in the telecommunications market.

To that end, a good telecommunications system in a community might be seen as an economic development tool, giving the local government a distinct competitive advantage within a region or nationally.<sup>190</sup> New businesses could, for example, conceivably look to the quality of reception for cellular telephones or the adequacy of telephone lines for computer communications, thus allowing telecommuting. Further, a local government can now provide some of its services to the public over a computer network, such as a system for tracking the status of applications for development

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<sup>188</sup>Thomas Ragonetti, "A Towering Problem? Land Use Regulation of Commercial Broadcasting Towers," *Zoning and Planning Law Report* 15 (1992): 2.

<sup>189</sup>Telecommunications Act of 1996, P.L. No. 104-104, 110 Stat. 56, 47 U.S.C.A. 151 *et seq.* The Act can also be found on the Federal Communications Commission website: [www.fcc.gov/telecom.html](http://www.fcc.gov/telecom.html).

<sup>190</sup>For an excellent discussion of the connection between telecommunications and economic growth, see Office of Technology Assessment, Congress of the United States, *The Technological Reshaping of Metropolitan America*, OTA-ETI-643 (Washington, D.C.: U.S. GPO, September 1995), ch. 7 (discussing telework, intelligent transportation systems, and investment in telecommunications infrastructure).

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permits.<sup>191</sup> In many communities in the U.S. there are now computer networks that allow residents to exchange information, ideas, and services. Examples include the Blacksburg, Virginia, Electronic Village, the Cambridge, Massachusetts, Civic Network, and the Seattle, Washington, Community Network.<sup>192</sup>

No existing state enabling statutes expressly authorize the preparation of local telecommunications plans or plan elements. However a number of communities in the U.S. have developed plans, policies, and telecommunications-specific ordinances. For example, Sunnyvale, California, has adopted a policy document that addresses the city's role as a regulator of telecommunications, as a service provider that uses telecommunications to disseminate information to the public, and as a facilitator of telecommunications technology.<sup>193</sup> Other communities have adopted specialized ordinances that streamline the permitting process for telecommunications facilities and/or establish performance standards for such facilities to make the permitting process more flexible.<sup>194</sup>

The following Section authorizes a telecommunications component in the community facilities element of the local comprehensive plan. Acknowledging the economic development potential of telecommunications, the model statutory language addresses the local government's external role in regulating telecommunications facilities as well as its internal role of providing a conduit of information about the local government to its residents. The model component also coordinates the local government's initiatives with those of the state, as articulated in the state telecommunications and information technology plan (see Section 4-206.1), where such a plan has been prepared. With respect to the local government's regulatory role, the component is to show existing telecommunications facilities, public rights-of-way, and public structures that may be used as locations for new telecommunications facilities, and other general areas within the local government's jurisdiction that represent preferred locations for such facilities while protecting

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<sup>191</sup>See George Arimes, "Doing the Job in Double Time," *Planning* 63, no. 3 (March 1997): 22-25 (describing project tracking system in San Diego that will allow public access of data through Internet).

<sup>192</sup>Blacksburg Electronic Village, "About the Blacksburg Electronic Village," (1997), [www.bev.net/project/index.html](http://www.bev.net/project/index.html); Cambridge Civic Network (1997), [www.civic.net.2401/cambridge\\_civic\\_network/cambridge\\_civic\\_network.html](http://www.civic.net.2401/cambridge_civic_network/cambridge_civic_network.html); Seattle Community Network, "Seattle Community Network," (1997), [www.scn.org/ip/commnet/principles.html](http://www.scn.org/ip/commnet/principles.html). For a comprehensive listing of such free nets and community networks in the U.S., see: [www.freenet.mb.ca/othersys/freenets/usa.html](http://www.freenet.mb.ca/othersys/freenets/usa.html)

<sup>193</sup>City of Sunnyvale, California, Telecommunications Policy (Nov. 10, 1995), [www.ganymede.org/svale/telecomm\\_policy.html](http://www.ganymede.org/svale/telecomm_policy.html).

<sup>194</sup>For examples of comprehensive ordinances regulating telecommunications facilities, see City of Petaluma, California, Zoning Ordinance, Ch. 14.44, Telecommunication Facility and Antenna Criteria (1996), [www.abag.ca.gov/bayarea/telco/samples/petaluma.html](http://www.abag.ca.gov/bayarea/telco/samples/petaluma.html); Albany Dougherty Planning Commission, Telecommunications Ordinance (Albany, Ga., 1996). City of Bloomington, Minnesota, Zoning, Ch. 19(1997), [www.ci.bloomington.mn.us/structur/codes/special/tower/towercov.htm](http://www.ci.bloomington.mn.us/structur/codes/special/tower/towercov.htm); City of Sonoma, California, Zoning Ordinance (1996), Ordinance 96-23, [www.abag.ca.gov/bayarea/telco/samples/sonoma.city.html](http://www.abag.ca.gov/bayarea/telco/samples/sonoma.city.html);

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community character. It is also to propose changes to local ordinances, regulations, and procedures affecting telecommunications in order to enhance investment in infrastructure, advance technological advancement, and provide universal service.

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### 7-206.1 Telecommunications Component

- (1) A telecommunications component [may *or* shall] be included in the community facilities element of the local comprehensive plan. Two or more local governments may enter into an agreement to jointly prepare such a component pursuant to Section [7-202(11)] above.
- (2) The purposes of the telecommunications component are to:
  - (a) coordinate local telecommunications initiatives through the state telecommunications and information technology plan prepared pursuant to Section [4-206.1], if such a plan has been adopted, and other state programs;
  - (b) assess short- and long-term telecommunications needs, especially regarding infrastructure and service technology, for the public and private sectors;
  - (c) determine the location and capacity of existing telecommunications infrastructure and services within or potentially affecting the local government;
  - (d) define the role of the local government in encouraging competition within the marketplace;
  - (e) encourage investment in the most advanced telecommunications technology while protecting the public health, safety, and general welfare, including aesthetics and community character;
  - (f) ensure that investments in telecommunications infrastructure are provided in a timely, orderly, and efficient manner that will minimize public inconvenience and disruption to expansion and new construction of facilities; and
  - (g) establish a framework for providing reasonable access to public rights-of-way and public structures and ensuring that the local government receives fair and reasonable compensation for use of that access.
- (3) In preparing the telecommunications component, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others, such as those conducted in the preparation of the state telecommunications and information technology plan or any regional plan. The supporting studies may include, but shall not be limited to:

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- (a) surveys and assessments of future telecommunications needs on a local and/or regional basis as they relate to businesses, local government (including the needs of individual departments of the local government), education, health services, and economic development;
  - (b) an assessment of the existing private telecommunications system on a local and regional basis, including a determination of infrastructure location, rate structures, and provision of services;
  - (c) an assessment of federal telecommunications statutes and regulations to evaluate their impact on the local government;
  - (d) an inventory of existing telecommunications facilities, public structures, co-location sites, and other areas that could serve as preferred locations for new telecommunications facilities, and a visual impact assessment of these sites and facilities should they be selected as preferred locations;
  - (e) an assessment of the ordinances, regulations, and permitting procedures of the local government that affect private telecommunications firms and their effects on the cost of doing business as well as on investment in infrastructure, technological advancement, and the provision of universal service; and
  - (f) an assessment of the ability of private telecommunication firms to cooperate with each other and with the local government to coordinate construction to ensure minimum public inconvenience or disruption.
- (4) The telecommunications component shall consist of summaries of the relevant studies described by paragraph (3) above as well as a statement of goals, policies, and guidelines by which the local government may improve telecommunications infrastructure and services in order to address the purposes listed in paragraph (2) above. The component shall include a summary map drawn at the same scale as the future land-use plan map required by Section [7-204(6)(c)] above that shows existing telecommunications facilities, public rights-of-way, and public structures that may be used as locations for new telecommunications facilities, and other areas within the jurisdiction of the local government that represent preferred locations for such facilities.
- (5) The telecommunications component shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] below. These actions may include, but shall not be limited to, proposals for:
- (a) construction or installation of, or improvements to, the telecommunications facilities and computer networks of the local government;
  - (b) changes to zoning ordinances to ensure an adequate number of sites for telecommunications facilities;

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- (c) ordinances that establish fees, allow the use of public rights-of-way and public structures for telecommunications facilities, ensure the coordination of construction in such rights-of-way in order to minimize public inconvenience and disruption, and provide for removal of such facilities in the event of obsolescence or abandonment;
  - (d) ordinances containing design criteria to promote public safety, maintain community character, and minimize the impact of telecommunications facilities on adjacent land uses;
  - (e) public information programs to market the telecommunications potential of the local government and/or region for economic development purposes;
  - (f) agreements between telecommunications firms and the local government for use of telecommunication facilities by police, fire, and/or emergency service personnel; and
  - (g) changes to local ordinances, regulations, and procedures affecting telecommunications in order to enhance investment in infrastructure, technological advancement, and the provision of expanded access to all citizens.
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### ***Commentary: Housing Element***

Language authorizing housing elements as part of a local comprehensive plan appears in the planning statutes of 25 states (see the research note on state planning statutes at the end of this Chapter and Table 7-5). The purpose of such an element is to assess local housing conditions and project future housing needs, especially for affordable housing, in order to assure that a wide variety of housing is available for a community's existing residents (who may be underserved by the choices available to them, such as the need for rental units for large families and the disabled, or who may be paying a disproportionate amount of their income in rent) as well as those who might reside there in the future.

As noted in Chapter 4, the presence of an adequate supply of housing for all income groups is also important to support economic development.<sup>195</sup> When they locate or expand, businesses typically look to the supply of housing for potential workers. Having a sufficient supply of housing in a community for a broad variety of income groups is a strategic advantage for a local government. Moreover, the existing housing stock of a community is a resource. The housing element will typically identify measures to maintain a good existing inventory of housing stock through

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<sup>195</sup>See the commentary to Section 4-207 (State Housing Plan) and Section 7-208 (Economic Development Element).

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rehabilitation, code enforcement, technical assistance to homeowners, creation of loan and grant programs, and other measures that will ensure that a local government conserves what it has.

State statutes authorizing or requiring housing elements vary in detail. Idaho, for example, requires housing as a “component” of a local comprehensive plan, describing it as:

[a]n analysis of housing conditions and needs; plans for the improvement of housing standards; and plans for the provision of safe, sanitary, and adequate housing, including the provision for low-cost conventional housing, the siting of manufactured housing and mobile homes in subdivisions and parks and on individual lots which are sufficient to maintain a competitive market for each of those housing types and to address the needs of the community.<sup>196</sup>

Vermont’s housing element language calls for municipalities to:

include a recommended program for addressing low and moderate income persons’ housing needs as identified by the regional planning commission pursuant to section 4348a(a)(9) of this title. The program may include provisions for conditional permitted accessory apartments within or attached to single family residences which provide affordable housing in close proximity to cost-effective care and supervision for relatives or disabled or elderly persons.<sup>197</sup>

Rhode Island states that the housing element:

[s]hall consist of identification and analysis of existing and forecasted housing needs and objectives, including, but not limited to, programs for the preservation of federally insured or assisted housing, [and] improvement and development of housing for all citizens. The housing element shall enumerate local policies and implementation techniques to provide a balance of housing choices, recognizing local, regional, and statewide needs for all income levels and for all age groups, including, but not limited to, the affordability of housing and the preservation of federally insured or assisted housing. The element shall identify specific programs and policies for inclusion in the implementation program necessary to accomplish this purpose.<sup>198</sup>

Connecticut’s description of a “plan of development” for a municipality includes a requirement that:

[s]uch plan shall make provision for the development of housing opportunities for multifamily dwellings, consistent with soil types, terrain, and infrastructure capacity, for all residents of the municipality and the planning region in which the municipality is located,

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<sup>196</sup>Id. Code §67-6508(l) (1997) (Housing).

<sup>197</sup>Vt. Stats., Tit. 24, Ch. 117, §4382(a)(10) (1997).

<sup>198</sup>R.I. Gen. Laws §45-22.2-6 (1997).

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as designated by the secretary of the office of policy and management under section 16a-4a. Such plan shall also promote housing choice and economic diversity in housing, including housing for both low and moderate income households, and encourage the development of housing which will meet the housing needs identified in the [state] housing plan prepared pursuant to section 8-37 and in the housing component of the state plan of conservation and development prepared pursuant to section 16a-26.<sup>199</sup>

Some states, like Florida, Georgia, Oregon, and Washington, detail general language in a state statute through administrative rules.<sup>200</sup> For example, Washington's statute describes the mandatory housing element as one:

ensuring the vitality and character of established residential neighborhoods that: (a) includes an inventory and analysis of existing and projected housing needs; (b) includes a statement of goals, policies, objectives and mandatory provisions for the preservation, improvement, and development of housing, including single-family residences (c) identifies sufficient land for housing, including, but not limited to, government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities; and (d) makes adequate provisions for existing and projected needs of all economic segments of the community.<sup>201</sup>

The Washington Administrative Code repeats these same provisions and then includes a series of recommended steps and analytical approaches for the housing element. It suggests, for example, that a "strategy for preserving, improving, and developing housing" to meet the needs of all economic segments of the community should include:

- (i) Conservation of the range of housing choices to be encouraged, including but not limited to, multifamily housing, mixed uses, manufactured homes, accessory living units, and detached homes.
- (ii) Consideration of various lot sizes and densities, and of clustering and other design configurations.
- (iii) Identification of sufficient appropriately zoned land to accommodate the identified housing needs over the planning period.

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<sup>199</sup>Conn. Gen. Stats., Ch. 126, Tit. 8, §8-23 (1997).

<sup>200</sup>Fl. Stats. §163.3177(6)(f); Fl. Admin. Code §9J-5.010 (1994); Ga. Admin. Code §11-2-.04((5)(e) (1992); Ore. Admin. Rules, Ch. 660, Division 8 (Interpretation of Goal 10 Housing); Wash. Rev. Code §36.70A.070(2) (1996); Wash. Admin. Code §365-195-310 (1993)

<sup>201</sup>Rev. Code. Wash. §36.70A.070(2) (1996).

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(iv) Evaluation of the capacity of local public and private entities and the availability of financing to produce housing to meet the identified need.<sup>202</sup>

Chapters 4 (State Planning) and 6 (Regional Planning) of the *Legislative Guidebook* include a variety of state and regional models for housing planning.<sup>203</sup> In addition, Chapter 4 contains a lengthy research note on state planning approaches to promote affordable housing that describes, among other programs, local housing planning requirements in both California and New Jersey.

The model statutes below provide two alternatives. Alternative 1 is general language intended to be consistent with the state housing plan description in Section 4-207 and the regional housing plan description in Section 6-203. Where the regional planning agency has prepared housing projections, they would need to be reflected in the local housing element. Alternative 2 utilizes the more detailed housing element that is described in Section 4-208.9 (Alternative 2), contained in the “Model Balanced and Affordable Housing Act,” which establishes a statewide fair-share housing planning system.

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### **7-207 Housing Element (Two Alternatives)**

#### *Alternative 1 – A General Housing Element*

- (1) A housing element shall be included in the local comprehensive plan.
- (2) The purposes of the housing element are to:
  - (a) document the present and future needs for housing within the jurisdiction of the local government, including affordable housing and special needs housing,<sup>204</sup> and the extent to which private- and public-sector programs are meeting those needs;
  - (b) take into account housing needs of the region in which the local government is located, including the need for affordable housing, especially as it relates to the location of such housing proximate to jobsites;

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<sup>202</sup>Wash. Admin. Code §365-195-310(2)(j) (1993).

<sup>203</sup>See Sections 7-207 (State Housing Plan), 7-208 (State Planning for Affordable Housing (Two Alternatives)); and 6-6-203 (Regional Housing Plan).

<sup>204</sup>The households most commonly identified as requiring “special needs” programs include the elderly, the physically and mentally disabled, single heads of households, large families, farm workers and migrant laborers, and the homeless.

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- (c) identify barriers to the production and rehabilitation of housing, including affordable housing;
  - (d) assess the condition of the housing stock within the local government's jurisdiction and methods to maintain it, including rehabilitation and code enforcement; and
  - (e) develop sound strategies, programs, and other actions to address needs for housing, including affordable housing.
- (3) In preparing the housing element, the local planning agency shall undertake supporting studies that are relevant to the topical areas included in the element. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies may concern, but shall not be not limited to, the following:
- (a) an evaluation of and summary statistics on housing conditions within the jurisdiction of the local government for all economic segments. The evaluation shall include the existing distribution of housing by type, size, gross rent, value, and, to the extent data are available, condition, the existing distribution of households by gross annual income, and the number of middle-, moderate-, and low-income households that pay more than [28] percent of their gross household income for owner-occupied housing and [30] percent of their gross annual income for rental housing.<sup>205</sup> In evaluating housing condition the local planning agency may conduct field surveys of areas and households within the jurisdiction of the local government as well as assess other qualitative data on housing (such as data from the U.S. Census or from local code enforcement records) and may summarize such conditions in maps or tables, or by other means;
  - (b) a projection for each of the next [5] years of total housing needs by type and density ranges, including needs for middle-, moderate-, and low-income and special needs housing in terms of units necessary to be built or rehabilitated within the jurisdiction of the local government. Where the [regional planning agency] has prepared such projections for the region in which the local government is located as part of a regional housing plan pursuant to Section [6-203], the local planning agency shall take into account the projections of the regional housing plan in preparing the local projections of total housing need. Where the [regional planning agency] has not prepared such projections, the local planning agency shall instead take into account any projections of housing need for the region or county in which the local government is located that have been published by any state housing, community development, or similar agency in preparing the local projections of total housing needs;

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<sup>205</sup>For definitions of middle-, moderate-, and low-income housing and affordable households, see also 24 C.F.R. §91.5 (Definitions) and 5 N.J. Admin. Code §5:93-1.3.

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- (c) an assessment of housing needs, especially the need for affordable housing, of employees of major employers located within the jurisdiction of the local government and the degree those needs can be addressed by existing or future housing provided within the jurisdiction of the local government.
  - (d) an analysis of the capabilities, constraints, and degree of progress made by the public and private sectors in meeting the housing needs, including those for affordable housing and special needs housing, within the jurisdiction of the local government;
  - (e) an identification of local regulatory barriers to affordable housing and/or housing rehabilitation, including building, housing, zoning, and related codes, and their administration; and
  - (f) an analysis of any proposals for action by local governments contained in any state and/or regional housing plan.
- (5) The housing element shall consist of a statement of local housing goals, policies, and guidelines, including numerical goals for each of the next five years for housing units, both new and rehabilitated, for middle-, moderate-, and low-income households and special needs housing within the jurisdiction of the local government, as well as total need by housing type and density ranges. The element shall include summaries of supporting studies identified in paragraph (3) above.
- (6) The housing element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] below. These actions may include, but shall not be limited to:
- (a) financing for the acquisition, rehabilitation, preservation, or construction of affordable and special needs housing, the stimulation of public- and private-sector cooperation in the development of affordable housing, and the creation of incentives, including tax abatement for the private sector to construct or rehabilitate affordable housing;
  - (b) use of publicly owned land and buildings as sites for affordable and special needs housing;
  - (c) regulatory and administrative techniques to remove barriers to the development of affordable housing and to promote the location of such housing proximate to jobsites, including:
    - 1. modifying procedures to expedite the processing of permits for inclusionary developments and modifying development fee requirements, including reduction or waiver of fees and alternative methods of fee payment;

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2. designating a sufficient supply of sites in the housing element that will be zoned at uses and densities that may accommodate affordable and special needs housing, rezoning lands at uses and densities necessary to ensure the economic viability of inclusionary developments, and giving density bonuses for mandatory set-asides of affordable dwelling and special needs units as a condition of development approval;
  3. modifying development regulations to permit accessory dwelling units, group homes for the disabled and other residential facilities for special needs populations, manufactured housing, and mobile homes; and
  4. generally removing constraints that unnecessarily contribute to housing costs or unreasonably restrict land supply.
- (d) enactment of housing and property maintenance codes, and initiation or modification or redesign of code enforcement programs to ensure maintenance and rehabilitation of existing housing stock;
  - (e) any other changes in local tax, infrastructure financing, and land-use policies, procedures, and ordinances (including local land development regulations) to encourage or support affordable housing and the preservation and rehabilitation of existing housing stock, including reserving infrastructure capacity for affordable housing, and
  - (f) use of federal funds and any state, local, or other resources available for affordable housing.

### *Alternative 2 – A Housing Element Intended to Satisfy a Local Government’s Fair-Share Obligation*

- (1) A housing element shall be included in the local comprehensive plan.
- (2) The housing element described in Section [4-208.9, *Alternative 1*] that has been prepared by the local government and reviewed and approved by the [Balanced and Affordable Housing Council *or* regional planning agency] pursuant to Section [4-208.13, *Alternative 1*] shall serve as the required housing element for the purposes of this Section.

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### ***Commentary: Economic Development Element***

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Many local comprehensive plans address economic development to accommodate as well as stimulate economic growth and preserve existing jobs.<sup>206</sup> The traditional approach to both aspects has been to forecast economic growth and to meet the land and infrastructure needs of commerce and industry. Indeed, analysis of the local government's economic base has typically been a fundamental study underlying the land-use element. The practice of economic development has evolved considerably over time, however. The economic development tools available to local government, especially as a result of specialized state legislation and related state and federal initiatives (notably those through the U.S. Economic Development Administration and the U.S. Department of Housing and Urban Development), have grown extensively, as has local sophistication in their use.

Moreover, the perspective of what economic development is has substantially broadened. Economic development is no longer thought of as merely meeting land-use and infrastructure needs. It now extends to human resources (e.g., education, job training, and other forms of labor force development), development financing (e.g., tax increment financing, industrial development bonds, low interest loans, and revolving loan funds), and to the creation of organizations such as chambers of commerce, community development corporations, business incubators, and specialized public-private partnerships that market an area's benefits and resources as well as actively participate in development projects.<sup>207</sup> In some parts of the nation, the state itself may be leading the economic development initiatives on behalf of local governments. In others, economic development may have a more regional focus, with a number of local governments or business groups joining together to achieve common goals. In still others, the initiative may come from individual local governments.

Still, despite where the initiatives may originate, many see regions themselves as the fundamental economic unit. The discrete competitive factors and advantages of a region – its natural resources, its collective labor pool, its relative wage levels, its particular combination of business enterprises, the skills of its workforce, its business and political leadership, its investment in public infrastructure, its cultural amenities – are what make it attractive and cause it to grow.

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<sup>206</sup>This commentary and the following model economic development element are based, in part, on a paper by Dr. Gerrit Knaap, "Toward Model Statutes for the Economic Development Element of Local Comprehensive Plans," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998). Dr. Knaap was a Senior Research Fellow on the Growing Smart<sup>SM</sup> project.

<sup>207</sup>See generally Stephen B. Friedman and Alexander J. Darragh, "Economic Development," Ch. 10, in *The Practice of Local Government Planning*, 2d ed., Frank So and Judith Getzels, eds (Washington, D.C.: International City Management Association, 1988); Donald T. Iannone, "Economic Development," Ch. 5, in *Managing Small Cities and Counties: A Practical Guide* (International City/Council Management Association, 1994); Edward J. Blakely, *Planning Local Economic Development: Theory and Practice*, 2d ed. (Thousand Oaks, Ca.: Sage, 1994); Mary L. McLean and Kenneth P. Voytek, *Understanding Your Economy: Using Analysis to Guide Local Strategic Planning* (Chicago: APA Planners Press, 1992); and Avrom Bendavid-Val, *Local Economic Development Planning: From Goals to Policies*, Planning Advisory Service Report No. 353 (Chicago: American Planning Association, 1980).

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Thus, local governments now operate in a world in which the Los Angeles area competes with Seattle and Tokyo and the Chicago area with London and New York.<sup>208</sup>

Local (or regional) economic development typically has several purposes:

- job creation and retention;
- increases in real wages (e.g., economic prosperity);
- stabilization or increase of the local tax base; and
- job diversification – making the community less dependent on a few employers.

A number of factors typically prompt a local economic development program. They include: loss of a major employer; competition from surrounding communities (or nearby states); the belief that economic development yields a heightened quality of life, the desire to provide employment for existing residents who would otherwise leave the area, economic stagnation or decline in a community or part of it, and the need for new tax revenues.<sup>209</sup>

A number of states address economic development in their local planning statutes or administrative rules. All of the states that follow stress the analysis of economic development potential in a state and/or regional as well as a local context.

New Jersey authorizes, as part of a municipal master plan:

[a]n economic plan element considering all aspects of economic development and sustained economic vitality, including (a) a comparison of the types of employment expected to be provided by the economic development to be prompted with the characteristics of the labor pool resident in the municipality and nearby areas and (b) an analysis of the stability and diversity of the economic development to be promoted.<sup>210</sup>

Rhode Island requires the preparation of an economic development element as part of a mandatory local comprehensive plan. Rhode Island's statute calls for such an element to include:

the identification of economic development policies and strategies, either existing or proposed by the municipality, in coordination with the land use plan element. These

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<sup>208</sup>For a discussion of transformation to global economies and the competition of economic regions as opposed to nations, see Robert D. Yaro and Tony Hiss (Regional Plan Association), *A Region at Risk: The Third Regional Plan for the New York-New Jersey-Connecticut Area* (Washington, D.C.: Island Press, 1996), 23-43.

<sup>209</sup>Stuart Meck and Kenneth Pearlman, *Ohio Planning and Zoning Law*, 1997 ed. (St. Paul: West Group, 1997), 609-610.

<sup>210</sup>N.J.S.A. §40:55D-28 (b)(9) (1996).

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policies should reflect local, regional, and statewide concerns for the expansion of the economic base and promotion of quality employment opportunities. The policies and implementation techniques must be identified for inclusion in the implementation program element.<sup>211</sup>

Oregon and Georgia are examples of states that have detailed economic development requirements in local comprehensive plans through administrative rules rather than through statutes. In both cases, the administrative rules are highly detailed. Oregon's administrative rules focus on the preparation of an "economic opportunities analysis" that is to: (1) review national and state and local trends for commercial and industrial uses that could reasonably be expected to locate or expand in the planning area; (2) identify the types of sites that are likely to be needed by such uses; (3) estimate the amount of serviceable land for such uses; and (4) designate additional serviceable land for such uses, if possible depending on public facility limitations.<sup>212</sup> Georgia's administrative rules call for an analysis of the community's economic base, labor force, and local economic development resources. According to the rules, this assessment should result in:

a plan for economic development in terms of how much growth is desired, what can be done to support retention and expansion of existing businesses, what types of new businesses and industries will be encouraged to locate in the community, what incentives will be offered to encourage economic development, whether educational and/or job training programs will be initiated or expanded, and what infrastructure improvements will be made to support economic development goals during the planning period.<sup>213</sup>

Section 7-208, the description of the local economic development element that follows, draws on many of the provisions of these statutes and rules. Generally this description is intended to be consistent with the state economic development plan model statute in Section 4-206. Like the state-level model, the local economic development element is a form of strategic planning by which the local government assesses its strengths and weaknesses, especially in the context of trends in the surrounding region. It then proposes a series of actions to encourage job retention and growth, accommodate business and industry, and broaden economic opportunity.

It should be emphasized that the preparation of such an element may be facilitated by the use of special advisory task forces consisting of representatives of local economic development organizations, major employers, commercial and industrial real estate brokers and developers, and others with similar knowledge. Such task forces will enhance the local government's capacity in plan preparation as well as provide a strong public-private linkage that will serve it well in implementing the economic development elements proposals.

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<sup>211</sup>R.I. Gen. Laws §45-22.2-6 (D) (1996).

<sup>212</sup>Ore. Admin. Rules §660-08-015 (April 1987).

<sup>213</sup>Rules of the Ga. Dept. of Community Affairs §110-3-2.04(5)(b)2.5 (June 11, 1992).

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### THE JOBS/HOUSING BALANCE

While all the elements in the local comprehensive plan are to be coordinated, the *Legislative Guidebook* places special emphasis on ensuring an express recognition of the linkage between the housing and economic development elements—what has been called the “jobs-housing balance.”<sup>214</sup> Often local governments, particularly in suburban areas, embark on programs to attract new businesses but neglect to provide reasonable opportunities for affordable housing for the employees of those new businesses. The language in the *Guidebook* attempts to guard against that possibility. For example, a purpose of the housing element, in Section 7-207(2)(b) (Alternative 1), is to “take into account housing needs of the region in which the local government is located, including the need for affordable housing, especially as it relates to the location of such housing proximate to jobsites.” The economic development element's purpose, in Section 7-208(2)(e) includes defining “the local government's role in encouraging job retention and growth and economic prosperity, particularly in relation to the availability of adequate housing for employees of existing and potential future businesses, industries, and institutions within its jurisdiction. . . .” It also includes, in the list of underlying studies for the element, an analysis of the existing and projected housing stock within the local government as to whether it will be adequate for such employees.

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### 7-208 Economic Development Element [Opt-Out Provision Applies]

- (1) An economic development element shall be included in the local comprehensive plan, except as provided in Section [7-202(5)] above.
- (2) The purposes of the economic development element are to:
  - (a) coordinate local economic development initiatives with those of the state through its state economic development plan prepared pursuant to Section [4-206] and other state initiatives;
  - (b) ensure that adequate economic development opportunities are available in order to provide a heightened quality of life and to enhance prosperity;

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<sup>214</sup>See Robert Cervero, “Job-Housing Balance Revisited: Trends and Impacts in the San Francisco Bay Area,” *Journal of the American Planning Association* 62, No. 4 (Autumn 1996): 429-511; Robert Cervero, “Jobs-Housing Balancing and Regional Mobility,” *Journal of the American Planning Association* 55, No. 2 (Spring 1989): 136-150.

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- (c) relate the local government's initiatives to the distinct competitive advantages of its surrounding region that make it attractive for business and industrial growth and retention, including its historic, cultural, and scenic resources;
  - (d) assess the local government's strengths and weaknesses with respect to attracting and retaining business and industry; and
  - (e) define the local government's role in encouraging job retention and growth and economic prosperity, particularly in relation to the availability of adequate housing for employees of existing and potential future businesses, industries, and institutions<sup>215</sup> within its jurisdiction, transportation, broadening of job opportunities, stimulating private investment, and balancing regional economies.
- (3) In preparing the economic development element, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others, such as those conducted in preparation of the state economic development plan or any regional plan. The supporting studies may concern, but shall not be limited to, the following:
- (a) job composition and growth or decline by industry sector on a national, statewide, or regional basis, including an identification of categories of commercial, industrial and institutional activities that could reasonably be expected to locate within the local government's jurisdiction. This shall include any studies and analyses of trends and projections of economic activity made as part of the land-use element pursuant to Section [7-204(5)(b)];
  - (b) existing labor force characteristics and future labor force requirements of existing and potential commercial and industrial enterprises and institutions in the state and the region in which the local government is located;
  - (c) assessments of the locational characteristics of the local government and the region in which it is located with respect to access to transportation to markets for its goods and services, and its natural, technological, educational, and human resources;
  - (d) assessments of relevant historic, cultural, and scenic resources and their relation to economic development;
  - (e) patterns of private investment or disinvestment in plants and capital equipment within the jurisdiction of the local government;

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<sup>215</sup>Institutions are included in the economic development element. In many communities, institutions like public and private hospitals and universities as well as nonprofit organizations are significant employers.

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- (f) patterns of unemployment in the local government and the region in which it is located;
  - (g) surveys of owners or operators of commercial and industrial enterprises and institutions within the local government's jurisdiction with respect to factors listed in subparagraphs (a) to (e) above. This shall also include an identification of the types of sites and supporting services for such sites that are likely to be needed by such enterprises and institutions that might locate or expand within the local government's jurisdiction;
  - (h) inventories of commercial, industrial, and institutional lands within the local government that are vacant or significantly underused. Such inventories may identify the size of such sites, public services and facilities available to it, and any site constraints, such as floodplains, steep slopes, or weak foundation soils. In conducting such an inventory, the local government shall utilize the existing land-use inventory prepared pursuant to Section [7-204(5)(f)] above. This inventory shall also identify any environmentally contaminated sites that have the potential for redevelopment for commercial and industrial uses once such contamination has been removed;
  - (i) assessments of organizational issues within the local government for encouraging economic development and the roles and responsibilities of other organizations that are involved in economic development efforts within the local government's jurisdiction and/or the region in which it is located, including the potential for cooperative efforts with other local governments;
  - (j) the adequacy of the existing and projected housing stock within the local government's jurisdiction for employees of existing and potential future commercial and industrial enterprises and institutions within its jurisdiction;
  - (k) assessments of regulations and permitting procedures imposed by the local government on commercial and industrial enterprises and institutions and their effects on the costs of doing business as well as their effect on the attraction and retention of jobs and firms; and
  - (l) opinions of the public, through surveys, public hearings, and other means, as to the appropriate role of the local government in economic development and desired types of economic development. Such opinions may also be obtained through the process of preparing the issues and opportunities element pursuant to Section [7-203] above.
- (4) Based on the studies undertaken pursuant to paragraph (3) above, the economic development element shall contain a statement, with supporting analysis, of the economic development goals, policies, and guidelines of the local government. This shall include:

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- (a) a definition of the local government's role and responsibilities as a participant in the development of its region's economy;
- (b) an identification of categories or particular types of commercial, industrial, and institutional uses desired by the local government; and
- (c) a commitment to designate an adequate number of sites of suitable sizes, types, and locations and to ensure necessary community facilities through the community facilities element of the local comprehensive plan.

The economic development element may also include goals, policies, and guidelines to maintain existing categories, types, or levels of commercial, industrial, and institutional uses.

- (5) The economic development element shall contain actions to be incorporated into the long-range program of implementation required by Section [7-211] below. These actions may include, but shall not be limited to, proposals for:
  - (a) rezoning of an adequate number of sites for commercial, industrial, and institutional uses during the 20-year planning period;
  - (b) reuse of environmentally contaminated sites for commercial and industrial activities through [*cite to state statute authorizing brownfields redevelopment*];
  - (c) capital projects of transportation and community facilities to service designated sites for commercial, industrial, and institutional activities;
  - (d) creation of or changes in job training programs;
  - (e) use of economic development incentives authorized by state law such as [tax abatement, industrial development bonds, tax increment financing, and urban renewal] and grant and loan programs that use local, state, or federal monies;
  - (f) creation of a joint economic development zone pursuant to Section [14-201] below;
  - (g) amendments to land development regulations that affect commercial, industrial, and institutional uses and other changes in administrative and permitting processes of the local government to facilitate economic development;
  - (h) programs of monitoring the needs of existing businesses and institutions to ensure their retention;
  - (i) design guidelines for commercial, industrial, and institutional areas;

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- (j) creation of new or continuation and enhancement of existing economic development organization(s), such as a chamber of commerce, community development corporation, tourism bureau, or community improvement corporation; and
  - (k) public information programs to market the economic development potential of the local government.
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### *Commentary: Critical and Sensitive Areas Element*

A number of states call on local governments to identify critical and sensitive areas in their local comprehensive plans. Such areas include particular land and water bodies that provide protection to or habitat for rare and endangered plants and wildlife. They may be natural resources, such as wetlands, requiring protection from inappropriate or excessive development. By identifying such areas, the local government can take action, through regulation, purchase of land or interests in land, modification of public and private development projects, or through other measures to safeguard these resources.

Three states provide good examples of this approach. As a consequence of 1992 amendments to its planning statutes, Maryland requires a local comprehensive plan that must include a sensitive areas element that covers streams and their buffers, 100-year floodplains, habitats of threatened and endangered species, and steep slopes. The state economic growth, resource protection, and planning commission is required to define and establish standards to govern activities in sensitive areas that apply to such areas until the local government adopts a sensitive areas element.<sup>216</sup>

Florida has a similar provision in its laws. It mandates a “conservation element” in the local comprehensive plan for the “conservation, use, and protection of natural resources in the areas, including “. . . water, water recharge areas, wetlands, waterwells, estuarine marshes, soils, beaches, shores, floodplains rivers, bays, lakes, harbors, forests, fisheries, marine habitat, minerals, and other natural and environmental resources.”<sup>217</sup>

Washington also requires that each county and city designate critical areas and adopt development regulations to protect their functions and values. In doing so, the local governments must use “best available science” in developing policies and regulations.<sup>218</sup> Under state

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<sup>216</sup>Md. Ann. Code Art. 66B, §3.05 and Art. State Finance and Procurement, §5-709 (1996). Delaware has a similar requirement for a conservation element for a county comprehensive plan. Del. Code §6956(g)(4) (1996).

<sup>217</sup>Fla. Stats. §163.3177(6)(d) (1996).

<sup>218</sup>Wash. Rev. Code §§36.70.060, 36.70A.170, 36.70.172 (1996).

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administrative rules, critical areas include wetlands, recharge areas for aquifers, fish and wildlife habitat conservation areas, and geologically hazardous areas.<sup>219</sup>

Section 7-209 below is a critical and sensitive areas element similar to the statutes in these states. The element applies to: aquifer systems; watersheds to fresh and coastal water systems and bodies; wellhead protection areas; inland and coastal wetlands; as well as any other areas that might satisfy the criteria for designation as an area of critical state concerned described in Chapter 5, Section 5-201 *et seq.*, of the *Legislative Guidebook*.

The element calls on the local government to assess the relative importance of critical and sensitive resources. This is a difficult but important task. It is *difficult* because it requires a subjective ranking of one resource's value over another's. The relative ranking is *important* as it allows local governments to focus on priority protection areas. For communities that deem all their critical and sensitive resources of equal value, the resulting analysis should state so. Otherwise, the community should attempt to prioritize resources where possible. For example, a community that relies solely on one source of surface water for drinking water may wish to prioritize lands within the surface water body's watershed over lands identified as providing wildlife habitat. Note that this prioritization does not minimize the importance of any critical or sensitive resource. Rather, it allows the community to focus protection efforts based on the relative benefit each resource area provides.

It also suggests that the local government use a "carrying capacity analysis" as a tool in evaluating critical areas.<sup>220</sup> Such an analysis is an assessment of the ability of a natural system to absorb population growth as well as other physical development without significant degradation. Understanding the carrying capacity or constraints of natural resources (particularly ground and surface water systems) provides local governments with an effective method for identifying which portions of the community or region are most suitable sites for new or expanded development. Similarly, knowledge of carrying capacity limitations allows local government residents and officials to make more rational and defensible decisions regarding how and where development may occur in critical and sensitive areas. For example, if the carrying capacity of a surface water body has been determined to allow for a residential density of one dwelling unit per 20,000 square feet (assuming septic tanks instead of central sewers), proposals requiring 40,000 square feet (based on protecting the pond from excessive phosphorus loading) would not be defensible. Conversely, if a carrying capacity analysis determined that the surface water body would become eutrophic at a density of less than 40,000 square feet per dwelling, a zoning ordinance requiring a minimum of 40,000 square feet per dwelling would likely be defensible under the local government's police

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<sup>219</sup>Wash. Admin. Code §365-195-200(5)(1997). See also Wash. Admin. Code. §365-195-410 and ch. 365-190 (guidelines for inventorying and classifying critical areas).

<sup>220</sup>See generally Devon M. Schneider, David R. Godschalk, and Normal Axler, *The Carrying Capacity Concept as a Planning Tool*, Planning Advisory Service Report No. 338 (Chicago: American Planning Association, December 1978).

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power authority. Alternately, the local government may decide that public sewers, as opposed to septic systems, should be required in the affected area.

Establishing the carrying capacity of a resource is a rigorous quantitative analysis, yet has often been avoided due to the perception that the scientific investigations required are beyond the financial or technical abilities of many local governments. For example, determining the carrying capacity of a surface water body with respect to nitrogen or phosphorus loading requires a thorough understanding of the dynamics of the water body, the sources of nitrogen or phosphorus loading in the watershed, and the level at which nitrogen or phosphorous is assimilated by the water resource.

Still, completing a carrying capacity analysis provides the community with a powerful tool for making decisions and choices about how to resolve conflicts between development and preservation goals. The solutions may include proposing alternative technological approaches or mitigation techniques.

If the community has determined that protection of a certain public supply well is a priority, the carrying capacity analysis will assist in evaluating the appropriate level of new development within the wellhead protection area to that well. Without such an analysis accompanied by a public debate and evaluation over its findings, decisions regarding development within the wellhead protection area are often reduced to opinions, unsubstantiated by scientific research. More important, completing such an analysis and identifying important critical and sensitive areas flags potential problems in advance of development, providing predictability.

Too often environmental analysis is conducted at the time a development proposal is well along, leading to the “discovery” of a critical area on a site where, say, affordable housing is proposed, so the debate becomes not how to protect the resource, but how to protect the resource by stopping or seriously slowing down the development. Finally, by providing a factual basis for specialized land development regulations that may need to be enacted to protect the critical and sensitive areas against harm or degradation, this plan element may avert or minimize a taking claim when development must be severely restricted.

### **SUGGESTIONS FOR PREPARING THE CRITICAL AND SENSITIVE AREAS ELEMENT**

The narrative for the element should include descriptions of the critical or sensitive area identified and refer to the map(s) on which the resource has been graphically identified (e.g. “See Map \_\_\_, scale 1”= \_\_\_, January 1, 2000). Maps developed for this element should be based on field surveys and prepared manually or, where possible, with a geographic information system (GIS). Regardless of the mapping method chosen, the maps should be prepared as overlays, so that all of the identified critical and sensitive areas can be identified individually (e.g. all inland wetlands) and cumulatively (e.g. all wetlands, surface water bodies, wellhead protection areas, etc.). While there is no required scale for the maps, it is strongly recommended that the scale chosen be practical and useful, given the available information and the costs of the mapping effort. For example, a scale of 1” = 100’ is far more useful than a scale of 1” = 2,000’, but will require a greater level of precision and a greater cost.

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The identification of aquifer systems is a required component regardless of whether the local government relies on surface water supplies for drinking water or obtains drinking water from outside municipal boundaries. This requirement is based on the following assumptions:

- (1) Aquifer resources, even if degraded, have potential future uses for drinking water supplies and often exist in multiple layers. For example, in many parts of the country, groundwater can be obtained from various depths, representing the fact that aquifer units are often segregated from other aquifer units (e.g. upper and lower aquifers). Thus even where the upper or lower aquifer is degraded, it remains possible to extract potable water from the unaffected aquifer system.
- (2) Private wells are used for drinking water purposes typically in non-urban areas. These wells extract water from the same aquifer as do public water supplies (albeit often at shallower levels). Thus even where public water supplies are derived from sources other than “local” groundwater, understanding aquifer systems is important for protection of private wells.
- (3) Aquifer systems, as with other critical and sensitive resources, do not respect municipal boundaries. An aquifer system running through City “A” may be used for drinking water by abutting Town “B”. Unabated contamination of the land area in City “A” is likely to negatively impact the drinking water supply of adjacent communities.

Accurate information regarding aquifer systems in a local government is available for every jurisdiction in the country from either the United States Geological Survey, the regional office of the U.S. Environmental Protection Agency, and/or the relevant state office of environmental management/protection. Depending on the state in which the local government lies, aquifer information, including detailed mapping, may be available on electronic databases such as geographic information systems.

Identification of watersheds to fresh and coastal water systems requires an understanding of the topography of the general area and a determination of the direction of surface water flow/runoff. Watersheds to many large fresh and coastal water bodies have been mapped by federal agencies (e.g. United States Geological Survey) and state agencies (e.g. coastal zone management office). Regional offices of the U.S. Environmental Protection Agency have information on mapped watersheds within their region, most of which information is currently available at EPA’s Internet site ([www.epa.gov](http://www.epa.gov)). In many other cases, non-profit organizations (e.g. watershed agencies) have completed mapping of surface water bodies.

Identification of wellhead protection areas is required by the majority of states as a prerequisite to the development of a new public water supply source.<sup>221</sup> Information on wellhead protection area

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<sup>221</sup>See Jon Witten and Scott Horsley with Sanjay Jeer and Erin K. Flanagan, *A Guide to Wellhead Protection*, Planning Advisory Service Report No. 457/458 (Chicago: American Planning Association, August 1995).

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delineation is generally available from the respective state department of environmental protection/management, the regional office of U.S. EPA and/or the local water utility. Even where not required by the state, communities should also consider delineating and identifying wellhead protection areas for pre-existing wells.

Wetland habitats, be they fresh, brackish or saltwater, provide numerous benefits, ranging from flood prevention to water purification.<sup>222</sup> The federal government and all states regulate wetland resources. Many states have mapped both inland resources and, where relevant, coastal resources. As accurate mapping of wetland systems requires detailed field investigations, this component should attempt to identify wetlands only in a general manner. In other words, wetland by wetland mapping is not required for the analysis of wetland called for in the element.

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### **7-209 Critical and Sensitive Areas Element<sup>223</sup> [Opt-Out Provision Applies]**

- (1) A critical and sensitive areas element shall be included in the local comprehensive plan, except as provided in Section [7-202(5)] above.
- (2) The purposes of the critical and sensitive areas element are to:
  - (a) further identify the characteristics of critical and sensitive areas within the jurisdiction of the local government as well as detail such areas that have been previously identified in the land-use element pursuant to Section [7-204] above;
  - (b) assess the relative importance of these areas to the local government in terms of size, quality, and/or resource significance and relate them to relevant regional systems;
  - (c) establish the thresholds at which the identified areas begin to decline in value as a resource;
  - (e) identify mitigating measures that may need to be taken in such areas to offset or accommodate the impacts of development;

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<sup>222</sup>See David G. Burke, Erik J. Meyers, Ralph W. Tiner, Jr., and Hazel Groman, *Protecting Nontidal Wetlands*, Planning Advisory Service Report No. 414/415 (Chicago: American Planning Association, December 1988).

<sup>223</sup>This model statute was drafted by Jon Witten, an attorney and planning consultant in Sandwich, Massachusetts, with additional material by Stuart Meck, AICP, principal investigator for the Growing Smart<sup>SM</sup> project and Megan S. Lewis, AICP, a research associate with the American Planning Association.

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- (f) identify conflicts between other elements of the local comprehensive plan and land development regulations and critical and sensitive areas;
  - (g) provide a factual basis for any land development regulations that the local government may enact that apply to and protect critical and sensitive areas [.][]; and]
  - [(h) provide a factual basis on which to initiate the designation of an area of critical of state concern pursuant to Section [5-204].]
- (3) The critical and sensitive areas element shall be in both map and textual form. Maps shall be at a suitable scale consistent with the existing land-use map or map series described in Section [7-204(6)(a)] above.
  - (4) The critical and sensitive areas element shall contain an analysis component and a policy component as well as proposals for action to be included in the long-range program of implementation.
  - (5) The analysis component shall include:
    - (a) an identification of any critical and sensitive areas that are within the jurisdiction of the local government or that may be shared with abutting local government units, including:
      1. aquifer systems;
      2. watersheds to fresh and coastal water systems and bodies;
      3. wellhead protection areas for existing and planned future public supply wells that are included in the community facilities element described in Section [7-206];
      4. inland and coastal wetlands, including beaches, banks and dunes;
      5. other wildlife habitats, including animals, birds, fish, and plants and including habitats for federal and state listed endangered and threatened species;
      6. any other areas that might meet the criteria for designation as an area of critical state concern<sup>224</sup> pursuant to Section [5-203(1)(a) to (d) and (f) to

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<sup>224</sup>For example, critical habitat areas would be covered by the area of critical state concern designation and could be addressed in this element, providing a basis for nomination. See Christopher J. Duerksen, Donald L. Elliott, N. Thompson Hobbs, Erin Johnson, and James R. Miller, *Habitat Protection Planning: Where the Wild Things Are*, Planning Advisory Service Report No. 470/471 (Chicago: American Planning Association, May 1997).

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(g))] above, but excluding any areas susceptible to significant natural hazards in Section [5-203(1)(e)] that would otherwise be addressed in the natural hazards element prepared pursuant to Section [7-210] above; and

7. [other].

(b) an appraisal of the relative importance of each critical and sensitive area identified in subparagraph (a), above;

(c) an assessment of the carrying capacity of any natural resources identified in subparagraph (a) 1 through 3, above, where such an analysis is appropriate in the judgment of the local planning agency, and a determination of any mitigating measures (such as changes to local land development regulations, modification of site plans, uses of alternative technologies, and/or public acquisition) that may need to be taken to offset or accommodate the impacts of development; and

◆ The language here is intended to ensure that the local government not only assesses the critical and sensitive area's carrying capacity, as needed, but also informs that analysis with an appraisal of mitigating measures to accommodate development and overcome environmental constraints. These measures may include changes to local land development regulations, modification to site planning practices, use of alternative wastewater treatment technology, etc. Not all resource management issues can be resolved with technological or regulatory fixes, but the process of evaluation should at least identify them and what their strengths and weaknesses are. The determination of whether to use a detailed carrying capacity analysis is at the discretion of the local planning agency.

(d) a determination of whether proposals or actions contained in any other elements of the local comprehensive plan will affect and/or conflict with any critical and sensitive areas identified pursuant to subparagraph (a) above.

◆ For example, a program of economic development is likely to require supportive infrastructure, including water supply and sewage disposal. New economic development may be dependent on new sources/supplies of drinking water, thus triggering the need to develop new wells or reservoirs. In turn this will trigger the need to delineate wellhead protection areas or watersheds. Similarly, increased wastewater disposal needs often requires development of new decentralized sewage treatment systems, expansion of existing centralized treatment systems or use of on-site wastewater disposal systems (e.g. septic systems). The land area(s) needed for increased wastewater disposal should be evaluated in light of the inventory conducted under subparagraph (a) above.

The analysis should also identify conflicts between a local government's critical and sensitive resources and the growth and development programs contained in the local comprehensive plan.

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For example, using the scenarios noted in the commentary above, there are potential conflicts between the development of a new sewage treatment facility and groundwater quality protection. A conflicts analysis will allow the community to determine possible mitigating measures (e.g. relocate the sewage treatment plant outside of the watershed, aquifer or zone of contribution) and/or re-evaluate the location chosen for development. The conflicts analysis is logically connected to the assessment of relative importance in subparagraph (b), above. If a sewage treatment facility will discharge wastewater to an aquifer system considered to be impaired and not likely to provide potable water, it is possible that the community may continue with plans for the treatment plant. However, if the aquifer has been identified in subparagraph (b) above as a primary source of current and/or future drinking water supplies, decisions regarding the treatment plant should likely be altered.

- (6) The policy component shall contain a statement of the local government's goals, policies, and guidelines with respect to the protection of critical and sensitive areas and a map or map series that summarizes the areas to be protected.
- (7) The critical and sensitive areas element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] below. These actions may include, but shall not be limited to, proposals for:
  - (a) acquisition of identified critical and sensitive areas in fee simple or by easement by the local government or by nonprofit conservation organizations;
  - (b) the designation of areas of critical state concern;
  - (c) enactment of land development regulations to protect identified critical and sensitive areas, including but not limited to critical and sensitive area overlay districts pursuant to Section [9-101];
  - (d) local capital improvements or modifications to local capital improvements that will mitigate their effect on identified critical and sensitive areas; and
  - (e) any implementing agreements between the local government and other local governments to protect critical and sensitive areas that are shared by more than one governmental unit entered into pursuant to Section [7-504] below.

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### ***Commentary: Natural Hazards Element***

Planning for the reduction of losses from natural hazards has been largely driven by concerns for public safety. California, for example, uses the term “safety element” to describe a required local

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comprehensive plan element that involves the assessment of a variety of natural hazards.<sup>225</sup> Other issues that justify such planning – including fiscal and economic instability – are derived mostly from the consequences of failing to adequately exercise the police power to ensure public safety in the face of natural disasters. This remains true even with planning for long-term recovery and post-disaster reconstruction: the aftermath of one natural disaster is simply the prelude to the next one.

States and communities across the country are slowly, but increasingly, realizing that simply responding to natural disasters, without addressing ways to minimize their potential effect, is no longer an adequate role for government. Striving to prevent unnecessary damage from natural disasters through proactive planning that characterizes the hazard, assesses the community's vulnerability, and designs appropriate land-use policies and building code requirements is a more effective and fiscally sound approach to achieving public safety goals related to natural hazards.<sup>226</sup> Attending to natural hazard mitigation can also provide benefits in other local policy areas. Minimizing or eliminating development in floodplain corridors, for example, provides environmental benefits as well as potential new recreational opportunities. Communities can often profit from undertaking post-disaster reconstruction actions that at other times might be too controversial or cumbersome – the notion of striking while the iron is hot. Where a disaster has destroyed a marginal business district, for example, planners can seize the opportunity to use redevelopment to effect a rebirth that might not otherwise be possible.

Building public consensus behind even the most solid plans can be a challenging task, especially in jurisdictions exposed to multiple hazards. To meet this challenge, it is recommended that the development of a natural hazards element, including plans for post-disaster recovery and reconstruction, come from an interdisciplinary, interagency team with broadly based citizen participation, to ensure both a range of input and effective public support. Community experience in dealing with natural hazards plans, whether for mitigation or post-disaster recovery, or both, has consistently demonstrated that this topic demands a wide range of input and expertise.

The following model incorporates the best practices found in state statutes (see footnote below)<sup>227</sup> plus other best practices drawn from exemplary local planning for natural hazards and

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<sup>225</sup>Calif. Govt. Code §65302 (g) requires a safety element “for the protection of the community from any unreasonable risks associated with the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami, seiche, and dam failure; slope instability leading to mudslides and landslides; subsidence, liquefaction and other seismic hazards identified pursuant to Chapter 7.8 (commencing with Section 2690) of the Public Resources Code, and other geologic hazards known to the legislative body; flooding; and wild land and urban fires.” In addition to the mapping of seismic and geologic hazards, the element is to address “evacuation routes, peakload water supply requirements, and minimum road widths and clearances around structures, as those items relate to identified fire and geologic hazards.”

<sup>226</sup>See generally Roger A. Nazwadzky, “Lawyering Your Municipality Through a Natural Disaster or Emergency,” *Urban Lawyer* 27, No. 1 (Winter 1995): 9-27.

<sup>227</sup>The following state statutes provide for natural hazards planning: Arizona (Ariz.Rev.Stat. § 11-806B), California (Cal.Gov’t.Code §65302(e)(7) & (g)), Colorado (Colo.Rev. Stat. §§30-28-106, 31-23-206), Florida (Fla.Stat.Ann. §§163.3177(6)(g), 7(h), 163.3178), Georgia (Ga. Code Ann. §12-2-8), Idaho (Idaho Code § 67-6508(g)),

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long-term post-disaster recovery. These latter best practices are identified in the commentary to the model natural hazards element below.

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### 7-210 Natural Hazards Element [Opt-Out Provision Applies]

- (1) A natural hazards element shall be included in the local comprehensive plan, except as provided in Section [7-202(5)] above.
- (2) The purposes of the natural hazards element are to:
  - (a) document the physical characteristics, magnitude, severity, frequency, causative factors, and geographic extent of all natural hazards, from whatever cause, within or potentially affecting the community, including, but not limited to, flooding, [seismicity, wildfires, wind-related hazards such as tornadoes, coastal storms, winter storms, and hurricanes, and landslides or subsidence resulting from the instability of geological features];
  - ◆ Obviously, the presence and prevalence of specific natural hazards varies widely not only among states, but even within states at both regional and local levels. This section lists all major categories while allowing states to use only those that apply, although it is clearly better to list in the statute any hazards that may apply *somewhere* in the state. Flooding, however, is a universally applicable concern. It should be noted that “natural” hazards include hazards caused or exacerbated by human action, such as forest fires sparked by campfires and ground subsidence caused by old mines.
  - (b) identify those elements of the built and natural environment and, as a result, human lives, that are at risk from the identified natural hazards, as well as the extent of existing and future vulnerability that may result from current zoning and development policies;

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Indiana (Ind.Code § 36-7-4-503), Iowa (Iowa Code § 281.4), Kentucky (Ky.Rev.Stat.Ann. §100.187(5)), Louisiana (La.Rev.Stat.Ann. §33:107), Maine (Me.Rev.Stat.Ann. tit. 30A § 4326A(1)(d)), Maryland (Md. Code Ann. tit. 66B § 3.05(a)(1)(viii)), Michigan (Mich.Comp.Laws §125.36), Montana (Mont. Code Ann. §76-1-601(2)(h)), Nevada (Nev.Rev.Stat. § 278.160.1 (k) & (l)), North Carolina (N.C.Gen.Stat. §113A-110ff), Oregon (Or.Rev.Stat. §197.175), Pennsylvania (53 Pa.Stat.Ann. §10301(2)), Rhode Island (R.I.Gen.Laws § 45-22.2-6(E)), South Carolina (S.C. Code Ann. § 6-7-510), Utah (Utah Code Ann. § 10-9-302(2)(c)), Vermont (Vt.Stat.Ann. tit. 24, §4382(a)(2)), Virginia (Va. Code Ann. § 15.1-446.1.1), Washington (Wash.Rev. Code §36.70.330(1)), West Virginia (W.Va. Code §8-24-17(a)(9)).

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- (c) determine the adequacy of existing transportation facilities and public buildings to accommodate disaster response and early recovery needs such as evacuation and emergency shelter;
  - (d) develop technically feasible and cost-effective measures for mitigation of the identified hazards based on the public determination of the level of acceptable risk;
  - (e) identify approaches and tools for post-disaster recovery and reconstruction that incorporate future risk reduction; and
  - (f) identify the resources needed for effective ongoing hazard mitigation and for implementing the plan for post-disaster recovery and reconstruction.
- (3) The natural hazards element shall be in both map and textual form. Maps shall be at a suitable scale consistent with the existing land-use map or map series described in Section 7-204 (6)(a) above.
- (4) In preparing the natural hazards element, the local planning agency shall undertake supporting studies that are relevant to the topical areas included in the element. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies may concern, but shall not be limited to, the following:
- (a) maps of all natural hazard areas, accompanied by an account of past disaster events, including descriptions of the events, damage estimates, probabilities of occurrence, causes of damage, and subsequent rebuilding efforts;
- ◆ With regard to flooding and coastal storm surge zones, the local jurisdiction may simply incorporate the existing National Flood Insurance Program (NFIP) maps and U.S. Army Corps of Engineers/National Weather Service storm surge maps. State and U.S. Geological Survey maps should provide at least a starting point for areas with seismic hazards. Portland Metro, in cooperation with the Oregon Department of Geology and Mineral Industries (DOGAMI), has undertaken an effort funded by Federal Emergency Management Agency (FEMA) to complete seismic hazard mapping of the entire Portland region using geographic information systems (GIS).<sup>228</sup> The department is also mapping tsunami hazard areas along the Oregon coast as a FEMA-funded sequel to the first such project, completed in early 1995 in Eureka, California.<sup>229</sup>

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<sup>228</sup>See *Using Earthquake Hazard Maps for Land Use Planning and Building Permit Administration*, Report of the Metro Advisory Committee for Mitigating Earthquake Damage (Portland, Ore.: Portland Metro, May 1996) and *Metro Area Disaster Geographic Information System: Volume One* (Portland, Ore.: Portland Metro, June 1996).

<sup>229</sup>National Oceanic and Atmospheric Administration (NOAA), Pacific Marine Environmental Laboratory. *Tsunami Hazard Mitigation: A Report to the Senate Appropriations Committee* (Seattle, Wash.: NOAA, The Laboratory, March 31, 1995).

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In states with volcanoes, the mapping should include lava, pyroclastic, and debris flows and projected patterns of ash fallout in the surrounding region, including the potential for flooding from the blockage of rivers. Other sources for potential problems include the National Weather Service for storm and wind patterns and some innovative new GIS techniques in Colorado for mapping wildfire hazards.<sup>230</sup>

- (b) an assessment of those elements of the built and natural environments (including buildings and infrastructure) that are at risk within the natural hazard areas identified in subparagraph (a) above as well as the extent of future vulnerability that may result from current land development regulations and practices within the local government's jurisdiction;
- ◆ The study in subparagraph (4)(b) is also known among disaster officials and experts as a "vulnerability assessment" and serves two purposes: (1) to identify vulnerable structures and; (2) to determine the cause and extent of their vulnerability. For example, the California Governor's Office of Emergency Services has outlined procedures used by various communities for inventorying seismic hazards.<sup>231</sup> The subparagraph emphasizes the importance of including the impact of natural hazards in a buildout analysis in order to assess the potential consequences of current laws and policies, including those pertaining to the extension of public infrastructure in hazard-prone areas.

This requirement can be tailored to the actual hazards a state may be dealing with, as California and Nevada have done with seismic safety. One striking example is a 1979 Los Angeles ordinance that mandated both an inventory and a retrofitting program that over time has upgraded the seismic stability of the city's housing stock. The format for this with regard to flood hazard areas is already reasonably clear as a result of NFIP regulations, which include requirements for elevating substantially damaged or improved buildings above the base flood elevation. Analysis of wind-related problems is more likely to result in building code changes to strengthen wind resistance, as in southern Florida.

- (c) state or other local mitigation strategies which identify activities to reduce the effects of natural hazards;

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<sup>230</sup>Colorado has been increasing its attention to both the wildfire issue and hazards generally. See *Land Use Guidelines for Natural and Technological Hazards Planning* (Denver: Colorado Department of Local Affairs, Office of Emergency Management, March 1994). An interesting source on the mapping of wildfire hazards is Boulder County's World Wide Web site at <http://boco.co.gov/gislu/whims.html>.

<sup>231</sup>*Earthquake Recovery: A Survival Manual for Local Government* (Sacramento: California Governor's Office of Emergency Services, September 1993), Chs. 9-10.

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- (d) an inventory of emergency public shelters, an assessment of their functional and locational adequacy, and an identification of the remedial action needed to overcome any deficiencies in the functions and locations of the shelters;
  - (e) an identification of all evacuation routes and systems for the populations of hazard-prone areas that might reasonably be expected to be evacuated in the event of an emergency and an analysis of their traffic capacity and accessibility;
- ◆ This study is a good place to marry the expertise of planners (including transportation planners) and emergency managers. While the latter can identify the resources and the needs in this area, the former can help integrate that knowledge into routine planning for hazard-prone areas. Lee County, Florida, has used such studies to evaluate its shelter availability for disaster purposes. Because of limited access to its offshore location, Sanibel, Florida, has gone even further in using evacuation and shelter capacity as the basis for growth caps.

An interesting example of a natural hazards element component dealing with these issues appears in Florida Stats. §163.3178 (2)(d), which requires a “component which outlines principles for hazard mitigation and protection of human life against the effects of natural disaster, including population evacuation, which take into consideration the capability to safely evacuate the density of coastal population proposed in the future land use plan element in the event of an impending natural disaster.”

- (f) analyses of the location of special populations that need assistance in evacuation and in obtaining shelter;
  - (g) an inventory of the technical, administrative, legal, and financial resources available or potentially available to assist both ongoing mitigation efforts as well as post-disaster recovery and reconstruction;<sup>232</sup> and
- ◆ Jurisdictions across the country have experimented with a number of means of facilitating and empowering efforts to reduce their vulnerability to natural hazards. Some of these involve the use of performance and design standards that give planners and planning commissions greater authority to insist that new development meet strict standards of hazard mitigation. For example, Wake County, North Carolina, requires that, in drainage areas of 100 acres or more, the applicant must show that any rise in water level resulting from building on the property can be contained on that property, with the applicant's only alternative being to secure easements from neighboring property owners to allow for that rise. Portola Valley, California, is a good example

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<sup>232</sup>For a discussion of approaches to drafting floodplain management ordinances, see Jim Schwab, “Zoning for Flood Hazards,” *Zoning News* (Chicago: American Planning Association, October 1997). See also Marya Morris, *Subdivision Design in Flood Hazard Areas*, Planning Advisory Service Report No. 473 (Chicago: American Planning Association, September 1997).

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of seismic and hillside hazard mitigation in its use of cluster zoning for new subdivisions in certain areas.<sup>233</sup> Jurisdictions also have experimented with means of financing such efforts. A clear starting point is to center somewhere in local government a periodically updated repository of information about outside funding sources both from government and the private sector, including voluntary resources from nonprofit organizations. The advantage is that the community can then, in the event of a disaster, tap these resources expeditiously, preferably with the added advantage of an already developed plan for reconstruction. In addition, this study will serve to highlight funding mechanisms through local government, such as the All Hazards Protection District and Fund created by Lee County, Florida, in 1990 to support local hazard mitigation programs.<sup>234</sup> That fund depends on a property tax levy; in 1993, Lee County also considered, but did not pass, a proposal for an impact fee targeted at hazard-prone areas to fund emergency public shelters.

- (h) a study of the most feasible and effective alternatives for organizing, in advance of potential natural disasters, the management of the process of post-disaster long-term recovery and reconstruction.
- ◆ Numerous studies have examined at some length the potentials and pitfalls of various structural arrangements for organizing interagency, interdisciplinary task forces to oversee the process of long-term recovery and reconstruction following a disaster. A forthcoming (1998) APA Planning Advisory Service Report, *Planning for Post-Disaster Recovery and Reconstruction*, sponsored by the Federal Emergency Management Agency, deals with this issue and provides an extensive bibliography. Such plans have also been developed in Los Angeles<sup>235</sup>; Nags Head, North Carolina; and Hilton Head Island, South Carolina, among other jurisdictions, and are mandated for coastal communities in Florida and North Carolina. Two overriding principles seem to emerge from such efforts to date: (1) that successful implementation depends heavily on support from top local officials, whether that be the mayor or city manager; and (2) that a recovery task force should include representatives of all major agencies potentially involved in the reconstruction effort, specifically including but not limited to safety and emergency management forces, planning, building inspectors, public works, and transportation. It is vitally important in

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<sup>233</sup>William Spangle and Associates, Inc., *Geology and Planning: The Portola Valley Experience* (Portola Valley, Cal.: William Spangle and Associates, 1988).

<sup>234</sup>Lee County, Fla., Resolution No. 90-12-19.

<sup>235</sup>The Northridge earthquake in February 1994, which occurred shortly after the adoption of the Los Angeles plan, afforded the rare opportunity for the National Science Foundation to underwrite two independent analyses of the plan's utility and effectiveness in the aftermath of that disaster. Spangle Associates with Robert Olson Associates, Inc., prepared *The Recovery and Reconstruction Plan of the City of Los Angeles: Evaluation of its Use after the Northridge Earthquake* (NSF Grant No. CMS-9416416), August 1997. The other study is *The Northridge Earthquake: Land Use Planning for Hazard Mitigation* (CMS-9416458), December 1996, by Steven P. French, Arthur C. Nelson, S. Muthukumar, and Maureen M. Holland, all of the City Planning Program at the Georgia Institute of Technology.

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the aftermath of a disaster that all these agencies know not only what the others are doing, but who should report to whom for what purposes.

- (5) The natural hazards element shall consist of:
- (a) a statement, with supporting analysis, of the goals, policies, and guidelines of the local government to address natural hazards and to take action to mitigate their effects. The statement shall describe the physical characteristics, magnitude, severity, probability, frequency, causative factors, and geographic extent of all natural hazards affecting the local government as well as the elements of the built and natural environment within the local government's jurisdiction that are at risk;
  - (b) a determination of linkages between any natural hazards areas identified pursuant to subparagraph (a) above and any other elements of the local comprehensive plan;
  - (c) a determination of any conflicts between any natural hazards areas and any future land-use pattern or public improvement or capital project proposed in any element of the local comprehensive plan;
  - (d) priorities of actions for eliminating or minimizing inappropriate and unsafe development in identified natural hazard zones when opportunities arise, including the identification and prioritization of properties deemed appropriate for acquisition, or structures and buildings deemed suitable for elevation, retrofitting, or relocation;

- ◆ This language is drawn from Florida Stats. §163.3178 (2), which outlines the components of the coastal management element required of all communities within coastal counties, and (8). Subdivision (2)(f) states that a redevelopment component “shall be used to eliminate inappropriate and unsafe development in the *coastal* areas when opportunities arise” (emphasis added). Paragraph (8) requires that each county “establish a county-based process for identifying and prioritizing coastal properties so they maybe acquired as part of the state's land acquisition programs.” The language has been combined and adapted here in part because it is also possible for the community itself to use state and federal funds to acquire, for example, substantially damaged floodplain properties and to relocate their residents. Tulsa, Oklahoma, and Arnold, Missouri, provide excellent examples of this strategy, in large part because they developed *ongoing* acquisition programs that were already in place before in the predisaster period. (A case study appears in the forthcoming PAS Report, *Planning for Post-Disaster Recovery and Reconstruction*.) This is, in effect, an “issues and opportunities” component of the natural hazards element.

- (e) multiyear financing plan for implementing identified mitigation measures to reduce the vulnerability of buildings, infrastructure, and people to natural hazards that may be incorporated into the local governments operating or capital budget and capital improvement program;

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- (f) a plan for managing post-disaster recovery and reconstruction. Such a plan shall provide descriptions that include, but are not limited to, lines of authority, interagency and intergovernmental coordination measures, processes for expedited review, permitting, and inspection of repair and reconstruction of buildings and structures damaged by natural disasters. Reconstruction policies in this plan shall be congruent with mitigation policies in this element and in other elements of the local comprehensive plan as well as the legal, procedural, administrative, and operational components of post-disaster recovery and reconstruction.
- (6) The natural hazards element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] below. These actions may include, but shall not be limited to:
- (a) amendments or modifications to building codes and land development regulations and floodplain management and/or other special hazard ordinances, including but not limited to natural hazard area overlay districts pursuant to Section [9-101], and development of incentives, in order to reduce or eliminate vulnerability of new and existing buildings, structures, and uses to natural hazards;
  - (b) implementation of any related mitigation policies and actions that are identified in other elements of the local comprehensive plan;
  - (c) other capital projects that are intended to reduce or eliminate the risk to the public of natural hazards;
  - (d) implementation of provisions to carry out policies affecting post-disaster recovery and reconstruction as described in subparagraph (5)(f) above, such as procedures for the inspection of buildings and structures damaged by a natural disaster to determine their habitability as well as procedures for the demolition of buildings and structures posing an imminent danger to public health and safety; and
  - (e) implementation of provisions to ensure that policies contained in other portions of the local comprehensive plan do not compromise the ability to provide essential emergency response and recovery facilities as described in the local emergency operations program, such as:
    - 1. adequate evacuation transportation facilities;
    - 2. emergency shelter facilities; and
    - 3. provisions for continued operations of public utilities and telecommunications services.

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### ***Commentary: Program of Implementation***

The concept of a program of implementation as part of the comprehensive plan is drawn from the American Law Institute's *Model Land Development Code*.<sup>236</sup> The intention of the program is to ensure that each element, whether required or optional, is translated into a series of actions that are designed to be accomplished over the planning horizon. By detailing their costs and consequences, the implementation program should give meaning to the goals and objectives of the local comprehensive plan.

Section 7-211 below is a general description of the program of implementation. In the ALI Code, the program was to be short-term, from one to five years, in the belief that such a time frame was more realistic and that action was more likely to flow from the plan's adoption by the governing body. By contrast, the time frame in Section 7-211 may extend up to 20 years (but also includes short-term actions). A longer-range perspective is especially important in the design and construction of public improvements, particularly those that have federal funding (and require extensive environmental reviews), which may go well beyond a five-year schedule.

The model also calls for the inclusion of benchmarks and procedures to monitor the effectuation of the plan. In addition to the language below, the model language for optional or required elements elsewhere in this Chapter may also contain a description of pertinent alternative measures to give the user of the statutes a sense of what might be appropriate to consider in formulating a program of implementation for that element.

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### **7-211 Program of Implementation**

- (1) In order to achieve the goals, policies, and guidelines established in a local comprehensive plan, the plan shall contain a long-range program of implementation of specific public actions as well as actions proposed by non-profit and for-profit organizations to be taken in connection with required or optional elements, except for the issues and opportunities element described in Section [7-203].

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<sup>236</sup>ALI, *A Model Land Development Code*, §3-105, Short-Term Program, 132-133. Cf. Id. Stat. §67-6508 (n) (1996) which requires that the plan include an "implementation" component that contains "[a]n analysis to determine actions, programs, budgets, ordinances, or other methods including scheduling of public expenditures to provide for the timely execution of the various components of the plan."

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- (2) For each required or optional element, the program of implementation shall, as applicable, also include, but shall not be limited to, the following:
- (a) a time frame for identified actions (e.g., the sequence in which such actions should occur), which time frame shall cover a period not less than [5] and not more than [20] years, which time horizon may vary by required or optional element;
  - (b) an allocation of responsibilities for actions among the various governmental agencies and, where applicable, not-for-profit and for-profit organizations operating in the planning area and having interests in carrying out the program;
  - (c) a schedule of proposed capital improvements that includes a description of the proposed improvement, an identification of the governmental unit to be responsible for the improvement, the year(s) the improvement is proposed for construction or installation, an estimate of costs, and sources of public and private revenue available or potentially available for covering such costs. Such schedule shall form the basis for any local capital budget and local capital improvement program prepared pursuant to Section [7-502] below;
  - (d) benchmarks as described in Section [7-504] below;
  - (e) a general description of any land development regulations or incentives that may be adopted by the local government within the period of the program of implementation in order to achieve the goals, policies, and guidelines set forth in the local comprehensive plan and that may be further detailed in the individual plan elements; and
  - (f) a description of other procedures and programs that the local government may use in monitoring and evaluating the implementation of the plan, such as monitoring the supply, price, and demand for buildable land.
- (3) The program of implementation may also include, but shall not be limited to, the following:
- (a) proposed development criteria to be incorporated into any land development regulations or subplans;
  - (b) a statement describing proposed programs of public services (such as housing code enforcement, housing rehabilitation, policing, or public recreational activities) or changes in existing programs of public service that includes estimates of costs of personnel, equipment, supplies, and related matters;
  - (c) a statement of measures describing the ways in which state, regional, and/or local programs may best be coordinated to promote the goals and policies of the local comprehensive plan;

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- (d) a statement of recommendations and actions proposed by not-for-profit and for-profit organizations that would carry out the goals, policies, and guidelines set forth in the local comprehensive plan;
  - (e) proposals to adopt or amend a regional planning and coordination agreement to be entered into pursuant to Section [6-402], an urban service agreements be entered into pursuant to Section [6-403], and an implementing agreement to be entered into with other governmental units and nonprofit and for-profit organizations pursuant to Section [7-503]; and
  - (f) recommendations for further legislation or actions at the state, regional, or local levels that are not included in subparagraph (a) or (e), above as may be necessary to fully implement the local comprehensive plan.
- (4) The program of implementation shall be in a uniform format for all required and optional elements.
  - (5) Specific public actions that are proposed in the long-range program of implementation shall not constitute a commitment by the local government to expend monies in a certain manner or at a certain time, raise taxes, enact or change fees or other charges, or issue bonds or to otherwise enact or change ordinances.
- ◆ Paragraph (5) recognizes that public actions that are proposed in the long-range program of implementation may not be carried out or may not be carried in the manner originally contemplated. Governing bodies cannot precisely adhere to such a schedule because of shifting public needs, funding sources, modifications to related laws, etc. For example, a proposal for a road improvement project may be contingent on the availability of federal or state matching funds that may not be available at the time the project is finally ready for construction. Moreover, governing bodies change over time and, as a consequence, so will support for specific types of actions recommended in plans.

### Optional Elements

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#### *Commentary: Agriculture, Forest, and Scenic Preservation Element*

Agricultural and forest lands are a source of food, fiber, and building materials. They contribute to an area's economy and the continuing viability of rural communities. Unique farmlands, such as the cranberry bogs of New Jersey, the vineyards of California's Napa Valley and the citrus regions

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of the Sunbelt, provide a cornucopia of food varieties in the United States.<sup>237</sup> Due to the scenic amenities they provide as well as the retention of floodwater, these lands may also confer additional benefits as open space and may contribute to the tourism economy as well. Forest land offers habitat for wildlife, and trees purify and filter the air. In addition, forest lands can provide opportunities for hunting, fishing, and other forms of recreation. Because of these characteristics such lands are important land-use activities.

However, as urban development moves outward and property values rise, pressure is placed on owners of agricultural and forest lands to convert them to other, more intensive uses. Moreover, new development, particularly in the form of residential subdivisions, may be incompatible with agricultural activities because of dust, noise, and odor associated with farming and feedlots. As farmers apply pesticides, spread manure, and operate loud machinery, adjacent homeowners complain. Thus, farming operations may become more difficult.<sup>238</sup> Forests, of course, are resources that may take 50 to 100 years (or longer) to mature.

A number of states require local comprehensive plans to contain elements that preserve and protect such uses, although they may sometimes use the term “open space” in describing them.<sup>239</sup> Other states, like Iowa and Minnesota, have enacted agricultural districting statutes that have a planning dimension to them.<sup>240</sup>

Section 7-212 below describes an agriculture, forest, and scenic preservation element that would be an optional part of a local comprehensive plan. While agricultural and forestry uses are also to be identified in the land-use element (see Section 7-204), this element gives these activities a special emphasis and may be appropriate for local governments in rural areas. The primary emphasis of the element is to focus on the value of agriculture and forest lands as a contribution to the local economy. A secondary emphasis is to recognize that such lands (as well as other privately owned undeveloped lands) may have a scenic value as open space or as historic and cultural resources. The Section indicates bracketed language that should be incorporated if this secondary emphasis is to be included (see, e.g., Section 7-212(2)(c), (4)(c), and (6)((b)).

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<sup>237</sup>Frederick R. Steiner, “The Agriculture Land and Site Assessment System,” *Environment & Development* (May 1995): 1.

<sup>238</sup>See Laura Thompson, “The Conflict at the Edge,” *Zoning News* (February 1997): 1-3; see also Michael Barrette, “Hog-Tied by Feedlots,” *Zoning News* (October 1996): 1-4.

<sup>239</sup>See, e.g., Cal. Gov’t Code §§65560 to 65570 (1997) (open space element); Id. Code §6508(e) and (f) (1998) (land use and natural resources components of comprehensive plan); Ore. Admin. Code Div. 5 (Interpretation of Goal 3 Agricultural Lands) (Sept. 1986) and Div. 6 (Goal 4 Forest Lands) (Dec. 1991); R.I. Gen. Laws, 45-22.26(E) (1997) (natural and cultural resources element); Wash. Rev. Code §36.70A.170 (1997) (natural resource lands and critical areas – designations, including agricultural and forest lands); Wash. Admin. Code §365-194-400 and ch. 365-190 (1993).

<sup>240</sup>Iowa Code, Ch. 352 (1997) (County Land Preservation and Use Commissions), esp. §352.5 (County land preservation and use plan); Minn. Stat. Ch. 40A (Agricultural Land Preservation Program), esp. §§40A04-40A.05 (describing agricultural land preservation plan, and Ch. 473H (Metropolitan Agricultural Preserves Program) (1997).

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Under this Section, a local government inventories agricultural and forest land as well as other privately owned undeveloped land that may have value as a scenic, historic, or cultural resource. The element requires the local government to identify any conflicts between such lands and any other element of the local comprehensive plan. It calls for the local government to map such areas, prioritize them, and propose a program of action that would preserve and protect such lands as well as promote the continuance of agricultural- and forest-based economies through joint marketing efforts and grant and loan programs, among other initiatives.

The identification of farmland is a key component of this element. Through soil surveys, prime farmlands have been identified throughout the country by the Natural Resources Conservation Service (NRCS) (formerly the Soil Conservation Service) and represent lands containing soil properties that are highly suitable for agriculture. While soil surveys are useful, another, more focused method for determining suitable agricultural lands is through the use of the U.S. Department of Agriculture's Land Evaluation and Site Assessment (LESA) system.<sup>241</sup> LESA is designed to assist local and state governments arrive at objective rankings of the agricultural value of land within the community by gauging many diverse factors. Several states, including California, Hawaii, and Illinois, and a number of local governments have experience with a LESA-based system. LESA and the NRCS research on soils provide extremely useful tools for local governments as they evaluate the relative importance of agricultural properties.

Still, there are numerous active agricultural operations throughout the nation that are not identified by NRCS soil typology, or are not favorably reviewed by LESA, yet they constitute a significant economic resource. For example, many grazing operations occur on land not likely to be included in a LESA survey. The language in Section 7-212(4)(a) and (c) describing the inventories attempts to provide flexibility in identifying such lands.

If the local government incorporates an urban growth area into its comprehensive plan, the requirement of inventorying agricultural and forestry lands within the growth area may be omitted if it is intended that developed land will gradually replace such activities. On the other hand, if it is intended, for example, that forestry and related activities are to be continued within the urban growth area, then the inventory should include such lands.

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<sup>241</sup>U.S. Department of Agriculture, Soil Conservation Service, *National Agricultural Land Evaluation and Site Assessment Handbook* (Washington, D.C.: U.S. GPO, 1983); see also Frederick R. Steiner, James R. Pease, and Robert E. Coughlin, editors, *A Decade with LESA: The Evolution of Land Evaluation and Site Assessment* (Soil and Water Conservation Society, 1994); Frederick R. Steiner, "The Agriculture Land and Site Assessment System," *Environment & Development* (May 1995): 1-3.

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### 7-212 Agriculture, Forest [, and Scenic] Preservation Element<sup>242</sup>

- (1) An agriculture, forest[, and scenic] preservation element [may *or* shall] be included in the local comprehensive plan. No local government may undertake a transfer of development rights (TDR) program for agricultural, forest [or scenic] preservation purposes pursuant to Section [9-401], [enact agricultural or forest preservation zoning,] or acquire in fee simple, or less than fee simple, including the purchase of development rights, agricultural, forest[, or scenic] land unless it has first prepared and adopted this element as a part of the local comprehensive plan. However, a local government may accept gifts or donations of land or interests in land, including transferred development rights, for agriculture, forest[, or scenic] preservation purposes without having first prepared and adopted this element.<sup>243</sup> No land may be included in an agricultural district for the purposes of Section [14-401] unless it has first been delineated as agricultural land and prioritized for protection or preservation pursuant to subparagraph (6)(d) below.
- ◆ This element may need to be required if urban growth areas are mandated. Not all local governments, however, will need to address the need to preserve agricultural and forest land.
- (2) The purposes of an agriculture, forest[, and scenic] preservation element are to:
    - (a) inventory agricultural, forest[, and scenic] lands within the jurisdiction of the local government;
    - (b) assess the relative importance of these lands in terms of size, quality, and/or resource significance as well as contribution to the economy of the local government and/or the surrounding region;
    - [(c) recognize that, in addition to their primary value as contributing to the economy of the local government and/or the surrounding region, agricultural and forest lands also have environmental value and may also have historic, cultural, open space, and scenic values;]
- ◆ If it is desired that the element is only to focus on agriculture and forestry as economic activities, even though there are other potential secondary noneconomic benefits that are associated with their preservation, then subparagraph (c) may be omitted.

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<sup>242</sup>This model statute was drafted by Jon Witten, AICP, an attorney and planning consultant in Sandwich, Massachusetts, with additional material by Stuart Meck, AICP, principal investigator for the Growing Smart<sup>SM</sup> project, and Michelle Zimet, AICP, an attorney and senior research fellow with the project.

<sup>243</sup>This language does not limit a local government's action in employing a transfer of development rights program or an acquisition program, either in fee simple or less-than-fee simple, for land other than agricultural and forest lands.

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- (d) prioritize such areas containing agricultural, forest[, and scenic] lands in order to take subsequent action to preserve them through acquisition or other means or protect them from incompatible forms of development;
- (e) promote and enhance the continuation of agriculture- and forest-based economies; and
- [(f) reinforce any urban growth area designated pursuant to Section [6-201.1], as applicable.]

◆ Subparagraph (f) and related language below should be omitted if the planning statutes do not make reference to designation of urban growth areas.

- (3) The agriculture, forest[, and scenic] preservation element shall be in both map and textual form.
- (4) In preparing the agriculture, forest [, and scenic] preservation element, the local government shall undertake supporting studies. In undertaking supporting studies, the local government may use studies conducted by others. Maps for any inventories shall be at a suitable scale consistent with the existing land-use map or map series described in Section [7-204(6)(a)] above. The supporting studies may include, but shall not be limited to:
  - (a) an inventory of publicly and privately owned agricultural lands, including such lands subject to conservation easements or other restrictions that ensure that it will remain undeveloped. [Such an inventory shall include lands outside of an urban growth area, if such an area has been designated pursuant to Section [6-201.1], suitable for agricultural use.] Agricultural land contained in the inventory shall include land that:
    - 1 is classified by the Natural Resources Conservation Service, U.S. Department of Agriculture, as predominantly Class [*insert class numbers from soil surveys*] soils in [*insert regions of the state*];
    - 2 consists of other soil classes that are suitable for agricultural use, taking into consideration suitability for grazing; climatic conditions; existing and future availability of water for irrigation; existing land-use patterns; technological and energy inputs required; and accepted farming practices;
    - 3. contains uses related to and in support of agricultural, including dwellings related to agriculture.
    - 4. provides a buffer of sufficient distance between adjoining and nearby land on which farm practices are undertaken and other nonagricultural land that might be adversely affected by such farm practices.

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- (b) an inventory of publicly and privately owned forest lands, including such lands subject to conservation easements or other restrictions that ensure that it will remain undeveloped. [Such an inventory shall include lands suitable for forestry outside of an urban growth area, if such an area has been designated pursuant to Section [6-201.1].] Such an inventory may include, but shall not be limited to:
1. land used for forest operations;
  2. uses related to and in support of forest operations;
  3. uses to conserve soil and water quality, and to provide for fish and wildlife resources, agriculture, and recreational opportunities appropriate in a forest environment; and/or
  4. dwellings related to forestry management.
- [(c) an inventory of any publicly and privately owned undeveloped land not included in subparagraphs (a) and (b) above that is:
1. subject to conservation easements or other restrictions that ensure that it will remain undeveloped; and/or
  2. particularly characterized by scenic views or vistas or has, in its undeveloped state, historical or cultural significance.]

- ◆ Identification of lands that are neither agricultural nor forest may nevertheless warrant identification and protection as part of the local comprehensive plan effort. Identification of these “other” open spaces will vary dependent upon the setting. Urban communities will likely consider smaller parcels of greater significance than rural cities or towns, although this is only a generalization. At issue is the identification of tracts of open, undeveloped or “under-developed” land that has scenic, historic, or cultural value, regardless of parcel size.

It is important to identify the ownership of open spaces, regardless of whether the land is categorized as agriculture, forest, or “open space.” Publicly held land may be contrasted with land held in private ownership (and thus subject to development). Another category, and one requiring more research by the local planning agency, are those lands subject to conservation restrictions, easements, or other restrictions permanently or for a fixed period of time. By identifying ownership and/or restriction status of agriculture, forest or open space lands, the local government can more accurately shape the action element of the local comprehensive plan. For example, a large tract of undeveloped forest in private ownership on the edge of an urbanizing area is unlikely to remain undeveloped in perpetuity absent some action by the local government or other entities. The local government can then decide upon appropriate action to acquire the land or obtain conservation easements.

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As noted above in the discussion of Section 7-212(1)(c), which addressed the element's purposes, if it is desired that the element only focus on agriculture and forestry as economic activities, then subparagraph (c) may be omitted. The local government may instead elect to address such open space issues through the parks and recreation component of a community facilities element.

- (d) an assessment of the relative priority of importance of lands inventoried in subparagraphs (a) to [(b) or (c)] above. In undertaking this assessment, the local planning agency may develop its own prioritization system or use systems developed by other governmental units, including any developed by state agencies and the federal government;
- ◆ Assessing the relative importance of agricultural and forest resources is a difficult but important task. It is *difficult* because it requires a subjective ranking of one resource's value over another. The relative ranking is *important* as it allows local governments to focus on priority protection areas. For example, a community that has a strong agricultural industry may wish to prioritize for protection lands used for and in support of agriculture in lieu of lands more generally defined as “forest” or “open space.” Use of the LESA system described above should provide helpful guidance.
  - (e) an analysis of employment, economic, and land-use trends over at least the previous [10] years for which data are available in agriculture and forestry within the local government, especially in relation to the surrounding region and to the state. Such an analysis may include, but shall not be limited to, changes in employment, value-added, type of agriculture and forestry, technology in use, acreage in use, and size of farms and forestry operations. The analysis may also include an assessment of tourism related to agricultural;
  - (f) an evaluation of the effectiveness of any implementation measures that have been in effect since the adoption of the previous edition, if any, of this element of the local comprehensive plan; and
  - (g) a determination of any conflicts between agricultural, forest[, and scenic] resources and any future land-use pattern or public improvement proposed in any other element of the local comprehensive plan and identification of measures to mitigate such conflicts.
- ◆ This determination should identify and analyze conflicts between a local government's agricultural, forest, and scenic resources and growth and development programs contained in the local comprehensive plan. For example, a community calling for expanded economic development, a new town center, or improved/expanded housing stock should ensure that these goals do not conflict with goals of preserving large tracts of open space or a viable agricultural industry. A conflicts analysis will help the community balance conflicting goals through the

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determination of possible mitigating measures (e.g., focus development outside of identified agricultural or forest preservation areas) and/or re-evaluate the location chosen for development.

- (6) Based on the studies undertaken pursuant to paragraph (5) above, the agriculture, forest [, and scenic] preservation element:
    - (a) shall contain a statement of the local government's goals, policies, and guidelines with respect to the preservation and protection of agricultural and forest lands and promotion of agricultural- and forest-based economies; [and]
    - [(b) may contain a statement of the local government's goals, policies, and guidelines with respect to undeveloped land that is:
      - 1. subject to conservation easements or other restrictions that ensure that it will remain undeveloped; and/or
      - 2. particularly characterized by scenic views or vistas, or that has, in its undeveloped state, historical or cultural significance.]
    - (c) shall contain a plan map or map series that is at the same scale as the map or map series employed for the land-use element pursuant to Section [7-204(6)(c)] that delineates land described in subparagraphs (a) [and (b)], above, and that depicts priorities for protecting such lands. [To the extent possible, such lands shall be in a contiguous pattern that reinforces the urban growth area, if such area has been designated pursuant to Section [6-201.1].]
  - (7) The agriculture, forest[, and scenic] preservation element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] above. These actions may include, but should not be limited to, proposals for:
    - (a) the acquisition of identified agricultural, forest [and/or other privately owned, undeveloped land] in fee simple or less than fee simple, including the purchase of development rights, by the state or local government or by nonprofit conservation organizations;
- ◆ Acquisition of a land parcel in fee simple refers to the acquisition of all the rights associated with that parcel; purchase of the owner's entire ownership and rights to the land. Government's purchase of the fee provides the highest level of protection for the land, assuming that the acquiring agency subsequently places appropriate restrictions against development on the land. Purchase of land in "less than fee simple" refers to purchase of some of the rights incident to land ownership. For example, a government or nonprofit conservation organization could purchase a farmer's development rights on her land, thus restricting the land's development potential. Similarly, a government or conservation organization could purchase a walkway or bikepath easement through a private forest. Purchase of less than fee rights in land, by virtue

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of the fact that all the rights are not being acquired, is generally far less expensive than purchase of the entire fee interest in private property. See Section 9-402, Purchase of Development Rights, and Section 9-402.1, Conservation Easements.

(b) the use of transfer of development rights;

- ◆ Transfer of development rights (TDR) is a technique that allows a landowner to detach development rights from a property, such as farmland, and transfer those rights to a portion of the community designated as capable of absorbing additional development. The tool requires local governments to establish areas slated for preservation (e.g. agricultural or forest resources) as well as areas that are able to receive the transferred rights (e.g., areas that have sufficient infrastructure). A model TDR statute appears in Section 9-401.

(c) the establishment of agriculture or forestry zoning districts;

- ◆ Adoption of an agriculture or forestry zoning district requires the identification and adoption of defensible minimum parcel sizes for effective agricultural or forest operations.<sup>244</sup> For example, certain agricultural activities require large contiguous tracts. Zoning could reflect this fact and establish minimum lot sizes coincident with large tract requirements as well as prohibit most non-agricultural activities from locating within the zoning district (e.g., prohibit land uses such as residential housing that are likely to conflict with agricultural operations).

(d) [the use of current use assessment of agricultural and forest land pursuant for property taxation purposes to *[cite to applicable state statute]*];

- ◆ Most states allow the assessment of agricultural and/or forest land values at their “current use”, as opposed to the traditional assessment of “highest and best use.” Current use valuation allows owners of farming and forestry operations to receive substantial property tax benefits as their lands are assessed and taxed as currently used, not at the speculative or market value of the property. In order to obtain tax relief, the farmer must have a minimum-sized parcel (say 10 acres) and show that the property is actively farmed. Some statutes contain a rollback penalty that requires the payment of the difference between the current use and the highest and best use (plus interest) if the property is converted to nonfarm use. The number of years included in the rollback varies among the states. In addition, several states require that, in order to receive current use valuation, the landowner must enter into a restrictive agreement. In the agreement,

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<sup>244</sup>See *Caspersen v. Town of Lyme*, 139 N.H. 637, 661 A. 2d 759 (1995) (finding that 50-acre minimum lot size in mountain and forestry district was rationally related to town’s legitimate goals of encouraging forestry and timber harvesting and was supported by expert testimony that small lots create access problems, that there are not any opportunities for harvesting on small lots, that there are more opportunities for harvesting on 50-acre lots, and that size has an important effect on profitability of forestry enterprises).

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the landowner agrees to restrict the use of the land for a specific period of time in exchange for current use valuation or a freeze on the actual amount of property taxes imposed.<sup>245</sup>

- (e) the establishment of agricultural districts pursuant to Section [14-401];
  - ◆ Some 16 states have agricultural districting statutes.<sup>246</sup> Such districts are created voluntarily and are intended to create areas where commercial agriculture is encouraged. For land in such districts, the statutes may give property tax relief in the form of current use assessment or deferred assessments, limitations on assessments to farmland for water, sewage, and drainage (from which the property does not benefit by virtue of its use), exemption from a local nuisance ordinances that would restrict normal farming practices, state level review of eminent domain action within the district, and limitations on the ability of local government to assess farmland in the district for costs of new water and sewer lines extending to nonagricultural uses.<sup>247</sup> Such statutes may be distinguished from current use assessment statutes because they require that lands first be placed in a district before agricultural use assessment may apply.
    - (f) proposals to promote the agricultural and forest economy of the area through cooperative marketing efforts or through grant or loan programs; and
    - (g) pursuant to Section [7-503] below, any implementation agreements entered into between the local government and other local governments or other entities to protect agricultural or forest lands or other undeveloped lands that have scenic views or vistas or have historical or cultural significance.
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### ***Commentary: Human Services Planning***

In the 1960s, local plans increasingly began to reflect concerns for social issues by addressing provision of human services, especially to disadvantaged groups in the community.<sup>248</sup> This area

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<sup>245</sup>Tom Daniels and Deborah Bowers,  *Holding Our Ground: Protecting America's Farms and Farmland* (Washington, D.C.: Island Press, 1997), 93-95.

<sup>246</sup>American Farmland Trust (AFT), *Saving America's Farmland: What Works* (Washington, D.C.: AFT, 1997), 197.

<sup>247</sup>Tom Daniels and Deborah Bowers,  *Holding Our Ground*, 98-99.

<sup>248</sup>For a review of thinking about the intersection of physical and social planning as it existed in the 1960s, see, e.g., Herbert J. Gans, "A Memorandum on Social Planning" and "Social and Physical Planning for the Elimination of Urban Poverty," in  *People and Plans: Essays on Urban Problems and Solutions* (New York: Basic Books, 1968), 82-94

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continues to be addressed in a number of contemporary local comprehensive plans. Human services include a broad range of activities that state and local governments, nonprofit organizations, and the private sector provide to help meet health, welfare, employment, or other basic needs of groups in the community such as the poor, the elderly, youth (especially children), or the disabled. Human services programs may address alcohol and drug abuse, crisis management, day care, teenage pregnancy, family violence, nutrition, job training, mental and physical health (including infant, child, and adolescent health programs), consumer protection, and tenant rights, and include a variety of counseling services.<sup>249</sup>

The human services elements or policies of these plans typically define the local government's role in the delivery of human services among a diverse group of providers. These roles can be summarized as follows:

- (1) Provider – the local government directly provides the service itself.
- (2) Regulator – the local government oversees and regulates other agencies who directly provide services.
- (3) Funder – the local government uses its own funds or funds from federal programs like community development block grants and enters into contracts with service providers. It may exercise performance control over contracts through contract monitoring and evaluation.
- (4) Capacity builder – the local government provides advice, consultation, and technical assistance to build up the planning, management, and coordination capacities of other agencies. For example, it might use its tax or grant funds to assist a local citizens council in mental health planning or to build a network of emergency services.

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and 231-248; Harvey S. Perloff, "Common Goals and the Linking of Physical and Social Planning," in *Urban Planning and Social Policy*, edited by Bernard J. Frieden and Robert Morris (New York: Basic Books, 1968), 346-359. See also Cleveland City Planning Commission, *Policy Planning Report* (Cleveland, Ohio: The Commission, 1974) (city plan that examined issues of housing, income, job development, transportation, and community development from perspective of the city's disadvantaged citizens, articulating policies to give them wider choice); Norman Krumholz and John Forester, *Making Equity Planning Work: Leadership in the Public Sector* (Philadelphia: Temple University Press, 1990) (discussion of Cleveland plan).

<sup>249</sup>Thomas K. MacKese, "Human Services" (Ch. 8), in *Managing Small Cities and Counties: A Practical Guide*, edited by James Banovetz, Drew A. Dolan, and John W. Swaim (Washington, D.C.: International City/County Management Association, 1994), esp. 149-160.

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(5) Facilitator/coordinator – the local government may focus on providing the mechanism by which local service providers, client groups, and others may come together and negotiate goals, policies, programs, and activities.<sup>250</sup>

The nature of the local government's role depends on the capacity of the governmental unit itself, the interests of the community, and the authority of the local government for such activities. Some local governments may operate public health departments, but in other areas these services may be provided by special districts. Counties will tend to have broader authority for human services activities than cities, but this may vary over states and regions.

The health and human services element of the Palm Beach County, Florida, comprehensive plan addresses the role of the county in providing a broad array of services including public health program services (including health education, school, environmental, and mental health); services for people living with AIDS; services for adults, families, children, and the elderly (including abuse and neglect prevention and emergency food and shelter); and support of information and referral services.<sup>251</sup> Assistance in updating the element and coordinating of the element's implementation are the charges of a citizens advisory committee on health and human services created by the county commission.<sup>252</sup> The committee makes program and budget recommendations, identifies annual service and funding priorities, and determines and recommends service outcomes and measurements in the context of the comprehensive plan's policies.<sup>253</sup>

The Howard County, Maryland, General Plan describes the priority citizen needs for the county (e.g., family support, affordable child care, in-home services such as home care and nutrition for the elderly, adult day care, and equal opportunity and consumer services) and describes the county's approach to support such services. These include developing human services needs assessments,

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<sup>250</sup>Richard S. Bolan, "Social Planning and Policy Development in Local Government," in *Managing Human Services*, edited by Wayne Anderson, Bernard J. Frieden, and Michael J. Murphy (Washington, D.C.: International City Management Association, 1977), 110, quoting New England Municipal Center, *Opportunities for Municipal Participation in Human Services* (Durham, N.H.: New England Municipal Center, 1975).

<sup>251</sup>Palm Beach County, Florida, *1989 Comprehensive Plan, Health and Human Services*, Ord. No. 90-32, Revised 9/18/90, 1-HS to 21-HS.

<sup>252</sup>Palm Beach County, Florida, "Resolution of the Board of County Commissioners of Palm Beach County, Florida, Establishing the Palm Beach County Citizens Advisory Committee on Health and Human Services," Resolution R-90-1978 (November 13, 1990).

<sup>253</sup>Palm Beach County, Florida, "Resolution of the Board of County Commissioners of Palm Beach County, Florida, Amending Resolution No. R-90-1978 Dated November 13, 1990, Establishing the Palm Beach County Citizens Advisory Committee on Health and Human Services," Resolution No. 493-317 (March 16, 1993).

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establishing multi-service centers throughout the county, and devising a funding distribution system for grants and contracts.<sup>254</sup>

The City of Seattle's Comprehensive Plan contains a "human development element" adopted in November 1995. It describes a series of broad goals and policies that address vulnerable populations, education and employability, health, community safety, and service delivery. Here the element places the city in a coordinative/facilitator role rather than a direct provider role.<sup>255</sup> A "human services strategic plan" for the City of Tacoma, Washington, establishes strategic priority areas that include a reduction in and prevention of violence and abuse, provision of basic services for food shelter, and clothes, and basic health care. Tacoma will provide funds for these, based on an annual application process by provider agencies. The plan is intended to help the city annually maintain and monitor some 120 separate contracts for human services activities.<sup>256</sup>

The 1990 Nantucket Island, Massachusetts, Comprehensive Plan states that it is the plan's goal "[t]o facilitate, sustain and improve the health, education and well-being of all persons on Nantucket by providing those public and private human services which improve the quality of life for all age groups."<sup>257</sup> The plan proposes the development, for public distribution, of a comprehensive directory of existing human service providers on Nantucket for health and medical services, support services such as emergency shelter and substance abuse, and emergency services. The plan also recommends establishing a formal program of assessment and evaluation of the Island's human services programs.

Section 7-213 below describes an optional human services element of a local comprehensive plan. The model statute is drafted broadly to accommodate the different roles that a local government might define for itself in the human services area. One feature of the model is language that provides for the appointment by the local legislative body of an advisory task force to help formulate the element; this is similar to the approach used in Palm Beach County, described above. Appointing an advisory task force ensures that the human services element draws on the experience and expertise of those in the human services field as well as those who are the direct beneficiaries of the services. The model emphasizes the development of an inventory of human services providers and programs in the community, an assessment of the existing needs being addressed by these providers, and an identification of any gaps in service and future needs. The model also stresses

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<sup>254</sup>Howard County, Maryland, *1990 General Plan. . . a six point plan for the future* (Ellicott City, Md.: Howard County Department of Planning and Zoning, 1990), 148-155.

<sup>255</sup>City of Seattle, *Comprehensive Plan, Human Development Element*, adopted November 1995, [www.ci.wa.us/planning/humandev.htm](http://www.ci.wa.us/planning/humandev.htm).

<sup>256</sup>City of Tacoma, Washington, *Human Services Strategic Plan* (April 6, 1998), [www.ci.tacoma.wa.us/PDS/Community/human%20services/human2.htm](http://www.ci.tacoma.wa.us/PDS/Community/human%20services/human2.htm).

<sup>257</sup>Nantucket Planning and Development Committee, *Comprehensive Plan, Nantucket Island, Massachusetts, Goals and Objectives for Balanced Growth*, Article No. 11 (Nantucket Island, Mass.: The Committee, November 1, 1990), 15.

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setting benchmarks by which human services programs may be evaluated for funding by the local government as well as other entities. It also emphasizes new human services programs or changes in or the elimination of existing human services programs, as appropriate.

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### 7-213 Human Services Element

- (1) A human services element may be included in the local comprehensive plan. The legislative body of the local government may appoint an advisory task force of persons with interest in or expertise in human services to assist the local planning agency and local planning commission, if one exists, in the preparation of this element.<sup>258</sup>
- (2) The purposes of the human services element are to:
  - (a) integrate consideration of human services issues with other planning undertaken by the local government;
  - (b) coordinate programs of human services providers, whether they are the local government, other government agencies, or nonprofit or for-profit organizations and determine roles, if any, in addition to coordination, that the local government may assume in relation to provision of human services;
  - (c) identify deficiencies in existing human services programs;
  - (d) establish benchmarks by which human services programs may be evaluated for funding by the local government as well as other entities; and
  - (e) propose new human services programs or changes in or the elimination of existing human services programs, as appropriate.
- (3) In preparing the human services element, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies may include, but shall not be limited to:
  - (a) descriptions of human service agencies within the jurisdiction of the local government (including the local government itself, if applicable), their programs (including those directed at the support of families and children), and the missions of those programs;

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<sup>258</sup>See Section 7-106(2)(n), Powers and Duties of Local Planning Commission, which addresses the creation and appointment of advisory task forces to assist the local planning commission.

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- (b) an identification of the groups of people served by human service agencies within the jurisdiction of the local government, their approximate numbers, and those people in groups who have priority for receiving service from the provider, either established by law or by the provider;
  - (c) projections of changes in the character, composition, or size of those groups anticipated during the term of the human services element;
  - (d) analyses of expected changes in the services provided by human services agencies within the jurisdiction of the local government due to existing, pending, or potential changes in federal or state laws or regulations or other factors outside of the control of human service agencies;
  - (e) analyses of the resources of the human service agencies within the jurisdiction of the local government to meet current and future needs, including needs that may currently be unmet or may potentially arise in the future, and an estimate of additional resources that may be necessary to meet those needs;
  - (f) qualitative assessments and evaluations of existing programs operated by human service agencies within the jurisdiction of the local government; and
  - (g) relevant studies completed for other elements of the local comprehensive plan, including those that address population and population characteristics (including income), unemployment, and workforce and skill requirements.
- (4) The human services element shall consist of a statement of goal, policies, and guidelines for meeting human services needs within the jurisdiction of the local government. The element shall include summaries of supporting studies identified in paragraph (3) above. The element may include:
- (a) a statement of what the local government regards as important human services needs for the community;
  - (b) a statement of the role that the local government will assume with respect to other human services agencies within its jurisdiction; and
  - (c) an identification of the priorities of the local government in meeting human services needs with its own resources.
- (5) The human services element shall contain actions to be incorporated into the long-range program of implementation required by Section [7-211] above. These actions may include, but shall not be limited to, those that the local government, other governmental agencies, nonprofit organizations, and the private sector may take to achieve the goals and policies of the element, including:

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- (a) benchmarks for evaluating the degree to which human service programs are meeting the needs of individuals within the jurisdiction of the local government so that the local government as well as other entities can determine whether or not to fund them;
  - (b) human service programs or program changes to better meet existing and projected needs;
  - (c) proposed facilities for human services agencies, such as clinics and offices, and/or changes in existing facilities;
  - (d) proposals for new ordinances or administrative rules or policies or changes in existing ordinances or administrative rules or policies that may be enacted or adopted by the local legislative body or its administrators to promote the goals and policies of the human services element; and
  - (e) implementation agreements entered into pursuant to Section [7-503] below.
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### ***Commentary: Community Design Planning***

The purpose of community design planning is to provide a framework for identifying positive physical attributes in a community and establishing principles on which to guide private and public development. In *The Urban Design Process*, Hamid Shirvani defines urban design as “that part of the planning process that deals with the physical quality of the environment.”<sup>259</sup> The activities that constituted urban and town planning at its historical roots – the configuration of streets, the placement of public institutions and edifices, the physical arrangement of neighborhoods, manufacturing plants, and retail trade centers, the massing of buildings, the enhancement or preservation of views – are what the planning profession now considers urban design. Today planners regard design as a distinct subfield of the planning profession, one that combines public policy and social concerns with the physical layout and appearance of a community. For this model plan element, the *Legislative Guidebook* uses the more inclusive term “community” rather than “urban,” in the context of design, reflecting that design planning processes are undertaken in both large cities and in suburban and rural jurisdictions.

The community design element presented in Section 7-214 is intended to help communities foster a high-quality physical design as a means of enhancing quality of life for residents.<sup>260</sup> This

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<sup>259</sup>Hamid Shirvani, *The Urban Design Process* (New York: Van Nostrand Reinhold, 1985), 6.

<sup>260</sup>This model statute, however, is not intended to be used as a vehicle for historic preservation planning. Another Section of the *Guidebook*, 7-215, provides model plan element language for that purpose.

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is accomplished by using the planning process to assess the positive and negative aspects of the community's overall appearance, by providing a framework for design planning in specific districts within a community, and by developing sound design goals and policies that are inclusive of the points-of-view of a cross-section of residents and other interested persons.

One of the more challenging aspects of community design planning is the process a local government and its residents go through to define aesthetic and design quality in their own terms. Without a well-accepted and fair sense of what is considered “good” or “bad” design and a clear presentation of those ideals such as in a plan, the administration of design guidelines or standards can be legally<sup>261</sup> and politically problematic. The lack of planning prior to the application and enforcement of standards is what has led many private developers, business people, and citizens to label design standards and design review commissions as elitist and not reflective of a majority view. This element is therefore intended to provide a means of carefully appraising the community’s visual environment and then laying the groundwork for community design processes and principles first before embarking on new programs of design review that would apply to both public and private development. There are a variety of contemporary theories and techniques for establishing community design processes (see footnote).<sup>262</sup>

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### 7-214 Community Design Element

- (1) A community design element may be included in the local comprehensive plan. No local government may adopt or amend a design review ordinance pursuant to Section [9-301] unless it has first prepared and adopted a community design element as described in this Section.

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<sup>261</sup>In some states, it is impermissible to regulate land use for aesthetic purposes alone. However, aesthetic considerations may be a secondary purpose of regulation. See, e.g., *Village of Hudson v Albrecht, Inc.*, 9 Ohio St. 3d 69, 458 N.E.2d 852 (1984), appeal dismissed, 467 U.S. 1237 (1984) (recognizing the “legitimate governmental interest of maintaining the aesthetics of the community” but tying the promotion of aesthetics to the protection of real estate “from impairment and destruction of value”).

<sup>262</sup>See Jonathan Barnett, *An Introduction to Urban Design* (New York: Harper & Row, 1982); Gordon Cullen, *The Concise Townscape* (New York: Van Nostrand Reinhold, 1961); Sherwin Greene, “Cityshape: Communicating and Evaluating Community Design,” *Journal of the American Planning Association* 59, no. 2 (Spring 1992): 177-189; Richard Hedman with Andrew Jaszewski, *Fundamentals of Urban Design* (Chicago: APA Planners Press, 1984); Kevin Lynch, *The Image of the City* (Cambridge, Mass.: MIT Press, 1960); Kevin Lynch, *A Theory of Good City Form* (Cambridge, Mass.: MIT Press, 1981); Anton Nelessen, *Visions for a New American Dream* (Chicago: APA Planners Press, 1994); Hamid Shirvani, *The Urban Design Process* (New York: Van Nostrand Reinhold, 1985); Paul D. Spreiregen, *Urban Design: The Architecture of Towns and Cities* (New York: McGraw Hill, 1965). Two classic urban design plans are: San Francisco Department of City Planning, *The Urban Design Plan* (San Francisco, Ca.: The Department, May 1971); and Regional Plan Association, *Urban Design Manhattan* (New York: Viking Press, 1969).

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- (2) The purposes of the community design element are to:
    - (a) assess the positive and negative factors that constitute the visual environment of the community as well as the appearance and character of community gateways, business districts, neighborhoods, and other areas; and
    - (b) establish a basis for the local government to make decisions about community appearance and character by defining its goals and policies and by describing design principles or guidelines that will contribute to a desired overall image or series of images of the community
  - (3) In preparing the community design element, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies may include, but shall not be limited to:
    - (a) assessments and surveys, in map, graphic, and text form, of the local government's visual character (including views, topography, street patterns, building form and massing, settlement patterns, and major landscape features), and predominant architectural character,
    - (b) reviews of previous plans that addressed community design in order to assess their effectiveness;
    - (c) evaluations of goals, policies, and guidelines contained in other elements of the local comprehensive plan to determine their positive and negative impacts on community design; and
    - (d) surveys of citizens to determine preferences for visual character.
  - (4) The community design element shall contain goals, policies, and guidelines (in map, graphic, and textual form) which may include, but not be limited to:
    - (a) promoting the development of areas of special identity and character;
- ◆ Areas of special identity or character may include the central business district, neighborhood commercial districts, entertainment districts, residential areas with a unique character, community gateways, scenic highway corridors, and areas in and around major institutions such as campuses, hospitals, and museums and related cultural centers.
- (b) preserving and enhancing scenic views, sites, and corridors;
  - (c) describing a series of design principles for the local government;

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- (d) encouraging innovative site and architectural design in private development projects that add to the local government's character;
  - (e) conserving and supporting the design characteristics and qualities of individual neighborhoods that make them attractive and unique;
  - (f) emphasizing important places, sites, and gateways by installing public art, removing excess and inappropriate signage, and placing utility lines underground;
  - (g) establishing linkages between community design goals and policies and the design and provision of community facilities and transportation facilities;
  - (h) establishing streetscape design criteria, including building design, scale, orientation, setbacks, landscaping, and signage that is appropriate to the street width and design traffic speeds; and
- ◆ Subparagraphs (4)(f) and (g) presume that a mechanism exists for community design policies to be taken into account in the design or redesign of transportation and community facilities (e.g., utilities, streets, roadways, transit, bicycle, and pedestrian facilities). Measures to ensure that this happens typically cannot be legislated or prescribed. Such a process may involve an interdepartmental task force or work group with representatives from the community design staff, public works staff, and planning staff. Or it could be the result of an open, iterative decision making process through which local government departments regularly collaborate on cross-cutting issues. A waterfront development plan that includes public access, design of new public facilities, appropriate commercial uses, landscape architecture, view protection, and water quality protection is an example of such a cross-cutting issue.
- (i) ensuring that the character of infill development in residential or commercial areas is compatible with the desirable attributes of surrounding residential and commercial areas.
- (5) The community design element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] above. These actions may include, but shall not be limited to, proposals for:
- (a) the adoption of a design review ordinance pursuant to Section [9-301], a community design and open space incentives ordinance pursuant to Section, 9-501], a sign ordinance, landscape design standards, and other land development regulations;
  - (b) procedures and standards for the review and approval of statuary and other works of public art;
  - (c) incentives for the inclusion of public art in private development projects; and

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- (d) local capital improvements that will enhance community character such as street lighting, street furniture, special paving, landscaping, gateway structures, and fountains.
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### ***Commentary: Historic Preservation Planning***

Planning and zoning for historic preservation by local governments have evolved rapidly since the 1970s. Following the birth of the environmental movement and the increased awareness and controls on community appearance, historic preservation is no longer confined to a handful of quaint historic towns. State enabling legislation for historic preservation is now in place in some form in many states.<sup>263</sup> States have adopted their preservation laws incrementally over the last several decades, continually adding to the list of techniques and incentives. Many states have laws authorizing the establishment of local historic districts and commissions and the designation of landmarks, as well as provisions for variances, regulation of new construction, limitations on the demolition of historic structures, and allowances for tax relief to induce property owners to adhere to the restrictions.<sup>264</sup>

At the same time that preservation efforts were gathering steam, a handful of states were also reforming their state and local planning enabling laws. Most of those states took advantage of that opportunity and made preservation of historic and cultural resources a state goal, and even more commonly, a mandated, recommended, or optional element in a local comprehensive plan.<sup>265</sup>

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<sup>263</sup>See generally, Constance E. Beaumont, *Smart States, Better Communities: How State Governments Can Help Citizens Preserve Their Communities* (Washington, D.C.: National Trust for Historic Preservation, 1996) for a discussion of the relationship of state growth management and planning initiatives to historic preservation planning and techniques. It includes case studies of state and local approaches to incorporating preservation ideals into state and local planning.

<sup>264</sup>See generally Christopher Duerksen, ed., *A Handbook on Historic Preservation Law* (Washington, D.C.: Conservation Foundation, 1983); and Constance E. Beaumont, *Smart States, Better Communities*, esp. ch. 1.

<sup>265</sup>To date, historic preservation is a mandatory element in local comprehensive plans in Delaware (Del. Code Tit. 9 §2656(g)(9) (1995)); Georgia (Ga. Code Ann. §50-8-7.1(b)(1) (1989)); and Rhode Island (R.I. Gen. Laws §45-22.1-6(E) (1996)). Historic preservation is an optional element in the following states: see Florida (Fla. Stat. §163.3177(7)(i) (1991)) where preservation issues are further required to be addressed in the future land use, housing, and coastal zone management elements (Fla. Stat. §163.3177(6)(a) (1991) – future land use); Fla. Stat. §163.3177(6)(g) (1991) – coastal zone management); Fla. Stat. §163.3177(6)(f) (1991) – housing); Maine (30 Me. Rev. Stat. Ann. §4326-1-I (1989)) where historic and scenic resources must be considered in the plan, although it is not required as a separate element; New Jersey (N.J. Stat. Ann. §. 40:550-28(b)(10)(1996)); and Oregon (Ore. Rev. Stat. §197.175(2)(a) (1995)), where local governments are required to "prepare, adopt, amend, and revise comprehensive plans in compliance with goals approved by the [state land conservation and development] commission." Oregon Statewide Planning Goal 5 is Open Spaces, Scenic and Historic Areas, and Natural Resources. Local governments are required to provide programs that will "protect scenic and historic areas and natural resources for future generations" and conduct inventories on the

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The process of preparing the historic preservation element of a local comprehensive plan gives the local government the opportunity to take an all-encompassing look at the range of preservation mechanisms that the state enables it to use. Further, it allows the local government to review other land-use management tools that have a direct impact on preservation, such as land development regulations, housing, transportation, growth management, and environmental protection.

Planning enabling legislation generally does not provide much detail on either the content or structure of historic preservation elements. Rather, it instructs the state's historic preservation office or other rule-making agency to promulgate rules and guidelines for local governments. The model legislation that follows takes a more detailed approach and offers specific recommendations on what should be included in a historic preservation element. The legislation recommends that the plan element include: a statement of the local government's historic preservation goals, policies, and guidelines; a map showing the general location of historically significant features; the boundaries of areas that may be suitable for designation as historic districts; and, actions to be incorporated into the long-range program of implementation as required by Section 7-211 above.

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### **7-215 Historic Preservation Element**

- (1) A historic preservation element may be included in the local comprehensive plan. No local government may adopt or amend a historic preservation ordinance pursuant to Section [9-301] unless it has first prepared and adopted a historic preservation element as described in this Section.
- (2) The purposes of the historic preservation element are to:
  - (a) identify, designate, protect, and preserve the local government's significant historic, archaeological, and cultural sites, landmarks, buildings, districts, and landscapes;
  - (b) guide new development, as well as the rehabilitation or adaptative reuse of historic and cultural resources;
  - (c) contribute to the economic development and vitality of the local government;

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quality and quantity of: outstanding scenic views and sites, historic areas, sites, and objects, and cultural areas (see *Oregon's Statewide Planning Goals & Guidelines*, 1995 ed. Ore. Dept. of Land Conservation and Development, at. 8); Vermont, where local planning is voluntary, but local governments that choose to adopt a comprehensive plan must include in it a "statement of policies on the preservation of rare and irreplaceable natural areas, scenic and historic features and resources." (Vt. Stat. Ann., Tit. 24, §4382(5) (1992)); and Washington, where state planning goal 13 is to "identify and encourage lands, sites, or structures that have historic or archaeological significance." However, historic preservation is not a mandatory or even optional plan element for local governments in the Washington growth management program (Rev. Code Wash. 36.70A.010).

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- (d) inform and educate the public about the local government's historic, archaeological, and cultural resources; and
  - [(e) integrate any relevant goals, policies, and guidelines in the state comprehensive plan, [and] any state historic preservation plan, [and the regional comprehensive plan] with local planning.]
- (3) In preparing the historic preservation element, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others, such as the [state historic preservation office], preservation organizations, and citizen and business groups, concerning the local government's historic, archaeological, and cultural resources. The supporting studies may include, but shall not be limited to:
- (a) a survey of historically significant sites, landmarks, buildings, districts, and landscapes;
  - (b) an assessment of past and current protection and preservation efforts within the local government; and
  - (c) a discussion of the prehistory of the local government and the surrounding areas, such as geologic events, native populations, and early settlers.
- (4) The historic preservation element shall consist of the following:
- (a) a statement, with supporting analysis, of the local government's historic preservation goals, policies, and guidelines;
  - (b) a map that shows the general location of historically significant sites, landmarks, buildings, districts, and landscapes; and
  - (c) the boundaries of areas that may be suitable for designation as historic districts.
- (5) The historic preservation element shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] above. These actions may include, but shall not be limited to, proposals for:
- (a) the adoption of a historic preservation ordinance pursuant to Section [9-301], a transfer of development rights program pursuant to Section [9-401], and other techniques, as part of the local government's land development regulations;
  - (b) loans, grants, tax relief, and other financial incentives or in-kind assistance;

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- (c) historic preservation easements,<sup>266</sup>
- (d) capital improvements; and
- (e) educational programs.

- ◆ The Providence, Rhode Island, preservation plan includes an “Action Strategy for Preservation,” which details goals, actions, first steps, time frames, and participants for implementing the plan. While not providing specific dates, the time frames are broken down into “immediate and ongoing,” “short term,” “mid term,” and “long term.” The participants that are identified to take the actions specified include government staff and elected representatives and agencies, private nonprofit organizations, private institutions, and neighborhood or community organizations.<sup>267</sup>

### 7-216 [Other]

### Subplans

The following Sections present three different types of subplans that are meant to detail proposals contained in the local comprehensive plan. They address planning for neighborhoods, for lands near transit stops or facilities, and for redevelopment areas (including central and other business districts, and brownfields – environmentally contaminated sites that can be remediated and reused). In all cases, these subplans are to be treated as amendments to the local comprehensive plan (but see footnote).<sup>268</sup> For an example of a generic subplan, see the “specific plan” provisions in the California planning statutes.<sup>269</sup>

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<sup>266</sup>See e.g., Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources* (Denver, Colo.: Colorado Historical Society, 1984).

<sup>267</sup>City of Providence, *A Plan for Preservation* (Providence, R.I.: City of Providence Department of Planning and Development, September 1993).

<sup>268</sup>Note that the model statutes in the following three Sections require an adopted local comprehensive plan before preparation of subplans. In the view of the *Legislative Guidebook*, it is difficult to undertake small area planning without some type of overall framework. However, it should also be recognized that, in some communities, small area planning may occur in tandem with or independent of comprehensive planning efforts for the entire jurisdiction of local governments. Plans are sometimes completed for small areas first because they respond to an immediate set of needs or political opportunities. Users of these models should consider the context in which these statutes are to be used; if the state does not have mandatory planning, then the restrictive language on requiring an adopted local comprehensive plan before adopting a subplan may need to be relaxed.

<sup>269</sup>Cal. Gov’t Code §65450 *et seq.* (1998)

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### ***Commentary: Neighborhood Plans***

Section 7-301 describes the purposes and the contents of a neighborhood plan. A neighborhood plan may be distinguished from a local comprehensive plan in that it focuses on a specific geographic area of the local government which includes substantial residential development (as opposed to a plan that, say, looked at an industrial area). It is intended to be a document that will detail goals, policies, and guidelines contained in a broader local comprehensive plan and that proposes a shorter-range program of implementation that would include actions that may be taken by the local government as well as by other governmental agencies, and nonprofit and for-profit groups.<sup>270</sup> It is based on a review of the literature of neighborhood planning,<sup>271</sup> a survey of contemporary neighborhood plans in the United States conducted by the APA's Research Department (see: A Note on Neighborhood Plans at the end of this Chapter), and several working papers commissioned by APA for the Growing Smart<sup>SM</sup> project.<sup>272</sup> The description of the plan characterizes the plan's contents in permissive, rather than mandatory, language to ensure flexibility.

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<sup>270</sup>Neighborhood plans tend to emphasize on problems or issues that can be addressed in one to two years. This reflects, in many respects, the nature of neighborhood planning process itself, which often focuses on high-visibility problems that can be resolved quickly like clean-up of trash and installation of street lights.

<sup>271</sup>See, e.g., Frederick J. Adams, "Michigan Neighborhood Improvement Act," *The Planner's Journal* 3 (1937): 133-35 (an early version of neighborhood planning legislation, but never enacted); Bernie Jones, *Neighborhood Planning: A Guide for Citizens and Planners* (Chicago, IL: American Planning Association, 1979); Wendelyn A. Martz, *Neighborhood-Based Planning: Five Case Studies*, Planning Advisory Service Report No. 455. (Chicago: American Planning Association, 1995); David S. Sawicki and Patricia Flynn, "Neighborhood Indicators: A Review of the Literature and an Assessment of Conceptual and Methodological Issues," *Journal of the American Planning Association* 62, no. 2 (1996): 165-84; Christopher Silver, "Neighborhood Planning in Historical Perspective," *Journal of the American Planning Association* 51, no. 2 (1985): 161-74; Joel T. Werth and David Bryant, *A Guide to Neighborhood Planning*, Planning Advisory Service Report No. 342 (Chicago: American Planning Association, July 1979); N.Y.C. Charter §197a (describing plans for the development, growth, and improvement of the city and its boroughs and community districts); and N.J.Stat.Ann. §55:19-21 *et seq.*, esp. §55:19-64 (1996) (Neighborhood empowerment plans).

<sup>272</sup>See Michael W. Marshall, "Working with Low-Income Neighborhoods to Prepare a Neighborhood Plan," Charles E. Connerly, "Identifying and Targeting Neighborhoods for Revitalization," Frank J. Costa, Brian J. Sommers, and Gail Gordon Sommers "University Park Neighborhood Association: A University-Community Partnership"; Ralph Stone, "Neighborhood Planning in St. Petersburg, Florida," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998).

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In the following model, the local government must first adopt a local comprehensive plan before adopting a neighborhood plan.<sup>273</sup> The model permits private persons and organizations residing or conducting business in the neighborhood, as well as the local planning agency itself, to prepare the plan. Where such persons or organizations prepare the neighborhood plan, they must follow rules and/or guidelines adopted by the local planning agency. The model also provides a role for the review of the neighborhood plan by the planning commission, before action by the legislative body. Where it exists, a neighborhood planning council (see Section 7-109) would, of course, have a role to play in the plan's formulation, either through a review or through the actual preparation of the document. It is not necessary, it should be emphasized, for every part of the local government's geographic area to be covered by a specific neighborhood plan and the model statute below does not contemplate that degree of territorial comprehensiveness. Rather, the local government may undertake such plans over a period of years, depending on neighborhood interests and its own internal resources for preparing them and carrying them out.

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### 7-301 Neighborhood Plan

- (1) A neighborhood plan may be prepared or revised by the local planning agency, or any private person or organization residing or conducting business within the neighborhood. Neighborhood planning councils established pursuant to Section [7-109] above may prepare or assist in the preparation or revision of the plan. Before any private persons or organizations, including neighborhood planning councils, may prepare or revise neighborhood plans pursuant to this Section, the local planning agency shall first adopt rules and/or guidelines for the form and content of such plans.
- (2) A neighborhood plan shall be revised on a [periodic *or* [5]-year] basis.
- (3) The legislative body of the local government may adopt a neighborhood plan or revision thereof as an amendment to the local comprehensive plan. No neighborhood plan or revision thereof shall be adopted by the local legislative body until it has first adopted a local comprehensive plan and has referred the proposed neighborhood plan or revision thereof to the local planning commission, if one exists, for a recommendation in writing. Where a neighborhood planning council exists for all or a portion of the area included in the

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<sup>273</sup>It is conceivable that a local government could develop neighborhood plans without a local comprehensive plan, but it would eventually have to address systemic communitywide issues. For example, issues such as economic development, location of key community facilities like landfills and libraries and placement of transportation facilities like rail lines cannot be adequately dealt with on a segmented neighborhood-by-neighborhood basis. The *Legislative Guidebook's* approach is to ensure that the broader policy framework of a comprehensive plan be in place first before undertaking a neighborhood plan in order to help resolve conflicts between and among neighborhoods and between neighborhoods and citywide goals.

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neighborhood plan and where the council has not had the responsibility of preparing the plan or revision, the legislative body shall also refer the proposed neighborhood plan or proposed revision thereof to the council for a recommendation in writing. If the local planning commission or the neighborhood planning council has not made a recommendation in writing on the proposed neighborhood plan or proposed revision thereof within [30] days, the legislative body may then take action on the revision.

- (4) Neighborhood plans shall provide additional goals, policies, guidelines, supporting analyses, and programs of implementation that detail, and that are consistent with, the adopted local comprehensive plan. More specifically, the purposes of a neighborhood plan are to:
  - (a) provide a vehicle by which the goals, policies, and guidelines in the local comprehensive plan are interpreted by the local legislative body and applied to the designated neighborhoods of a local government;
  - (b) provide a means by which the local government may engage citizens in local government planning and decision making that affect the development of their neighborhood;
  - (c) state neighborhood issues, problems, opportunities, and priorities that arise out of the process of preparing the plan;
  - (d) foster or sustain a sense of community within designated neighborhoods; and
  - (e) provide a basis for the commitment of local government financial resources as well as private financial resources to carry out proposals and programs, especially capital projects.
- ◆ If there is a conflict between the local comprehensive plan and the proposed neighborhood plan, the local government will either: (1) need to modify the neighborhood plan before adopting it; or (2) amend the comprehensive plan to eliminate the conflict and then adopt the neighborhood plan.
- (5) In preparing a neighborhood plan, the local planning agency or such other private person or organization shall undertake supporting studies, with maps of existing conditions or other graphics, that are relevant to topical areas included in the neighborhood plan. In undertaking these studies, the local planning agency or such other private person or organization may use studies that have been previously prepared to support the local comprehensive plan or that have been conducted by others. The supporting studies may concern physical, social, economic, and environmental conditions in the designated neighborhood and may include, but shall not be limited to:
  - (a) population and population distribution, which may include analyses by age, household size, education level, income, or other appropriate characteristics, and which shall include [10]-year projections;

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- (b) an analysis of employment and labor force characteristics of residents in comparison with such characteristics at the [county *or* metropolitan] level and opportunities for employment and job training for neighborhood residents;
- (c) an evaluation of and summary statistics on housing conditions for all economic segments, including special needs populations. The evaluation shall include the existing distribution of housing by type, size, value or gross rent, condition, the existing distribution of households by gross annual income and size, and the number of middle-, moderate-, and low-income households that pay more than [28] percent of their gross annual household income for owner-occupied housing and [30] percent of their gross annual household income for rental housing and surveys and assessments of the physical condition of residential properties, buildings, and structures;
- (d) an evaluation of the physical conditions of non-residential properties, buildings, and structures;
- (e) an analysis of trends in changes in real property values and in property ownership by neighborhood residents and non-residents owning property in the designated neighborhood over the previous [5] years;
- (f) an evaluation of conditions of land and public infrastructure, including streets and alleys, water and sewer lines, buildings, parks, sidewalks, and other public facilities owned or operated by the local government, other governmental agencies, and public utilities;
- (g) an analysis of the neighborhood's market for retail goods and personal services, including an identification of strengths and weaknesses of existing retail and personal service establishments serving the neighborhood and the potential market to support expansions to existing establishments as well as new establishments;
- (h) an inventory of existing land uses that applies the land-use classification system from the local comprehensive plan; a description and analysis of existing land uses, including an historical overview of land-use change in the neighborhood; and a discussion of current land-use issues, including an assessment of proposals for future land uses in the local comprehensive plan. This inventory may also include a description of existing zoning districts within the neighborhood, alternate build-out projections for the neighborhood based on different assumptions, and a description of land-use ratios for the neighborhood in comparison with those for areas covered by the local government as a whole;
- (i) an inventory and evaluation of architecturally significant and historically significant buildings and structures;

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- (j) an inventory of properties known publicly to contain environmentally contaminated land and/or structures;
  - (k) an inventory of neighborhood-level services and facilities, such as refuse disposal and recycling, snow removal, street cleaning, emergency services, libraries, community centers, and recreation centers;
  - (l) an analysis of trends in personal and property crimes reported to the local police department in the past [5] years;
  - (m) an inventory of public educational facilities serving the designated neighborhood;
  - (n) an assessment of neighborhood-level social services, such as child day care, adult day care and other forms of home health care, group homes for the disabled, food and sheltering services, crisis intervention and counseling services, including those directed at the support of families and children;
  - (o) an assessment of transportation services available at the neighborhood level, including the presence or location of public transit stops and the frequency and quality of mass transit service to destinations that are important to residents;
  - (p) an inventory and analysis of existing and proposed circulation systems for vehicles, pedestrians, and bicycles. This may also include an assessment of traffic accidents, levels of service at intersections, traffic signalization, and availability of parking;
  - (q) a survey of residents and businesses concerning various aspects of the quality of life in the neighborhood, which may be used to supplement any of the studies identified in this paragraph; and
  - (r) an identification and evaluation of the presence of natural hazard conditions that may threaten lives or property in the neighborhood, where such conditions have been first documented in a natural hazards element of the local comprehensive plan.
- (4) A neighborhood plan may provide for, address, and include, but need not be limited to the following:
- (a) a statement, with supporting analysis, of neighborhood goals, policies, and guidelines for the following topics:
    1. land use, including residential, commercial, and industrial development;
    2. transportation, including mass transit, vehicular circulation, pedestrian movement, and bicycling;
    3. economic development and employment;

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4. housing, including housing that is affordable to middle-, moderate-, and low-income households, special needs housing, or housing may be in need of rehabilitation or improved maintenance;
  5. public infrastructure, including public utilities;
  6. safety and crime prevention;
  7. parks, recreation, scenic, and cultural resources;
  8. architectural and historic preservation;
  9. enforcement or development of statutes, ordinances, or administrative rules or policies relating to nuisance conditions or environmental hazards in the neighborhood;
  10. large-scale developments that will have neighborhood-wide impacts or present issues of neighborhood-wide significance;
  11. human or social services that meet the needs of underserved populations; and
  12. primary and secondary education.
- (b) a neighborhood plan map that shows:
1. neighborhood boundaries;
  2. future land use in terms of net density for residential land uses and intensity for non-residential land uses;
  3. existing and proposed community facilities;
  4. existing and proposed transportation facilities; and
  5. any other matters of neighborhood significance that can be graphically represented.
- (c) amendments, as appropriate, to the long-range program of implementation in the local comprehensive plan as required by Section [7-211] that describe shorter-term actions that the local government and its boards, commissions, departments, and divisions, state agencies, public utilities, special districts, school districts, non-profit organizations, the private sector and other organizations may take over the next [5] years to achieve the goals and polices of the neighborhood plan, including:

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1. [5]-year schedules of:
  - a. programs or program changes of services that may be undertaken by the local government, non-profit organizations, and the private sector. The schedule shall include a description of the program or program change, the agency or organization responsible for the program, an estimate of annual program costs, and the sources of public or private revenue for covering such costs;
  - b. proposed local capital improvements for the neighborhood that may be integrated with the local capital budget and local capital improvement program of the local government. The schedule shall include a description of the proposed local capital improvement, an identification of the department or division of the local government that will be responsible for the project, the year the capital improvement is proposed for construction or installation, an estimate of costs, and the sources of public or private revenue for covering such costs; and
  - c. capital projects for the neighborhood that are proposed by the non-profit and private sectors and by public agencies other than the local government. The schedule shall include a description of the proposed capital project, an identification of the organization, business entity, or public agency that will be responsible for the project, the year the project is proposed for construction or installation, an estimate of costs, and the sources of public or private revenue for covering such costs;
2. proposals for new programs of public services and/or for changes to existing programs of public services that may be carried out in order to promote the goals and policies of the neighborhood plan. Such proposals shall describe the new program or program change, identify the agency or organization that will be or is responsible for the project, and provide an estimated annual cost of the program or program change for a period of [5] years;
3. proposals to the local government for new ordinances or administrative rules or policies or changes in existing ordinances or administrative rules or policies that may be enacted or adopted by the local legislative body or its administrators to promote the goals and policies of the neighborhood plan; and
4. any other measures that may promote the goals and policies of the neighborhood plan.

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### ***Commentary: Transit-Oriented Development***

Transit-oriented development (TOD) planning emerged in the 1980s and 1990s as a mechanism for reducing dependence on the automobile caused by dispersed, low-density development, improving the economic viability and general efficiency of public transit systems and regional transportation networks, and improving or enhancing the key factors that affect quality of life for citizens. TOD planning principles include compact development, pedestrian-friendly streets, mixed land uses, and a variety of housing types and densities. TOD shares many of the same principles as the New Urbanism movement in city planning,<sup>274</sup> though a TOD's distinguishing feature is a transit station and immediate surroundings that function as a focal point of a community.<sup>275</sup>

TOD plans can be prepared for new development sites on the urban fringe for which transit service is planned or anticipated. In existing cities and suburbs, TOD plans can be prepared that would retrofit development patterns and land-use regulations at existing transit nodes, using rezoning, infill development strategies, public-private development initiatives, and new streetscape plans to achieve TOD principles.

The roots of modern TOD planning lie in the network of railroad and streetcar neighborhoods and suburbs that arose in the late 19<sup>th</sup> century in almost every major American city. Dependency by people on public transit for work, school, and recreational trips dictated settlement patterns that mixed land uses, were compact, and generally treated pedestrians and motorized travel equally. The reemergence and refinement of this approach to planning-making and development are a response

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<sup>274</sup>See generally Peter Katz *et al.*, *The New Urbanism: Toward an Architecture of Community* (New York: McGraw Hill, 1994); Andres Duany and Elizabeth Plater-Zyberk, *Towns and Town-Making Principles* (New York: Rizzoli, 1992). Compare with Raymond Unwin, *Town Planning in Practice* (Princeton, N.J.: Princeton Architectural Press, 1994, reprint of 1909 edition).

<sup>275</sup>Michael Bernick and Robert Cervero, *Transit Villages in the 21<sup>st</sup> Century* (New York: McGraw Hill, 1997); Michael Bernick and Jason Munkres, "Designing Transit-Based Communities," Working Paper 581 (Berkeley, Ca.: Institute of Urban and Regional Development, National Transit Access Center, University of California at Berkeley, August 1992). See generally Fred Kent and Steve Davies, *The Role of Transit in Creating Livable Metropolitan Communities* (Washington, D.C. Transportation Research Board, Transit Cooperative Research Program, Project H-04D, FY 1993, April 1996); New Jersey Transit, *Planning for Transit-Friendly Land Use: A Handbook for New Jersey Communities* (Trenton, N.J.: New Jersey Transit, June 1994); Tri-County Metropolitan Planning District (TRI-MET), *Planning and Design for Transit Handbook: Guidelines for Implementing Transit Supportive Development* (Portland, Ore.: TRI-MET, January 1996); Marya Morris, *Creating Transit-Supportive Land-Use Regulations*, Planning Advisory Service Report No. 468 (Chicago: American Planning Association, December 1996); City of San Diego, Land Guidance System, *Transit-Oriented Development Design Guidelines*, approved by the City Council, August 4, 1992, prepared by Calthorpe Associates for the City of San Diego (San Diego: Planning Department, October 1992); Peter Calthorpe, *The Next American Metropolis* (New York: Princeton Architectural Press, 1993).

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to the effects on people, communities, neighborhoods, business viability, and the natural environment that eight decades of automobile dependency have had.

Section 7-302 that follows describes a TOD plan that is adaptable in urban or suburban contexts and can be used for areas around transit stations as well as along transit corridors. It is based partly on a California statute, although the degree of detail has been substantially increased to provide guidance to the user.<sup>276</sup> The contents of some existing TOD plans were analyzed and evaluated for use in this model.<sup>277</sup> The model statute calls for supporting studies on all aspects of the planning area, including land-use types and densities, existing land development regulations, market analyses of potential development, surveys of transit users, and existing conditions and necessary modifications to public infrastructure, among others. The statement of the goals, policies, and guidelines of such a plan are intended to reflect basic TOD principles, including compact development patterns and increased densities and intensities, mixed land uses, and improved pedestrian circulation, comfort, and safety. The model also describes the typical set of actions that would be necessary to implement a TOD plan, which include enactment of amendments to land development regulations, scheduling capital improvements, application of financial incentives including special assessments and tax increment financing, and the creation or designation of a public or nonprofit organization (which could be the local planning agency) to administer the plan.

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### 7-302 Transit-Oriented Development Plan

- (1) The local planning agency may prepare and periodically revise a transit-oriented development plan and the legislative body of the local government may periodically adopt such plan or revision thereof as an amendment to the local comprehensive plan. However, no transit-oriented development plan shall be adopted by the legislative body until it has first adopted a local comprehensive plan and has referred the proposed transit-oriented

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<sup>276</sup>Cal. Gov't Code §65460 *et seq.* (1998) (Transit Village Development Planning Act of 1994).

<sup>277</sup>See e.g., Tri-Met Metropolitan Transportation District, *Planning and Design for Transit Handbook: Guidelines For Implementing Transit Supportive Development* (Portland, Or.: Tri-Met, 1996); City of San Diego, Land Guidance System, *Transit-Oriented Development Design Guidelines* (San Diego: City of San Diego, October 1992); Maryland-National Capital Park and Planning Commission, *The Approved and Adopted Transit District Development Plan for the Prince George's Plaza Transit District Overlay Zone* (Upper Marlboro, Md.: The Commission, July 1992); Arlington County, Va., Board, *Rosslyn Station Area Plan Addendum* (Arlington, Va.: Arlington County Economic Development Division, January 1992); and City of Chicago Department of Planning and Development and the Neighborhood Capital Budget Group, *Community Green Line Planning Project*. (Chicago: The Department, December 30, 1994).

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development plan or revision to the local planning commission, if one exists, for a recommendation in writing.

- (2) The purposes of a transit-oriented development plan are to detail and refine proposals in the local comprehensive plan for areas around existing or proposed transit stations and along transit corridors in order to create a pattern of development characterized by uses, densities, intensities, and design features that both support and are supported by mass transit service.
- (3) In preparing the transit-oriented development plan, the local planning agency shall undertake supporting studies and shall consult with existing and potential providers of mass transit service for the area to be covered by the plan. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies may include, but shall not be limited to:
  - (a) an inventory of existing land uses that applies the land-use classification system from the local comprehensive plan;
  - (b) a description and analysis of existing land uses, including an assessment of proposals for future land uses in the local comprehensive plan;
  - (c) evaluation of land development regulations affecting the area, including assessments of densities and intensities necessary to support transit services;
  - (d) analyses of socio-economic conditions as well as conditions of public safety of the area;
  - (e) opinion and origin/destination surveys of transit users as well as business owners, residents, and employees of the area;
  - (f) market analyses for residential, commercial, office, and industrial development;
  - (g) identification of existing and needed pedestrian and bicycle linkages to the transit station or access point to transit service;
  - (h) studies of traffic circulation and traffic signalization;
  - (i) studies of supply and demand for parking;
  - (j) identification of property ownership and opportunities for land assembly; and
  - (k) an evaluation of the conditions of public infrastructure such as streets, alleys, lighting, and street furniture that are relevant to transit-oriented development.
- (4) Based on the studies undertaken pursuant to paragraph (3) above, the transit-oriented development plan shall contain:

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- (a) a description of transit service that is or is proposed to be available in the area, including existing or proposed schedules and routes;
- (b) a statement of goals, policies, and guidelines (in map, graphic, and textual form) that may include, but shall not be limited to:
  - 1. concentrating land uses of appropriate intensity and density in the transit station area and along transit routes that will generate transit ridership in peak and off-peak periods;
  - 2. encouraging a mix of uses within the transit station area and along major transit routes at a scale, density, and intensity that will produce a high level of pedestrian activity and reduce dependence on the automobile;
  - 3. enhancing the physical and aesthetic quality of the area surrounding the transit station, with specific attention to the needs of pedestrians and transit users;
  - 4. providing for increased and improved pedestrian circulation in the area and encouraging walking and bicycling as alternative modes of transit station access;
  - 5. improving the ability of passengers to transfer easily between transportation modes;
  - 6. encouraging parking location and design that provide shared or joint-use facilities; and
  - 7. providing information to transit users to orient them quickly to the character of the area surrounding the transit station or transit stop and to advise them about the location and time of transit services.
- (c) a plan map that shows:
  - 1. the boundaries of the area or areas covered by the plan, including the area(s) surrounding the transit station or stations or containing the transit corridor;
  - 2. site plan(s) of transit station(s), as existing and/or proposed, as applicable, that relate(s) the station(s) to the surrounding area;
  - 3. location of any other transit stops, such as bus stops;
  - 4. future land use in terms of minimum net densities for residential land uses and minimum intensities for non-residential land uses;

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5. existing and proposed community facilities that benefit or are intended to benefit transit service or transit users;
  6. existing and proposed transportation facilities; and
  7. any other matters that benefit or are intended to benefit transit service or transit users that can be graphically represented.
- (5) The transit-oriented development plan shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] above that may include, but shall not be limited to:
- (a) enactment of amendments to land development regulations for the area that increase density and/or intensity (including provisions for bonuses), diversify the mix of uses, allow shared parking, reduce required parking, modify setback or bulk provisions, provide for site plan review of new buildings or additions, establish an aesthetically-pleasing environment through unified design standards and guidelines, authorize transfer of development rights, and/or provide for overlay districts;
  - (b) local capital improvements that may include the installation, construction, or reconstruction of streets, lighting, related pedestrian amenities, public utilities, parks and open spaces, bikeways, and public buildings and facilities, including parking garages;
  - (c) assignment of the responsibility of administering the implementation of the plan to an existing agency of the local government, or creation of a public or nonprofit organization with such responsibility;
  - (d) the use of tax increment financing to pay for public improvements pursuant to Section [14-302];
  - (e) the use of special assessments pursuant to Section [*cite to special assessment statute*];
  - (f) land acquisition and assembling and replatting of lots or parcels;
  - (g) changes to the local government's engineering and design standards for public improvements and private development to enhance compatibility with and access to transit stations and transit stops;
  - (h) amendments to the major thoroughfare plan and corridor map;
  - (i) programs to enhance public safety in the area included in the plan;
  - (j) installation of signage or provision of public information for transit users;

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- (k) waiver or reduction of any transportation-related development impact fees for new development in the area included in the transit-oriented development plan; and
  - (l) development agreements pursuant to Section [8-701] that advance or are consistent with goals, policies, and guidelines of the plan.
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### ***Commentary: Planning Redevelopment Areas***

Local governments typically plan for several types of areas needing redevelopment, each of which calls for a different set of planning strategies: (1) business districts that are experiencing loss of retail, office, and related residential activity;<sup>278</sup> (2) residential areas where dwelling units are in a marked state of deterioration or dilapidation; and (3) industrial areas where plants and facilities are abandoned, idled, or underused and the sites themselves are environmentally contaminated and must be remediated before they can be reused.<sup>279</sup>

In the United States, urban redevelopment efforts were prompted by the enactment of the Housing Act of 1949.<sup>280</sup> In providing grants to cities, this statute greatly stimulated the process of urban renewal, a mechanism by which a local government assembles and acquires land in slums and blighted areas, clears the land as necessary, relocates displaced families and businesses, and writes down the cost of the land from acquisition to reuse value. New infrastructure may be installed and land sold or leased to private or public developers. Housing rehabilitation and concentrated code enforcement may occur as well.

The early years of the urban renewal programs were characterized by massive clearance and reuse projects in American cities, an approach that largely has disappeared. This approach was criticized for the removal of large numbers of low-rent housing units while failing to provide replacement dwellings (except for high-income residents) as well as for the destruction of entire neighborhoods

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<sup>278</sup>For a discussion of planning approaches for central business districts, see Emanuel Berk, *Downtown Improvement Manual* (Chicago: APA Planners Press, May 1976); *Downtown Development Handbook*, 2d ed. (Washington, D.C.: Urban Land Institute, 1992).

<sup>279</sup>See generally Smart Growth Network, Urban and Economic Development Division, Office of Policy, Planning and Evaluation, U.S. Environmental Protection Agency, *An Integrated Approach for Brownfields Redevelopment: A Priority Setting Tool* (September 1996) at: [www.smartgrowth.org/library/brownfields\\_tool/brownfields\\_priority\\_set.html](http://www.smartgrowth.org/library/brownfields_tool/brownfields_priority_set.html).

<sup>280</sup>The Housing Act of 1949, Pub. L. No. 171, 63 Stat. 413, 432 U.S.C. §1441 *et seq.* The federal urban renewal provisions were amended many times, most significantly in 1954, when rehabilitation and conservation were added to clearance activities. 42 U.S.C. §1450 *et seq.*

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(including businesses) within cities.<sup>281</sup> In 1974, the Congress enacted the Federal Housing and Community Development Act,<sup>282</sup> which established the Community Development Block Grant (CDBG) Program and replaced the urban renewal program as well as many other categorical grants. The emphasis of planning using CDBG monies as well as complementary state grants now tends to focus on maintenance and rehabilitation of older, existing housing stock, and reconstruction and reuse of commercial and industrial buildings where feasible. Redevelopment projects tend to be smaller and the implementing actions more discrete and selective.

The 1970s brought a recognition of the impact on urban areas of environmentally contaminated industrial (as well as commercial and residential) sites resulting from the use, storage, and spillage of hazardous waste, sometimes due to the presence of leaking underground storage tanks. These contaminated urban industrial areas raise public health concerns, blight nearby neighborhoods, and hamper normal business recruitment and retention. At the same time these sites represent an inventory of land that, once environmental contamination is removed or mitigated, can be reused for a variety of public and private uses.

The current regulatory framework affecting these “brownfields sites” as they are known is defined primarily by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), amended in 1986 as the Superfund Amendment and Reauthorization Act,<sup>283</sup> and the Resource Conservation and Recovery Act.<sup>284</sup> The U.S. Environmental Protection Agency administers this legislation, and actively supports demonstration projects.<sup>285</sup> State EPAs assist in enforcement.<sup>286</sup> In addition, states may have individual statutes that further define the regulatory framework.

In California, redevelopment funding has been used as a tool by many communities to assist in the ongoing financing of seismic retrofits of unreinforced masonry buildings. In post-earthquake recovery, redevelopment authority has been used to subsidize repair of damaged structures, alleviate hazardous conditions (including demolition of hazardous structures), assist property owners in

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<sup>281</sup>See Martin Anderson, *The Federal Bulldozer: A Critical Analysis of Urban Renewal, 1949-1962* (Cambridge, Mass.: M.I.T. Press, 1964); James Q. Wilson, ed., *Urban Renewal, The Record and The Controversy* (Cambridge, Mass.: M.I.T. Press, 1967).

<sup>282</sup>The Federal Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 683, appears, as amended, at 42 U.S.C. §5301 *et seq.*

<sup>283</sup>42 U.S.C. §9601 *et seq.*

<sup>284</sup>42 U.S.C. §6901 *et seq.*, esp. §6933 (describing state inventory programs of hazardous waste sites).

<sup>285</sup>For a comprehensive review of “brownfields” pilot programs, see the U.S. EPA web site: [www.epa.gov/swerosps/bf/](http://www.epa.gov/swerosps/bf/). A useful U.S. EPA guidance document, OSWER Directive No. 9355.7-04, “Land Use in the CERCLA Remedy Selection Process” which deals with local land use considerations in brownfields cleanups appears at: [www.epa.gov/swerosps/bf/ascii/land\\_use.txt](http://www.epa.gov/swerosps/bf/ascii/land_use.txt). See also James Schwab, “Redeveloping Brownfields,” *PAS Memo* (American Planning Association, May 1997); Charles Bartsch and Elizabeth Collaton, *Brownfields: Cleaning and Reusing Contaminated Properties* (Westport, Conn: Praeger, 1997).

<sup>286</sup>See Clement Dinsmore, “State Initiatives on Brownfields,” *Urban Land* 55, no. 6 (June 1996): 37-42.

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securing new tenants, and provide relocation and temporary housing assistance. Several communities utilized such redevelopment authority after a series of earthquakes in the 1980s and the 1994 Northridge earthquake. The Community Redevelopment Financial Assistance and Disaster Project Law<sup>287</sup> (the “Disaster Law”) was adopted in 1964 to address tsunami damage from the Alaska earthquake of that year. It provides resources for post-disaster recovery and reconstruction by expanding the extent of the area eligible for redevelopment funds (under pre-existing state redevelopment authority), and by providing for an expedited process of redevelopment agency formation and plan adoption by any area certified to be in need of assistance by the Governor and declared a disaster area by the President.

Section 7-303 that follows describes a general purpose redevelopment area plan that can be adapted to many types of areas needing redevelopment.<sup>288</sup> Broadly drafted, it describes the factors that may characterize such areas, the underlying studies that such a plan may need, and the components of the plan. Paragraph (5) is a list of the type of implementing measures that a local government may employ. Typically states will have a suite of incentives for redevelopment in their statutes (e.g., tax abatement, tax increment financing, enterprise zones, special assessments for improvements in a redevelopment area) or may have special priorities for redevelopment that affect state-administered grant and loan programs.

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### 7-303 Redevelopment Area Plan

- (1) The local planning agency [or other agency under the supervision of the local planning agency]<sup>289</sup> may prepare and periodically revise a redevelopment area plan and the legislative body of the local government may adopt such plan or revision thereof as an amendment to the local comprehensive plan. However, no redevelopment area plan or revision thereof shall be adopted by the legislative body until it has first adopted a local comprehensive plan and has referred the proposed redevelopment area plan or revision to the local planning commission, if one exists, for a recommendation in writing.
- (2) The purposes of a redevelopment area plan are to detail and refine proposals in the local comprehensive plan and to encourage reinvestment in and revitalization and reuse of areas

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<sup>287</sup>Cal. Health and Safety Code §§34000 to 34008 (1997).

<sup>288</sup>For examples of descriptions of similar specific plans, see American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia, Pa.: ALI, 1976), §2-211 (Specially Planned Areas); Cal. Gov’t Code, Art. 8 (describing “specific plans”). See also Peter Buchsbaum, “Retrofitting Edge Cities into Centers,” *Land Use Law & Zoning Digest* 50, No. 6 (June 1998): 3-9 (discussion of N.J. Stat. Ann. §40A:12A-1 et seq., 1992 Local Redevelopment and Housing Law).

<sup>289</sup>In some communities, redevelopment area planning is undertaken by a separate redevelopment agency.

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of the local government that are characterized by two or more of the following conditions or circumstances:

- (a) loss of retail, office, and industrial activity, use, or employment;
  - (b) a predominance of deteriorating or deteriorated structures;
  - (c) abandonment of structures;
  - (d) environmentally contaminated land;
  - (e) the existence of unsanitary or unsafe conditions that endanger life, health, and property;
  - (f) damage from disasters;
  - (g) defective or inadequate street or lot layout;
  - (h) unimproved vacant land that has remained so for a period of ten years prior to the local government's decision to prepare the redevelopment area plan,<sup>290</sup> and that by reason of its location, remoteness, lack of means of access to developed sections or portions of the local government, or topography, or nature of the soil, is not likely to be developed through the instrumentality of private capital;
  - (i) deterioration in public improvements such as streets, street lighting, curbs, gutters, sidewalk, and related pedestrian amenities;
  - (j) tax or special assessment delinquency exceeding the fair market value of the land; and/or
  - (k) any combination of such factors that substantially impairs or arrests the sound growth and economic development of the local government, impedes the provision of adequate housing, or adversely affects the public, health, safety, morals, or general welfare due to the redevelopment area's present condition and use.
- (3) In preparing the redevelopment area plan, the local planning agency shall undertake supporting studies. In undertaking these studies, the local planning agency may use studies conducted by others. The supporting studies may include, but shall not be limited to:
- (a) analyses of socio-economic conditions of the redevelopment area;

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<sup>290</sup>Typically, a local government that prepares a redevelopment area plan will enact a resolution defining the extent of the area to be covered by the plan and directing an agency of the local government, such as the planning agency or a redevelopment agency, to prepare the plan. The date of that resolution would signify the start of the process.

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- (b) an inventory of existing land uses that applies the land-use classification system from the local comprehensive plan; a description and analysis of existing land uses, including an historical overview of land-use change in the redevelopment area; and a discussion of current land-use issues, including an assessment of proposals for future land uses in the local comprehensive plan.
  - (c) opinion surveys of property owners, business owners, employees, and residents within the redevelopment area;
  - (d) surveys and assessments of the conditions of properties, buildings, and structures;
  - (e) an evaluation of conditions of public infrastructure, including streets and alleys, water and sewer lines, buildings, parks, sidewalks, and other public facilities owned or operated by the local government, other governmental agencies, and public utilities;
  - (f) analyses of tax and special assessment delinquency of properties within the redevelopment area;
  - (g) assessments and site investigations to characterize the extent and location of environmental contamination of properties within the redevelopment area [[that are consistent with] *cite to any brownfields statute and implementing rules*];
  - (h) assessments and site investigations that characterize the extent and location of properties susceptible to the effects of natural hazards, or that describe damages from actual disaster events;
  - (i) assessments of historic, cultural, and scenic resources in the redevelopment areas;
  - (j) market analyses for residential, commercial, and industrial uses;
  - (k) analyses of parking supply and demand; and
  - (l) studies of traffic circulation and traffic signalization.
- (4) Based on the studies undertaken pursuant to paragraph (3) above, the redevelopment plan shall contain the following:
- (a) a statement, with supporting analysis, of the local government's goals, policies, and guidelines regarding the revitalization and reuse of the redevelopment area, including a statement of the relationship of the plan to the local comprehensive plan;
  - (b) a plan map drawn to an appropriate scale that delineates the boundaries of the redevelopment area and that may show:

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1. the location and characteristics of permissible types of development;
  2. the location and characteristics of streets, other rights-of way, public utilities, and other public improvements;
  3. the dimensions and grading of parcels and the dimensions and siting of structures;
  4. areas where rehabilitation of buildings is to occur;
  5. parcels to be acquired or on which demolition is to occur; and
  6. parcels on which environmental contamination or susceptibility to natural hazards is to be remediated.
- (c) a legal description of the redevelopment area; and
- (d) any other planning matters that contribute to the redevelopment and use of the area as a whole.
- (5) The redevelopment area plan shall contain actions to be incorporated into the long-range program of implementation as required by Section [7-211] above that may include, but shall not be limited to, proposals for:
- (a) the creation or designation of a public or non-profit agency to oversee and administer the implementation of the plan;
  - (b) land development regulations that apply to the redevelopment area;
  - (c) the enactment, amendment, and enforcement of property maintenance and housing codes;
  - (d) the creation of business retention and technical assistance programs and of grant and loan programs to encourage the rehabilitation of buildings, improve the appearance of building facades and signage, stimulate business start-ups and expansions, and otherwise attract private investment to the area;
  - (e) the use of tax increment financing to pay for public improvements pursuant to Section [14-302];
  - (f) the use of special assessments pursuant to Section [*cite to special assessment statute*];

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- (g) local capital improvements that may include the installation, construction, or reconstruction of streets, lighting, related pedestrian amenities, public utilities, parks, playgrounds, and public buildings and facilities;
- (h) programs of site remediation to remove environmental contamination [[pursuant to] *[cite to any brownfields statute and implementing rules]*];
- (i) programs to minimize the minimize the effects of natural hazards on property;
- (j) acquisition of property;
- (k) the demolition and removal of structures and improvements;
- (l) programs of temporary and permanent relocation assistance for displaced businesses and residents, including an estimate of the extent to which decent, safe and sanitary dwelling units affordable to displaced residents will be available to them in the existing local housing market;
- ;
- (m) assembly and replatting of lots or parcels;
- (n) disposition of any property acquired in the redevelopment area, including the sale, leasing, or retention by the local government;
- (o) programs to market and promote the redevelopment area and attract new businesses; and
- (p) implementation agreements entered into pursuant to Section [7-503].

### **7-304 [Other Subplans – *for Future Expansion*]**

## **PROCEDURES FOR PLAN REVIEW, ADOPTION, AND AMENDMENT**

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### ***Commentary: Public Participation Procedures and Public Hearings***<sup>291</sup>

Traditionally, in authorizing local planning commissions and/or legislative bodies to prepare and adopt a comprehensive plan, state statutes only mention citizen participation in the statute through a single public hearing.<sup>292</sup> While useful, public hearings may become adversarial, sometimes resulting in a one-way conversation rather than a multiparty dialogue. Planning statutes must do more to recognize and encourage and perhaps even mandate greater community involvement in local comprehensive planning.

A number of authors point to the cost of conflict as one of the primary reasons why the traditional approach to developing a comprehensive plan needs rethinking. While there are many reasons for employing consensus building for the purposes of preparing a plan, the practice continues to generate significant interest as a method of addressing and balancing complex and controversial issues where multiple, conflicting interests are at stake as well as ensuring a basis for (and public expectation of) implementation.<sup>293</sup> Planning disputes address environmental concerns, affordable housing, adequacy of public infrastructure, and economic development, among other issues, and they become more contentious because they involve specific sites, landowners, and stakeholders as well as tangible costs and benefits.

One proponent of collaborative problem solving points out that not only can a collaborative process bring political, technical, and values-oriented criteria together, but that “[a] positive, open and collaborative civic culture will help promote constructive community decisionmaking and trust between citizens and staff.”<sup>294</sup> Undergirding this is the belief that better decisions will emerge as communities enable joint thinking among a diverse group of people, thus encouraging greater creativity and a larger number of options of better quality.<sup>295</sup> Several authors have suggested that

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<sup>291</sup>This commentary and parts of Section 7-401 are based in part on “Collaborative Processes for Preparing and Adopting a Comprehensive Plan,” by Patricia Salkin in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol 2*, Planning Advisory Service Report No. 480/481 (Chicago: American Planning Association, September 1998).

<sup>292</sup>For example, the SCPEA required, before adoption of the master plan or any such part, extension or addition, “at least one public hearing thereon” by the municipal planning commission. SCPEA, §8.

<sup>293</sup>Judith Innes, “Planning Through Consensus Building,” 460.

<sup>294</sup>William R. Potapchuk, “New Approaches to Citizen Participation,” *National Civic Review* 89, no. 2 (Spring 1991): 160.

<sup>295</sup>International City /County Management Association, “Solving Community Problems by Consensus,” *MIS Report* 21, no. 10 (Washington, D.C. : ICMA, October 1989).

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land-use planning is becoming far more participatory, and this calls for planners to employ new skills of consensus building and conflict management.<sup>296</sup>

As states revise their planning statutes, they often incorporate citizen participation procedures. With specific reference to citizen participation in land-use planning as it relates to growth management, a Maine statute provides:

In order to ensure citizen participation in the development of a local growth management program, municipalities may adopt local growth management programs only after soliciting and considering a broad range of public review and comment. The intent of this subsection is to provide for the broad dissemination of proposals and alternatives, opportunity for written comments, open discussions, information dissemination and consideration of and response to public comments.<sup>297</sup>

The law further calls for the same level of citizen participation when amending an adopted comprehensive plan.<sup>298</sup>

Public participation is also required in Florida. Its planning statute provides: “It is the intent of the Legislature that the public participate in the comprehensive planning process to the fullest extent possible. Towards this end, local planning agencies and local governmental units are directed to adopt procedures designed to provide effective public participation in the comprehensive planning process. . . .”<sup>299</sup> Among the minimum requirements towards achieving public participation set forth in the statute, is the requirement that procedures for considering a proposed plan or amendments thereto by the local agency (or governing body), “. . . shall provide for broad dissemination of the proposals and alternatives, opportunity for written comments, public hearings. . . provisions for open discussions, communications programs, information services, and consideration of and response to public comments.”<sup>300</sup> Florida law further provides that each local vision, “. . . should be developed through a collaborative planning process with meaningful public participation. . . .”<sup>301</sup> The Florida legislature also established a conflict resolution consortium, “. . . to reduce the public and private

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<sup>296</sup>Kaiser and Godschalk, “Twentieth Century Land Use Planning,” 382. See also David G. Godschalk *et al.*, *Pulling Together: A Planning and Development Consensus Building Manual* (Washington, D.C.: Urban Land Institute, 1994) (observing that conflict management is an essential part of contemporary public participation).

<sup>297</sup>30-A Me. Rev. Stat. §4324(3) (1995).

<sup>298</sup>*Id.*, §4324(10) (1995).

<sup>299</sup>Fla. Stat. §163.3181(1) (1996).

<sup>300</sup>*Id.*, §163.3181(2) (1996).

<sup>301</sup>*Id.*, §163.3167(11) (1996).

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costs of litigation . . .” and to “. . . resolve public disputes, including those related to growth management issues. . . through the use of alternative dispute resolution and consensus-building.”<sup>302</sup>

Municipal planning law in the District of Columbia provides that, “. . . the Mayor shall establish procedures to ensure citizen involvement in the planning process. . . .”<sup>303</sup> The preparation of a general land-use plan in Arizona requires that the local planning agency “. . . seek maximum feasible public participation from all geographic, ethnic and economic areas of the municipality and consult and advise with public officials and agencies, public utility companies, civic, educational, professional and other organizations, and citizens generally to the end that maximum coordination of plans may be secured and properly located sites for all public purposes may be indicated on the general plan.”<sup>304</sup> Idaho requires the local planning or zoning commission to:

provide for citizen meetings, hearings, surveys, or other methods, to obtain advice on the planning process, plan, and implementation. The commission may also conduct informational meetings and consult with public officials and agencies, public utility companies, and civic, educational, professional, and other organizations. As part of the planning process, the commission shall endeavor to promote a public interest in and understanding of the commission’s activities.<sup>305</sup>

Oregon requires that each city and county governing body submit to the State Land Conservation and Development Commission (LCDC) (the body that has rulemaking authority over the state land-use planning program) “a program for citizen involvement in preparing, adopting and amending comprehensive plans and land use regulations. . . . Such program shall at least contain provision for a citizen advisory committee or committees broadly representative of the geographic areas and interests relating to land use and land use decisions.”<sup>306</sup> A state citizen involvement advisory committee reviews each proposed local program and recommends to the LCDC whether or not the program is adequate and, if it is inadequate, in what respects.<sup>307</sup>

The Washington Growth Management Act provides:

Each city and county that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and

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<sup>302</sup>Id., §240.702 (1996).

<sup>303</sup>D.C. Code. §1-244(a) (1996).

<sup>304</sup>Az. Rev. Stat. §9-461.05(E) (1996).

<sup>305</sup>Id. Code §67-6507 (1996).

<sup>306</sup>Ore. Rev. Stat. §197.16(b) (1996).

<sup>307</sup>Id., §197.16(c) (1996).

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amendment of comprehensive land-use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. . .<sup>308</sup>

The model language in Section 7-401 below requires the local government to adopt written procedures for public participation in the preparation of the local comprehensive plan, but avoids language that is too specific. The local government, under this Section, must tailor an approach that is best for its individual community.

The model gives some examples of selected techniques, but leaves the choice of those techniques up to the community. In addition, Section 7-401 establishes procedures for public hearings on the comprehensive plan that are similar to those found elsewhere in the *Legislative Guidebook* for state and regional planning agencies.<sup>309</sup>

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### **7-401 Public Participation Procedures and Public Hearings**

- (1) The [legislative body of the local government *or* the local planning commission] shall adopt written procedures designed to provide early and continuous public participation in the preparation of the local comprehensive plan or successive elements or other amendments thereto.
- (2) The public participation procedures shall provide for the broad dissemination of proposals and alternatives for the local comprehensive plan or such part or other amendment in order to ensure a multi-directional flow of information among participants in advance of and during the preparation of plans. Examples of measures contained in such procedures may include, but shall not be limited to:
  - (a) surveys and interviews of the local government's residents and business owners, operators, and employees;
  - (b) communications programs and information services, such as public workshops and training, focus groups, newsletters, a speaker's bureau, radio and television broadcasts, and use of computer-accessible information networks;

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<sup>308</sup>R.C.W. §36.70A.140 (1996)

<sup>309</sup>See Section 4-209, Workshops and Public Hearings, and Section 6-301, Workshops and Public Hearings.

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- (c) opportunity for written comments on drafts of the plan or such part or other amendment;
  - (d) appointment of a person to serve as a citizen participation coordinator for the planning process; and/or
  - (e) the creation of advisory task forces.
- (3) The [legislative body *or* local planning commission] shall hold at least [1] public hearing prior to the adoption of a proposed local comprehensive plan or such part or other amendment. The [legislative body *or* planning commission] shall give notice by publication in a newspaper(s) having general circulation within the local government and may also give notice, which may include a copy of the draft plan or amendment, by publication on a computer-accessible information network<sup>310</sup> or by other appropriate means at least [30] days before the public hearing. The form of the notice of the public hearing shall include:
- (a) the date, time, and place of the hearing;
  - (b) a description of the substance of the proposed plan or such part or amendment;
  - (c) the officer(s) or employee(s) of the local government from whom additional information may be obtained;
  - (d) the time and place where the proposed plan or such part or other amendment may be inspected by any interested person prior to the hearing; and
  - (e) the location where copies of the proposed plan or such part or other amendment may be obtained or purchased.
- (4) The [legislative body or planning commission] shall also give notice by certified mail in the form described in paragraph (3) above at least [30] days before the public hearing to:
- (a) the director of the [state planning agency];
  - (b) the director of any [regional planning agency] in the region where the local government is located;
  - (c) the chief executive officer of any adjoining local government;
  - (d) the chief executive officer of any special district, including a school district, that operates in whole or in part within or adjoining the local government;

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<sup>310</sup>This language would authorize publication via the Internet, which is especially appropriate as more local governments establish their own World Wide Web sites..

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- [(e) any neighborhood planning council established pursuant to Section [7-109] above;]
  - [(f) any neighborhood or community organization recognized by the legislative body pursuant to Section [7-110] above; and]
  - (g) [other].
- (5) At the public hearing, the [legislative body *or* local planning commission] shall permit interested persons to present their views orally or in writing on the proposed local comprehensive plan or such part or other amendment, and the hearing may be continued from time to time.
- (6) After the public hearing, the [legislative body *or* local planning commission] may revise the proposed plan or such part or other amendment, giving appropriate consideration to all written and oral comments received.

### State Review and Approval Procedures

Sections 7-402.1 to 7-402.5 below together provide procedures for state review and approval of local and regional comprehensive plans by a state comprehensive plan appeals board, for appeals by municipalities and other local governments of urban growth area designations in the event of a dispute with a regional or county planning commission, and for appeals by state agencies to undertake significant capital projects that were not incorporated into state-approved local or regional comprehensive plans. These Sections should be utilized when the state legislature determines that the state should have a role in ensuring that such plans meet legislative and administrative requirements and comply with state goals and policies while providing a means of hearing disputes over decisions made under the planning statutes.

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#### ***Commentary: Comprehensive Plan Appeals Board***<sup>311</sup>

Any time there is an administrative proceeding and an agency makes a significant planning decision an appeal process must be available to the governmental units involved and possibly other significantly affected parties. This ensures that administrative agencies are following and

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<sup>311</sup>Parts of this commentary are drawn from Nancy Stroud, “State Review and Certification of Local Plans,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, PAS Report 462/463 (Chicago: American Planning Association, March 1996), 85-88.

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interpreting the law correctly and are not abusing their discretion. Although good professional review and assistance are critical to the credibility of a program, few state agencies have sufficient political resources of their own to ultimately endure the controversy that results from continual challenges to (or anger over) their decisions without such a relief valve.

Several states have such appeals processes. In Rhode Island, when the state department of administration declines to approve a local comprehensive plan, cities and towns may request a review by a Comprehensive Plan Appeals Board, appointed by the governor.<sup>312</sup> Similarly, in Florida, local governments may appeal certification decisions by the Department of Community Affairs to the Administration Commission, composed of the governor and cabinet officers.<sup>313</sup> In Washington, which does not have state approval of local plans, the three regional Growth Management Hearings Boards<sup>314</sup> fulfill much the same function by directly reviewing challenges by interested parties to the adequacy of adopted local plans.

The courts alone, on a case-by-case basis, could, in effect, conduct the review of local or regional plans in those instances when a landowner or other plaintiff challenges a plan based on its non-compliance with the enabling statute where the plan has regulatory impact. But the state court system, with its lack of expertise in such planning issues, is not a preferred initial appellate forum. And the uncertainty that such a process would introduce, both for the local or regional bodies and for the landowners, defeats one of the very purposes of planning in the first place, which is to give the public and interested parties some certainty about the intended future actions of the local government. The more efficient means of ensuring that a plan or land use regulation complies with the enabling statute and is compatible with other relevant plans is to have it reviewed for this purpose before coming into effect.

As the commentary on the approval of regional and local comprehensive plans below explains in more detail, review of regional or local plans or actions by other governmental entities has a subjective dimension and consequently there is a policy or political element to the process. For this reason, there should be recourse from the decision of administrative bodies such as the state planning agency, to a policy-focused body. The body established in this Section is the Comprehensive Plan Appeals Board (CPAB).<sup>315</sup> The membership requirements for such a body can be constituted to represent various levels of government, various regions of the state, various public interests, or such other arrangements as will make the body a repository of experience whose decisions are respected.

It is expected, and required in the Section, that governmental entities appearing before the Board will be represented to at least some degree by planning personnel, if the entity has planning

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<sup>312</sup>R.I. Gen. Laws §45-22.3-1 *et seq.*

<sup>313</sup>Fla. Stat. §163.3184(9) to (11) (1997).

<sup>314</sup>Wash. Rev. Code § 36.70A.250 *et seq.*(1997).

<sup>315</sup>This Section is based in part on R.I. Gen. Laws, § 45-22.3-1 *et seq.* (1995) (state comprehensive plan appeals board).

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personnel. This is to ensure that there is somebody with experience in planning and land-use regulation representing the government's interests before the board, or at least closely advising the governmental entity's representative, and that the proceeding does not become wholly focused on legal procedures, important as they may be.

To the same end, the CPAB is authorized to create and enforce rules of procedure before it. It is left up to the CPAB as to how detailed such procedure will be, and how much or little such procedure will follow that used in the courts of law. Too informal a procedure can lead to allegations that a party has not had a full opportunity to state its case and respond to the cases of other parties, or that the Board has too much discretion to rule as it pleases, while too formal a procedure leads to complaints of delay and rigidity.

A critical issue in the grant of power to such a board is the degree of deference that it shows to the decisions of state agencies and local governments. In the Sections that follow, different standards of review are employed, depending on the type of decision on appeal. For reviews of proposed comprehensive plans or amendments, for example, the CPAB examines not merely whether the plan is in compliance with statutes, but also the more subjective questions of whether the proposed plan or amendment is compatible with other relevant plans, whether its stated factual bases are correct, and whether the plan is a reasonable response to the circumstances (see Section 7-402.2). In contrast, the CPAB is required to give more deference to the decision of a regional or county planning agency to establish an urban growth area, unless that decision is arbitrary, capricious, or unreasonable (see Section 7-402.3). The CPAB is required to turn a more critical eye to reviews of proposed state capital projects that are contrary to an existing adopted regional or local comprehensive plan (see Section 7-402.4).

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### **7-402.1 Comprehensive Plan Appeals Board**

- (1) There is hereby created a Comprehensive Plan Appeals Board for the state. The Board shall consist of [*number*] members for [4]-year terms and shall be composed as follows: [*Describe composition, including any special qualification requirements.*] [*Identify who appoints members, such as governor and/or majority leader of house and senate. Describe manner of initial appointment and appointment to subsequent terms.*]. A majority of members of the Board shall constitute a quorum for the conduct of all business by the Board. The Board shall elect a chair from among its members.
- (2) The Comprehensive Plan Appeals Board shall have the following powers and duties to:
  - (a) review Reports Upon Proposed Plans and to approve, reject, or approve in part and reject in part proposed regional and local comprehensive plans and significant amendments, pursuant to Section [7-402.2];

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- (b) review, upon an appeal by a municipality [or other local governments], determinations of a [regional *or* county] planning agency regarding the designation of urban growth areas, pursuant to Section [7-402.3];
  - (c) rule upon petitions by the state, state agencies[, ] [and] special districts[, and school districts] to approve proposed significant capital improvement not included in approved regional or local comprehensive plans, pursuant to Section [7-402.4]; and
  - (d) [*add other powers and duties as desired*].
- (3) The Comprehensive Plan Appeals Board shall adopt, pursuant to the provisions of the [*state administrative procedures act*], rules of procedure governing practice before it, and such other rules as it deems necessary and appropriate to carry out its responsibilities under this Act.
- (4) In all proceedings before the Comprehensive Plan Appeals Board, at least one of the representatives of any party which is a governmental entity shall be an officer, selected by the party, of its planning agency or office, if any.
- (5) All proceedings of the Comprehensive Plan Appeals Board shall be open to the public.
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### ***Commentary: Approval of Regional and Local Plans by the State***<sup>316</sup>

There is an obvious need to ensure that the plans drawn up by regional and local bodies are in compliance with the statutes and regulations authorizing such plans, and are coordinated with (or at least do not conflict with) any state plans and state agency plans. But by what criteria should a plan be reviewed?

First, the proposed plan must *comply with all legal requirements*; it must contain all the elements and provisions required by law and be prepared according to the procedural requirements of the enabling statute and regulations. It is fundamental that the governmental unit preparing a plan act within its legal authority in the preparation (procedures) and contents (substance) of the plan.

Second, the plan must be *consistent*. It must not conflict with itself internally (say, by using different assumptions for different plan elements) or with other relevant state, regional, and neighboring local plans. A local plan that has conflicting elements can result in conflicts in the legislation implementing the plan, or even the inability to enact coherent implementing regulations. The state and regional plans are applicable in the same territory as the local plan, and will typically

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<sup>316</sup>Parts of this commentary are drawn from Nancy Stroud, “State Review and Certification of Local Plans,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, PAS Report 462/463 (Chicago: American Planning Association, March 1996), 85-88.

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contain goals and objectives that affect the local plan. Any conflict between the plans will also directly impact residents and land owners in the form of conflicting implementing legislation. Plans of neighboring local governments can be thwarted by contrary provisions in neighboring local plans, as when one community intends an outlying area to consist of low-density residential development but another community designates an area directly adjacent to it for heavy industry.

Last, the plan should *be a “good” plan*, that is, it must be *sound and feasible*. A plan may be in complete compliance with all legal requirements, and not conflict in any way with other plans, and yet be an ill-advised and faulty plan when compared against the actual area and population that the plan is to serve. Alternately, there may be inadequate resources to implement the bulk of the plan’s proposed initiatives. Such a document is not really a plan – a logical approach to future action – at all but rather an inadequate and flawed document that cannot be the basis for logical action in the future.

The requirement that all plans must be submitted to the state for prior review, with such review having the power to reject a local plan, can be misperceived as mandating or requiring planning, and being incompatible with a law authorizing but not mandating local planning. But there is nothing in requiring approval of local plans that mandates that a local government prepare one, although mandatory planning can also be linked to state approval or certification. The procedure set forth in these Sections is intended to ensure that **if** a local or regional government plans, then the resulting plan will comply with the enabling statutes and regulations, will not thwart the plans of neighboring local governments and the region in which the local government lies or any overarching plans, goals, or policies of the state, and will be sound and feasible. The basis for this is the notion that *a bad plan can very well be worse than no plan at all under certain circumstances*, as when a local comprehensive plan: (a) contradicts an element of a state or regional plan; (b) interferes with the goals or implementation of the comprehensive plan of a neighboring local government; or (c) is grossly unrealistic in its premises or in the availability of resources to implement the plan.

### **WHICH STATES HAVE REVIEW AND/OR CERTIFICATION?**

The idea of reviewing or certifying local or regional plans is not new. Florida, Georgia, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington<sup>317</sup> all have such a process in place for some years, as has the United Kingdom<sup>318</sup> since the 1970s. They have built up a

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<sup>317</sup>Florida: Fla. Stat. Ann. §§163.3184 to .3191; Georgia: Ga. Code Ann. § 36-70-25; Minnesota: Minn. Stat. §394.232, subdiv. 5; New Jersey: N.J. Stat. Ann. § 52:18A-202 *et seq.*; Oregon: Ore. Rev. Stat. §§ 197.250 to .283; Rhode Island: R.I. Gen. Laws §§ 45-22.3-1 to -8; Vermont: Vt. Stat. Ann. tit. 24 §§ 4305, 4345a, 4350; Washington: Wash. Rev. Code §§ 36.70A.130, 250 *et seq.*

<sup>318</sup>Under British law, revisions of or amendments to structure plans may be subject to a procedure called an “examination in public” (EIP) before approval by the Secretary of State for the Environment. The structure plan consists of a written statement which sets out the local planning authority’s policies and general proposals for the development and other use of land in the area, and a key diagram which illustrates the policies and general proposals in the written statement. Prior to approving or rejecting a structure plan, the Secretary of State (who is chief of the Department of the Environment) determines whether to hold an EIP during the plan’s review period. An EIP is held when the Secretary

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reservoir of experience for planning governments elsewhere to draw upon. This experience has shown that a workable plan review and approval or certification process should include: (a) an adequate time period for local plan preparation; (b) review and comment on the submitted local plan by affected state and regional agencies and local governments to the certification agency; (c) an adequate time period for evaluation by the certification agency; (d) a detailed evaluation report by the certification agency with concrete suggestions for improving the submitted plan; (e) an opportunity for the local government to conform its plan to the state evaluation; (f) adequate incentives for the local plan to achieve certification; (g) a certification or approval decision reviewable under a quasi-judicial process; and (h) periodic recertification or reapproval, including certification of amendments.

State agency review, such as that by the state transportation or environmental agencies, is critical if the planning program requires those agency plans to be compatible with a certified local plan, as in Vermont and Rhode Island. Review of local plans by a regional agency (whether a county, regional planning body or otherwise) is essential to adequately address interjurisdictional planning issues (except perhaps in the smallest states) and can also provide assistance to state review that might otherwise be too far removed from local realities. At both the administrative hearing stage and the review stage, the parties that will be affected by the proposed plan must be able to comment upon it. Since the proposed plan is being reviewed for consistency with the existing state, state agency, regional, and local plans, the parties affected by the plan review include the state planning agency, state agencies with strategic plans, the regional planning agency, and the local planning agencies of the adjacent local governments. These same entities should also be able to comment on whether the stated factual bases for the plan are basically correct, as they may have some of the information which contributes to that analysis. In California, a statute<sup>319</sup> requires that cities and

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of State determines that further information and investigation are needed, in particular on those matters that arise from conflicts between the plan's proposals and national or regional policies, or those of neighboring planning authorities, or between the various policies in the plan itself, or where there are issues that involve substantial unresolved controversy. A panel of up to three persons is appointed to conduct the EIP. The Secretary identifies, as the subject of the EIP, only those matters arising from the submitted proposals on which he or she needs to be better informed. It is on these issues that the panel's inquiry focuses, not on the full body of the plan. The panel invites individuals to testify in this regard, but the EIP is not a public hearing open to all. The examination itself is to take the form of a "probing discussion" to draw attention to those issues on which information and clarification are needed. A record of the EIP is developed and a report to the Secretary is written. The panel's report may contain recommendations that will form the basis for modifications to the proposed structure plan. Department of the Environment (U.K.) and the Welsh Office, *Structure plans: The examination in public* (London: HMSO, 1989), 1-19. See Town and Country Planning Act, 1990, Ch. 8 §5 (describing "examination in public" procedure). For a discussion of the examination in public procedure, see Neal Alison Roberts, *The Reform of Planning Law: A Study of the Legal, Political and Administrative Reform of the British Land-use Planning System* (London: MacMillan Press, 1976), chapters 6, 7 and 11; J. Barry Cullingworth and Vincent Nadin, *Town and Country Planning in the UK*, 12th ed (London: Routledge, 1997), 297-298; R. Phelps, "Structure plans: the conduct and conventions of examinations in public," *Journal of Planning and Environment Law* (1995): 95-101.

<sup>319</sup>Cal. Gov't. Code §65352 (1997).

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counties, prior to adopting proposed plans or significant amendments to plans through their legislative bodies, must refer them to adjoining cities and counties, school districts, areawide planning agencies (if any) federal agencies that will be affected by the proposed plan or amendment, and other specified bodies. These bodies then have 45 days to comment on the proposed plan or amendment. (However, the California statute also specifies that it is merely directive and not mandatory; failure to refer the proposal to the listed entities will not invalidate the adoption of the plan or amendment.)

### **WHICH AGENCY DOES THE REVIEW?**

The agency chosen in most states to review or certify plans is an appointed commission, such as the Oregon Land Conservation and Development Commission<sup>320</sup> or the Vermont Council of Regional Commissions (for regional plans) and Regional Planning Commissions (for municipal plans)<sup>321</sup>, assisted by a professional staff. The Director of a state operating agency such as the Florida Department of Community Affairs<sup>322</sup> or the Rhode Island Division of Planning,<sup>323</sup> has also carried out the certification process.

In the procedure created by Section 7-402.2 below, hearing or plan-review officers of the administrative agency would review any proposed plan, check that it complies with the legal requirements, and compare it to the state's plan (or goals for planning if the state does not have a plan as such) and state agency plans. The officer would then be required to make both a finding as to whether the plan is accepted, rejected, or accepted in part and rejected in part, supported by an analysis of the reviewed plan stating why every particular element of the plan was disposed of as it was. The Section authorizes the state planning agency to contract out the initial administrative review to regional planning agencies. This authority to delegate may be preferred by a state with a strong regional planning focus, but should not be used to merely "pass the buck" from the state to a region if that region does not have the necessary resources to perform such reviews.

The first level of this review is conducted by a review officer, who makes a report of his or her findings and submits it to the director of the state planning agency or the regional planning agency if there has been a delegation of the review function. The director makes the actual decision as to whether the proposed plan or amendment is approved, rejected, or approved in part and rejected in part, and states in a written order the decision and the basis for it. If a party to the original review of the proposed plan objects to that order, that party may appeal to the Comprehensive Plan Appeals Board (see above).

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<sup>320</sup>Or. Rev. Stat. §197.040 (1997).

<sup>321</sup>Vt. Stat. Ann. tit. 24, §4305 (Council of Regional Commissions), 4345a (Regional Planning Commissions).

<sup>322</sup>Fla. Stat. Ann. §163.3184 (1997).

<sup>323</sup>R.I. Gen. Laws §45-22.2-9 (1997).

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The evaluation of a plan is largely a policy question. Whether a proposed plan or amendment is a reasonable one is at least partially subjective. An administrative proceeding should be placed at the beginning of the review process because it can efficiently dispose of routine questions (e.g., whether all the plan elements called for in a statute are present). However, local governments and planning agencies may be concerned about a statute which would require them to submit plans for review by an administrative official whose decision could not be reviewed in depth. Consequently, there should be a policy-focused reviewing board that is able to conduct a fresh *de novo* review on important issues<sup>324</sup> and that will not be bound by the director's decision.<sup>325</sup>

### **WHAT IS THE EFFECT OF CIRCUMVENTING THE REVIEW PROCEDURE?**

A key question is what would be the effect of not submitting the plan for review, or enacting a plan which has been rejected. The most direct method is to make the adoption of such a plan void, to state that any enactment purporting to adopt a rejected or unsubmitted plan does not have the actual power to do so. The “plan,” legally, does not exist. But this leads to another issue: what if the local or regional government decides to act in compliance with and in furtherance of their “plan” though it has not been legally adopted as a plan? The solution to that problem is to create a rebuttable presumption that development regulations enacted after the unauthorized “plan” are not reasonable. If the plan is faulty, then enactments that presumably are implementing it are faulty as well.

### **SOME POINTS ON THE REVIEW PROCEDURE**

The approach in this *Legislative Guidebook* is that the proposed plan be submitted for approval by the state planning agency after public participation and formal hearings. This is because the draft plan for review should be a version ready to be adopted by the local or regional government. The result is that there is no preset mandatory time period in which the local or regional government must complete the preparation of a plan, as the review process is triggered only when the plan is ready for adoption. Also, if a preliminary draft is submitted for review and approved, and then changed after the public commentary and hearings, then the review will have to occur all over again.

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<sup>324</sup>One reviewer of this Section questioned the need for a *de novo* review at both the administrative level and before the Comprehensive Plan Appeals Board. The reviewer pointed out that, if resources are going to be spent in both preparing and reviewing the plan, then there should be some deference to the local government and the administrative officials who initially review the plan. At each subsequent review, the reviewer pointed out, it is not reasonable to expect the administrative official or board to review the plan in more depth than the first reviewer. Certainly this is an alternative point of view, and has validity. However, as stated above, the review is not simply mechanical or wholly objective; it has political or policy content to it. It is for that reason that the *Guidebook* allows the reviewing body to conduct a new review of the proposed plan.

<sup>325</sup>One alternative is dispute resolution between the local government and the state. In Minnesota, disputes between a county and the state office of strategic and long-range planning regarding the development, content, or approval of voluntary community-based land-use plans by the state may be subject to mediation under provisions of the Community-Based Planning Act. Minn. Stat. §572A.01 (1998).

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If a plan that is ready for adoption is submitted for review, and is approved, then the proposed plan can be adopted and implemented by the local government or regional planning agency without need for further review.

Once the plan is submitted for review, the governmental bodies with an interest in the plan – the state, its agencies, regional planning agencies, local governments in a region, neighboring regions and/or local governments – are granted 60 days to make written comments. The time limit ensures that the plan approval process cannot be brought to a halt by intentionally delaying the submission of a written opinion.

An important component of the approval process is the periodic review of approved plans and reapproval where substantial changes have been made to the plans, or where new state policy requires an additional review. Section 7-402.2 provides for a ten-year period of validity of the approval, after which, if there has been no new proposed plan or amendment, the presumption of reasonableness which attaches to most governmental actions will be reversed. In the meantime, significant amendments to local and regional plans should also be subject to review if they are substantial enough to warrant review, as they are in these Sections. What constitutes a “significant” or “substantial” amendment is left to be determined by administrative rule making.

### **ALTERNATIVE SELF-REVIEW PROCEDURE**

The procedure set forth in the Section below authorizes the review of local or regional comprehensive plans and significant amendments by the state. However, concerns over local autonomy as well as the sheer administrative burden of the state reviewing every proposed plan and significant amendment of every local government and regional planning agency may cause some states to prefer a more streamlined, locally-focused, procedure. If desired, the Section below can be easily modified by any state adopting it to an alternative, self-review and approval procedure. Such a procedure for the self-evaluation of proposed plans, based upon a checklist, is applied by the member governments of the San Diego Association of Governments (SANDAG) in ensuring that their plans are consistent with the SANDAG Regional Plan.<sup>326</sup>

Under such an arrangement, the local government or regional planning agency would submit a copy of the proposed plan or amendment to the various governmental units and others – the same relevant parties as in the regular version of the Section – for comment. However, instead of submitting the proposed plan or amendment to the state for review, the local government or the regional planning agency would evaluate the proposed plan or amendment for compliance, consistency, soundness and feasibility, which are the plan approval criteria in Section 7-402.2(4).

In evaluating its proposed plan or amendment, the planning government would employ a detailed checklist (with supporting guidance) created by the state planning agency.

As the state itself must under this Section, the local government or regional planning agency would then produce a report recommending the acceptance or rejection of the plan or amendment

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<sup>326</sup>San Diego Association of Governments (SANDAG), *Regional Growth Management Strategy* (San Diego: SANDAG, 1993), 67-117 (describing “local-regional consistency,” “local-regional consistency checklist,” and “self-certification process and schedule”).

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and stating the reasons for the recommendation. Additionally, the report would have to include a completed checklist. If the report recommended rejection, then the plan or amendment cannot be adopted. If the recommendation is to accept the plan or amendment, with due notice being given to all relevant parties, and no one objects within 30 days (or some other period), then the plan or amendment can be adopted by the local government or regional planning agency and it will be presumed valid in the face of any legal challenge. If acceptance were recommended and any relevant party disagreed, that party could initiate a review of the local or regional plan and report by petitioning the Comprehensive Plan Appeals Board as under the present version of the Section. External formal review of the plan or amendment can thus be limited to cases where there is a serious dispute, rather than in every case.

Thus, in order to create a self-review procedure from Section 7-402.2:

- (a) eliminate paragraphs (6) and (8) (they are unique to an external state review and are not needed in a self-review);
- (b) amend paragraphs (7) through (11) to have the plan review conducted by the local planning agency or regional planning agency, and not a state review officer, in the manner described above;
- (c) add a new paragraph authorizing the state planning agency to create the checklist and promulgate related administrative rules and requiring the planning governments to apply the checklist and related rules to their proposed plans and amendments; and
- (d) leave intact the initial paragraph of (12), but omit subparagraphs (a) to (e). In addition the remaining parts of the Section can be left as is, but all references to “Order” should be changed to “Report.”

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### **7-402.2 Review and Approval of Regional and Local Comprehensive Plans and Significant Amendments**

- (1) No regional or local comprehensive plan, or significant amendment thereto, may be adopted by a [regional planning agency], local government, special district, or school district pursuant to Sections [6-303], [6-305], or [7-403] unless it has first been reviewed under the procedures of this Section and approved thereunder, either in whole or in part.
- (2) The purposes of this Section are to:
  - (a) ensure that the proposed comprehensive plan or amendment is in compliance with this Act and any rules thereunder;

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- (b) ensure that the state and its agencies, the region, contiguous regions and contiguous local governments, and other interested parties, being affected by the proposed comprehensive plan or amendment, have an opportunity to comment upon it;
  - (c) ensure that the proposed comprehensive plan or amendment does not conflict with the plans and capital improvements of the state and its agencies, the region, contiguous regions, and contiguous local governments, so that when plans are implemented by different governmental units, the effects shall reinforce each other;
  - (d) ensure that the stated facts and findings which are the basis of the proposed comprehensive plan or amendment are substantially correct; and
  - (e) ensure that the proposed comprehensive plan or amendment is a proper response to the facts and findings which are the stated basis of the proposed comprehensive plan or amendment.
- (3) For purposes of this Section:
- (a) “planning government” refers to the [regional planning agency] proposing the regional comprehensive plan or significant amendment, or the local government proposing the local comprehensive plan or significant amendment.
  - (b) what constitutes a “significant amendment” shall be defined by rule of the [state planning agency].
- (4) A proposed plan or significant amendment shall be approved pursuant to this Section if every element thereof is compliant, consistent, sound, and feasible. It shall be rejected if, in consideration of all its parts, it is not compliant, consistent, sound, and feasible. It shall be approved in part and rejected in part if one or more elements thereof is not compliant, consistent, sound, and feasible but the plan or significant amendment, in consideration of all its parts, tends to be compliant, consistent, sound, and feasible.
- (a) A proposed comprehensive plan or significant amendment thereto, or a particular element of the same, is compliant when it conforms with the requirements of this Act [,] [and] any rules enacted thereunder[, and any ordinance or charter requirement that otherwise affects the preparation of comprehensive plans by the planning government.]
  - (b) A proposed comprehensive plan or significant amendment thereto, or a particular element of the same, is consistent when its goals, policies, and program of implementation would further, or at least would not interfere with, the goals, policies, and program of implementation of:
    - 1. other elements of the same proposed comprehensive plan or significant amendment thereto;

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2. the plans of the state including *[list plans]*;
  3. the capital improvements of the state, its agencies [,] [and ] special districts [, and school districts];
  4. if the planning government is a [regional planning agency], the approved regional comprehensive plans of the contiguous regions and the approved local comprehensive plans of the local governments which are located in the region; and
  5. if the planning government is a local government, the approved regional comprehensive plan for the region in which the local government is located and the approved local comprehensive plans of the contiguous local governments.
- (c) A proposed comprehensive plan or significant amendment thereto, or a particular element of the same, is sound when both:
1. the findings of facts, statistics, and other information stated to be the basis of the proposed comprehensive plan or significant amendment thereto are substantially correct and substantially reflect the circumstances facing the planning government, the [regional planning agencies] and local governments which are contiguous with it or which are located in it, and the state; and
  2. the goals and the policies of the proposed comprehensive plan or significant amendment thereto are an appropriate response to the findings of facts, statistics, and other information stated to be the basis of the proposed comprehensive plan or significant amendment.
- (d) A proposed comprehensive plan or significant amendment thereto, or a particular element of the same, is feasible when sufficient authority and resources, including but not limited to finances, personnel, and facilities, exist to carry out the program of implementation in the proposed comprehensive plan or significant amendment thereto, or a particular element of the same.
- (5) After the completion of the preparation of a proposed comprehensive plan or significant amendment thereto, and upon the completion of the procedures and hearings required by Section [6-301] or [7-401], the planning government shall, for purposes of obtaining comments pursuant to paragraph (8) below, submit, within [30] days, copies of the proposed comprehensive plan or significant amendment to:
- (a) the director of the [state planning agency], who shall then send a copy of the proposed comprehensive plan or significant amendment to the director of each state agency that has adopted a strategic plan pursuant to Section [4-202];

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- (b) the chief executive officer of each special district and school district that has any territory located within the planning government;
  - (c) if the planning government is a [regional planning agency], the director of the [regional planning agencies], if any, for all contiguous regions;
  - (d) if the planning government is a [regional planning agency], the chief executive officer of each local government that is located in the region;
  - (e) if the planning government is a local government, the director of the [regional planning agency], if any, for the region in which the local government is located;
  - (f) if the planning government is a local government, the chief executive officer of each contiguous local government[.][, and]
  - (g) [*other interested parties*].
- ◆ “Other interested parties” can be whomever the state legislature decides should have a role in the review of local comprehensive plans and amendments. This may include individual citizens or taxpayers, nonprofit advocacy groups, neighborhood or community organizations, and any other nongovernmental organizations.
- (6) If two or more planning governments are proposing the same element or significant amendment to their comprehensive plans, then, at the option of the planning governments, they may submit the common proposed element or significant amendment jointly, and for purposes of this Section the proposed element or significant amendment shall be treated as a single amendment, and the planning governments shall be treated as a single planning government except for the purposes of the time limitation set forth in paragraph (23) below. This, however, shall not preclude the rejection of the proposed element or amendment as to one planning government and its approval as to another, applying the requirements of paragraph (4) above.
  - (7) The director of the [state planning agency] shall, within [10] days of receipt of the proposed comprehensive plan or significant amendment, select a review officer to conduct the review. The review officer may, but need not, be an employee of the [state planning agency]. The director of the [state planning agency] shall notify in writing the planning government and the other parties identified in paragraph (5) above within [5] business days of the appointment of a review officer of the name of the review officer and the address and telephone number at which he or she may be reached during business hours.
  - (8) The [state planning agency] may enter into an agreement with any [regional planning agency] to perform the review mandated by paragraph (10) below for proposed local comprehensive plans or significant amendments by local governments of the respective regions, but shall not so contract with any [regional planning agency] unless that [agency]

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has sufficient professional planning staff to perform said reviews at least as efficiently as the [state planning agency]. When such an agreement has been entered into with a [regional planning agency], the [regional planning agency] shall select a review officer and make the notification thereof, as provided in paragraph (7) above, and the director of the [regional planning agency] shall perform the duties of the director of the [state planning agency], but in all other ways the provisions of this Section applicable to review shall apply equally to reviews performed by the [state planning agency] and by [regional planning agencies].

- (9) Upon receipt of the notice required by paragraph (7) above, the parties so notified, with the exception of the planning government may, within [60] days, submit to the review officer and all parties identified in paragraph (7) above a written opinion upon the proposed comprehensive plan or significant amendment, stating any comments thereon, objections thereto, or criticisms thereof. The [state planning agency], [regional planning agencies], and the local governments in consultation with their planning agencies, shall include in their opinions a statement as to whether or not the proposed comprehensive plan or significant amendment is consistent with their state, regional or local plan and whether or not it is sound.
- (10) The review officer shall review the proposed plan or significant amendment and the written opinions thereon, and shall determine whether or not the proposed comprehensive plan or significant amendment meets the requirements of paragraph (4) above.
- (11) After conducting the review, the review officer shall, within [30] days of date upon which the last opinion was due to have been received by him or her, produce a written Report Upon the Proposed Plan (or Amendment).
  - (a) Such Report shall state whether the proposed plan or significant amendment should be approved, rejected, or approved in part and rejected in part, in the latter instance specifying which elements should be rejected. When the Report suggests that a proposed plan or significant amendment should be rejected, or approved in part and rejected in part, it shall include, for each element thereof rejected, a statement of how that element does not meet the requirements of paragraph (4) above. The Report may also include recommendations of how the rejected element or amendment may be revised to meet the requirements of paragraph (4) above .
  - (b) Such Report shall include the proposed plan or significant amendment and all opinions in the Appendix thereto.
- (12) The Report shall, within [5] days of its completion, or of the date upon which it is required by this Section to be completed, be transmitted to the parties referred to in paragraph (7) above and submitted to the director of the [state planning agency].
  - (a) The director shall review the proposed comprehensive plan or significant amendment and shall determine whether or not it meets the requirements of paragraph (4) above.

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- (b) The director, in conducting the review, shall read the Report, including the opinions submitted pursuant to paragraph (9) above, but shall not be bound thereby in making the determination required by paragraph (4). The review shall be *de novo* and shall not defer to the Report.
  - (c) Within [15] days of receiving the Report, the director shall issue a written Order, approving, rejecting, or approving in part and rejecting in part the proposed comprehensive plan or significant amendment. The Report shall be attached to and incorporated within the Order as an appendix.
  - (d) If the Order differs from the Report in its conclusions or findings, the director shall specify in the Order how and why the Order differs from the Report, and if the Order rejects, or approves in part and rejects in part different elements or for different reasons than the Report, it shall include, for each element thereof rejected, a statement of how that element does not meet the requirements of paragraph (4) above. The Order may also include recommendations of how the rejected element or amendment can be revised to meet the requirements of paragraph (4) above.
  - (e) Within [5] business days of issuing the Order, the director of the [state planning agency] shall transmit a copy of the same to all of the parties referred to in paragraph (7) above.
- (13) If any of the parties referred to in paragraph (7) above, upon receipt of the Order, have any objections to or criticisms of the Order, they may, within [30] days of the transmission of the Report, commence a review of the Order by the Comprehensive Plan Appeals Board. A review of an Order by the Comprehensive Plan Appeals Board shall be commenced by submitting a copy of the Order to the Chairperson of the Comprehensive Plan Appeals Board and by submitting a notice that the same was done to all parties referred to in paragraph (7) above.
- (14) If no review of the Order is commenced within [30] days of the transmission of the Order, then, any time after the [thirtieth] day:
- (a) A proposed plan or significant amendment that is approved may be adopted by the planning government and, if it is a regional comprehensive plan or significant amendment, by the local governments, special districts, and school districts in the region.
  - (b) A proposed plan or significant amendment that is approved in part and rejected in part may be adopted, but only to the extent of the approval, by the planning government, and the bodies referred to in subparagraph (a) above if the planning government is a regional planning agency.

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- (c) Any purported adoption by a [regional planning agency], local government, special district, or school district of a proposed plan, element, or significant amendment thereof, which is rejected shall be void.
  - (d) A comprehensive plan or significant amendment that is adopted shall enjoy a rebuttable presumption of validity, to the extent of the adoption, in any judicial or administrative proceeding in which the invalidity of the plan or amendment is asserted by any party.
- (15) The Comprehensive Plan Appeals Board, shall, within [15] days of the commencement of the review of an Order, set a date, time, and place for a hearing on said review, and shall commence a hearing on the date and time and at the place so set.
- (a) All parties referred to in paragraph (7) above shall be notified in writing of the hearing within [30] days before the hearing.
  - (b) At least [30] days before the date of the hearing, the Board shall give notice to the public of the date, time, place, and purpose of the hearing by publication in a newspaper of general circulation in the territory of the planning government. The Board may also give such notice, which may include a copy of the draft plan or amendment, by publication on a computer-accessible information network or other appropriate means.
- ◆ The hearing contemplated by paragraph (15) is open to the public. However, the only parties who may participate are those referred to in paragraph (7) above because they are the only parties with standing.
- (16) The Comprehensive Plan Appeals Board may, in addition to the evidence gathered at the hearing, consult any publicly available source of demographic, economic, land supply, land demand, or other data in making its determination, as well as the plans of the state, [regional planning agencies], and local governments.
  - (17) The Comprehensive Plan Appeals Board shall determine whether or not the proposed comprehensive plan or significant amendment meets the requirements of paragraph (4) above. It shall review the proposed comprehensive plan or significant amendment in light of the comments, objections, and criticisms and of the Order, but shall not be limited or bound thereby in making its determination. The evaluation of the proposed comprehensive plan or significant amendment by the Comprehensive Plan Appeals Board shall be *de novo* and shall not defer to the Order.
  - (18) The Comprehensive Plan Appeals Board shall, within [30] days of the last session of the hearing required by paragraph (15) above, produce a Review of the Order. Such Review shall state whether the proposed plan or significant amendment is approved, rejected, or approved in part and rejected in part, in the latter instance specifying which elements are rejected. When the Review rejects a plan or proposed significant amendment, or approves

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it in part and rejects it in part, it shall include, for each element thereof rejected, a statement of how that element was not compliant, consistent, sound, and feasible, as applicable. The Review may also include recommendations of how the rejected element or amendment can be revised to meet the requirements of paragraph (4) above. This recommendation may also include suggestions for mediation. Said Review shall include the Order, all testimony and evidence from the hearing, and all data and plans consulted pursuant to paragraph (16) above, if any, in the Appendix thereto.

- ◆ Conceivably a Comprehensive Plan Appeals Board could mediate disputes itself. However it may also recommend the disputes be mediated by a third party. This will depend on the preferences of the Board, the Board's workload, and the parties to the appeal.
  - (19) The Review shall, within [5] days of its completion, or of the date upon which it is required by this Section to be completed, be transmitted to the parties referred to in paragraph (7) above.
  - (20) Within [30] days of the transmission of the Review, any party referred to in paragraph (7) above may appeal the decision of the Comprehensive Plan Appeals Board to the [trial-level] Court for the relevant county in the manner set forth in the [Code of Civil Procedure] for judicial review.
  - (21) If no judicial review of the Review is commenced within [30] days of the transmission of the Order, then, any time after the [30th] day the planning government may adopt the comprehensive plan or significant amendment in the manner and to the extent provided in paragraph (14) above, as applicable, and the adopted comprehensive plan or amendment shall be presumed valid in the manner and to the extent provided in subparagraph (14)(d) above.
  - (22) The enactment by a [regional planning agency] or local government of any ordinance, referendum, or measure purporting to adopt a comprehensive plan without submitting the same to the review procedure mandated by this Section, or purporting to adopt a comprehensive plan when such adoption is in violation of the provisions of this Section, shall constitute a rebuttable presumption that any development regulations adopted subsequent to said enactment may no longer be reasonable.
  - (23) If [10] years pass from the adoption of a comprehensive plan or significant amendment thereto without the submission of a new proposed comprehensive plan or significant amendment for review under this Section, then this shall constitute a rebuttable presumption that any development regulations adopted by the [regional planning agency] or local government subsequent to said adoption may no longer be reasonable, with such presumption commencing only after the [10th] year.
  - (24) Upon the approval and lawful adoption of a proposed plan or significant amendment thereto, 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], anywhere within a

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[regional planning agency]'s or local government's jurisdiction which is not described in and not included in the comprehensive plan, as amended, of that [agency] or local government, except as provided in Section [7-402.4].

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### ***Commentary: Appeal of Urban Growth Area Designation***

Section 7-402.3 provides for an appeal to the Comprehensive Plan Appeals Board by a municipality (or other local government) of a regional or county planning agency's written determination of a designation of an urban growth area in a regional comprehensive plan. The appeal would occur when the municipality is unable to reach agreement with the agency over the location and extent of the urban growth area and has also employed any procedures for dispute resolution.

Under the procedures, the municipality files a petition with the Comprehensive Plan Appeals Board. The regional or county planning agency, as well as other governmental units, may respond to the petition. The Board holds a hearing on the petition and then issues a ruling on the matter. If the Board determines the procedures in Section 6-201.1(5), which sets forth the steps involved in establishing the urban growth area, have not been followed but that the written determination of the agency is not arbitrary, capricious, or unreasonable, it can remand the matter to the county or regional planning agency with instructions to comply. If it finds that the written determination of the agency is arbitrary, capricious, or unreasonable, it then approves the petition and rejects the designation.

If the Board rejects the petition, then, after a period in which appeal of its decision to a trial-level court in the state may occur, the regional planning agency, municipalities, and other local governments are to incorporate and adopt the proposed urban growth area as part of their plans.

Note that the Board does not have the authority to negotiate a disputed urban growth area among the parties. Under Section 6-201.1, that is the province of the regional or county planning agency, municipalities, and other local governments. Rather, the Board's authority is to determine whether the correct procedures have been followed and substantive criteria have been met, and whether the designation of the boundary is reasonable. Under Section 7-402.3(9)(b), the Board does have the authority to recommend ways in which the urban growth area may be modified to meet the requirements of the Act, but the actual resolution of a dispute over growth area designation would instead occur by action of the parties to that dispute. While the parties would not necessarily be bound by the recommendations, following the Board's suggestions is the fastest route to achieving compliance.

If a local government refused to incorporate an approved urban growth area in its local comprehensive plan, its plan would not be approved by the state. A local government that consistently fails to obtain state approval of its local comprehensive plan would be subject to the loss of certain state funds pursuant to Section 7-402.5 below.

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### 7-402.3 Appeal of Determination Regarding Urban Growth Area Designation

- (1) Any municipality [or other local government] may appeal the written determination of a [regional *or* county planning agency] designating a proposed urban growth area pursuant to Section [6-201.1(5)(e)] by filing a petition with the Comprehensive Plan Appeals Board.
- (2) The petition shall contain:
  - (a) a copy of the written determination of the [regional *or* county planning agency] made pursuant to Section [6-201.1(5)(e)];
  - (b) a map drawn to an appropriate scale showing the proposed urban growth area that is the subject of the appeal;
  - (c) a copy of the proposed [regional comprehensive plan] or amendment of which the proposed urban growth area is part;
  - (d) a statement regarding how the proposed urban growth area does not satisfy the requirements of paragraph (8) below; and
  - (e) any other relevant information or analyses.
- (3) Within [5] days of filing of the petition with the Board, the municipality [or other local government] shall send a copy of the petition to:
  - (a) the director of the [regional *or* county planning agency];
  - (b) the chief executive officer of all local governments in or adjacent to the proposed urban growth area;
  - (c) the chief executive officer of all other municipalities in the [region *or* county]; and
  - (d) [*other interested parties*].
- (4) Within [30] days of receiving the petition, any party designated in paragraph (3) above may file with the Board a response to the petition, which may include:
  - (a) a statement regarding how the proposed urban growth area does not satisfy the requirements of paragraph (8) below; and
  - (b) any other relevant information or analyses.

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- (5) Within [10] days of receiving the last response to the petition, or [45] days from the filing of the petition at the latest, the Board shall set a date, time, and place for a hearing on the appeal, and shall commence a hearing on the date and time and at the place so set.
- (a) All parties referred to in paragraph (3) above, as well as the municipality [or other local government] filing the petition, shall be notified in writing of the hearing within [30] days before the hearing.
- (b) At least [30] days before the date of the hearing, the Board shall give notice to the public of the date, time, place, and purpose of the hearing by publication in a newspaper of general circulation in the [region *or* county]. The Board may also give such notice, which may include a copy of the petition and supporting documents, by publication on a computer-accessible information network or other appropriate means.
- (6) The Comprehensive Plan Appeals Board may, in addition to the evidence gathered at the hearing, consult any publicly available source of demographic, economic, land supply, land demand, or other data in making its determination, as well as the plans of the state, [regional planning agencies], and local governments.
- (7) Within [30] days of the completion of the hearing mandated by paragraph (5) above, the Comprehensive Plan Appeals Board shall rule upon the petition. The Board shall either approve the petition, remand the petition, or reject the petition, as provided in paragraph (9) below. The Board shall, within [5] days of ruling on the petition, notify in writing the parties referred to in subparagraph (5)(a) above of its decision and shall include in said writing the legal and factual bases for its decision, including any data or plans consulted pursuant to paragraph (6) above.
- (8) The Comprehensive Plan Appeals Board shall, in ruling upon the petition, find in writing whether or not:
- (a) the procedural requirements of Section [6-201.1(5)], including the procedures for dispute resolution, have been complied with;
- (b) the criteria of Section [6-201.1(6)] and, as applicable for any new fully contained community, Section [6-201.1(8)], have been satisfied, and the sequence of Section [6-201.1(7)] has been adhered to; and
- (c) the written determination by the [regional *or* county planning agency] pursuant to Section [6-201.1(5)(e)] is arbitrary, capricious, or unreasonable.
- (9) If the Board finds that:
- (a) the requirements of subparagraph (8)(a) have not been satisfied, but finds that the requirements of subparagraphs (8)(b) and 8(c) above have been satisfied, then it

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shall remand the matter to the [regional *or* county planning agency] with instructions to comply with the requirements of subparagraph (8)(a);

- (b) the requirements of subparagraphs (8)(b) and/or 8(c) have not been satisfied, whether or not the requirements of subparagraph (8)(a) have been satisfied, then it shall approve the petition and shall include, with its findings, recommendations of how the urban growth area that is the subject of the petition may be revised to meet the requirements of subparagraphs (8)(b) and (8)(c); or

- ◆ It is recommended that the Board be given the authority to suggest how the urban growth may be revised to satisfy the statutory requirements (assuming all dispute resolution options have been exhausted). If the Board states how a disapproved urban growth area can be changed so that it would be approved, the process of obtaining approval of the urban growth area is streamlined. This is because the parties do not have to guess or surmise what changes are needed and do not have to develop an acceptable urban growth area by trial and error.

- (c) the requirements of subparagraphs (8)(a), (8)(b), and (8)(c) have been satisfied, then it shall reject the petition.

- (10) Within [30] days of the notification required by paragraph (7) above, any party referred to in paragraph (5)(a) above may appeal the decision of the Comprehensive Plan Appeals Board to the [*trial-level*] Court for the relevant county in the manner set forth in the [*state administrative appeals act or code of civil procedure*] for judicial review.

- (11) If the Board approves the petition, then the enactment by a [regional *or* county planning agency] or municipalities [and other local governments] of any ordinance, referendum, or measure purporting to adopt or otherwise implement the urban growth area that is the subject of the petition shall be void and shall constitute a rebuttable presumption that any development regulations adopted subsequent to said enactment may not be reasonable.

- ◆ As noted, if the Board approves the petition and therefore rejects the disputed urban growth area, it is obligated to recommend those changes to the growth area that are necessary to ensure compliance with the statute. This will prevent the designation process from becoming an endless cycle of proposals and rejections. Until the growth area designation is resolved, however, state approval of local comprehensive plans that are directly affected by the proposed growth area cannot be completed, and some type of conditional approval will be necessary. The Legislative Guidebook provides, in Section 7-402.2, that the state may approve parts of a comprehensive plan and reject others.

- (12) If the Board rejects the petition, then, after [30] days from the notification required by paragraph (7) above, the [regional *or* county planning agency] and the municipalities [and other local governments] in the urban growth area that is the subject of the petition shall incorporate and adopt the proposed urban growth area pursuant to Section [6-201.1(5)(d)] as if the urban growth area were approved by agreement.

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### ***Commentary: Procedures for Authorizing State and Special District Projects Not Included in Approved Regional or Local Comprehensive Plans***

An advantage to state approval of a regional or local comprehensive plan is that once the approved plan is adopted, then no state agency, special district, or school district (if the state legislature decides to include school districts in the process) may construct a capital improvement that is not included in and described in the plan (see Section 7-402.2(24)). The intention of such a requirement is to ensure that such agencies or districts take seriously the review process for the plan. It is also meant to encourage the agencies or districts to ensure that their own projects are incorporated into the plan and that the projects mesh with the development objectives of the regional planning agency or local government.

However, circumstances may arise where, despite best efforts, a capital improvement has not been included in a regional or local plan. This may be the result of timing – where a plan has recently been approved and the next update is several years away. Alternately, it may be the result of a new opportunity for funding, where, for example, federal monies are available for a short period of time to provide matching funds for the project. Sometimes the project will simply be omitted inadvertently.

The following procedure is intended to provide a mechanism by which such large-scale or significant capital improvements that were not described and included in a plan may be constructed nonetheless. Under this procedure, which is based in part on a Rhode Island statute,<sup>327</sup> the state agency, special district, or school district petitions the Comprehensive Plan Appeals Board for approval of the capital improvement. Notices are sent to the regional or county planning agency or the local government in which the capital improvement is proposed, who may file a written response to the petition. A hearing is held and the Board must determine, in approving the petition, whether the project satisfies three criteria, among them, whether the proposed capital improvement has been planned to, and in fact does, vary as little as possible from the regional or local comprehensive plan, or, if it does vary, the manner in which it departs is insignificant.

The nature of the review is such that it will encourage state agencies, special districts, and school districts to meet with the regional planning agency or local government to resolve any questions or concerns about the proposed capital improvement, in order to ensure subsequent approval of the proposed capital improvement by the Board. One consequence may be that these agencies and districts will instead attempt to ensure that their capital improvements are contained in local comprehensive plans so that the procedure in Section 7-402.4 need not be employed.

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<sup>327</sup>R.I. Gen. Laws §45.22.2-10 (1995) (coordination of state agencies).

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### **7-402.4 State[,] [and] Special District[, and School District] Projects Not Included in Approved Regional and Local Comprehensive Plans; Review by Comprehensive Plan Appeals Board**

- (1) Any state agency [,][or] special district[, or school district] that proposes to construct a significant capital improvement within a [regional planning agency]'s or local government's jurisdiction that is not described as a capital improvement and included in the comprehensive plan of that [agency] or local government, approved pursuant to Section [7-402.2] may do so only with the approval of the Comprehensive Plan Appeals Board in accordance with this Section. What constitutes a "significant capital improvement" shall be defined by rule of the [state planning agency].
- ◆ The state planning agency is given the authority to define "significant capital improvements" that will be subject to this review, with the purpose of exempting small projects, such as resurfacing, minor additions to public buildings, and repair and replacement of facilities that have minimal impact on facility capacity. If it is desired, capital improvements of school districts may be omitted from regional comprehensive plans and therefore, by eliminating the relevant bracketed language, would not be subject to the review process described in this Section.
- (2) The purposes of this Section are to:
  - (a) ensure coordination between state agencies[,] [or] special districts[, or school districts] and regional planning agencies and local governments in the construction of significant capital improvements that have not previously been described and included in a regional or a local comprehensive plan; and
  - (b) provide a mechanism for review of such significant capital improvements that balances the need to promote or protect the public health, safety, and welfare of the people of the state[,] [and the] special district[, and school district] with the interests of the region and the local government.
- (3) A state agency[,] [or] special district[, or school district] that proposes to construct a significant capital improvement that is not described and included in the comprehensive plan of a [regional planning agency] or local government which has been approved pursuant to Section [7-402.2] shall petition the Comprehensive Plan Appeals Board in writing for approval of such capital improvement, which petition shall set forth:
  - (a) a description of the significant capital improvement that includes:

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1. the location, such as lot or parcel number, street address, or other relevant method of determining location, such as descriptions of rights-of-way and easements;
  2. the type, use, or purpose of the project, including the number of persons to be served by the project;
  3. the size of the project, including the acreage of the land, and any descriptions of buildings, including their square footage;
  4. the year(s) of construction of the capital improvement; and
  5. the cost of the project, including construction, design, and engineering.
- (b) a statement explaining why the proposed significant capital improvement is needed to promote or protect the health, safety, and welfare of the people of the state; and
- (c) a statement explaining how the proposed significant capital improvement has been planned to, and in fact does, vary as little as necessary from the comprehensive plan of the [regional *or* county planning agency] or the local government, or how the manner in which it varies is insignificant.
- (d) a statement in writing from the [regional planning agency] or local government that confirms that the significant capital improvement is not described in and is not included in the comprehensive plan of the region or local government.
- (4) A copy of the petition shall be sent by the petitioning state agency[,] [or] special district[,or school district] to:
- (a) the director of the [state planning agency];
  - (b) the director of the [regional *or* county planning agency], if any, for the region(s) in which the significant capital improvement is proposed;
  - (c) the chief executive officer of the local government(s) in which the significant capital improvement is proposed; and
  - (d) [*other interested parties*].
- (5) The parties so notified shall have [30] days to file a written response to the petition with the Comprehensive Plan Appeals Board and shall transmit a copy to all other parties so notified as well as the petitioner.
- (6) Within [15] days of the filing of the petition with the Comprehensive Plans Appeals Board, the Board shall set a date, time, and place for a hearing on said review, and shall commence

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a hearing on the date and time and at the place so set. At least [30] days before the date of the hearing, the Board shall provide written notice of the hearing on the petition to the petitioning state agency[,] [or] special district[, or school district] and to the parties listed in paragraph (4) above as well as by publication in a newspaper of general circulation in the area of the [regional planning agency] or local government that is the site for the proposed significant capital improvement. It may also give notice, which may include a copy of the petition and supporting documents, by publication on a computer-accessible information network or other appropriate means.

- (7) The Comprehensive Plan Appeals Board may, in addition to the information presented at the hearing or as part of the petition, consult any publicly available sources of demographic, economic, land supply, land demand, or other data in making its determination as well as plans of the state, its regional planning agencies, and its local governments.
- (8) Within [30] days of the hearing, the Comprehensive Plan Appeals Board shall make its decision on the petition. The decision shall be in the form of a written opinion stating whether the project is approved, approved with reasonable conditions, or rejected and the manner or extent to which the proposed significant capital improvement does or does not comply with the requirements of paragraph (9) below. The written opinion shall be transmitted, within [10] days of its issue, to the petitioning state agency[,] [or] special district[, or school district] and to the parties referred to in paragraph (4) above.
- (9) No such petition shall be approved by the Comprehensive Plan Appeals Board unless the Board determines that:
  - (a) the proposed significant capital improvement is consistent with an adopted plan of the state[,] [or] special district [,or school district];
  - (b) the proposed significant capital improvement is needed to promote or protect the health, safety, and welfare of the people of the state; and
  - (c) the proposed significant capital improvement has been planned to, and in fact does, vary as little as necessary from the comprehensive plan of the [regional *or* county planning agency] or the local government or the manner in which it varies is insignificant, in the opinion of the board.
- (10) Within [30] days of receipt of the written opinion, the petitioning state agency[,] [or] special district[, or school district], or any of the parties referred to in paragraph (4) above may appeal the decision of the Comprehensive Plan Appeals Board to the [trial-level] court for the relevant county in the manner set forth in the [*administrative appeals or review act or code of civil procedure*] for judicial review.

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### *Commentary: Financial Incentive to Prepare New Plan*

In a state that mandates local planning (or regional planning agency), how do you induce local governments (or regional planning agencies) to prepare plans, apart from providing direct funds to do so? If a local government or regional planning agency simply refuses to prepare a comprehensive plan or repeatedly prepares a plan that does not meet state standards, what recourse is there? A number of states authorize, as a last resort, the withholding of discretionary and nondiscretionary grant funds for local governments that are not in compliance with the state planning statutes.

In **Florida**, if the state Administrative Commission (the administrative hearing body) finds that a comprehensive plan or plan amendment is not in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act, then the Commission must specify remedial action which would put the plan or amendment in compliance, and also may direct state agencies not to provide funds for the expansion of roads, bridges, water and sewer systems in the local government whose plan is not in compliance.<sup>328</sup> It may also declare the local government ineligible to receive Small City Community Development Block Grants, Recreation Development Assistance Program funds, state revenue sharing, and grants under the coastal management program (if it is the coastal management element of the plan which is in non-compliance).

**Oregon** authorizes the Land Conservation and Development Commission to withhold grant funds from a local government that is in non-compliance with state planning goals, and it may have the local government's share of state-shared revenues withheld by the amount of state planning grants already received, with the Commission empowered to retain a portion of the withheld funds to cover costs.<sup>329</sup> This power is part of the Commission's general power to order local governments, state agencies, and special districts to bring comprehensive plans (and land use regulations and decisions) into compliance with state goals, which it may exercise only after due notice and a hearing.<sup>330</sup>

In **Washington**,<sup>331</sup> the governor may reduce a city or county's appropriations, cut off a county or city's road-fund distributions and its share of certain state-collected sales, use, and liquor tax revenues, or rescind the county or city's ability to collect real estate excise taxes, if a growth management hearings board finds after a hearing that the county or city is not compliant and the governor makes findings that the noncompliance is due to bad faith or unreasonable delay. These sanctions may be applied for failing to adopt a comprehensive plan and for failing to designate urban growth areas or critical areas or to enact regulations protecting critical areas. Washington's approach may be too harsh, in that it allows the governor to cut off not only grant funds but also basic tax

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<sup>328</sup>Fla. Stat. §§163.3184(10) and (11) (1997).

<sup>329</sup>Ore. Rev. Stat. §§197.335(4) and (5) (1997).

<sup>330</sup>Or. Rev. Stat. §197.320 - .328 (1997).

<sup>331</sup>Wash. Rev. Code § 36.70A.330 - .345 (1997).

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revenue that the state happens to collect on behalf of a city or county. It may be at the same time too lenient, in that there are two levels of fact-finding before a county or city can be sanctioned for the easily-proven fact that it did not produce a comprehensive plan by a given deadline.

In **Tennessee**, in counties and municipalities that do not have “growth plans” that have been approved by statutorily created local planning advisory committees, certain state grants for housing, infrastructure, tourism, and job training, as well as federal transportation and community development funds are to remain “unavailable” until the plans are approved.<sup>332</sup>

An alternative approach is that of **Rhode Island**. When that state enacted its Comprehensive Planning and Land Use Regulation Act<sup>333</sup> in 1988, it required that existing comprehensive plans had to be brought into compliance with the provisions of that Act by a specific date, either by amending an existing plan or proposing a new one.<sup>334</sup> It also provided that comprehensive plans must be updated at least once every five years, but with the proviso that comprehensive plans could not be amended more than four times in a calendar year.<sup>335</sup> There is no loss of grant money or other penalty if a local government fails to timely submit a plan for approval under the Act which is ultimately approved. However, in such an instance, the director of administration will prepare, and the comprehensive plan appeals board will adopt, a plan for that municipality without its approval, subject to appeal by the municipality to the state supreme court.<sup>336</sup>

The following Section authorizes the governor to direct the withholding of state funds from regional planning agencies (if the act applies to them) and local governments that do not prepare required comprehensive plans or prepare plans that do not meet state standards (presuming that there is a state review and approval process that determines whether the plan is in compliance with state requirements). Paragraph (3) of this Section provides a “warning period”: if a regional planning agency or local government doesn’t submit a proposed plan within four years of the effective date of this Act or within nine years of the approval of its most recent comprehensive plan or significant amendment under the Act, it will receive a written notice from the state planning agency, and will have one more year to comply before grant funds may be cut off, if the governor so decides. Under paragraph (5), eligibility for receipt of such grant funds is automatically restored when the regional planning agency or local government submits a plan or amendment that is then approved by the state.

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<sup>332</sup>State of Tennessee, S.B. 3278 (approved May 19, 1998), §11. See the discussion of this legislation in the commentary to Section 6-201.1 (Urban Growth Areas).

<sup>333</sup>R.I. Gen. Laws §45-22.2-1 *et seq.* (1997).

<sup>334</sup>R.I. Gen. Laws §45-22.2-5(A)(3) (1997).

<sup>335</sup>R.I. Gen. Laws §§ 45-22.2-12(B) and (C) (1997).

<sup>336</sup>R.I. Gen. Laws §45-22.2-13 (1997).

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### 7-402.5 Submission of Plans Under This Act; Withholding of Grant Money

- (1) If any [regional planning agency] or local government does not submit a proposed comprehensive plan to the [state planning agency] for approval under Section [7-402.2] of this Act, with such proposed comprehensive plan then being approved [, or approved in part and rejected in part,] within [5] years of the effective date of this Act, then the [state planning agency] shall notify the governor in writing of the failure of that [regional planning agency] or local government to submit a proposed comprehensive plan for approval within the [5]-year period.
  - (2) If any [regional planning agency] or local government does not submit a proposed comprehensive plan or significant amendment thereto to the [state planning agency] for approval under Section [7-402.2] of this Act, with such proposed comprehensive plan then being approved [, or approved in part and rejected in part,] within [10] years of the most recent approval of a comprehensive plan or significant amendment by that [regional planning agency] or local government, then the [state planning agency] shall notify the governor in writing of the failure of that [regional planning agency] or local government to submit a proposed comprehensive plan or significant amendment for approval within the [10]-year period.
- ◆ Paragraph (1) of this Section applies to submission of regional or local comprehensive plans for *initial* approval. Paragraph (2) applies to submission of plan revisions or amendments *after initial approval* – the requirement that plans be periodically updated. The ten-year time limit for updates is consistent with Section 7-406 on periodic revision of plans. In either case, failure of a regional planning agency or local government to submit a proposed plan or amendment for review and approval means that the state planning agency must notify the governor of this fact.
- (3) If [4] years of the [5]-year period established by paragraph (1) above, or [9] years of the [10]-year period established by paragraph (2) above, elapse for any [regional planning agency] or local government, and the [agency] or local government does not submit a proposed comprehensive plan or significant amendment thereto, then the [state planning agency] shall notify in writing the chief executive officer of that [agency] or local government of the provisions of this Section.
  - (4) Upon the receipt of the notice referred to in paragraphs (1) and (2) above, the governor may declare the [regional planning agency] or local government named in the notice ineligible to receive funds under the following grant programs: [*list grant programs and statutory citations*]. The governor's declaration shall render the named [regional planning agency] or local government ineligible to receive funds under those grant programs enumerated in the declaration.

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- (5) Eligibility to receive said funds under those grant programs enumerated in the governor's declaration shall be restored to any [regional planning agency] or local government when:
- (a) that [regional planning agency] or local government submits for approval a proposed comprehensive plan or significant amendment and the proposed comprehensive plan or amendment is approved [, or approved in part and rejected in part,] pursuant to Section [7-402.2] of this Act; and
  - (b) the governor has been notified in writing of the same.
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### ***Commentary: Adoption, Amendment, and Recordation of Local Comprehensive Plans***

Sections 7-403 to 7-405 contain procedures for adopting, certifying, recording, filing, and amending the local comprehensive plan. These provisions are similar to those for state and regional agencies described elsewhere in the *Legislative Guidebook*.<sup>337</sup>

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### **7-403 Adoption of Local Comprehensive Plans**

- (1) With the recommendation of the local planning commission, if one exists, the legislative body of the local government may adopt the local comprehensive plan as a whole by a single [ordinance *or* resolution] or may, by successive [resolutions *or* ordinances], adopt successive elements of the plan, and any other amendment thereto.
- (2) The adoption of the local comprehensive plan or of any such part or other amendment shall be by [ordinance *or* resolution] of the legislative body carried by the affirmative votes of not less than a majority of the entire membership of the legislative body.<sup>338</sup> The [ordinance *or* resolution] shall refer expressly to the document intended by the legislative body to form the whole or part of the plan. The action taken shall be recorded on the plan or part or other

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<sup>337</sup>See Section 4-210, Adoption of Plans (Four Alternatives); Section 4-211, Certification of Plan; Availability for Sale; Section 6-303, Adoption of Regional Plan; Section 6-304, Certification of Regional Plan, Availability for Purchase.

<sup>338</sup>This language assumes a legislative body like a city council where the number of persons who can vote is fixed by statute or charter. In New England states, where the town meeting form of government may exist, the legislative body would be the town meeting. Consequently, the language here may need to be modified to require "a majority of all present and voting members" of the town meeting approving the plan.

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amendment by the identifying signature of the presiding officer and the clerk of the legislative body.

### **7-404 Certification, Filing, and Recordation of Local Comprehensive Plans; Availability for Purchase; Computer Access to Plans**

- (1) A true copy of the adopted local comprehensive plan or part or other amendment thereof and a true copy of its adopting [ordinance *or* resolution] shall be certified by the legislative body and filed with the clerk of the legislative body, the public library that serves the area in which the local government is located, the state library, [the director of the regional planning agency in the region where the local government is located,] the chief executive officer of any adjoining local government, and the director of the [state planning agency].
- (2) The adopted local comprehensive plan or part or other amendment thereof shall be filed and recorded with the recorder of each county wherein the local government is located.
- (3) The [chief executive officer *or* director of planning] of the local government shall make the local comprehensive plan or part or other amendment available for purchase by the public at actual cost or at a lesser amount.
- (4) The [chief executive officer *or* director of planning] of the local government may also make the local comprehensive plan or part or other amendment available in whole or in a summary form for viewing and downloading by the public on a computer-accessible information network.

### **7-405 Amendment of Local Comprehensive Plans**

- (1) The legislative body of the local government may amend the local comprehensive plan from time to time in the manner provided for in Sections [7-401] to [7-404] above , but not more than [once] during any calendar year, except:
  - [(a) in the case of an amendment involving the siting, significant expansion, or significant reduction of a state facility pursuant to Section [5-101] *et seq.*;
  - [(b) in the case of an amendment involving an area of critical state concern pursuant to Section [5-201] *et seq.*;
  - [(c) in the case of an amendment involving a development of regional impact pursuant to Section [5-301] *et seq.*; and]
  - (d) in the case of a natural or man-made emergency. In such a case, the legislative body may amend the local comprehensive plan more than [twice] during any calendar year if the additional plan amendment receives the [unanimous *or* two-thirds] vote of the legislative body and the legislative body in the [ordinance *or* resolution] approving the amendment states the nature of the emergency.

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### ***Commentary: Periodic Review and Revisions of the Local Comprehensive Plan and Land Development Regulations***

Plans and land development regulations should not be static documents and should be revisited on a periodic basis. There are good reasons for this. A community's values may change, in part as a result of changed issues facing it. New land uses and forms of development may arise that need to be taken into account. The supply and demand for developable land may change substantially due to significant economic or social changes. Old development regulations may, for a variety of reasons, prove unworkable or ineffective in addressing the problems for which they were originally enacted. For example, the development standards in subdivision regulations may be producing streets that are too wide and too costly to maintain (as well as to construct). The local government may also find that, over time, the patchwork amendment of the plan and regulations has yielded a system that is hard to understand for the average citizen, much less the sophisticated developer or home builder. The parts don't fit together very well and the land development process becomes creaky, maze-like, and unpredictable. Finally, the federal and state case law affecting the comprehensive plan and land development regulations may change (e.g., the case law surrounding the constitutionality of development impact fees and other exactions<sup>339</sup>) as well as federal and state statutes (e.g., federal and state statutes on group homes, family definition, and discrimination against the disabled<sup>340</sup>).

The need to periodically assess comprehensive plans and land development regulations and their operation has been recognized in the planning and popular urban affairs literature.<sup>341</sup> A 1998 account of an effort to rewrite the Minneapolis zoning code characterized the difficulty with the existing ordinance:

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<sup>339</sup>See the commentary to Section 8-601, Development Impact Fees.

<sup>340</sup>See, e.g., U.S.C.A. §3601 et. seq. (the Federal Fair Housing Act); *City of Edmonds v. Oxford House, Inc.* 514 U.S. 725 (1996) (holding that non-occupancy based definition of "family" was not exempt from provisions of the Fair Housing Act, U.S.C.A. §3607(b)(1)); see generally Daniel Lauber, "A Real LULU: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988," *John Marshall L.Rev.* 29, No. 2 (Winter 1996): 369-407.

<sup>341</sup>John Vranicar, Welford Sanders, David Mosena, *Streamlining Land Use Regulation: A Guidebook for Local Governments*, prepared for the U.S. Department of Housing and Urban Development, Office of Policy Development and Research by the American Planning Association (Washington, D.C.: U.S. GPO, November 1980), esp. Ch. 5; NAHB National Research Center, *Affordable Residential Land Development: A Guide for Local Government and Developers* prepared for the U.S. Department of Housing and Urban Development, Office of Policy Development and Research (OPDR) (Washington, D.C.: OPDR, November 1987); Charles Lerable, *Preparing a Conventional Zoning Ordinance*, Planning Advisory Service Report No. 460 (Chicago: American Planning Association, 1995).

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Some of the complexities of the Minneapolis zoning law sound like they were written by Abbott and Costello. Let's say you own an apartment building, and you want to know whether you can build an addition to it. You discover that it is zoned R5A—general residential. You go to the codebook and it defines R5A as being the same as R5, but allowing a little more density. So you look up R-5, and the basic meaning of that is a little denser than R4. In the end you are back to R1, and you still can't make any sense of it. About all you can do is consult the planning department. “The only person who understands this is the zoning inspector,” concedes Planning Commissioner Dick Little. “You have to rely on his interpretation.”

. . . The code sets up more than 20 categories of commercial use, and imposes tight restrictions on most of them. If a piece of land is zoned B-2, for example, that means that the 1963 planners [the last time the zoning code was updated was in 1963] meant for it to house small scale “neighborhood” retail units, but not wider-ranging “community” retail, such as pet stores, music stores or photography studios.<sup>342</sup>

Reports by the National Commission on Urban Problems (1968), the President's Commission on Housing (1982), and the federal Advisory Commission on Regulatory Barriers (1991) all contained recommendations that local governments should regularly take a close look at the regulatory systems (see commentary at the beginning of this Chapter). As noted above, the Advisory Commission called for states to institute “barrier removal” plans that would provide a comprehensive assessment of both state and local regulations and administrative procedures with a special focus on their impact on housing affordability.

New Jersey law<sup>343</sup> requires a “general reexamination” of the plan and regulations and shifts the presumption of constitutionality against local land development regulations if the local government does not review the “master plan” (as it is termed in New Jersey) every six years.<sup>344</sup>

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<sup>342</sup>Alan Erhrenhalt, “The Trouble with Zoning” *Governing* 11, No. 5 (February 1998): 28-34, at 33.

<sup>343</sup>N.J. Stat. Ann. §§40:55D-89 and -89.1 (1997). Section 89.1 reads as follows: “The absence of the adoption by the planning board of a reexamination report pursuant to [§40:55D-89] shall constitute a rebuttable presumption that the municipal development regulations are no longer reasonable.”

<sup>344</sup>Id. Florida statutes also require that the local planning agency prepare and that the governing body adopt, in whole or in part, a report assessing and evaluating the success or failure of the comprehensive plan, or element or portion thereof. Such a report must be completed at least once every five years after the adoption of the plan and also sent to the state land planning agency. The report is to suggest changes needed to update the plan or its elements. Fla. Stat. §163.3191 (1996). See also Cal. Evid. Code §669.5 (1998), under which land use regulations that unduly restrict residential development lose the presumption of validity.

For an early discussion of the use of the comprehensive plan as a presumption-shifting device in supporting the constitutionality of local zoning and subdivision regulations, see also William A. Doebele, Jr., “Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico,” *Natural Resources Journal* 2 (1962): 321, 336-337; William A. Doebele, Jr., “Horse Sense About Zoning and the Master Plan,” *Zoning Digest* 13 (1961): 208, 212-14. Cf. Daniel R. Mandelker and A. Dan Tarlock, “Shifting the Presumption of Constitutionality in Land-Use Law,” *Urban Lawyer* 24, no. 1 (Winter 1992): 1-50, at 47-49. Mandelker and Tarlock favor linking presumption-shifting to

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Section 7-406 below, based partially on the New Jersey statute, proposes that local governments conduct a systematic review of their local comprehensive plan and land development regulations at least every five years, including a revision of the comprehensive plan at least every ten years, but more often at the discretion of the local government. For example, it may be preferable for the local government to conduct a review whenever significant changes in the land market indicate a need for a review. It proposes that the legislative body assign this responsibility to the local planning agency, the local planning commission, or an advisory task force that would develop a written report with recommendations. The reexamination would look not only at the language of the comprehensive plan and land development regulations but also at the way they were being administered. The Section provides examples of topics to be considered in the reexamination. Under the model, it would be necessary only for the review to be completed and the written report to be accepted and/or adopted by the legislative body.<sup>345</sup> If no reexamination report or revised plan is adopted as required, the state can withhold the local government's funding under certain specified programs until a written report is made.

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### **7-406 Periodic Review and Revisions of Local Comprehensive Plans and Land Development Regulations**

- (1) The legislative body of the local government shall review the local comprehensive plan and land development regulations at least once every [5] years and shall adopt such parts or other amendments to the plan and regulations in accordance with the provisions of Sections [7-405] and [8-103], as the legislative body deems necessary to update the plan and regulations. The legislative body shall revise, or cause to be revised, and adopt a new local comprehensive plan at least once every [10] years.

[or]

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a local government's comprehensive plan to detect "political malfunction" in a community that is producing bizarre or unjustified land-use decisions, like single-tract spot zoning. Under their approach, a land-use decision that is consistent with a comprehensive plan is presumed constitutional and one that is not is presumed unconstitutional. "The advantage of this approach is that it allows a court to avoid making an independent judgment on a local government's political process as a basis for presumption-shifting. Instead, the court can rely on the comprehensive plan as the basis for deciding when the presumption should shift. The objection to this approach is that reliance on the plan is not justified if it is also produced by a process that malfunctions politically." *Id.*, 48-49.

<sup>345</sup>Conceivably, a legislative body could adopt some elements of the general review while simply accepting others, without necessarily endorsing them.

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- ◆ The following two paragraphs are intended to provide an inducement for maintaining an up-to-date local comprehensive plan and land development regulations and for periodically reevaluating them in-between revisions.

- (1) The legislative body of the local government shall, at least once every [5] years,<sup>346</sup> provide for a general reexamination of the local comprehensive plan and land development regulations to be conducted by the local planning commission, if one exists, the local planning agency, or an advisory task force appointed for that purpose. It shall prepare, or cause to be prepared, and adopt a revision of the local comprehensive plan at least once every [10] years in lieu of a reexamination report upon the comprehensive plan.
  - (a) The legislative body shall review and, by [resolution], adopt or adopt with changes a report of the findings of such reexamination, or portions thereof, a copy of which shall be filed with the clerk of the legislative body and sent to [the director of the regional planning agency in the region where the local government is located,] the chief executive officer of any adjoining local government, and the director of the [state planning agency].
  - (b) The first such reexamination report shall be completed by [date]. Thereafter, the legislative body shall provide for a general reexamination to be completed at least once every [5] years from the previous reexamination and a revision of the local comprehensive plan at least once every [10] years.
  - (c) The reexamination report shall state, but shall not be limited to stating, with regard to the local comprehensive plan:
    1. the major problems and opportunities facing the local government at the time of the adoption of the last reexamination report or local comprehensive plan;
    2. the extent to which such problems and opportunities have been reduced or have increased subsequent to such date;
    3. the extent to which the vision articulated in the local comprehensive plan has been achieved;
    4. the extent to which actual development has departed from development patterns proposed in the local comprehensive plan;

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<sup>346</sup>This language gives the local government the ability to undertake the general reexamination more often than every five years, for example, when there is a significant change in market conditions that will affect the assumptions and projections of the plan.

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5. the extent to which there have been or need to be significant changes in the assumptions, forecasts, projections, goals, policies, and guidelines that are the basis of the local comprehensive plan (including assumptions about population and economic forecasts and the local land market, changes in land-use projections and in designation of areas in the land-use element for projected land uses, and changes in any applicable state or regional plans or in the plans of adjoining local governments), and what amendments, if any, to the local comprehensive plan should consist of;
  6. the extent to which proposed actions contained in the program of implementation have been carried out; and
  7. whether a new local comprehensive plan should be prepared based on the magnitude of changes currently facing the local government.
- (d) The reexamination report shall contain an analysis of changes in, or alternatives to, existing land development regulations in response to the reexamination or revision of the local comprehensive plan. The report may also consider, but is not limited to considering:<sup>347</sup>
1. the relationship of the land development regulations to the vision statement and goals, policies, and guidelines in the local comprehensive plan;
  2. proposed actions for new land development regulations or amendments to existing regulations contained in the program of implementation of the local comprehensive plan;
  3. measures or actions that may be necessary in connection with a land supply monitoring system pursuant to Sections [7-204.1 (5) to (7)];
  4. the organization, clarity of language, internal consistency, and usability of the existing land development regulations;
  5. the adequacy of definitions contained in the existing land development regulations and whether they conflict with definitions in state statutes;
  6. the actual or potential beneficial and adverse impacts of the land development regulations upon development, including any unnecessary cost-generating requirements for housing and other provisions that may

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<sup>347</sup>See Stuart Meck, "A Model Request for Proposals for Drafting a New Zoning Code," *Zoning News* (Chicago: American Planning Association, September 1996): 1-4. Some of the topics in the list of considerations are drawn from this article.

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- adversely affect the supply of affordable housing, contained in the existing land development regulations;
7. improvements and exactions, prescribed in Section [8-601];
  8. development standards adopted as part of the improvements and exactions ordinance;
  9. development impact fees, prescribed in Section [8-602];
  10. the modification of the unified development review process established pursuant to Section [10-201 et seq.];
  11. the establishment or modification of a consolidated review process pursuant to Section [10-208];
  12. changes in fees for development permits;
  13. federal and state court decisions and federal or state statutes that may affect the validity of existing land development regulations;
  14. changes in the types or characteristics of land uses or development proposed to be located within the jurisdiction of the local government; and
  15. patterns in petitions for appeals, variances, and mediations.
- (2) If a local government fails to revise and adopt its comprehensive plan in more than [10] years and/or fails to produce a reexamination report that has been adopted by the legislative body pursuant to paragraph (1) above, the governor may declare the local government ineligible to receive funds under or more of the following grant programs: *[list grant programs and statutory citations]*.
- (a) The governor's declaration shall render the named local government ineligible to receive funds under those grant programs enumerated in the declaration.
  - (b) Eligibility to receive said funds under the grant programs enumerated in the governor's declaration shall be restored when the local government has adopted a comprehensive plan or reexamination report as required by this Section and the governor has been notified in writing of the same.

### **IMPLEMENTATION; AGREEMENTS WITH OTHER GOVERNMENT AND NONPROFIT ORGANIZATIONS**

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### *Commentary: Corridor Maps*<sup>348</sup>

#### WHAT IS A CORRIDOR MAP?

Section 7-501 authorizes a “corridor map,” which is different from the “official map” provided for by earlier model legislation. However, because the corridor map is analogous in some respects to the official map, some description and history of the official map are helpful in understanding the purposes to be served by the corridor map. The official map allows a local government to “reserve” designated land areas for later public improvements. Once a local government adopts an official map, the local government has the authority to prohibit development, subject to constitutional limitations, on the designated land areas, protecting the mapped area from development that would interfere with the future public improvement and, in most cases, increase the cost of the land.

Based on the local government’s comprehensive plan and its plan for thoroughfares, the local government produces a map of land indicated for future public use. The effect of such an indication is that the public is placed on notice that the local government or some other level of government intends in the future to “take” or formally acquire title to the land under eminent domain in order to provide the indicated public facility. The most common approach is for the local government to forbid, either outright or absent special circumstances, the construction of permanent structures on land indicated on the official map as future public land. At the time of condemnation, the government will not have to pay the added value of land with buildings or structures on it nor incur the substantial cost of removing the structures that are in the path of the project. Also, if permanent buildings and other structures are not allowed to be built in the way of public facilities, there will be fewer persons and businesses displaced by such projects.

The *Legislative Guidebook* recommends the use of corridor maps for transportation facilities only. The need for transportation corridors to be protected comes from their linear nature: an obstruction in the intended corridor will necessitate either increased expense or a detour of the corridor. Similar linear public uses, such as drainage facilities, may have a similarly strong need for protection. Although official map legislation has been used to protect parks and open space,<sup>349</sup>

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<sup>348</sup>Portions of this commentary are based, in part, on “A Working Paper on Official Maps,” by Brian W. Blaesser and Daniel R. Mandelker, in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 2*, Planning Advisory Service Report, No. 480/481 (Chicago: American Planning Association, September 1998). See also Daniel R. Mandelker and Brian W. Blaesser, *Corridor Preservation: Study of Legal and Institutional Barriers*, prepared for the Office of Real Estate Services (Washington, D.C.: Federal Highway Administration, 1996). Professor Mandelker also assisted in the drafting of the model corridor map statute in Section 7-501. Mr. Blaesser critiqued several drafts of the model statute as well.

<sup>349</sup>Delaware: Del. Code Ann. tit. 22, §701 (1997); Massachusetts: Mass. Gen. Laws ch. 41, §81E (1997); New York: N.Y. Gen. City. Law § 26 (1997); South Carolina: S.C. Code Ann. § 6-7-1230 (1997).

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and other non-linear public facilities,<sup>350</sup> as well as thoroughfares, the necessity of protecting such other, non-linear public uses is not typically as great nor as legally defensible; obstruction on one parcel of land can often be addressed by condemning another nearby parcel instead. Because the need to condemn is much less compelling in such cases, the probability of a successful legal challenge to the official map becomes greater. Consequently, the model statute presented in Section 7-501 below is limited to transportation facilities.

Many official map statutes provide that subdivision plats, upon approval, are incorporated into the official map.<sup>351</sup> The primary reason for such a provision is to coordinate the thoroughfares of the existing official map with the streets of subdivisions (which are generally minor streets). However, it is now recognized that the subdivision of land can interfere with land reservation through corridor maps, so land subdivision is treated as “development” under the model law that requires permission from the local government.

### THE TAKINGS PROBLEM

But there is a down side to the official map. As described above, the local comprehensive plan and the official map can provide predictability by identifying in advance the desired location of public facilities. However, the price of that predictability under an official mapping designation is that the landowner is unable to build upon land that has been so designated unless the official map legislation provides some form of relief. This has usually been provided through a variance when hardship can be demonstrated. A landowner banned from constructing permanent buildings or structures on his or her property for an indefinite period of time could argue that the government has deprived him or her of the reasonable use of his or her land. This is the scenario that the U.S. Supreme Court faced in *Lucas v. South Carolina Coastal Council*.<sup>352</sup> There, a South Carolina statute provided that no permanent structure could be built within a certain distance of the ocean shoreline. A landowner purchased a seaside parcel of land before the enactment of the statute with the intent to build a house similar to the existing houses in the neighborhood but was forbidden under the statute to construct any permanent structure on his parcel because of its proximity to the shoreline. The Supreme Court held that “where regulation denies all economically beneficial or productive use of land,”<sup>353</sup> there is a taking *per se*, entitling the land owner to compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution. In the Court’s words, a “total deprivation of

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<sup>350</sup>Pennsylvania: 53 Pa. Stat. Ann. §10401 (1997) (flood control basins, storm water management areas, and drainage easements).

<sup>351</sup>Alabama: Ala. Code §11-52-34 (1997); Massachusetts: Mass. Gen. Laws ch. 41, § 81E (1997); Oklahoma: Okla. Stat. Ann. §11-47-118 (1998); Pennsylvania: 53 Pa.Stat. §10403 (1997).

<sup>352</sup>505 U.S. 1003 (1992).

<sup>353</sup>505 U.S. 1015.

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beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation<sup>354</sup> by the government.

The U.S. Supreme Court in its *Lucas* decision determined that a **permanent** or **indefinite** deprivation of **all** reasonable usage of the land by government regulation constitutes a regulatory taking, since the government did not take title or possession of the property as in the typical physical takings case. Because all government regulation of the use of property impacts the value of that property to some degree, the Supreme Court has time and again been called upon to review laws that have limited or restricted the usage of the land and has generally upheld those laws as long as some reasonable use was feasible. Zoning, with its height, density, and use restrictions, limits the uses of a parcel of land but has been upheld as long as it did not make the land effectively useless.<sup>355</sup> Historic preservation laws, which forbid a landowner to change the outward appearance of his or her building, have also been upheld when the landowner could continue to make beneficial use of the interior of the building.<sup>356</sup>

In state cases on official maps, the courts have repeatedly ruled that merely indicating on an official map the intention to eventually take certain property for public use does not by itself effect a taking.<sup>357</sup> On the other hand, various courts have found that the prohibition of developing a parcel, or the down-zoning of a parcel of land, done in order to depress the value of the land in anticipation of a taking of the land under eminent domain, is itself a taking, entitling the land owner to the pre-regulation value of the land, which is the value when the owner could reasonably develop the land.<sup>358</sup>

The courts have also considered in several cases whether an official map is a taking. One New Jersey Supreme Court case found unconstitutional a state statute that required subdividers to reserve land shown on an official map for park and playground use for one year. The court held that the reservation amounted to a unilateral option to reserve the land and was constitutional only if the

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<sup>354</sup>505 U.S. 1017.

<sup>355</sup>*Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

<sup>356</sup>*Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>357</sup>*Arnold v. Prince George's County*, 311 A.2d 223 (Md. 1973) (indication of road in master plan not a taking); *Marvin E. Neiberg Real Estate Co. v. St. Louis County*, 488 S.W.2d 626 (Mo. 1973) (selection of highway route under agreement between county and state highway department for selection of secondary state highways not a taking).

<sup>358</sup>*People ex rel Dep't of Transp. v. Diversified Properties Co.*, III, 17 Cal. Rptr.2d 676 (Cal. App. 1993) (city refused to issue permit because state intended to built freeway on the land, and city and state had informal agreement to prevent development of intended freeway land); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266 (Tex. Civ. App. 1975) (subdivision plan rejected because of specific request of river authority which intended to build dam on property); *Plainfield v. Borough of Middlesex*, 173 A.2d 785 (N.J.L. Div. 1961) (privately-owned land previously zoned residential rezoned to allow only parks and schools). But see *Dep't of Transp. v. Lundberg*, 825 P.2d 641 (Ore. 1992) (citing requirement of sidewalk dedication not done to depress value of land for compensation), *cert. den'd* 506 U.S. 975 (1992).

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municipality compensated the landowner.<sup>359</sup> The State of New Jersey has now codified the compensation requirement for official map reservations in its subdivision control legislation.<sup>360</sup>

Courts may be less likely to find a taking under a state corridor preservation law when the state agency is required to purchase reserved property if development is denied. Another New Jersey case, *Kingston E. Realty Co. v. State*,<sup>361</sup> involved an official map statute that required the issuance of a permit if the state highway agency did not take any action to acquire the property within 120 days of the denial of a development permit by a municipality. The statute was upheld, and the court distinguished the case from *Lomarch* on the grounds that restriction was for a shorter period of time and was not a blanket reservation.

The Florida Supreme Court in *Joint Ventures, Inc. v. Department of Transportation*<sup>362</sup> held that the state's highway corridor mapping law, on its face, violated substantive due process because its very purpose was to prevent the development of land that would increase the cost of planned acquisition. In that case, the DOT's recordation of the map of reservation precluded the issuance of development permits. The court found that "freezing" property in this fashion was no different than government deliberately attempting to depress land values in anticipation of eminent domain proceedings – in effect, placing a "heavy governmental thumb on the scales to ensure that in the forthcoming dispute between it and one or more of its citizens, the scales will tip in its own favor."<sup>363</sup>

In a later decision, *Palm Beach County v. Wright*,<sup>364</sup> the Florida Supreme Court held that an unrecorded county thoroughfare map adopted as part of the mandatory county plan was *not* a taking on its face, even though the effect of the map was to prohibit all development in the corridor that would impede future highway construction. The county noted that the thoroughfare map was a long-range planning tool tied to its comprehensive plan and did not designate the exact routes of future highways. The county also contended the map provided enough flexibility so that it could not be determined whether a taking had occurred until a developer submitted an application for development. At that time the county would be able to work with the developer to mitigate the effect of the map such as density transfers and development clustering to avoid the highway right-of-

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<sup>359</sup>*Lomarch Corp. v. City of Englewood*, 237 A.2d 881 (N.J. 1968). See also *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983) (invalidating official map reservation for highway that was in effect for 14 years); *Jensen v. City of New York*, 369 N.E.2d 1179 (N.Y. 1977) (reservation made property "virtually unsalable"); *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951) (invalidating reservation for parks and playgrounds although reservation for streets previously upheld).

<sup>360</sup>N.J. Stat. Ann. §40:55D-44.

<sup>361</sup>330 A.2d. 40 (N.J. App. Div. 1975). Contra *Lachman v. Hall*, 364 A.2d 1244 (Del. Ch. 1976).

<sup>362</sup>563 So.2d 622 (Fla. 1990).

<sup>363</sup>563 So.2d at 626.

<sup>364</sup>641 So.2d 50 (Fla. 1994).

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way. The county also contended that the map would have the effect of increasing the value of properties within the corridor.

The court's reasons for upholding the thoroughfare map in this case while invalidating the corridor mapping law on its face in the *Joint Ventures* case are instructive for designing corridor map legislation. Specifically, the court noted that the thoroughfare map limits development only to the extent necessary to ensure compatibility with future land use, is *not* recorded as were the maps of reservation, may be amended twice a year, and does not precisely indicate road locations.<sup>365</sup> When a landowner/developer submits a development approval application, the county, as the permitting authority, has the flexibility to ameliorate hardships caused by the plan. It can work with the landowner/developer to “(1) assure that the routes through the land will maximize development potential; (2) offer development opportunities for clustering the increasing densities at key nodes and parcels off the corridors; (3) grant alternative and more valuable uses; (4) avoid loss of value that results from taking by using development rights transfer and credit for impact fees; and, if necessary, (5) alter or change the road pattern.”<sup>366</sup>

Two U.S. Supreme Court decisions are important in the discussion of official maps. Both address the use of exactions, such as a requirement that a developer dedicate land located in a mapped corridor to a state or local government for future use as a roadway. In *Nollan v. California Coastal Commission*,<sup>367</sup> the owners of a seaside house applied for a permit to build a larger house, which the state Coastal Commission would not approve unless they dedicated a portion of their property directly along the beach as a easement of the public to cross their property. The Court invalidated the permit requirement, applying a *nexus* test which limits dedications to land necessary to meet needs created by the new development; that is, where there is a “nexus” between the dedication extracted from the developer and the demand for public services created by the development. Land dedications for public facilities are invalid when a development does not create the need for the dedication. The Supreme Court clarified the meaning of the *Nollan* case for exactions in its *Dolan* decision, decided a few years later.

In *Dolan v. City of Tigard*,<sup>368</sup> the city adopted a comprehensive plan noting that flooding had occurred along a creek. The plan suggested a number of improvements to the creek basin and recommended that the floodplain be kept free of structures and preserved as greenways to minimize flood damage. A plan for the downtown area proposed a pedestrian/bicycle pathway intended to encourage alternatives to automobile transportation for short trips in the business district. The Dolans, owners of a store in the city's central business district, which was near the creek, planned to double the size of their store, pave a 39-space parking lot, and build an additional structure on the

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<sup>365</sup>641 So.2d at 53.

<sup>366</sup>641 So.2d at 52.

<sup>367</sup>483 U.S. 625 (1987).

<sup>368</sup>512 U.S. 374 (1994).

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property for a complementary business. To implement its plans and land development code, the city conditioned the Dolans' building permit with a requirement that they dedicate roughly ten percent of their property to the city. The dedication included land within the floodplain for the improvement of a storm drainage system along the creek and a 15-foot adjacent strip for a pedestrian-bicycle pathway. To justify the dedication, the city found that the pathway would offset traffic demand and relieve congestion on nearby streets, and that the floodplain dedication mitigated the increase in stormwater runoff from the Dolan property. The owners challenged the dedication requirement in court, and the case proceeded ultimately to the U.S. Supreme Court.

The Court held a “nexus” existed, as required by the *Nollan* case, between a legitimate government purpose and the permit condition on the Dolan property. But the Court found that a taking had occurred because “the degree of the exactions demanded by the city's permit conditions [did not] bear the required relationship to the projected impact of [plaintiffs'] proposed development.”<sup>369</sup> The Court reviewed the tests that state courts had adopted to decide this question and rejected all of them. It held the “reasonable relationship” test adopted by a majority of state courts was closest to “the federal constitutional norm,” but rejected it because it is “confusingly similar”<sup>370</sup> to the minimal level of scrutiny courts require under the equal protection clause.

Instead, the Court adopted a “rough proportionality” test to determine whether a taking has occurred under the federal constitution. The Court explained that “[n]o 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.”<sup>371</sup> In a footnote, the Court added that the city had made an “adjudicative decision” to condition plaintiffs' building permit, and that “in this situation” the burden of proof rests with the city. An adjudicative decision, also known a quasi-judicial decision, requires the decision maker, as the basis for its decision, to determine the facts of a matter through a hearing, to make findings of fact, and to exercise discretion of a judicial nature in weighing the evidence and arriving at its decision. *Dolan* shifted the burden of proof because the exaction was imposed through adjudication as a condition on the developer.

The test the Court adopted for exactions in *Dolan* requires local governments to justify their exactions more carefully than the test adopted by a majority of state courts, and property owners can rely on the federal test by suing under the federal Constitution in state courts. However, the Court in the *Dolan* case appears to rely on the adjudicative nature of the city's dedication requirement, while an exaction in an official map program is more in the nature of legislative action, regulating the actions of many, than an adjudication of the rights and duties of one. Nevertheless, because “rough proportionality” may be found by the Court to be the applicable test even in non-adjudicative instances, it would be wise for a local government to support an exaction in an official map area with

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<sup>369</sup>512 U.S. at 388.

<sup>370</sup>512 U.S. at 391.

<sup>371</sup>512 U.S. at 391.

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careful planning preceding the designation of a transportation corridor and with studies or other documentation that demonstrate that the exaction is in fact related to transportation needs.

### APPROACHES TO THE TAKINGS PROBLEM

One of the earliest comprehensive planning laws, and the model for state planning enabling acts for decades, is the *Standard City Planning Enabling Act* (SCPEA).<sup>372</sup> The SCPEA declared that the official map is only a reservation of the land indicated on the map as for public use, and not the establishment of a right-of-way, nor the taking of land therefor. The SCPEA also required the payment of compensation at the time the map was adopted, but not for improvements added later. The logic behind this approach was that, having received notice that the land was intended for eventual public use, the owner should not be entitled to compensation for building in the intended right-of-way. This approach to the takings problem is not workable, however, because, in failing to provide compensation for the later improvements, it opens the local government to takings claims based on inadequate compensation.

Another approach to official maps was proposed in 1935 by Alfred Bettman in *Model Laws For Planning Cities, Counties, and States*.<sup>373</sup> The proposed Municipal Mapped Streets Act, and the parallel County and Regional Mapped Roads Act, required that the planning commission have adopted a master plan including a major street plan before the municipal or county council could adopt an official map. Before adopting or amending any official map, the council has to hold a public hearing, for which all owners of land affected by the proposed map must receive notice by mail. Once the official map is adopted, the city or county may provide by ordinance that no permit be issued for any building or structure that will lie in whole or in part in a street indicated on the map. To relieve potential hardship under such a moratorium, the ordinance shall provide for the grant, by the board of zoning appeals or another designated body, of permits to build on mapped streets. The board must hold a hearing after proper notice before making a decision, and can place area, height, and other restrictions and conditions on the issuance of such a permit. The board cannot issue a permit to build in a mapped street unless it finds that the property of which the mapped street is a part “will not yield a reasonable return” without such permit or that, after balancing the city’s or county’s interest in preserving the official map with the owner’s interest in making use of his or her land, the permit is required by “justice and equity.”

The solution applied in a model law by the Advisory Commission on Intergovernmental Relations<sup>374</sup> is to restrict the development of the dedicated land but to also provide that, once a

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<sup>372</sup>Advisory Committee on City Planning and Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (Washington D.C.: U.S. GPO, 1928), 34-43.

<sup>373</sup>Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States* (Cambridge, Mass.: Harvard University Press, 1935), 89-92, 110-113.

<sup>374</sup>Advisory Commission on Intergovernmental Relations (ACIR), “An Act to Authorize Local Governments to Adopt Official Maps, in *ACIR State Legislative Program: Environment, Land Use, and Growth Policy, Vol. 5* (Washington, D.C.: U.S. GPO, 1975), 116, 118.

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landowner applies for a permit to develop on dedicated land, the local government has a certain specific period of time to either commence eminent domain proceedings against the land in question or to amend the official map so that the land in question is no longer dedicated. This allows the government to avoid dealing with the problem until the landowner actually wants to develop the land. However, once the problem arises and the owner seeks permission to develop the dedicated land, the limitation of this approach becomes apparent: the government has only the choice of buying the property, whether the government is ready to use it for the public project or not, or changing the map so that the land in question is no longer set aside for a public use. A modern approach would give the government several alternate options.

Another approach is to forbid the construction of buildings or permanent structures on land dedicated on an official map, but to then allow a variance in certain circumstances at the time the landowner applies for a permit to build. Such a procedure is contained in the 1935 *Model Laws for Planning*. A similar procedure is followed in New Jersey,<sup>375</sup> where if the parcel of land in a dedicated road bed or other area “cannot yield a reasonable return to the owner unless a building permit is granted,” the board of adjustment or planning board may order the issuance of a permit to build on the dedicated property “which will as little as practicable increase the cost of opening such street, or tend to cause a minimum change of the official map,” and the board may place reasonable conditions on the issuance of the permit.

### **FEATURES OF THE MODEL STATUTE**

The corridor map in Section 7-501 below reserves land only for the construction of transportation facilities, for the reasons above. The corridor map proposed in this Section is intended for use as a positive and flexible regulatory technique that can implement the transportation element of the comprehensive plan by coordinating new development with the provision of transportation facilities. A corridor map must be consistent with the local comprehensive plan, especially with the thoroughfare plan which is a part of the comprehensive plan. Therefore, no local government can adopt a corridor map unless it has first adopted a local comprehensive plan with a thoroughfare plan. The map is prepared by the local planning agency but takes effect only upon adoption by the local legislature after public hearing. Because governmental units other than the local government, such as county and state highway departments, may intend to construct roads within the local government’s jurisdiction, and those roads are included in the thoroughfare plan, the local planning agency cooperates with these other governmental units in formulating the official map. In addition, before the map can be adopted, other governmental units whose intended roads are indicated on the map can formally object to that indication and have the land reserved on their behalf removed from the map.

The effect of reservation is to forbid the construction or expansion of permanent structures in the intended right-of-way of planned transportation facilities as indicated on the map, and the owner of land including reserved land explicitly may build on the non-reserved portion of the land and may

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<sup>375</sup>N.J. Stat. Ann. §40:55D-34 (1997).

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use the reserved portion as long as no permanent structure is placed there or expanded. The local government, or the governmental unit on whose behalf the land is reserved, may exercise the power of eminent domain at any time within the reservation period, and may at its discretion employ options to purchase. The designation of land on a corridor map loses effect after five years unless the intended transportation facilities have in that time been built or at least eminent domain proceedings have commenced against the reserved land.

If a landowner applies for a permit for development on reserved land, there must be a hearing, open to the public, on the permit application. The local planning commission, planning agency, or a hearing officer may conduct the hearing, and after the hearing recommends a determination of the case from a list of options. These include (1) approving the permit, (2) approving it conditionally, (3) denying it, (4) staying proceedings for a specific period of time, (5) modifying the permit application and then granting it as modified, (6) eliminating or altering the reservation, (7) compensating the owner through TDRs or other similar mechanisms, (8) taking the right-of-way by eminent domain, or (9) obtaining voluntarily or by eminent domain a negative easement over the reserved land – that is, a contractual duty, running with the land, on the part of the owner not to build on the land, akin to a conservation easement, or purchasing an option on the land. Its recommendations are forwarded to the local legislative body, which can adopt or reject the recommendations or remand the matter for further hearings. For instance, if the recommendation is made to take the reserved land by eminent domain, and the local government (or other agency) does not commence to do so within thirty days, there must automatically be a new hearing and a reconsideration of the recommendation.

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### 7-501 Corridor Map

- (1) A local government may create and adopt a corridor map for its territory that designates land intended for the construction or improvement of transportation facilities. The map shall include land designated by the [state transportation department] for the construction or improvement of transportation facilities. As used in this Section, the term “transportation facilities” includes streets, highways, public transit, bikeways, and trails.
- ◆ The model act purposely uses the term “corridor map” rather than “official map” to distinguish it from the more precise official map authorized by earlier model legislation. As suggested by the commentary, the map is limited to streets and other linear transportation facilities. The dedication or reservation of land for parks and schools, and the collection of impact fees for park and school facilities, are usually carried out in the subdivision approval or building permit process, where they can be done more effectively.

Many states authorize state transportation agencies to adopt maps or by other means designate land intended for transportation facilities. It is important that a local corridor map include these

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facilities so that local governments can take these state facilities into account when exercising land use control powers. Some states require the inclusion of planned state facilities in local plans. See Del. Code Ann. tit. 17, § 145.

- (2) The purposes of this Section are to:
  - (a) implement the local comprehensive plan, and especially the thoroughfare plan required by Section [7-205(5)(a)(3)], by reserving land needed for future transportation facilities designated by the plan;
  - (b) provide a basis for coordinating the provision of transportation facilities with new development by designating corridors where the construction and improvement of transportation facilities is expected; and
  - (c) protect the rights of landowners whose land is reserved in a corridor map.
- ◆ The statement of purpose emphasizes the use of the corridor map to implement the local comprehensive plan. The map is not just simply a technique to reserve land for condemnation. It is an important control that can reserve land for future transportation facilities so that new development and the construction of these facilities at appropriate locations can be coordinated.
  - (3) The local planning agency may prepare a corridor map and the local legislative body may adopt a corridor map as provided in this Section.
    - (a) In preparing the corridor map, the local planning agency shall have the cooperation of any other agency of the local government it requires, and may cooperate and consult with other state and local governmental units in identifying land intended by those governmental units for transportation facilities.
- ◆ The local comprehensive plan should indicate any transportation facilities which are intended for construction or improvement. The purpose of this section is to authorize the local planning agency to cooperate with any state or local governmental units responsible for these facilities to identify in more detail, as necessary, the corridors in which these facilities will be constructed or improved.
  - (b) A local government may adopt a corridor map only if has first adopted a local comprehensive plan pursuant to Section [7-403] that includes the thoroughfare plan required by Section [7-205(5)(a)(3)], and only if the corridor map is found to be consistent with the local comprehensive plan and thoroughfare plan.
- ◆ Because a corridor map is intended to implement the local comprehensive plan, a local government may not adopt one unless it has a comprehensive plan and unless the map is consistent with that plan. A corridor map adopted when there is no comprehensive plan, or that

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is not consistent with a local comprehensive plan, would be subject to challenge as being unauthorized by the statute.

- (c) The local planning agency may propose a corridor map that establishes the width and termini of a corridor as necessary to allow flexibility in planning the design of a transportation facility. When it proposes a corridor map, the local planning agency shall minimize, wherever feasible, the disruption and relocation of residential neighborhoods, residences, and businesses, and interference with utility facilities. Land included in the corridor map is designated as “reserved land” in this Section.
- ◆ A proposal by the local planning agency is the first step in the adoption of a corridor map. The map itself is general rather than parcel-specific. However, the Section does not prohibit a corridor map that precisely identifies the land covered by the map, if the local government wants to adopt such a map. This subparagraph is based, in part, on the New Hampshire corridor protection act, N.H. Rev. Stat. Ann. § 230-A:2.
  - (4) Before the public hearing required by paragraph (5), below, if the proposed corridor map includes land intended for transportation facilities to be constructed or improved by governmental units other than the local government, the local planning agency shall submit a copy of the proposed corridor map to the chief executive officer of each such governmental unit.
    - (a) Such other governmental units shall review the proposed corridor map and shall, within [30] days of receipt of the map, indicate in writing any reserved land for transportation facilities for which they are responsible that they want removed from the corridor map.
    - (b) The local planning agency shall remove any land identified under subparagraph (a) from the corridor map.
- ◆ This is a formal approval by other governmental units, including state agencies, of the inclusion in the corridor map of land they intend to take for public use. The local planning agency should already have consulted with the other governmental units in drafting the corridor map, pursuant to subparagraph (3)(a) above. Notice that the agencies to be consulted include the state transportation agency.
  - (5) The [local planning agency *or* local planning commission] may recommend a corridor map to the local legislative body only after [the agency *or* the local planning commission] has scheduled and held a public hearing on the map.
    - (a) At least [30] days before the hearing, the local planning agency shall notify the public of the date, time, place, and nature of the hearing by publication in a newspaper of general circulation in the territory of the local government. The local

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planning agency may also give notice, which may include a copy of the draft map or amendment, by publication on a computer-accessible information network or other appropriate means.

- (b) The local planning agency shall notify all owners of parcels of land that include proposed reserved land of the date, time, place, and nature of the public hearing by certified mail at least [30] days before the hearing.
- (c) The local planning agency shall notify local governments that border upon the local government proposing the corridor map, and state or local governmental units who are intended to use land indicated as reserved land on the proposed corridor map, in writing at least [30] days before the hearing by the local planning agency of the date, time, and place of the hearing, by personal service, certified mail, or facsimile to the chief executive officers of the governmental units.
- (d) After the public hearing, the [local planning agency *or* local planning commission] may recommend the corridor map to the local legislative body for adoption, either with or without modifications.
- (e) The local legislative body may adopt the corridor map by ordinance after holding a public hearing, as provided by local ordinance, if it makes written findings that the corridor map is consistent with the local comprehensive plan and thoroughfare plan, or may return the corridor map to the [local planning agency *and/or* local planning commission] for additional consideration.
- (f) A local government may amend a corridor map at any time under the procedures provided by this Section.

◆ Adoption by ordinance is essential to make the map legally binding. If the legislative body decides not to adopt the map, reconsideration by the planning agency is appropriate so the agency can redesign the map to take into account any problems or objections that arose at the hearings. The planning agency can then resubmit the map for additional consideration by the legislative body.

- (6) Upon the adoption or amendment of a corridor map, the local planning agency shall:
  - (a) maintain a true copy of the corridor map accessible to the public at the offices of the local government or another place equally or more accessible to the public, and
  - (b) send a written notice to all owners of parcels of land that include reserved land, notifying them that a portion of their parcel of land is reserved land and describing the provisions of this Section.
- (7) After the adoption of a corridor map:

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- (a) Reserved land shall be considered reserved for public use but shall not, solely by the adoption of the corridor map, be considered occupied, taken, or opened for public use, nor shall the local government or other governmental units, solely by the adoption of the corridor map, become responsible for the improvement or maintenance of reserved land that they do not own.
  - (b) The local government and such other governmental units shall by this Section have the authority, but not the obligation, to negotiate and enter into option contracts for reserved land.
- ◆ A local government may, for reasons of local politics or increased certainty, prefer to have an option to buy reserved land rather than having no pre-existing rights in the land except the power to forbid construction on reserved land. However, this Section should not be interpreted as in any way compelling local governments to use land-purchase options.
  - (8) After the adoption of a corridor map:
    - (a) The local government and other governmental units intended to make public use of reserved land shall by this Section have full authority to exercise the power of eminent domain over reserved land at any time.
    - (b) If the local government or such other governmental units commence eminent domain proceedings against reserved land that is the subject of an application for development under this Section, the proceeding under the application shall cease.
  - (9) No owner of real property shall carry out development upon reserved land, except as provided in this Section. No government shall issue any permit for development except pursuant to the procedure and in compliance with the criteria set forth in this Section.
    - (a) This Section does not forbid or restrict the use of any reserved land that does not constitute the development of that land, nor does this Section forbid or restrict development on the unreserved portion of any reserved land.
- ◆ This paragraph expressly preserves the right of a landowner to use reserved land for purposes other than for development, as defined in this Section, and to develop the unreserved portion of his or her parcel.
  - (b) Nothing in this Section shall be interpreted as authorizing the rezoning of reserved land or of parcels of land that include reserved land with the objective of restricting the use of reserved land in anticipation of eminent domain proceedings to acquire the reserved land.
- ◆ This provision prevents a local government from downzoning land with the goal of reducing its market value in anticipation of a taking, which would be a violation of the Due Process Clause

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of the Fourteenth Amendment to the U.S. Constitution. It is directly related to the preceding subparagraph, which preserves the landowner's right to use reserved land.

- (10) An owner of reserved land who proposes to develop reserved land shall apply to the [local planning agency *or* local planning commission *or* hearing examiner] for a development permit. The applicant shall sign such written application, which shall include:
- ◆ Section 10-301 *et seq.* of the *Legislative Guidebook* provide for the appointment of hearing examiners by the local government.
- (a) the name, address, and telephone number of the applicant;
  - (b) if the applicant is represented by legal counsel, a statement to that effect and the name and business address, telephone number, and facsimile number of counsel;
  - (c) a legal description of the relevant parcel of land owned by the applicant, including a description of the portion thereof which is reserved land;
  - (d) a statement of how the applicant proposes to develop the reserved land, including a site plan map drawn at a scale sufficient to show building location, thoroughfare and pedestrian circulation, open spaces, parking and such other matters relating to the development of the reserved land as may be required by land development regulation.
  - (e) a statement of how the proposed development complies with all other applicable land development and building regulations;
  - (f) a statement of how the proposed development has been planned so as to mitigate, as much as possible, its impact on the preservation of the mapped corridor; and
  - (g) any relevant information to support the aforementioned statements.
- (11) Upon receiving the application, the [local planning agency *or* local planning commission *or* hearing officer] shall schedule a hearing on the application.
- (a) The hearing shall be set by the local planning agency for a date no later than [45] days from receipt of the application.
  - (b) The applicant shall be notified by the local planning agency in writing of the date, time, and place of the hearing within [5] business days of receipt of the application, by personal service or certified mail or, if represented by legal counsel, by personal service, certified mail, or facsimile to legal counsel.

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- (c) If the reserved land is reserved for public use by a governmental unit other than the local government, that governmental unit shall be notified by the local planning agency in writing of the date, time, and place of the hearing within [5] business days of receipt of the application, by personal service, certified mail, or facsimile to the chief executive officer of the governmental unit.
  - (d) The public shall be given notice by the local planning agency at least [30] days before the date of the hearing, of the date, time, place, and purpose of the hearing by publication in a newspaper of general circulation in the territory of the local government. The local planning agency may also give such notice, which may include a copy of the application and supporting documents, by publication on a computer-accessible information network or other appropriate means.
  - (e) The hearing shall be open to the public. The applicant shall, at the hearing, have an opportunity, personally or through counsel, to present evidence and argument to the [local planning agency *or* local planning commission *or* hearing officer] in support of his or her application, as shall any governmental unit that is due notice pursuant to subparagraph(c)above.
- (12) Within [15] days of the completion of the hearing, the [local planning agency *or* local planning commission *or* hearing officer] shall produce a written report containing its recommendations on the applicant's proposal for development and findings and conclusions supporting its recommendations. The [local planning agency *or* local planning commission *or* hearing officer] may recommend any one or a combination of the following:
- (a) approval of the development as proposed, with or without conditions;
  - (b) denial of the development as proposed;
  - (c) a stay of proceedings for a defined period of time not to exceed [6] months;
  - (d) modification of the mapped corridor to remove of all or part of the reserved land from the mapped corridor, and the issuance of a development permit for development on land removed from the mapped corridor, with or without conditions;
  - (e) modification of the proposed development and the issuance of a development permit for the development as modified, with or without conditions;
  - (f) mitigation of the proposed development, or approval of the development with conditions, through:
    - 1. the transfer of development rights from the reserved land, pursuant to a transfer of development rights ordinance adopted pursuant to Section [9-401], to land outside the reserved land; and/or

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2. credit against exactions owed by the owner of the reserved land, pursuant to an exactions ordinance adopted pursuant to Section [8-601], either on the reserved land or other land;
- ◆ Sections 8-601 (Land Development Exactions) and 9-401 (Transfer of Development Rights) will be included in the final version of the *Legislative Guidebook*.
- (g) acquisition of all or part of the reserved land by the governmental unit responsible for the transportation facilities to be constructed on the reserved land;
  - (h) conveyance of a corridor preservation restriction by the owner of the reserved land on all or part of the reserved land to the governmental unit responsible for the transportation facilities;
  - (i) acquisition of a corridor preservation restriction on all or part of the reserved land by the government agency responsible for the transportation facilities; and
  - (j) the purchase of an option to buy the reserved land.
- ◆ Paragraph (12) authorizes a variety of recommendations on the development proposal that can preserve the mapped corridor as much as possible while at the same time mitigating the impact of corridor preservation on the landowner who proposed development. For example, it may be possible to reduce or even reject the development proposed for the reserved land if sufficient offsets are provided through transfer of development rights or credits against exactions. The paragraph also contemplates recommendations that include internal clustering of development, and other modifications in the development proposal, that can allow the local government to approve the development without impairing the preservation corridor. Acquisition of a corridor preservation restriction is an alternative to full acquisition that can reduce preservation costs.
- (13) Within [5] business days after it has produced its report, the [local planning agency *or* local planning commission *or* hearing officer] shall:
    - (a) send [10] copies of its report to the legislative body;
    - (b) serve the report upon the applicant by personal service or certified mail or, if represented by legal counsel, by personal service, certified mail, or facsimile to legal counsel; and
    - (c) serve the report upon any other governmental unit that is responsible for transportation facilities to be constructed or improved on the reserved land within [5] business days of the production of the report, by personal service, certified mail, or facsimile to the chief executive officer of the governmental unit.

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- (14) If the report recommends acquisition of the reserved land, or acquisition of a corridor preservation restriction on the reserved land, the governmental unit responsible for the construction or improvement of a transportation facility on the reserved land shall commence proceedings to acquire the reserved land or corridor preservation restriction within [30] days. If the government agency does not commence proceedings within [30] days, the [local planning agency *or* local planning commission *or* hearing officer] shall conduct additional hearings on the development proposal, as provided in this Section, and issue a new report and recommendations, as provided in paragraphs (12) and (13) above, which shall not include a recommendation of acquisition.
- ◆ The government agency responsible for the transportation facility is given a set period to purchase the property or a corridor preservation restriction. This prevents delay caused by the agency claiming that it will acquire the property but making no timely effort to do so. If the acquisition is not commenced in that period, the additional hearings and new recommendations sustain the possibility of a compromise or mutually-acceptable solution even after the rejection of an recommendation of acquisition. It should be noted that the agency may be a state agency. If there is a similar state law authorizing corridor preservation by the state transportation department, legislation may be required to integrate the requirements of this Section with that law.
- (15) If the report does not recommend acquisition of the reserved land or a corridor preservation restriction, or if the governmental unit responsible for the transportation facility does not acquire the reserved land or a corridor preservation restriction in the reserved land, the local legislative body shall hold a hearing on the report of the [local planning agency *or* local planning commission *or* hearing officer] after notice in writing to the applicant of the date, time, and place of the hearing, by personal service or certified mail or, if represented by legal counsel, by personal service, certified mail, or facsimile to legal counsel. Following the hearing, the local legislative body may accept or reject the report, accept the report with modifications, or return the report to the [local planning agency *or* local planning commission *or* hearing officer] for additional consideration.
- (16) If the local legislative body approves the development proposed by the applicant, either with or without conditions:
- (a) The [*development permit officer or some other enforcement official*] shall issue a development permit to the applicant stating that the applicant may carry out the approved development on the reserved land and must also comply with all other laws and regulations that apply to the development that the local government has adopted, unless the local legislative body modified any applicable laws or regulations when it approved the development permit.
- ◆ This subparagraph clarifies the relationship between the corridor map development permit and other local government regulations, including subdivision regulations. All other regulations continue to apply, and what another ordinance forbids, the corridor map development permit

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does not allow unless the local legislative body modified these regulations in approving the development permit.

- (b) The local legislative body shall amend the corridor map to incorporate the approved development, including any site plans of the proposed development, into the corridor map.

- (17) A decision by the local legislative body on a report on a proposal for development on reserved land is a “land-use action” subject to appeal as provided in Section [to be indicated].

◆ Provisions are to be made for the appeal of “land-use actions” in the model statutes. This paragraph makes it clear that these provisions apply to decisions by the local legislative body on proposals to develop reserved land.

- (18) A corridor map shall terminate and shall be of no effect unless, within [5] years, the governmental unit responsible for the transportation facility to be constructed or improved on reserved land:

- (a) has commenced proceedings to acquire the right-of-way for the transportation facility; or

- (b) has begun the construction or improvement of the transportation facility.

◆ The case law, as discussed above, shows that a temporary restriction of land use, especially one of a fixed duration, is more likely to be upheld against constitutional challenge. This paragraph provides that any particular parcel of reserved land becomes no longer reserved if the government agency does not, within a set period, take steps to construct or improve the transportation facility that is the basis for the corridor map. This does not preclude the adoption of a new corridor map indicating the same reserved lands, but does require that adoption to undergo the original adoption procedure, including consultation with other governmental units and public hearings. Note that the bracketed five-year term of the corridor maps is a recommendation, since that period is consistent with the requirement to review the local comprehensive plan under Section 7-406 above. Moreover, the challenge to a restriction on a specific parcel of land that is reserved can be initiated at any time.

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### ***Commentary: Local Capital Improvement Program and Capital Budget***

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Alongside zoning and subdivision control, the capital improvement program (CIP) – a five-year schedule of capital improvement projects – is one of the local government’s most powerful tools for implementing a local comprehensive plan. By carefully selecting and timing capital projects, the CIP process can ensure that a local government repairs and replaces existing infrastructure, meets needs in mature, growing and redeveloping areas, coordinates activities of various government departments, and ultimately influences the pace and quality of development in a community.

The CIP document itself consists of project descriptions and schedules and tables showing revenue sources and expenditures by year. Capital improvements include major non-recurring expenditures for such projects as civic centers, libraries, museums, fire and police stations, parks, playgrounds, street construction or reconstruction, sewage and water treatment plants, water and sewer lines, and swimming pools. Costs associated with capital improvement projects include architectural and engineering fees, feasibility studies, land appraisal and acquisition, and construction. The first year of the CIP becomes capital budget, when it is adopted by ordinance along with the operating budget by the legislative body.<sup>376</sup> Once the capital budget has been adopted, then the local government departments can begin to spend money on individual projects, contract for architectural and engineering design, acquire land and easements, sell bonds as necessary, and send out requests for construction bids.

State planning enabling legislation (or municipal charters) may allow or direct the preparation of CIPs. New Jersey statutes, for example, authorize the governing body to formally designate the planning board (as it is called) as the group that formulates the CIP, coordinating its preparation with municipal officials and the local school board.<sup>377</sup> In Florida, the local comprehensive plan must include a capital improvement element, to be reviewed on an annual basis.<sup>378</sup> The element must contain standards to ensure the availability of public facilities at acceptable levels of public service.

For urban and rapidly urbanizing counties and the cities within them that are required to plan by statute as well as local governments that choose to plan even if state law does not mandate it, Washington state requires that the comprehensive plan include a capital facilities plan element consisting of:

- (a) an inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within project funding capacity and clearly identifies sources of public monies for such purposes; and (e) a requirement to

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<sup>376</sup>A local government’s fiscal capacity, priorities, and project management capacity may change over time and it should have the flexibility to add, subtract, or change the sequence of projects in a CIP. A shortfall in general fund revenues may result in the local government postponing a project, such as purchase of land for and development of a neighborhood park, until it can accumulate enough money to pay for it.

<sup>377</sup>N.J. Stat. Ann. §§40:55D-29 to 30 (1997).

<sup>378</sup>Fla. Stat. §163.3177(3)(a) (1997).

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assess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, the capital facilities plan element, and financing plan within the capital facilities plan are coordinated and consistent.<sup>379</sup>

In Nevada, a local government cannot impose impact fees unless it first prepares a CIP, which must be updated at least every three years.<sup>380</sup> This requirement is intended to ensure that local governments adequately plan how the impact fee revenues are to be spent after they have been collected from developers. The statute requires that such revenues be placed in a separate interest-bearing account that clearly identifies the category of capital improvement within the service area for which the fee was imposed. Other states have a similar requirement for the preparation and adoption of a CIP as a condition of imposing impact fees.<sup>381</sup>

The following Section provides for the preparation of a CIP and the adoption, by ordinance, of a local capital budget. The CIP and capital budget are intended to carry out the program of implementation contained in the local comprehensive plan. The legislative body first designates the local planning agency or some other department to be responsible for overseeing the CIP's preparation for the legislative body's consideration on an annual basis. Once it has received the draft CIP, the legislative body may refer it to the local planning commission, if one exists, for recommendations. The legislative body may hold a public hearing on the CIP before adopting the local capital budget portion of the CIP by ordinance to cover expenses for capital improvements for the fiscal year.

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### 7-502 Local Capital Improvement Program; Adoption of Local Capital Budget

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<sup>379</sup>Wash. Rev. Code §36.70A.070(3) (1997).

<sup>380</sup>Nev. Rev. Stat. §278B.150 *et seq.* (1997).

<sup>381</sup>Ariz. Rev. Stat. Ann. §11-1106 (Supp. 1997) (applying to counties that adopt impact fees); Ga. Code Ann. §36-71-3(a) (Supp. 1997) (CIP as part of adopted comprehensive plan); Haw. Rev. Stat. §46-142 (1997); Idaho Code §67-8206 (Supp. 1997) (CIP must be based on projections of land uses and population over at least a 20-year period); 604 Ill. Comp. Stat. Ann. §5/5-905(h) and §5/5-910 (1997) (comprehensive road improvement plan based on land use assumptions projected over 10-year period); Ind. Code Ann. §36-7-4-1318 (Burns Supp. 1997) (zone improvement plan based on projected development over 10-year period); Me. Rev. Stat. Ann. tit. 30-A, §4354(2)(C) (West Supp. 1997) (schedule for use of funds to be consistent with capital investment component of comprehensive plan); N.H. Rev. Stat. Ann. §674:21(V)(b) (1997); N.M. Stat. Ann. §5-8-3 to 5-8-5 (1997); Or. Rev. Stat. §223.309 (1997); Pa. Stat. Ann. tit. 53, §10502(A)(a)(Supp. 1997) (CIP must reflect land use assumptions projected over period of at least five years); Tex. Local Govt. Code Ann. §395.046 (West Supp. 1997) (CIP to be based on land use assumptions projected over period of at least 10 years); Vt. Stat. Ann. tit. 24, §5203(A)(a) (1997); Va. Code Ann. §15.2-2321 (Michie Supp. 1997) (CIP adopted as amendment to comprehensive plan or 6-year plan for county secondary roads); W. Va. Code §7-20-6(a)(7) (1997).

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- (1) In order to carry out proposed projects contained in the program of implementation of a local comprehensive plan, a local government [shall *or* may] on an annual basis prepare a local capital improvement program (CIP) and adopt a local capital budget. The legislative body shall designate either the local planning agency or another department of the local government to be responsible for formulating and revising the CIP for its consideration.
- (2) The CIP shall include, but shall not be limited to:
  - (a) a description of each local capital improvement, its costs, its sources of funds, its projected year(s) of implementation, its probable annual operating and maintenance costs,<sup>382</sup> its probable revenues, if applicable, and a statement of the relationship of the local capital improvement to the local comprehensive plan;
  - (b) a description of priorities used in selecting and scheduling local capital improvements, as may be established by the legislative body;
  - (c) a projection of available funds for all local capital improvements during the [5]-year period;
  - (d) an estimate of indebtedness to be incurred by the issuance of bonds for local capital improvements proposed over the [5]-year period; and
  - (e) summary tables showing, by year and by fund type, beginning fund<sup>383</sup> balances, projected revenues or sources of funds, projected expenditures for all local capital improvements for that year, and ending fund balances.
- (3) The local planning agency or other designated department shall request proposals for local capital improvements from local government departments and boards and commissions, recognized neighborhood or community organizations, and citizens. The agency or designated department shall develop and periodically revise instructions and guidance for the submission of proposals for potential inclusion in the CIP.

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<sup>382</sup>Annual operating and maintenance costs are included in order that they may be incorporated into the operating budget. For example, a new wastewater treatment plant will have additional costs related to routine maintenance as well as electricity.

<sup>383</sup>Capital improvement programs may be financed from different funds, such as a general fund, which would include property, income, and sales taxes (if applicable), fees, fines, and interest, and other unrestricted sources of revenue, or a water fund, which would include revenues from water user charges and water taps. A water fund is a restricted fund for a public utility and cannot, however, be used to finance, for example, a sewer project. Similarly, an impact fee is segregated into a fund that is only to be used for specific types of improvements related to the impact of new development. Revenues from an impact fee could not to be used to remedy existing deficiencies in infrastructure, such as road resurfacing.

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- (4) The local planning agency or other designated department shall formulate the CIP for consideration by the legislative body, which may refer the CIP to the local planning commission, where it exists, for an advisory report on the necessity, desirability, relative priority of local capital improvements by reference to the local comprehensive plan, and any other relevant matters in connection with the document. If requested, the local planning commission shall make its advisory report within a period established by the legislative body, but such report shall not be binding on the legislative body. Upon receiving the local planning commission's report, the legislative body may modify the CIP. The legislative body may, after giving notice, hold a public hearing on the CIP. The legislative body shall then adopt the local capital budget by ordinance pursuant to Section [*cite to state law on adoption of budgets by ordinance*].
- (5) No funds for a local capital improvement shall be encumbered or spent and no bonds shall be issued to support such improvement unless the improvement is included in the adopted local capital budget.
- [(6) No local government shall adopt an impact fee ordinance pursuant to Section [8-602] unless it has first prepared a CIP and adopted a local capital budget pursuant to this Section. After it has adopted an impact fee ordinance, it shall continue on an annual basis to prepare a CIP and shall adopt a local capital budget pursuant to this Section.]

- ◆ This paragraph is only required if the state authorizes impact fees by statute, although municipalities that operate in home rule states may not require enabling legislation.
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### ***Commentary: Implementation Agreements***

Once a local comprehensive plan has been adopted, its provisions will, of course, be implemented if resources are made available to do so. A local government will typically enact ordinances that effectuate particular portions of the plan through such devices as zoning and subdivision control and then enforce them through its own personnel and administrative bodies. In addition, it will budget funds for new programs and capital projects called for in the plan.

However, there are instances when an entity other than the local government itself may be in a better position to implement elements of the comprehensive plan. For instance, a local government may wish to contract out the operation of a wastewater treatment plant to a county or regional agency. Code enforcement could be undertaken by another governmental body as well.<sup>384</sup> It may be more efficient and avoid conflicts to have agreements with special districts regarding

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<sup>384</sup>Note that an agreement as described above is a contract with some other entity to perform, on an ongoing basis, some aspect of the general implementation of the comprehensive plan. It is not a development agreement, where the local government and a landowner form an agreement regulating the particular use of a particular parcel of land.

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implementation of the plan, as when a local government plans transit-oriented development areas around stations operated by a transit authority. Neighborhood or community organizations may be the best entities to carry out certain social programs such as child day care or neighborhood-based economic development. Private organizations may also be an essential part of a given local government's plan implementation.

Several states currently have statutes that specifically authorize the formation of such implementation agreements.<sup>385</sup> Most of these statutes require that the agreement must state the purpose of the agreement, describe the financing arrangement, and provide for the termination of the agreement. Some contain provisions concerned with the ability or authority of parties to the agreement to perform their duties under the agreement,<sup>386</sup> and some require that any agreement be approved by ordinances of the legislative bodies of the governmental parties.<sup>387</sup> Kansas explicitly includes private for-profit and not-for-profit entities as potential parties to such agreements.<sup>388</sup> Kansas also specifically provides for cooperation agreements between local governments "in the exercise and performance of planning powers, duties, and functions."<sup>389</sup>

Some states may wish to authorize that implementation agreements be entered into only between governmental agencies or between governmental agencies and not-for profit organizations. Others may want to allow private consultants and other for-profit entities to enter into implementation agreements. Section 7-503 below leaves that option open to the legislature. The *Legislative Guidebook* has explicitly included neighborhood and community organizations as potential parties to implementation agreements because of their quasi-governmental nature and their potential for bringing grass-roots perspectives and action to plan implementation. It also authorizes local governments to contract for plan implementation with federal agencies and Indian tribes. This may

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<sup>385</sup>Arizona: Ariz. Rev. Stat. Ann. §11-952 (1997); Colorado: Colo. Rev. Stat. Ann. §29-1-203 (1997); Illinois: 55 Ill. Comp. Stat. §220/1 *et seq.* (1997); Kansas: Kan. Stat. Ann. §12-2901 *et seq.* (1997); Michigan: Mich. Comp. Laws §124.1 *et seq.* (1998); North Carolina: N.C. Gen. Stat. § 60A-460 *et seq.* (1998); Pennsylvania: 53 Pa. Cons. Stat. §2301 *et seq.* (1998); Washington: Wash. Rev. Code. §39.34.010 *et seq.* (1997).

<sup>386</sup>Ariz. Rev. Stat. Ann. §11-952(D) (all intergovernmental agreements must be reviewed by the attorneys for the parties to ensure each party has the "powers and authority granted under the laws of this state" to perform under the agreement); Kan. Stat. Ann. §12-2904(f) (review of proposed agreements by state Attorney General, with written evaluation to governmental parties, and state review when proposed agreement affects state agency); 53 Pa. Cons. Stat. Ann. §2314 (review by Local Government Commission of all proposed agreements with the state, other states, agencies of other states, and federal agencies); Wash. Rev. Code §39.34.050 (state review of proposed intergovernmental agreements affecting state agencies).

<sup>387</sup>Ariz. Rev. Stat. Ann. §11-952(H); Colo. Rev. Stat. Ann. §29-1-203(1); 53 Pa. Cons. Stat. Ann. §§2305, 2315; Wash. Rev. Code §39.34.030(2).

<sup>388</sup>Kan. Stat. Ann. §§12-2902, -2903.

<sup>389</sup>Kan. Stat. Ann. §12-744(c) (1997).

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be useful, for example, in contracting with the U.S. Army Corps of Engineers on a drainage or stormwater issue or with an Indian tribe whose territory borders a local government.

An agreement under this Section cannot be entered into unless the contracting party has the resources to perform under the agreement. Furthermore, the agreement may be terminated if the contracting party no longer has sufficient resources to perform under the agreement, even if it did at the time of formation.

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### 7-503 Implementation Agreements

- (1) A local government that has adopted a local comprehensive plan may enter into agreements with other entities, including [federal agencies, Indian tribes and nations], the [state planning agency], state agencies, any [regional planning agency], neighborhood and community organizations, special districts, school districts, universities and colleges, and non-profit [and for profit] corporations and organizations, to implement the local comprehensive plan or any element or portion thereof, whether implementation entails the development or construction of a local capital improvement, the provision of a service, or the enforcement or administration of ordinances or regulations.
  - (2) An implementation agreement shall not take effect and shall not be binding unless approved by the legislative body of the local government and enacted as an ordinance thereof.
  - (3) Before a proposed implementation agreement is submitted to the legislative body for its approval, the solicitor, or other such attorney for the local government, shall review the proposed agreement as to whether it is in proper form and whether the parties to the proposed agreement have the authority to perform their duties under the agreement, and shall submit a written copy of the review to the legislative body.<sup>390</sup>
- ◆ As discussed in the commentary, review of a proposed agreement by the local government's attorney is one of the methods of ensuring that all the parties to an agreement have the authority to perform the agreement. The other method, review by a state agency or official, was rejected as unduly intrusive in the formation of a bilateral agreement, since such review is not or may not be limited to the issue of authority or proper contractual form. Note that state review is mandated when a state agency would be affected by the agreement, or the agreement was with the state, another state, or the federal government, but usually not in the typical case.

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<sup>390</sup>Note that the implementation agreement may be subject to competitive bidding requirements of the state or local government as well as any other requirements governing the awarding of contracts, including those of the federal government if federal monies are involved.

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- (4) An implementation agreement entered into pursuant to this Section shall include or address the following:
  - (a) the elements or portions of the local comprehensive plan, including the long-range program of implementation as described in Section [7-211], that the other party or parties to the agreement will be implementing and any ordinances or regulations of the local government that the other party or parties to the agreement will be administering or enforcing;
  - (b) the authority and means by which the other parties to the agreement will be implementing the local comprehensive plan or administering or enforcing ordinances or regulations, and any assistance which the local government may or shall provide;
  - (c) the benchmarks by which the local government may monitor and evaluate, at least annually but more frequently by agreement, the performance under the agreement by the other parties, and procedures for monitoring and evaluation;
  - (d) the manner of compensation by the local government of the other parties, including the sources of revenue for such compensation;
  - (e) the provision of insurance and the manner of and extent to which the parties to the agreement will indemnify other parties;
  - (f) procedures for the settlement of disputes under the agreement by negotiation, mediation, or binding arbitration;
  - (g) provisions regarding the amendment of the agreement;
  - (h) procedures for the termination of the agreement after a stated period of time or for stated reasons, including a provision that the agreement may be terminated at any time for no stated reason by agreement of all the parties; and
  - (i) any other necessary and proper matters.
- (5) No implementation agreement shall be formed by the local government with any entity that is found by the local government to have insufficient resources and authority to perform its duties under the agreement. The failure, whether existing at the time of agreement or arising thereafter, of a party to have sufficient resources and authority to perform its duties under the implementation agreement shall be sufficient grounds for the other party or parties to unilaterally terminate the agreement.
- (6) No implementation agreement entered into pursuant to this Section shall relieve any party to the agreement of any obligation or responsibility imposed on it by law.

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### ***Commentary: Benchmarking in Local Comprehensive Plans***

Performance benchmarking is a process of ensuring accountability in planning. A benchmarking system allows the local government to develop general descriptions of what it hopes to achieve through its various programs or by implementing proposals in its plans. It then develops baseline indicators, numeric if possible, that will track the achievement of the desired conditions. After identifying desired conditions, the local government sets thresholds of where the indicator will be at certain points in the future. The local government then periodically tracks the achievement of those desired outcomes.

While no existing local planning statutes require benchmarking per se,<sup>391</sup> a number of local governments have voluntarily begun benchmark programs.<sup>392</sup> Noblesville, Indiana, for example, established a benchmarking process in 1994, adopted benchmarks that informed the preparation of a comprehensive plan, and created by ordinance a steering committee and commission to track the achievement of benchmarks and report to the legislative body.<sup>393</sup> Prompted by the Washington state growth management act, King County and 35 cities in the Seattle metropolitan area established and adopted a benchmarking system in 1994 to monitor the effectiveness of countywide planning policies. The participating communities prepare a report that tracks the outcomes described in the benchmarks.<sup>394</sup>

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<sup>391</sup>Florida requires an evaluation and appraisal report of the local comprehensive plan that is to be sent to the governing body and the state land planning agency at least once every five years after the adoption of the comprehensive plan. While not using the term “benchmark,” the statute asks that the report assess “the comprehensive plan objectives as compared with actual results at date of report.” Fla. Stat. §163.9191(2)(c) (1997).

<sup>392</sup>Stuart Meck and Laura Thompson, “Benchmarking: Developing Report Cards for Planning,” *PAS Memo* (Chicago: American Planning Association, February 1998): 1-4.

<sup>393</sup>City of Noblesville, Ind., Ord. No. 53-11-95, An Ordinance Providing for the Creation of the Benchmarking Steering Committee and the Benchmarking Stewardship Commission (12-26-95).

<sup>394</sup>King County Office of Budget and Strategic Planning, *King County Benchmarking Report, 1996* (Seattle: The Office, December 16, 1996). See also City of Seattle, Office of Management and Planning, *Seattle’s Comprehensive Plan: Monitoring Our Progress* (Seattle: The Office, 1996).

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Several states have amended their statutes to provide for a benchmarking system.<sup>395</sup> Oregon is the most notable example. The Oregon Progress Board, created by the state legislature in 1989, is a nine-member body, with eight citizen representatives and the governor, that is charged with carrying out a state strategic plan and follows the achievement of goals in that plan through a state benchmarking process.<sup>396</sup> The board issues biennial reports on the benchmarks and encourages local governments to establish complimentary programs. At least nine local governments in the state have initiated the development of benchmarking systems.<sup>397</sup>

The New Jersey State Planning Act requires that the state development and redevelopment plan contain “monitoring . . . targets in the economic, environmental, infrastructure, community life, and intergovernmental coordination areas to be evaluated on an on-going basis following adoption of the Final Plan.”<sup>398</sup> The act requires the state planning commission, in implementing a monitoring program, to evaluate reasons for the failure to realize plan targets and determine if changes in those targets or policies are warranted. A 1997 draft of the revised state plan encourages counties and municipalities to establish their own indicator programs and share information with such programs with others.<sup>399</sup>

Section 7-504 describes a benchmarking process to be incorporated into a local comprehensive plan. Under this Section, a local government establishes benchmarks for plan elements and designates a department, such as the local planning agency, to monitor progress towards benchmarks and report on such progress on an annual basis. If desired by the legislative body, the local planning commission or special task force may assist the designated department in the annual review. In addition, data on achievement of benchmarks are to be included in the local comprehensive plan re-examination report required under Section 7-406.

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<sup>395</sup>Other states, like Minnesota and Utah, have benchmarking programs that are part of a state strategic planning effort. See, e.g., Minnesota Planning, *Minnesota Milestones: A Report Card for the Future* (St. Paul, Minn.: Minnesota Planning, 1992); and State of Utah Strategic Planning Committee, *Utah Tomorrow Strategic Plan* (Salt Lake, Ut.: The Committee, 1996), at <http://www.governor.stat.ut.us/planning/utahom/master96.htm>. The Minnesota report is authorized by Minn. Stat. §4A.01 (1997) (directing the state office of strategic and long-range planning to develop an integrated long-range plan for the state). The Utah plan is authorized by Utah Stat. §38-18-1(8) (1997) (directing Utah Tomorrow Strategic Planning Committee to recommend to the legislature and governor on an ongoing strategic planning process for the state).

<sup>396</sup>Ore. Rev. Stats. §184.007 *et seq.* (1997).

<sup>397</sup>Oregon Progress Board, *Oregon Benchmarks: Standards for Measuring Statewide Progress and Institutional Performance, Report to the 1995 Legislature* (Salem, Ore.: The Board, December 1994), 1.

<sup>398</sup>N.J.S.A. §52:18A-202.3(a) (1997).

<sup>399</sup>New Jersey State Planning Commission, *New Jersey State Development and Redevelopment Plan: Reexamination Report and Preliminary Plan* (Trenton: The Commission, June 25, 1997), 260

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### **SOME POSSIBLE BENCHMARKS**

Here are some possible benchmarks that a local government could employ to measure achievement of its local comprehensive plan:<sup>400</sup>

- The rate of conversion of vacant, buildable land to improved land.
- The ratio of vacant, buildable land to the total land area of the local government.
- The sales price of vacant, buildable land.
- The average sales price of single-family housing.
- The percentage of new development that is on reused land (as opposed to greenfield sites).
- A ratio of achieved density to allowed density in new residential projects.
- Achievement of a certain percentage vacancy rate in housing.
- The number of existing housing units converted into more compact units with or without the demolition of existing buildings.
- The number of units of affordable housing that have been built in relation to a fair-share housing plan that establishes regional allocations to local governments for such units.
- The number of units of affordable housing that have been rehabilitated.
- A reduction to a certain percentage of residents who spend more than 30 percent of their household income on housing (including utilities).
- Achievement of a certain mix in the types of housing.
- An increase in the amount (in acres) of environmentally sensitive land that is protected by land development regulations or special state programs.
- An increase in the amount of neighborhood parkland per capita.

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<sup>400</sup>See Meck and Thompson, "Benchmarking: Developing Report Cards on Planning"; Ore. Rev. Stat. §197.763(2) (1997) (describing performance measures adopted by metropolitan service district); David N. Ammons, *Municipal Benchmarks: Assessing Local Performance and Establishing Community Standards* (Thousand Oaks, Ca.: Sage, 1996).

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- A reduction of the acreage of residential development that is located in floodplains.
  - A reduction to a certain number of vehicle miles traveled per capita or vehicle hours traveled per capita.
  - Number of miles of overhead utility wires relocated underground.
  - Number of illegal and nonconforming signs removed.
  - An increase in the proportion of all trips to work made by carpool, public transportation, bicycles, walking, or working at home.
  - Achievement of a certain number of lane miles of streets that are resurfaced each year.
  - For communities that are in arid climates or are experiencing water shortages, a reduction in the gallons/per capita/per day of domestic water use to a certain number.
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### **7-504 Benchmarks; Reporting Requirements**

- (1) A local government shall establish benchmarks for each element of a local comprehensive plan, except for the issues and opportunities element described in Section [7-203] above.
- (2) The benchmarks shall be included in the program of implementation pursuant to Section [7-211(2)(d)] above.
- (3) The legislative body shall designate either the local planning agency or another department of the local government to be responsible for establishing a benchmarking system. The local planning agency or the designated department may seek comments and opinions regarding the benchmarking system from any neighborhood planning council established pursuant to Section [7-109] above, any neighborhood or community organization recognized pursuant to Section [7-110] above, and the public. The legislative body may also designate the local planning commission, if one exists, or may create and designate a task force to advise the local planning agency or the designated department in the interpretation of the data.
- (4) The local planning agency or the designated department shall prepare an annual written benchmark report for the legislative body and the chief executive officer that compares the benchmarks with actual data on performance and includes any advice, comments, and opinions received. If the local planning agency prepares the benchmark report, that report shall be included in the agency's annual report pursuant to Section [7-107] above. Any reexamination report on the local comprehensive plan required by Section [7-406] above

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shall also include an analysis that compares the benchmarks with actual data on performance for at least the previous [5]-year period.

### NOTE 7A – A NOTE ON NEIGHBORHOOD PLANS

This research note describes an analysis of the contents of 47 neighborhood plans which were submitted to the American Planning Association in 1996 in response to a request to members of its Planning Advisory Service. All plans were adopted between 1980 and 1996, with the majority of them being adopted after 1992 (see Appendix). The plans are a mix of what might be considered collaborative plans and the more traditional, city-sponsored, single-agency neighborhood plans. Of particular interest were plans from communities that had begun to do *collaborative planning* – planning in which multiple city departments, community organizations, citizens, local stakeholders, and social service providers successfully coordinated their efforts to deliver a wide range of quality services at the neighborhood level and to provide a more responsive, interactive environment for residents to express their concerns and needs. Though this kind of multidisciplinary, community planning has been taking place over the last few decades, it is far from standard operating procedure in most places.

APA's survey revealed that over 36 elements appear in neighborhood plans in various combinations. It is clear that no all-encompassing recommendation can be made on what should comprise the content of neighborhood plans. While these elements can offer suggestions of what might work for a particular neighborhood, the balance of any plan's content will have to evolve out of the process a community undertakes to assess its needs, resources, and values.

APA has used the following series of symbols to make clear the importance of each of the elements that were identified. After describing the elements, the analysis makes a series of recommendations concerning best practices. Those recommendations are in italics.

Where an element is an essential part of a basic neighborhood plan. (✓)

Where an element is optional and probably dependent on local circumstances. (☞)

Where an element is optimal if collaborative planning is the community goal. (✌)

APA grouped the plan elements into the following categories, based on their relative purpose and sequence in the planning process:

- (1) **General Housekeeping.** Organizational items that make the plan readable and usable and serve to encourage further involvement in the planning process.

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(2) **Planning Process Validation.** Elements that demonstrate the legitimacy of the research and consensus-building processes that led to the development of the plan.

(3) **Neighborhood Establishment.** Elements that serve to create an image or identity for the community apart from the jurisdiction as a whole.

(4) **Functional Elements.** Substantive items that may vary widely from plan to plan (e.g., safety element, housing element, etc.).

(5) **Implementation Framework.** Those elements that are the goals, programs, actions, or schedules used to implement the plan.

(1) **General Housekeeping Elements.** The elements in this category are used to create a clear, navigable plan document. The rule of thumb for these items is “consider the reader.” Elements listed below serve to engage the reader in the neighborhood planning process, whether that person lives or works in the neighborhood or holds a powerful position in city hall. They also reflect the hard work of all the neighborhood planning participants.

(✓) Name of the Plan - All the plans APA reviewed had a name that incorporated the neighborhood name.

*Names should be simple and sensible. Provocative sounding plans that omit the community name such as “Our Vision, Ourselves, 2020,” will not register as clearly in the minds of the outsiders a community might be trying to influence, such as the mayor, the city council, or the chief of police.*

(✓) Table of Contents - Seventy percent of the plans had a table of contents.

*Including a table of contents enables the reader to use the plan more easily, and to help go directly to a topic of particular interest.*

(✓) Time Frame - Ninety-one percent of the plans included an adoption date or some kind of plan initiation date.

*Time frames should include milestones (e.g., when the planning process was initiated, when the first draft was completed, or when certain benchmarks might be achieved). From these, the reader gets a sense of the community’s progress, its investment in the planning process, and the plan’s horizon, which typically ranges from one to five years. The plan adoption date should appear on the front cover or title page.*

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- (✓) Acknowledgments - Eighty-one percent of the plans reviewed had acknowledgments.

*A simple page at the beginning of the plan or an appendix can help the reader understand who the neighborhood players, planning staff, and political officials are and how they are associated with the neighborhood. Acknowledgments should include the names, titles, and affiliations of participants who can answer questions about the plan or the planning process.*

- (✓) Glossary - Twenty-three percent of the plans had some type of glossary or key to terminology (e.g., describing that “CDBG” means “Community Development Block Grant”).

*A glossary is best placed as an appendix to the plan, and terms should be listed alphabetically. It can save space in charts and also serve to establish and explain “local lingo” or casual references to places that only people in the neighborhood would understand (e.g. “the park,” “the hill,” or “Johnson’s place”).*

- (✎) Plan Organization - Forty-three percent of the plans reviewed had a section on the organization of the plan itself.

*Why items are included, where they can be found, and how goals and policies generally relate to implementation schedules should be mentioned in a plan organizations section. The location or structure of critical items, such as functional elements, citizens’ comments, the implementation section, the relationship of the neighborhood plan to the comprehensive plan or the funding section, should also be noted.*

- (✎) Graphic Aids - Eight-five percent of the plans included graphic aids.

*Photographs are good for showing off the positive aspects of the neighborhood, highlighting good design or documenting the planning process. Charts and matrices can convey trends and time-sensitive information, such as demographics or implementation schedules. Maps are obviously critical to defining the neighborhood. Thematic maps that plot circulation patterns or crime activity can help pinpoint areas in need of special attention. Text art, such as borders, headers, boxes, and bulleted items help to organize the information and give the reader emphatic cues. Finally, illustrations depicting desired height, bulk, signage, or landscaping policies (including computerized photo realistic visual simulations) are useful for expressing community design goals.*

- (✎) Resource Directory - Four percent of the plans had a resource directory.

*Good neighborhood planning efforts usually result in the creation of new committees and alliances, or the designation of support agencies and their respective contact persons. To*

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*be useful, a resource directory must keep phone numbers, titles, and names updated. If someone, such as neighborhood resident or a neighborhood planner, is designated to keep this information current, the resource directory can be a supplement to the plan, taking the form of a booklet or a regular part of a neighborhood newsletter. Having someone maintain a resource directory also serves to maintain a degree of regular contact among the players. The directory should provide listings both alphabetically and by subject.*

**(2) Planning Process Validation.** Nowhere is citizen participation as critical as it is at the neighborhood planning level. In order for people to take ownership of their local planning process, the business of planning and interacting with city hall has to be demystified. Information has to be accessible and comprehensible. Putting information about how the planning process operated makes the plan a working reference document, and it in turn validates the process by providing documentation. The following items were found in many of the plans reviewed.

- (✓) Neighborhood Organizational Structure and Planning Process - Just more than half of the plans had a section devoted to neighborhood organizational structure and planning process.

*How the planning process is initiated and carried out is an important part of plan validation. Often flow charts are used to illustrate the sequence and nature of events. This section may also include a reference to the specific ordinance that adopts the plan or background information about why the planning process was initiated (e.g., a neighborhood disaster or a growing concern over crime or disinvestment). Many jurisdictions require that a formal neighborhood organization be in place as a condition to planning assistance or plan adoption. The presence of neighborhood leadership should be made clear in a neighborhood plan or, at the very least, emerge out of the planning process. However neighborhood leadership is established, the plan should make it clear who the leaders are. Though this may seem like a perfunctory task, it credits the neighborhood with having an "above board," legitimate power structure.*

- (✓) Mission/Purpose Statement - Forty-three percent of the plans included a mission or purpose statement.

*Mission/purpose statements should establish the importance of going through the neighborhood planning process. They should also convey that the process is all-inclusive and that it is in accordance with policies set forth in the local government's comprehensive plan, if one exists.*

- (✓) Citizen Participation Proclamation - Slightly more than half of the plans devoted a separate section to citizen participation.

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*Well-positioned at the beginning of the plan, this section should document the citizen participation process employed in developing the plan. This sets the stage for the policies and recommendations that will follow. Local ownership of the planning process must be evident. Both positive and negative citizen feedback is important. The record of that feedback can be taken from either meeting minutes or survey results.*

- (✓) Needs Assessment - Sixty percent of the plans included needs assessment information.

*An assessment of different types of need for a variety of human as well as other services is a fundamental component of neighborhood planning, especially when it identifies groups in the neighborhood that are underserved. Needs assessments can measure: social services, physical conditions, commercial resources, and cultural amenities. When assessing needs, it is also important to take stock of existing resources within the community. Assessing the positive aspects of a neighborhood can reveal unexpected opportunities for dealing with the negatives.*

- (✎) Relationship to Other Plans - Several plans described this relationship, especially when the local government had completed a comprehensive plan for the entire community.

*This component should define a framework or structure to indicate that policies are consistent, and it should show that a plan's collaborators are thinking of the welfare of the neighborhood in the context of a larger community. This can be achieved in either a separate section that explains the desired effect of the neighborhood plan or explanation of this relationship can be interspersed throughout the plan by element.*

(3) **Neighborhood Establishment.** Though neighborhood plans are supposed to be about securing the future, they also serve to fortify the present by giving the neighborhood a distinct concept of itself through boundary delineation, historical analysis, and identity analysis.

- (✓) Boundary Delineation - Ninety-three percent of the plans included a map and a description of the neighborhood boundaries.

*It is important when considering the boundaries of a neighborhood that the neighborhood and the city departments agree or, at the very least, accommodate each party's perception of the neighborhood boundaries. Settling on boundaries is a necessary part of establishing the neighborhood and should involve representatives from the community, the necessary city departments, and, possibly, selected social service providers to the area. One method of determining boundaries is to have participants at a public meeting draw lines on maps to define their own boundaries. Then the maps can be combined to reveal the most common perception of what area constitutes the neighborhood.*

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- (13) Neighborhood History - Sixty-four percent of the plans reviewed included a neighborhood history section.

*A discussion of neighborhood history gives the residents and business owners a sense of where the neighborhood came from, who founded it, and who were its leaders. Design review policies that encourage a certain building type or scale can also be inspired and supported by historical research. Pride-enhancing cultural activities like annual coordinated yard sales, art fairs, garden walks, or holiday decorating seasons are also often rejuvenated through a look into the past.*

- (14) Neighborhood Identity - Forty-three percent of the plans included a section on neighborhood identity.

*Once the residents of a neighborhood learn more about who they are collectively and where they want to go as a community, they may want to develop a strategy for promoting a community identity. Community identity serves to enhance a neighborhood's reputation or set the neighborhood apart from the rest of the city in terms of image. Projecting a certain image is usually motivated by the desire to preserve or enhance property values in a community or to instill community pride and retain residents. It can also be borne out of a basic need to create a safer, more social, and more livable environment. A strong sense of neighborhood identity is evidence of a good planning ethic and helps to facilitate collaboration within the community.*

(4) **Neighborhood Plan Elements.** Most of the plans had four or five elements, such as housing, safety, land use, and recreation, that were addressed as separate topics. Sometimes the elements would begin with a description or inventory of existing conditions, as was mentioned above in the section on inventories, and end with proposals for action. Others would simply list policy recommendations and the implementation strategies to carry out those recommendations. Some neighborhood plan elements were included as a requirement or a preference to maintain consistency with the local government's comprehensive plan.

- (15) Residential - Seventy-seven percent of the plans reviewed included a residential element.

*Policies regarding residential development included promoting owner-occupied housing, requiring mandatory inspection of rental properties, and zoning changes to encourage the development of more housing and rehab programs for vacant properties. Issues pertaining to private property maintenance, housing stock, affordability and demand, building conditions, property values, infill development, abandonment and design standards were common in the plans reviewed. Residential elements and their policies to promote housing safety, aesthetic quality, accessibility, and affordability are encouraged.*

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- (✓) Transportation/Circulation/Pedestrian Access - Slightly more than 70 percent of the plans reviewed included an element covering transportation/circulation/pedestrian movement.

*Transportation elements and policies should promote general connectivity and fluidity of transportation facilities (e.g., sidewalks, streets, transit stations, and parking lots) in a safe way that accommodates individuals of all ages and the vehicles they use.*

- (✓) Land Use/Zoning - Sixty-two percent of the plans reviewed included a land-use element. The current land-use patterns and zoning classifications of the neighborhood were also frequently addressed in the plans, often as part of a general needs assessment.

*This element usually included a zoning map and an existing land-use map. Concern over how development would progress under the current zoning classifications was typical. Land use/zoning data should be provided with simplicity and clarity.*

- (✓) Infrastructure/Utilities - Nearly half (45 percent) of the plans reviewed had infrastructure elements.

*The quality of infrastructure in a neighborhood is very important to residents. However, it is perhaps the least controllable of all aspects of a neighborhood's quality of life. Because their agendas are usually tied to a citywide capital improvement program rather than to a variety of neighborhood visioning processes, public works departments and private utility companies are not always directly responsive to neighborhoods. Getting a neighborhood's infrastructure needs on the capital improvements agenda can be very challenging. Consequently, neighborhood representatives may have to be aggressive.*

- (✗) Safety/Crime Prevention - Fifty-five percent of the plans included a safety/crime prevention element.

*Safety elements dealt with issues ranging from personal and property crime to reducing hazardous conditions in the area, such as traffic at dangerous intersections. Community policing programs and neighborhood watch programs were recommended in many neighborhoods. Enforcing curfews and encouraging better parent/child/police communication was also very common. Lighting, traffic calming, snow removal, and the safety of specific public features (e.g., playground equipment or bus stops) was also mentioned repeatedly. Safety and crime prevention policies should be based on police data for the neighborhood and resident perceptions. The perception of fear is as serious a crime problem as actual criminal activity because it erodes citizen comfort, street vitality, and neighborhood unity.*

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- (13) Parks, Recreation, and Cultural Resources - Fifty-three percent of the plans had parks, recreation, and cultural resource elements.

*Such elements should reflect resident feedback and may be supported by observations about the use of parks and other public spaces. Representatives from city parks and recreation departments or, where they exist, cultural affairs departments, should be involved in the implementation of these policies.*

- (13) Architectural Control/Historic Preservation - Fifty-three percent of the plans included an architectural control/historic preservation element.

*These elements are sometimes an outgrowth of the history section of a neighborhood plan. Concern over the scale, texture, color, signage, street furniture, setbacks, and landscaping for future development was often expressed in terms of design guidelines or the need to create a design review committee. Some communities, particularly historic neighborhoods, required specific design standards as part of a historic preservation plan or ordinance.*

- (13) Economic Development/Employment - Nearly forty percent of the plans reviewed had an economic development/employment element.

*Creating community development corporations, encouraging new business development through development streamlining, and providing job training and placement assistance were among the programmatic recommendations. Also mentioned were creating markets for locally produced goods and services, marketing the ethnic or cultural aspects of the community through festivals and special events, and organizing volunteer clean-up of business areas to foster a more attractive investment potential within the community. Some plans looked to development finance options, such as revolving loan funds, grants, or tax incentives. Economic development and employment programs at the neighborhood level should be linked to citywide, state, and federal programs that can offer financial and technical assistance.*

- (13) Commercial - Thirty-six percent of the plans had a commercial element.

*Those plans with commercial elements tended to focus on the revitalization of an existing commercial area rather than on the creation of new commercial areas. Developing streetscape programs, business associations, shared parking, signage programs, bicycle parking, and more pedestrian accessibility were typical objectives.*

- (13) Nuisances and Developments of Local Impact (DLIs) - Twenty-eight percent of the plans we reviewed included a section on nuisances or DLIs. Some plans had sections devoted to

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the eradication of specific nuisances, such as poorly maintained properties or noisy cars. Remedies for these problems usually involved working with the planning department to draft appropriate nuisance regulations or working with the neighbors to develop a heightened level of consideration. Specific types of development, not entirely viewed as a pox upon the community but still sometimes annoying, created special problems. These developments are referred to here as Development of Local Impact (DLIs) because they are generally good for the community, despite the nuisances they generate, and some sort of peaceful coexistence on the part of the development and the community is desired. Among these were college campuses, convention centers, highways, trains stations, and medical centers. Usually, the problems associated with these DLIs included parking, circulation, and in the case of college campuses, housing supply and student behavior.

*Nuisance and DLI issues should be sorted out on a case-by-case basis. Where conflict resolution and negotiation can substitute for regulatory action, it should be encouraged. The planner or neighborhood representative who serves as the liaison to the planning department plays a crucial communicative role in this process. He or she must acknowledge and respect the issues of concern to all parties and work toward a solution that benefits the community as a whole.*

- (13) Industrial - Only six percent of the plans reviewed included a section on industrial development. However, the few plans that mentioned industrial development in the neighborhood were concerned with removing or confining industrial land uses to a specific area or rerouting the traffic generated by the industry.

*The most important factor to consider when dealing with industrial property in neighborhoods is the health and environmental hazards that may accompany the specific type of industry.*

- (14) Environment - Nine percent of the plans included environment sections. A small number of the plans included a section on the natural environment. Of the plans that did have an environment section, recommendations included the development of a nature preserve, the identification and dedication of environmentally sensitive undeveloped areas, and the modification of current zoning toward environmental preservation.

*Environmental awareness may be encouraged in the community through indigenous species education programs, recycling programs, and education about human ecology, energy conservation, and waste reduction.*

- (15) Community-Level Human Services - Approximately one-third of the plans included community-level social service elements. Many neighborhood plans included a section on

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improving social service delivery at the local level. Issues that appeared frequently included providing day care for children and the elderly, increasing access to state welfare offices and programs such as Head Start and GED classes, coordinating neighborhood tutoring clubs and community gardens, developing safe houses and programs that celebrate ethnic diversity within the neighborhood, and providing health assessment services, such as blood pressure and diabetes testing at local community centers. Existing facilities, such as available school rooms, city-owned vacant land, churches, and park district property, were incorporated into many of these ideas.

*The integration of human services into a neighborhood plan is best served by assembling a team of various service providers. Such a team may include case workers, employment counselors, tutors, day care providers, church leaders, community police officers, code enforcement officers, health care specialists, and planners. The purpose of the team should be to coordinate the provision of social and community services at the local level.*

(☑) Educational Needs - A third of the plans reviewed had an educational needs element. *The educational need of a neighborhood may be assessed with the assistance of the local school district's administrators, teachers, and residents.*

(☑) Youth Services - A third of the plans reviewed included a youth services element.

*Some plans had entire sections devoted to youth issues while others addressed this subject through an educational needs or crime/safety element. The issues usually included providing day care, after school activities, or mentoring opportunities for neighborhood kids. Youth initiatives included encouraging local businesses to develop internship programs, working with local schools to provide better vocational training, and expanding the provision of park and recreation activities. Some youth elements went so far as to provide needs assessments information on graduation levels, teen pregnancy, and literacy rates for the neighborhood.*

(5) **Implementation Framework.** A statement of goals and objectives typically follows neighborhood plan's analysis of existing conditions, needs assessment, and statement of the community's desires for the future. This is sometimes followed by an implementation program or schedule.

(☑) Goals and Objectives- All of the plans reviewed included an element concerning goals and objectives as well as related policy statements.

*The goals and objectives of the neighborhood plan represent the community's vision and values. Sometimes they are simply called goals and objectives, but they may also be presented as vision statements or policy recommendations.*

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- (✓) **Implementation Program** - Sixty percent of the plans reviewed included an implementation element, many of which were either woven into the functional plan elements or included at the end of the document. Implementation information frequently took the form of a chart or matrix that listed the action items in a single column.

*Once goals and objectives have been defined, the schedule for achieving them has to be set, commitments must be made, and responsibility for actually accomplishing them has to be assigned.*

- (✓) **Funding** - Nearly a quarter (23 percent) of the plans included a section on funding. Funding sources ranged from city capital improvements funds, special assessments, transportation funds, tax increment funds, CDBG grants, special state or federal program grants (such as historic preservation or urban forestry), donations, fund-raisers, community development loans and private investors.

- (✎) **Appendices (Ordinances, Survey Results, etc.)** - Slightly more than half (53%) of the plans reviewed included at least one appendix that either detailed research or presented ordinances.

- (✎) **Evaluation/Monitoring** - Only one of the plans surveyed included a section on evaluation/monitoring.

*One way to that ensure evaluation occurs would be to require the local government or neighborhood organizations or implementation committees to publish annual reports on the progress of their plan implementation. Completion of such reports could be a factor for the local government to consider in future project funding.*

### **Appendix – List of Neighborhood Plans Reviewed (by Chronology)**

Southeast Arvada Neighborhood, 1980 - Arvada, Co.  
Cherry Creek Neighborhood, 1986 - Denver, Co.  
Highland Neighborhood, 1986 - Denver, Co.  
Ft. Lauderdale Neighborhood Master Plan Program, 1986 - Ft. Lauderdale, Fla.  
Coronado Neighborhood, 1986 - Phoenix, Az.

Curtis Park Neighborhood, 1987 - Denver, Co.  
West Side Neighborhood, 1989 - Fort Collins, Co.  
North Shore Neighborhood, 1990 - St. Petersburg, Fla.  
Aylesford - East University Small Area Plan, 1991 - Lexington, Ky.  
Kendall-Whittier Neighborhood, 1991 - Tulsa, Ok.

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Northwest Plan, 1991 - Columbus, Ohio  
Fox Hill Neighborhood, 1992 - Hampton, Va.  
Champaign Comprehensive Neighborhood Plan Program, 1992 - Champaign, Ill.  
Roser Park Neighborhood Plan, 1992 - St. Petersburg, Fla.  
Second Ward Neighborhood, 1992 - Houston, Tex.

Broadway Neighborhood, 1992 - Rock Island, Ill.  
Campus/Evergreen Neighborhood, 1992 - Bremerton, Wash.  
Old Southeast Neighborhood, 1993 - St. Petersburg, Fla.  
Childs Park Neighborhood, 1993 - St. Petersburg, Fla.  
Irvington Neighborhood, 1993 - Portland, Ore.

Kenton Neighborhood, 1993 - Portland, Ore.  
Piedmont Neighborhood, 1993 - Portland, Ore.  
Woodlawn Neighborhood, 1992 - Portland, Ore.  
King Neighborhood, 1993 - Portland, Ore.  
Arbor Lodge Neighborhood, 1993 - Portland, Ore.

Boise Neighborhood, 1993 - Portland, Ore.  
Eliot Neighborhood, 1993 - Portland, Ore.  
Concordia Neighborhood, 1993 - Portland, Ore.  
Humboldt Neighborhood, 1993 - Portland, Ore.  
Sabin Neighborhood, 1993 - Portland, Ore.

Northgate Neighborhood, 1993 - Seattle, Wash.  
Lewisburg Neighborhood, 1993 - Covington, Ky.  
Southeast Community Plan, 1993 - Baltimore, Md.  
Chicago Addition Plan, 1993 - Rock Island, Ill.  
University Medical Central Valley Hospital Plan, 1994 - Las Vegas, Nev.

Poco Way Neighborhood Revitalization Strategy, 1994 - San Diego, Calif.  
Hickory Neighborhood Planning Process, 1994 - Hickory, N.C.  
Douglas Park, 1994 - Rock Island, Ill.  
North Midtown Neighborhood, 1995 - Jackson, Miss.  
Northeast Greeley Neighborhood, 1995 - Greeley, Colo.

Laurel/Nikomis Neighborhood, 1995 - Sarasota, Fla.  
Bee Ridge Neighborhood, 1995 - Sarasota, Fla.  
Longview Neighborhood, 1996 - Rock Island, Ill.  
Keystone Neighborhood, 1996 - Rock Island, Ill.  
Montecito/Happy Valley, 1996 - San Rafael, Cal.

West Side Neighborhood, 1996 - Manchester, Conn.  
Verplanck Neighborhood, 1996 - Manchester, Conn.

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### NOTE 7B – A NOTE ON COMPREHENSIVE PLANNING REQUIREMENTS IN STATE STATUTES

This research note and accompanying Table 7-5 provide an overview of state statutes on local comprehensive planning. The statutes described in the table are only the single best statute for local planning in each state (for example, if the municipal statute is more precise than the county statute, the municipal statute is summarized). This is an important point because states frequently have two or more statutes on local planning and the “best” one in each state was selected for this overview. In this sense, this overview is a best case scenario of state statutes on local planning.

The major findings described in this note are answers to the following four questions:

- (1) How up-to date are the laws – that is, their similarity to the *Standard City Planning Enabling Act* (SCPEA) from the 1920s?
- (2) Can the statutes be ignored or are they mandatory?
- (3) How complete are the statutes in terms of plan elements?
- (4) How strong are the state roles in supporting local planning?

**(1) How up-to-date are the statutes?** In this overview, the statutes are described as how much they are changed from the 1920s planning laws. The four categories below are statutes with few or no changes, those with a moderate number of significant changes, those with many significant changes, and state planning laws that are totally revised to the point that they no longer resemble the 1920s laws. The findings are:

- 24 state have planning laws with few or no changes from SCPEA or similar 1920s planning laws;
- 8 states have planning laws with a moderate number of significant changes;
- 7 states have planning laws with many significant changes from 1920s planning laws but still resembles them in some way; and
- 11 states have planning laws that are totally revised to the point that they no longer resembles any 1920s planning law.

**(2) Do the statutes mandate local planning or can the statutes be ignored?** There is a temptation to say a statute is mandatory or not, but reality is not that simple. In some states, the legislation mandates local governments to plan. But in other states, local governments are not required to plan unless they choose to create a planning commission.

In other words three categories are meaningful: Whether planning is mandated, conditionally mandated, or optional. Conditional mandates are an important distinction because in some states, every community has elected to create a planning commission when it did not have to but once it

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did, the commissions must plan. The best statutes are described below in terms of these three categories related to mandatory planning. (It is important to note that these statutes may only involve one class of municipalities that may not have planning jurisdiction over the entire state.) Given these distinctions, the best statutes look like this:

- 10 states have statutes that make local planning optional;
- 25 states have statutes that conditionally mandate local planning; and
- 15 states have statutes that mandate local planning.

**(3) How complete are the statutes in terms of elements?** Some state laws actually mandate the creation of planning commissions, and give them the duty to plan, and then mandate no contents to the plans.

The statutes include those with some plan elements listed, statutes with many elements in great detail, and statutes that contain no definition of a plan and mention no plan elements. In Table 7-1, 20 types of plan elements are described as present or not in the surveyed statutes. For example, the most ubiquitous plan element is, not surprisingly, land use. It is mentioned in the planning laws of 48 states. Only 25 state laws address housing as an element in local plans, and an unexpected 24 states mention implementation as a plan element. Some of the more rare plan elements (with the number of laws mention them in parenthesis) are urban growth areas (4) (although state statutes may address urban growth areas in sections other than local comprehensive planning), energy (8), human services (1), air quality (3), and community design (7).

These elements are also described in the table in terms of whether they are mandated or not and the amount of detail on each element in the statute (3 levels of detail are described as: 1 = little; 2 = moderate; and 3=substantial). For example, although 24 states mention implementation as an element, it is only mandated in 11 states. Only 4 states describe the implementation plan element in substantial detail (level 3).

**(4) What is the strength of the state role in supporting local planning in each state?** The state's role in local land-use planning can make a difference in whether it is successful or not. The criteria used to classify the strength of the state role in local planning were:

- The similarity of the best statute on local planning to the 1920s planning laws;
- Whether the state's best planning statute mandates local planning;
- Whether the state requires consistency between plans of governments that are equal (horizontal consistency) and those that are not (vertical consistency);
- Whether the state has a land-use plan or plan policies; and
- Whether the state certifies, approves, or acknowledges local plans as consistent with state plan policies, goals, or standards.

These criteria were grouped to give these descriptions of the state roles:

- Weak - the state's role meets none of the criteria above;

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- Significant - the state's role meets 1 or 2 of the criteria above; or
- Substantial - the state's role includes 3 to 5 of the criteria.

Note that this is a rather generous classification because all a state had to have done to get in the category of having a significant role is to have a statute that is somewhat more detailed than a 1920s planning statute.

Even with this generous classification scheme the strength of the state roles are:

- 22 states have weak roles;
- 17 states have significant roles; and
- and only 11 states have substantial roles in local-land use planning.

In summary, there is incredible variety between state planning laws and overall they are in dire need of modernization because at best:

- Almost half of the states have 1920s vintage state laws on local planning;
- Most state statutes allow local governments to ignore local planning provisions if they wish;
- Many important plan elements are omitted and not mandated in many state planning laws; and
- Only 11 states have substantial roles in local planning.

### Key to Table 7-5

These explanations of symbols (letters and numbers) in Table 7-5 are listed by column number:

1. State postal abbreviations.
2. Similarity of surveyed statute to 1920s planning statutes are described as numbers 1 through 4 meaning:
  - 1 - not updated (few or no modernizations from SCPEA or similar 1920s model planning laws);
  - 2 - slightly updated (few but not many significant modernizations beyond the 1920s model planning laws);
  - 3 - moderately updated (many significant changes but still resembles the 1920s model planning laws in some way);and
  - 4 - substantially updated (contains a significant number of modernizations and no longer resembles SCPEA or any 1920s model planning law in any way)..
3. This column is an overview, usually from more than one statute, of what types of municipalities have mandatory or optional planning. (By contrast column 9 concerns only the municipalities in the one statute logged in the remainder of the columns.)

The letters "M," "I," and "O," related to whether planning is mandatory or not as:

M - mandatory;

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O - optional; and

I - mandated if a precondition is met such as if a planning commission is created.

The other symbols in this column 3 concern the type of municipality as:

G - gore (a type of municipality limited to the state of Vermont);

P - parish;

MR - metropolitan region;

MN - municipality;

C - county;

CT - cities;

T - town;

TP - township;

B - borough; and

V - villages.

4. See the descriptions in column 3 concerning "M," "O," and "I."

5. Y - yes, N - no.

6. Same as column 5.

7. The numbers 1 through 4 in this column describe the strength of the state role in local planning as:

1 - weak;

2 - significant; and

3 - substantial.

8. Citations of statutes.

9. See column 3 for the abbreviations of types of municipalities.

10. Same as column 5.

11. Through 31. These columns describe the various plan elements, of the best or most detailed statute on local planning in each state, generally with two symbols. The first symbol (M, O, or I as in column 3) relates to whether the element is mandated. The second symbol (numbers 1-3) describes how detailed the plan element is in the statute as:

1 - little detail;

2 - moderate detail; and

3 - substantial detail.

In order to distinguish the letter "I" from the number "1," in these columns, note that the first symbol is always a letter and the second is always a number.

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15. This column includes the additional symbols as letters in parenthesis as:

- (A) - agriculture;
- (F) - forest; and
- (OS) - open space.

32. This column describes other types of plans that are mentioned in the surveyed planning statutes and the symbols are those for columns 11 through 31.





## CHAPTER 8

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# LOCAL LAND DEVELOPMENT REGULATION

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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### Chapter Outline

#### GENERAL PROVISIONS

- 8-101 Definitions**
- 8-102 Authority to Adopt Land Development Regulations; Purposes; Presumption of Validity**
- 8-103 Adoption and Amendment of Land Development Regulations; Notice and Hearing**
- 8-104 Consistency of Land Development Regulations with Local Comprehensive Plan**
- 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]**
- 8-106 Relationship of Land Development Regulations to Lands Owned by the Federal, State, and Other Governmental Units (Four Alternatives)**

#### ZONING

- 8-201 Zoning Ordinance**

#### REVIEW OF PLATS AND PLANS

- 8-301 Subdivision Ordinance; Review and Approval of Subdivision by Local Government**
- 8-302 Site Plan Review**
- 8-303 Planned Unit Development; Traditional Neighborhood Development**

#### UNIFORM DEVELOPMENT STANDARDS

- 8-401 Uniform Development Standards**

#### DEVELOPMENT RIGHTS AND PRIVILEGES

- 8-501 Vested Right to Develop (Two Alternatives)**
- 8-502 Regulation of Nonconformities; Amortization (Two Alternatives)**

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

- 8-601 Development Improvements and Exactions**
- 8-602 Development Impact Fees**
- 8-603 Concurrency; Provision of Adequate Public Facilities**
- 8-604 Moratorium on Issuance of Development Permits for a Definite Term**

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### DEVELOPMENT AGREEMENTS

#### 8-701 Development Agreements

#### Cross-References for Sections in Chapter 8

Section No.	Cross-Reference to Section No.
8-101	7-502, 8-401
8-102	2-102, 7-406, 7-501, 8-201, 8-301, 8-302, 8-303, 8-601, 8-602, 8-603, 8-701, 9-101, 9-201, 9-301, 9-401, 9-403, 9-501, 14-301
8-103	7-106, 7-109, 7-110, 8-102
8-104	7-201, 7-406, 8-102
8-105	8-102, 8-103
8-106	7-109, 7-110, 7-402.2, 7-402.4, 8-102
8-201	8-102, 8-103, 8-104, 8-303, 8-502, 9-101, 9-301, Ch. 10, Ch. 11
8-301	7-501, 8-102, 8-103, 8-104, 8-201, 8-501, 8-601, 8-602, 10-204, 10-207, Ch. 11
8-302	8-102, 8-103, 8-104, 8-201, 8-301, 8-303, 8-501, 8-601, 8-602, 10-201, 10-502
8-303	8-102, 8-103, 8-104, 8-201, 8-301, 8-601, 8-602, 10-502
8-401	4-103, 8-601, 8-602, 10-601 <i>et seq.</i>
8-501	8-201, 8-301, 8-302, 8-303, 8-701, 10-201, 10-203
8-502	8-201, 8-301, 8-302, 8-303
8-601	8-102, 8-103, 8-104, 8-301, 8-302, 8-303, 8-401, 8-501, 8-602
8-602	7-202, 7-502, 7-503, 8-102, 8-103, 8-104, 8-301, 8-302, 8-303, 8-401, 8-601, Ch. 10
8-603	7-202, 7-302, 7-303, 7-502, 7-503, 8-102, 8-103, 8-104, 10-201 <i>et seq.</i>
8-604	4-401, 7-201 <i>et seq.</i> , 8-102, 8-103, 8-104, 8-603, Ch. 10
8-701	7-202, 8-102, 8-103, 8-104, Ch. 10, Ch. 11

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### THE EVOLUTION OF MODEL ZONING AND SUBDIVISION STATUTES

This commentary<sup>1</sup> 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.<sup>2</sup> 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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<sup>1</sup>This commentary appeared in different form as "Model Planning and Zoning Enabling Legislation: A Short History," by Stuart Meck, AICP, in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. I*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 1-17.

<sup>2</sup>*Proceedings of the Fifth National Conference on City Planning, Chicago, Illinois* (Boston, University Press, 1913): 247-259.

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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.<sup>3</sup>

### THE STANDARD ACTS

The *Standard State Zoning Enabling Act* (SZE) 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.<sup>4</sup> 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.<sup>5</sup> Another motivation, for the SZE 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.<sup>6</sup>

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

<sup>4</sup>Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (SZE), revised edition (Washington, D.C. U.S. GPO, 1926); and Advisory Committee on Planning and Zoning, U.S. Department of Commerce, *A Standard City Planning Enabling Act* (SCPEA) (Washington, D.C. U.S. GPO, 1928).

<sup>5</sup>See Ruth Knack, Stuart Meck, and Israel Stollman, "The Real Story Behind the Standard Planning and Zoning Enabling Acts of the 1920s," *Land Use Law & Zoning Digest* 48, No. 2 (February 1996): 3-9, at 3 (discussing Hoover's interest in planning and land-use controls).

<sup>6</sup>See SZE, iii.

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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.<sup>7</sup>

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<sup>8</sup> 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."<sup>9</sup>

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<sup>7</sup>The SCPEA's provisions for subdivision control are discussed in more detail in the commentary to Section 8-301, Subdivision Review.

<sup>8</sup>Indeed, the SZEA did not contain any definitions at all!

<sup>9</sup>SZEA, note 43.

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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 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.”<sup>10</sup> 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.<sup>11</sup>

### MODEL LAWS FOR PLANNING CITIES

In 1935 Harvard University Press published *Model Laws for Planning Cities, Counties and States, Including Zoning, Subdivision Regulation, and Protection of Official Map*, authored by attorneys Edward M. Bassett, Frank B. Williams, and Alfred Bettman, and planner Robert Whitten.<sup>12</sup> Bassett and Bettman also served on the committee that drafted the Standard Acts.

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) 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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<sup>10</sup>Mellier Scott, *American City Planning Since 1890*, 195.

<sup>11</sup>Harland Bartholomew, “What Is Comprehensive Zoning,” in *National Conference on City Planning, New York, Planning Problems of Town, City and Region: Papers and Discussions* (Philadelphia, Pa.: Wm. F. Fell, 1928), 47-71 (discussing underlying studies to be made in advance of the preparation of a zoning ordinance).

<sup>12</sup>Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States, including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935).

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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.”<sup>13</sup>

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 SZEAs 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.<sup>14</sup> 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.”<sup>15</sup> Thus, the legislative body could rein in the board if it had been abusing its powers.<sup>16</sup> 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.<sup>17</sup> The act was a series of changes to the basic structure of the SZEAs 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.<sup>18</sup>

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<sup>13</sup>Id., at 15.

<sup>14</sup>Id., 64.

<sup>15</sup>Id., 65.

<sup>16</sup>Of 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.

<sup>17</sup>H. Walker, Jr., *Problems and Suggestions in the Drafting of Rural Zoning Enabling Legislation*, Resettlement Administration, U.S. Department of Agriculture, Land Use Planning Pub. No. 10 (Washington, D.C.: U.S.D.A., 1936).

<sup>18</sup>Id., 47-50.

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### 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.<sup>19</sup> 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.”<sup>20</sup>

### 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*.<sup>21</sup> 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 SZEA. 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

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<sup>19</sup>William A. Doebele, Jr. “Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico,” *National Resources Journal* 2 (1962): 321.

<sup>20</sup>Id., at 336, note 29, citing Proposed New Mexico Act Defining the Content and Preparation of the General Plan. For a discussion of this language and its implications, see William A. Doebele, Jr., “Horse Sense About Zoning and the Master Plan,” *Zoning Digest* 13 (1961): 209, 212-214.

<sup>21</sup>American Society of Planning Officials (ASPO), *New Directions in Connecticut Planning Legislation: A Study of Connecticut Planning, Zoning and Related Statutes* (Chicago: ASPO, February 1966). The summary is drawn from Chapter 4. The ASPO Connecticut Report, the American Law Institute’s Model Land Development Code (see discussion below), the report of the National Commission on Urban Problems (see discussion below), and several other studies are analyzed at length in David Heeter, *Toward a More Effective Land-Use Guidance System: A Summary and Analysis of Five Major Reports*, Planning Advisory Service Report No. 250 (Chicago: ASPO, 1969).

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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.”<sup>22</sup> 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.<sup>23</sup> 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).<sup>24</sup>

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.<sup>25</sup> The report called for state legislation to

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<sup>22</sup>William Reilly, ed., and the Task Force on Land Use and Urban Growth *The Use of Land: A Citizens’ Policy Guide to Urban Growth*, (New York: Thomas Y. Crowell, 1973), 17.

<sup>23</sup>Id., 25.

<sup>24</sup>Id., 26-27.

<sup>25</sup>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.<sup>26</sup> In addition, it encouraged incentives, such as density bonuses, to stimulate large-scale developments, which it championed.<sup>27</sup> 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.<sup>28</sup>

### **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.<sup>29</sup> 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.<sup>30</sup> 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 SZE. 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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<sup>26</sup>Id., 27.

<sup>27</sup>Id., 28.

<sup>28</sup>Id., 19-22.

<sup>29</sup>American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia: ALI, 1976).

<sup>30</sup>This summary of Article 2 is abstracted from ALI, *A Model Land Development Code*, 28-29.

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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.<sup>31</sup>

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."<sup>32</sup>

### **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.<sup>33</sup>

### **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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<sup>31</sup>For a critical discussion of the decision not to mandate planning in the ALI Code, see George Raymont, "New? Yes . . . More Effective? No," in American Society of Planning Officials, *1971 Land Use Controls Annual* (1971), 47; and Allison Dunham and Fred Bosselman, "The Reporters' Reply," *1971 Land Use Controls Annual* (1971), 113, 114-115.

<sup>32</sup>ALI Code, 29.

<sup>33</sup>U.S. Advisory Commission on Intergovernmental Relations (ACIR), *State Legislative Program, No. 5: Environment, Land Use and Growth Policy* (Washington, D.C. U.S. GPO, November 1975), 13-65, *passim*.

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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.<sup>34</sup>

### **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.<sup>35</sup> The National Association of Home Builders (NAHB) Research Center in 1993 published *Proposed Model Land Development Standards and Accompanying 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.<sup>36</sup> 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*.<sup>37</sup> 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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<sup>34</sup>Council of State Governments, *Suggested State Legislation* (Lexington, Ky.: The Council) (volumes for various years). By year, the legislation included: "County Powers in Relation to Local Planning and Zoning Actions Act," in Vol. 35 (1976), 70-74; "County Planning, Zoning, and Subdivision Control in Unincorporated Areas Act," in Vol. 35 (1976), 75-85; "Small Airport Zoning Regulation and Restrictions Act," in Vol. 44 (1985), 23-30; "State Flood Hazard Area Regulations Act," in Vol. 47 (1988), 1-21; "Comprehensive Planning and Land Use Regulation Act," in Vol. 49 (1990), 9-28; "Stormwater Management and Sediment Reduction Act," in Vol. 52 (1992); 87-97; and "Development Impact Fee Act," in Vol. 52 (1993), 115-123.

<sup>35</sup>J. Bachrach et al., "A Standard Impact Fee Enabling Statute," 135-141; and Julian C. Juergensmeyer and James C. Nicholas, 156-162, in *Development Impact Fees: Policy Rationale, Practice, Theory and Issues*, Arthur C. Nelson, ed. (Chicago: Planners Press, 1988).

<sup>36</sup>U.S. Department of Housing and Urban Development, Office of Policy Development and Research, *Proposed Model Land Development Standards and Accompanying Model State Enabling Legislation, 1993 Edition*, prepared by NAHB Research Center (Washington, D.C.: June 1993).

<sup>37</sup>American Bar Association (ABA) Advisory Commission on Housing and Urban Growth, Richard Fishman, ed., *Housing for All Under Law: New Directions for Housing, Land Use and Planning Law* (Cambridge, Mass.: Ballinger, 1978). See also the discussion of this report in the commentary to Section 2-102, State Interests for Which Public Entities Shall Have Regard.

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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.”<sup>38</sup>

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.<sup>39</sup>

### 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*.<sup>40</sup> 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).

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<sup>38</sup>Id., xxi.

<sup>39</sup>Ibid.

<sup>40</sup>National 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.

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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.<sup>41</sup> 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."<sup>42</sup> 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. 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.<sup>43</sup> 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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<sup>41</sup>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.

<sup>42</sup>National Commission on Urban Problems, *Building the American City*, 247.

<sup>43</sup>The President's Commission on Housing, *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.

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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.<sup>44</sup> 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.<sup>45</sup>

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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<sup>44</sup>Advisory Commission on Regulatory Barriers to Affordable Housing, “*Not in My Back Yard*”: *Removing Regulatory Barriers to Affordable Housing* (Washington, D.C.: U.S. GPO, 1991). The summary of recommendations below appears in the report at 14-16, *passim*.

<sup>45</sup>Many 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.

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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.”<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> Similarly, he called for duplexes and accessory apartments to be permitted uses as of right in all new residential construction.<sup>49</sup> 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.”<sup>50</sup>

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

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<sup>46</sup>Id., 15-16.

<sup>47</sup>George W. Liebman, “The Modernization of Zoning: Enabling Act Revision as a Means to Reform,” *Urban Lawyer* 23, No. 1 (Winter 1991): 1-24, 12.

<sup>48</sup>Ibid.

<sup>49</sup>Id., 14.

<sup>50</sup>Id., 15.

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limitations, and light and air standards.<sup>51</sup> 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.”<sup>52</sup> 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.<sup>53</sup> 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).<sup>54</sup> 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.<sup>55</sup>

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.”<sup>56</sup> 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.”<sup>57</sup>

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<sup>51</sup>Id., 13.

<sup>52</sup>Ibid.

<sup>53</sup>Id., 13, citing S.B. 419, 1981 Oregon Laws.

<sup>54</sup>Id., 15, citing Ore. Admin. Rules §660-07-022 (no distinction on the basis of form of tenure).

<sup>55</sup>Id., 14, citing 24 Vt. Stat §4406(3).

<sup>56</sup>Id., 14.

<sup>57</sup>Id., 24.

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### **According to the Growing Smart<sup>SM</sup> 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.

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## 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.

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**“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;

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- (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;

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- (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.

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**“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.<sup>58</sup>

- ◆ 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

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<sup>58</sup>See 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].

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**“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.

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### ***Commentary: Authority to Adopt Land Development Regulations***

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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.<sup>59</sup>

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.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> 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

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<sup>59</sup>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).

<sup>60</sup>See Brian Blaesser and Lane Kendig, “Computerized Zoning: The Future Is Now,” *Land Use Law & Zoning Digest* 48, No. 4 (April 1996): 3-11.

<sup>61</sup>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).

<sup>62</sup>Ore. Admin. Rules §660-08-15 (March 1991) (this rule applies to “needed housing”); §660-16-010(3) (November 1993 (this rule applies to local planning and land-use regulations affecting open spaces, scenic and historic areas, and natural resources)). For a discussion of Ore. Admin. Rules §660-08-15, see Terry Morgan, “Exclusionary Zoning Remedies Under Oregon’s Land Use Planning Program,” *Environmental Law* 14, No. 4 (Summer 1984): 779-830, at 812-815; and Robert L. Liberty, “Oregon’s Comprehensive Growth Management Program: An Implementation Review and Lessons from Other States,” *Environmental Law Reporter News & Analysis* XXII, No. 6 (June 1992): 10367, 10378 to 10379.

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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.

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### **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.<sup>63</sup>
- (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;

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<sup>63</sup>This phrase is drawn from the SZE, §1.

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- (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.

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- (d) development that is exempt from the requirements of the land development regulations.<sup>64</sup>
- ◆ 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.
- ◆ See Sections 10-201 *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.
  - ◆ 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 [*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].

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<sup>64</sup>This language is adapted from the ALI Code, §2-101(2).

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- (7) 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.

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- (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;

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- (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 landowners<sup>65</sup> 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.

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<sup>65</sup>The statutory language is adapted from Cal. Gov't Code §65091 (1999).

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### *Commentary: Gauging Regulatory Consistency with a Local Comprehensive Plan*<sup>66</sup>

The *Standard Zoning Enabling Act* (SZEА), 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 SZEА, has spawned a large body of litigation and corresponding commentary and analysis on the question of regulatory consistency.<sup>67</sup> 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 SZEА’s “a comprehensive plan.” **Arizona**<sup>68</sup> states that zoning ordinance and regulations “shall be consistent with and conform to the adopted general plan of the municipality, if any.” **California** law<sup>69</sup> 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

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<sup>66</sup>This commentary and the Section 8-104 that follows are based in part on an analysis by Robert Lincoln, “Implementing the Consistency Doctrine,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 89-104.

<sup>67</sup>Joseph F. DiMento, *The Consistency Doctrine and the Limits of Planning* (Cambridge, Mass.: Oelgeschlager, Gunn, and Hain, 1980); Charles Haar, “In Accordance with a Comprehensive Plan,” *Harvard. L. Rev.* 68 (1955): 1154; Charles Haar, “The Master Plan: An Impermanent Constitution,” *Law and Contemporary Problems* 20 (1955): 353; Daniel Mandelker, “The Role of the Local Comprehensive Plan in Land Use Regulation,” *Mich. L. Rev.* 74 (1976): 899; Edith M. Netter and John Vranicar, *Linking Plans and Regulations: Local Responses to Consistency Laws in California and Florida*, Planning Advisory Report No. 363 (Chicago: American Planning Association, 1981); Charles L. Siemon, “The Paradox of ‘In Accordance with a Comprehensive Plan’ and Post Hoc Rationalization: The Need for Efficient and Effective Judicial Review of Land Use Regulations,” *Stetson Law Review* 16 (1987): 603; Edward J. Sullivan and Lawrence Kressel, “Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement,” *Urban Law Ann.* 9 (1975): 33; A. Dan Tarlock, “Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against,” *Urban Law Ann.* 9 (1975): 69. For a review of the case law on the consistency issue, see Norman Williams, Jr. *American Land Planning Law*, Vol. 1 (Deerfield, Ill.: Clark Boardman Callaghan, 1988), Ch. 23; Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville: Lexis Law Publishing Co, 1997), §§3.13 to 3.15; and Eric D. Kelly, gen. ed., *Zoning and Law Use Controls*, Vol. 5 (New York: Matthew Bender, October 1998), §32A.05[1]. For a good appraisal of a Florida decision on consistency, see Thomas Pelham, “Quasi-Judicial Rezoning: A Commentary on the Snyder Decision and the Consistency Doctrine,” *Land Use and Environmental Law* 9, No. 2 (1994): 243-306 (analyzing *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469 (Fla. 1993)).

<sup>68</sup>Ariz. Rev. Stat. §9-462.01 (1999).

<sup>69</sup>Cal. Gov’t Code §65860 (1997).

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programs specified in such a plan.” **Delaware**<sup>70</sup> 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**<sup>71</sup> 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**<sup>72</sup> states that local zoning ordinances and maps must be “pursuant to and consistent with a comprehensive plan adopted by the municipal legislative body.” **Nebraska**<sup>73</sup> provides that zoning regulations must be preceded by the adoption of a comprehensive development plan and must be consistent with that plan. **Oregon**<sup>74</sup> 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**<sup>75</sup> 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<sup>76</sup> requires city and county land development regulations to be “consistent with and implement” the comprehensive plan, and also<sup>77</sup> 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**<sup>78</sup> 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.

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<sup>70</sup>Del. Code tit. 9 §§2653, 2656 (1999).

<sup>71</sup>Ky. Rev. Stat. §101.213 (1997).

<sup>72</sup>Me. Rev. Stat. tit. 30A §§4352.2 to .3 (1999).

<sup>73</sup> Neb. Rev. Stat. §23-114.03 (1999).

<sup>74</sup>Or. Rev. Stat. §197.010(1) (1997).

<sup>75</sup>R.I. Gen. Laws §§45-24-31, -34 (1998).

<sup>76</sup>Wash. Rev. Code §36.70A.040(1)(1999).

<sup>77</sup>Wash. Rev. Code §35.63.125.

<sup>78</sup>Wis. Stat. §66.0295 (1999).

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Based in part on a Florida statute,<sup>79</sup> 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.<sup>80</sup>

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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<sup>79</sup>Fla. Stat. §163.3194 (1998).

<sup>80</sup>See *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).

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### 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

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the regulations, amendment, or action. The local planning agency shall make the written report available to the public at least [7] days prior to any public hearing or meeting on the regulations, amendment, or action that is the subject of the report.

- (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:

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- (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.
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### ***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.<sup>81</sup> 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.<sup>82</sup>

Based on administrative rules from Washington state,<sup>83</sup> 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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<sup>81</sup>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).

<sup>82</sup>*Welsh v. City of Orono*, 355 N.W.2d 117 (Minn. 1994). See also *Arthur Whitcomb, Inc. v. Town of Carroll*, 141 N.H. 402, 686 A.2d 743 (1996) (comprehensive state legislation on commercial excavation preempts local zoning); *River Springs Ltd. Liability Co. v. Board of County Commissioners*, 899 P.2d 1329 (Wyo. 1995) (state agency has pervasive control over mining).

<sup>83</sup>Wash. Admin. Code §§36-195-70 to 365-194-735 (1997).

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

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### **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.

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### ***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.<sup>84</sup> 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.<sup>85</sup> The leading case adopting the sovereign immunity rule is *Kentucky Institute for Education of the Blind v. City of Louisville*.<sup>86</sup> 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*.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

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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<sup>84</sup>On this topic see generally Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing 1997), §§4.26 to 4.41; Edward Ziegler, *Rathkopf's Law of Zoning and Planning* (Eagan, Minn: West Group, 1999), Ch. 53 (Governmental Uses and Zoning). The American Law Institute's *Model Land Development Code* provided that, unless exempted by statute, governmental development would be subject to regulation by local governments in the exercise of the powers conferred upon them by the *Code*. American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia: ALI, 1976), §12-201, Compliance with Local Regulations).

<sup>85</sup>Pursuant 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).

<sup>86</sup>97 S.W. 402 (1906).

<sup>87</sup>*City of Baltimore v. State Dep't of Health*, 38 Md. App. 570, 381 A.2d 1188 (1978); *City of Treasure Island v. Decker*, 174 So.2d 756 (Fla. Dist. Ct. App. 1965).

<sup>88</sup>See, e.g., *Rutgers v. Piluso*, 60 N.J. 142, 286 A.2d 697 (1972).

<sup>89</sup>*Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), overruled on other grounds by *Racing Guild of Ohio, Local 304 v. State Racing Commission*, 28 Ohio St. 3d 317, 503 N.E.2d 1025 (1986).

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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.<sup>90</sup>

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.<sup>91</sup> **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.<sup>92</sup> 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.<sup>93</sup> 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.

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

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

<sup>91</sup>Ore. Rev. Stat. §227.286 (1999).

<sup>92</sup>Cal. Gov't Code §§53090 to 53096 (1999).

<sup>93</sup>R.I. Gen. Laws §45-22.210(E).

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### *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] [special districts] [, 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 [,] [, or] [special districts] [, or 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

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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];

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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

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### ***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

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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.<sup>94</sup> 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,<sup>95</sup> 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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<sup>94</sup>Ky. Rev. Stats. §100.203 (1998); R. I. Gen. Laws §45-24-32 (1996). See also 30-A Me. Rev. Stat. Ann. §4352 (1997) (describing contents of zoning ordinance); and Me. Admin. Rules Ch. 210 (1998) (Zoning Ordinance Review Criteria Rule, describing required elements of a zoning ordinance).

<sup>95</sup>23 U.S.C. §131 (2000). For a discussion of the federal Highway Beautification Act, see Albert, “Your Ad Goes Here: How the Highway Beautification Act of 1967 Thwarts Highway Beautification,” 48 U.Kan.L.Rev. (2000).

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**Alaska**<sup>96</sup> bans all outdoor advertising except as expressly permitted by statute.<sup>97</sup> 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.<sup>98</sup> Signs in violation of the statute are nuisances and may be removed at the owner's expense,<sup>99</sup> and violations are also punishable by fine.<sup>100</sup> Compensation for the removal of advertising signs is authorized but not required.<sup>101</sup> Municipal ordinances regulating outdoor advertising more restrictively than the state statute are expressly authorized.<sup>102</sup>

**Hawaii**<sup>103</sup> 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.<sup>104</sup> Signs may be required to be removed five years after becoming nonconforming,<sup>105</sup> but compensation must be paid, although that compensation includes only the loss of rights in the sign and land.<sup>106</sup> Signs in violation of the statute are nuisances,<sup>107</sup> and violations of the statute are subject to fine and imprisonment.<sup>108</sup> More restrictive regulations of signs may be adopted.<sup>109</sup>

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<sup>96</sup>Alaska Stat. §§19.25.080 *et seq.* (2000).

<sup>97</sup>Alaska Stat. §19.25.090.

<sup>98</sup>Alaska Stat. §19.25.105.

<sup>99</sup>Alaska Stat. §19.25.150.

<sup>100</sup>Alaska Stat. §19.25.130.

<sup>101</sup>Alaska Stat. §19.25.140.

<sup>102</sup>Alaska Stat. §19.25.180.

<sup>103</sup>Haw. Rev. Stat. §§264-71 *et seq.* (2000).

<sup>104</sup>Haw. Rev. Stat. §264-72.

<sup>105</sup>Haw. Rev. Stat. §264-74.

<sup>106</sup>Haw. Rev. Stat. §264-75.

<sup>107</sup>Haw. Rev. Stat. §264-76.

<sup>108</sup>Haw. Rev. Stat. §264-77.

<sup>109</sup>Haw. Rev. Stat. §264-78.

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Hawaiian counties are also expressly authorized<sup>110</sup> 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.<sup>111</sup> 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.<sup>112</sup> County regulations may be enforced civilly<sup>113</sup> and criminally.<sup>114</sup>

**Maine**<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> Business direction signs may be permitted, subject to regulations adopted by the commissioner that govern their location, size, color, shape, lighting, and other aspects.<sup>118</sup> The license fee for business direction signs is fixed at \$30 initially and the same amount for annual renewal.<sup>119</sup> 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.<sup>120</sup> 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

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<sup>110</sup>Haw. Rev. Stat. §§445-111 *et seq.*.

<sup>111</sup>Haw. Rev. Stat. §445-112.

<sup>112</sup>Haw. Rev. Stat. §445-113.

<sup>113</sup>Haw. Rev. Stat. §445-120.

<sup>114</sup>Haw. Rev. Stat. §445-121.

<sup>115</sup>Me. Rev. Stat. tit.23 §§1901 *et seq.*.

<sup>116</sup>Me. Rev. Stat. tit.23 §§1906, 1908-1911.

<sup>117</sup>Me. Rev. Stat. tit.23 §1904.

<sup>118</sup>Me. Rev. Stat. tit.23 §§1906, 1909-1910.

<sup>119</sup>Me. Rev. Stat. tit.23 §1919.

<sup>120</sup>Me. Rev. Stat. tit.23 §1914.

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religious or civic meetings, memorials, signs for historic or cultural institutions, etc.).<sup>121</sup> 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.”<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> Amortization of signs lawful as of 1978 was authorized to extend up to six years.<sup>125</sup> Unlawful signs may be removed at the owner’s expense,<sup>126</sup> and fines may be imposed.<sup>127</sup> Stricter local ordinances, consistent with the state statute, are expressly allowed.<sup>128</sup>

**Rhode Island**<sup>129</sup> 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.<sup>130</sup> The outdoor advertising permitted by statute must have a permit from the state Director of Transportation, who may adopt regulations under the statute.<sup>131</sup> 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,<sup>132</sup> and violations of the statute may be punished by

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<sup>121</sup>Me. Rev. Stat. tit.23 §1913-A.

<sup>122</sup>Me. Rev. Stat. tit.23 §1912.

<sup>123</sup>Me. Rev. Stat. tit.23 §1911.

<sup>124</sup>Me. Rev. Stat. tit.23 §1915.

<sup>125</sup>Me. Rev. Stat. tit.23 §1916.

<sup>126</sup>Me. Rev. Stat. tit.23 §1917.

<sup>127</sup>Me. Rev. Stat. tit.23 §1920.

<sup>128</sup>Me. Rev. Stat. tit.23 §1922.

<sup>129</sup>R.I. Stat. §§24-10.1-1 *et seq.* (2000).

<sup>130</sup>R.I. Stat. §24-10.1-3.

<sup>131</sup>R.I. Stat. §24-10.1-4.

<sup>132</sup>R.I. Stat. §24-10.1-7.

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finer up to \$500.<sup>133</sup> Lawfully-erected nonconforming signs may not be required to be removed less than five years from becoming nonconforming,<sup>134</sup> and compensation is due for the removal of lawfully-erected signs.<sup>135</sup> 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.<sup>136</sup> Ordinances or regulations more restrictive than the statute may be adopted.<sup>137</sup>

**Vermont**<sup>138</sup> 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.<sup>139</sup> Off-premise signs directing the public to a business require a license from the TIC.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> Noncompliant signs, except for those lawfully existing on March 23, 1968, may be removed by the TIC or state transportation agency,<sup>143</sup> and

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<sup>133</sup>R.I. Stat. §24-10.1-8.

<sup>134</sup>R.I. Stat. §24-10.1-5.

<sup>135</sup>R.I. Stat. §24-10.1-6.

<sup>136</sup>R.I. Stat. §24-10.1-3.

<sup>137</sup>R.I. Stat. §24-10.1-9.

<sup>138</sup>10 Vt. Stat. Ann. §§481 *et seq.* (2000).

<sup>139</sup>10 Vt. Stat. Ann. §484.

<sup>140</sup>10 Vt. Stat. Ann. §§488, 490, 499.

<sup>141</sup>10 Vt. Stat. Ann. §493.

<sup>142</sup>10 Vt. Stat. Ann. §495.

<sup>143</sup>10 Vt. Stat. Ann. §497.

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violators may be fined or imprisoned.<sup>144</sup> The statute and the regulations of the TIC expressly do not preclude stricter regulation of signs by local governments.<sup>145</sup>

Other states with billboard regulations more stringent than required by the Federal Highway Beautification Act include **Missouri**<sup>146</sup> and **Oregon**<sup>147</sup>

The Growing Smart<sup>SM</sup> *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.”<sup>148</sup> 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.”<sup>149</sup> The amortization of nonconforming signs (and other uses) is expressly authorized<sup>150</sup> 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,<sup>151</sup> or, if the issue of sign control is considered to be of particular importance, through an optional agriculture, forest, and scenic preservation element.<sup>152</sup>

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### 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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<sup>144</sup>10 Vt. Stat. Ann. §503.

<sup>145</sup>10 Vt. Stat. Ann. §505.

<sup>146</sup>Mo. Rev. Stat. §§226.500 *et seq.*.

<sup>147</sup>Or. Rev. Stat. §§377.700 *et seq.* (2000).

<sup>148</sup>Sec. 8-201(2)(h).

<sup>149</sup>Sec. 8-201(2)(k).

<sup>150</sup>Sec. 8-502(4) - (6).

<sup>151</sup>Sec. 7-204.

<sup>152</sup>Sec. 7-212.

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- (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].

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- (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];

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- (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.<sup>153</sup>
- (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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<sup>153</sup>For a review of state requirements regarding manufactured housing, see S. Mark White, "State and Federal Planning Legislation and Manufactured Housing: New Opportunities for Affordable, Single-Family Shelter," *Urban Lawyer* 28, No. 2 (Spring 1996): 263-292; Molly A. Sellman, "Equal Treatment of Housing: A Proposed Model State Code for Manufactured Housing," in *1989 Zoning and Planning Law Handbook*, Mark S. Dennison, ed. (New York: Clark Boardman Co., Ltd. 1989), Ch. 18.

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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

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#### *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.<sup>154</sup> 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<sup>155</sup> 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

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<sup>154</sup>For a history of the development of subdivision regulations in the U.S., see David Listokin and Carol Walker, *The Subdivision and Site Plan Handbook* (New Brunswick, N.J.: Center for Urban Policy Research, 1989), Pt. II, Ch. 1. See also Robert H. Freilich and Michael M. Schultz, *Model Subdivision Regulations*, 2d ed. (Chicago: APA Planners Press, 1995), 1-7.

<sup>155</sup>For 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.

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Typically subdivision regulation is a two to three-part process.<sup>156</sup> 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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<sup>156</sup>This discussion originally appeared in different form as "Subdivision Control: A Primer for Planning Commissioners," by Stuart Meck, AICP, in *The Commissioner* (Chicago: American Planning Association, Fall 1996/Winter 1997): 4-6.

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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.<sup>157</sup> 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.<sup>158</sup> In Kentucky, a planning commission or the county fiscal court may have authority to approve subdivisions.<sup>159</sup> 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.<sup>160</sup>

### MODEL ACTS FOR SUBDIVISION CONTROL

The *Standard City Planning Enabling Act* (SCPEA), published in 1928, authorized subdivision regulation.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup> 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.

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<sup>157</sup>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).

<sup>158</sup>Cal. Gov't Code, §66440 (1998).

<sup>159</sup>Ky. Rev. Stat. §10.273 (1998).

<sup>160</sup>Ohio Rev. Code §711.041, §711.05 §711.10 (1998).

<sup>161</sup>SCPEA, §§12 to 17.

<sup>162</sup>If there was another municipality within the five-mile radius, both municipalities could review subdivisions up to a point equidistant between them. *Id.*, §12.

<sup>163</sup>*Id.*, §14.

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Approved plats were treated as amendments to the municipal plan. The planning commission was also give 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.”<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup>

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.<sup>168</sup> 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.<sup>169</sup>

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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<sup>164</sup>Id.

<sup>165</sup>Edward M. Bassett, Frank B. Williams, Alfred Bettman, and Robert Whitten, *Model Laws for Planning Cities, Counties, and States, including Zoning, Subdivision Regulation, and Protection of Official Map* (Cambridge, Mass.: Harvard University Press, 1935), 39-47, esp. 41-43.

<sup>166</sup>Id., 84-88.

<sup>167</sup>Id., at 66.

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

<sup>169</sup>Id., §11-204 (Recording of Plats and Subdivision Maps) and Note, 477-78.

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purposes that such regulation should serve, did not detail the contents of an ordinance or the manner in which it was to be administered.<sup>170</sup>

### **GROWING SMART<sup>SM</sup> 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.<sup>171</sup> 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 *Legislative Guidebook*. Nor does the model describe in detail the contents of a plat, as do some state statutes.<sup>172</sup> 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.

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### **8-301 Subdivision Ordinance; Review and Approval of Subdivision by Local Government**

- (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.*]
- (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:

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<sup>170</sup>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.

<sup>171</sup>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 *Guidebook* particularly utilizes language from the excellent Rhode Island subdivision statute.

<sup>172</sup>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).

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- (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.<sup>173</sup>
    - (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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<sup>173</sup>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;
- ◆ 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.<sup>174</sup>
- (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.<sup>175</sup> Such standards shall require that:

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<sup>174</sup>Mont. Code Ann. §76-3-504(8) (1998) (minimum requirements for subdivision regulations).

<sup>175</sup>For 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.

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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).<sup>176</sup> 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;

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<sup>176</sup>See generally Marya Morris, *Subdivision Design in Flood Hazard Areas*, Planning Advisory Service Report No. 473 (Chicago: American Planning Association, September 1997).

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- (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]<sup>177</sup>

- ◆ 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 provided 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)].

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<sup>177</sup>This 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.<sup>178</sup> 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

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<sup>178</sup>In 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.

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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*].

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### ***Commentary: Site Plan Review***<sup>179</sup>

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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<sup>179</sup>For reviews of the case law surrounding site plan review, see Norman Williams, Jr., *American Land Planning Law*, Vol. 5 (Deerfield, Ill.: Clark Boardman Callaghan, 1988, and 1998 Supp.), §152.01; Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing Co, 1997), § 6.68; Patrick J. Rohan, Eric D. Kelly, gen. ed., *Zoning and Land Use Controls*, Vol. 6 (New York: Matthew Bender, 1996), ch. 33C; and Edith M. Netter, in Edward Ziegler, ed., *Rathkopf's Law of Zoning and Planning, Vol. 5*. (Eagan, Minn.: West Group, 1993 Release), ch. 62. Most of the case law turns on procedural and scope of authority issues connected with specific state statutes.

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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.<sup>180</sup>

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.”<sup>181</sup> Some state courts have found the authority to conduct site plan review to be implied, absent express statutory authority.<sup>182</sup> 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.<sup>183</sup>

A number of states have statutes that expressly authorize site plan review. **Connecticut**<sup>184</sup> 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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<sup>180</sup>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).

<sup>181</sup>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).

<sup>182</sup>*McCran v. Town Plan. and Zoning Comm’n*, 161 Conn. 6, 282 A.2d 900 (1997); *Charter Twp. Of Harrison, v. Calisi*, 121 Mich. App. 777, 329 N.W.2d 488 (1982); *Sun Oil Co. v. Zoning Bd. of Adjustment*, 403 Pa. 409, 169 A.2d 294 (1961)

<sup>183</sup>*Colwell v. Howard County*, 31 Md. App. 8, 354 A.2d 210 (1976); *Y.D. Dugout, Inc. v Bd. of Appeals*, 357 Mass. 25, 255 N.E.2d (1970); *Southwick, Inc. v. City of Lacey*, 58 Wash. App. 886, 795 P.2d 712 (1990).

<sup>184</sup>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).

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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.”<sup>185</sup> 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.<sup>186</sup>

**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.”<sup>187</sup> 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.<sup>188</sup>

**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,<sup>189</sup> and a final site plan approval.<sup>190</sup> The statute allows an abbreviated review for a “minor site plan,”<sup>191</sup> 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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<sup>185</sup>Mich. Comp. Stats. §125.286e (townships); §125.584d (cities and villages). The definition of site plan appears in paragraph (1) of both statutes.

<sup>186</sup>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.

<sup>187</sup>N.H. Rev. Stat. Ann. § 674:43I (1998).

<sup>188</sup>Id., §674:44.

<sup>189</sup>N.J. Stat. Ann. §40:55D-46.

<sup>190</sup>Id., §40:55D-50.

<sup>191</sup>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.].”<sup>192</sup> The statute includes a list of standards and requirements that may be included in a site plan ordinance.<sup>193</sup>

The **New York** statutes<sup>194</sup> 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].<sup>195</sup>

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

In contrast to variances and conditional uses, site plan review is limited to onsite conditions, unless the enabling legislation provides otherwise.<sup>197</sup> 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

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<sup>192</sup>§40:55D-5, Definitions M to O.

<sup>193</sup>Id., §40:55D-41.

<sup>194</sup>N.Y. Village Law §7-725-a; N.Y. Town Law §274-a, and New York Gen. City Law §27-a (1998).

<sup>195</sup>R.I. Gen. Laws §45-24-49(B) (Special provisions—development plan review) (1996).

<sup>196</sup>Id., §45-24-49(C).

<sup>197</sup>If 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.

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egress proposed by the plan creates “unsafe and inefficient vehicular circulation.”<sup>198</sup> Other state court decisions have reached similar conclusions regarding the scope of site plan review.<sup>199</sup>

### 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.

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### 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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<sup>198</sup>*Lionel’s Appliance Ctr. v. Citta*, 156 N.J. Super. 257, 383 A.2d 773, 779 (N.J. Super. Ct. Law. Div. 1978).

<sup>199</sup>*Coscan Washington, Inc. v. Maryland-National Capital Park and Planning Comm’n*, 87 Md. App. 602, 590 A.2d 1080 (1991); *Southland Corp. v. Mayor and City Council*, 75 Md. App. 375, 541 A.2d 653 (1988); *Holmes v. Planning Bd. of New Castle*, 78 A.D. 2d 1, 433 N.Y.S.2d 587 (2d Dept. Sup. Ct. 1980).

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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;<sup>200</sup> 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].

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### ***Commentary: Planned Unit Development***

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<sup>200</sup>This language is derived from N.J. Rev. Stat. Ann. §40:55D-41.

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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.<sup>201</sup> 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.<sup>202</sup>

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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<sup>201</sup>William H. Whyte, *Cluster Development* (New York: American Conservation Association, 1964), ch. 1. For a case discussing and upholding cluster zoning, see *Chrinko v. South Brunswick Twp. Planning Bd.*, 77 N.J. Super. 594, 187 A.2d 221 (1963).

<sup>202</sup>For a detailed history on the emergence of PUDs, see Patrick J. Rohan, Eric D. Kelly, Gen. Editor *Zoning and Land Use Controls* (New York: Matthew Bender, 1991), §32.01[1]. See generally Daniel R. Mandelker, *Controlling Planned Residential Developments* (Chicago: American Society of Planning Officials, 1966); and National Commission on Urban Problems, *Building the American City, Report of the National Commission on Urban Problems* (Washington, D.C.: U.S. GPO, 1968), 245-246; Robert Burchell, ed., *Frontiers of Planned Unit Development* (New Brunswick, N.J.: Center for Urban Policy Research, 1973); David Mosena and Frank Bangs, *Planned Unit Development Ordinances*, Planning Advisory Service Report No. 271 (Chicago: American Society of Planning Officials, 1973).

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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.<sup>203</sup> 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.<sup>204</sup> 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.<sup>205</sup> Other states that have adopted PUD legislation of varying detail include Arkansas, Colorado, Connecticut, Idaho, Kentucky, Massachusetts, Montana, Nevada, New York, and Ohio.<sup>206</sup>

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<sup>203</sup>Richard F. Babcock, Jan Z. Krasnowiecki, and David N. McBride, “The Model State Statute,” *Univ. of Pa. L. Rev.* 114, no 1 (1965): 140-170; Urban Land Institute (ULI) Technical Bulletin 52, *Legal Aspects of Planned Unit Residential Development* (Washington, D.C.: ULI, 1965).

<sup>204</sup>Richard F. Babcock, et al., “The Model State Statute,” at 141.

<sup>205</sup>N.J. Stat. Ann. §40:55 D-1 et seq.; Pa. Stat. Ann. §53:10701 et seq.

<sup>206</sup>Conn. Gen. Stat. Ann. §8-13(b), et seq., 8-13(e)(5), 8-13(a)(e)(3); Kan. Stat. Ann. §§12-728a(2), (3), 12-733; Colo. Rev. Stat. §§24-67-107, 24-67-108; Nev. Rev. Stat. §280A.010 et seq.; Mont. Code Ann. §11-3842 et seq.; Ohio Rev. Code Ann. §§303.022, 519.021; Idaho Code Ann. §67-6155; Mass. Gen. Laws Ann. ch.40A, §1; Ky. Rev. Stat. Ann. §100.203(1)(e); Ark. Stat. Ann. §19-2829(b); N.Y. Town Law § 281, N.Y. Village Law §7-738, N.Y. Gen. City Law §37.

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The American Law Institute also promulgated a model statute for PUDs in 1975 in *A Model Land Development Code*.<sup>207</sup> 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.<sup>208</sup> 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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<sup>207</sup>American Law Institute, *A Model Land Development Code*, §2-210, 60-61.

<sup>208</sup>See Rohan, *Zoning and Land Use Controls*, §32.04 [1][b].

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[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 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

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- (c) may be mandatory for land contained in specified zoning use districts as provided in the planned unit development ordinance.
- ◆ 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;<sup>209</sup> 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

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<sup>209</sup>This language is adopted from Richard F. Babcock, et al., “The Model State Statute,” at 145.

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- (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;

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- (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.<sup>210</sup> Note that

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<sup>210</sup>S. Mark White and Dawn Jordan, “Neotraditional Development: A Legal Analysis,” *Land Use Law & Zoning Digest* 49, no. 8 (August 1997): 3-11, at 3. See generally Peter Katz, *The New Urbanism: Toward an Architecture of Community* (New York: McGraw Hill, 1994); Andres Duany and Elizabeth Plater-Zyberk, *Towns and Town Making Principles* (New York: Rizzoli, 1992); Peter Calthorpe, *The Next American Metropolis* (New York: Princeton Architectural Press, 1993); Raymond Unwin, *Town Planning in Practice* (New York: Princeton Architectural Press, 1994) (reprint of 1909 edition). For an example of a statute that is intended to encourage “village” style development, with design objectives for a zoning use district that are similar to those for traditional neighborhood development above, see Conn. Gen. Stat. §8-2j (1998).

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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.<sup>211</sup>
- (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;

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<sup>211</sup>This language is adopted from Richard F. Babcock, et al., “The Model State Statute,” at 147.

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- (c) will not significantly interfere with the enjoyment of other land in the vicinity;<sup>212</sup> 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.

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<sup>212</sup>This language is adapted from the ALI Model Land Development Code, §2-210, at 51.

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### UNIFORM DEVELOPMENT STANDARDS

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#### *Commentary: Uniform Development Standards*<sup>213</sup>

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.<sup>214</sup> (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;<sup>215</sup> (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;<sup>216</sup> (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

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<sup>213</sup>A useful book containing and discussing development standards is David Listokin and Carole Walker, *The Subdivision and Site Plan Handbook* (New Brunswick, N.J.: Center for Urban Policy Research, 1989).

<sup>214</sup>See generally Steven Seidel, *Housing Costs and Government Regulations: Confronting the Regulatory Maze* (New Brunswick, N.J.: Center for Urban Policy Research, 1978), Ch. 7 (The Effect of Subdivision Regulation on Housing Costs).

<sup>215</sup>U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research (HUD), *Proposed Model Land Development Standards and Accompanying Model State Enabling Legislation*, 1993 ed. (Washington D.C.: U.S. GPO, 1993), 1.

<sup>216</sup>David Listokin and Carol Walker, *The Subdivision and Site Plan Handbook*, 160.

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jurisdictions may have to become familiar with very technical differences in standards in order to comply with the law.<sup>217</sup> 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.”<sup>218</sup> 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.<sup>219</sup>

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.<sup>220</sup> 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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<sup>217</sup>Id., 176-177; HUD, *Proposed Model Land Development Standards*, 2-3.

<sup>218</sup>National Commission on Urban Problems, *Building the American City* (Washington, D.C.: U.S. GPO, 1968), 318-321, at 318.

<sup>219</sup>U.S. Advisory Commission on Regulatory Barriers to Affordable Housing, “*Not in My Back Yard*” *Removing Barriers to Affordable Housing* (Washington, D.C. U.S. Department of Housing and Urban Development, 1991), 15.

<sup>220</sup>HUD, *Proposed Model Land Development Standards*.

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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.<sup>221</sup> However, the commissioner of the appropriate state department, or local planning board under the model ordinance, actually adopts the standards into law.<sup>222</sup> Annual review of the standards, including recommendation of necessary changes, is required.<sup>223</sup>

### 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,<sup>224</sup> 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.<sup>225</sup> 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,

### 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.

SOURCE: U.S. Dep't of Housing and Urban Development, Office of Policy Development and Research (HUD), *Proposed Model Land Development Standards and Accompanying Model State Enabling Legislation*, 1993 ed. (Washington D.C.: U.S. GPO, 1993), 117 (Water Supply Standard 1.2).

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<sup>221</sup>Id., 139-140; 143-144; 147-148.

<sup>222</sup>Id., 140, 144, 148.

<sup>223</sup>Id., 141, 145, 148.

<sup>224</sup>N.J. Stat. Ann. §§40:55D-40.1 *et seq.* (1998).

<sup>225</sup>N.J. Stat. Ann. §§40:55D-40.3, -40.4.

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override any rejection by the Commissioner of a particular proposed standard.<sup>226</sup> The Advisory Board must conduct an annual review of the site improvement standards and make any recommendations for changes in writing to the Commissioner.<sup>227</sup> 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."<sup>228</sup>

The Advisory Board released its first set of proposed uniform site improvement standards, applicable to residential development only, in June 1996.<sup>229</sup> The proposed standards were adopted in June 1997, after the necessary public hearings.<sup>230</sup> Minor amendments, mainly to resolve issues of interpretation, have arisen from the annual review mandated by the Site Improvement Law.<sup>231</sup> 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).<sup>232</sup>

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."<sup>233</sup> 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.<sup>234</sup>

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<sup>226</sup>N.J. Stat. Ann. §40:55D-40.4(a) & (b).

<sup>227</sup>N.J. Stat. Ann. §40:55D-40.4(d).

<sup>228</sup>N.J. Stat. Ann. §§40:55D-40.4(c), -40.5.

<sup>229</sup>The Residential Site Improvement Standards are codified at N.J. Admin. Code tit. 5, ch. 21 (1998).

<sup>230</sup>Telephone interview on March 19, 1999 with Mr. John Patella, Senior Policy Advisor, New Jersey Department of Community Affairs, Trenton, N.J..

<sup>231</sup>*Id.*; Telephone interview on March 19, 1999 with Ms. Joanne Harkins, Director of Land Use and Planning, New Jersey Builders Association, Trenton, N.J..

<sup>232</sup>*Id.*

<sup>233</sup>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).

<sup>234</sup>Telephone interview with Leslie McGowan.

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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.<sup>235</sup> 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.<sup>236</sup> 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,<sup>237</sup> 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.”<sup>238</sup>

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.<sup>239</sup>

### 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.

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<sup>235</sup>Telephone interview with Joanne Harkins.

<sup>236</sup>*Id.*

<sup>237</sup>*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).

<sup>238</sup>*New Jersey State League of Municipalities v. Dep’t of Community Affairs*, 158 N.J. 211, 224, 729 A.2d 21, 28 (1999).

<sup>239</sup>Telephone interview with Joanne Harkins.

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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.

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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.

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### 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.

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- (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]

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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.

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- (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.

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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.*].]

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### DEVELOPMENT RIGHTS AND PRIVILEGES

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#### *Commentary: Vested Right to Develop*<sup>240</sup>

#### 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.<sup>241</sup>

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

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<sup>240</sup>See generally Charles Siemon and Wendy Larsen, *Vested Rights: Balancing Public and Private Development Expectations* (Washington, D.C.: Urban Land Institute, 1982); Orlando Delogu, “Land Use and Vested Rights: Mixed Law and Policy Issues,” *Land Use Law & Zoning Digest*, Vol. 41, No. 1 (1989): 3-5; David Heeter, “Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes,” *Urban Law Ann.* (1971): 63; John J. Delaney, AICP, “The Developers’/Landowners’ Perspective of Planning Law Reform,” in *Modernizing Statute Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 31-38.

<sup>241</sup>Under present constitutional analysis, a regulation of property does not constitute a taking unless it denies all reasonable use of the property; that is, the property loses all market value. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

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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.<sup>242</sup>

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.<sup>243</sup> 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.<sup>244</sup> 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.<sup>245</sup> 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

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<sup>242</sup>*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).

<sup>243</sup>*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).

<sup>244</sup>*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).

<sup>245</sup>*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).

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approval sufficient?<sup>246</sup> Preliminary approval of a site plan?<sup>247</sup> Final approval of a site plan?<sup>248</sup> Issuance of a building permit?<sup>249</sup>

Further confusing an examination of the case law is the issue of “last-minute” amendments to land development regulations.<sup>250</sup> 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.<sup>251</sup> 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.<sup>252</sup> 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.<sup>253</sup> “Where a project is caught in a

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<sup>246</sup>*Cos 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).

<sup>247</sup>*Juanita Bay Valley Community Assoc. v. City of Kirkland*, 9 Wash.App. 59, 510 P.2d 1140 (1973) (Approval of grading permit sufficient basis for estoppel).

<sup>248</sup>*Tellimar 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.)

<sup>249</sup>*Avco 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.)

<sup>250</sup>See generally, Roland F. Chase, Annotation, *Retroactive Effect of Zoning Regulation, In Absence of Saving Clause, on Pending Application for Building Permit*, 50 A.L.R.3d 596 (1973).

<sup>251</sup>*Rockville Fuel & Feed Co. v Gaithersburg*, 266 Md. 117, 291 A.2d 672, (1972); *Willdel Realty, Inc. v New Castle County*, 270 A.2d 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).

<sup>252</sup>*Henry & Murphy, Inc. v Allenstown*, 424 A.2d 1132 (N.H. 1980); *American Nat. Bank & Trust v. City of Chicago*, 311 N.E.2d 325 (Ill.App. 1974); *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970); *Hobbs v Markey*, 398 S.W.2d 54 (Ky. 1965); *State ex rel. Great Lakes Pipe Line Co. v Hendrickson*, 393 S.W.2d 481 (Mo. 1965).

<sup>253</sup>*Cunningham v City of Twin Falls*, 125 Idaho 776, 874 P.2d 587 (App. 1994); *WMM Props. v. Cobb County*, 339 S.E.2d 252 (Ga. 1986); *Folsom Enters. v. City of Scottsdale*, 620 F.Supp. 1372 (D. Ariz. 1985); *Smith v. Winhall Planning Comm’n*, 436 A.2d 760 (Vt. 1981); *Hass v Kirkland*, 78 Wash.2d 929, 481 P.2d 9 (1971); *Gibson v Oberlin*,

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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.”<sup>254</sup> 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.<sup>255</sup>

### 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.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup> 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.<sup>259</sup>

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171 Ohio St. 1, 167 N.E.2d 651 (1960).

<sup>254</sup>Douglas T. Kendall, Timothy J. Dowling, and Andrew w. Schwartz, “Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases,” *Urban Lawyer* 33, No. 2 (Spring 2001): 405-431, 429.

<sup>255</sup>*Whitehead Oil Co. v. City of Lincoln*, 515 N.E.2d 390 (Neb. 1994); *Bankoff v. Bd. of Adjustment*, 875 P.2d 1138 (Okla. 1994); *Lake Bluff Housing Partners v. City of South Milwaukee*, 525 N.W.2d 59 (Wis. App. 1994); *Marmah, Inc. v. Town of Greenwich*, 405 A.2d 63 (Conn. 1978); *Rockville Fuel & Feed v. City of Gaithersburg*, 291 A.2d 672 (Md. 1972); *Commercial Props. Inc. v. Peternel*, 211 A.2d 514 (Pa. 1965); *Sunset View Cem. Ass’n v. Kraintz*, 16 Cal. Rptr. 317 (Cal. App. 1961); *Gibson v. City of Oberlin*, 171 Ohio St. 1, 167 N.E.2d. 651 (1960).

<sup>256</sup>Ariz. Rev. Stat. §9-1201(3), (4) (1997).

<sup>257</sup>Ariz. Rev. Stat. §9-1202 (A), (B).

<sup>258</sup>Ariz. Rev. Stat. §9-1202(C), (F).

<sup>259</sup>Ariz. Rev. Stat. §9-1202(H - J).

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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.”<sup>260</sup> 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.<sup>261</sup> 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.”<sup>262</sup> 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.<sup>263</sup> 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.<sup>264</sup>

In **California**, the developer of a subdivision can file, in place of a tentative map, a vesting tentative map.<sup>265</sup> 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.<sup>266</sup> 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<sup>267</sup>--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

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<sup>260</sup>Ariz. Rev. Stat. §9-1203(A), (B).

<sup>261</sup>Ariz. Rev. Stat. §9-1203(D).

<sup>262</sup>Ariz. Rev. Stat. §9-1204.

<sup>263</sup>Ariz. Rev. Stat. §9-1204.

<sup>264</sup>Ariz. Rev. Stat. §9-1205(B), (C).

<sup>265</sup>Cal. Gov't Code § 66498.1(a) (1997).

<sup>266</sup>Cal. Gov't Code §66498.1(b), (d).

<sup>267</sup>Cal. Gov't Code §§66498.2, 66498.4 .

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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.<sup>268</sup> 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....”<sup>269</sup>

**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.”<sup>270</sup> 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.<sup>271</sup>

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.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> A vested right created under one local government is binding on any other local government that may later assert jurisdiction over the property.<sup>275</sup> 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

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<sup>268</sup>Cal. Gov’t Code §§66498.3.

<sup>269</sup>Cal. Gov’t Code §§ 66498.1(c), 66498.6(b).

<sup>270</sup>Colo. Rev. Stat. §24-68-102(4) (1999).

<sup>271</sup>Colo. Rev. Stat. §24-68-103(1)(a).

<sup>272</sup>Colo. Rev. Stat. §24-68-102.5

<sup>273</sup>Colo. Rev. Stat. §24-68-103(1)(b).

<sup>274</sup>Colo. Rev. Stat. §24-68-104.

<sup>275</sup>Colo. Rev. Stat. §24-68-106.

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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”.<sup>276</sup>

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.<sup>277</sup> 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.<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup>

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.<sup>281</sup> 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.”<sup>282</sup> 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.<sup>283</sup> 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

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<sup>276</sup>Colo. Rev. Stat. §24-68-105.

<sup>277</sup>Fla. Stat. §163.3167(8) (1997).

<sup>278</sup>Kan. Stat. §12-764(a) (1997).

<sup>279</sup>Kan. Stat. §12-764(b).

<sup>280</sup>Kan. Stat. §12-764(c).

<sup>281</sup>Mass. Gen'l Law Ch. 40A, §6(par. 1) (1997) (emphasis added).

<sup>282</sup>Mass. Gen'l Law Ch. 40A, §6(par. 1 & 2).

<sup>283</sup>Mass. Gen'l Law Ch. 40A, §6(par. 5).

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limit.<sup>284</sup> 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.<sup>285</sup> 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.”<sup>286</sup> 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.<sup>287</sup> 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.<sup>288</sup> 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.”<sup>289</sup>

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.<sup>290</sup> 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.<sup>291</sup> The same extensions are available, including the extension for delays in obtaining permits that were diligently sought.<sup>292</sup>

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<sup>284</sup>Mass. Gen'l Law Ch. 40A, §6(par. 5).

<sup>285</sup>Mass. Gen'l Law Ch. 40A, §6(par. 9).

<sup>286</sup>N.J. Stat. §40:55D-49(a) (1997).

<sup>287</sup>N.J. Stat. §40:55D-49(d).

<sup>288</sup>N.J. Stat. §40:55D-49(c), (d).

<sup>289</sup>N.J. Stat. §40:55D-49(f).

<sup>290</sup>N.J. Stat. §40:55D-52(a).

<sup>291</sup>N.J. Stat. §40:55D-52(b).

<sup>292</sup>N.J. Stat. §40:55D-52(a), (b), & (d).

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**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.<sup>293</sup> 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.”<sup>294</sup> If no such ordinance is enacted, the issuance of a zoning permit is the vesting point.<sup>295</sup> A phased development plan is a plan that contemplates development in phases and is not as specific as a site-specific development plan.<sup>296</sup> 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.<sup>297</sup>

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.<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup> There is no vested right in relation to overlay zoning districts nor as to building, plumbing, electrical, or mechanical codes.<sup>301</sup>

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<sup>293</sup>N.C. Gen'l Stat. §160A-385.1(b)(5) (1997).

<sup>294</sup>N.C. Gen'l Stat. §160A-385.1(b)(5).

<sup>295</sup>N.C. Gen'l Stat. §160A-385.1(f)(3).

<sup>296</sup>N.C. Gen'l Stat. §160A-385.1(b)(3).

<sup>297</sup>N.C. Gen'l Stat. §160A-385.1(c), (d).

<sup>298</sup>N.C. Gen'l Stat. §160A-385.1(c).

<sup>299</sup>N.C. Gen'l Stat. §160A-385.1(d)(3).

<sup>300</sup>N.C. Gen'l Stat. §160A-385.1(e)(1).

<sup>301</sup>N.C. Gen'l Stat. §160A-385.1(e)(2).

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The **Oregon** statute<sup>302</sup> 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.<sup>303</sup> 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.<sup>304</sup> 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.<sup>305</sup> 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.<sup>306</sup>

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.”<sup>307</sup> 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.<sup>308</sup> Once an application for a project is filed, the duration of any permit required for the project cannot be shortened.<sup>309</sup> 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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<sup>302</sup>Or. Rev. Stat. § 227.178 (1999).

<sup>303</sup>Pa. Stat. tit. 53, §10508(4)(i) (1997).

<sup>304</sup>Pa. Stat. tit. 53, §10508(4)(ii), (iv).

<sup>305</sup>Pa. Stat. tit. 53, §10508(4)(v).

<sup>306</sup>Pa. Stat. tit. 53, §10508(4)(v), (vii).

<sup>307</sup>Tex. Local Gov't Code §245.002(a) (1999).

<sup>308</sup>Tex. Local Gov't Code §§245.001(1), 245.002(b).

<sup>309</sup>Tex. Local Gov't Code §245.002(c).

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forfeiting any rights.”<sup>310</sup> 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.<sup>311</sup>

**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.”<sup>312</sup> 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.<sup>313</sup> 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.<sup>314</sup> There is no vested right from a permit, permission, or approval issued in reliance on an intentional material misrepresentation.<sup>315</sup> 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.<sup>316</sup>

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,<sup>317</sup> while

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<sup>310</sup>Tex. Local Gov’t Code §245.002(d).

<sup>311</sup>Tex. Local Gov’t Code §245.004.

<sup>312</sup>Va. Code §15.2-2307 (1999).

<sup>313</sup>Va. Code §15.2-2307 (1999).

<sup>314</sup>Ariz. Rev. Stat. §9-1204(B); Colo. Rev. Stat. §24-68-105(2); N.C. Gen’l Stat. §160A-385.1(e)(2); Texas Gov’t Code §481.143(c)(4) (1996).

<sup>315</sup>Ariz. Rev. Stat. §9-1204(A)(3); N.C. Gen’l Stat. §160A-385.1(e)(1)(d).

<sup>316</sup>Ariz. Rev. Stat. §9-1204(A)(2); Colo. Rev. Stat. §24-68-105(1)(b); N.C. Gen’l Stat. §160A-385.1(e)(1)(b); Texas Gov’t Code § 481.143(c)(11) (1996).

<sup>317</sup>Ariz. Rev. Stat. §9-1204(A)(1); Colo. Rev. Stat. §24-68-105(1)(a); N.C. Gen’l Stat. §160A-385.1(e)(1)(a).

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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.<sup>318</sup> In the statutes that address the question, the vested right can be terminated by the payment of just compensation.<sup>319</sup> 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.<sup>320</sup>

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.<sup>321</sup> 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.<sup>322</sup> Florida grants a right to complete a development of regional impact pursuant to a final development order if development is proceeding in good faith.<sup>323</sup> 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.<sup>324</sup> 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.<sup>325</sup>

### 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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<sup>318</sup>Ca. Gov’t Code §§66498.2, 66498.4; Mass. Gen’l Laws ch. 40A, §6.

<sup>319</sup>Colo. Rev. Stat. §24-68-105(1)(c); N.C. Gen’l Stat. §160A-385.1(e)(1)(c).

<sup>320</sup>Ariz. Rev. Stat §9-1202(H), (I); Ca. Gov’t Code §66498.1(c), (e); N.C. Gen’l Stat. §160A-385.1(c).

<sup>321</sup>Ariz. Rev. Stat. §§9-1201(4); -1202(B); Colo. Rev. Stat. §24-68-102(4); N.C. Gen. Stat. §160A-385.1(a)(5).

<sup>322</sup>Cal. Gov’t Code §66498.1(b); Mass. Gen’l Laws ch. 40A, §6; Pa. Stat. tit. 53, §10508.

<sup>323</sup>Fla. Stat. §163.3167(8).

<sup>324</sup>Kan. Stat. §12-764.

<sup>325</sup>Va. Code §15.2-2307 (1999).

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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,<sup>326</sup> 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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<sup>326</sup>*Sahl v. Town of York*, 760 A.2d 266, 269 (Me. 2000), citing *Town of Sykesville v. West Shore Communications, Inc.*, 677 A.2d 102, 104 (Md. 1996).

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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:

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- (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]<sup>327</sup> 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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<sup>327</sup>See Chapter 10, Administrative and Judicial Review of Land-Use Decisions.

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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]<sup>328</sup> 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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<sup>328</sup>See Chapter 10, Administrative and Judicial Review of Land-Use Decisions.

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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.
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### *Commentary: Regulation of Nonconforming Uses*<sup>329</sup>

#### 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.<sup>330</sup> 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

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<sup>329</sup>Some general resources on nonconforming uses include: Robert M. Anderson, *American Law of Zoning*, Vol 1, (4th ed. Deerfield, IL: Clark Boardman Callaghan, 1996), ch. 6; Daniel R. Mandelker, *Land Use Law*, (4th ed., Charlottesville, VA: Lexis Law Publishing Co. 1997,)194-206; Patrick J. Rohan & Eric Damian Kelly, *Zoning and Land Use Controls*, (New York City: Matthew Bender & Co. 1998), 1-27 to 1-30, 41-1 et seq.; Joseph M. Schilling & James B. Hare, *Code Enforcement: A Comprehensive Approach* (Point Arena, Ca: Solano Press, 1994), 168-171; Mark S. Dennison, “Changing or Expanding Nonconforming Uses,” *Zoning News* (March 1997): 1-4; Eric J. Strauss & Mary M. Geise, “Elimination of Nonconformities: The Case of Voluntary Discontinuance,” *Land Use L. & Zoning Dig.* 45, No. 6 (June 1993): 3-10; and Rodney Cobb, “Amortizing Nonconforming Uses,” *Land Use L. & Zoning Dig.* 37, No. 1 (January 1985): 3-7.

<sup>330</sup> 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.

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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 areas 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.<sup>331</sup> 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

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<sup>331</sup>See *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) (upholding these techniques)

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The *Standard State Zoning Enabling Act* (SZE<sup>332</sup>), 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 SZE, 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.<sup>333</sup> 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.<sup>334</sup> 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.<sup>335</sup>

**Alaska**<sup>336</sup> 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,<sup>337</sup> 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

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<sup>332</sup>Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (Washington, D.C.: U.S. GPO, 1926).

<sup>333</sup>American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Washington, D.C.: ALI, 1976), 150-158.

<sup>334</sup>ALI Code §§4-101, 102.

<sup>335</sup>ALI Code §4-102.

<sup>336</sup>Alaska Stat. §2.25.060 (1998).

<sup>337</sup>Ariz. Rev. Stat. §9-462.02 (1998).

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the intent of the property owner to maintain that use.”<sup>338</sup> **Delaware** protects nonconforming uses as long as “no structural alteration of [the] building is proposed or made.”<sup>339</sup> **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.”<sup>340</sup>

**Kansas**<sup>341</sup> 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**<sup>342</sup> states that that uses lawful at the time any zoning regulation is adopted may continue despite being in violation of that regulation.<sup>343</sup> 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.<sup>344</sup>

**Louisiana**<sup>345</sup> 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**<sup>346</sup> 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

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<sup>338</sup>Conn. Gen. Stat. §8-2 (1997).

<sup>339</sup>Del. Code. Ann. tit. 9, §§2610(a), 4920(a), 6920(a) (1998).

<sup>340</sup>Ind. Code §36-7-4-601(d)(2)(C) (1998).

<sup>341</sup>Kan. Stat. Ann. §12-758 (1998).

<sup>342</sup>Ky. Rev. Stat. §100.253 (1998).

<sup>343</sup>Ky. Rev. Stat. §100.253(1).

<sup>344</sup>Ky. Rev. Stat. §100.253(2), (3).

<sup>345</sup>La. Rev. Stat. Ann. §33:4722(C) (1998).

<sup>346</sup>Mich. Comp. Laws §125.583a (1998).

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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**<sup>347</sup> 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**<sup>348</sup> 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**<sup>349</sup> 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<sup>350</sup> 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**<sup>351</sup> 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.<sup>352</sup> However, the county commission may enact reasonable regulations to “regulate and control” nonconforming uses,<sup>353</sup> so that the local government may be able to adopt an amortization ordinance. **Ohio**<sup>354</sup> 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

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<sup>347</sup>Neb. Rev. Stat. §14-406 (1998).

<sup>348</sup>Nev. Rev. Stat. §497.120 (1998).

<sup>349</sup>N.H. Rev. Stat. Ann. §674:19 (1998).

<sup>350</sup>N.J. Stat. Ann. §40:55D-68 (1998).

<sup>351</sup>N.Y. Village Law §7-709 (1998).

<sup>352</sup>N.D. Cent. Code §11-33-13 (1998).

<sup>353</sup>N.D. Cent. Code §11-33-14.

<sup>354</sup>Ohio Rev. Code §§303.19 (counties), 519.19 (townships), 713.15 (municipalities) (1998). See generally Stuart Meck and Kenneth Pearlman, *Ohio Planning and Zoning Law* (Eagan, Minn: West Group, 1999), ch. 7 (Nonconforming uses).

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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**<sup>355</sup> 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. **Pennsylvania** authorizes local zoning ordinances to “identify and register” nonconformities.<sup>356</sup>

**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.<sup>357</sup> 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.<sup>358</sup> Local governments are authorized to approve alteration of a nonconforming use and to impose conditions on that approval.<sup>359</sup>

**South Carolina**<sup>360</sup> 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.” **Tennessee**<sup>361</sup> 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).

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<sup>355</sup>Or. Rev. Stat. §215.130 (1998).

<sup>356</sup>Pa. Stat. Ann. tit. 53, §10613 (1998).

<sup>357</sup>R.I. Gen. Laws §45-24-39(A), (B) (1998).

<sup>358</sup>R.I. Gen. Laws §45-24-39(C).

<sup>359</sup>R.I. Gen. Laws §45-24-40.

<sup>360</sup>S.C. Code Ann. §5-23-20 (1999).

<sup>361</sup>Tenn. Code Ann. §13-7-208 (b) - (e) (1999).

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**Texas** protects only “property...used in a public service business” under its nonconformity statute.<sup>362</sup> **Vermont**<sup>363</sup> 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**<sup>364</sup> 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**,<sup>365</sup> 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**<sup>366</sup> 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<sup>367</sup> 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.<sup>368</sup> 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

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<sup>362</sup>Tex. Loc. Gov't Code §211.013 (1999).

<sup>363</sup>Vt. Stat. Ann. tit. 24, §4408 (1998).

<sup>364</sup>Va. Code Ann. §15.2-2307 (1998).

<sup>365</sup>W. Va. Code §8-24-50 (1999).

<sup>366</sup>Wyo. Stat. Ann. §18-5-207 (1998).

<sup>367</sup>Wisc. Stat. §62.23(7)(h) (1999).

<sup>368</sup>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,<sup>369</sup> others extend protection to related uses, such as ones essential or integral to the existing use,<sup>370</sup> uses with the same nature or purpose as the existing nonconforming use,<sup>371</sup> or uses with the same quality or character.<sup>372</sup> The expansion of a nonconforming structure is not covered by the nonconforming use protection and is subject to present land development regulations.<sup>373</sup> 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,<sup>374</sup> but some states have held that “abandonment” compelled by circumstances outside the owner’s control does not terminate protection.<sup>375</sup> 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.<sup>376</sup>

### 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

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<sup>369</sup>*Baggs v. Zoning Bd. of Rev.*, 79 R.I. 211, 86 A.2d 658 (1952); *State ex rel. City Ice & Fuel Co. v. Stegner*, 120 Ohio St. 418, 166 N.E. 226 (1929); *Vokes v. Avery W. Lowell, Inc.*, 18 Mass. App. 471, 468 N.E.2d 271 (1984), rev. den’d 393 Mass. 1103, 470 N.E.2d 798; *Austin v. Zoning Hearing Bd.*, 91 Pa. Cmwlth. 356, 496 A.2d 1367 (1985).

<sup>370</sup>*Gauthier v. Larchmont*, 30 App.Div.2d 303, 291 N.Y.S.2d 584 (1968).

<sup>371</sup>*Powers v. Bldg. Inspector of Barnstable*, 363 Mass. 648, 296 N.E.2d 491 (1973); *Connecticut Sand & Stone Corp. v. Zoning Bd. of App.*, 150 Conn. 439, 190 A.2d 594 (1963); *Hawkins v. Talbot*, 248 Minn. 549, 80 N.W.2d 863 (1957).

<sup>372</sup>*Aurora v. Kranz*, 103 App.Div. 1022, 478 N.Y.S.2d 1012 (1984); *Town Council of Los Gatos v. State Bd. of Equalization*, 141 Cal.App.2d 344, 296 P.2d 909 (1956); *Schaible v. Bd. of Adjustment*, 15 N.J. Misc. 707, 194 A. 388 (1937).

<sup>373</sup>*Baxter v. City of Preston*, 768 P.2d 1340 (Idaho 1989); *Stuckman v. Kosciusko Cty. Bd. of Zoning App.*; 506 N.E.2d 1079 (Ind. 1987); *Knowlton v. Browning-Ferris Industries*, 220 Va. 571, 260 S.E.2d 232 (1979).

<sup>374</sup>*Curtis v. Main*, 482 A.2d 1253 (Me. 1984); *Longwell v. Hodge*, 297 S.E.2d 820 (W.Va. 1982); *Sun Oil Co. v. Bd. of Zoning App.*, 393 N.Y.S.2d 760 (1977); *Jones v. Cusimano*, 524 So.2d 172 (La. Ct. App. 1988); *City of Chicago v. Cohen*, 49 Ill.App.3d 349, 364 N.E.2d 335 (1977).

<sup>375</sup>*City of Minot v. Fisher*, 212 N.W.2d 837 (N.D. 1973); *Marchese v. Norristown Borough Zoning Bd. of Adjust.*, 2 Pa.Cmwlth 84, 277 A.2d 176 (1971); *Trebat v. City of Park Ridge*, 110 Ill.App.2d 404, 249 N.E.2d 681 (1969).

<sup>376</sup>*Schuylkill Haven Bleach & Dye Works v. Zoning Hearing Bd.*, 100 Pa.Cmwlth 125, 514 A.2d 282 (1986), app. den’d 527 A.2d 549 (Pa. 1987).

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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,<sup>377</sup> 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,<sup>378</sup> some courts hold that a statutory general welfare provision, or constitutional home rule authority, may confer the power to amortize.<sup>379</sup>

**Colorado's** nonconforming use statute<sup>380</sup> 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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<sup>377</sup>23 U.S.C. §131(g).

<sup>378</sup>*State v. Bates*, 305 NW 2d 416 (Iowa 1981).

<sup>379</sup>*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).

<sup>380</sup>Colo. Rev. Stat. §30-28-120 (1999).

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for the recovery or amortization of the investment in the nonconformance.” **Hawaii**<sup>381</sup> 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**<sup>382</sup> 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.<sup>383</sup> 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<sup>384</sup> 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**<sup>385</sup> 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**<sup>386</sup> 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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<sup>381</sup>Haw. Rev. Stat. §46-4(a) (1999).

<sup>382</sup>65 Ill. Comp. Stat. §5/11-13-1 (1998).

<sup>383</sup>Minn. Stat. §394.36 (1998).

<sup>384</sup>1999 Minn. Sess. Laws ch. 96, to be codified at Minn Stat. § 394.21(1a).

<sup>385</sup>Mo. Rev. Stat. §64.255(2) (1998).

<sup>386</sup>Okla. Stat. §11-44-107.1 (1998).

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**South Dakota** provides for the protection of nonconforming uses, unless discontinued for more than a year.<sup>387</sup> 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.<sup>388</sup> In **Utah**,<sup>389</sup> 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.<sup>390</sup> **Michigan**<sup>391</sup> 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.<sup>392</sup> **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.<sup>393</sup>

**Arkansas**<sup>394</sup> 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

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<sup>387</sup>S.D. Codified Laws §11-2-26 (1999).

<sup>388</sup>S.D. Codified Laws §11-2-27.

<sup>389</sup>Utah Code §10-9-408 (1998).

<sup>390</sup>Colo. Rev. Stat. §30-28-120(2), Del. Code Ann. tit. 9, §§2610(b), 4920(b), 6920(b).

<sup>391</sup>Mich. Comp. Laws §125.583a(3).

<sup>392</sup>Minn. Stat. §394.36(3).

<sup>393</sup>N.D. Cent. Code §11-33-13.

<sup>394</sup>Ark. Code Ann. §14-56-304 (1998).

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A number of states have upheld the constitutionality of amortization provisions.<sup>395</sup> Other states have found amortization to be per se unconstitutional,<sup>396</sup> or unconstitutional unless used to abate nuisances.<sup>397</sup> Some state courts have not allowed local governments to enact amortization ordinances without express authorization by state statute.<sup>398</sup> 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.<sup>399</sup> 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.<sup>400</sup> 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 *Modjeskja Sign Studios v. Berle*,<sup>401</sup> 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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<sup>395</sup>*Village of Oak Park v. Gordon*, 32 Ill.2d 295, 205 N.E.2d 464(1965); *Naegele Outdoor Ad. Co. v. Village of Minnetonka*, 281 Minn.492, 162 N.W.2d 206 (1968); *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964); *Lachapelle v. Town of Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967); *Harbison v. City of Buffalo*, 4 N.Y.2d 353, 152 N.E.2d 42 (1958); *City of University Park v. Benners*, 485 S.W.2d 773 (Tex. 1972).

<sup>396</sup>*Lamar Adv. of So. Ga. v. City of Albany*, 260 Ga. 46, 389 S.E.2d 216 (1990); *Pennsylvania N.W. Distrib. v. Zoning Hearing Bd.*, 526 Pa. 186, 584 A.2d 1372 (1990); *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. 1965).

<sup>397</sup>*City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953); *Northern Ohio Sign Contractors Ass'n. v. Lakewood*, 32 Ohio St. 3d 316, 513 N.E.2d 324 (1987); *Ailes v. Decatur Cty. Area Planning Comm'n*, 448 N.E.2d 1057 (Ind. 1983) cert den'd 465 U.S. 1100 (1984); *Loundsbury v. City of Keene*, 122 N.H. 1006, 453 A.2d 1278 (1982).

<sup>398</sup>*State v. Bates*, 305 N.W.2d 426 (Iowa 1981); *Scottsdale v. Scottsdale Assoc. Merchants, Inc.*, 120 Ariz. 4, 583 P.2d 891 (1978); *Paducah v. Johnson*, 522 S.W.2d 447 (Ky. 1975); *DeMull v. Lowell*, 368 Mich. 242, 118 N.W.2d 232 (1962).

<sup>399</sup>*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.

<sup>400</sup>*Flick Theater v. Las Vegas*, 104 Nev. 87, 752 P.2d 235 (1988); *Oak Park v. Gordon*, 32 Ill.2d 295, 205 N.E.2d 464 (1965); *Livingston Rock & Gravel v. Los Angeles Cty.*, 43 Cal.2d 121, 272 P.2d 4 (1954).

<sup>401</sup>43 N.Y.2d 468, 373 N.E. 2d 255 (N.Y. 1977), *appeal dismissed and cert. denied*, 439 U.S. 809 (1978)

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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.<sup>402</sup>

### 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 an 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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<sup>402</sup>*Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996).

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- (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 nonconformity 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

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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

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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

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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.

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- (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.

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- (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

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*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.

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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<sup>403</sup> 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.<sup>404</sup> 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.<sup>405</sup> Special provisions govern dedications for parks and recreation and for school sites.<sup>406</sup> In particular, a general plan must be in place before a

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<sup>403</sup>Cal. Gov’t Code §§66473 *et seq.* (1998).

<sup>404</sup>Cal. Gov’t Code §§66475 - 66475.3.

<sup>405</sup>Cal. Gov’t Code §66475.4(b) - (d).

<sup>406</sup>Cal. Gov’t Code §§66477, 66478.

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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).<sup>407</sup>

**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.<sup>408</sup> 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.<sup>409</sup> 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.”<sup>410</sup>

**Montana** has a park dedication statute<sup>411</sup> 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.”<sup>412</sup> 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

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<sup>407</sup>Cal. Gov’t Code §66477.

<sup>408</sup>Colo. Rev. Stat. §30-28-133(4) (1998).

<sup>409</sup>Colo. Rev. Stat. §30-28-133(6).

<sup>410</sup>Colo. Rev. Stat. §30-28-133(11).

<sup>411</sup>Mont. Code Ann. §76-3-621 (1999).

<sup>412</sup>N.J. Stat. Ann. §40:55D-38(b) (1997).

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of the subdivision or site plan by allowing the posting of performance bonds by the developer.<sup>413</sup>

**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.<sup>414</sup>

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.<sup>415</sup> 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.<sup>416</sup>

**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.”<sup>417</sup>

### 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

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<sup>413</sup>N.J. Stat. Ann. §40:55D-38(c).

<sup>414</sup>N.Y. Town Law §277(2) (1999).

<sup>415</sup>N.Y. Town Law §277(4).

<sup>416</sup>N.Y. Town Law §277(9).

<sup>417</sup>Wash. Rev. Code §58.17.110 (1998).

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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

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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.

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### **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:

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- (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.

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- (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;

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- (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:

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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.

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- (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

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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.

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### ***Commentary: Development Impact Fees***<sup>418</sup>

#### **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

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<sup>418</sup>See generally Gus Bauman and William H. Ethier, “Development Exactions and Impact Fees: A Survey of American Practices,” *Law & Contemporary Problems* 50, no. 1 (1987): 51; John J. Delaney, “The Developers’/Landowners’ Perspective of Planning Law Reform,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1* (Chicago: American Planning Association, 1996), 31-381; Arthur C. Nelson, ed., *Development Impact Fees: Policy Rationale, Practice, Theory, and Issues*, (Chicago: American Planning Association, 1988); James C. Nicholas, *The Calculation of Proportionate-Share Impact Fees*, Planning Advisory Service Report No. 408 (Chicago: American Planning Association, 1988); James A. Kushner, *Subdivision Law and Growth Management* (Eagan: West Group, 1998), §6.04[2].

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required to serve the new development. 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

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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*.<sup>419</sup> 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*,<sup>420</sup> the Court must first determine whether an “essential nexus” exists between a legitimate state interest and the condition exacted by the city.<sup>421</sup> 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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<sup>419</sup>512 U.S. 374 (1994).

<sup>420</sup>483 U.S. 825 (1987).

<sup>421</sup>512 U.S. at 386, quoting *Nollan*, 483 U.S. at 837.

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proposed development.<sup>422</sup> The Court rejected, on one hand, “very generalized statements as to the necessary connection”<sup>423</sup> which some state courts had made and, on the other, the strict “specific and uniquely attributable”<sup>424</sup> 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.”<sup>425</sup>

Though the U.S. Supreme Court has not applied the *Dolan* test to an impact fee case,<sup>426</sup> 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 *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 *Dolan* test may be the minimum hurdle that must be cleared by any impact-fee authorizing statute.

### STATE COURT CASES

While the *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.<sup>427</sup> 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 *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

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<sup>422</sup>512 U.S. at 388, quoting *Nollan*, 483 U.S. at 834.

<sup>423</sup>512 U.S. at 388.

<sup>424</sup>512 U.S. at 389, citing *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 380, 176 N.E.2d 799, 802 (1961).

<sup>425</sup>512 U.S. at 391.

<sup>426</sup>However, in the case of *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 *Dolan v. City of Tigard*.” This was the extent of the Court’s opinion.

<sup>427</sup>*Ayres v. City of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1, 5-7 (1949).

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that new development receives from those expenditures.<sup>428</sup> This test is much closer to the Constitutional standard on exactions set forth in *Dolan*, though it is derived separately under state law.<sup>429</sup> Indeed, the “rough proportionality” requirement was proclaimed by state courts before the *Dolan* decision was handed down.<sup>430</sup>

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.”<sup>431</sup> 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.”<sup>432</sup> 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.”<sup>433</sup> In a 1995 case,<sup>434</sup> the Illinois Supreme Court clarified the “specifically and uniquely attributable” test. The court held that “the new development must receive a *direct* and *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.”<sup>435</sup>

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

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<sup>428</sup>*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).

<sup>429</sup>*Isla Verde Int'l Holdings v. City of Camas*, 990 P.2d 429 (Wash. App. 2000).

<sup>430</sup>*Sparks v. Douglas Co.*, 863 P.2d 142 (Wash. 1993).

<sup>431</sup>*Pioneer Trust & Savings Bank v. Village of Mount Prospect*, 22 Ill. 375, 379, 176 N.E.2d 799 (1961), citing *Rosen v. Village of Downers Grove*, 19 Ill.2d 448 (1960).

<sup>432</sup>*Frank Ansuini Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910, 914 (1970).

<sup>433</sup>*Town of Coventry v. Glickman*, 429 A.2d 440, 444 (R.I. 1981).

<sup>434</sup>*Northern Illinois Home Builders Association v. DuPage County*, 165 Ill.2d 25, 649 N.E.2d 384 (1995).

<sup>435</sup>165 Ill.2d 25, 34-35, citing Appellate Court decision, 251 Ill.App.3d 494, 502-503 (emphasis in original).

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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.<sup>436</sup> The ordinance must be preceded by a development fee needs assessment.<sup>437</sup> 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.<sup>438</sup> 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.<sup>439</sup> Credit must be granted for on-site parks built by the developer against development fees that are assessed for parks.<sup>440</sup> 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.<sup>441</sup> Development fees can be waived for affordable housing or for other development “determined to serve an overriding public interest.”<sup>442</sup>

The **Georgia** Development Impact Fee Act<sup>443</sup> authorizes municipalities and counties that have a comprehensive plan with a capital improvements element to enact impact fee ordinances.<sup>444</sup> Existing impact fee provisions are protected, but local ordinances are required to be in compliance

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<sup>436</sup>Ariz. Rev. Stat. §11-1102 (1998).

<sup>437</sup>Ariz. Rev. Stat. §11-1106(A).

<sup>438</sup>Ariz. Rev. Stat. §11-1105(A).

<sup>439</sup>Ariz. Rev. Stat. §§11-1105(C), 11-1106(G).

<sup>440</sup>Ariz. Rev. Stat. §11-1106(E).

<sup>441</sup>Ariz. Rev. Stat. §11-1105(A)(3)(e), (B).

<sup>442</sup>Ariz. Rev. Stat. §11-1105(E), (F).

<sup>443</sup>Ga. Code Ann. §§36-71-1 *et seq.* (1997).

<sup>444</sup>Ga. Code Ann. §36-71-3(a).

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with the Act by a specific date.<sup>445</sup> 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.<sup>446</sup> Except for on-site improvements, no exactions, whether in cash or in kind, can be made except pursuant to such an ordinance.<sup>447</sup> 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.<sup>448</sup>

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.<sup>449</sup> An impact fee cannot be collected earlier in the development process than the issuance of a building permit.<sup>450</sup> 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.<sup>451</sup> 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.<sup>452</sup> Payment of an impact fee automatically satisfies any adequate public facilities requirement applicable to the development project.<sup>453</sup> 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.<sup>454</sup>

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<sup>445</sup>Ga. Code Ann. §§36-71-12.

<sup>446</sup>Ga. Code Ann. §§36-71-11.

<sup>447</sup>Ga. Code Ann. §36-71-3(a).

<sup>448</sup>Ga. Code Ann. §§36-71-5; -6.

<sup>449</sup>Ga. Code Ann. §§36-71-4(a) to (c), (m); -8(b).

<sup>450</sup>Ga. Code Ann. §36-71-4(d).

<sup>451</sup>Ga. Code Ann. §§36-71-3(b); -4(g) to (i); -7; -10.

<sup>452</sup>Ga. Code Ann. §§36-71-9.

<sup>453</sup>Ga. Code Ann. §36-71-3(c).

<sup>454</sup>Ga. Code Ann. §36-71-4(k).

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The **Idaho** Development Impact Fee Act<sup>455</sup> 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.<sup>456</sup> 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.<sup>457</sup> 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.<sup>458</sup> Existing impact fee provisions are protected for one year after the adoption of the Act, after which they must comply with the Act.<sup>459</sup>

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.<sup>460</sup> Fees cannot exceed a project's proportionate share of the demand for new public facilities, and developers can demand individualized assessment of the fee.<sup>461</sup> However, the addition of fines and penalties for late payment is expressly authorized, as is the denial of utility hookups or development permits.<sup>462</sup> 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.<sup>463</sup> 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),<sup>464</sup> refunds to the owner of record when the intended capital improvement is not appropriated for or commenced within five years,<sup>465</sup>

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<sup>455</sup>Idaho Code §67-8201 *et seq.* (1998).

<sup>456</sup>Idaho Code §§67-8206(2); -8208.

<sup>457</sup>Idaho Code §67-8206(3) to (5).

<sup>458</sup>Idaho Code §67-8205.

<sup>459</sup>Idaho Code §67-8215.

<sup>460</sup>Idaho Code §67-8204(19, (20).

<sup>461</sup>Idaho Code §67-8204(1), (5), (6).

<sup>462</sup>Idaho Code §67-8213.

<sup>463</sup>Idaho Code §67-8203(29).

<sup>464</sup>Idaho Code §§67-8204(7); -8209.

<sup>465</sup>Idaho Code §§67-8204(12); -8210(4); -8211.

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and appeals, including mandatory mediation.<sup>466</sup> 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.<sup>467</sup>

**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.”<sup>468</sup> The fee cannot exceed a “proportionate share” of costs ... “specifically and uniquely attributable to the new development.”<sup>469</sup> 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.<sup>470</sup> Impact fees may be assessed only by ordinance, which must be preceded by notice and a public hearing.<sup>471</sup> The fee is to be collected at the time of final plat approval or when a building permit is issued.<sup>472</sup> The ordinance must be consistent with a local comprehensive road improvement plan.<sup>473</sup> 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.<sup>474</sup>

**Indiana**<sup>475</sup> 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.<sup>476</sup> 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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<sup>466</sup>Idaho Code §§67-8204(14); -8212.

<sup>467</sup>Idaho Code §67-8204(10).

<sup>468</sup>605 Ill. Comp. Stat. §5/5-904 (1997).

<sup>469</sup>605 Ill. Comp. Stat. §5/5-904.

<sup>470</sup>605 Ill. Comp. Stat. §5/5-904.

<sup>471</sup>605 Ill. Comp. Stat. §5/5-905.

<sup>472</sup>605 Ill. Comp. Stat. §5/5-911.

<sup>473</sup>605 Ill. Comp. Stat. §5/5-904.

<sup>474</sup>605 Ill. Comp. Stat. §§5/5-907 to 5-909.

<sup>475</sup>Ind. Code §36-7-4-1311 (1998).

<sup>476</sup>Ind. Code §36-7-4-1312.

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charges.<sup>477</sup> Impact fees may be assessed only for facilities in the categories of sewers, parks, and recreation, roads, drainage, and water supply.<sup>478</sup> 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.<sup>479</sup> Fees must be spent pursuant to a zone improvement plan, which must be consistent with the comprehensive plan.<sup>480</sup> Impact fee ordinances must include a schedule or formula for calculating the impact fee, so that developers can “accurately predict” the applicable fee.<sup>481</sup> Developers can demand an individualized assessment of their impact fee, which “locks in” the fee if a building permit has been issued.<sup>482</sup> The fee is to be collected within 30 days of receiving a permit or plat approval, whichever is earlier.<sup>483</sup> Permits or other approval of development cannot be delayed with the goal of awaiting the outcome of any impact fee procedure.<sup>484</sup> 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.<sup>485</sup>

Impact fee ordinances must provide for an appeal of an assessment,<sup>486</sup> and for credits for any capital improvement to be financed by impact fees which the developer constructs itself.<sup>487</sup> 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.<sup>488</sup> Independent judicial

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<sup>477</sup>Ind. Code §§36-7-4-1311(e); -1313.

<sup>478</sup>Ind. Code §36-7-4-1309.

<sup>479</sup>Ind. Code §§36-7-4-1314 to -1316.

<sup>480</sup>Ind. Code §§36-7-4-1318; -1319.

<sup>481</sup>Ind. Code §36-7-4-1320.

<sup>482</sup>Ind. Code §36-7-4-1322.

<sup>483</sup>Ind. Code §36-7-4-1322.

<sup>484</sup>Ind. Code §36-7-4-1341.

<sup>485</sup>Ind. Code §§36-7-4-1331; -1332.

<sup>486</sup>Ind. Code §§36-7-4-1333; -1334.

<sup>487</sup>Ind. Code §§36-7-4-1335 to -1337.

<sup>488</sup>Ind. Code §36-7-4-1338.

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review of the impact fee ordinance and decisions thereunder is authorized.<sup>489</sup> 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.<sup>490</sup> To ease payment of large fees, ordinances must include an installment payment plan.<sup>491</sup> Impact fees can be collected in a civil action, and the local government has a lien under the statute.<sup>492</sup>

**Maine**<sup>493</sup> 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**<sup>494</sup> 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.<sup>495</sup> The capital improvement plan must be reviewed every three years.<sup>496</sup> In the capital planning process and afterwards, the local government is to be advised by a five-member capital improvements advisory committee, which

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<sup>489</sup>Ind. Code §36-7-4-1339.

<sup>490</sup>Ind. Code §§36-7-4-1326 to -1328.

<sup>491</sup>Ind. Code §36-7-4-1324.

<sup>492</sup>Ind. Code §36-7-4-1325.

<sup>493</sup>Me. Rev. Stat. Ann. tit. 30A, §4354 (West 1997).

<sup>494</sup>Nev. Rev. Stat. §§278B.020; .050 (1998).

<sup>495</sup>Nev. Rev. Stat. §§278B.170 to .210.

<sup>496</sup>Nev. Rev. Stat. §278B.290.

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may be the planning commission if it has at least one non-governmental member who is in the real-estate, development, or building industries.<sup>497</sup>

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.<sup>498</sup> 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.<sup>499</sup> 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.<sup>500</sup> A development that pays impact fees has a right to the services of the facilities for which the fee was assessed.<sup>501</sup> Credits must be provided for a developer's construction of off-site improvements,<sup>502</sup> 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.<sup>503</sup>

**New Hampshire**<sup>504</sup> 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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<sup>497</sup>Nev. Rev. Stat. §278B.150.

<sup>498</sup>Nev. Rev. Stat. §§278B.160; .220.

<sup>499</sup>Nev. Rev. Stat. §278B.280.

<sup>500</sup>Nev. Rev. Stat. §278B.230.

<sup>501</sup>Nev. Rev. Stat. §278B.310.

<sup>502</sup>Nev. Rev. Stat. §278B.240.

<sup>503</sup>Nev. Rev. Stat. §278B.260.

<sup>504</sup>N.H. Rev. Stat. §674:21 (1997).

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**New Mexico's** Development Fee Act<sup>505</sup> 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.<sup>506</sup> Before enacting an impact fee ordinance, there must be in place a capital improvements plan.<sup>507</sup> 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.<sup>508</sup> 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.<sup>509</sup> 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.<sup>510</sup> No moratorium can be placed on development for the purpose of awaiting the outcome of any of the above processes.<sup>511</sup>

There is a statutory requirement of a maximum fee per service unit.<sup>512</sup> Impact fees are to be assessed as early as possible, and collected at the time a development permit or building permit is issued,<sup>513</sup> and a developer can enter into an agreement with the local government to pay the impact fee over time.<sup>514</sup> 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.<sup>515</sup> A development has the right to use facilities financed by its impact fees.<sup>516</sup> Fee revenue must be held

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<sup>505</sup>N.M. Stat. §§5-8-1 *et seq.* (1997).

<sup>506</sup>N.M. Stat. §5-8-3.

<sup>507</sup>N.M. Stat. §5-8-6.

<sup>508</sup>N.M. Stat. §§5-8-19 to -29.

<sup>509</sup>N.M. Stat. §§5-8-30 to -36.

<sup>510</sup>N.M. Stat. §5-8-37.

<sup>511</sup>N.M. Stat. §5-8-42.

<sup>512</sup>N.M. Stat. §5-8-7.

<sup>513</sup>N.M. Stat. §5-8-8.

<sup>514</sup>N.M. Stat. §5-8-10.

<sup>515</sup>N.M. Stat. §§5-8-11; -17.

<sup>516</sup>N.M. Stat. §5-8-12.

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in separate, interest-bearing accounts, and must be accounted for separately than the general revenue.<sup>517</sup> Credit for dedication of land or construction of facilities by the developer includes such on-site improvements as sewers, roads, and sidewalks.<sup>518</sup>

**Oregon**<sup>519</sup> authorizes the assessment of “system development charges” by local governments.<sup>520</sup> There must be a system for challenging expenditures of the charges,<sup>521</sup> and credits for particular improvements made by developers must be provided.<sup>522</sup> 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.<sup>523</sup> 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.<sup>524</sup> 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.<sup>525</sup>

**Pennsylvania**<sup>526</sup> authorizes municipalities to assess impact fees to finance “public transportation capital improvements.”<sup>527</sup> 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.<sup>528</sup> 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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<sup>517</sup>N.M. Stat. §5-8-16.

<sup>518</sup>N.M. Stat. §§5-8-11, -15.

<sup>519</sup>Or. Rev. Stat. §§223.297 *et seq.* (1998).

<sup>520</sup>Or. Rev. Stat. §223.302(1).

<sup>521</sup>Or. Rev. Stat. §223.302(2).

<sup>522</sup>Or. Rev. Stat. §223.304(3).

<sup>523</sup>Or. Rev. Stat. §223.304(1), (2), (5).

<sup>524</sup>Or. Rev. Stat. §§223.299(2) to (4); 223.307.

<sup>525</sup>Or. Rev. Stat. §223.309.

<sup>526</sup>53 Pa. Cons. Stat. §§10501-A *et seq.* (1998).

<sup>527</sup>53 Pa. Cons. Stat. §10503-A.

<sup>528</sup>53 Pa. Cons. Stat. §10503-A(b).

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bus lanes, pedestrian ways, rail lines, or tollways.”<sup>529</sup> 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.<sup>530</sup> 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).<sup>531</sup> Both the advisory committee and the local legislative body must hold public hearings on the plan before it may be adopted.<sup>532</sup> 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.<sup>533</sup>

The impact fee itself must be adopted by ordinance.<sup>534</sup> 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.<sup>535</sup> Transportation impact fees are payable at the time a building permit issues.<sup>536</sup> Credits may be provided for affordable housing and for other developments “determined by the municipality to serve an overriding public interest.”<sup>537</sup> De minimis applications for development approval are not subject to impact fees, and the impact fee ordinance must specify what is de minimis.<sup>538</sup> Fee revenue must be placed in a segregated, interest-bearing account.<sup>539</sup> The fees are to be assessed and spent on a service-area basis.<sup>540</sup> There must be a refund of impact fees not spent

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<sup>529</sup>53 Pa. Cons. Stat. §10502-A.

<sup>530</sup>53 Pa. Cons. Stat. §10503-A(d).

<sup>531</sup>53 Pa. Cons. Stat. §10504-A.

<sup>532</sup>53 Pa. Cons. Stat. §10504-A(c)(1), (e)(3).

<sup>533</sup>53 Pa. Cons. Stat. §§10503-A(f), 10505-A(c)(3).

<sup>534</sup>53 Pa. Cons. Stat. §10503-A(a), (c).

<sup>535</sup>53 Pa. Cons. Stat. §10503-A(a).

<sup>536</sup>53 Pa. Cons. Stat. §10505-A(e).

<sup>537</sup>53 Pa. Cons. Stat. §10503-A(a)(5)(i) & (ii).

<sup>538</sup>53 Pa. Cons. Stat. §10503-A(a)(5)(iii).

<sup>539</sup>53 Pa. Cons. Stat. §10505-A(d).

<sup>540</sup>53 Pa. Cons. Stat. §10505-A(a), (b).

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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.<sup>541</sup> Appeal to the court of common pleas is provided, but unlike most civil actions, each side must bear its own costs.<sup>542</sup>

Impact fees in **Rhode Island** are governed by Section 47 of the Land Development and Subdivision Review Enabling Act of 1992.<sup>543</sup> 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.<sup>544</sup>

**Texas** authorizes “political subdivisions” to impose impact fees.<sup>545</sup> 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.<sup>546</sup> 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.<sup>547</sup> 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.<sup>548</sup> 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.<sup>549</sup> Also, the land use assumptions and capital improvement plans must be updated at least

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<sup>541</sup>53 Pa. Cons. Stat. §10505-A(g).

<sup>542</sup>53 Pa. Cons. Stat. §10506-A.

<sup>543</sup>R.I. Gen. Laws §45-23-47 (1997).

<sup>544</sup>R.I. Gen. Laws §§45-23-66 *et seq.*

<sup>545</sup>Tex. Loc. Gov’t Code §395.011 (1999).

<sup>546</sup>Tex. Loc. Gov’t Code §§395.001; .012.

<sup>547</sup>Tex. Loc. Gov’t Code §395.013.

<sup>548</sup>Tex. Loc. Gov’t Code §§395.013; .014, .0411.

<sup>549</sup>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.<sup>550</sup> No moratorium on development may be placed in order to await completion of any of the aforementioned steps.<sup>551</sup> 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.<sup>552</sup> Based on the capital improvements plan, there is a statutory maximum impact fee per service unit.<sup>553</sup> Developers and the political subdivision may enter into an agreement setting the fee.<sup>554</sup> Once fees have been assessed, additional fees can be collected only if there are additional service units in the development.<sup>555</sup> A new development has the right to the services of the facilities that were funded by its impact fees.<sup>556</sup> 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.<sup>557</sup> 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.<sup>558</sup> An appeals process must be provided.<sup>559</sup> A developer must receive a credit for constructing off-site roads.<sup>560</sup> 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.<sup>561</sup>

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<sup>550</sup>Tex. Loc. Gov't Code §§395.052 to .057.

<sup>551</sup>Tex. Loc. Gov't Code §395.076.

<sup>552</sup>Tex. Loc. Gov't Code §395.058.

<sup>553</sup>Tex. Loc. Gov't Code §§395.014; .015.

<sup>554</sup>Tex. Loc. Gov't Code §395.018.

<sup>555</sup>Tex. Loc. Gov't Code §395.017.

<sup>556</sup>Tex. Loc. Gov't Code §395.020.

<sup>557</sup>Tex. Loc. Gov't Code §395.019.

<sup>558</sup>Tex. Loc. Gov't Code §395.025.

<sup>559</sup>Tex. Loc. Gov't Code §395.077.

<sup>560</sup>Tex. Loc. Gov't Code §395.023.

<sup>561</sup>Tex. Loc. Gov't Code §395.016.

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**Vermont**<sup>562</sup> grants municipalities the power to levy impact fees.<sup>563</sup> The municipality must have a capital budget in place before it can enact an impact fee ordinance.<sup>564</sup> 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.<sup>565</sup> An ordinance may provide for exemptions as long as the basis for exemption is clear in the ordinance,<sup>566</sup> and developers can set aside off-site land in an undeveloped state in lieu of paying an impact fee.<sup>567</sup> 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.<sup>568</sup>

**Virginia**<sup>569</sup> 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.<sup>570</sup> These governments may impose fees only on new development for “reasonable road improvements attributable in substantial part to the new development.”<sup>571</sup> Road development does not include streets and other roads that a developer is required to build within the development.<sup>572</sup> 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.<sup>573</sup> A road improvements program must be adopted, after public hearing, to evaluate the existing roads, the need for additional

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<sup>562</sup>Vt. Stat. Ann. tit. 24, §§5200 *et seq.* (1998).

<sup>563</sup>Vt. Stat. Ann. tit. 24, §5202(a).

<sup>564</sup>Vt. Stat. Ann. tit. 24, §5203(a).

<sup>565</sup>Vt. Stat. Ann. tit. 24, §5203(b), (d), (e).

<sup>566</sup>Vt. Stat. Ann. tit. 24, §5205.

<sup>567</sup>Vt. Stat. Ann. tit. 24, §5202(b).

<sup>568</sup>Vt. Stat. Ann. tit. 24, §5204.

<sup>569</sup>Va. Code Ann. §§15.2-2317 *et seq.* (1998).

<sup>570</sup>Va. Code Ann. §15.2-2317.

<sup>571</sup>Va. Code Ann. §15.2-2319.

<sup>572</sup>Va. Code Ann. §15.2-2318.

<sup>573</sup>Va. Code Ann. §15.2-2319.

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road capacity, and the cost thereof.<sup>574</sup> 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.<sup>575</sup> Only then may the government adopt an impact fee ordinance, which must set forth a schedule of fees.<sup>576</sup> The program and the ordinance must be reviewed and updated at least every two years.<sup>577</sup> A formula for calculating a statutory maximum impact fee is provided.<sup>578</sup> The fee is to be collected at the time a certificate of occupancy is to be issued.<sup>579</sup> Fee revenue is to be segregated in a “road improvement account,” deposited in an interest-bearing bank account.<sup>580</sup> 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.<sup>581</sup> 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.<sup>582</sup>

**West Virginia’s** Local Powers Act<sup>583</sup> 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.<sup>584</sup> The capital project may be in the areas of water, sewer, drainage, schools, roads, parks, and police, fire, and emergency services.<sup>585</sup> 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.<sup>586</sup> The fee

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<sup>574</sup>Va. Code Ann. §15.2-2321.

<sup>575</sup>Va. Code Ann. §§15.2-2320; -2321.

<sup>576</sup>Va. Code Ann. §15.2-2322.

<sup>577</sup>Va. Code Ann. §§15.2-2325.

<sup>578</sup>Va. Code Ann. §15.2-2323.

<sup>579</sup>Va. Code Ann. §15.2-2323.

<sup>580</sup>Va. Code Ann. §15.2-2326.

<sup>581</sup>Va. Code Ann. §§15.2-2323; 2324.

<sup>582</sup>Va. Code Ann. §§15.2-2327.

<sup>583</sup>W.Va. Code §§7-20-1 *et seq.* (1997).

<sup>584</sup>W.Va. Code §7-20-4.

<sup>585</sup>W.Va. Code §7-20-3(a), (b).

<sup>586</sup>W.Va. Code §§7-20-4; -7(a).

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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.<sup>587</sup> The fees must be assessed according to a standard formula.<sup>588</sup> Refunds for fee money not expended within six years from collection must be paid to the present owner.<sup>589</sup> Credits for past or future payments must be appropriately adjusted for time (i.e. the present value of the payment must be used).<sup>590</sup> 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.<sup>591</sup>

### **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.

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<sup>587</sup>W.Va. Code §7-20-8.

<sup>588</sup>W.Va. Code §7-20-7(c).

<sup>589</sup>W.Va. Code §7-20-9.

<sup>590</sup>W.Va. Code §7-20-5.

<sup>591</sup>W.Va. Code §7-20-7(c).

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- 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.<sup>592</sup>
- 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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<sup>592</sup>American Planning Association, *Policy Guide on Impact Fees*, [www.planning.org/govt/impact.html](http://www.planning.org/govt/impact.html) (1998).

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40 percent representation of certain industries with no government officials or employees, especially in smaller communities.

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### 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:

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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:

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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.

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- (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.

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- (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.

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- ◆ 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.
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### *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

#### **The Problem with Level of Service Standards**

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.

Source: Douglas R. Porter, *Managing Growth in America's Communities* (Washington, D.C.: Island Press, 1997), 130.

have sufficient available capacity to serve development at a predetermined level of service (LOS). A 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.<sup>593</sup> Alternatively, the local government can elect to move up the

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<sup>593</sup>S. Mark White, *Adequate Public Facilities Ordinances and Transportation Management*, Planning Advisory Service Report No. 465 (Chicago: American Planning Association, August 1996), 5; Marya Morris and James Schwab, “Adequate Public Facilities Ordinances,” *Zoning News* (Chicago: American Planning Association, May 1991): 1; see generally Arthur C. Nelson and James B. Duncan, with Clancy J. Mullen and Kirk R. Bishop, *Growth Management*

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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*,<sup>594</sup> 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*<sup>595</sup> 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.<sup>596</sup>

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

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*Principles and Practices* (Chicago: APA Planners Press, 1995), Ch. 7; James A. Kushner, *Subdivision Law and Growth Management* (Deerfield, Ill: West Group, 1998), §§2.13 to 2.13; Eric Damian Kelly, *Managing Community Growth: Policies, Techniques, and Impacts* (Westport, Conn.: Praeger, 1994), 44-48; James Duncan and Associates and Eric Damian Kelly, *Adequate Public Facilities Study: An Analysis of APF/Growth Management Systems*, prepared for the Montgomery County Planning Department and the Maryland-National Capital Park and Planning Commission (Austin, Tx.: James Duncan and Associates, November 1991).

<sup>594</sup>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.

<sup>595</sup>30 N.Y.2d 339, 285 N.E. 2d (1972), appeal dismissed, 407 U.S. 1003 (1972).

<sup>596</sup>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.<sup>597</sup> 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.<sup>598</sup>

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.<sup>599</sup> The rule requires each local government to adopt, as a component of its comprehensive plan, objectives, policies, and standards for a concurrency management system.<sup>600</sup> 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.”<sup>601</sup> 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

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<sup>597</sup>Fla. Stat. Ann. §163.3202(2)(g) (1998).

<sup>598</sup>Fla. Stat. Ann. §163.3177(10)(h) (1998).

<sup>599</sup>Fla. Admin. Code §9-J5.0055 (1998).

<sup>600</sup>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.)

<sup>601</sup>Fla. Admin. Code §9-J5.0055(1)(d).

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schools<sup>602</sup> 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."<sup>603</sup> 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.<sup>604</sup>

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. . . .<sup>605</sup>

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.<sup>606</sup>

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<sup>602</sup>The Florida statutes were amended in 1998 to expressly require that school concurrency be imposed only on a countywide basis. Fla Stat. §163.3180(12) - (14) (1999). For the history and explanation of this legislation, see David L. Powell, "Back to Basics on School Concurrency," *Fla. Stat. L. Rev.* 46 (1999): 451-586.

<sup>603</sup>Thomas G. Pelham, "Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth," *Fla. State Univ. L. Rev.* 19, No. 4 (Spring 1992): 973-1052, at 1050.

<sup>604</sup>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).

<sup>605</sup>Ruth Steiner, "Transportation Concurrency: The Florida Example," *Transportation Research Record* (forthcoming in 1999), 14.

<sup>606</sup>*Id.*, 15-16.

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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.<sup>607</sup> 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."<sup>608</sup> 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,"<sup>609</sup> 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.<sup>610</sup>

**Maryland** and **New Hampshire** both authorize, but do not require, adequate public facilities ordinances.<sup>611</sup> Neither state describes the operation of adequate public facilities ordinances. In

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<sup>607</sup>*Transportation and Land Use Study Committee* (Tallahassee, Fla.: Florida Department of Transportation, January 15, 1999), 19-32.

<sup>608</sup>Wash. Rev. Code §36.070(6)(b) (1998).

<sup>609</sup>*Id.*

<sup>610</sup>Wash. Admin. Code §365-195-835 (1997). Some of the provisions of this rule have been used in Section 8-603 below.

<sup>611</sup>Md. Code Ann. Art. 66B, §10.1(a)(1) (1998); N.H. Rev. State Ann. §§674:21-:22 (1998).

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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.<sup>612</sup> 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.<sup>613</sup>

### 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”<sup>614</sup> 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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<sup>612</sup>Maryland Office of Planning, *Adequate Public Facilities* (Baltimore: The Office, June 1996). Maryland’s Smart Growth program, which restricts state growth-related capital expenditures to locally designated “priority funding areas” requires that counties must adopt adequate public facilities standards for schools as a condition of state certification of the designation. Md. Code Ann. Art. State Finance and Procurement, §7-7B-04(C)(1) (1998).

<sup>613</sup>N.H. Rev. State Ann. §§674:21I(a) to (b), :22 (1998).

<sup>614</sup>Thomas G. Pelham, “Adequate Public Facilities Requirements” at 1019.

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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.”<sup>615</sup> 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.”<sup>616</sup> 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.

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<sup>615</sup>Id.

<sup>616</sup>Id.

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### 8-603 Concurrency; Provision of Adequate Public Facilities

- (1) 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.
- (2) 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.
- (3) 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

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- 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];

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- (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];
- ◆ If the legislature prefers that local governments have the authority to create a program whereby one developer can build or finance public facilities in excess of the adequate public facilities requirement and transfer the excess to another development that requires additional public facilities to comply with this statute, the bracketed language should be omitted. It should also be noted that the bracketed provision does not apply to sales, assignments, or transfers of capacity within the same development; that is, when the land is sold or otherwise conveyed to a subsequent owner.

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- (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

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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.<sup>617</sup> 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

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<sup>617</sup>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.

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- ◆ Language exempting transit-oriented development and redevelopment areas from concurrency is intended to serve as an incentive to promote infill development.<sup>618</sup> 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<sup>619</sup> 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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<sup>618</sup>For a discussion of this approach, called “concurrency waivers,” see Robert H. Freilich, Elizabeth A. Garvin, and S. Mark White, “Economic Development and Public Transit: Making the Most of the Washington Growth Management Act,” *University of Puget Sound L. Rev.* 16, No. 3 (Spring 1993): 949-973, at 967.

<sup>619</sup>A critique of the Florida concurrency system notes that there as 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.
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### ***Commentary: Development Moratoria***

A moratorium is “an authorized delay in the provision of government services or development approval.”<sup>620</sup> 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

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<sup>620</sup>Robert Meltz, Dwight H. Merriam, and Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation* (Washington, D.C.: Island Press, 1999), 266; see also Dwight H. Merriam and Gurdon H. Buck, “Smart Growth, Dumb Takings,” *Environmental Law Reporter News and Analysis* 29 (December 1999): 10746-10756 (discussion of takings problems in implementing moratoria; commenting that “a moratorium’s objectives should expressly identify critical public health and safety issues” and a moratorium “should be for as short a time as necessary”; also adding that “every entity imposing a moratorium should do all that is possible to encourage reasonable economic use of affected property, including allowing interim uses and waivers or exemptions from the moratorium on a case-by-base basis”).

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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.<sup>621</sup> **Arizona**<sup>622</sup> 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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<sup>621</sup>*Naylor v. Township of Hellam*, No. J-66-2000 (Pa. 2001) (moratorium is effectively a suspension of the zoning ordinance, which is not authorized in Pennsylvania’s Municipalities Planning Code, 53 Pa.Stat. §§10101 *et seq.*).

<sup>622</sup>Ariz. Rev. Stat. §§11-833, 9-463.06 (1998).

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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**<sup>623</sup> 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<sup>624</sup> 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**<sup>625</sup> 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**<sup>626</sup> 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

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<sup>623</sup>Cal. Gov’t Code §65858 (1998).

<sup>624</sup>Cal. Evid. Code §669.5.

<sup>625</sup>Me. Rev. Stat. tit. 30A §4356 (1999).

<sup>626</sup>Minn. Stat. §462.355(4) (1999).

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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”<sup>627</sup> when “unusual circumstances requiring prompt attention” arise and “for the purpose of developing or altering a growth management process.”<sup>628</sup> 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.<sup>629</sup> The statute specifies in minute detail the development permissible and impermissible under an interim zoning ordinance.<sup>630</sup> With some exceptions, only residential and agricultural uses are permitted,<sup>631</sup> and the interim zoning ordinance thus acts as a partial moratorium on commercial and industrial development.

**New Jersey**<sup>632</sup> 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<sup>633</sup> authorizes moratoria only if “a shortage of public facilities ... would otherwise occur” for urban or urbanizable land or if some other “compelling need” exists.<sup>634</sup> Compelling need requires findings that applying existing land development regulations would be “inadequate to prevent irrevocable public harm from development,” that the moratorium is

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<sup>627</sup>N.H. Rev. Stat. §§674:22 -674:30 (1999).

<sup>628</sup>N.H. Rev. Stat. §674:23.

<sup>629</sup>N.H. Rev. Stat. §674:23.

<sup>630</sup>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 than 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..

<sup>631</sup>N.H. Rev. Stat. §674:25.

<sup>632</sup>N.J. Stat. §40:55D-90 (1999).

<sup>633</sup>Or. Rev. Stat. §§197.505 - 197.540 (1999).

<sup>634</sup>Or. Rev. Stat. §197.520(2), (3).

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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.<sup>635</sup> 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.<sup>636</sup> 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.<sup>637</sup> 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.<sup>638</sup> 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.<sup>639</sup>

**Washington**<sup>640</sup> 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,<sup>641</sup> 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

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<sup>635</sup>Or. Rev. Stat. §197.520(3).

<sup>636</sup>Or. Rev. Stat. §197.520(1), (5).

<sup>637</sup>Or. Rev. Stat. §197.520(4).

<sup>638</sup>Or. Rev. Stat. §197.530.

<sup>639</sup>Or. Rev. Stat. §197.540.

<sup>640</sup>Wash. Rev. Code §§35A.63.220, 36.70.795 (1999).

<sup>641</sup>*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

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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.”<sup>642</sup>

In its famous *Lucas* decision (1992),<sup>643</sup> 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.”<sup>644</sup> 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.”<sup>645</sup>

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,<sup>646</sup> and a one-year water moratorium was upheld by the federal Ninth Circuit.<sup>647</sup> 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*.”<sup>648</sup> A moratorium on mobile-home permits

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<sup>642</sup>482 U.S. 321.

<sup>643</sup>*Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992). For the view that a moratorium is a categorical taking under some instances, see Wendy Larsen and Marcella Larson, “Moratoria as Takings Under *Lucas*,” *Land Use Law & Zoning Digest* 12, No. 6 (June 1994): 3-7.

<sup>644</sup>505 U.S. 1027.

<sup>645</sup>505 U.S. 1029.

<sup>646</sup>*Offen v. Prince George’s County*, 96 Md. App. 526, 625 A.2d 424 (1993).

<sup>647</sup>*Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994).

<sup>648</sup>*Woodbury Place Partners v. Woodbury*, 492 N.W.2d 258, 261 (Minn. Ct. App. 1992), *cert den’d* 508 U.S. 960 (1993).

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imposed until a comprehensive plan, including provisions on mobile homes, could be adopted was found not to constitute a taking by the Eleventh Circuit.<sup>649</sup> 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.”<sup>650</sup>

And in a 2000 decision on this point, the Ninth Circuit reversed<sup>651</sup> a federal District Court decision<sup>652</sup> 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<sup>653</sup> or by the legal elements of ownership.<sup>654</sup> 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 remedying 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-

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<sup>649</sup>*Brown v. Crawford County*, 960 F.2d 1002 (11th Cir. 1992).

<sup>650</sup>*Williams v. City of Central*, 907 P.2d 701, 704 (Colo. Ct. App. 1995).

<sup>651</sup>*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000).

<sup>652</sup>*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 34 F.Supp.2d 1226 (D. Nev. 1999).

<sup>653</sup>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).

<sup>654</sup>*Andrus v. Allard*, 444 U.S. 51 (1979).

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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.<sup>655</sup>

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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<sup>655</sup>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

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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;

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- (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)],] [A/a]n 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.]

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- ◆ 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.

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### ***Commentary: Development Agreements***<sup>656</sup>

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<sup>656</sup>See generally David L. Callies, “Solutions After *Dolan*: Land Development Agreements,” *Land Use Law & Zoning Digest* vol. 49, no. 10 (October 1997): 3-7; John J. Delaney, “The Landowners’/Developers’ Perspective on Planning Law Reform,” in *Modernizing State Planning Statutes: The Growing Smart Working Papers, Vol. 1*, Planning Advisory Service Report 462/463 (Chicago: American Planning Association, 1996), 31-38; Erin J. Johnson & Edward H. Ziegler, eds., *Development Agreements: Analysis, Colorado Case Studies, Commentary* (Denver: Rocky Mountain Land Use Institute, 1993); Daniel J. Curtin, Jr. & S.A. Edelstein, “Development Agreement Practice in California and Other States,” *Stetson Law Review* 22 (1993): 761; Mark S. Dennison, “Successful Development Agreements,” *Planning Advisory Service Memo* (Chicago: American Planning Association, July 1993): 1-4.

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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.”<sup>657</sup> 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**<sup>658</sup> 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<sup>659</sup> 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.<sup>660</sup> 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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<sup>657</sup>Erin J. Johnson, “Development Agreements: Planning Perspectives,” in *Development Agreements: Analysis, Colorado Case Studies, Commentary*, 3.

<sup>658</sup>Ariz. Rev. Stat. §9-500.05 (1998).

<sup>659</sup>Cal. Gov’t Code §§65864 - 65869.5 (1998).

<sup>660</sup>Cal. Gov’t Code §65865.

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canceled by mutual consent of the parties.<sup>661</sup> Since the agreement runs with the land, it must be recorded once approved.<sup>662</sup> 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.<sup>663</sup> If an agreement is contrary to subsequent state or federal laws, it may be amended to be placed into compliance with those laws.<sup>664</sup> Development agreements are enforceable by all parties thereto.<sup>665</sup> 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.<sup>666</sup>

**Florida's** authorizing statute on development agreements<sup>667</sup> 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.<sup>668</sup> 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.<sup>669</sup> 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.<sup>670</sup> 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."<sup>671</sup> The agreement may be enforced by any party in civil

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<sup>661</sup>Cal. Gov't Code §§65867 - 65868.

<sup>662</sup>Cal. Gov't Code §65868.5.

<sup>663</sup>Cal. Gov't Code §65866.

<sup>664</sup>Cal. Gov't Code §65869.5.

<sup>665</sup>Cal. Gov't Code §65865.4.

<sup>666</sup>Cal. Gov't Code §65865.1.

<sup>667</sup>Fla. Stat. §§163.3220 - 163.3243 (1998).

<sup>668</sup>Fla. Stat. §§163.3223, .3229 - .3231.

<sup>669</sup>Fla. Stat. §163.3225.

<sup>670</sup>Fla. Stat. §§163.3229, .3237, .3241.

<sup>671</sup>Fla. Stat. §163.3233.

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court by injunction, and, since the agreement runs with the land, must be recorded.<sup>672</sup> 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.<sup>673</sup>

**Hawaii** has a development agreement statute<sup>674</sup> 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.<sup>675</sup> Such agreements must be consistent with the county's general plan and other applicable development plans,<sup>676</sup> and will not take effect until approved by the county legislative body after a public hearing.<sup>677</sup> They must identify the land that is the subject of the agreement and set a termination date, which may be extended by mutual agreement.<sup>678</sup> 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."<sup>679</sup> Development agreements are enforceable by the parties and their successors in interest, and thus must be recorded.<sup>680</sup> 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.<sup>681</sup>

**Idaho** has a relatively simple law on development agreements.<sup>682</sup> 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. The

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<sup>672</sup>Fla. Stat. §§163.3239, .3243.

<sup>673</sup>Fla. Stat. §163.3235.

<sup>674</sup>Haw. Rev. Stat. §§46-121 *et seq.* (1998).

<sup>675</sup>Haw. Rev. Stat. §§46-123, -126.

<sup>676</sup>Haw. Rev. Stat. §46-129.

<sup>677</sup>Haw. Rev. Stat. §§46-124, -128.

<sup>678</sup>Haw. Rev. Stat. §46-126.

<sup>679</sup>Haw. Rev. Stat. §46-127(b).

<sup>680</sup>Haw. Rev. Stat. §§46-127(a), -132.

<sup>681</sup>Haw. Rev. Stat. §46-125.

<sup>682</sup>Idaho Code §67-6511A (1998).

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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**<sup>683</sup> 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<sup>684</sup> 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.<sup>685</sup> 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.<sup>686</sup> The agreement itself must be recorded within a reasonable time after approval, and recordation binds the parties and their successors in interest.<sup>687</sup> 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.<sup>688</sup>

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<sup>683</sup>Md. Code Ann. art. 66B §13.01 (1998).

<sup>684</sup>Nev. Rev. Stat. §§278.0201 - .0207 (1998).

<sup>685</sup>Nev. Rev. Stat. §278.0201.

<sup>686</sup>Nev. Rev. Stat. §§278.0203(1), .0207.

<sup>687</sup>Nev. Rev. Stat. §278.0203(2).

<sup>688</sup>Nev. Rev. Stat. §278.0205.

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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 rescission 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.

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### 8-701 Development Agreements

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- (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:

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- (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;

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- ◆ 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.

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## CHAPTER 9

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# **SPECIAL AND ENVIRONMENTAL LAND DEVELOPMENT REGULATIONS AND LAND-USE INCENTIVES**

This Chapter contains model statutes that address various special issues in land development regulation, including environmental issues. In a sense, this Chapter is a continuation of Chapter 8, which deals with more general or ‘typical’ land development regulations. The first three Sections are intended to implement particular elements of the local comprehensive plan, adopted pursuant to Chapter 7, Local Planning. The protection of, and regulation of development in, critical and sensitive areas and natural hazard areas is addressed in Section 9-101. Section 9-201 is concerned with transportation demand management. And Section 9-301 authorizes regulations for the protection of historic properties and districts and for the preservation of aesthetic design standards in specific districts.

The second group of statutes provides flexible tools for balancing the need to protect the public and the environment with the rights of property owners. The first two Sections in this group, 9-401 and 9-402, authorize transfer of development rights from one property to another and the purchase of development rights by the local government. The Section on conservation easements, 9-402.1, provides the legal instrument through which the transfer or purchase of development rights is implemented. And the mitigation Section, 9-403, authorizes local governments to permit development in otherwise-undevelopable critical and sensitive areas, such as wetlands, in exchange for the creation or restoration of replacement critical and sensitive areas elsewhere.

A final model statute, Section 9-501, authorizes land development regulations that provide density and intensity incentives for affordable housing, good community design, and open space donation.

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## CHAPTER 9

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### Chapter Outline

9-101	Regulation of Critical and Sensitive Areas and Natural Hazard Areas
9-201	Transportation Demand Management
9-301	Historic Districts and Landmarks; Design Review
9-401	Transfer of Development Rights
9-402	Purchase of Development Rights
9-402.1	Conservation Easements
9-403	Mitigation
9-501	Land-Use Incentives for Affordable Housing, Community Design, and Open Space Dedication; Unified Incentives Ordinance

### Cross-References for Sections in Chapter 9

Section No.	Cross-Reference to Section No.
9-101	7-202, 7-209, 7-210, 8-102, 8-103, 8-104, 8-201, 8-502, 9-401, 9-402, 9-403
9-201	4-103, 8-103, 8-104, 7-205
9-301	7-214, 7-215, 8-102, 8-103, 8-104, 8-201, 8-604, 10-201
9-401	7-209, 7-210, 7-212, 7-215, 7-503, 8-102, 8-103, 8-104, 9-402.1
9-402	7-209, 7-210, 7-212, 7-215, 8-102, 8-103, 8-104, 9-402.1
9-402.1	9-301, 9-401, 9-402, 9-403
9-403	4-103, 7-209, 8-102, 8-103, 8-104, 9-101, 9-402.1, 10-201 <i>et seq.</i>
9-501	7-207, 7-214, 8-102, 8-103, 8-104, 8-201, 8-601, 8-602, 8-701, 10-201

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### *Commentary: Regulation of Critical and Sensitive Areas and Natural Hazard Areas<sup>1</sup>*

#### **INTRODUCTION**

Critical and sensitive areas and natural hazards exist in every region of the country. The following model Section is designed to allow local governments to regulate and otherwise protect these locations on their own. It is important to note that in many instances a local government will desire to regulate and protect both types of area in a single regulation, or, because regulating and protecting both may take on different forms and require differing levels of information, adopt separate ordinances. This issue is presented in greater detail within the model Section below.

#### **CRITICAL AND SENSITIVE AREAS**

Critical and sensitive areas are defined and discussed in Sections 7-101 and 7-209 of the *Guidebook*, and consist of areas that contain or constitute natural resources sensitive to excessive or inappropriate development.<sup>2</sup> These include aquifer systems, watersheds to fresh and coastal water systems, wellhead protection areas, inland and coastal wetland resources and critical habitat areas. As discussed within Section 7-209, determination and protection of certain critical and sensitive areas can only be accomplished, from both a practical and a legal perspective, if the local government has sufficient analytical support identifying the area and assessing its “critical” or “sensitive” nature.

For example, a regulation designed to protect surface water bodies must incorporate an accurate watershed delineation. The delineation must be identified on a map or maps of suitable scale and must reflect current scientific understanding regarding surface water flows and watershed dynamics. If the regulation is designed to limit contaminant transport to the water resource, the regulation must identify which contaminants are being regulated, and arguably provide a basis for the regulation’s purpose. Similarly, a regulation designed to protect drinking water wells must be linked to an accurate delineation of the zone of contribution to the wells. The delineation must reflect current analytical technique and not, as has often been the case, be based on best guesses as to groundwater flow and capture area locations. And a regulation designed to protect wetland resources must incorporate an appropriate methodology for the identifying wetland species and reflect current science on the interaction between ground and surface water systems.

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<sup>1</sup>This commentary and the following model statute were drafted by John Bredin, Esq., Research Fellow, Stuart Meck, FAICP, Principal Investigator for Growing Smart<sup>SM</sup>, and Jon Witten, Esq., an attorney and a planning consultant in Sandwich, Massachusetts.

<sup>2</sup>For an example of a statute authorizing designation and regulation of critical areas, see Wash. Rev. Code §§36.70A.060, 36.70A.170, 36.70A.172, and 36.70A.175 (1999). Administrative rules appear at Wash. Admin. Code §365-190-080 (1999).

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### NATURAL HAZARD AREAS

Natural hazard areas are discussed in Section 7-210 and include those portions of the community that pose risk to the built and natural environment and public safety from a known or potential natural hazard or disaster. A natural hazard does not even have to be wholly natural; consider ground subsidence from old mines or landslides exacerbated by the clearing of trees from hillsides. These hazards and hazard areas are numerous and unique, and specific provisions will not be made in the model Section for each natural hazard. The organization of the model Section should still be helpful in guiding the drafting of regulations to manage particular natural hazard areas. For example, the model Section below is intended to serve as the statutory authority for floodplain management ordinances.

One reason why floodplain ordinances are important is that property owners in a floodplain cannot obtain insurance under the National Flood Insurance Program<sup>3</sup> unless the local government first adopts floodplain regulations that satisfy or exceed criteria established by the Federal Emergency Management Agency.<sup>4</sup>

### TWO WORDS OF CAUTION

Local governments seeking to protect critical and sensitive areas and/or natural hazard areas need to ensure that their regulations do not conflict with, or are otherwise pre-empted by, state or federal law. Indeed, a state may have a separate permitting procedure for certain types of critical or sensitive areas. For example, the New Jersey Freshwater Wetlands Protection Act completely preempts local government regulation of development affecting freshwater wetlands and establishes transition zones around wetlands in which limited or no development (no structures other than temporary structures of 150 square feet or less) can take place.<sup>5</sup>

It is also vital to note that while the ordinances authorized by this model Section are necessary to implement the critical and sensitive areas element and natural hazards element of the local comprehensive plan, they are not the only implementation measures. This is particularly true with the natural hazards element.<sup>6</sup> Emergency response plans, such as evacuation plans, must be prepared and their contents made familiar to the officials who will implement them. Building and property management codes must be updated and modified to make buildings and other structures less susceptible to damage from the natural hazard. Public infrastructure and capital improvements such as drainage culvert enlargement and strengthening of bridge and road supports may be needed. And

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<sup>3</sup>42 U.S.C. §4001 *et seq.* (2000).

<sup>4</sup>44 C.F.R. §60.3 (2000).

<sup>5</sup>N.J.S.A. §§13:9B-1 *et seq.* (1999).

<sup>6</sup>For a discussion of planning for disasters and of the regulations and other measures needed before, during, and after a disaster occurs, see Jim Schwab with Kenneth C. Topping, Charles C. Eadie, Robert E. Deyle, and Richard A. Smith, *Planning for Post-Disaster Recovery and Reconstruction*, Planning Advisory Service Report No. 483/484 (Chicago: American Planning Association, 1998).

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ordinances managing post-disaster reconstruction must be adopted, or at least drafted, before a disaster strikes.

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### 9-101 Regulation of Critical and Sensitive Areas and Natural Hazard Areas

- (1) Every local government, except for those which may opt out pursuant to Section [7-202(5)(b) and (c)], shall 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 ordinance*]:
  - (a) a critical and sensitive areas ordinance; and/or
  - (b) a natural hazards ordinance.
- ◆ Under Section 7-202(5), concerning elements of the local comprehensive plan, local governments may opt out of the natural hazards element requirement if they have no significant exposure to any natural hazard, and may opt out of the requirement for a critical and sensitive areas element if there are less than five acres of critical and sensitive area in the local government or if all critical and sensitive areas are within areas of critical state concern.
- (2) The purposes of this Section are to:
  - (a) ensure an adequate quality and quantity of drinking water;
  - (b) ensure high quality ground and surface water systems;
  - (c) conserve the natural resources of the community, both living and non-living;
  - (d) prevent contamination of the natural environment;
  - (e) protect and conserve wetlands, their resources and amenities; and
  - (f) minimize the danger to life, health, and property due to fire, flood, earthquake, severe storms and other natural hazards.
- (3) As used in this Section, and in any other Section where “critical and sensitive areas” and/or “natural hazard areas” are referred to:
  - (a) **“Alteration of Land Form”** means any human-made change in the existing topography of the land, including, but not limited to, filling, backfilling, grading, paving, dredging, mining, excavation, and drilling;

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- (b) **“Best Management Practices”** means the process of minimizing the impact of nonpoint source pollution on receiving waters or other resources, including, but not limited to, detention ponds, vegetative swales and buffers, street cleaning, reduced road salting, and public education programs;
- (c) **“Critical and Sensitive Area”** means lands and/or water bodies that:
  - 1. provide protection to or habitat for natural resources, living and non-living; or
  - 2. are themselves natural resources;requiring identification and protection from inappropriate or excessive development;

◆ This definition is also provided in Section 7-101.

- (d) **“Critical and Sensitive Areas Overlay District”** (CSAOD) means those land areas that constitute a critical and sensitive area, designated on a zoning map as overlay districts;
- (e) **“Floodplain Management”** means the process of, and mechanisms for, minimizing the occurrence of, and damage from, flooding;
- (f) **“Habitat Management”** means the process of, and mechanisms for, maintaining wildlife habitats and the diversity of species therein, including but not limited to fish, animals, birds, and plants;
- (g) **“Hazardous Material”** means any substance defined as a “hazardous chemical” in 29 C.F.R. § 1910.1200(c) as amended;
- (h) **“Hazardous Waste”** means any [waste material *or similar term*] as defined in the [State Hazardous Waste Regulations];
- (i) **“Natural Hazard”** means any condition or area, from any cause, designated in the natural hazards element of a local comprehensive plan as a natural hazard, including but not limited to:
  - 1. hurricane or severe storm;
  - 2. tornado;
  - 3. tsunami or storm surge;
  - 4. flooding;

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5. earthquake;
  6. landslide or mudslide;
  7. volcanic eruption;
  8. snowstorm or blizzard;
  9. forest fire, brush fire, or other such fire; and
  10. [other].
- (j) “**Natural Hazard Areas Overlay District**” (NHAOD) means those land areas that contain and encompass a natural hazard, designated on a zoning map as overlay districts;
- (k) “**Mitigation Measure**” means any mechanism designed to prevent, or reduce the extent and/or magnitude of negative impacts to a critical and sensitive area, or of the natural hazards associated with a natural hazards area. Mitigation measures may include, but are not limited to:
1. alteration of land form, or prohibitions or restrictions on alteration of land form;
  2. prohibitions or restrictions upon the release of hazardous material, hazardous waste, and other substances into the ground, surface water, ground water, or atmosphere;
  3. best management practices;
  4. habitat management;
  5. floodplain management;
  6. stormwater management; and
  7. tidal management.
- (l) “**Stormwater Management**” means the process of ensuring that the magnitude and frequency of stormwater runoff does not increase the hazards associated with flooding, water quality is not impaired by untreated stormwater flow, and the integrity of riverine, estuarine, aquatic, and other habitats is not compromised;

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- ◆ If not properly managed, stormwater runoff can increase flood flows and can carry contaminants into groundwater and surface water systems, threatening receiving water quality and also habitats based in or dependent on those surface water systems.
  - (m) “**Substantial Damage**” means damage of any origin sustained by a structure whereby the cost of restoring the structure to its pre-damage condition would equal or exceed fifty percent (50%) of the market value of the structure before the damage occurred, regardless of the value of or actual cost of repair work performed; and
  - (n) “**Tidal Management**” means the process of, and mechanisms for, ensuring that the magnitude and frequency of tides and wave action does not increase the hazards associated with flooding and/or erosion. Tidal management may include, but is not limited to, breakwaters, seawalls, the expansion or restoration of beaches, and the planting of vegetation to protect beaches and soil from erosion;
- (4)
  - (a) A critical and sensitive areas ordinance shall not be adopted unless the local government has first adopted a local comprehensive plan with a critical and sensitive areas element pursuant to Section [7-209].
  - (b) A natural hazard areas ordinance shall not be adopted unless the local government has first adopted a local comprehensive plan with a natural hazards element pursuant to Section [7-210].
- (5) A critical and sensitive areas ordinance and/or a natural hazard area ordinance pursuant to this Section shall include the following minimum provisions:
  - (a) a citation to enabling authority to adopt and amend the ordinance;
  - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-103] and to the purposes of this Section;
  - (c) a statement of consistency with the local comprehensive plan, and with the critical and sensitive areas element and/or the natural hazards element in particular, that is based on findings pursuant to Section [8-104];
  - (d) definitions, as appropriate, for such words or terms contained in the ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
  - (e) procedures and criteria for the designation of critical and sensitive area overlay districts (CSAODs) and/or natural hazards area overlay districts (NHAODs);
  - (f) provisions prohibiting particular uses, activities, and structures within CSAODs and/or NHAODs;

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- ◆ This provision allows the local government to develop a list of uses and activities that should be prohibited from the CSAOD and/or NHAOD. This list should be tailored to specific resource protection or natural hazard issues within the local government.
  - (g) provisions permitting particular uses, activities, and structures within CSAODs and/or NHAODs, subject to a conditional use permit;
- ◆ The requirement of a conditional use permit gives the local government the opportunity to carefully review the proposed use or activity to ensure its appropriateness within the CSAOD and/or NHAOD and to attach conditions, if necessary, to its approval.
  - (h) provisions exempting particular uses, activities, and structures from the ordinance, as consistent with applicable federal and state law and regulations; and
- ◆ The exemption provision gives the local government the opportunity to exempt from the regulation uses that the local government chooses to exempt, due to the nature of the natural hazard area or critical and sensitive area, state or federal supremacy issues, or local preference.
  - (i) provisions adopting and implementing standards for mitigation measures within CSAODs and/or NHAODs, said standards constituting criteria for the grant of conditional use permits pursuant to subparagraph (5)(g).
- ◆ Note that if a local government participates in the National Flood Insurance Program (NFIP), the NHAOD standards must comply with the NFIP regulations adopted by the Federal Emergency Management Agency, 44 C.F.R. §60.3.
  - (6) A critical and sensitive area ordinance and/or natural hazard areas ordinance may:
    - (a) be adopted as a single ordinance;
- ◆ There may be natural hazards that endanger critical and sensitive areas. Or there may be natural hazards that benefit critical and sensitive areas, as with limited fires in forests or prairies and certain forms of plant life. In either case, it may be appropriate for a particular local government to address its critical and sensitive areas and natural hazard areas in one cohesive ordinance.
  - (b) authorize a transfer of development rights (TDR) program pursuant to Section [9-401] and/or a purchase of development rights (PDR) program pursuant to Section [9-402]; and
  - [(c) in a natural hazard areas ordinance, include a provision that any building or structure in an NHAOD that suffers substantial damage due to one or more of the natural hazards associated with the NHAOD shall be restored or repaired only if, and to the degree that, the building or structure, and the uses and activities conducted therein,

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comply with all provisions of the ordinance adopted pursuant to subparagraphs (5)(f), (g), (h), and (i), any provision of Section [8-502] to the contrary notwithstanding].

- ◆ This requires a building or structure in a natural hazards area that is destroyed or severely damaged by that natural hazard to comply with the presently-applicable natural hazards regulations on uses prohibited, permitted, and permitted only by a conditional use permit. This is an exception to the rule of Section 8-502 that a building or structure that is destroyed may be rebuilt to its pre-destruction condition unless the destruction was due to the intentional or reckless act of the owner. Without such an exception, structures susceptible to natural hazards or that even exacerbate them could be rebuilt without restriction to their pre-damage condition, with the same result when the natural hazard strikes again.

Because this provision is an exception to the normal rule on nonconforming uses and may bar reconstruction of existing buildings, it may be controversial and is thus a bracketed option.

- (7) (a) All criteria for, boundaries and characteristics of, and standards applicable to:
  - 1. CSAODs shall be those of the critical and sensitive areas identified in the critical and sensitive areas element of the local comprehensive plan pursuant to Section [7-209]; and
  - 2. NHAODs shall be those of the natural hazards identified in the natural hazards element of the local comprehensive plan pursuant to Section [7-210].
- (b) The provisions of a critical and sensitive areas ordinance applicable to a CSAOD or NHAOD, when the boundaries of the CSAOD or NHAOD divide a lot or parcel, shall apply only to the portion of the lot or parcel that is located within the CSAOD or NHAOD boundaries.
- (c) An area may be designated both a CSAOD and an NHAOD.
- (d) Where the boundaries of a CSAOD or NHAOD are in doubt or dispute, in any hearing, review, or appeal pursuant to Chapters 10 or 11, the burden of proof shall be upon the owner of the land in question to show where the boundaries should be located. While evidence and testimony challenging the boundaries may be submitted by a professional engineer, wetlands scientist, hydrologist, or geologist, the rebuttable presumption is that the boundaries of the CSAOD and/or NHAOD as identified on the zoning map are accurate.

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### *Commentary: Transportation Demand Management*<sup>7</sup>

#### INTRODUCTION<sup>8</sup>

Transportation demand management (TDM) is a term used for a set of mechanisms intended to influence individual travel behavior. Such measures include both incentives (“carrots”) to encourage desirable behavior and disincentives (“sticks”), which discourage undesirable behavior. In economic terms, TDM is a demand-side strategy as opposed to the traditional supply-side strategy of increasing the transportation system’s carrying capacity by building more roads.

Demand management offers a tool for addressing several issues. A principal (perhaps obvious) goal of TDM is to relieve traffic congestion by reducing the number of auto trips taken, vehicle trips during peak travel times, and the drive-alone rate. Another commonly-cited goal is diminishing air pollution; while a third is reducing fossil fuel consumption. TDM may also affect highway safety, including accident-related injuries, fatalities, and property damage to vehicles, transportation infrastructure, and other property; the opportunity cost incurred when land that could have been used for some other purpose is used for car-related infrastructure; and environmental degradation resulting from surface water runoff from roadways which, in addition to containing road salt in some areas, may contain petroleum products and other contaminants.

#### EXISTING TDM STATUTES

Numerous states have statutes authorizing or related to transportation demand management.<sup>9</sup> A variety of approaches to TDM could be observed in these statutes. In fact, the breadth of approaches

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<sup>7</sup>This Section is adapted from Deborah L. Johnson, “Suggestions for Model Transportation Demand Management Legislation,” *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers*, Vol. 1, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, 1996) 133-146.

<sup>8</sup>See, generally, Erik Ferguson, *Transportation Demand Management*, Planning Advisory Service Report No. 477 (Chicago: American Planning Association, 1998); Mark E. Hanson, “Automobile Subsidies and Land Use: Estimates and Policy Responses,” *Journal of the American Planning Association* 58, No. 1: 60-71; Peter Schauer, “Issues of Time and Space: Transportation Demand Management, A Solution For 21st Century Congestion,” *The Western Planner* (April/May 1994): 5-8; Anthony Downs, *Stuck In Traffic: Coping With Peak-Hour Traffic Congestion*, (Washington D.C.: Brookings Institution, 1992).

<sup>9</sup>A total of 17 states were examined. Arizona: Ariz. Rev. Stat. §§49-581 *et seq.* (1998); California: Cal. Gov’t Code §§65088-65089.9 (1999), Cal Pub. Res. Code §§25480-25486, Cal. Str. & H. Code §149.1; Colorado: Colo. Rev. Stat. §§43-1-1101 *et seq.* (1998); Connecticut: Conn. Gen’l Stat. §§13b-38a *et seq.* (1998); Delaware: Del. Code §§1903-1905 (1999); Florida: Fla. Stat. §§339.177, 341 (1999); Georgia: Ga. Code §§32-9-4 *et seq.* (1998); Hawaii: Haw. Rev. Stat. §§226-17 *et seq.* (1999); Illinois: 625 Ill. Comp. Stat. §§32/1 *et seq.* (1999); Maine: 10 Me. Rev. Stat. §1461 *et seq.* (1998); Massachusetts: Mass. Gen’l Laws tit. 63, §§31D, 31F (1998); New Jersey: N.J. Stat. Ann. §§27:26A-1 *et seq.* (1999); Oregon: Ore. Rev. Stat. §184.730 (1999); Pennsylvania: 35 Pa. Stat. §4007.10, 74 Pa. Comp. Stat. §§1301-1302 (1999); Rhode Island: R.I. Gen’l Laws §37-5-7 (1999); Washington: Wash Rev. Code §§46.16.023, 46.74, 47.06, 47.66, 47.80, & 70.94.521 (1998); Wisconsin: Wis. Stat. §144.3712 (1998).

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challenged research because they are codified, variously, under health and safety, environment, transportation, highways, motor vehicles, planning and zoning, public works, executive office, commerce and trade, and taxation titles. Many states have adopted TDM mechanisms principally to comply with these federal Clean Air Act Amendments<sup>10</sup> and with ISTEA<sup>11</sup> and its successor, the Transportation Equity Act for the 21st Century (TEA-21).<sup>12</sup> It seems merely incidental that these state statutes constitute a coherent TDM strategy.<sup>13</sup> For this reason, existing statutes do little to suggest an extensive spectrum of specific elements that should be included in TDM legislation.

Nonetheless, commonalities among existing statutes do exist. There are two general approaches as to whether TDM measures are mandatory or merely authorized. One approach consists of enabling legislation that conveys specific authority for the creation, governance, and enforcement of rules to the administrative level. The other comprises legislative mandates that set rules into law and identify the responsible body for effectuating those laws.

A distinguishing characteristic of enabling legislation is that it transfers authority from the legislative to the administrative level by delegating the power and duty to adopt and implement trip reduction goals and measures to a specific governmental unit or units. The majority of the states examined used this approach. In some cases, general parameters for the administrator's activities are set by the use of compelling language; however, in others the administrator is simply given authority without any minimal requirements.

An example of broad authorization is **Georgia's** statute, which enables the state Department of Transportation (DOT) to participate in the establishment and operation of ridesharing programs both on its own and in cooperation with others; subject only to general appropriations for doing so and to its own rules and regulations.<sup>14</sup> Other than a brief definition of a ridesharing program, this constitutes the entire TDM statute. Another good illustration is **Rhode Island's** commuter parking facilities statute, which authorizes its public works department and director to plan, construct and maintain, or to enter into agreements with other agencies for commuter parking facilities to encourage the use of mass transportation and reduce peak traffic demands on highway systems<sup>15</sup> In this instance, some additional specific authorities are granted to the director, although the director is not compelled to carry them out.

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<sup>10</sup>42 U.S.C. §§7401 *et seq.* (1999).

<sup>11</sup>Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 as amended.

<sup>12</sup>P.L. 105-178, as amended by P.L. 105-206, the TEA-21 Restoration Act (1998).

<sup>13</sup>For example, Illinois' TDM legislation, the Employee Commute Options Act, is subject to automatic repeal upon the repeal of the Clean Air Act Amendments. 625 Ill. Comp. Stat. §32/75 (1999). This suggests that Illinois' predominant interest in adopting its Employee Commute Options Act was meeting the federal mandate rather than employing TDM.

<sup>14</sup>Ga. Code Ann. §32-9-5 (1998).

<sup>15</sup>R.I. Gen'l Laws §37-5-7(1998).

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The principal advantage of a broad authorization is that it offers the greatest deal of flexibility in which endeavors the state might get involved in and allows a more direct means of incorporating “cutting-edge” concepts into practice. By effectively saying, “You’re the professionals in this field; you do what is most appropriate,” legislators resist micromanaging at the macro level and better enable administrators to coordinate with the local level. However, a fundamental drawback is that each of these measures is devoid of a context in which it is to operate. No clear direction is adopted for either ridesharing programs or commuter parking facilities, and their place in the overall transportation planning system is left to the imagination.

A more detailed type of enablement is seen in the **Illinois** Employee Commute Options Act.<sup>16</sup> Illinois authorizes its DOT to adopt necessary rules to accomplish the purposes of the legislation. However, the Act goes on to list some specific activities of the department in carrying out its actions and enlists an advisory board to advise the department in its activities. A part of the Act does contain a legislative mandate applicable to affected employers. In **Maine**, a matching fund is established for regional rideshare services.<sup>17</sup> The statute lists minimal rules and regulations that shall be used by its department of economic and community development in disbursing funds, although it allows the department to construct additional rules and requires a certain level of reporting. A statute like Maine’s offers basically the advantages of a broader authorization but with a higher level of accountability and a greater sense of the broader context for trip reduction regulations.

Legislative mandates also run the spectrum from broad to narrow. For instance, **Colorado** mandates the creation of a 20-year transportation plan (including transportation control measures) for certain regions.<sup>18</sup> But while it requires certain elements within that plan and creates an advisory committee, it also leaves the minute technical aspects of the plan up to its Department of Transportation. By contrast, **New Jersey’s** Traffic Congestion and Air Pollution Control Act<sup>19</sup> provides more specific requirements to its DOT.

### CONTENT OF THE MODEL SECTION

Section 9-201 below is intended to provide a strong framework for the implementation of a full range of TDM measures within a comprehensive planning context. The state adopts rules and guidelines to assist the local governments in their adoption of trip reduction ordinances. Such ordinances must be adopted by populous local governments, and local governments with at least one major employer or major worksite and located in a populous region. Other local governments are authorized to adopt trip reduction ordinances. In either case, trip reduction ordinances must be

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<sup>16</sup>625 Ill. Comp. Stat. §§32/1 *et seq.*

<sup>17</sup>Me. Rev. Stat. Ann. tit. 216 (1998).

<sup>18</sup>Colo. Rev. Stat. Ann. §43-1-1103 (West 1998).

<sup>19</sup>N.J. Stat. Ann. §§27:26A-1 *et seq.* (1998).

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consistent with the local comprehensive plan, and the transportation element of the plan in particular; no such ordinance may be adopted if the local government does not have a local comprehensive plan. Trip reduction ordinances are the primary tool for identifying commute trip reduction zones (areas with a similar level of traffic congestion and/or percentage of people driving alone) and for requiring commute trip reduction programs from all major employers, and employers at major worksites, in those local governments. The Section requires analysis of the existing commute situation, the setting of clear and achievable goals for the reduction of single-occupancy vehicle commute trips (people driving alone to and from work), and suggests measures for achieving those goals.

One notable aspect of the Section is the authorization for local governments to designate transit zones and for employers to relocate their worksites to transit zones as a commute trip reduction measure. This is in addition to typical trip reduction measures such as discouraging parking, encouraging transit use, carpooling, and vanpooling, and implementing telecommuting and flexible work hours. Transit zones are defined as areas with a high level of transit service, and rules of the state Department of Transportation would set more specific criteria. The intent of this provision is to direct employment into downtowns and other central business districts, where existing public transit infrastructure exists and where the additional density and intensity of development will support further transit improvements.

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### 9-201 Transportation Demand Management

- (1) The [name state] Department of Transportation shall adopt and implement a transportation demand management program, and local governments shall adopt and implement trip reduction ordinances, in the manner prescribed in this Section.
- (2) The purposes of this Section are to:
  - (a) reduce the number of single-occupant motor vehicle trips;
  - (b) encourage the location of major workplaces in central business districts and similar areas conducive to public transit, pedestrian, and bicycle commuting;
  - (c) encourage telecommuting and alternative work schedules;
  - (d) encourage commuting and other transportation by pedestrian, bicycle, public transit, ridesharing, carpool, and vanpool modes;
  - (e) create and implement effective methods or measures, responsive to the needs of the various constituencies and communities of the state, for achieving the aforementioned purposes; and

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- (f) facilitate cooperation by the state, state agencies, [regional planning agencies], regional transportation agencies, local governments, transit agencies, business, industry, and the general public in achieving the aforementioned purposes.
- (3) As used in this Section and in any trip reduction ordinance:
- (a) “**Carpool**” means a group of [two *or* three] or more persons commuting on a regular basis to and from work by means of a vehicle with a seating capacity of nine persons or less;
  - (b) “**Commute Trip**” means trips between home and a worksite, including incidental trips during the trip between home and a worksite, that occur during peak travel periods;
  - (c) “**Commute Trip Reduction Zones**” mean areas, such as census tracts or combinations of census tracts, within or encompassing a local government that are characterized by similar employment density, population density, level of transit service, parking availability, access to high-occupancy vehicle facilities, and other factors that are determined to affect the level of single-occupancy vehicle commuting;
  - (d) “**Commute Trip Vehicle Miles Traveled Per Employee**” means the sum of the individual vehicle commute trip lengths in miles over a set period of time divided by the number of full-time employees during that period;
  - (e) “**Department**” means the state Department of Transportation;
  - (f) “**Major Employer**” means a private or public employer that employs [100] or more full-time employees at a single worksite who begin their regular work day during the peak travel period for 12 continuous months during the year; or nine continuous months in the case of schools and facilities of higher learning;
  - (g) “**Major Worksite**” means a building or group of buildings on physically contiguous parcels of land or on parcels separated solely by private or public roadways or rights of way, at which there are [100] or more full-time employees who begin their regular work day during the peak travel period for 12 continuous months during the year, or nine continuous months in the case of schools and facilities of higher learning;
  - (h) “**Peak Travel Period**” means the time period between 6:00 and 9:00 a.m. on weekdays, exclusive of state and national holidays;
  - (i) “**Proportion of SOV Commute Trips**” means the number of commute trips made by SOVs divided by the number of full-time employees;

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- (j) “**Single-Occupant Vehicle**” or “**SOV**” means a passenger motor vehicle occupied by only one person;
- (k) “**Task Force**” means the Commute Trip Reduction Task Force;
- (l) “**Transit Zone**” means a commute trip reduction zone with a high level of transit service;
- (m) “**Transportation Demand Management**” (TDM) means a measure generally designed to limit the demand for transportation infrastructure, usually through reducing the number of SOV trips;
- (n) “**Transportation Demand Management Measures**” means the specific measures used to help manage transportation demand. Transportation demand management measures include, but are not limited to:
  - 1. relocation of the worksite to a transit zone;
  - 2. provision of preferential parking or reduced parking charges, or both, for high-occupancy vehicles;
  - 3. instituting or increasing parking charges for SOVs;
  - 4. provision of commuter ride matching services to facilitate employee ridesharing for commute trips;
  - 5. provision of subsidies for transit fares, carpooling, and/or vanpooling;
  - 6. provision of vans for vanpools;
  - 7. permitting the use of the employer’s vehicles for carpooling or vanpooling;
  - 8. permitting flexible work schedules to facilitate employees’ use of transit, carpools, or vanpools;
  - 9. cooperation with transportation providers to provide additional regular or express service to the worksite;
  - 10. construction of special loading and unloading facilities for transit, carpool, and vanpool riders;
  - 11. provision of bicycle parking facilities, lockers, changing areas, and showers for employees who bike or walk to work;

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12. provision of parking incentives such as a rebate for employees who do not use the parking facilities;
  13. establishment of a program to permit employees to work part- or full-time at home or at an alternative worksite closer to their home;
  14. establishment of a program of alternative work schedules such as compressed work week schedules which reduce commuting; and
  15. implementation of other measures designed to facilitate the use of high-occupancy vehicles such as on-site day care facilities and “guaranteed ride home” programs.
- (o) “**Vanpool**” means [five] or more persons commuting on a regular basis to and from work by means of a vehicle with a seating capacity of not more than [15] persons;
- (4) The Department shall:
- (a) be responsible for providing technical assistance to [regional planning agencies] and local governments and, through liaisons in those regions and local governments, to major employers, in carrying out the functions of this Section; and
  - (b) convene a Commute Trip Reduction Task Force, with not more than [15] members, that represents a balance of state agency representatives; [regional planning agencies], local governments, transit agencies; major employers’ representatives; and the general public. The Department shall be responsible for identifying appropriate membership and providing staff support.
- (5) The Department shall adopt rules, and may adopt guidelines, for trip reduction ordinances.
- (a) The Task Force shall recommend in writing proposed rules and guidelines. The Department shall give due consideration to the recommendations of the Task Force, and shall explain, in writing, any revisions of or alterations to the recommendations of the Task Force and the legal and factual bases therefor.
  - (b) The rules and guidelines shall ensure consistency in trip reduction ordinances among regions and local governments, taking into account differences in employment and housing density, employer size, existing and anticipated levels of transit service, special employer circumstances, and other factors the Department determines are relevant.
  - (c) At a minimum, the rules shall include:

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1. methods and information requirements for determining initial year values of the proportion of SOV commute trips and the commute trip vehicle miles traveled per employee
  2. methods and information requirements for measuring compliance with, or progress toward meeting, commute trip reduction goals;
  3. criteria for establishing commute trip reduction zones;
  4. criteria for establishing transit zones;
  5. methods for assuring consistency in the treatment of employers who have worksites in more than one region or local government;
  6. methods to ensure that employers receive full credit for the results of TDM efforts and commute trip reduction programs which have been implemented by major employers and employers at major worksites prior to the initial year;
  7. an appeals process by which major employers and employers at major worksites who, as a result of special characteristics of their business or its locations, would be unable to meet the requirements of a trip reduction ordinance, may obtain a waiver or modification of those requirements and criteria for determining eligibility for waiver or modification;
  8. alternative commute trip reduction goals for employers who cannot meet the goals of this Section because of the unique nature of their business;
  9. alternative commute trip reduction goals for major employers whose worksites change and who contribute substantially to traffic congestion in trip reduction zones; and
  10. model trip reduction ordinances.
- (d) The rules shall be considered rules of the Department, and shall be subject to Section [4-103] in the same manner as rules of the [state planning agency]. Their preparation and adoption shall be governed by the [*Administrative Procedure Act*] except as otherwise provided in this Section.
- (e) The rules and guidelines shall be sent to all [*regional planning agencies*] and local governments within [30] days after their adoption.
- (f) The Task Force shall, at least once every [5] years, conduct a general review of this Section, the rules and guidelines, and of progress toward implementing trip reduction ordinances and commute trip reduction programs. The review shall

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incorporate the progress reports pursuant to paragraph (10) below. The general review shall result in a written report to the Department, the Governor and the [legislature] that contains:

1. recommendations of proposed amendments to this Section or other statutes, new legislation, and/or amendments to the rules and guidelines under this paragraph (5). These recommendations may include proposals that the [legislature], the Department, and/or other state agencies adopt and implement other types of TDM measures beyond employee commute trip reduction measures, including but not limited to parking strategies, pricing strategies (road and bridge tolls), and land development regulations to foster bicycle/pedestrian and transit use; and
2. an analysis of changes in, or alternatives to, existing statutes, rules, and guidelines that would increase their effectiveness or reduce any identified adverse impacts; and/or why such changes or alternatives are less effective or would result in more adverse effects than the existing statutes, rules, and guidelines.

The Department 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 Department fails to adopt, in whole or with revisions, such a written report within five years of the adoption of the first rules pursuant to this Section or of the last adoption of a written report, the rules and guidelines shall not enjoy a presumption of reasonableness, and the Department shall bear the burden of demonstrating such reasonableness.

- (6) Every local government with a population of [150,000] or more, or containing one or more major employers or major worksites and located in a region with a population of [150,000] or more, shall adopt a trip reduction ordinance. Every other local government may adopt a trip reduction ordinance. A trip reduction ordinance:
  - (a) may be adopted only pursuant to this Section, and any purported adoption of a trip reduction ordinance contrary to this Section is void;
  - (b) shall be adopted in the manner of a land development regulation pursuant to Section [8-103] of this Act, except as otherwise provided in this Section;
  - (c) shall be prepared in cooperation with the [regional planning agency], adjacent or contiguous local governments, transit agencies, major employers, and the owners of, and employees at, major worksites;
  - (d) may not be adopted unless and until the local government has adopted a local comprehensive plan with a transportation element that includes all the applicable components required by Section [7-205];

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- (e) shall be consistent with the local comprehensive plan and the transportation element thereof, and shall not be inconsistent with the trip reduction ordinances of the:
  - 1. other local governments in the region if the local government is within the jurisdiction of a [regional planning agency]; or
  - 2. adjacent or contiguous local governments otherwise;
- (f) shall, before it may be adopted by any local government within the jurisdiction of a [regional planning agency], be submitted to that [regional planning agency] for review.
  - 1. The [regional planning agency] shall review the proposed ordinance for compliance with this Act and the rules pursuant to this Section and for consistency as provided in paragraph (6)(e) of this Section.
  - 2. The [regional planning agency] shall approve or reject the proposed trip reduction ordinance within [30] days of receipt, and shall notify the local government in writing of its decision and the legal and factual bases therefor within [10] days of its decision.
  - 3. The [regional planning agency] shall submit a copy of every proposed trip reduction ordinance, and of its decision thereon, to the Task Force within [10] days of its decision.
  - 4. A local government whose proposed trip reduction was rejected pursuant to this paragraph may appeal the decision of the [regional planning agency] to the Task Force, which shall review the proposed ordinance in the same manner as proposed ordinances submitted pursuant to subparagraph (6)(g) below.
  - 5. Any purported adoption of a trip reduction ordinance that must be submitted to a [regional planning agency] pursuant to this subparagraph (6)(f) but which was not so submitted or was submitted and rejected is void.
- (g) shall, before it may be adopted by a local government not within the jurisdiction of a [regional planning agency], be submitted to the Task Force for review.
  - 1. The Task Force shall review the proposed ordinance for compliance with this Act and the rules pursuant to this Section and for consistency as provided in paragraph (6)(e) of this Section.
  - 2. The Task Force shall approve or reject the proposed trip reduction ordinance within [30] days of receipt, and shall notify the local government

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in writing of its decision and the legal and factual bases therefor within [10] days of its decision.

3. The Task Force shall retain a copy of every proposed trip reduction ordinance and the decision thereon, whether rendered by the Task Force or by a [regional planning agency].
4. Any purported adoption of a trip reduction ordinance that must be submitted to the Task Force pursuant to this paragraph but which was not so submitted or was submitted and rejected is void.

(7) A trip reduction ordinance shall:

- (a) apply to all major employers and to all employers at major worksites, except that it shall not apply to construction worksites when the expected duration of the construction project is less than two years;

◆ Since major worksites have essentially the same vehicle use impact as a major employer (100 or more employees arriving at a building or complex of buildings during the major commuting hours), employers of any size located at major worksites are subject to this Section and to trip reduction ordinances to the same degree as major employers. Though there are obvious benefits for a small employer to locate at a major worksite, there is a possibility that if a trip reduction ordinance is perceived as onerous by small employers located at major worksites, some such employers will move to separate, non-major, worksites, thus increasing sprawl. The best preventative measure is to adopt a fair and balanced trip reduction ordinance and to monitor the land market for signs of such a movement of employers.

- (b) be designed to achieve reductions in the proportion of SOV commute trips and commute trip vehicle miles traveled per employee by employees of major public- and private-sector employers in the local government;
- (c) include at least the following minimum provisions:
  1. a means for determining initial year values of the proportion of SOV commute trips and commute trip vehicle miles traveled per employee;
  2. goals for reductions in the proportion of SOV commute trips and commute trip vehicle miles traveled per employee;
  3. a means for determining compliance with, and/or progress toward meeting, commute trip reduction goals;
  4. designation of commute trip reduction zones, if any exist;

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5. designation of transit zones, if any exist;
  6. provisions for monitoring and review of the progress toward the aforementioned goals within commute trip reduction zones;
  7. requirements for major employers and employers at major worksites to adopt and implement commute trip reduction programs, pursuant to paragraph (9) of this Section;
  8. a commute trip reduction program for employees of the local government;
  9. provisions for periodic review of the compliance of employers with their commute trip reduction programs, pursuant to paragraph (9) of this Section;
  10. provisions for enforcement pursuant to Chapter 11 of this Act for the failure of a major employer or employer at a major worksite to implement a commute trip reduction program or to modify its commute trip reduction program as may be necessary. Such provisions shall take into account the nature, seriousness, and circumstances of the violation, whether there is a pattern of noncompliance, and efforts which are being made to achieve compliance;
  11. an appeals process by which employers who, as a result of special characteristics of their business or its locations, would be unable to meet the requirements of the trip reduction ordinance, may obtain waiver or modification of those requirements; and
  12. a review of local parking policies and ordinances as they relate to employers and major worksites, and of any revisions necessary to comply with commute trip reduction guidelines.
- (8) A local government that has adopted a trip reduction ordinance that designates commute trip reduction zones and/or transit zones may:
- (a) amend its land development regulations to establish lower minimum parking-area requirements in transit zones and/or commute trip reduction zones;
  - (b) amend its land development regulations to establish maximum parking-area limits in transit zones and/or commute trip reduction zones; or
  - (c) amend other ordinances and regulations, such as on-street parking regulations, with the purpose of reducing the number of parking spaces available and/or the times of their availability within transit zones and/or commute trip reduction zones.

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- (9) Every major employer, and every employer at a major worksite, in a local government that has adopted trip reduction ordinance shall adopt and implement a trip reduction program.
- (a) A commute trip reduction program shall consist of, at a minimum:
1. designation of a transportation coordinator, whose name, location, and telephone number must be displayed prominently at each affected worksite;
  2. regular distribution of information to employees regarding alternatives to SOV commuting;
  3. annual review of employee commuting;
  4. annual reporting to the local government, consistent with the method established in the trip reduction ordinance, of compliance with the SOV reduction goals; and
  5. implementation of one or more transportation demand management measures designed to achieve the applicable commute trip reduction goals adopted by the local government.
- (b) The local government shall review the initial commute trip reduction program of each major employer and each employer at a major worksite within [90] days of receipt of the program, and shall annually review each such employer's compliance with its commute trip reduction program.
1. The local government shall notify the employer in writing of the findings of its review within [10] days of its conclusion.
  2. If the jurisdiction finds that the program is not likely to meet the applicable commute trip reduction goals, the local government shall work with the employer to modify the program as necessary.
  3. The employer shall implement the commute trip reduction program within [three] months of receiving notice of its approval of the program.
- (c) If a major employer or employer at a major worksite does not meet the applicable commute trip reduction goals, then the local government shall, after consulting with the employer, propose modifications to the commute trip reduction program and direct the employer to revise its program with [30] days to incorporate those modifications, or alternative modifications proposed by the employer that the local government determines to be appropriate.

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- (d) Failure to modify the program as provided in subparagraph (9)(c) above shall constitute a violation of land development regulations pursuant to Chapter 11 of this Act.
  - (e) Employers or owners of worksites may form or use existing transportation management associations to assist members in developing and implementing commute trip reduction programs.
- (10) Every local government that adopts a trip reduction ordinance shall submit an annual progress report to the Department, in a format established by the Department. The report shall describe progress in attaining the applicable commute trip reduction goals for each commute trip reduction zone and commute trip reduction program, and shall highlight any problems being encountered in achieving the goals. The local government shall publish the progress report and make it available to the public.
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### ***Commentary: Historic and Architectural Design Review***<sup>20</sup>

Historic preservation and architectural design review have increasingly become a standard component of communities' suite of land development regulations. With the assistance of historic preservation and architectural design controls, communities can maintain and foster their unique identities, which in turn can help to make the community a desirable place to live and do business. Historic preservation ordinances<sup>21</sup> seek to preserve the *existing* historic character of structures or sites that may be associated with an important historic event or person or are representative of a certain architectural type or period. Design review controls<sup>22</sup> are concerned with the aesthetics of *proposed* residential and nonresidential development.

Historic preservation controls are typically applied to an existing area known as an "historic district" that contains buildings or structures with identifiable historic or architectural characteristics,

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<sup>20</sup>See generally Christopher J. Duerksen, "Historic Preservation," in Edward Ziegler, ed., *Rathkopf's Law of Zoning and Planning*, Vol. 1 (Eagan, Minn.: West Group, 1992 Supp.), Ch.15; and Gordon L. Ohlsson, "Aesthetic Zoning" in Eric Damian Kelly, gen. editor, *Zoning and Land Use Controls*, Vol. 2 (New York: Matthew Bender, 1991), Ch. 16.

<sup>21</sup>See generally Christopher J. Duerksen, ed., *A Handbook on Historic Preservation Law* (Washington, D.C.: Conservation Foundation, 1983); Richard J. Roddewig, *Preparing a Historic Preservation Ordinance*, Planning Advisory Service Report No. 374 (Chicago: American Planning Association, 1983); Nancy Benzinger Brown, "Historic Preservation Legislation," in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers*, Vol. 3 , Planning Advisory Service Report No. \_\_\_\_, (Chicago: American Planning Association, forthcoming).

<sup>22</sup>See generally Mark L. Hinshaw, *Design Review*, Planning Advisory Service Report No. 454 (Chicago: American Planning Association, February 1995); Peggy Glassford, *Appearance Codes for Small Communities*, Planning Advisory Service Report No. 379 (Chicago: American Planning Association, October 1983); Brenda Case Lightner, "Survey of Design Review Practices" *PAS Memo* (Chicago: American Planning Association, January 1993).

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or individual structures designated as “historic landmarks,” Historic districts and landmarks are often identified for protection through part of a survey process conducted by experts in history or architecture and based on specific criteria contained in a historic preservation ordinance. Frequently, locally-designated historic districts and landmarks are simultaneously listed on the U.S. Department of Interior’s National Register of Historic Places.<sup>23</sup> Protection is accomplished through the regulation of proposed changes to a district or landmark property, including alterations to existing structures and sites, demolition, the construction of additions and new structures, and the relocation of historic buildings to new sites.

Design review regulations, in comparison, attempt to promote or establish community character by insuring that a certain architectural style or styles are followed (e.g., “look-alike” ordinances) or, in contrast, that architectural diversity is encouraged (“anti-look-alike” ordinances).<sup>24</sup> In the former, the emphasis is on compatibility of new buildings and modifications to existing buildings. In the latter, the emphasis is on avoiding monotony.

While the objectives of the two laws differ significantly, the process involved can be similar.<sup>25</sup> A board<sup>26</sup> is assigned by ordinance the responsibility of reviewing proposed development or changes to existing buildings and issuing a permit, a “certificate of appropriateness,” when it is found that the proposal complies with criteria and standards in the ordinance. Accompanying the ordinance may be descriptive, often illustrated, guidelines to give examples of how to interpret design criteria or standards of review in the ordinance.<sup>27</sup>

Historic preservation ordinances rest on firm legal ground. Virtually every state authorizes regulations for historic preservation, either as a permissible objective in zoning and other land-use

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<sup>23</sup>The most important piece of federal legislation is the National Historic Preservation Act of 1966, as amended. 16 U.S.C. §§470a-470m. The act authorizes the Secretary of the Interior to maintain a National Register of Historic Places, which includes historic areas, sites, and buildings. The act contains a review process that requires federal agencies to take into account the effect of federal “undertakings” on National Register properties. National Register designations often form the basis for local historic districts.

<sup>24</sup>Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing Co., 1997), §11.22, 459.

<sup>25</sup>Though a single board can be used for both historic preservation and design review, the expertise needed for each is distinct and therefore there may need to be two boards, each containing the experts needed for its respective task.

<sup>26</sup>The use of a board rather than a single officer addresses due process concerns. Preservation ordinances have been upheld against due process challenges because the review board was required to have members with expertise in history or architecture. See, e.g., *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

<sup>27</sup>These guidelines are often adopted by the historic preservation or design review board. See, e.g., *Sherman v. Dayton Board of Zoning Appeals*, 84 OhioApp.3d 223, 515 N.E.2d 937(1993) (holding that mandatory standards adopted by the city’s landmarks commission, as specific applications of more general federal guidelines for historic districts, had the force of law).

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regulations,<sup>28</sup> or as a separate statute, sometimes describing the composition and powers of a historic district commission, the process by which historic districts are created, and the manner in which proposed development in such districts and on landmarked property is to be reviewed.<sup>29</sup>

Both historic preservation and design review ordinances have been challenged as improper uses of the police power, regulating “mere” aesthetics. This view has rarely been supported by the courts. These ordinances are typically adopted to address concerns beyond or in addition to aesthetics, such as economic stability, support of property values, and social development.<sup>30</sup> Furthermore, the majority view in U.S. courts is that aesthetics alone *is* a proper purpose in land use regulation.<sup>31</sup> In *Berman v. Parker*, a nonzoning case involving the constitutionality of an redevelopment statute for the District of Columbia, the U.S. Supreme Court remarked in dicta that was to favorably influence consideration of aesthetic purposes in state courts:

The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as health, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>32</sup>

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<sup>28</sup>N.M. Stat. Ann. §3-22-2 (1999); N.Y. Gen. Mun. Law §86-a.

<sup>29</sup>See, e.g., Ariz. Rev. Stat. §9-462.01(A)(10) (1999); Ark. Stat. §§14-172-201 et seq. (1999); Rev. Conn. Gen. Stat. Tit. 7, Ch. 97a (1997); Ga. Code Ann. §§36-16-1 et seq.; Idaho Code §§67-4601 to 67-4619 (1999); Ind. Stat. Ann. §§36-7-11 et seq. (1999); Mass. Gen. Laws Ann. Ch. 40C (1999); Mich. Comp. Laws Ann. §§399.172-215 (1999); Nev. Rev. Stat. §384.005 (1999); N.H. Rev. Stat. Ann. §§674:45-674:50 (1999); N.M. Stat. Ann. Ch. 3, Art. 22 (1999); S.D. Code. Laws Ann. Ch. 1-19B (1999); Va. Code Ann. §15.2-2306 (1999); and W. Va. Code Ann. Art. 26A (1999). See generally Pamela Thurber and Robert Moyer, *State Enabling Legislation for Local Preservation Commissions* (Washington, D.C.: National Trust for Historic Preservation, Fall 1984).

<sup>30</sup>See, e.g., *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Reid v. Architectural Board of Review*, 119 OhioApp. 67, 192 N.E.2d 74 (1963); *Village of Hudson v. Albrecht*, 9 OhioSt.3d 69, 458 N.E.2d 852 (1984), appeal dismissed, 467 U.S. 163 (1984).

<sup>31</sup>*Donrey Communications Co. v. City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983), cert. denied, 466 U.S. 959 (1984); *Metromedia Inc. v. City of San Diego*, 26 Cal.3d 848, 610 P.2d 407 (1980), rev'd on other grounds, 453 U.S. 490 (1981); *City of Lake Wales v. Lamar Adv. Ass'n*, 414 So.2d 1030 (Fla. 1982); *John Donnelly & Sons v. Outdoor Adv. Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *Asselin v. Town of Conway*, 137 N.H.368, 628 A.2d 247 (1993); *Cromwell v. Ferrier*, 19 N.Y.2d, 363, 225 N.E.2d 749; *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965); *State v. Smith*, 618 S.W.2d 474 (Tenn. 1981), *Town of Sandgate v. Colehamer*, 156 Vt. 77, 589 A.2d 1205 (1990).

<sup>32</sup>*Berman v. Parker*, 348 U.S. 26, 33 (1954).

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In more recent years, the U.S. Supreme Court upheld New York City's landmarks preservation ordinance, which "embod[ied] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city."<sup>33</sup> The Court further stated:

Because this Court has recognized in a number of settings that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city ... appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible government goal.<sup>34</sup>

In a few cases, architectural review ordinances have been invalidated as an improper delegation of power or because they were unconstitutionally vague and thus it was difficult for a board to make a decision based on the standards in the ordinance.<sup>35</sup> In contrast, historic preservation ordinances have generally withstood due process challenges.<sup>36</sup>

### EARLIER MODEL LEGISLATION

The American Law Institute's 1976 *Model Land Development Code* contained several provisions dealing with aesthetic controls. One section authorized local governments to designate specified land or structures as landmarks (including a reasonable amount of land surrounding the landmark) and to require that no development occur unless the local government approved a special

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<sup>33</sup> *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132 (1978).

<sup>34</sup>Id. at 129. (Citations omitted). Other cases upholding historic preservation ordinances as proper uses of the police power include *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Bohannon v. City of San Diego*, 30 Cal.App.3d 416 (1973); *Figarsky v. Historic District Comm.*, 368 A.2d 163 (Conn. 1976); *Rebman v. City of Springfield*, 250 N.E.2d 282 (Ill. 1969); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13 (N.M. 1964); *City of New Orleans v. Levy*, 64 So.2d 798 (1953); and *Opinion of the Justices*, 128 N.E.2d. 557 (Mass. 1955).

<sup>35</sup>*City of West Palm Beach v. State*, 158 Fla. 863, 30 So.2d 491 (Fla. 1947); *Piscitelli v. Twp. Comm.*, 103 N.J. Super. 589, 248 A.2d 274 (1968) *Bd. of Supvrs. v. Rowe*, 215 Va. 128, 216 S.E.2d 199 (1975); *Waterfront Estates Dev., Inc. v. City of Palos Hills*, 232 Ill.App.3d 367, 597 N.E.2d 641 (1992); *Pacesetter Homes v. Village of Olympia Fields*, 104 Ill.App.2d 218, 244 N.E.2d 369 (1968); *Morristown Rd. Assoc. v. Mayor and Common Council*, 163 N.J. Super. 58, 394 A.2d 157 (1978). *Contra Novi v. City of Pacifica*, 169 Cal.App.3d 678, 215 Cal.Rptr. 439 (1985).

<sup>36</sup>See generally, George Abney, "Florida's Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims," 25 *Fla. St. U. L. Rev.* 1017 (1998), which identifies an extensive body of state and federal court decisions upholding governmental decisions under historic preservation ordinances against claims of vagueness and unlawful designation of authority.

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development permit.<sup>37</sup> Another section allowed development ordinances to designate special preservation districts of historic, archaeological, scientific, architectural, natural or scenic significance and to regulate development within them through a special permit process.<sup>38</sup> The development ordinance was to specify criteria to be used in granting the permit.

### THE MODEL STATUTE

Section 9-301 below authorizes a local government to adopt historic preservation and design review ordinances as part of its land development regulations. Under the historic preservation ordinance, a local government may create historic districts and designate historic landmarks. Under the design review ordinance, a local government may create design review districts. Both types of ordinances require that a certificate of appropriateness be obtained before certain types of development in a district or on a landmark site may occur. The model describes the contents of both such ordinances in greater detail.

The designation of historic landmarks and districts and of design review districts is conditioned upon the adoption of a local comprehensive plan that also contains a historic preservation element and/or a community design element. Both elements require the kind of background studies that would allow the formulation of design criteria.

The model statute provides options as to the body that is to review applications for a certificate of appropriateness. For example, a local planning commission, hearing examiner, or another individual local official may be designated, or a new board, such as a historic preservation commission, may be created for the purpose of administering the ordinance. The certificate, which is a type of development permit, is to be granted pursuant to criteria in the ordinance.

The Section provides the option to adopting state legislatures to authorize the regulation of publicly accessible interiors as well as the exterior features of buildings. According to a survey conducted by the National Alliance of Preservation Commissions in 1998, approximately 8 percent of the jurisdictions responding have control over interior architectural features that are visible to the public such as an office building lobby, a theater, or restaurant.<sup>39</sup> Examples of states specifically authorizing the regulation of interiors include Michigan<sup>40</sup> and North Carolina.<sup>41</sup>

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<sup>37</sup>American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia: ALI, 1976), §2-208, Landmark Sites.

<sup>38</sup>Id., §2-208, Special Preservation Districts.

<sup>39</sup>National Association of Preservation Commissions, *United States Preservation Commission Identification Project 1998*, <http://www.arches.uga.edu/~napc/napc3.pdf>

<sup>40</sup>Mich. Comp. Laws §399.205 (2000).

<sup>41</sup>N.C. Gen. Stat. §160A-400.9(b) (2000) (interior regulation of private property only if landowner consents, but consent is binding on future owners of same property).

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There are concerns about the protection of historic properties while a historic preservation plan element or ordinance is pending in the local legislative process. The historic features of a property could be irrevocably damaged or destroyed in the time it takes a local government to add the property to the protected list. There is a tool in the *Guidebook* well-suited to protecting historic properties while the designation process is pending – the moratorium, as authorized and regulated by Section 8-604. To make this connection clearer, and to resolve any ambiguities in the moratorium Section, Section 9-301 below expressly authorizes planning moratoria for individual properties that have historic preservation potential, giving local governments up to 180 days free from development in which to adopt or amend the historic preservation plan element and ordinance to include the property in question.

There may be similar concerns with the effect of historic preservation on individual landowners, specifically that the regulations may create an undue hardship that must somehow be remedied. The *Guidebook* includes a general procedure for addressing claims of undue hardship – the mediated agreement pursuant to Section 10-504. With the procedure of that Section being generally available, there is no need for a separate procedure solely for historic preservation regulation (or indeed any other particular category of land development regulation).

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### 9-301 Historic Districts and Landmarks; Design Review

- (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*]:
  - (a) a historic preservation ordinance that authorizes the designation of areas by ordinance as historic preservation districts, that authorizes the designation of properties by ordinance as historic landmarks, and requires that, in accordance with standards of review specified in the ordinance, a certificate of appropriateness be obtained from a historic preservation board for development affecting the exterior [and interior] architectural features of all or specified proposed development therein, and/or
  - (b) a design review ordinance that authorizes the designation of areas by ordinance as design review districts and requires that, in accordance with standards of review specified in the ordinance, a certificate of appropriateness be obtained from a design review board for development affecting the exterior [and interior] architectural features of all or specified proposed development therein
- (2) As used in this Section:
  - (a) “**Certificate of Appropriateness**” means the written decision by a local historic preservation board or design review board that proposed development is in

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compliance with a historic preservation ordinance or design review ordinance, respectively, including the standards of review therein;

- (b) “**Contributing Structure**” means a classification applied to a site, building, structure or object within a historic district signifying that it contributes generally to the qualities which give the historic district its historical, architectural, archaeological or cultural significance, but without necessarily being itself a landmark.
- (c) “**Design Review Board**” means any officer or body designated by the legislative body to review applications for and issue a certificate of appropriateness for exterior architectural features of all or specified proposed development in a design review district;
- (d) “**Design Review District**” means a geographically definable area possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united aesthetically by development or that, in the determination of the local legislative body, has the potential to be united aesthetically by development;
- (e) “**Exterior Architectural Features**” mean the architectural character and general composition of the exterior of a structure, including, but not limited to the kind, color, and texture of the building material and the type, design, and character of all windows, doors, light fixtures, signs, and other appurtenant elements including antennas, receiving dishes, and utility structures. Exterior architectural features include:
  - 1. natural and man-made features of the site that significantly affect the character or appearance of the site; and
  - 2. archeologically or culturally significant features of the site;
- (f) “**Historic District**” means a geographically definable area possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by physical development;
- (g) “**Historic Landmark**” means an individual property of historical, architectural, archeological, or cultural interest;
- (h) “**Historic Preservation Board**” means any officer or body designated by the legislative body to review applications for and issue a certificate of appropriateness for [exterior architectural features of] all or specified proposed development in a historic district or of a historic landmark;
- [(i) “**Interior Architectural Features**” mean the architectural character and general composition of a significant landmark interior, including the room design and

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configuration, color and texture of materials, and the type, pattern, and character of all architectural details and elements, including but not limited to staircases, doors, hardware, moldings, trims, plaster work, light fixtures, and wall coverings;]

- (j) “**Significant Landmark Interior**” means the interior of a building or structure that has been designated as a historic landmark, is open to or available for use by the public, and satisfies the criteria for designation under this Section;] and
  - (k) “**Standards of Review**” mean the criteria used by a historic preservation board or design review board in deciding whether to issue a Certificate of Appropriateness.
- (3) A historic preservation ordinance and/or a design review ordinance adopted pursuant to this Section shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the 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 historic preservation ordinance and/or design review ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
  - (e) for a historic preservation ordinance, criteria to be applied by the local government in selecting areas to be designated by ordinance as historic districts and in selecting individual properties to be designated by ordinance as historic landmarks[, including any significant landmark interiors]. Properties eligible for designation shall possess integrity of location, design, setting, materials, workmanship, feeling and association; and:
    - 1. be associated with events that have made a significant contribution to the history of the local government, this State, or the United States;
    - 2. be associated with the lives of persons significant in past events;
    - 3. embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
    - 4. yield, or be likely to yield, information important in prehistory or history;

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- ◆ These criteria are based on the "Criteria for Evaluation" for listing on the National Register of Historic Places under 36 C.F.R. § 60.4. Additional criteria reflecting the particular historic preservation objectives of a local jurisdiction may be added in the ordinance.
  - (f) for a design review ordinance, criteria to be applied by the local government in selecting areas to be designated by ordinance as design review districts;
  - (g) standards of review to be applied by the historic preservation board and/or design review board in reviewing applications for a certificate of appropriateness. These criteria shall include such matters as are consistent with the desired character of the exterior [and interior] architectural features of buildings and structures and their surroundings in a historic district, in a design review district, or on properties that have been designated as historic landmarks;
- ◆ The Secretary of the Interior's Standards for Rehabilitation, codified at 36 C.F.R. Part 67, are the prevalent standards used by local governments in the regulation of historic properties. These standards may be modified or embellished to reflect the particular historical or architectural character of the properties subject to protection within a specific locality.
  - (h) procedures for the review of applications for a certificate of appropriateness pursuant to paragraph (7) below;
  - (i) specifications for all application documents and plan drawings for a certificate of appropriateness; and
  - (j) designation of an officer or body, including but not limited to a local planning commission or hearing examiner, as the historic preservation board and/or design review board, or the creation of a new board or boards. The same officer or body may be designated as both the historic preservation board and the design review board, or separate designations may be made. If the historic preservation ordinance and/or design review ordinance creates a new board or boards, then the ordinance shall:
- ◆ Under this Section, a "board" may consist of a single local official assisted by his or her staff.
  1. specify the number of members who shall serve on the board, including alternate members;
  2. specify that at least one member of the board shall have expertise or training in history, architecture, architectural history, archaeology, or land-use planning;
- ◆ Historic preservation and design review board members should, to the greatest extent possible, have sufficient backgrounds in history, architecture, architectural history, and related

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backgrounds to preclude potential due process challenges or claims of arbitrary and capricious decision making. Where a community cannot “field” an all-professional board or boards, it should ensure that board members have the requisite expertise to the greatest extent possible, through training or other means, and have access to qualified experts when necessary.

3. provide for the appointment of board members, including alternate members, and for the organization of the board;
  4. specify the terms of members of the board, which may be staggered;
  5. specify the requirements for voting on matters heard by the board, and specify the circumstances in which alternate members may vote instead of regular members; and
  6. specify procedures for filling vacancies in unexpired terms of board members, including alternate members, and for the removal of members, including alternate members for due cause.
- (4) A local government that has adopted a historic preservation ordinance and/or a design review ordinance may adopt an advisory manual of written and graphic design guidelines to assist applicants in the preparation of an application for a certificate of appropriateness.
- (a) Design guidelines may provide examples of development and alterations to development that would meet the intent of the standards of review.
  - (b) Design guidelines shall be prepared by the historic preservation board and/or design review board and adopted by the local legislative body, and shall be consistent with the standards of review, but are not by themselves legally binding.
- (5) No local government may designate pursuant to this Section:
- (a) a historic landmark or historic district unless it has first adopted a local comprehensive plan that contains a historic preservation element pursuant to Section [7-215]; and
  - (b) a design review district unless it has first adopted a local comprehensive plan that contains a community design element pursuant to Section [7-214];
- ◆ Note that a community design element may concern broad and concrete aesthetic issues that do not require a design review (“all single-family houses shall be clad in brick” for instance). Therefore, while design review cannot occur without the community design plan element, that element can be implemented independently of this Section to the extent that discretionary design review is not needed.

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- (6) A historic district, design review district, or historic landmark shall be designated by ordinance in the manner provided for discrete and identifiable lots or parcels of land in Section [8-103].
- (a) The ordinance shall contain, as applicable, a legal description of:
1. the boundaries of the historic or design review district; and/or
  2. the property that is to be designated a historic landmark[, including any significant landmark interiors].
- (b) The ordinance may be adopted only upon receipt of recommendations from the historic preservation board or design review board, provided however, that the legislative body may enact or amend the land development regulations if it has not received a recommendation from the historic preservation board or design review board within [60] days of the date of the public hearing on the proposed ordinance or amendment. The local legislative body shall give due consideration to the recommendations of the historic preservation board or design review board.
- (c) A historic district, design review district, or historic landmark shall be shown as an overlay district or other zoning district on the zoning map of the local government pursuant to Section [8-201(3)(o)].
- (7) A certificate of appropriateness is required for all proposed development removing, destroying, adding, or altering exterior [and interior] architectural features of properties located in a historic district or design review district or of properties designated pursuant to this Section as historic landmarks, or for disturbing or excavating archaeologically or culturally significant sites within a historic district or a property designated pursuant to this Section as a historic landmark.
- (a) A certificate of appropriateness may be issued subject to such conditions which, in the opinion of the historic preservation board or design review board, are directly related to the standards of review, provided such conditions do not conflict with or waive any other applicable requirement of the land development regulations.
1. The board shall base any conditions it adopts on competent, credible evidence it shall incorporate into the record and its decision.
  2. If the historic preservation board or design review board issues the certificate with conditions pursuant to this paragraph, the plan drawings and other materials submitted with the application describing the exterior [and interior] improvements shall be revised to include such conditions before the certificate of appropriateness is issued.

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- (b) A certificate of appropriateness is a development permit, and certificates of appropriateness shall be part of the unified development permit review process established pursuant to Section [10-201]. A record hearing shall be conducted upon all applications for a certificate of appropriateness.
- (8) This Section:
  - (a) does not authorize a historic preservation board or design review board, in a decision on an application for a certificate of appropriateness, to prohibit or deny a land use that is permitted as of right in the applicable zoning use district, although it may prohibit or deny permission for development even though that development may be necessary for a permitted land use;
- ◆ Uses as of right should not lose their as-of-right nature because the building in which the use is located is subject to a design review or historic preservation ordinance. To give an example, a design review board could compel a fast-food chain to employ signage and building decor that are compatible with the design district but could not prohibit a restaurant from operating within the design-compliant building if restaurants are as-of-right in that use district. States with similar provisions include North Carolina (N.C. Gen'l Stat. §160A-400.13) and West Virginia (W.Va. Code §8-26A-7(11)). Care should be taken in the preparation of the land-use element of the comprehensive plan and the zoning ordinance to provide as-of-right uses in historic or design review districts that are compatible with the purposes and standards of the districts.
  - (b) shall not prevent the ordinary maintenance or repair of any exterior [or interior] architectural feature in a historic district, design review district, or historic landmark that does not involve a change in design, material, or appearance thereof;
  - (c) shall not prevent the construction, reconstruction, alteration, restoration, moving, or demolition of any exterior [or interior] architectural feature that the [code enforcement agency] shall certify is required by the public health or safety because of an unsafe or dangerous condition; and
  - (d) does not prevent the maintenance or, in the event of an emergency, the immediate restoration of any existing above-ground utility structure without a certificate of appropriateness.
- (9) All buildings and contributing structures in a historic district or on a historic landmark shall be maintained in a reasonable state of repair by the owner and by any other person who may have legal custody and control over the premises.
  - (a) The [code enforcement agency], at the request of the historic preservation board or design review board, may order the owner or any other person with legal custody and control over the premises to correct defects or repairs to any building or contributing structure within a historic district or on a historic landmark, so that such

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properties are preserved and protected in accordance with the purpose of the historic preservation ordinance.

- (b) Any such order shall be in writing and shall state the specific actions that must be taken to comply with this provision and the date for compliance.
- ◆ Some historic preservation ordinances specifically authorize a code enforcement agency to institute, perform, or complete the necessary remedial work to prevent deterioration or de facto demolition by neglect and impose a lien against the property for the expenses incurred. This power is included in Chapter 11 as a generally-available remedy for the local government when a landowner does not maintain or repair their property as required by land use regulations. Many communities also authorize the use of eminent domain as a means of protecting historic buildings from serious neglect, but such a grant is beyond the scope of the *Legislative Guidebook*.
- (10) A local government may adopt a moratorium, pursuant to Section [8-604], for the purpose of preparing and adopting historic preservation plans, ordinances, designations, and amendments thereto, and may apply said moratorium to individual properties with the potential or need for historic preservation under this Section.
- ◆ Such a moratorium gives the local government up to 180 days to add a property to its historic preservation plan element and ordinance, during which no development permit, including building permits, may issue for that property.
- (11) This Section, or any provision thereof, shall not invalidate any designation of a historic district, historic landmark, or design review district made, or any certificate of appropriateness issued, pursuant to any earlier statute, ordinance, or regulation, if said designation or issuance was valid at that time.

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### ***Commentary: Transfer of Development Rights***<sup>42</sup>

#### **THE BASICS**

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<sup>42</sup>See generally John J. Costonis, "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," *Harvard L. Rev.* 85 (1972): 574, 578; Robert A. Johnston & Mary E. Madison, "From Landmarks to Landscapes: A Review of Current Practices in the Transfer of Development Rights," *Journal of the American Planning Association*, Vol 63, No. 3 (Summer 1997): 365-378; Rick Pruetz, *Saved by Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights* (Burbank, Calif.: Arje Press, 1997); Frank Schnidman, "Transferable Development Rights," Ch. 23, in Donald Hagman and Dean Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (Chicago: American Society of Planning Officials, 1978); Sarah J. Stevenson, "Banking on TDRs: The Government's Role as a Banker of Transferable Development Rights," *1999 Zoning and Planning Law Handbook* (St. Paul, MN: West Group, 1999), 419-478.

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What is a transfer of development rights (also called transfer of development credits, transferable development rights, or simply “TDR”)? Put most simply, it is the yielding of some or all of the right to develop or use a parcel of land in exchange for a right to develop or use another parcel of land, or another portion of the same parcel of land, more intensively. In TDR programs, a local or regional government that wishes to preserve land in an undeveloped or less-developed state may do so without payment of cash compensation<sup>43</sup> if it is willing to accept higher densities or more intensive uses elsewhere. The owner has, in theory, not suffered a taking even in the extreme case where all reasonable use of a parcel of land is effectively precluded, because he or she has not lost any rights of ownership but merely transferred one component of ownership of land -- the right to develop and use the land -- from one parcel to another.

Why would a local government wish to preserve privately-owned land in an undeveloped state or prevent future development of such property? There are typically three reasons for a TDR program. The first is to preserve open space or ecologically sensitive areas (such as wetlands). The second common use of TDR is the preservation of agricultural or forest uses. The last, and most familiar, use of TDR is in the preservation of historic landmarks.

### **TDR CASES -- THE U.S. SUPREME COURT**

Only two cases directly concerning TDR have been before the United States Supreme Court: *Penn Central Transportation Co. v. City of New York*,<sup>44</sup> and *Suitum v. Tahoe Regional Planning Agency*.<sup>45</sup>

(1) *Penn Central*. In the *Penn Central* case, the City of New York enacted a Landmarks Preservation Law. Under this ordinance, the city Landmarks Preservation Commission designates landmark buildings and districts, after hearing. The owners of properties so designated must keep the exterior features of the building in good repair, and that Commission must approve any proposal to alter the exterior architectural features of the landmark, including exterior improvements.<sup>46</sup> There are three grounds for approving a proposed exterior alteration: it does not affect exterior architectural features, it is appropriate to the historic nature and features of the landmark, or the owner would make an “insufficient return” on the property without it.<sup>47</sup> The ordinance also provided

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<sup>43</sup>However, the owner of the sending parcel will probably receive cash in payment from the owner of the receiving parcel for the transfer of the development right.

<sup>44</sup>438 U.S. 104 (1978).

<sup>45</sup>No. 96-243 (U.S. 1997).

<sup>46</sup>438 U.S. 104, 110-112.

<sup>47</sup>438 U.S. 104, 112.

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that unused development rights could be transferred to lots on the same block or across the street, or to nearby lots under the same ownership.<sup>48</sup>

The Penn Central Transportation Company owned Grand Central Terminal, which was a landmark under the Landmarks Preservation Law due to it being an exemplar of Beaux Arts design. The building is an eight-story railway station, with space not used for railway purposes rented to other commercial uses. The Penn Central Transportation Company also owned several neighboring hotels and office buildings along Park Avenue, at least eight of which were eligible under the ordinance to be recipients of development rights from the Grand Central Terminal. When the Company twice applied to the Commission for permission to build an over-50-story office building atop the Terminal, it was twice denied permission on the grounds that the skyscraper was incompatible with the turn-of-the-century design of the Terminal. The Company did not seek judicial review of the Commission decisions but instead brought suit, challenging the landmark designation and the denial of permission to build as a taking.<sup>49</sup>

The Court found that there was no taking in these circumstances. First and foremost, the “objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.”<sup>50</sup> Second, the Company was not denied economically viable use of the property, the Court held, since it was economically viable in its form as a railway station with leased commercial space, nor were the investment-backed expectations of the Company thwarted by denial of permission to build the office tower, because their reasonable expectation, backed by expenditure of money, was in the existing railway station.<sup>51</sup>

Though the Court did not have to address the topic of TDR, since it found that there was no taking on an independent basis, the Court said,

“...it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. ... [T]he New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants

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<sup>48</sup>438 U.S. 104, 113-114.

<sup>49</sup>438 U.S. 104, 115-119.

<sup>50</sup>438 U.S. 104, 129.

<sup>51</sup>438 U.S. 104, 136.

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and, for that reason, are to be taken into account in considering the impact of regulation.”<sup>52</sup>

(2) *Suitum*. The Tahoe Regional Planning Agency regulates land development for the ecologically-sensitive Lake Tahoe region on the California/Nevada border. Because the area under its jurisdiction is so delicate, the Agency strictly regulates development. Every parcel must pass the Agency’s “Individual Parcel Evaluation System” (IPES) in order for the owner to receive permission to develop the parcel. However, undeveloped parcels in areas carrying runoff water into the Lake Tahoe watershed cannot receive a development permit under the IPES. To adjust for this severe restriction of development, owners of parcels that cannot be developed under IPES may transfer the development right to other parcels eligible for construction.<sup>53</sup>

The “development rights” that can be transferred by an owner with an undevelopable parcel include the general right to build a residence, called a “Residential Development Right,” the right to construct a residence in the present calendar year (which is otherwise assigned by lottery), termed a “Residential Allocation,” and the right to build or add to a residence a particular square footage of “footprint” (in the case of land that cannot be developed because of a runoff area, 1 percent of the total area of the undevelopable parcel), called “Land Coverage Rights.” Ms. Suitum was the owner of a parcel in a water runoff area and was denied the right to construct a residence on her parcel. Under the Agency’s TDR program, she, without dispute, had three Residential Development Rights, one Residential Allocation, and the right to 183 additional square feet of “footprint.” She did not attempt to exercise these rights on another parcel or by transferring them. Instead, Ms. Suitum brought suit against the Agency, claiming that it had effected a taking of her property without just compensation.<sup>54</sup>

The Supreme Court stated that there was a dispute over whether the case before it was ripe for adjudication in the first place. According to precedents, a takings claim is not ripe for adjudication unless the owner has both received a final regulatory decision on the use of his or her property and has sought compensation through the procedure set by state law.<sup>55</sup> Ms. Suitum argued that she was denied all reasonable use of the parcel she owned, that the TDRs were of little or no value, and that her claim was ripe because it would be futile to try to transfer them.<sup>56</sup> The Agency responded that the various TDRs were of significant market value (and offered appraisals in support of that proposition), that the value of the rights was relevant to the question of whether there was a taking

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<sup>52</sup>438 U.S. 104, 137.

<sup>53</sup>No. 96-243, pg. 3, 4.

<sup>54</sup>No. 96-243, pg. 4.

<sup>55</sup>No. 96-243, pg. 5.

<sup>56</sup>No. 96-243, pg. 5.

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in the first place, and therefore that Ms. Suitum's claim was not ripe because she had not tried to collect or exercise her development rights.<sup>57</sup>

The Court found that there was a final decision on the use of Ms. Suitum's property when the Agency declared under IPES that her parcel could not be developed. Also, there was no dispute as to exactly what TDRs she would receive from the Agency.<sup>58</sup> As to the fact that any particular sale of TDRs can be denied approval by the Agency, and thus there was no final decision by the Agency, the Court found that, "[w]hile a particular sale is subject to approval, saleability is not...."<sup>59</sup>

On the issue of the value of the TDRs, the Court asserted that "the valuation of Suitum's TDRs is therefore simply an issue of fact about possible market prices..."<sup>60</sup> In other words, the Supreme Court found that the value of the TDRs was not essential to determining whether or not there had been a taking, as the Agency had claimed. The Court declared the case was ripe and remanded the case for further proceedings.

The concurrence of Justices Scalia and O'Connor is even more explicit on the issue of TDR and where in the takings equation they should be considered: TDRs are not a transfer of the right to develop the sending parcel, but a tool for compensating the owner of the sending parcel with a valuable and saleable, but different, right.<sup>61</sup> As Justice Scalia stated, "...the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity...."<sup>62</sup>

### **TDR CASES -- THE STATE COURTS**

Because takings is an issue under state constitutions as well as the Federal Constitution, and because TDR programs exist under state and local law, the state courts have had the most experience with challenges to TDR programs.

### **Validity of TDR Programs**

TDR ordinances have survived challenges from several legal directions. In Washington, D.C., a TDR program was upheld against claims that it violated the uniformity requirement of the zoning

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<sup>57</sup>No. 96-243, pg. 4.

<sup>58</sup>No. 96-243, pg. 7.

<sup>59</sup>No. 96-243, pg. 8.

<sup>60</sup>No. 96-243, pg. 8.

<sup>61</sup>No. 96-243, pg. 11.

<sup>62</sup>No. 96-243, pg. 12.

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enabling statute and that it constituted discrimination on the basis of wealth.<sup>63</sup> The New York City TDR program was upheld in the face of a claim that it constituted illegal spot zoning.<sup>64</sup> A TDR ordinance in Los Angeles was unsuccessfully challenged on the basis that a TDR program is inconsistent with the concept of zoning in accordance with a comprehensive plan (akin to a “spot zoning” claim).<sup>65</sup>

In Florida, in *Glisson v. Alachua Cty.*,<sup>66</sup> an appellate court upheld an ordinance and regulations restricting development in an area with both ecological and historic significance on the grounds that protecting the area from further development was a legitimate public purpose, and the ordinance and regulations were a reasonable means to that end both because existing uses were permitted and because TDRs (and variances) were allowed to those who could not make reasonable use of their property.

In the case of *City of Hollywood v. Hollywood, Inc.*,<sup>67</sup> a landowner challenged a TDR program on the basis of substantive due process. Under the program, the developer was to receive the right to build 368 housing units on one portion of his property if he deeded over a beachfront area that could accommodate 79 units. The court found that protecting the aesthetic value of the unspoiled beach was a legitimate public purpose, and that the transfer of the right to develop housing units to another portion of the property was a reasonable means to that end even though the owner was required under the transfer to deed outright to the city several acres of property.<sup>68</sup>

A similar substantive due process claim was made in *Gardner v. New Jersey Pinelands Comm'n.*<sup>69</sup> In dispute was the statute and regulations creating the New Jersey Pinelands, specifically the restriction of development on agricultural parcels in exchange for transferable rights useable elsewhere in the Pinelands area. As in *City of Hollywood*, above, the New Jersey Supreme Court found that the preservation of agricultural land from more intensive residential or commercial development was a legitimate purpose and the restriction on development combined with the TDRs was a reasonable means to that end.

However, while several states have upheld TDR programs, the state courts have not universally approved all TDR ordinances. The initial Montgomery County (Maryland) TDR ordinance was invalidated on the grounds that, under the Maryland zoning enabling statutes, the designation of

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<sup>63</sup> *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 355 A.2d 550 (D.C. App. 1976), cert den'd 429 U.S. 966 (1977).

<sup>64</sup> *Fur-Lex Realty v. Lindsay*, 81 N.Y.Misc. 2d 904, 367 N.Y.S.2d 388, 392 (Sup. Ct. N.Y. Cty. 1975).

<sup>65</sup> *Local & Regional Monitor v. City of Los Angeles*, 12 Cal.App.4th 1441, 16 Cal.Rptr.2d 358 (Cal. App. 1993).

<sup>66</sup> 558 So.2d 1030 (Fla. App. 1990).

<sup>67</sup> 432 So.2d 1332 (Fla. App. 1983).

<sup>68</sup> 432 So.2d 1332, 1338.

<sup>69</sup> 125 N.J. 193, 593 A.2d 251 (1991).

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receiving parcels and the permissible density on those parcels was a rezoning and thus a legislative act, and could not be assigned to the planning board as the ordinance provided.<sup>70</sup> However, the county amended the ordinance to comply with the enabling acts, and the TDR ordinance is still in place.<sup>71</sup>

### **Effectiveness of TDR Programs Against Takings Claims**

In *Aptos Seascope Corp. v. Santa Cruz Cty.*,<sup>72</sup> a California appeals court expressly stated that TDR should be considered in the analysis of whether there has been a taking and can indeed “preclude a finding that an unconstitutional taking has occurred.”<sup>73</sup> Courts in similar states have found that TDRs go directly to the question of whether there has been a denial of economically viable use of the owner’s property.<sup>74</sup>

The Court of Appeals (highest court) of New York heard the early case of *Fred F. French Inv. Co. v. New York City*.<sup>75</sup> In that case, private park space in a multi-unit residential development was declared open to the public, in exchange for the right to develop at a higher density at a site in midtown Manhattan. The TDR program in question allowed certain density increases as of right but required an approval after public hearing for larger density changes. The court found that there was a taking, and that the transferred development rights were inadequate compensation because their value is speculative until attached to a particular parcel and because the large density transfers were contingent on city approval, which could be denied.<sup>76</sup>

However, when the same court heard the *Penn Central* case approximately one year later,<sup>77</sup> the court found that the transferred development rights in the New York City historic preservation ordinance were reasonable compensation even though they did not equal the value of the right to develop the sending parcel. The court reasoned that almost any land regulation negatively affects

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<sup>70</sup>*West Montgomery Cty. Citizens Ass’n v. Maryland-Nat’l Capital Park & Planning Comm’n*, 309 Md. 183, 522 A.2d 1328 (1987).

<sup>71</sup>Julian C. Juergensmeyer, James C. Nicholas, and Brian D. Leebrick, “Transferable Development Rights and Alternatives After *Suitum*,” *Urban Lawyer* 30, No. 2 (Spring 1998): 441, 451 fn. 89; Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing Co., 1997), §12.13., 494.

<sup>72</sup>138 Cal.App.3d 484, 188 Cal.Rptr. 191 (1982).

<sup>73</sup>138 Cal.App.3d 484, 496, 188 Cal.Rptr. 191, 197.

<sup>74</sup>*Gardner v. New Jersey Pinelands Comm’n*, 125 N.J. 193, 593 A.2d 251 (1991); *Fifth Avenue Corp. v. Washington Cty.*, 282 Or. 591, 581 P.2d 50 (1978); *Glisson v. Alachua Cty.*, 558 So.2d 1030 (Fla. App. 1990); *Aptos Seascope Corp. v. Santa Cruz Cty.*, 138 Cal.App.3d 484, 188 Cal.Rptr. 191 (1983).

<sup>75</sup>39 N.Y.2d 587, 350 N.E.2d 381 (1976), appeal dismissed 429 U.S. 990 (1976).

<sup>76</sup>39 N.Y.2d 587, 598, 350 N.E.2d 381, 388.

<sup>77</sup>42 N.Y.2d 324, 366 N.E.2d 1271 (1977).

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the value of property, and therefore the value of the increased density on the receiving parcel did not have to equal or exceed the value of the right to develop the sending parcel. The court also found that there was more certainty of where and how the transferred development rights could be used in the *Penn Central* TDR program than in the TDR ordinance at question in the *Fred F. French Inv. Co.* case, and thus distinguished the two cases.

In the case of *Corrigan v. City of Scottsdale*,<sup>78</sup> an Arizona court struck down a TDR ordinance on the grounds that the Arizona Constitution requires that just compensation must be “made in money.”<sup>79</sup> The court had already found that the declaration of 80 percent of a 4800-acre parcel of land as undevelopable Conservation Area was an unreasonable means to protecting the aesthetic interest in open land. Therefore, in striking down the ordinance on the basis of the constitutional requirement of compensation in money, the court was effectively considering TDR as solely a compensation measure.

Even though courts have found that TDR can negate a takings claim, and must be considered in the analysis of whether there has been a taking, there can be other takings-related problems with TDR programs. For instance, courts look askance at artificially downzoning a receiving area -- zoning that area for a use or density significantly lower than the surrounding areas so that the TDRs become necessary to have any economically-viable development in the receiving area.<sup>80</sup>

### EXAMPLES OF TDR PROGRAMS

There are a number of municipalities, counties, and regions that have TDR programs in place. These vary from rural areas to the largest city in the nation. The programs protect, in various communities, historical landmarks, agricultural and forest uses, and natural areas and open space. Rick Pruetz, by reviewing planning literature and by sending a questionnaire to 3,500 communities across the nation, has found 107 TDR programs in 25 states.<sup>81</sup>

*Pine Barrens, New York.* The Pine Barrens is an area on the east end of Long Island designated by state statute – the Long Island Pine Barrens Protection Act.<sup>82</sup> (Note that it is not the same as the

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<sup>78</sup>149 Ariz. 553, 720 P.2d 528 (App. 1985), rev'd on other grounds, 149 Ariz. 538, 720 P.2d 513 (1986).

<sup>79</sup>Ariz. Const. Art. 2, Sec. 17.

<sup>80</sup>*Neuzil v. Iowa City*, 451 N.W.2d 159 (Iowa 1990); *Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8 (1989); *Odabash v. Borough of Dumont*, 65 N.J. 115, 319 A.2d 712 (1974); *National Amusements, Inc. v. City of Boston*, 29 Mass.App. 305, 560 N.E.2d 138 (1990).

<sup>81</sup>Pruetz, 14-17, 41.

<sup>82</sup>N.Y. Env'tl. Conserv. Law §§57-101 to 57-137 (1997).

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Pinelands of New Jersey, an area that also has a successful TDR program.<sup>83</sup>) The purpose of the Pine Barrens Protection Act is to preserve natural areas, agricultural and fishing resources, and historic sites in the Pine Barrens-Peconic Bay area.<sup>84</sup>

The Act designates the portion of the Pine Barrens-Peconic Bay system that constitutes the Central Pine Barrens, which is divided by the Act itself into a core preservation area and a compatible growth area.<sup>85</sup> Governing the Central Pine Barrens is the Central Pine Barrens Joint Planning and Policy Commission – one appointee of the governor, the executive of Suffolk County, and the executives of three named towns. The Commission prepares and adopts a comprehensive land-use plan for the Central Pine Barrens area, can alter at its discretion (after due notice to affected land owners) the border between the core preservation area and the compatible growth area by up to 300 feet, and adopts regulations and standards implementing the plan, including but not limited to incentives and bonuses to encourage the use of TDRs.<sup>86</sup>

The Commission is required to 1) inventory all privately-owned land in the core preservation area; 2) calculate the development yield of all such parcels “in a reasonable and uniform manner” based on such measures as area, density, height limitations, and floor area ratios; 3) notify the owners of such parcels of its determination; 4) designate receiving areas, both inside and outside the Central Pine Barrens, for development rights transferred from the core preservation area, and 5) consider the fiscal impact of the TDR program it develops.<sup>87</sup> Under the comprehensive land-use plan, some of the goals the Commission must comply with in designating receiving areas in the compatible growth area are to:

preserve...the essential character of the existing Pine Barrens environment, ... protect the quality of surface and groundwaters, discourage piecemeal and scattered development, encourage appropriate patterns of compatible...development in order to accommodate regional growth influences in an orderly way while protecting the Pine Barrens environment from the individual and cumulative adverse impacts thereof, accommodate a portion of development redirected from the preservation area ... across municipal boundaries, and allow appropriate growth consistent with the natural resources goals of [the plan].<sup>88</sup>

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<sup>83</sup>N.J. Stat. Ann. §§13:18A-1 to –29 (1997), upheld in *Matlack v. Board of Chosen Freeholders*, 191 N.J. Super. 236, 466 A.2d 83 (L. Div. 1983), aff’d 194 N.J. Super. 359, 476 A.2d 1262 (App. Div. 1984); Telephone interview, 10/12/98, with John Costonis.

<sup>84</sup>N.Y. Env’tl. Conserv. Law §57-103.

<sup>85</sup>N.Y. Env’tl. Conserv. Law §57-107(10) - (12).

<sup>86</sup>N.Y. Env’tl. Conserv. Law §§57-109(2), 119.

<sup>87</sup>N.Y. Env’tl. Conserv. Law §57-119 (7), (8).

<sup>88</sup>N.Y. Env’tl. Conserv. Law §57-121(4).

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The Pine Barrens TDR program, in place since mid-1995, has been employed to a moderate degree – as of August 31, 1998, 228 parcels in the core preservation area were awarded transferable development credits.<sup>89</sup> Out of the 52,500 acres of the core preservation area (and 47,500 acres of the compatible development area), the total area of the sending parcels was nearly 199 acres.<sup>90</sup> Ray Corwin, the executive director of the Commission, asserts that the TDR program is a success, especially when considered as a voluntary *portion* of the entire Pine Barrens regulatory system. The prevalence of small parcels using the program is intentional: the fee structure of the TDR program is calculated to reduce the cost to small landowners of using TDRs.<sup>91</sup>

*Collier County, Florida.* Collier County is on the southern tip of Florida, on the Gulf Coast. With a population of more than 150,000, it includes the growing city of Naples but also includes portions of the fragile Everglades ecosystem. To preserve both coastal areas and the inland wetlands, the county enacted a zoning ordinance in 1974 that included a Special Treatment Overlay Zone. Within the Zone, covering over 80 percent of the county's area, a permit is required for all new development, and strict environmental requirements apply to the issuance of such permits. To soften the impact of the regulatory aspect of the Zone, the ordinance also authorizes TDRs – one dwelling unit for every two acres – from parcels in the Zone to parcels outside the Zone, if the sending property is at least two acres. No receiving parcel can increase its density by more than 20 percent of its zoned density. To ensure that the transferred development rights will not still be used on the sending property, the owner of the sending property may either deed it outright to the county or sign and record a guarantee that the land will not be developed and will be left in a natural state, with the permissible exception of nature trails, boardwalks, and related uses.<sup>92</sup>

The Collier County TDR program has been somewhat of a success – 526 development rights, arising from 325 acres in the Zone, have been transferred since the program's inception.<sup>93</sup> However, due mainly to the fact that existing zoning provides adequate density without purchasing TDRs, the program has been very rarely employed in the last 10 years or so.<sup>94</sup> On the other hand, nine other

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<sup>89</sup>Information sheet from Pine Barrens Credit Clearinghouse, a division of the Central Pine Barrens Commission (n.d).

<sup>90</sup>Pine Barrens Credit Clearinghouse information sheet; Brief of the National Trust For Historic Preservation in the United States *et al.* at 19, *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 (U.S. 1997).

<sup>91</sup>Telephone interview, 10/14/98, with Ray Corwin, executive director, Central Pine Barrens Commission.

<sup>92</sup>Pruetz at 187-188.

<sup>93</sup>Pruetz at 188.

<sup>94</sup>Telephone interview, 10/6/98, with Ms. Barbara Cacchione, Planning Services Department, Collier County.

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south Florida counties facing the same need to preserve the unique coastline and wetlands environments of southern Florida have followed Collier's lead by enacting TDR ordinances.<sup>95</sup>

*Montgomery County, Maryland.* Montgomery County, like many other counties throughout the nation, is a county in transition. While it contains thousands of acres of farmland, it also includes several growing suburbs of Washington, D.C., and portions of the county are served by the Washington Metro (subway) and commuter trains. Like many such counties, the County Board wanted to preserve agricultural uses in the face of expanding residential subdivisions and commercial uses, so they enacted an agriculturally-oriented TDR ordinance in 1981.

The rural area, covering almost one-third of the county, was downzoned from 1 residential unit per 5 acres to 1 unit per 25 acres, and the owners received 5 transferable rights to build a dwelling unit per each 25 acres. Note that, since the owner of the sending parcel can still build one residence per 25 acres, a grant of 5 transferable rights to build a dwelling unit per 25 acres gives the sending parcel the transferable right to build one more dwelling unit than it had under the old zoning. The areas of the county designated as receiving areas were the developing corridors along superhighways and railways into Washington, so that suburbanization, which was occurring regardless of the TDR program, would be concentrated along the transportation facilities that serve the development. For the sake of efficiency, the TDR program is administered as part of the subdivision approval: when a developer is seeking plat approval and is going to buy transferable rights as part of the development, the sale of development rights is approved as part of the plat approval.<sup>96</sup>

The Montgomery County TDR program has been very effective: more than 38,000 acres of the approximately 91,000 rural acres have been preserved by transfers of development rights as of 1998.<sup>97</sup> Because of the existing development pressure and the concentrated nature of the receiving area, the market value of TDRs was high – around \$10,000 per right.<sup>98</sup> And, just as the Collier County, Florida, TDR program inspired other counties in Florida to enact similar ordinances, the success of the Montgomery County program in preserving farmland and concentrating development has provided impetus for six other counties in Maryland to adopt TDR programs.<sup>99</sup>

*New York City, New York.* The oldest, and one of the most famous, TDR programs was instituted in New York City as part of its historic preservation program. New York City has several

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<sup>95</sup>Pruetz at 45.

<sup>96</sup>Juergensmeyer, Nicholas, and Leebrick at 450-451.

<sup>97</sup>Ann Louise Strong, "Transfer of Development Rights to Protect Water Resources," *Land Use Law & Zoning Dig.* Vol. 50, No. 9 (Sept. 1998): 3, 7.

<sup>98</sup>Brief of the National Trust For Historic Preservation at 18; Juergensmeyer, Nicholas, and Leebrick at 450-451, 474.

<sup>99</sup>Pruetz at 45.

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buildings of historic importance, especially in its high-density core areas of Midtown and downtown Manhattan. However, since many of these buildings make less-intensive use of the land they occupy than is permitted by present zoning and other land-use regulations, there is a great incentive for the owners of such properties to tear down the historic structure and replace it with a modern building that takes full advantage of the legally-permitted density.

Therefore, in 1965, the City enacted the Landmarks Preservation Law. The Law creates a Landmarks Preservation Commission, which designates landmark buildings and districts after holding a hearing at which the owner has a right to participate; the designation is subject to judicial review. The owners of properties so designated -- landmark properties -- must keep the exterior features of the building in good repair, and the commission must approve any proposal to alter the exterior architectural features of the landmark, including exterior improvements.<sup>100</sup> There are three grounds for approving a proposed exterior alteration. The first is that the proposed alteration to the landmark does not affect exterior architectural features; not surprisingly, a decision in favor of the owner results in a “certificate of no effect on protected architectural features.” The second route to approval of an alteration to a landmark is the “certificate of appropriateness”; that is, the commission finds that the proposed alterations do affect the external features of the landmark, but the alterations are appropriate to the historic nature and features of the landmark. The third basis is that the owner would make an “insufficient return” on the property unless he or she is allowed to make the alteration.<sup>101</sup>

With the same focus on guaranteeing that owners of landmark properties receive a “reasonable return” on their investment, the ordinance also provides for TDR. As the Law originally applied, unused development rights could be transferred to adjacent lots on the same block.<sup>102</sup> After a 1968 amendment, owners of landmark sites could transfer unused density from a landmark parcel to property across the street or across a street intersection, subject to a restriction that the floor area of the receiving parcel may not be increased by more than 20 percent above its otherwise-zoned level.<sup>103</sup> There was a further amendment in 1969, allowing transfer of density “across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership.”<sup>104</sup> Thus, lots blocks away from the landmark property could use the development rights as long as the same owner owned the landmark lot, the receiving parcel, and the land in between except for streets (the exact situation the Penn Central Railroad was in with regards to Grand Central Terminal and the properties built on top of the tracks leading to the Terminal).

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<sup>100</sup>*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 110-112.

<sup>101</sup>438 U.S. 104, 112.

<sup>102</sup>438 U.S. 104, 110, 113-114.

<sup>103</sup>438 U.S. 104, 114.

<sup>104</sup>438 U.S. 104, 114.

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The TDR portion of the Landmarks Preservation Law has been only mildly successful: over a dozen transfers have been made over the years since its enactment.<sup>105</sup> The main problem with the program is that there are other means under New York City zoning laws to obtain increased density (including rezoning and various density bonus programs such as for designing a building with a plaza or open area adjacent) and the process for approving TDRs under the Landmarks Preservation Law involves the approval of the Community Board for the surrounding neighborhood, the City Planning Board, and the City Council, and approval can take up to seven months.<sup>106</sup>

However, very recently, New York City has established a TDR program for its Theater Subdistrict. The subdistrict has existed in the Broadway theater area since the 1970s, and within the district, there are regulations to preserve live theaters as such and to prevent their demolition and conversion to other uses such as office buildings. Just a few months ago, the City established a program whereby listed theaters (approximately 44 in number) can transfer their unused development rights to any other property in the subdistrict under a streamlined approval procedure if the owner agrees to maintain the property as an operating theater.<sup>107</sup>

*The Chicago Plan.* “The Chicago Plan” is the common name for a TDR program for the preservation of landmarks, created by John J. Costonis, a law professor, and Jared B. Shlaes, a real-estate consultant, and proposed for adoption by the City of Chicago.<sup>108</sup> It was proposed in 1971 because Chicago had been, at that time, making little or no effort to protect historic landmarks, especially the original, pioneering “skyscrapers” of the 1880s and 1890s that were being torn down for the construction of taller, modern skyscrapers.

The Chicago Plan is based on the idea that most landmark properties do not fully employ the density allowed by the zoning and other land-use regulations for the land they rest on. In areas that are not developing intensively, this is rarely a problem because there is little or no pressure to build the property to its full density. But in heavily-developing areas, especially with a limited supply of land—such as the downtown areas of many cities—the market provides the incentive to develop to the extent of the law parcels that are not “fully” developed. This is true even if the landmark building is operating at a profit.<sup>109</sup>

What the Chicago Plan proposes is that areas containing landmark properties, such as a downtown area, would be declared to be development rights transfer districts by the City Council,

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<sup>105</sup>Brief of the National Trust For Historic Preservation at 19; Pruetz at 225.

<sup>106</sup>Telephone interview, 10/7/98, with Melanie Meyers, NYC Department of City Planning; Juergensmeyer, Nicholas, and Leebrick at 447-448, 454.

<sup>107</sup>Telephone interview, 10/7/98, with Melanie Meyers, NYC Department of City Planning.

<sup>108</sup>John J. Costonis, “The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks,” *Harvard L. Rev.* Vol. 85 (1972): 574, 578.

<sup>109</sup>Costonis, at 575, 579-580, 582, 589.

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at the recommendation of the Landmarks Commission and the Planning Commission. The owners of buildings declared to be landmarks, within a transfer district, could transfer the development rights he or she is not employing to one or more non-landmark properties in the transfer district, whether or not owned by him or her, and have the property-tax valuation of the landmark parcel appropriately adjusted. In exchange, the landmark property would become subject to a preservation restriction, binding the owner and all future owners of the landmark parcel to maintain the property according to certain standards and to refrain from altering or demolishing the property without consent from the city. The area of receiving parcels could not be expanded by more than 15 percent, and all transfers would be subject to development restrictions in the ordinance.<sup>110</sup>

For the owners of landmarks who did not voluntarily convey their development rights and enter into a preservation restriction, the city could condemn the development rights under eminent domain, putting condemned rights into a development rights bank and funding condemnations with the revenues generated from the bank's sale of development rights condemned earlier.<sup>111</sup>

The great flexibility in the Chicago Plan is the ability to transfer development rights to any non-landmark property in the district, and not just to neighboring properties or nearby properties under the same ownership, as in the New York Landmarks Preservation Law.<sup>112</sup> Another powerful tool in the Chicago Plan is the development rights bank. Instead of having to obtain revenue from the general treasury to condemn development rights, often for downtown properties worth millions of dollars, the city has a dedicated source of income to condemn development rights of landmarks: the sale of development rights it has earlier condemned.<sup>113</sup> Properly managed, the development rights bank is a self-perpetuating system, much like a revolving loan fund.

The main benefit to the owner of the landmark comes from the tax effects of losing the development rights. Whether the transfer is voluntary or as a result of condemnation, the loss of development rights on the sending parcel greatly reduces the value of the property for the purpose of property tax assessments.<sup>114</sup> Without the transfer, evidenced by recorded documents, the owner of property is assessed for the possible development value of the property, even if he or she intends never to build to the full extent of the law. With it, the owner is assessed only for the actual value of what the existing building can be used for, and not the hypothetical value of what the largest permissible building on the parcel would be worth.

Such a program was not implemented by the City of Chicago due to legal conservatism in City Hall under Mayor Richard J. Daley and in the legal community -- the more traditional zoning/police power approach to protecting landmarks had been tried and judicially approved -- and due to the fact

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<sup>110</sup>Costonis, at 590, 592, 594-595.

<sup>111</sup>Costonis, at 590, 593.

<sup>112</sup>Costonis, at 594-596.

<sup>113</sup>Costonis, at 597-598.

<sup>114</sup>Costonis, at 592-593.

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that downtown developers could build to market intensities and densities under existing zoning or by employing incentives, and did not need to purchase TDRs.<sup>115</sup> However, the adoption of elements of the Chicago Plan by the Illinois Legislature as a municipal historic preservation enabling act (see below), and in the TDR enabling statutes of New York State and Tennessee (also below) must be noted, so that the Chicago Plan was a model for action by others if not by the city for which it was intended.

### TDR ENABLING STATUTES

Several local governments have implemented TDR programs without express authority from a state enabling statute. In those cases, they relied on their general authority to regulate the type and density of land use.<sup>116</sup> However, it is best to avoid any claim that a local TDR ordinance is *ultra vires* (that is, that the local government had no authority to enact it) by enacting a state statute that expressly authorizes TDR programs.<sup>117</sup>

Some states generally authorize local governments to enact TDR ordinances, but provide no standards, conditions, or other regulation of their content. Florida's "Private Property Rights Protection Act" includes TDR as one possible mitigation measure when a land owner claims, and the local government agrees, that a particular local land development regulation or decision "inordinately burdens" the owner's reasonable use of the land.<sup>118</sup> Idaho simply authorizes TDRs for the preservation of historic properties.<sup>119</sup> Maryland merely authorizes counties and municipalities, including Baltimore, to establish TDR programs.<sup>120</sup> New Hampshire<sup>121</sup> authorizes TDR along with many other "innovative land use controls," such as timing, intensity, and use incentives, phased development, planned unit development, cluster development, flexible zoning, inclusionary zoning,

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<sup>115</sup>Telephone interview, 10/7/98, with Jared Shlaes, Shlaes & Co., Chicago; Telephone interview, 10/12/98, with John Costonis.

<sup>116</sup>*Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 355 A.2d 550 (D.C. App. 1976); *Matlack v. Board of Chosen Freeholders*, 466 A.2d 83 (N.J.L. Div. 1983), aff'd 476 A.2d 1262 (N.J. App. Div. 1984).

<sup>117</sup>See *West Montgomery Cty. Citizens Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 522 A.2d 1328 (Md. 1987) (TDR ordinance assigns power to designate receiving areas to planning board, *ultra vires* under zoning enabling act requiring rezoning to be approved by local legislature).

<sup>118</sup>Fla. Stat. §70.001 (1997).

<sup>119</sup>Idaho Code §67-4619 (1998).

<sup>120</sup>Md. Ann. Code art. 66B, §11.01 (1998).

<sup>121</sup>N.H. Rev. Stat. Ann. §674:21 (1998).

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and impact fees. The only standards in the statute, however, are for impact fees. Rhode Island authorizes TDR programs as part of the standard zoning power of a city or town.<sup>122</sup> South Dakota generally authorizes counties and municipalities to employ TDRs as part of historic preservation ordinances.<sup>123</sup> Washington takes a similar approach to New Hampshire's and states that a "comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights."<sup>124</sup>

**Arizona** includes in its zoning enabling statute<sup>125</sup> a provision authorizing the use of TDR. The provision<sup>126</sup> requires that any TDR must be with the consent of the owners of the sending and receiving parcels and must be preceded by notice and a hearing. It also requires that any TDR be performed pursuant to a local ordinance that requires the issuance and recording of documents severing the development right from the sending parcel and transferring them to the receiving parcel, prescribes means and procedures for ensuring development in violation of the transfer does not occur on the sending parcel, and authorizes the local government to purchase and resell development rights.

**Connecticut** also has a more detailed statute. The general zoning enabling section includes express authority to create a TDR program and to vary density limits in the receiving areas.<sup>127</sup> Another provision requires that development rights cannot be transferred except upon the joint application of the transferor and the transferee (the owners of the sending and receiving parcels, respectively).<sup>128</sup> And another section expands the scope of TDR by allowing two or more municipalities with a TDR program to enter into an agreement authorizing and establishing procedures for the transfer of development rights from parcels in one municipality to parcels in another.<sup>129</sup>

**Georgia** authorizes counties and municipalities to employ TDR to protect natural land, open space, recreational land, farm land, and "land that has unique aesthetic, architectural, or historic

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<sup>122</sup>R.I. Gen. Stat. §45-24-33(B)(2) (1998).

<sup>123</sup>S.D. Codified Laws §1-19B-26 (1998).

<sup>124</sup>Wash. Rev. Code §36.70A.090 (1998).

<sup>125</sup>Ariz. Rev. Stat. §9-462.01 (1998).

<sup>126</sup>Ariz. Rev. Stat. §9-462.01(12).

<sup>127</sup>Conn. Gen. Stat. §8-2(a) (1997).

<sup>128</sup>Conn. Gen. Stat. §8-2f.

<sup>129</sup>Conn. Gen. Stat. §8-2e.

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value.”<sup>130</sup> As in Arizona, all transfers must be preceded by notice and a hearing and must be with the consent of the owners of both the sending parcel and the receiving parcel.<sup>131</sup> Indeed, the required elements of a county or local TDR ordinance are exactly the same as in Arizona, except that Georgia also authorizes “persons” to purchase development rights and to either resell them or hold them for conservation purposes.<sup>132</sup>

**Illinois**, as stated above, bases its municipal TDR enabling statute<sup>133</sup> on the Chicago Plan. The municipality is authorized to designate landmarks and to implement the designation with regulations, purchase (of the full title or of just the development rights), or the employment of TDRs.<sup>134</sup> The development right is the density permissible under zoning law (and the statute recommends using quantifiable measures of density), and a voluntary TDR is secured by the execution and recording, by the owner of the landmark, of a conservation easement against the landmark and in favor of the municipality.<sup>135</sup> When a landmark property becomes subject to a conservation easement, either by voluntary TDR or through condemnation by the municipality, the value of the landmark property for tax purposes is adjusted.<sup>136</sup> The municipality is also authorized to create a development rights bank, holding condemned development rights and funding further condemnations by the sale of development rights.<sup>137</sup> The Illinois County Historic Preservation Law<sup>138</sup> also grants counties the power to employ TDR when the owner of a parcel, seeking permission to alter or demolish the landmark property, can show specific evidence of economic hardship from being denied permission.<sup>139</sup>

The **Kentucky** statute<sup>140</sup> authorizes cities, counties, and urban-county governments to enact TDR ordinances, and does not limit their use to historic preservation. A TDR ordinance must provide for the voluntary transfer of development rights from one parcel of land to another, the restriction of

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<sup>130</sup>Ga. Code. Ann. §36-66A-1 (1998).

<sup>131</sup>Ga. Code. Ann. §36-66A-2.

<sup>132</sup>Ga. Code. Ann. §36-66A-2(7).

<sup>133</sup>65 Ill.Comp.Stat. §§5/11-48.2-1 to -7 (1998).

<sup>134</sup>65 Ill.Comp.Stat. §5/11-48.2-2.

<sup>135</sup>65 Ill.Comp.Stat. §5/11-48.2-1A.

<sup>136</sup>65 Ill.Comp.Stat. §5/11-48.2-6.

<sup>137</sup>65 Ill.Comp.Stat. §5/11-48.2-1A.

<sup>138</sup>55 Ill.Comp.Stat. §§5/5-30001 - 30022 (1998).

<sup>139</sup>55 Ill.Comp.Stat. §§5/5-30011(16), -30019 to -30021.

<sup>140</sup>Ky. Rev. Stat. Ann. §100.208 (1997).

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development on the transferring parcel, and the increase in density or intensity of development on the receiving parcel. Both transferring and receiving areas must be indicated on the zoning map. Cities within counties can enter into agreements with the county to provide for the transfer of development rights from parcels in the county to parcels in the city and vice versa. TDR are completely alienable and can be transferred by deed, but the local government is authorized to prescribe, by ordinance, procedures for the transfer of development rights and their enforcement.

**New Jersey** has created a statewide TDR bank within its Department of Agriculture.<sup>141</sup> The bank is authorized to purchase development rights, and to provide matching funds up to 80 percent for the purchase of development rights by a municipality or county.<sup>142</sup> It is also authorized to sell the TDRs it obtains. However, if it purchased or condemned development rights in cooperation with a local government, it must pay 20 percent of the proceeds to that local government unless the local government agrees to waive the payment and the TDRs are being used in “projects that satisfy a compelling public purpose.”<sup>143</sup>

**New York** authorizes cities,<sup>144</sup> towns,<sup>145</sup> and villages<sup>146</sup> to enact TDR ordinances by the same procedure as is prescribed for zoning ordinances.<sup>147</sup> Such ordinances may be enacted “to protect the natural, scenic, or agricultural qualities of open land, to enhance sites and areas of special character or special historical, cultural, aesthetic, or economic interest or value....”<sup>148</sup> To ensure the TDR program is well-considered, the statutes require that a TDR ordinance can be enacted only in accordance with a local comprehensive plan, the receiving district must first be found by the local legislature to have adequate public facilities and other necessary resources to accommodate the transferred development rights, the local legislature must consider and adjust for the impact of the TDR program on low- and moderate-income housing, and the local government must also produce and keep updated a generic environmental impact statement for the receiving area.<sup>149</sup> The sending and receiving districts must be designated and mapped with specificity, and the ordinance must provide the procedure for transferring development rights. The means by which the sending parcel

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<sup>141</sup>N.J. Stat. Ann. §4:1C-51 (1998).

<sup>142</sup>N.J. Stat. Ann. §4:1C-52(a).

<sup>143</sup>N.J. Stat. Ann. §4:1C-54.

<sup>144</sup>N.Y. Gen. City Law §20-f (1998).

<sup>145</sup>N.Y. Town Law §261-a (1998).

<sup>146</sup>N.Y. Village Law §7-701 (1998).

<sup>147</sup>N.Y. Gen. City Law §20-f(3); N.Y. Town Law §261-a(3); N.Y. Village Law §7-701(3).

<sup>148</sup>N.Y. Gen. City Law §20-f(2); N.Y. Town Law §261-a(2); N.Y. Village Law §7-701(2).

<sup>149</sup>N.Y. Gen. City Law §20-f(2)(a), (f); N.Y. Town Law §261-a(2)(a), (f); N.Y. Village Law §7-701(2)(a), (f).

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loses its development rights is a conservation easement with the local government as the beneficiary, and the development rights received by the receiving parcel must be documented by a certificate from the local government; both the conservation easement and the certificate of development right must be recorded.<sup>150</sup> The creation of development rights banks by local governments is authorized; and the assessed value of land, for property tax purposes, affected by a TDR must be adjusted for the transfer within a year of the transfer.<sup>151</sup>

**North Carolina** authorizes the use of “severable development rights” by cities and counties in connection with dedicating a corridor for a street or highway indicated on a plan as an alternative to requiring dedication of the corridor as a condition of subdivision plat approval.<sup>152</sup> The local legislature must, through the zoning ordinance, indicate receiving districts for the SDRs, which are the only parcels where the development rights may be used, though the SDRs are vested rights and freely alienable upon their recording by the city or county. No plat or deed for property employing SDRs can be recorded until the development right of the sending parcel are extinguished in favor of the city or county and the document doing so is recorded. The city then deeds the rights back to the owner of the sending parcel (and records the deed), to be conveyed as the owner sees fit.<sup>153</sup>

**Pennsylvania** authorizes local governments to enact TDR ordinances and provides that no transfer of development rights can occur in absence of such an ordinance.<sup>154</sup> Development rights must be transferred by a deed, which must be recorded but cannot be accepted for recording without the deed being first approved by the local government.<sup>155</sup> Development rights cannot be transferred across municipal lines, except when there is a joint zoning ordinance between the municipalities where the sending and receiving parcels are located.<sup>156</sup>

The **Tennessee** statute<sup>157</sup> provides that only counties with a metropolitan government can have a TDR program, but TDRs can expressly be used for “historical, agricultural, or environmental” purposes. The area of the designated receiving property must be equal to or greater than the area of the sending parcel. The transfer of development rights to parcels owned by other persons must be allowed, and any TDR must be voluntary and by contract. The transfer of development rights is not subject to taxation, either property or income taxation. Conveyances of development rights

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<sup>150</sup>N.Y. Gen. City Law §20-f(2)(b), (c); N.Y. Town Law §261-a(2)(b), (c); N.Y. Village Law §7-701(2)(b), (c).

<sup>151</sup>N.Y. Gen. City Law §20-f(2)(d), (e); N.Y. Town Law §261-a(2)(d), (e); N.Y. Village Law §7-701(2)(d), (e).

<sup>152</sup>N.C. Gen. Stat. §§136-66.10, .11 (1997).

<sup>153</sup>N.C. Gen. Stat. §136-66.11(d), (f).

<sup>154</sup>Pa. Stat. Ann. tit. 53, §10619.1(a) (1998).

<sup>155</sup>Pa. Stat. Ann. tit. 53, §10619.1(b), (c).

<sup>156</sup>Pa. Stat. Ann. tit. 53, §10619.1(d).

<sup>157</sup>Tenn. Code Ann. §13-7-101(a)(2) (1997).

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have to be in writing and recorded with the county register of deeds, and development rights allocated to a property do not become effective until the transferred development rights are noted in an instrument so recorded.

### **BASIC ELEMENTS OF SUCCESSFUL TDR PROGRAMS**

As indicated above, there are several essential elements in a TDR program that is constitutional, legal, and effective. There should be a clear and valid public purpose for applying a TDR program to an area: preservation of open space and scenic views, protection of natural areas, including wildlife habitats and the species therein, agricultural or forest preservation, and the protection of historic landmarks. Both the sending area and the receiving area should be designated clearly. The designation of sending and receiving areas should be consistent with the local comprehensive plan. This is an absolute necessity in states that require land development regulations to be consistent with a plan. But it is also desirable in other states, so that the selection of sending and receiving areas will be reasonable and related rationally to the other elements of the plan, and (just as important if not more so) will be seen by the public as such. The development rights which the sending parcel has transferred should be clearly recorded as a conservation easement against the sending parcel and in favor of the local government. This both gives notice to future owners of the restricted development and makes the restriction of development of the sending parcel enforceable by the local government in a civil action.

It should be noted that the transfer of development rights may occur separately from the exercise of those development rights on a receiving parcel. One does not have to purchase development rights intending to use them immediately, or even knowing where one will use them, so long as the development rights are exercised (if at all – a conservation group or concerned citizen could obtain TDRs with the intent of never using them) within a receiving area and otherwise in compliance with the Section.

There is one basic question that the *Legislative Guidebook* will not directly resolve: should TDR programs be mandatory or voluntary? This refers to whether the owners of sending parcels **may** or **must** transfer their development rights -- all TDR systems are predicated on the voluntary sale of the TDRs to receiving parcels, subject to approval in many cases. As the statutes cited above show, some states require voluntary programs, while others envision mandatory transfer of rights. The advantage of voluntary systems is, of course, that all takings challenges are effectively precluded when the transaction is contractual. On the other hand, if the local government wants all parcels in the sending area to transfer their development rights, the most straightforward means of achieving this is a mandatory system -- to obtain 100 percent participation voluntarily, the local government would probably have to offer substantial incentives, in the form of TDRs of much greater density or intensity than those lost on the sending parcel. Also, TDR as a component of a development regulation system that includes traditional exercise of the police power has been more accepted by the legal community than TDR alone.<sup>158</sup> Because local governments in the same state but facing

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<sup>158</sup>Telephone interview, 10/12/98, with John Costonis.

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different circumstances may see a need for one or the other system, Section 9-401 below does not specifically require voluntariness, and thus authorizes both voluntary and mandatory TDR programs.

	<b>TDR Systems</b>	
	<u>Voluntary</u>	<u>Mandatory</u>
Public/homeowner resistance?	Less	More
Potential for takings claims?	No	Yes
100% participation in sending district?	No*	Yes

\*unless expensive incentives provided

In determining what development right is being transferred from the sending parcel, uniform standards, preferably based on quantifiable measures like density, area, floor-area-ratio, or height, should be used. The application of the development rights to receiving areas must be planned carefully. The receiving area must have adequate public facilities and services to accommodate the increased development the TDRs bring, and a TDR enabling statute should require that this criteria be applied by TDR programs. The density or intensity of development permitted in the receiving area without TDRs is also important. If a receiving area, in order to encourage the transfer of development rights to the area, has so low an allowable density without TDRs that development in the area is not economically viable without the TDRs, claims of downzoning and takings are possible.<sup>159</sup> Conversely, if the zoning of the receiving area allows development at market capacity without the TDRs, or other means of achieving density increases (such as density bonuses for buildings designed with a plaza or other open area adjacent) are readily available, there will be little demand for the TDRs and their market value will be diminished.<sup>160</sup> To restate the issue, economically-viable use of parcels in the receiving area must be possible at the base zoning without using TDRs, but development of receiving parcels to the density the market is demanding should not be possible without employing TDRs -- a balancing act, indeed.

As well as providing a mechanism for transfers of development rights from one privately-owned parcel to another, the local government may wish to have a more direct role in the development rights market. It may wish to buy and sell development rights in order to stabilize the market, or it may wish to buy up development rights in order to preserve property from development in a non-regulatory manner. Whatever the reason, the mechanism for this is the TDR bank,<sup>161</sup> which buys

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<sup>159</sup>Mandelker, §11.34 at 491.

<sup>160</sup>Telephone interview, 10/12/98, with John Costonis; Juergensmeyer, Nicholas, and Leebrick at 447-448; Joseph Stinson and Michael Murphy, *Transfer of Development Rights*, ¶ 18, <[www.law.pace.edu/landuse/tdr.html](http://www.law.pace.edu/landuse/tdr.html)>.

<sup>161</sup>For more on TDR banking, see Sarah J. Stevenson, "Banking on TDRs: The Government's Role as a Banker of Transferable Development Rights," *1999 Zoning and Planning Law Handbook* (St. Paul, MN: West Group, 1999): 419-478 .

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and receives donations of development rights, holds them, and may sell or convey them. The bank may be funded by tax or fee revenue, or by donations with local legislative approval, but it is also expected to use the revenue from the sale of development rights to fund future purchases. The model Section authorizes the creation of such a bank, which may be a governmental agency or a non-profit organization.

Beyond the legal factors for the effectiveness of TDR programs, there are market considerations. Specifically, not only must development be legally possible at the underlying zoning, there must be a market demand for development at a density or intensity *higher* than that available under zoning alone. In short, economic growth and development pressure must be occurring in the receiving area. Otherwise, there will be no market demand for the development rights even if the ordinance is well-drafted.

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### 9-401 Transfer of Development Rights

- (1) A local government may adopt local land development regulations and amendments that include provisions for the transfer of development rights, in the manner prescribed in this Section.
- (2) The purposes of this Section are to:
  - (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
  - (b) conserve agriculture and forestry uses of land;
  - (c) protect lands and structures of aesthetic, architectural, and historic significance;
  - (d) [*other purposes*];
  - (e) ensure that the owners of land that is so preserved, conserved, or protected may make reasonable use of their property rights by transferring their right to develop to other properties that can make use of it;
  - (f) provide a mechanism whereby development rights may be reliably transferred;
  - (g) ensure that development rights are transferred to properties that are in areas or districts that have adequate community facilities, including transportation, to accommodate additional development; and
  - (h) authorize the local government to create a TDR Bank, whereby development rights may be purchased and conveyed by the local government, in order to stabilize the market in development rights and to regulate or control the development of property

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that the local government intends to protect under subparagraphs (a) through (d) above.

- (3) As used in this Section, and all other Sections of this Act where “transfer of development rights” is referred to:
- (a) “**Development Rights**” mean the rights of the owner of a parcel of land, under land development regulations, to place that parcel and the structures thereon to a particular use or to develop that land and the structures thereon to a particular area, density, bulk, or height;
  - (b) “**Receiving District**” means one or more districts in which the development rights of parcels in the sending district may be used;
  - (c) “**Receiving Parcel**” means a parcel of land in the receiving district that is the subject of a transfer of development rights, where the owner of the parcel is receiving development rights, directly or by intermediate transfers, from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights;
  - (d) “**Sending District**” means one or more districts in which the development rights of parcels in the district may be designated for use in one or more receiving districts;
  - (e) “**Sending Parcel**” means a parcel of land in the sending district that is the subject of a transfer of development rights, where the owner of the parcel is conveying development rights of the parcel, and on which those rights so conveyed are extinguished and may not be used by reason of the transfer of development rights; and
  - (f) “**Transfer of Development Rights**” means the procedure prescribed by this Section whereby the owner of a parcel in the sending district may convey development rights to the owner of a parcel in the receiving district, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing regarding that parcel.
- (4) The legislative body of a local government may adopt a transfer of development rights program only by ordinance, in the manner for land development regulations pursuant to Section [8-103], and an ordinance pursuant to this Section shall:
- (a) be adopted by the legislative body only after it has adopted:
    - 1. a local comprehensive plan; and

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2. for a transfer of development rights program concerning critical and sensitive areas, a critical and sensitive areas element pursuant to Section [7-209];
  3. for a transfer of development rights program concerning natural hazards, a natural hazards element pursuant to Section [7-210];
  4. for a transfer of development rights program concerning agriculture, forest, or scenic preservation, an agriculture, forest, and scenic preservation element pursuant to Section [7-212]; and/or
  5. for a transfer of development rights program concerning historic preservation, a historic preservation element pursuant to Section [7-215];
- (b) be adopted by the legislative body only after a public hearing has been held on the proposed ordinance, with notice to all owners of property in the proposed sending and receiving districts. Any purported adoption contrary to this subparagraph shall be void;
  - (c) include a citation to enabling authority to adopt and amend the transfer of development rights ordinance;
  - (d) include a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;
  - (e) include a statement of consistency with the local comprehensive plan and with the applicable elements thereof, as listed in subparagraph (4)(a) above, that is based on findings made pursuant to Section [8-104];
  - (f) describe in detail both the sending and receiving districts, and shall require the designation of both the sending and receiving districts on the zoning map of the local government;
  - (g) describe the development rights to be transferred in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
  - (h) require that the owner of a sending parcel execute, and record with the county [*recorder of deeds*], a deed or instrument creating a conservation easement, describing the released development rights in reasonable detail and preferably in quantifiable terms. The sending parcel shall be the servient estate and the local government shall be the holder of the easement, and the local government may specify one or more non-profit organizations to be additional holders of the easement. Before any such easement is recorded, the instrument shall be submitted to the [local planning agency] for its approval;

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- (i) require that, before any transfer of development rights may be completed, the [local planning agency] shall approve the transfer of development rights. The only bases for rejecting a proposed transfer of development rights is that the development rights released by the instrument vary significantly from the development rights that the sending parcel is supposed to be releasing pursuant to the transfer of development rights, or there is some other significant error in the instrument;
- ◆ Note that there may be intermediate transfers of the development rights. Each transfer, with the exception of transfer to the owner of a receiving parcel who intends to exercise the development rights, is reviewed by the local government but only to ensure that the development rights being transferred are consistent with the original conservation easement.
- (j) require that, before any development rights transferred may be exercised upon a receiving parcel, the [local planning agency] shall approve the exercise of development rights. The only bases for rejecting a proposed exercise of development rights are that:
  - 1. the proposed receiving parcel upon which the development rights are to be exercised is not in a receiving district; or
  - 2. the exercise of development rights would increase the density or intensity of development on the receiving parcel to a degree that violates one or more of the provisions of paragraph (8) below; and
- (k) require that, once an exercise of development rights is approved, the [local planning agency] issue to the owner of the receiving parcel, and record with the county [*recorder of deeds*], a certificate assigning to the receiving parcel, and all present and future owners thereof, the development rights that the receiving parcel is to receive through the transfer of development rights. Such certificate shall describe the development rights in reasonable detail and refer to the instrument creating the conservation easement, and the certificate shall have a copy of the instrument attached.
- (5) Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.
- (6) No district shall be designated as a receiving district unless the local legislative body finds, before enacting an ordinance authorized by this Section, that the district has or will have adequate community facilities and other resources to accommodate the increased development authorized by the transfer of development rights from the sending district.
- (7) No district, or portion of any district, designated as a receiving district, shall be downzoned to the degree that no reasonable use can be made of a parcel of property, either after an

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ordinance pursuant to this Section has been adopted or before such adoption in anticipation of adoption.

- ◆ This paragraph is intended to prevent the takings problem discussed above, whereby, to encourage the use of TDRs in a receiving district, the local government downzones the district to the degree that owners cannot make a reasonable use of their property in the district unless they purchase TDRs.

- (8) Any other provision of local land development regulations to the contrary, the density or intensity of development of a receiving parcel may be increased by the transfer of development rights so long as the increase in density or intensity:
  - (a) is consistent with the local comprehensive plan; [and]
  - (b) is not incompatible with the land uses on neighboring lots or parcels; [and]
  - [(c) is not more than [20] percent greater than the development rights of the receiving parcel without the transfer of development rights.]

- ◆ No increase in density or intensity may contravene the plan or be inconsistent with surrounding land uses. However, some states may prefer a clear, numerical, limitation on the increase, and therefore subparagraph (c) is provided as an option. Note that the 20 percent figure can be altered at the state's preference.

- (9) The local government shall notify the county [*property tax assessor*] of a transfer of development rights within [30] days of:
  - (a) the approval of a transfer of development rights pursuant to subparagraph (4)(i) above;
  - (b) the issuance of a certificate pursuant to subparagraph (4)(k) above;
  - (c) the condemnation or purchase of development rights by the local legislative body or the TDR Bank, pursuant to subparagraphs (10)(a) or (b) below;
  - (d) the receipt by the TDR Bank of a donation of development rights pursuant to subparagraph (10)(e) below; or
  - (e) the sale or conveyance of development rights by the TDR Bank pursuant to subparagraph (10)(c) below;

and the [*assessor*] shall adjust the valuations for purposes of the real property tax of the sending parcel and of the receiving parcel or parcels, if any, appropriately for the development rights extinguished or received.

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- (10) The local government may, by ordinance, establish a transfer of development rights bank, otherwise referred to as the “TDR Bank.” The TDR Bank may be operated by the [local planning agency] or by any other existing or new entity designated by the ordinance, including an agency of the local government, the [regional planning agency] or [state planning agency], or a non-profit organization.
- (a) The TDR Bank shall have the power to purchase development rights[, subject to the approval of the local legislative body].
  - (b) The TDR Bank shall have the power to recommend to the local legislative body properties where the local government should acquire development rights by condemnation.
- ◆ If the local government itself does not have the power under the state eminent domain enabling statute to condemn development rights or a conservation easement (which is the same thing), that statute **must** be amended to give the local government that power, so that it can then be delegated pursuant to this paragraph.
- (c) The TDR Bank shall have the power to sell or convey any development rights it may possess[, subject to the approval of the local legislative body].
  - (d) The TDR Bank may, for conservation or other purposes, hold indefinitely any development rights it possesses.
  - (e) The TDR Bank may receive donations of development rights from any person or organization, public or private[, subject to the approval of the local legislative body].
  - (f) The TDR Bank may be funded from:
    - 1. the [general *or other*] fund of the local government treasury;
    - 2. the proceeds of the sale of development rights by the TDR Bank; or
    - 3. grants or donations from any source.
- A separate account in the local government treasury shall be established, into which the aforementioned funding shall be paid and from which the TDR Bank may purchase or condemn development rights and pay its reasonable expenses.
- (11) Two or more local governments may enter into an implementation agreement, pursuant to Section [7-503], whereby transfer of development rights may occur between a sending parcel in one local government and a receiving parcel or parcels in another local government. All relevant provisions and terms in ordinances pursuant to this Section in all local governments that are parties to the agreement shall be substantially identical, and this may be provided by

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including with the agreement a common ordinance to be adopted by all parties to the agreement.

- (12) This Section, or any provision thereof, shall not invalidate any completed transfer of development rights pursuant to any earlier statute, ordinance, or regulation, if said transfer was valid at that time.

- ◆ Paragraph (12) is a “savings clause,” preserving the validity of earlier transfers of development rights, even if performed contrary to the requirements of this Section, as long as they were legally proper at the time.

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### ***Commentary: Conservation Easements; Purchase of Development Rights***<sup>162</sup>

A local government may prevent certain types or categories of development on private property through regulation. However, the Fifth and Fourteenth Amendments to the U.S. Constitution, and similar provisions in state constitutions, limit governments’ ability to preclude all development of property; with certain exceptions, the general rule is that government may not prohibit all reasonable use of one’s property unless it pays “just compensation.”<sup>163</sup> More commonly, local political conditions may be adverse to a regulatory solution even where the proposed regulation would not prohibit all reasonable uses of the land and is clearly not a taking. In these cases, with political or legal roadblocks to a regulatory approach, local governments with the resources to do so may prefer to “buy out” certain development rather than prohibit it.

The local government could purchase or condemn the parcel on which it wishes to bar development. But this results in the local government paying the full value of the parcel and owning it outright. As such, purchasing the property may not be appropriate when the government wants to prevent some or all further development yet wishes the property to continue in private ownership, as with historic and agricultural preservation. Enter purchase of development rights, or “PDR.” Purchasing just the development rights that the local government wants to prevent being used is a more narrowly focused instrument, and tends to be less expensive than purchasing the full (fee simple) title to the property.

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<sup>162</sup>See generally E. Thompson, Jr., “‘Hybrid’ Farmland Protection Programs: A New Paradigm for Growth Management?” *William & Mary Env’t L. & Pol. Review*, Vol. 23 (Fall 1999): 831; Thomas S. Barrett & Stefan Nagel, *Model Conservation Easement and Historic Preservation Easement, 1996* (Washington D.C.: Land Trust Alliance, 1996); Janet Diehl & Thomas S. Barrett, *The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs* (Washington D.C.: Land Trust Alliance, 1988); Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources* (Denver: Colorado Historical Society, 1984).

<sup>163</sup>U.S. Constitution, Amendment V; *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992).

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Purchasing development rights is not a general substitute for regulation. Though cheaper than outright purchase of land, it is still relatively expensive. And regulatory measures rarely run afoul of the takings clause. Instead, PDR is a supplement to regulation, a method of making local government regulation more palatable to the affected landowners when their reaction is a serious political consideration. Indeed, the purchase of development rights can be a needed cash inflow allowing landowners such as farmers and ranchers to maintain or even expand that use, therefore contributing to the maintenance of a viable agricultural economy in the area. As such, PDR has become another useful tool for controlling the uses of land. For example, as of March 2000, 19 states and 34 localities in those states were protecting nearly 820,000 acres of farmland with PDR.<sup>164</sup>

### **PDR AND TAXES**

The use of PDR provides tax benefits to the landowner who has conveyed away their development rights. These benefits come under both real property taxes and income and estate taxes.

Land is typically assessed according to the value it could receive on the open market, which includes the uses to which it can be put as well as the present use or uses. Therefore, farmland, historic property, or open space that may legally be developed is valued and taxed commensurate with the most intense legal development. Since the landowner is not engaging in this more intense use, and therefore does not have the revenue from it, but pays a real property tax as if he or she were, there is a strong incentive for the unprofitable or marginally profitable owner to develop the property or sell it to developers. PDR constitutes a concrete legal limitation on the use of the property that is grounds for reducing the assessed value of the property and thereby its property taxes.

Since a conservation easement decreases the monetary value of the land it affects, the capital gain that would otherwise incur tax liability upon the sale of the property can be reduced or even become a capital loss. The same reduction in valuation affects the estate tax where applicable. Furthermore, the donation of a conservation easement to local governments and certain non-profit organizations is deductible for federal income tax<sup>165</sup> and estate tax<sup>166</sup> purposes, the latter up to 40 percent of the value of the land with a maximum of \$500,000. Nine states expressly provide for income tax credits for donated conservation easements.<sup>167</sup>

Altogether, the tax benefits may be significant enough for an owner who wishes to continue using the property in its present state to give a conservation easement, rather than sell one, solely

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<sup>164</sup>American Farmland Trust, <http://www.farmlandinfo.org/fic/tas/tafs-pacestate.html>

<sup>165</sup>26 U.S.C. §170(h).

<sup>166</sup>26 U.S.C. §2031(c).

<sup>167</sup>Arizona: Ariz. Rev. Stat. §§ 43-1021, 43-1081.02, 43-1121, & 43-1180; California: Cal. Pub. Res. Code §§37000 *et seq.*, Cal. Rev. & Tax Code §§ 17039.1, 17053.30, 23036.1, & 23630; Colorado: Colo. Rev. Stat. §39-22-522; Connecticut: Conn. Gen'l Stat. §12-217dd; Delaware: Del. Code §§30-1801 *et seq.*; Maryland: Md. Tax Code §§10-218 & 10-722; North Carolina: N.C. Gen'l Stat. §§105-130.34 & 105-151.12; South Carolina: S.C. Code §§12-6-3515, 50-3-1110 *et seq.*, & 62-3-715; Virginia: Va. Code §§58.1-510 *et seq.*.

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in order to take advantage of the lower property taxes and income tax deduction. Or a marginally profitable landowner who is not averse to developing his or her property may find that the tax breaks exceed the gain from developing the land or holding it for development.

### STATE STATUTES ON PDR

Several states have statutes expressly authorizing the purchase of development rights for purposes of preservation. The purposes for which states authorize PDR include the protection of open space and scenic views,<sup>168</sup> agricultural and forest preservation,<sup>169</sup> the protection of historic or cultural sites, or some combination of these.<sup>170</sup> Most of these statutes are bare authorizations to engage in the purchase of development rights for particular stated purposes, any detailed provisions in the statute being concerned with the funding and financial issues of PDR programs.

### THE LEGAL BASICS OF EASEMENTS<sup>171</sup>

The legal tool by which a local government (and others) can purchase just the development rights it wishes, while leaving title in the owner's private hands, is the **conservation easement**. An easement is a non-possessory right of a person or entity over the real property of another. It is non-possessory because, unlike a lease, it does not allow the person or entity to occupy the premises. Instead, it allows the person or entity to perform some specific action on the property which it otherwise would not be able to do (positive easements) or requires the owner of the property to refrain from some activity that he or she would otherwise be able to do (negative easements). Examples of positive easements include rights-of-way – the right to cross another's premises – and mineral rights, while negative easements include solar easements – prohibiting an owner from building a structure that would block sunlight from the neighboring property.

Though some easements may be created by law without the consent of the owner – for example, a lot or parcel with no direct access to a public thoroughfare will have a right of way across its neighbor by necessity – most easements are created by agreement. Easements can be structured so

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<sup>168</sup>Arizona: Ariz. Rev. Stat. §§9-464 *et seq.*; Colorado: Colo. Rev. Stat. §§31-25-201, 31-25-301 (authorizing PDR to preserve both open space and “vistas of scientific, historic, aesthetic, or other public interest”); Connecticut: Conn. Gen'l Stat. §7-131d; Iowa: Iowa Code §§457A.1 *et seq.*; Massachusetts: 1998 Mass. Acts ch. 293 (Cape Cod Open Space Land Acquisition Program); Missouri: Mo. Rev. Stat. §67.880; New Hampshire: N.H. Rev. Stat. §§79-C:1 *et seq.*; New Jersey: N.J. Stat. §§13:8A-1 *et seq.* (New Jersey Green Acres Land Acquisition); New York: N.Y. Envtl. Conserv. Law §§54-0301 *et seq.*; Pennsylvania: 32 Penn. Stat. §§5001 *et seq.*; Virginia: Va. Code §15.2-2403.

<sup>169</sup>California: Cal. Gov't Code §§10230 *et seq.*; Michigan: Mich. Comp. Laws §§125.231 *et seq.*, 125.301 *et seq.*, and 125.593 *et seq.*; Rhode Island: R.I. Gen'l Laws §§42-85-5 *et seq.*; Wisconsin: Wis. Stat. §§91.01 *et seq.*

<sup>170</sup>Indiana: Ind. Code §§14-12-2-1 *et seq.* (Indiana Heritage Trust Program); Ohio: Ohio Rev. Code §§5301.67 *et seq.* (agricultural and open space preservation).

<sup>171</sup>See generally Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* (Colorado Springs, CO: Shepard's/McGraw-Hill, Inc., 1990).

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that the duty is owed to a particular person or entity personally (easements in gross) or to whomever owns a particular property (an easement appurtenant). The property subject to these duties is referred to as the “burdened” or “servient” estate, while the party or property to which the duty is owed is the “benefitted” or “dominant” estate or party.

What differentiates an easement from an ordinary contract is that the easement binds future owners of the servient estate, even though they were not parties to the original agreement, so long as the document creating the easement is properly recorded or the owner is otherwise given notice of the existence of the easement. Similarly, the benefit of an easement appurtenant runs automatically to future owners of the dominant property.

### CONSERVATION EASEMENTS

A conservation easement is an example of a negative easement, whereby the owner of the burdened estate is bound not to engage in development activities that he or she would otherwise have a right to perform. A conservation easement can prohibit all future development, or it can specify particular development activities that are prohibited. For example, a scenic easement may prohibit the construction of buildings and structures in certain locations or above a particular height that would obstruct the view protected by the easement. It should be noted that a conservation easement may include positive duties – maintaining a building in good repair, or clearing tree stumps from a field, for example – as well as negative ones.

Since easements are a creation of the common law (actually, equity), conservation easements do not, strictly speaking, require an enabling statute. However, there are several characteristics of common-law easements that are adverse to useful and effective conservation easements. Traditionally, easements are not created or enforceable unless there is “privity of contract” and “privity of estate” between the parties.<sup>172</sup> For an easement to exist, the obligations or restrictions thereunder must be considered to “touch and concern the land,” which means “there must be some fundamental link between the promise and the burdened and benefitted land.”<sup>173</sup> Beyond the general vagueness of “touch and concern,” another complication is that, for an easement appurtenant, “touch and concern” must be satisfied for both the servient and the dominant estate. Many courts look suspiciously at easements that require the owner of the servient estate to actively perform some duty or activity, especially where the easement is in gross. In many states, easements in gross terminate with the original beneficiary of the easement and cannot be assigned to another.<sup>174</sup> Depending on

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<sup>172</sup>It is not necessary to explain privity of estate or contract in detail, except to state that they make enforcement of easements in gross by or against successors to the original parties difficult and uncertain, and are considered by many attorneys and lawmakers to be archaic requirements.

<sup>173</sup>Korngold §9.10, p. 307-309.

<sup>174</sup>Korngold, §5.08, p. 198.

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how the easement is created, in some states it may be enforceable only by injunction or with monetary damages but not both.<sup>175</sup>

Though the courts have modified or abolished these rules in many states, others have not, and thus there is uncertainty about the formation, enforceability, and assignability of conservation easements. To remove this uncertainty and subject conservation easements to only those reasonable requirements that are necessary to protect the parties and the public, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Conservation Easement Act.<sup>176</sup> Several states<sup>177</sup> have adopted conservation easement acts based on the Uniform Act. Under the Uniform Act and the state statutes adopting it, conservation easements are perpetual unless expressly stated otherwise. Conservation easements may be created without privity of contract or estate, where the agreement does not “touch and concern” the land, and where an easement in gross imposes a positive duty. The assignment of the benefit under a conservation easement is permitted even where it is an easement in gross. Conservation easements may be enforced in either law or equity, and both monetary damages and injunctive relief are available. In short, these statutes greatly reduce the potential that a conservation easement may be rendered unenforceable not because it was not the product of reasonable, voluntary agreement but because of archaic case law not related to the protection of the parties or the public.

Many of the state conservation easement acts (though not the Uniform Act) also expressly state that valuation of the servient estate for real property tax purposes must be adjusted to account for the development rights that have been extinguished by the conservation easement. Also, the Uniform Act and the adopting statutes authorize all “governmental units” to enter into conservation easements for purposes of preserving open space, natural areas, wildlife and plant habitat, agricultural and forest lands, and properties of historic, archeological, cultural, or aesthetic significance. Therefore, they are effectively general authorization for local governments to create and operate PDR programs for all the typical purposes of such programs.

### THE MODEL STATUTES

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<sup>175</sup>Korngold, §8.01, p. 249-250.

<sup>176</sup>National Conference of Commissioners on Uniform State Laws, “Uniform Conservation Easement Act,” in *Land Saving Action: A Written Symposium by 29 Experts on Private Land Conservation in the 1980s*, Russell L. Brenneman and Sarah M. Bates, eds., pp. 111-116 (Covelo, CA: Island Press, 1984).

<sup>177</sup>Arkansas: Ark. Code §§15-20-401 *et seq.*; Delaware: Del. Code §§11-6901 *et seq.*; Florida: Fla. Stat. §704.06; Georgia: Ga. Code §§44-10-1 *et seq.*; Hawaii: Haw. Rev. Stat. §§ 198-1 *et seq.*; Idaho: Idaho Code §§55-2101 *et seq.*; Illinois: 765 Ill. Comp. Stat. §§120/0.01 *et seq.*; Kansas: Kan. Stat. §§58-3810 *et seq.*; Maine: 33 Me. Rev. Stat. §§476 *et seq.*; Minnesota: Minn. Stat. §§84C.01 *et seq.*; Mississippi: Miss. Code §§89-19-1 *et seq.*; Nebraska: Neb. Rev. Stat. §§76-2,111 *et seq.*; Nevada: Nev. Rev. Stat. §§111.390 *et seq.*; North Carolina: N.C. Gen'l Stat. §§121-34 *et seq.*; Oregon: Or. Rev. Stat. §§271.710 *et seq.*; South Carolina: S.C. Code §§27-8-10 *et seq.*; South Dakota: S.D. Codified Laws §§1-19B-56 *et seq.*; Texas: Tex. Nat. Res. Code §§183.001 *et seq.*; Utah: Utah Code §§57-18-1 *et seq.*; Vermont: 10 Vt. Stat. §§821 *et seq.*; Washington: Wash. Rev. Code §§64.04.130 and 84.34.200 *et seq.*

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Before local governments can be authorized to purchase development rights through conservation easements, there must be legal authorization for conservation easements themselves. Therefore, included as Section 9-402.1 is a model conservation easements Section modeled upon the Uniform Conservation Easement Act. Since this Section deals with conservation easements by both governmental and private entities, it is appropriately placed in any codification with other statutes related to real property in general and easements specifically. Where a state has adopted the Uniform Conservation Easement Act or a similar statute, there is no need to adopt Section 9-402.1.

The model statute authorizing purchase of development rights by local governments, Section 9-402, is based on Section 9-401, which authorizes transfer of development rights (TDR). This is because PDR and TDR serve similar purposes of preserving desirable land or preventing undesirable development without resorting to regulation. Both provisions require that the local government have a local comprehensive plan and appropriate plan elements (critical and sensitive areas, natural hazards, agricultural and forest preservation, and/or historic preservation) in place before adopting a PDR or TDR program, and that the program be consistent with that plan and elements. Both require the owner of the parcel where development rights are to be extinguished to execute a conservation easement, that the easement must be submitted to the local government for approval, and that such approval can be denied only on limited and specified bases. Both prohibit the recording of an unapproved conservation easement. And both Sections have savings clauses for any TDR and PDR that occurred under previous statutes or ordinances.

The PDR statute also authorizes the local government to accept voluntary donations of development rights. Except that no price is paid for the development rights, such transactions are structured identically to purchases of development rights, with a conservation easement executed, approved by the local government, and recorded. As stated above, voluntary donations of development rights may occur when the landowner does not intend to exercise the development rights for some reason of personal preference and conveys the development rights in order to receive the property tax benefits of a lower land valuation, or when it is more profitable for a land owner to receive the tax benefits than to exercise or hold the development rights.

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### **9-402 Purchase of Development Rights**

- (1) A local government may adopt local land development regulations and amendments that include provisions for the purchase of development rights, in the manner prescribed in this Section.
- (2) The purposes of this Section are to:
  - (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
  - (b) conserve agriculture and forestry uses of land;

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- (c) protect lands and structures of aesthetic, architectural, and historic significance;
  - (d) [*other purposes*];
  - (e) ensure that the owners of land that is so preserved, conserved, or protected may be reasonably compensated for restrictions on otherwise permissible uses of their property rights while retaining ownership of the land and the right to commence and continue uses not so restricted; and
  - (f) provide a procedure for local governments to engage in such preservation, conservation, and/or protection through conservation easements.
- (3) For the purposes of this Section, “**Purchase of Development Rights**” means:
- (a) the purchase of development rights from an owner of land by a local government; and/or
  - (b) the voluntary donation of development rights by an owner of land to a local government.
- (4) The legislative body of a local government may adopt a purchase of development rights program only by ordinance, in the manner for land development regulations pursuant to Section [8-103], and an ordinance pursuant to this Section shall:
- (a) be adopted by the legislative body only after it has adopted:
    - 1. a local comprehensive plan; and
    - 2. for a purchase of development rights program concerning critical and sensitive areas, a critical and sensitive areas element pursuant to Section [7-209];
    - 3. for a purchase of development rights program concerning natural hazards, a natural hazards element pursuant to Section [7-210];
    - 4. for a purchase of development rights program concerning agriculture, forest, or scenic preservation, an agriculture, forest, and scenic preservation element pursuant to Section [7-212]; and/or
    - 5. for a purchase of development rights program concerning historic preservation, a historic preservation element pursuant to Section [7-215];
  - (b) include a citation to enabling authority to adopt and amend the purchase of development rights ordinance;

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- (c) include a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;
  - (d) include a statement of consistency with the local comprehensive plan and with the applicable elements thereof, as listed in subparagraph (4)(a) above, that is based on findings made pursuant to Section [8-104];
  - (e) describe the development rights that may be purchased in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
  - (f) require the local government to conduct an appraisal of the value of the parcel from which the local government is to purchase development rights and of the value of the development rights to be purchased; and
  - (g) require that the local government and any owner of a parcel from which the local government is to purchase development rights enter into a written purchase of development rights agreement in compliance with paragraphs (5) and (6) below.
- (5) A purchase of development rights agreement shall, at a minimum:
- (a) state the address and legal description of the premises;
  - (b) state the name of all record owners of the premises;
  - (c) describe the development rights to be purchased in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
  - (d) state the price that the local government shall pay in consideration of the purchase of development rights, including any agreed terms under which payment is to be made, unless the development rights are being voluntarily donated by the owners of the parcel;
  - (e) require that the owners of the parcel execute a deed or instrument creating a conservation easement, releasing development rights as agreed and describing the released development rights in reasonable detail, preferably in quantifiable terms, with the parcel from which development rights are being purchased as the servient estate and the local government as the holder of the easement;
  - (f) provide that the owner of the parcel shall submit the conservation easement to the [local planning agency] for its approval before the local government is obligated to pay the stated price;

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- (g) require that the local government approve the conservation easement, indicate its approval on the instrument creating the easement, and pay the agreed price within [28] days of submission of the instrument unless the development rights released by the conservation easement vary significantly from the development rights that the owner of the servient estate agreed to release pursuant to the purchase of development rights or there is some other significant error in the instrument; and
  - (h) require the owners of the servient estate to record any approved conservation easement with the county [*recorder of deeds*] within [28] days of payment, or of approval if the development rights are being voluntarily donated.
- (6) A purchase of development rights agreement may require that the conservation easement pursuant to paragraph (5)(e) above name one or more non-profit organizations as additional holders of the easement.
- ◆ There are non-profit organizations, such as land trusts, that have as their primary mission the protection of land and the preservation of the important resources thereon. The inclusion of such organizations as easement holders can be a valuable addition to a PDR program.
- (7) Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.
  - (8) This Section, or any provision thereof, shall not invalidate any completed purchase or gift of development rights pursuant to any earlier statute, ordinance, or regulation, if said transfer was valid at that time.

### 9-402.1 Conservation Easements

- (1) Conservation easements may be created and enforced according to the provisions of this Section.
- (2) The purposes of this Section and of a conservation easement are to:
  - (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
  - (b) conserve agriculture and forestry uses of land;
  - (c) protect lands and structures of aesthetic, architectural, and historic significance;
  - (d) preserve affordable housing; and

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- ◆ A conservation easement may be used to preserve affordable housing by prohibiting the conversion of affordable housing to market-rate housing or to another land use entirely.
  - (e) ensure that the owners of land that is so preserved, conserved, or protected may retain ownership of the land and the right to commence and continue uses not so restricted.
- (3) As used in this Section, and elsewhere in this Act where “conservation easements” are referred to:
  - (a) “**Conservation Easement**” means a non-possessory interest of a holder in real property imposing limitations or affirmative obligations upon the owners of that property for the purposes enumerated in paragraph (2) of this Section. Such limitations or obligations may include, but are not limited to, one or more of the following prohibitions:
    1. constructing or placing buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
    2. dumping or placing soil or other substance or material as landfill or dumping or placing trash, waste, or unsightly or offensive materials;
    3. removing or destroying trees, shrubs, or other vegetation;
    4. excavating, dredging, or removing loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface;
    5. surface use except for purposes that permit the land or water area to remain predominantly in its natural condition;
    6. activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation;
    7. acts or uses detrimental to such retention of land or water areas; and
    8. acts or uses detrimental to the preservation of sites or properties of historical, architectural, archaeological, or cultural significance.
  - (b) “**Entities Eligible to Be a Holder**” means:
    1. any governmental unit authorized to own real property and/or interests therein;
    2. any governmental unit participating in a transfer of development rights program under Section [9-401], a purchase of development rights program

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under Section [9-402], and/or a mitigation banking program under Section [9-403];

- ◆ Sections 9-401(12) and 9-402(8) are savings clauses for existing valid transfers, purchases, and gifts of development rights. Therefore, existing TDRs and PDRs are effectively “under” the above Sections.

3. any charitable or not-for-profit organization, corporation, or trust whose purposes include or encompass protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving sites or properties of historical, architectural, archaeological, or cultural significance; and
  4. any person or entity participating in a mitigation banking program pursuant to Section [9-403].
- (c) “**Holder**” means any entity, eligible to be a holder, that is:
1. a party to a conservation easement other than an owner of the servient estate or an entity having a third-party right of enforcement;
  2. a successor in interest, by assignment, to such a party; or
  3. an owner of a dominant estate, if any, under a conservation easement.
- (d) “**Third-Party Right of Enforcement**” means a right provided in a conservation easement to enforce any of its terms granted to an entity that is eligible to be a holder but is not a holder of the conservation easement.
- (e) “**Servient Estate**” means the property subject to limitations or obligations pursuant to a conservation easement.
- (4) (a) Except as otherwise provided herein, a conservation easement may be created, conveyed, recorded, or assigned in the same manner as other easements.
- (b) A conservation easement may be modified, released, or terminated only by order of the [*name of court*] upon findings, supported by evidence, that:
1. a change or changes in circumstance since the creation of the conservation easement has rendered the particular purpose or purposes of the conservation easement impracticable; and
  2. the modification, release, or termination is consistent with a specific goal, policy, or provision in the local comprehensive plan.

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A mere change in value of the servient estate shall not suffice as grounds for a modification, release, or termination. The court shall give preference to modification, adhering to the doctrine of “cy pres,” and shall approve release or termination only if the conservation easement can no longer be used to accomplish any conservation purpose. The court may require the payment of appropriate damages and/or restitution for a release or termination.

- ◆ This standard (with the exception of comprehensive plan consistency) is adapted from the American Law Institute’s *Restatement of the Law 3<sup>rd</sup>, Property (Servitudes)*, Section 7.11 (2000). The Restatements are summaries of the existing case law on various legal topics produced by a nationwide committee of attorneys and legal scholars. “Cy pres” is French for “as close as possible” and is the guiding principle when legal documents must be amended by the courts because the parties’ original intention can no longer be implemented through the document as originally written.
  - (c) The provisions of this Section shall not be construed to imply that any restriction, easement, covenant, or condition that does not have the benefit of this Section shall, on account of any provision hereof, be void, invalid, or unenforceable.
- ◆ These provisions clarify that the existing case law on easements has not been eliminated by this Section. Easements that do not qualify for this Section are not rendered void by that fact, but are valid or invalid based on their status under existing law.
  - (5) Conservation easements:
    - (a) may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the servient estate;
    - (b) may [not] be created by condemnation or by other exercise of the power of eminent domain;
- ◆ The purpose of this paragraph is to encourage adopting legislatures to squarely address the issue of conservation easements by eminent domain. If an adopting state legislature desires that conservation easements be created solely through voluntary transactions, then the “not” in the above paragraph should be included. If a legislature instead wishes to provide expressly that conservation easements may be obtained by eminent domain, the “not” should be deleted.
  - (c) shall run with the land, shall be of unlimited duration unless otherwise provided in the conservation easement, and shall be binding on all subsequent owners of the servient estate;
- ◆ This is the basic distinction between an easement and any other contractual arrangement.

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- (d) shall not be void, invalid, or unenforceable on account of:
  - 1. lack of privity of estate or contract;
  - 2. lack of a dominant estate or of benefit to particular land;
  - 3. the benefit being assignable;
  - 4. the imposition of any affirmative obligations or negative burdens on a holder, the servient estate, or any owner of the servient estate;
  - 5. being of a character or containing any provisions not recognized traditionally in covenants or easements, either at common law or in equity; or
  - 6. the benefit not touching or concerning real property.
- (e) shall be assignable to entities eligible to be a holder regardless of the lack of benefit to a dominant estate, unless otherwise provided in the conservation easement; and
- (f) may be released by the holder of the easement to the owner of the servient estate even though the owner of the servient estate may not be eligible to be a holder.
- (6) All conservation easements shall be recorded with the county [*recorder of deeds*] in the same manner as any other instrument affecting title to real property, with the exception of conservation easements, or instruments purporting to be conservation easements, that are required by Sections [9-401], [9-402], or [9-403] to be marked with the approval of the local government but are not so marked.
- (7) The owner of the servient estate shall submit a copy of a recorded conservation easement to the county [*property tax assessor*] within [30] days of the recordation, and the [*assessor*] shall adjust the valuations for purposes of the real property tax of the servient estate appropriately for the development rights extinguished by the conservation easement.
- (8) A conservation easement may be enforced by a civil action:
  - (a) commenced by any holder of the easement or entity having a third-party right of enforcement; and
  - (b) based in equity, law, or both, with any appropriate remedies in law and equity available, including both injunctive relief and monetary damages.

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- (9) A civil action affecting a conservation easement may be commenced by an owner of an interest in the servient estate, a holder of the conservation easement, an entity having a third-party right of enforcement, or a person so authorized by another law.
  - (10) A holder of a conservation easement may enter upon the servient estate in a reasonable manner and at reasonable times to assure compliance with the conservation easement.
  - (11) The ownership or attempted enforcement of rights held by the holder of a conservation easement does not by itself subject the holder to any liability for any damage or injury that may be suffered by any person on the servient estate or as a result of the condition of the servient estate.
- ◆ This provision insulates holders of conservation easements from being named in civil actions arising from the premises of the servient estate solely because of their non-possessory interest in that estate as an easement holder.

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### ***Commentary: Mitigation***<sup>178</sup>

When a developer proposes to develop property that includes critical and sensitive areas, such as wetlands, there are basically two possible methods. The first is to refrain from developing the portions of the property that constitute critical and sensitive areas. The second, which is the focus of this Section, is mitigation. As used in this context, mitigation is substitution, where the critical and sensitive areas to be developed are replaced or compensated for by the creation of new critical and sensitive areas. Mitigation can involve either creating critical and sensitive areas from land that was never critical and sensitive, or restoring land that was once a critical and sensitive area to that former condition. Also, mitigation can involve the developer creating or restoring such areas on his or her own land or, alternatively, obtaining land (or rights to land) that has been converted to a critical and sensitive area by another person or organization.

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<sup>178</sup>See generally Mark S. Dennison, *Wetland Mitigation: Mitigation Banking and Other Strategies for Development and Compliance* (Rockville, MD: Government Institutes, Inc., 1997); Megan Lewis, "Swamps for Sale: Wetlands Mitigation Banking," *Environment and Development*, Mar./Apr. 1996 (Chicago: APA Press); "Banking on Wetlands," *Environmental Manager*, February 1996 (John Wiley & Sons); Brian Blaesser, "New Federal Wetlands Policy: The Landowner's Perspective," *Land Use Law & Zoning Digest* Vol. 46, No. 1: 3,6-8 (January 1994); Robert D. Sokolove & Pamela D. Huang, "Privatization of Wetland Mitigation Banking," *Natural Resources & Environment*, Vol. 7, No. 1: 36-38, 68-69 (Summer 1992) (Chicago: American Bar Association, Section of Natural Resources, Energy, and Environmental Law); Jon A. Kusler & Mary E. Kentula, eds., *Wetland Creation and Restoration: The Status of the Science* (Washington D.C.: Island Press, 1990).

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The key issue in mitigation is equivalency: whether the created critical and sensitive area is roughly equal in size and quality to the area that is to be developed. The goal of mitigation is the preservation of critical and sensitive areas; if a developer could legally build on 100 acres of high-quality wetland by creating 100 acres of lower-quality wetland, then there would be a net loss in wetland habitat. Since such areas must be defined in the first place, these definitions are the clear starting place for creating standards for comparing created and destroyed critical and sensitive areas. But merely providing substitute land that meets the definition of a critical and sensitive area is not enough: 100 acres of low-quality wetland is still wetland according to the legal definition, but is not equivalent to 100 acres of high-quality wetland. Therefore, more detailed standards and criteria for comparing one critical and sensitive area to another are necessary.

### FEDERAL WETLANDS MITIGATION LAW

The development and mitigation of wetlands is already regulated by federal statutes and regulations. The primary law regulating wetlands and their development is the federal Clean Water Act.<sup>179</sup> Any dredging or filling of wetlands, with specific exceptions, requires a permit pursuant to Section 404 of the Act.<sup>180</sup> This permit is issued by the U.S. Army Corps of Engineers (the “Corps”) under its own procedures<sup>181</sup> but pursuant to substantive regulations from the U.S. Environmental Protection Agency (“EPA”)<sup>182</sup> and to EPA veto. In reviewing permit applications, the Corps must also solicit and consider, but is not generally bound by, recommendations from the U.S. Fish and Wildlife Service, the National Marine Fishery Service, and similar state and local agencies.<sup>183</sup>

Under this federal permitting process, an applicant seeking to engage in mitigation must first demonstrate that there is no “practicable alternative” to granting the permit “which would have less adverse impact.”<sup>184</sup> If this can be shown, then the applicant must prove that all potential negative impacts to the wetlands from the proposed permit have been minimized as much as possible.<sup>185</sup> Only if this is also shown can the applicant then engage in development of the wetlands and receive credit for created wetlands. There is a requirement that the created wetlands be in the same watershed as

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<sup>179</sup>Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* (1998).

<sup>180</sup>33 U.S.C. §1344.

<sup>181</sup>33 C.F.R. Parts 320, 323, 325.

<sup>182</sup>Clean Water Act Section 404(b)(1) Guidelines, 40 C.F.R. Part 230 (1998).

<sup>183</sup>33 C.F.R. §§320.4, 325.

<sup>184</sup>40 C.F.R. §230.10(a).

<sup>185</sup>40 C.F.R. §230.70.

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the wetlands to be developed and a strong preference for locating replacement wetlands on the same site as the wetlands they are replacing.<sup>186</sup>

### STATE MITIGATION LAW

Nearly half the states have their own statutes requiring a permit for development in wetlands areas. Of these, three states, **Michigan**, **New Jersey**, and **Oregon** have been officially or effectively delegated the responsibility of issuing permits under Clean Water Act Section 404, and therefore, in these states, there is no need to obtain separate federal and state wetlands development permits.<sup>187</sup>

Eight states have wetlands statutes expressly authorizing mitigation banking. **California**<sup>188</sup> authorizes mitigation banks for wetlands in the Sacramento-San Joaquin Valley Region, requiring the state Department of Fish and Game to enter into a memorandum of understanding with the relevant federal agencies on wetlands mitigation (the Corps, EPA, Fish and Wildlife, Marine Fisheries, etc.) and adopt mitigation regulations in cooperation with those agencies.

The **Florida** wetlands statute<sup>189</sup> regulates mitigation as a condition of wetlands permit approval for both private and public projects. It requires the submission of a mitigation plan to the state Department of Environmental Protection and the relevant water management district, and the criteria for evaluating such a plan are similar to the federal standards for wetlands mitigation. Florida statute also expressly provides funding and a review procedure for mitigation of wetlands destroyed in the construction of the Central Florida Beltway, a state project connecting several highways into a continuous system.<sup>190</sup>

**Louisiana**<sup>191</sup> requires mitigation as a condition for all permits to develop coastal wetlands.<sup>192</sup> The Department of Natural Resources is generally authorized to adopt regulations establishing mitigation criteria, including criteria for granting credits and geographical limitations on where credits may be used. However, the statute also prohibits the Department from requiring mitigation

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<sup>186</sup>Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605, 58611 (Nov. 28, 1995); Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

<sup>187</sup>Dennison at 91-92. Oregon has not officially been delegated to enforce Section 404 and regulations, but since the Corps granted a five-year permit to the state for wetland restoration and enhancement, the Corps has effectively yielded the wetlands permitting field in Oregon to the state.

<sup>188</sup>Cal. Fish & Game Code §§1775 *et seq.* (1998).

<sup>189</sup>Fla. Stat. §§373.403 *et seq.* (1998).

<sup>190</sup>Fla. Stat. §338.250.

<sup>191</sup>La. Rev. Stat. §§49:214.21 *et seq.* (1998).

<sup>192</sup>La. Rev. Stat. §49:213.41.

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from projects “which the secretary [of the Department] determines is primarily designed...to provide a net gain in ecological values” and authorizes the secretary to require either on-site or off-site mitigation despite any contrary provisions in department regulations if he or she “determines that the proposed mitigation is acceptable and sufficient.”

Louisiana also creates a wetlands conservation and restoration program,<sup>193</sup> under which a wetlands conservation and restoration plan<sup>194</sup> is prepared and implemented by a Wetlands Conservation and Restoration Task Force consisting of the secretaries of the Departments of Natural Resources, Wildlife & Fisheries, Environmental Quality, and Transportation & Development.<sup>195</sup> The program is financed by the state Wetlands Conservation and Restoration Fund, which receives a set portion of the state’s mineral revenues.<sup>196</sup>

**Maryland**<sup>197</sup> requires that there be “no practicable alternative” to developing a wetland before granting a wetlands permit and that “all necessary steps [shall be taken] to first avoid significant impairment and then minimize losses.”<sup>198</sup> After that point is reached, mitigation is required, under standards and procedures adopted and implemented by the state Department of the Environment.<sup>199</sup> The Department also creates and operates mitigation sites financed, through the Nontidal Wetland Compensation Fund, from mitigation fees paid by wetland owners for whom wetland creation or restoration were “not feasible alternatives.”<sup>200</sup> Agricultural activities (except for certain specified agricultural activities not required to obtain a wetlands permit) are expressly required to formulate a plan for mitigating any approved wetland development within three years, with deferral of mitigation if the state Department of Agriculture determines in writing that the farmer will otherwise undergo economic hardship.<sup>201</sup>

Maryland also has a Forest Conservation Act<sup>202</sup> that requires mitigation of developments in forest areas. Local governments must adopt a forest conservation program, and every proposed

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<sup>193</sup>La. Rev. Stat. §§49:213.1 *et seq.*

<sup>194</sup>La. Rev. Stat. §49:213.6.

<sup>195</sup>La. Rev. Stat. §49:213.5.

<sup>196</sup>La. Rev. Stat. §49:213.7.

<sup>197</sup>Md. Envir. Code §§5-901 *et seq.* (1999).

<sup>198</sup>Md. Envir. Code §§5-907(b), -909(a).

<sup>199</sup>Md. Envir. Code §§5-909(b), -910.

<sup>200</sup>Md. Envir. Code §5-909(c).

<sup>201</sup>Md. Envir. Code §5-905.

<sup>202</sup>Md. Nat. Res. Code §§5-1601 *et seq.* (1999).

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subdivision above a specified area is subject to that program. The developer of the subdivision must submit an acceptable forest conservation plan for the property before any subdivision plat approval. The Act provides specific criteria for quantity and quality acceptable reforestation to offset deforestation due to development. Offsite forest mitigation banking is authorized, and if mitigation cannot be accomplished either onsite or offsite, the developer must contribute to a Forest Conservation Fund in proportion to the acreage of required replacement forest. The developer must post a performance bond to ensure adherence to the forest conservation plan, and the owner of the premises must grant a conservation easement to the local government to guarantee the continued existence of the created forest.

**Minnesota**<sup>203</sup> creates a wetlands regulatory permitting program that “may not be more restrictive than the program under Section 404.”<sup>204</sup> Wetlands cannot be drained or filled unless an equal amount of wetlands “of at least equal public value”<sup>205</sup> are created to replace them pursuant to a wetland value replacement plan approved by the local government under rules created by the state Board of Water and Soil Resources.<sup>206</sup>

**New Jersey**<sup>207</sup> requires mitigation as a condition to the approval of any freshwater wetlands permit.<sup>208</sup> If wetlands “of equal ecological value to those which are being lost” cannot be created on-site, mitigation credits may be purchased from the state’s Wetlands Mitigation Bank. The bank is operated by a Wetlands Mitigation Council consisting of the Commissioner of Environmental Protection and six members appointed by the governor with the consent of the state Senate.<sup>209</sup>

**Oregon**<sup>210</sup> expressly adopts in its statute two basic principles from the federal wetland mitigation regulations. First, mitigation banking off-site is permissible only when “all on-site mitigation methods have been examined and found to be impracticable or off-site mitigation is found to be environmentally preferable,” and, second, the created wetlands have to be in the same basin or subbasin for freshwater wetlands or “estuarine ecological system” for estuarine (saltwater) wetlands as the wetlands to be developed.<sup>211</sup> It also creates a Wetlands Mitigation Bank Revolving Fund

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<sup>203</sup>Minn. Stat. §§103G.001 *et seq.* (1998).

<sup>204</sup>Minn. Stat. §103G.127.

<sup>205</sup>Minn. Stat. §103G.222(a).

<sup>206</sup>Minn. Stat. §103G.2242.

<sup>207</sup>N.J. Stat. Ann. §13:9B-3 *et seq.* (1998).

<sup>208</sup>N.J. Stat. Ann. §13:9B-13.

<sup>209</sup>N.J. Stat. Ann. §§13:9B-14 and -15.

<sup>210</sup>Or. Rev. Stat. §§196.600 *et seq.* (1998).

<sup>211</sup>Or. Rev. Stat. §196.620.

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Account, which is to finance the acquisition and operation of state wetland mitigation banks and is to be financed by the sale of credits from those banks as well as from general state revenue.<sup>212</sup>

The **Wyoming Wetlands Act**<sup>213</sup> authorizes the adoption of wetlands mitigation criteria and regulations of wetlands mitigation banking. Like the federal wetlands permitting process, the Wyoming system involves several agencies: the Department of Environmental Quality adopts the guidelines and regulations in cooperation with the state engineer, the water development commission, and the state Departments of Agriculture, Fish and Game, and Transportation.<sup>214</sup>

### PROVISIONS OF THE MODEL STATUTE

Section 9-403 below authorizes local governments to enact ordinances creating mitigation programs. Since the critical and sensitive areas element of the local comprehensive plan governs such areas, a local comprehensive plan with a critical and sensitive areas element must be in place before a mitigation ordinance may be adopted, and the ordinance must be consistent with that plan and element. When a development may or must provide mitigation measures pursuant to ordinance, then the provision of at least equivalent mitigation measures must either be a prerequisite to the issuance of a development permit or be included as a condition to the development permit. Mitigation measures may be prepared by the developer directly, the developer may purchase land that consists of created critical and sensitive areas, or the developer may receive credit for such created land while it remains in the ownership or responsibility of another. This last option may be exercised by the developer obtaining a conservation easement over the created area, so that it cannot be developed, if the easement is enforceable by the local government and the owner of the created land is able to maintain it as such.

As noted, the key issue in mitigation is evaluating the quality of the existing critical and sensitive area that is to be developed and of the area to be created. Consequently, mitigation standards are necessary. They must be consistent with the existing federal and state statutes and regulations of critical and sensitive areas, since these provisions govern in any conflict. In the area of wetlands, the federal role is so prominent that the model provides that applicable federal regulations on mitigation banking govern directly. For other critical and sensitive areas, the model provides two alternatives as to the responsibility for preparing and adopting the mitigation standards. The first involves the joint preparation of the standards by the state planning agency and environmental protection agency, after public hearing and comments from the local governments. This alternative includes the standard Growing Smart<sup>SM</sup> provision requiring review of the standards at least every five years. The other alternative requires the local government to include mitigation standards in any mitigation ordinance.

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<sup>212</sup>Or. Rev. Stat. §§196.640-.655.

<sup>213</sup>Wyo. Stat. §§35-11-308 *et seq.* (1998).

<sup>214</sup>Wyo. Stat. §35-11-311.

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It must be noted that, while there are detailed criteria and procedure for reviewing wetlands mitigation banking proposals under federal law, this does not supplant, or preclude the need to develop, such procedures and criteria at the state and local government levels, since there are critical and sensitive areas other than wetlands that can equally benefit from mitigation.

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### 9-403 Mitigation

- (1) A local government may adopt and amend a mitigation 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 this Section are to:
  - (a) preserve critical and sensitive areas;
  - (b) ensure that the owners of land that includes critical and sensitive areas may make reasonable use of their property by creating equivalent areas elsewhere to substitute or compensate for development upon critical and sensitive areas; and
  - (c) provide standards and procedures whereby the equivalency, in quantity and quality, of created critical and sensitive areas with critical and sensitive areas that are to be developed may be reliably determined.
- (3) As used in this Section:
  - (a) “**Creation,**” “**Created,**” and “**Creating**” include both the creation of critical and sensitive areas from land that was not previously critical and sensitive and the restoration as critical and sensitive areas of land that was previously but is not presently critical and sensitive.
  - (b) “**Federal Wetlands Mitigation Provisions**” mean the following, as amended:
    1. 33 U.S.C. §§1251 *et seq.*;
    2. 33 C.F.R. Parts 320-330;
    3. 40 C.F.R. Part 230;
    4. Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605 (Nov. 28, 1995);

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5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990);
6. Fish and Wildlife Service Mitigation Policy, 46 Fed. Reg. 7644 (Jan 23, 1981);
7. National Marine Fisheries Service Habitat Conservation Policy, 48 Fed. Reg. 53142 (1983);

and all other federal statutes, regulations, policies, and memoranda of agreement, as applicable, regarding mitigation as it relates to wetlands.

- (c) “**Mitigation**” means the substitution of critical and sensitive areas created from land that did not constitute critical and sensitive areas for critical and sensitive areas that are proposed to be subject to development and that, as a result of the development, will not constitute critical and sensitive areas.
  - (d) “**Mitigation Program**” means a requirement or authorization by a local government that the owner of a proposed development that includes or encompasses critical and sensitive areas engage in mitigation.
  - (e) “**Mitigation Measures**” mean the act of creating critical and sensitive areas, of purchasing or obtaining such land that has been created by another, or of reserving such land that has been created by another.
  - (f) “**Mitigation Standards**” mean the criteria by which the equivalence of created critical and sensitive areas with existing critical and sensitive areas is measured or determined. “Mitigation standards” include, but are not limited to, the definitions or criteria by which land is designated as a critical and sensitive area.
  - (g) “**Reserving**” means the procedure by which an owner who is to provide mitigation measures pursuant to a mitigation ordinance does so by obtaining a conservation easement over, but not title to, a critical and sensitive area created by another.
- (4) A mitigation program may be adopted by a local government only by a mitigation ordinance. A mitigation ordinance is a land development regulation, and shall be adopted by the legislative body only after it has adopted a local comprehensive plan that includes a critical and sensitive areas element pursuant to Section [7-209].
  - (5) When a local government has adopted a mitigation ordinance, all proposed development that includes or encompasses critical and sensitive areas, where the owner proposes to develop such areas, shall either:

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- ◆ This subparagraph makes it clear that mitigation is not required when critical and sensitive areas are not going to be developed; i.e., when the property will be developed but critical and sensitive areas will be left untouched. Therefore, this Section preserves the incentive to refrain from developing critical and sensitive areas in the first place rather than engage in the relatively expensive and risky mitigation process.
  - (a) be subject to a condition precedent to the issuance of any development permit that the owner must provide mitigation measures that are at least equivalent, in quality and quantity, to any critical and sensitive areas that are proposed to be developed. Any purported development permit issued when said condition precedent has not been satisfied is void, any provision of Section [8-501] to the contrary notwithstanding, or
  - (b) include as a condition to any development permit that the owner must provide mitigation measures that are at least equivalent, in quality and quantity, to any critical and sensitive areas that are proposed to be developed. Such a condition shall include a requirement that the owner provide a bond or other surety for the completion of such equivalent mitigation measures.
- (6) *Alternative A – State adoption of mitigation standards:*

The [state environmental protection agency] shall prepare and adopt mitigation standards.

  - (a) Mitigation standards shall be consistent with all applicable federal and state statutes and regulations regarding the critical and sensitive areas that are the subject of the mitigation standards, including, where applicable, federal wetlands mitigation provisions.
  - (b) Mitigation standards and amendments thereto shall be prepared in consultation with the [state planning agency], and the mitigation standards shall be void unless adopted by both the [state EPA] and the [state planning agency].
  - (c) Before adopting mitigation standards or amendments thereto, the [state EPA] shall send copies of the proposed standards or amendment to all relevant state agencies[, regional planning agencies] and local governments, which shall submit written comments thereon within [30] days of receiving the proposed standards or amendment.
  - (d) Before adopting mitigation standards or amendments thereto, the [state EPA] shall hold a public hearing thereon. The [state EPA] 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:

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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 EPA] 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.
- (e) At the public hearing, the [state EPA] shall permit interested persons to present their views orally or in writing on the proposed mitigation standards or amendment, and the hearing may be continued from time to time.
- (f) After the public hearing and the receipt of all written comments, the [state EPA] may revise the proposed standards or amendment, giving appropriate consideration to all written and oral comments received.
- (g) Mitigation standards and amendments thereto shall be considered rules of the [state EPA] and [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.
- (h) Mitigation standards and amendments thereto shall be sent to all [regional planning agencies] and local governments within [30] days after adoption.
- (i) If a local government adopts mitigation standards that are inconsistent with those adopted by the [state EPA], then any purported mitigation ordinance of that local government is void.
- (j) The [state EPA] shall, at least once every [5] years, conduct a general review of the mitigation standards. The general review shall result in a written report that contains:
1. an analysis of changes in, or alternatives to, existing mitigation standards that would increase their effectiveness or reduce any identified adverse impacts; and/or
  2. an analysis of why such changes or alternatives are less effective or would result in more adverse effects than the existing mitigation standards.

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If the [state EPA] fails to adopt, in whole or with revisions, such a written report within five years of the adoption of the first mitigation standards pursuant to this Act or of the last adoption of a written report, the mitigation standards shall not enjoy a presumption of reasonableness, and the [state EPA] shall bear the burden of demonstrating such reasonableness.

*Alternative B – Local government adoption of mitigation standards:*

Local governments shall include mitigation standards in the mitigation ordinance.

- (a) Mitigation standards shall be consistent with all federal and state statutes and regulations regarding critical and sensitive areas, including, where applicable, federal wetlands mitigation provisions.
  - (b) Mitigation standards shall be prepared by the [local planning agency] in consultation with qualified environmental scientists or engineers, or from documents or model standards that were prepared in consultation with qualified environmental scientists or engineers.
- (7) A mitigation ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the mitigation 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 and the critical and sensitive areas element thereof that is based on findings made pursuant to Section [8-104];
  - (d) a statement of consistency with any critical and sensitive areas ordinance adopted pursuant to Section [9-101];
  - (e) definitions, as appropriate, for such words or terms contained in the mitigation ordinance. Where this Act defines words or terms, the mitigation ordinance shall incorporate those definitions, either directly or by reference;
  - (f) a provision implementing the requirements of paragraph (5) above;
  - (g) a recitation of or citation to the mitigation standards;
  - (h) provisions and procedures implementing paragraph (8) below
  - (i) procedures for the review of proposed mitigation measures for compliance with the mitigation standards, such review constituting part of the unified development

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- permit review process pursuant to Section [10-201] *et seq.* of this Act and being consistent with paragraph (10) with regards to the mitigation of wetlands; and
- (j) procedures for the inspection and evaluation of mitigation measures for compliance with proposed mitigation measures approved upon review.
- (8) An owner may provide mitigation measures by reserving created critical and sensitive areas, where another person or entity retains ownership of such areas, if:
- (a) the owner of the proposed development obtains a conservation easement over the created areas;
  - (b) the conservation easement grants the local government the right to enforce the easement;
  - (c) the conservation easement is submitted to the local government for review;
  - (d) the local government finds that the owner of the created areas is:
    - 1. required pursuant to the conservation easement; and
    - 2. financially and otherwise capable,to maintain the created areas in a state at least equivalent to the critical and sensitive areas proposed to be developed;
  - (e) the created areas are at least equivalent to the areas proposed to be developed, and all other requirements of this Section and the mitigation ordinance are complied with;
  - (f) the local government approves the conservation easement per the above provisions and indicates its approval on the instrument creating the easement; and
  - (g) the conservation easement is recorded with the county [*recorder of deeds*] within [30] days of such approval.
- (9) Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.
- (10) With regards to mitigation of wetlands, the [state planning agency and state EPA] shall make all reasonable efforts to enter into a memorandum of understanding with the United States Environmental Protection Agency, Army Corps of Engineers, Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration regarding mitigation review pursuant to federal wetlands mitigation provisions and the participation therein of local governments

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that have adopted mitigation ordinances regarding wetlands. To the extent feasible, the procedure pursuant to subparagraph (7)(i) of this Section shall be integrated with the review procedure pursuant to federal wetlands mitigation provisions.

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### ***Commentary: Land-Use Incentives***<sup>215</sup>

The rapid growth that many communities experienced throughout the 1990s has spawned interest in finding innovative planning, regulatory, and development approaches and techniques to managing growth and to meet community objectives such as providing affordable housing. Many new plans and land development regulations now subscribe to the principles of smart growth, which include using land resources more efficiently through compact building forms and infill development; mixing land uses, promoting a variety of housing choices, supporting walking, cycling, and transit as attractive alternatives to driving, improving the development review process and development standards so that developers are encouraged to apply the smart growth principles, and connecting infrastructure planning to development decisions to maximize use of existing facilities and ensure that infrastructure is in place to serve new development. Smart growth, in effecting a more rational use of existing developed land and buildings, effects the preservation of natural, scenic, and historic resources.

**Incentive zoning** is a technique that has received renewed attention as communities aim to inculcate smart growth principles into planning and development processes. Incentive zoning is a system by which specific incentives or bonuses are granted to a developer on condition that certain physical, social, or cultural benefits or amenities will be provided to the community. A bonus is typically provided in the form of added permissible density to a development project. This is done by increasing the allowable floor area of a project above what is permitted in the zoning ordinance or increasing the allowable number of dwelling units in a residential development. Additionally, setback, height, and bulk standards are often allowed to be modified to accommodate the added density or, in the case of affordable housing, to reduce development costs. Waivers of specific regulatory requirements or fees--such as parking standards or impact fees--are also used as an incentive for a developer to provide various amenities.

The common types of community benefits or amenities for which state and local governments have devised incentive programs are urban design, human services (which includes affordable housing), and transit access. Some programs--particularly those that include affordable housing as a bonusable amenity--allow developers may pay cash in lieu of building or supplying the amenity for which the incentive is being provided. Some states group all types of incentives--for urban design, affordable housing, transit--into an umbrella statute that authorizes local governments to use

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<sup>215</sup>This commentary is based on "Zoning Bonuses and Incentives" by Marya Morris, AICP, in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 3*, Planning Advisory Service Report No. \_\_\_\_ (Chicago: American Planning Association, forthcoming, 2001).

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innovative land-use regulations. In several states--namely, California, New Jersey, Oregon, and Florida--the zoning and regulatory incentive statutes for affordable housing are part of a broader statewide housing program and thus are enacted separately.

### **HISTORICAL DEVELOPMENT OF ZONING BONUS SYSTEMS**

Zoning incentive systems came into use in the late 1950s and 1960s. Cities were looking for ways to enjoin private developers in improving the appearance of the cities without spending public money. Planners were also looking for ways to lessen the rigidity of Euclidean zoning which, in its preoccupation with separating land uses, was resulting in sterile, often less than functional, central business districts and neighborhoods and creating difficulties in meeting social objectives such as affordable housing and day care. What began as an experimental technique to use zoning to improve community design, has mushroomed into a fairly common tool for meeting a range of planning objectives.

In 1957, as part of a comprehensive revision of its zoning ordinance, Chicago became the first city to enact a zoning bonus system. That system encourages developers of downtown office buildings to provide public plazas and arcades in exchange for additional density. Unlike other cities that instituted bonus programs to exact public benefits from developers, the impetus for the Chicago bonus system was to stimulate development of high-rise office buildings, too many of which, in the view of the late mayor Richard J. Daley, were being built in New York rather than Chicago. The City of Chicago's enthusiasm for offering bonuses created what is now thought of as an overly permissive system that has resulted in very large buildings with minimal public benefit at the street level.<sup>216</sup>

Developers in downtown Chicago may increase the floor area ratio from a base of 16 to 30 if they provide plazas and arcades. A 15 percent as-of-right increase in floor area is provided for buildings that adjoin a public open space, which in Chicago includes parks, the Chicago River, and even Lake Michigan.<sup>217</sup> The City of Chicago planning staff undertook two comprehensive examinations of the program in 1987 and again in 1998 in attempt to persuade the city council to substantially revise the program to make it more effective in securing public amenities. Neither of those attempts were successful, but the report and staff recommendations provide an excellent cautionary tale of bonus programs for central cities in general. Some of the findings are presented below.

New York City began its zoning incentive program in 1961 and now has the most extensive system of any city. The city uses bonuses in two ways: first, they are used to provide street-level amenities in high-density residential and commercial districts, including plazas, arcades, and

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<sup>216</sup>Telephone interview with Tom Smith, Assistant Commissioner, Chicago Department of Planning and Development, September 16, 1999. Interview conducted by Marya Morris, AICP, Senior Research Associate, American Planning Association Research Department.

<sup>217</sup>Judith Getzels and Martin Jaffe., *Zoning Bonuses in Central Cities*, Planning Advisory Service Report No. 401 (Chicago: American Planning Association, 1988), 5.

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shopping gallerias. Second, bonuses are used to protect the neighborhood character of certain districts.

In residential and commercial districts developers receive either floor area bonuses or are allowed to reduce lot sizes in exchange for a plaza or arcade.<sup>218</sup> In lower-density residential districts, floor area bonuses are available in exchange for deep front and wide side yards. In most cases the bonuses are available as of right. Bonuses for buildings that contain community facilities (e.g., libraries and museums) and large residential developments are subject to a special permitting procedures--similar to a planned unit development review process--through which the developer and the city negotiate the amenities and bonuses to be provided. All residential projects that incorporate bonuses are subject to mandatory streetscape urban design guidelines.<sup>219</sup> Arcades, for example, must run the length of a block and cannot be terminated by a blank wall, although they can be interrupted by a pedestrian plaza.

Incentive zoning regulations are also applied in special districts in New York City, to help achieve certain planning objectives. These districts are areas deemed to have special character or specific development issues, such as theater districts, tourist areas, and mixed use shopping and residential districts. Additional regulations--including the zoning bonuses--are applied as overlay regulations over underlying zoning in these districts. The purpose of the Special Midtown District, for example, which was enacted in 1980 is to encourage intensives development in some subdistricts such as Times Square, to protect and preserve various Broadway theaters (many of which were being demolished and replaced with office towers), and to protect the overall character of the theater district. The same basic types of amenities are provided in special districts exchange for increased floor area, but the exact requirements and design guidelines are specific to each special districts and even further refined within subdistricts. Moreover, some of the special district also apply transfer of development rights to shift development and density from one part of the district to another.

### STATE INCENTIVE ZONING STATUTES

The authority of local governments to institute an incentive and bonus program comes from state enabling legislation.<sup>220</sup> At least 10 states have enacted legislation expressly enabling local governments to offer zoning bonuses and other incentives in exchange for certain public benefits. None of the statutes reviewed prescribe directly what types of amenities local governments may require or what types of bonuses they may offer.

Some state incentive statutes, including that of California, aim to achieve one specific public purpose, such as affordable housing. Many state statutes, including those of Florida, Maryland, and

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<sup>218</sup>New York City Zoning Resolution, §23-16 to -18 (1999).

<sup>219</sup>Alan Weinstein, "Incentive Zoning," Chapter 8 in *Zoning and Land Use Controls*, Vol. 2, Eric Damian Kelly, gen. ed. (New York: Matthew Bender, 19094), §26-041, 8-30.

<sup>220</sup>Cal. Govt. Code §65915 (1999); Conn. Gen'l Stat. §8-2g(a) (1999); Fla. Stat. §163.3202(3) (1999); Md. Gen'l. Mun. Law §10603 (1999).

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Rhode Island include incentive zoning on a list of innovative techniques that local governments are enabled to include in their zoning ordinance. Other techniques include transfer of development rights, design review, and density controls. The New York statute has unique provisions that require local governments that implement incentive zoning to evaluate whether existing public facilities that will serve the additional density can adequately accommodate additional development and to also prepare an environmental impact assessment on the proposed amenities.

Citing a shortage of housing for low- and moderate-income families and ever-increasing housing costs brought on in part by local government permitting processes and land-use regulations, **California** enacted legislation in 1979<sup>221</sup> requiring local governments to provide density bonuses and other incentives and concessions to developers of affordable housing. Local governments are required to enact an implementing ordinance to facilitate the incentive process. The law also requires local governments to establish procedures to waive or modify “development and zoning standards which would otherwise inhibit the utilization of the density bonus on specific sites. These procedures shall include, but not be limited to, such items as minimum lot size, side yard setbacks, and placement of public works improvements.” The state department of housing and community development publishes a model density bonus ordinance that cities and counties in the state may adopt to carry out the requirements of the statute.<sup>222</sup>

The other incentives and concessions that local governments may provide include a reduction in setback and square footage requirements, a reduction in parking requirements, approval of mixed use zoning, and other regulatory incentives or concessions that a developer or the city may propose for which “identifiable cost reductions” can be shown. The bonuses are used less often for residential developments that will be sold because the statute requires that they remain affordable for 10 to 30 years. Such a requirement provides no opportunity for equity recapture on the part of first-time home buyers. Thus, says Linda Wheaton, a housing policy specialist with the State of California Department of Housing and Community Development, the need for housing developments that receive bonuses to remain affordable is not reconciled with overarching goals helping families build equity and financial stability through home ownership. In terms of concessions, Wheaton says the most common waiver offered by local governments and sought out by developers is the reduction in parking requirements.<sup>223</sup>

To implement the density bonuses, the statute enables local governments to require developers to enter into a development agreement. Such an agreement would stipulate the exact terms of the

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<sup>221</sup>Cal. Govt. Code §65915. For an evaluation of the California statute, see Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan, “Selling Zoning: Do Density Bonuses for Moderate-Cost Housing Work?” *Land Use Law & Zoning Digest* 42, no. 8 (August 1990): 3-9.

<sup>222</sup>*Model Density Bonus Ordinance* (Sacramento, Calif.: Department of Housing and Community Development, Division of Housing Policy Development, August 6, 1996).

<sup>223</sup>Telephone interview with Linda Wheaton, Housing Specialist, California. Department of Housing and Community Development, October 12, 1999. Interview conducted by Marya Morris, AICP, Senior Research Associate, APA Research Department.

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bonuses the developer would receive and the incentives and concession made by the local government. Finally, the law directs courts to uphold the decision of a city or county to grant the density bonus if it finds that there evidence that the bonus will assist the local government in meeting its share of the regional housing needs or to implement its congestion management plan. For example the law enables local governments participating in a demonstration program to grant a density bonus of at least 25 percent of the maximum permitted residential density to developers of housing within one-half mile of a mass transit station.<sup>224</sup> According to Linda Wheaton the latter provision is rarely used, most likely because of the lack of an associated funding source to build housing in these areas.

In addition to the inclusionary housing requirements described in the next section, California has transit-oriented development legislation that authorizes the use of density bonuses to increase development density near transit stations with the goals of creating mixed use neighborhoods with a range of housing and transportation choices and reducing both vehicle miles traveled and auto emissions. The Transit Village Development Planning Act of 1994 was linked to a demonstration program of the Department of Transportation<sup>225</sup> to test the effectiveness of increasing densities of residential development in close proximity to mass transit to increase the benefit from public investment in mass transit.

The transit village act enables cities and counties to prepare a transit village plan that addresses the following characteristics:

- (a) A neighborhood centered around a transit station that is planned and designed so that residents, workers, shoppers, and others find it convenient and attractive to patronize transit.
- (b) A mix of housing types, including apartments, within not more than a quarter mile of the exterior boundary of the parcel on which the transit station is located.
- (c) Other land uses, including a retail district oriented to the transit station and civic uses, including day care centers and libraries.
- (d) Pedestrian and bicycle access to the transit station, with attractively designed and landscaped pathways.
- (e) A rail transit system that should encourage and facilitate intermodal service, and access by modes other than single occupant vehicles.
- (f) Demonstrable public benefits beyond the increase in transit usage, including all of the following:

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<sup>224</sup>Cal. Govt. Code §65913.5(a)(b), citing Cal. Govt. Code §14045.

<sup>225</sup>Cal. Govt. Code §14045(a). The demonstration program legislation indicates that local governments that participate must have an adopted land use plan and zoning ordinance that encourages development of high-density residential development near mass transit guideway stations and that are implementing state legislation regarding the following: development agreements Cal. Govt. Code § 65864; redevelopment plans pursuant to Art. 4, §33330 of the state Health and Safety Code; and congestion management plan adopted pursuant to Cal. Govt. Code §65099.

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- (1) Relief of traffic congestion.
  - (2) Improved air quality.
  - (3) Increased transit revenue yields.
  - (4) Increased stock of affordable housing.
  - (5) Redevelopment of depressed and marginal inner-city neighborhoods.
  - (6) Live-travel options for transit-needy groups.
  - (7) Promotion of infill development and preservation of natural resources.
  - (8) Promotion of a safe, attractive, pedestrian-friendly environment around transit stations.
  - (9) Reduction of the need for additional travel by providing for the sale of goods and services at transit stations.
  - (10) Promotion of job opportunities.
  - (11) Improved cost-effectiveness through the use of the existing infrastructure.
  - (12) Increased sales and property tax revenue.
  - (13) Reduction in energy consumption.
- (g) Sites where a density bonus of at least 25 percent may be granted pursuant to specified performance standards.<sup>226</sup>

**Connecticut**'s inclusionary zoning legislation allows local governments to provide developers with a special exemption from zoning density limits in districts that permit multifamily housing.<sup>227</sup> The exemption is applicable where the developer agrees to build a certain number of units of affordable housing. A local housing agency is charged with administering the program and setting thresholds to determine what sales and rent prices are to be considered affordable and the income groups that would be eligible to live in such housing. Developers must enter into a development agreement with the municipality that stipulates the number of affordable housing units being provided, the sales price or rents to be charged for the units, and deeds conveying covenants that indicate that the units will remain as affordable housing for 30 years.

Local governments in **Florida** are required by the state's growth management law to prepare a comprehensive plan including a housing element<sup>228</sup> and enact land development regulations to implement the plan. The enabling legislation for the regulations encourages the use of innovative land development regulations including incentive and inclusionary zoning, as well as provisions for transfer of development rights, planned unit developments, and impact fees.<sup>229</sup>

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<sup>226</sup>Cal. Gov't Code §65460.2.

<sup>227</sup>Conn. Gen'l Stat. Sec. 8-2g(a).

<sup>228</sup>Fla. Stat. §163.3177(6)(f).

<sup>229</sup>Fla. Stat. §163.3202(3).

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**Maryland** has broadly worded language in its zoning enabling legislation that permits local governments to “encourage innovation and to promote flexibility, economy, and ingenuity in development” as well as provisions authorizing increases in the permissible density or intensity of a particular use.<sup>230</sup> Maryland also expressly enables counties and cities to enact ordinances that “impose inclusionary zoning and award density bonuses to create affordable housing units” and “impose restrictions on the use, cost, and resale of housing . . .”<sup>231</sup>

**Minnesota**’s Community-Based Planning Act of 1997 contains 11 goals for local governments to address in preparing comprehensive plans, most of which are centered on smart growth principles, such as encouraging mixing of land uses, compact development, increasing affordable housing and promoting public transit.<sup>232</sup> The act also created a livable communities advisory council and directed it to, among other things, develop criteria and guidelines to promote “livable” communities in the state. The council must also recommend incentives to local governments to develop community-based plans, including for example, assistance with computerized geographic information systems, builders’ remedies and density bonuses, and revised permitting processes. The act lists several tools and strategies that local governments would be able to use to achieve the livable community goals, including “densities, urban growth areas, purchase or transfer of development rights programs, public investment surcharges, transit and transit-oriented development, and zoning and other official controls.”

**New Hampshire** has a catch-all statute for innovative land-use controls that permits local planning boards or person who administers a zoning ordinance to enact 14 different types of standards, including intensity and use incentive(s), impact fees, planned unit development, cluster development, performance standards, and inclusionary zoning.<sup>233</sup> The statute provides no criteria or guidelines on the type or magnitude of incentive that may be provided, nor any guidance on the other innovative provisions it enables local governments to use, with the exception of impact fees.

**New York** has an umbrella incentive zoning statute that is intended to “advance the city’s specific physical, cultural and social policies in accordance with the city’s comprehensive plan and in coordination with other community planning mechanisms or land use techniques.”<sup>234</sup> The law permits municipalities to amend the zoning ordinance to include bonus provisions and to evaluate the effects of any potential incentives to ensure that the district in which any additional density will be built contains “adequate resources, environmental quality and public facilities, including adequate transportation, water supply, waste disposal and fire protection.” Local governments are also required to prepare a “generic environmental impact statement” (paid for in part by the developer)

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<sup>230</sup>Md. Gen’l. Muni. Law §10603 (1999).

<sup>231</sup>Md. Code Ann. Art. 66B, §12.01.

<sup>232</sup>Minn. Stat., Ch. 202, Art. 4, §4A.08 (1997).

<sup>233</sup>N.H. Rev. Stat. Ann, Tit. 64, Ch. 674 §674.21.

<sup>234</sup>N.Y. Gen’l City Law § 81-d.

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to determine if the granting of incentives or bonuses will have a significant effect on the environment.<sup>235</sup> In addition to the environmental review, the statute also requires local governments “to evaluate the impact of the bonus provisions upon the potential development of affordable housing gained by the provision of such incentives or bonus afforded to an applicant or lost in the provision by an applicant of any community amenity to the city.”<sup>236</sup>

The New York statute includes procedures that must be followed by local governments in providing the incentives, including descriptions of the incentives, and bonuses to be provided; the community benefits and amenities that may be accepted from developers; procedures for obtaining bonuses; and provisions for a public hearing on the proposed project (but only if it would otherwise be subject to a zoning hearing). The law contains separate, although virtually identical provisions for towns and villages in New York to use incentives.<sup>237</sup>

**Oregon**’s statutes implementing urban growth boundaries enable local governments to undertake “actions or measures to ensure that adequate levels of residential development are achieved within urban growth boundaries.”<sup>238</sup> The actions and measures include “enacting provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer.” Other actions include increasing zoned residential densities overall, providing financial incentives, redevelopment and infill strategies. The statute also permits the “removal or easing of approval standards or procedures” in order to achieve higher densities.

**Rhode Island** has an all inclusive statute similar to New York that authorizes local governments to use development incentives for several purposes. The incentives provide increases in the permitted use or dimension as a condition for, but not limited to:

- (1) Increased open space
- (2) Increased housing choice
- (3) Traffic and pedestrian improvements
- (4) Public and/or private facilities
- (5) Other amenities as desired by the city or town and consistent with its comprehensive plan.<sup>239</sup>

### THE MODEL STATUTE

The model statute in Section 9-501 below is an adaptation and refinement of the well-drafted California statute which requires local governments to grant density bonuses of at least 25 percent, plus an additional incentive(s) or equivalent financial incentives to developers of affordable housing. In contrast to the California statute, which distinguishes between the types or categories of

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<sup>235</sup>N.Y. Gen’l. City Law § 81-d(3)(d).

<sup>236</sup>N.Y. Gen’l. City Law § 81-d(3)(g).

<sup>237</sup>N.Y. Town Law Sec. 261-b; N.Y. Village Law Sec. 7-703.

<sup>238</sup>Ore. Rev. Stat. 197.296(7) (1998).

<sup>239</sup>R.I. Gen. Laws Sec. 45-24-33 (B)(1) (1999).

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affordable housing (i.e., between low-income, very-low-income, and senior citizens housing), the model below makes no such differentiation, giving that discretion to local governments. The developer is required to enter into a development agreement with the local government that will formalize the manner in which the affordable housing is to be kept affordable and other administrative details relating to the project. The model statute also authorizes development incentives for increased nonresidential floor area for provision of “public benefit amenities” such as plazas, parks, and open space, access to transit stations, and overhead weather protection and street arcades. A public benefit amenity may also include provision of affordable housing as part of a nonresidential development, for which a density bonus may be granted. A local government may also adopt a “uniform incentives ordinance” that addresses both provision of affordable housing and dedication of open space and/or provision of community design amenities.

APA’s evaluation of the California statute has determined that, if such program is to be successful at the local level, it is necessary to have a long-term commitment to the program by the local government as well as a dedicated source of funds. Monies such as revenues from tax increment financing initiatives and federal community development block grant (CDBG) programs are essential sources to provide subsidies for affordable housing. For example, Petaluma, California, near San Francisco, financed 100 affordable units per year between 1990 and 1999. To do that, the city has a housing trust fund that is financed by tax increment revenues in designated redevelopment areas, CDBG monies, and developer contributions in lieu of building affordable housing. The fund is used to leverage private and nonprofit investments in affordable housing. It also is used to pay for impact fees for affordable housing units in developments where 10 to 15 percent of the units have been set aside for low or very low income households. As such, affordable housing projects are not necessarily excused from all fees, but, rather than coming out of the developer’s pocket or being passed on to the home buyer, there is a transfer of city funds from one account to another.<sup>240</sup>

In San Jose, California, the city’s success with regard to affordable housing is attributable to outright land acquisition, leveraged private investment using revenue generated through property tax increments in the city’s redevelopment planning areas, and a flexible approach to accommodating housing development wherever possible. San Jose generates approximately \$20 million per year for affordable housing through the tax increment mechanism. The city’s housing agency uses that money to leverage approximately seven times that amount in private investment.

The San Jose 2020 General Plan has several mechanisms built in to encourage housing development. Adopted in 1994, it is the city’s first modern plan that meets the various requirements of state law, if not the exact letter of the law. To start, the plan designates a substantial amount of land for housing development. Further it contains “Discretionary Alternate Use Policies” which allow various commercial or industrial sites to be redeveloped as housing at the discretion of the city council. For example, sites along major commercial streets and around future light rail stations may

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<sup>240</sup>Telephone interview with Bonnie Gaebler, Housing Administrator, City of Petaluma, California, January 11, 2000. Interview conducted by Marya Morris, AICP, Senior Research Associate, APA Research Department.

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be redeveloped as high-density housing if a proposal meets the goals and policies of the General Plan. Most development in San Jose takes place through planned residential district zoning, which provides the city and developers with a lot of flexibility as to where housing may be built, but gives the city council substantial control in implementing housing goals overall. Finally, the city does provide density bonuses. Zoned densities of 12 to 25 dwelling units/acre may be increased to 25-40 dwelling units/acre if 100 percent of the units in the project are affordable. Similar bonuses are available for projects that contain all rental units.<sup>241</sup>

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### **9-501 Land-Use Incentives for Affordable Housing, Community Design, and Open Space Dedication; Unified Incentives Ordinance**

- (1) The legislative body of a local government, in the manner for the adoption and amendment of land development regulations pursuant to Section [8-103 *or cite to some other provision, such as a municipal charter or state statute governing the adoption of ordinances*]:
  - (a) shall adopt and amend an ordinance that authorizes incentives for the provision of affordable housing; and
  - (b) may adopt and amend an ordinance that authorizes incentives for open space dedication and provision of public benefit amenities.
- (2) The purpose of this Section is to authorize the adoption and amendment of:
  - (a) an affordable housing incentives ordinance in order to respond to and accommodate present and future needs for affordable housing;
  - (b) a community design and open space incentives ordinance to provide additional amenities for public use or benefit in new development that carry out goals and policies of a local government identified in its local comprehensive plan; and
  - (c) a unified incentives ordinance that incorporates subparagraphs (a) and (b) above.
- (3) As used in this Section:
  - (a) **“Affordable Housing”** means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate- or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which annual housing costs constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the

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<sup>241</sup>Telephone interview with Kent Edens, Deputy Director of Planning, San Jose, California, January 14, 2000. Interview conducted by Marya Morris, AICP, Senior Research Associate, APA Research Department.

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unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the affordable rent is no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

- (b) **“Affordable Housing Development”** means any housing development that is subsidized by the federal, state, or local government, or any housing development in which at least [20] percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices that preserve them as affordable housing pursuant to this Section.
- (c) **“Affordable Housing Incentives”** mean a density bonus and other development incentives granted under an affordable housing incentive ordinance pursuant to this Section.
- (d) **“Affordable Rent”** means monthly housing expenses, including a reasonable allowance for utilities, for affordable housing units that are for rent to low- or moderate-income households.
- (e) **“Affordable Sales Price”** means a sales price at which low- or moderate-income households can qualify for the purchase of affordable housing, calculated on the basis of underwriting standards of mortgage financing available for the housing development.
- (f) **“Bonusable Area”** means space that is occupied by a public benefit amenity and that is determined by the local government to satisfy requirements under its land development regulations for additional gross floor area or dwelling units.
- (g) **“Bonus Ratio”** means the ratio of additional square feet of nonresidential floor area granted per square foot of bonusable area.
- (h) **“Density Bonus”** means the percentage of density increase granted over the otherwise maximum allowable net density under the applicable zoning ordinance as of the date of the application to the local government for incentives by a developer. The density bonus applicable to affordable housing shall be at least a 25 percent increase, and shall apply to the site of the affordable housing development.<sup>242</sup>
- (i) **“Development Agreement”** means a development agreement authorized by Section [8-701].

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<sup>242</sup>California communities offer density bonuses well in excess of 25 percent., in some cases as high as 150-175 percent. See Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan, “Selling Zoning: Do Density Bonuses for Moderate-Cost Housing Work?” *Land Use Law & Zoning Digest* 42, no. 8 (August 1990): 3-9, at 8 (discussion of Santa Rosa, California, incentives program).

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- (j) **“Development Incentives”** mean any of the following:
1. reductions in building setback requirements;
  2. reductions or waivers of impact fees, application fees for development permits, utility tap-in fees, or other dedications or exactions;
  3. reductions in minimum lot area, width, or depth;
  4. reductions in required parking spaces per dwelling unit or per square foot of floor area;
  5. increased maximum lot coverage;
  6. increased maximum building height and/or stories;
  7. reductions in minimum building separation requirements, provided that such reductions do not conflict with building code requirements of the state or the local government, as applicable;
  8. reductions or waivers of public or nonpublic improvements;
  9. approval by the legislative body of a local government of mixed use zoning in conjunction with the housing project if commercial, office, industrial or other land uses will contribute significantly to the economic feasibility of the housing development and if the mixed use zoning is consistent with the local comprehensive plan;
  10. authorization for the affordable housing development to include nonresidential uses, provided such uses or such authorization is consistent with the local comprehensive plan;
  12. authorization for the affordable housing to be located in a nonresidential zoning district, provided such authorization is consistent with the local comprehensive plan; or
  13. other incentives proposed by the developer of an affordable housing project or by the local government that result in identifiable cost reductions for affordable housing, including direct financial aid by the local government in the form of a loan or grant to subsidize or provide low interest financing for on- or off-site improvements, land, or construction costs.
- (k) **“Floor Area Ratio”** means the ratio of the maximum gross floor area on a lot or parcel to the area of the lot or parcel that is permitted pursuant to the land development regulations of a local government.

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- (l) **“Housing Costs”** mean the sum of actual or projected monthly payments for any of the following associated with for-sale affordable housing units: principal and interest on a mortgage loan, including any loan insurance fees; property taxes and assessments; fire and casualty insurance; property maintenance and repairs; homeowner association fees; and a reasonable allowance for utilities.
- (m) **“Housing Development”** means construction, including rehabilitation, projects consisting of five or more residential units, including single-family, two-family, and multiple-family residences for sale or rent.
- (n) **“Incentives”** mean one or more of the following:
1. affordable housing incentives;
  2. bonus ratio; and
  3. density bonus.
- (o) **“Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (p) **“Moderate-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (q) **“Public Benefit Amenity”** means one or more features for public use or benefit within or in the vicinity of a development that will entitle the development to a bonus ratio or a density bonus, as applicable, including, but not limited to:
1. shopping atriums;
  2. plazas, parks, and other open spaces;
  3. overhead weather protection and street arcades;
  4. bicycle parking and storage facilities;
  5. performing arts theaters;

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6. museums;
  7. access to transit stations and transit easements;
  8. provision of child day-care centers;
  9. provision of affordable housing as part of a nonresidential development; and
  10. [other].
- (r) **“Unified Incentives Ordinance”** means an ordinance that provides incentives for both:
1. provision of affordable housing; and
  2. dedication of open space and/or provision of community design amenities;
- and that complies with all requirements of this Section for both an affordable housing incentives ordinance and a community design and open space incentives ordinance.
- (4) The legislative body of a local government may adopt and amend an affordable housing incentives ordinance only after it has adopted a local comprehensive plan that contains:
- (a) a housing element pursuant to Section [7-207]; and
  - (b) a policy in written and/or mapped form that encourages affordable housing incentives.
- (5) The legislative body of a local government may adopt and amend a community design and open space incentives ordinance only after it has adopted a local comprehensive plan that contains:
- (a) if a density bonus for residential development for the public benefit amenity of a plaza, park, or other open spaces is authorized, a housing element pursuant to Section [7-207]; and
  - (b) if any other type of bonus ratio is authorized, a community design element pursuant to Section [7-214]; and
  - (c) a policy in written and/or mapped form that describes the relationship between the applicable public benefit amenities and the density bonus or bonus ratio and supports the granting of such density bonus or bonus ratio.

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- (6) An affordable housing incentive ordinance, a community design and open space incentives ordinance, or a unified incentives ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the ordinance;
  - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with the purposes of this Section;
  - (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 affordable housing incentive ordinance. Where this Chapter or Section defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
  - (e) procedures for the review of applications for incentives;
  - (f) a requirement that every developer that is to receive incentives shall enter into a development agreement with the local government;
  - (g) designation of an officer or body to review and approve applications for incentives; and
  - (h) provisions for enforcement, including the issuance of certificates of compliance.
- (7) An affordable housing incentives ordinance or a unified incentives ordinance shall also include the following minimum provisions:
- (a) a requirement that, where a developer proposes a housing development within the jurisdiction of the local government, the local government shall provide the developer with affordable housing incentives for the production of affordable housing within the development if the developer meets the requirements set forth in paragraphs (11) and (12) below; and
  - (b) provisions to ensure that once affordable housing is built through subsidies or other means as part of a housing development, its availability will be maintained through measures that establish income qualifications for affordable housing renters or purchasers, promote affirmative marketing measures, and regulate the price and rent, including resale price, of affordable housing units.
- (8) A community design and open space incentives ordinance or a unified incentives ordinance shall also include the following minimum provisions:
- (a) a statement of the types or categories or public benefit amenities for which a bonus ratio or density bonus shall be authorized, the amount of the respective bonus ratio

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- or density bonus, and the zoning use district or overlay district to which public benefit amenity and the respective bonus ratio or density bonus apply;
- (b) locational and other development standards for the public benefit amenities, including a statement of the minimum bonusable area that a public benefit amenity must contain in order to be eligible for a bonus ratio or a density bonus; and
  - (c) requirements for permanent public access to the public benefit amenity, including signage indicating the nature of the public access, secured by either:
    - 1. a conveyance of the plaza, park, or other open space, or access to transit stations or transit easements, to the local government or appropriate governmental unit as a public use as a condition of approval of the development permit, provided that the conveyance is in a form approved by the attorney of the local government or governmental unit; or
    - 2. where the public benefit amenity will not be owned by the local government or another governmental unit, provisions in the development agreement requiring permanent maintenance by the property owner, except that permanent public access may be limited to normal business hours.
- (9) An affordable housing incentives ordinance or a unified incentives ordinance may require that any new housing development within the jurisdiction of the local government contain at least [15] percent affordable housing if such a requirement is consistent with a policy contained in the local comprehensive plan. The incentives offered to the developer, whether density bonuses, development incentives, or both, shall be of at least equivalent financial value to the cost of making the affordable housing units affordable.
- (10) A community design and open space incentives ordinance or a unified incentives ordinance may:
- (a) include a manual of graphic and written design guidelines to assist developers in the preparation of applications for community design and open space incentives, but such guidelines shall be advisory only;
  - (b) include a statement of the maximum bonusable area that a public benefit amenity may contain in order to be eligible for a bonus ratio or a density bonus;
  - (c) include a provision that allows the developer to provide the public benefit amenity offsite as a condition of receiving a bonus ratio or density bonus, including standards of proximity of the development to the offsite public benefit amenity; and
  - (d) be adopted as an overlay district to all or portions of existing zoning use districts. The boundaries of the overlay district shall be shown on the zoning map pursuant to Section [8-201(3)(o)].

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- (11) Where a developer proposes a housing development that is to be an affordable housing development, the local government shall either:
- (a) grant a density bonus and at least one development incentive, unless the local government makes a written finding that the development incentive is not necessary to reduce the price or rent of the dwelling units in order to ensure that they are affordable housing; or
  - (b) provide, in lieu of subparagraph (a) above, development incentives of equivalent financial value based upon the land cost per dwelling unit. The value of such equivalent development incentives shall at least equal the land cost per dwelling unit that would result from a density bonus and shall contribute significantly to the economic feasibility of providing the affordable housing units.
- (12) The development agreement entered into between the developer of a housing development that is to be an affordable housing development and the local government shall include provisions to ensure the availability of affordable housing for sale or rent.
- (a) The development agreement shall provide for a period of availability for affordable housing as follows:
    - 1. Newly constructed low- and moderate-income sales and rental dwelling units shall be subject to affordability controls for a period of not less than [15] years, which period may be renewed pursuant to the development agreement;
    - 2. Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
    - 3. Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
    - 4. Any dwelling unit created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to affordability controls as delineated in subparagraph (a) 1 above.
    - 5. Affordability controls on owner- or renter-occupied accessory apartments shall be applicable for a period of at least [5] years.
    - 6. Alternatives not otherwise described in this subparagraph shall be controlled in a manner deemed suitable to the local government and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.

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- (b) In the case of for-sale housing developments, the development agreement shall include the following affordability controls governing the initial sale and use and any resale:
    - 1. All conveyances of newly constructed affordable housing dwelling units subject to the affordable housing incentives ordinance that are for sale shall contain a deed restriction and mortgage lien, which shall be recorded with the county [recorder of deeds *or equivalent official*]. Any restrictions on future resale shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies.
    - 2. Affordable housing units shall, upon initial sale, and resale in the period covered by the development agreement, be sold to eligible low- or moderate-income households at an affordable sales price and housing cost.
    - 3. Affordable housing units shall be occupied by eligible low- or moderate-income households during the period covered by the development agreement.
  - (c) In the case of rental housing developments, the development agreement shall include the following affordability controls governing the use of affordable housing units during the use restriction period:
    - 1. rules and procedures for qualifying tenants, establishing affordable rent, filling vacancies, and maintaining affordable housing rental units for qualified tenants;
    - 2. requirements that owners verify tenant incomes and maintain books and records to demonstrate compliance with the agreement and with the ordinance;
    - 3. requirements that owners submit an annual report to the local government demonstrating compliance with the agreement and with the ordinance.
  - (d) The development agreement shall include a schedule that provides for the affordable housing units to be built or rehabilitated concurrently with the units that are not subject to affordability controls.
- (13) The approval of incentives shall constitute a development permit. The incentives shall be part of the unified development permit review process established pursuant to Section [10-201].
- (14) This Section does not limit or require the provision of direct financial aid by the local government, the provision of publicly-owned land, or the waiver or reduction of fees,

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including impact fees pursuant to Section [8-602], or of dedication or exaction requirements pursuant to Section [8-601].

- (15) The [state planning agency *or* state department of development] shall by [date] prepare and distribute a model affordable housing incentives ordinance and related guidelines to assist local governments in complying with this Section.

## **ADMINISTRATIVE AND JUDICIAL REVIEW OF LAND-USE DECISIONS**

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

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### Chapter Outline

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### Cross-References for Sections in Chapter 10

<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
10-101	10-201, 10-208, 10-502, 10-601 <i>et seq.</i> , Ch. 11
10-102	12-101
10-103	7-501
10-201	10-101, 10-204, 10-209, 10-210
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10-302	10-210, 10-301
10-304	10-204, 10-205, 10-207
10-305	10-207, 10-209
10-306	10-601 <i>et seq.</i>
10-307	10-207, 10-209
10-501	10-301, 10-401, 10-502, 10-503
10-502	8-104, 8-201, 10-501
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10-504	8-701, 10-604
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10-601	10-601 <i>et seq.</i>
10-603	8-502, 10-203, 10-209, 10-210, 10-604, 10-607
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<b>10-609</b>	<b>10-606, 10-607</b>
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<b>10-618</b>	<b>10-602</b>

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### ADMINISTRATION OF LAND DEVELOPMENT REGULATIONS<sup>1</sup>

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

#### ADMINISTRATIVE REVIEW IN THE SZEA

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

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

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

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unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.<sup>2</sup>

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

### THE CHANGING FACE OF DEVELOPMENT PERMIT REVIEW

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

There are two principal reasons for the increased complexity and corresponding delay.<sup>5</sup>

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

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

<sup>3</sup>Id.

<sup>4</sup>Id.

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

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

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

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

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

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

<sup>7</sup>SZEА, n. 43.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

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

<sup>11</sup>Donald G. Hagman, *Urban Planning and Land Development Control Law* (St. Paul: West 1971), 71.

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

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

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

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

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

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### THE INTERNAL ADMINISTRATIVE PROCESS

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

### THE BOARD OF ADJUSTMENT

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

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

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<sup>14</sup>John Vranicar et al., *Streamlining Land Use Regulation*, 5, 16-17.

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

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

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

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

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

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

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

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

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

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

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

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

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

### **SOME SOLUTIONS**

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

### **HEARING EXAMINERS**

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<sup>21</sup>Id., at 5.

<sup>22</sup>Jesse Dukeminier, Jr. and Clyde L. Stapleton, “Boards of Adjustment: The Problem Re-examined,” *Zoning Digest* 14, No. 12 (December 1962): 361-371, at 370-371 .

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

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

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

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

### THE ALI CODE PROPOSALS

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

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

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

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

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

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

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### **Table 10-1 Why Development Permitting Processes Should Be Reformed**

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

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

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

<sup>27</sup>ALI Code, §2-202, Modification of Regulations Applicable to a Permitted or Existing Use.

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

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

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

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

### **CONSOLIDATED PERMITS; JOINT HEARINGS**

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

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<sup>28</sup>ALI Code, §2-204, Special Development Permit to Allow Economic Use.

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

<sup>30</sup>ALI Code, §§2-402, Joint Hearing, and 2-403, Agency Decision.

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

#### **SOLUTIONS NOT REQUIRING ENABLING LEGISLATION**

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

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**Table 10-2**  
**Factors Affecting Development Permitting Delays**

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

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

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<sup>31</sup>Or. Rev. Stat. §§215.416(2) and 227.175(2) (1999).

<sup>32</sup>Rev. Code Wash. §36.70B.110(7) (1998).

<sup>33</sup>Md. Code Ann., State Government, Tit. 11, §11-501 et seq. (Consolidated Procedures for Development Permits).

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

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

### A CAVEAT

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

## GENERAL PROVISIONS

### 10-101 Definitions

As used in this Chapter:

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

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

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<sup>35</sup>See Debra Bassert, “Streamlining the Development Approval Process,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 3*, Planning Advisory Service Report No. \_\_\_\_ (Chicago: American Planning Association, forthcoming).

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

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

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

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

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

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

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

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

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

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

“**Enforcement Action**” means an action pursuant to Chapter 11 of this Act.

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

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

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

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

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

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

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

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

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

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

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

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

- ◆ The definitions for hearings and appeals are critical. One important reform contained in this Chapter is to clarify the types of hearings and appeals authorized for land-use decisions at the local level, and how they should be held. The Sections on the unified development permit review process specify what kinds of hearings can be held at different stages of the development permit review process.
- ◆ (For definitions of “local comprehensive plan,” “development,” “land development regulation,” and “local government” see Chapter 3).

### 10-102 Purposes

The purposes of this Chapter are to:

- (1) provide for the timely consideration of development permit applications.
- (2) provide a unified development permit review process for land-use decisions by local governments;
- (3) authorize a consolidated development permit review process for land-use decisions by local governments;
- (4) provide for the appointment of hearing examiners;
- (5) provide for a Land-Use Review Board;

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- (6) authorize conditional uses, variances, and mediation in land development regulations; and
  - (7) provide a judicial review process for land-use decisions.
- ◆ This Section states the purposes of this Chapter. The judicial review process is limited to “land-use decisions,” which include any decisions made on an application for a development permit. It does not include “land-use actions,” as defined in Section 12-101(3), which are not so limited. A land-use decision can include a decision on a zoning map amendment if it is defined as a “development” that requires a development permit.

### 10-103 Exemptions for Corridor Maps

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

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

## UNIFIED DEVELOPMENT PERMIT REVIEW PROCESS FOR LAND-USE DECISIONS

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

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

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

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

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

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

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

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

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

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

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

- (1) The legislative body of each local government shall adopt, as part of its land development regulations, an ordinance that establishes a unified development permit review process for applications for development permits.
- (2) The ordinance establishing a unified development permit review process shall contain a list of all development permits required by the local government. For each such development permit, the list shall include:
  - (a) citation to the land development regulations, statute, rule, or other legal authority under which the development permit is required;
  - (b) the category of development to which it applies;
  - (c) the stage or sequence of the development process at which it must be obtained;
  - (d) the designation of the officer or body of the local government responsible for reviewing and granting the development permit and the subsequent certificate of compliance;
  - (e) whether a record hearing is required; [and]
  - (f) the approximate time necessary for review and grant of such development permit; [and]
  - [(g) the time limit for granting, granting subject to conditions, or denying such development permit pursuant to Section [10-210], said time limit:
    1. commencing from the time the local government makes a written determination that a development permit application is complete, or from the time a development application is deemed complete; and
    2. being reasonably based on the approximate time determined under paragraph (2)(f) above.]

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

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

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

- (4) The ordinance establishing a unified development permit review process shall establish reasonable time limits on the validity of development permits. A reasonable time limit is one that provides adequate time to complete the development authorized, based upon a good faith effort towards completion.
- ◆ Different types or scales of development may require different durations. Generally, the permits for more complex development should have longer durations.
- (a) The ordinance shall provide for the extension of such time limits whenever a change in circumstances precludes or precluded the landowner from completing the development according to the terms and conditions of the permit within the time limit established by the permit despite the landowner's reasonable efforts to complete the development within that time limit.
- (b) The ordinance may provide for the extension of such time limits under other circumstances as the local government sees fit.
- (c) An extension of time limits:
1. shall provide adequate time to complete the development authorized by the original development permit, based upon a good faith effort towards completion; and.
  2. does not by itself preclude or prohibit further extensions as necessary.
- (d) An application for extension of time limits is a development permit application.
- ◆ The effect of the last provision is to require the local government to describe the procedure for granting such permit extensions in the ordinance, as provided in paragraphs (2) and (3) above. It also makes the decision on a permit extension application appealable under Section 10-209 and reviewable under Section 10-601 *et seq.* judicial review.
- (5) For the purposes of this Chapter, the ordinance establishing the unified development permit review process may define the amendment of the zoning map by the legislative body as a development permit.
- ◆ States may adopt paragraph (5) where the courts have characterized the amendment of a zoning map as a quasi judicial act, when it affects specific individuals and when it involves the

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

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

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

### 10-202 Development Permit Applications

- (1) As part of the ordinance establishing the unified development permit review process, the legislative body shall specify in detail the information required in every application for a development permit and the criteria it will apply to determine the completeness of any such application. The ordinance shall require the local government to notify applicants for development permits, at the time they make application, of the completeness determination, notice, and time-limit requirements required by this Chapter for the review and approval of development permits.
  - (2) No local government may require a waiver of the time limits on a completeness determination or a decision on a development permit as a condition of accepting or processing an application for a development permit, nor shall a local government find an application incomplete because it does not include a waiver of these time limits.
- ◆ Without this provision, a local government could effectively negate the time limits of this Article by routinely requiring waiver of time limits as a condition to the approval of development permits.

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

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### *Commentary: Completeness*

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

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

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

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

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

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

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### **10-203 Completeness Determination**

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

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- (2) If the local government determines that the application is incomplete, it shall identify in its determination the parts of the application which are incomplete, and shall indicate the manner in which they can be made complete, including a list and specific description of the additional information needed to complete the application. The applicant shall then submit this additional information to the local government within [28] days of the determination pursuant to paragraph (1), unless the local government agrees in writing to a longer period.
- (3) The local government shall determine in writing that an application is complete within [28] days after receipt of the additional information indicated in the list and description provided to the applicant under paragraph (2).
- (4) A development permit application is deemed complete under this Section if the local government does not provide a written determination to the applicant that the application is incomplete within [28] days of the receipt of an application under paragraph (1) or within [28] days of the receipt of any additional information submitted under paragraph (2).
- (5) A development permit application is complete for purposes of this Section when it meets the completeness requirements of, or is deemed complete under, this Section, even though additional information may be required or modifications in the development may occur subsequently. The completeness determination does not preclude the local government from requesting additional information or studies either at the time of the notice of completeness or subsequently if new information is required or substantial changes in the proposed development occur.

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### ***Commentary: Administrative Review***

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

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

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### 10-204 Administrative Review

- (1) **When required.** The ordinance establishing the development permit review process may authorize local government officers and bodies to conduct an administrative review of development permit applications without a record hearing. The ordinance shall designate the development permits that are subject to an administrative review.
- (2) **Participation.** Documents and materials concerning a development permit application may be submitted to the officer or body that will conduct the administrative review by:
  - (a) The applicant; and
  - (b) any person, neighborhood planning council, neighborhood or community organization, or governmental unit, if it would be aggrieved by a decision on the development permit application.
- (3) **Conflicts.** Any decision-making officer or member of a decision-making body having a direct or indirect financial interest in property that is the subject of an administrative review, who is related by blood, adoption, or marriage to the owner of property that is the subject of an administrative review or to a person who has submitted documents and materials concerning an application, or who resides or owns property within [500] feet of property that is the subject of an administrative review, shall recuse him- or herself from the matter and shall state in writing the reasons for such recusal.
- (4) **Findings, decision, and notice.**
  - (a) A local government may approve or deny a development permit application, or may approve an application subject to conditions. Any approval, denial, or conditions attached to a development permit approval shall be based on and implement the land development regulations, and goals, policies, and guidelines of the local comprehensive plan.
  - (b) Any decision on a development permit application shall be based upon and accompanied by a written statement that:
    1. states the land development regulations and goals, policies, and guidelines of the local comprehensive plan relevant to the decision;
    2. states the facts relied upon in making the decision;
    3. explains how the decision is based on the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement;

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4. responds to all relevant issues raised by documents and materials submitted to the administrative review; and
  5. states the conditions that apply to the development permit, the conditions that must be satisfied before a certificate of compliance can issue, and the conditions that are continuing requirements and apply after a certificate of compliance is issued.
- (c) A local government shall give written notice of its decision to the applicant and to all other persons, neighborhood planning councils, neighborhood or community organizations, or governmental units that submitted documents and materials [and shall publish its decision in a newspaper of general circulation and may publish the decision on a computer-accessible information network].
- ◆ To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process. This Section also authorizes conditions on approved applications, which often are necessary to meet problems discovered about the application during the process. This authority is intended to be flexible, as conditions can implement any of the regulations or planning policies on which the decision is based. Subparagraph (c) makes newspaper and electronic publication of a decision optional. This Section is based on Idaho Code §67-6519, N.J. Stat. Ann. §40:55D-10, and Ore. Rev. Stat. §§227.173(3) and 227.175(3).
- (5) **Request for clarification.** Within [30] days of a request for clarification of findings and decisions specifically included in the written notice of decision pursuant to paragraph (4)(b) above, the local government shall issue a written clarification concerning those specific findings and decisions. Notice of the clarification shall be given in the same manner as the notice of decision pursuant to paragraph (4)(c) above.
- ◆ It may be important for a permit applicant, or some other interested party, to obtain clarification or explanation of some issue raised by the local government in its development permit decision. This paragraph authorizes the applicant for a development permit to make a request for such a clarification.
- (6) **Certificate of compliance.** The officer or body that grants a development permit shall issue a certificate of compliance if the completed development is in accordance with the conditions of the development permit that must be satisfied before a certificate of compliance can issue. The officer or body may delegate the responsibility of issuing the certificate of compliance to another officer.
- (a) The ordinance establishing the unified development permit review process may describe the type and sequence of inspections regarding a development authorized by a development permit in order that a certificate of compliance may be issued at the completion of the development.

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- (b) An owner of land for which a development permit has been issued may apply upon completion of the development for a certificate of compliance, and may introduce documentation and evidence, including the written reports of inspections performed according to paragraph (6)(a) above, and if the agency that issued the development permit finds that the completed development was in accordance with the terms and conditions of the development permit as of a particular date, the certificate of compliance shall be effective as of that date.
  - (c) The ordinance establishing the development review process may also provide for the periodic review of compliance with development permits.
  - (d) A local government may bring enforcement proceedings to remedy a violation of this paragraph, as authorized by Chapter 11 of this Act.
- ◆ The usual process for the issuance of a certificate of compliance is automatic once the agency that granted a development permit determines that the development has been completed in compliance with the development permit. However, if a development was in compliance before the agency found it to be so, or the agency has not yet made a decision, or, for some reason, the local government failed to issue a certificate, and the land owner wants the certificate to be retroactive to the date of compliance (i.e. for purposes of nonconforming use protection), subparagraph (b) authorizes the owner to specifically apply for a retroactive certificate, and shall be issued a certificate retroactively if he or she can prove compliance on the earlier date.

### 10-205 Notice of Record Hearing

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

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- (c) list the land development regulations and any goals, policies, and guidelines of the local comprehensive plan that apply to the application;
- ◆ This is a very important paragraph, because the land regulations and comprehensive plan goals, policies and guidelines listed in the notice will determine the issues on which the hearing will be held. Of course, it is open to any party to challenge this part of the notice as legally incomplete if it omits regulations or plan goals, and policies and guidelines that apply to the application.
- (d) set forth the street address or other easily understood geographical reference to the subject property;
  - (e) state that a failure to raise an issue at a record hearing, in person or by letter, or the failure to provide statements or evidence sufficient to afford the local government an opportunity to respond to the issue, precludes an appeal to the appeals board based on that issue, unless the issue could not have been reasonably known by any party to the record hearing at the time of the record hearing;
  - (f) state that a copy of the application, all documents and evidence submitted by or on behalf of the applicant, and any applicable land development regulations or goals, policies, and guidelines of the local comprehensive plan, are available for inspection at no cost and will be provided at reasonable cost;
  - (g) state that a copy of any staff reports on the application will be available for inspection at no cost at least [7] days prior to the record hearing, and will be provided at actual cost;
  - (h) state that a record hearing will be held and include a general explanation of the requirements for the conduct of the record hearing; and
  - (i) identify, to the extent known by the local government, any other governmental units that may have jurisdiction over some aspect of the application.
- ◆ This paragraph is based on Ore. Rev. Stat. §197.763. The hearing notice is extremely important. Many unnecessary hearing difficulties and unnecessary appeals can be avoided if the hearing notice must provide all the information that is needed to form an opinion about the application. An extension of time limits for a hearing is authorized when state agencies or other local governments must approve or review a development application, as this additional process may take longer than 30 days.
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### *Commentary: Methods of Notice*

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

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### **10-206 Methods of Notice**

- (1) A local government shall use reasonable methods to give notice of a development permit application to the public, including [neighborhood planning councils established pursuant to Section [7-109], neighborhood or community organizations recognized pursuant to Section [7-110]], and to local governments or state agencies with jurisdiction. A local government shall specify the methods of public notice it will use in its development permit review ordinance, and may specify different types of notice for different categories of development permits. However, any ordinance adopted under this paragraph shall at least specify all of the following methods:
  - (a) conspicuous posting of the notice on the property, for site-specific development proposals;
  - (b) publishing the notice, including at least the development location, description, type of permit(s) required, and location where the complete application may be reviewed, in a newspaper of general circulation in the jurisdiction of the local government [and giving notice by publication on a computer-accessible information network];
  - (c) posting the notice on a bulletin board in a conspicuous location in the principal offices of the local government; and
  - (d) mailing of notice to all adjacent local governments and to all state agencies that have jurisdiction over the development application.
- (2) Other examples of reasonable methods to inform the public that a local government may include in its development permit review ordinance are:
  - (a) notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
  - (b) notifying the news media;

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- (c) publishing notices in appropriate regional or neighborhood newspapers or trade journals;
- (d) publishing notice in local government agency newsletters or sending notice to agency mailing lists, either general lists or lists for specific proposals or subject areas; and
- (e) mailing notice to abutting and confronting property owners.

### 10-207 Record Hearings

- (1) **When required.** This Section applies when a local government holds a record hearing on a development permit application.
  - (2) **Availability of materials.** The applicant, or any person who will be a party to, or who will testify or would like to testify in any record hearing, shall submit all documents or evidence on which he or she intends to rely to the local government, which shall make them available to the public at least [7] days prior to the record hearing.
  - (3) **Availability of staff reports.** The local government shall make any staff report it intends to use at the record hearing available to the public at least [7] days prior to the record hearing.
- ◆ Paragraphs (2) and (3) require full disclosure of applicant materials and local government reports prior to a hearing. Failure to disclose these materials creates fairness problems that frustrate all parties to a hearing and that can lead to litigation. These paragraphs mean that parties to a hearing must submit materials for witnesses they intend to call, and materials must also be submitted by persons who would like to testify though they are not parties. See Section 10-207(6)(b).
- (4) **Record hearing rules.** As part of its unified development permit review process, the legislative body of each local government shall specify rules for the conduct of record hearings. The rules, as a minimum, shall include the requirements for record hearings contained in this Section, and may supplement, but may not conflict with, these requirements.
  - (5) **Parties.** Any governmental unit that has jurisdiction over the development application, and any abutting or confronting owner or occupant, may be a party to a record hearing held under this Section. Any other person or governmental unit, including a neighborhood planning council or neighborhood or community organization, may be a party to any record hearing held under this Section, if it would be aggrieved by a land-use decision on the development permit application.

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

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

- (a) The officer presiding at a record hearing, or such person as he or she may designate, [shall or may] have the power to conduct discovery and to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant evidence, including witnesses and documents presented by the parties. The presiding officer may call any person as a witness whether or not he or she is a party.
  - (b) The presiding officer shall take the testimony of all witnesses relating to a development permit application under oath or affirmation, and shall permit the right of cross-examination to all parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations on the time and number of witnesses.
  - (c) Technical rules of evidence do not apply to the record hearing, but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence.
  - (d) If a party to the record hearing provides additional documents or evidence, the presiding officer may allow a continuance of the record hearing or leave the record open to allow other parties a reasonable opportunity to respond.
  - (e) The local government shall provide for the verbatim recording of the record hearing, and shall furnish a copy of the recording, on request, to any interested person at its expense.
- ◆ Subparagraph (e) is based on N.J. Stat. Ann. §40:55D-10, which prescribes detailed procedures for public hearings that develop a record. See also Ore. Rev. Stat. §197.763(5). A local government may want to include provisions in their hearing rules for procedures not covered by this section. For example, the rules can provide procedures under which presiding officers can call witnesses other than witnesses called by parties. See paragraph (6)(b), above. They can also provide procedures for site visits, which are common in some jurisdictions. A site visit is acceptable if all parties are given personal notice of the visit, and if all decision makers are present at the site at the time of the visit. In addition, any information obtained during the site visit must be made part of the record and an opportunity provided for rebuttal.

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

(7) **Ex parte communications.**

*Alternative 1*

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

*Alternative 2*

- (a) A land-use decision based on a record hearing is void if a decision-making officer, or a member of a decision-making body, engages in a substantial ex parte communication concerning issues related to the development permit application with a party to the record hearing, or a person who has a direct or indirect interest in any issue in the record hearing, unless the official or member who engages in the ex parte communication provides an opportunity to rebut the substance of any written or oral ex parte communication by promptly putting it on the record and promptly notifying all parties to the record hearing of the contents of the communication.
- (b) An oral communication between local government staff and the decision-making officer or a member of a decision-making body is not a substantial ex parte communication under this paragraph.

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

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- (8) **Conflicts.** Any decision-making officer or member of a decision-making body having a direct or indirect financial interest in property that is the subject of a record hearing, who is related by blood, adoption, or marriage to the owner of property that is the subject of a record hearing or to a party to the record hearing, or who resides or owns property within [500] feet of property that is the subject of a record hearing, shall recuse him- or herself from the matter before the commencement of the record hearing and shall state the reasons for such recusal.
- (9) **Findings, decision, and notice.**
- (a) A local government may approve or deny a development permit application, or may approve an application subject to conditions.
- (b) Any decision on a development permit application shall be based upon and accompanied by a written statement that:
1. states the land development regulations and goals, policies, and guidelines of the local comprehensive plan relevant to the decision;
  2. states the facts relied upon in making the decision;
  3. explains how the decision is based on the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement of the comprehensive plan;
  4. responds to all relevant issues raised by the parties to the record hearing; and
  5. states the conditions that apply to the development permit, the conditions that must be satisfied before a certificate of compliance can issue, and the conditions that are continuing requirements and apply after a certificate of compliance is issued.
- (c) A local government shall give written notice of its decision to all parties to the proceeding [and shall publish its decision in a newspaper of general circulation and may publish the decision on a computer-accessible information network].

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

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

- (10) **Request for clarification.** Within [30] days of a request for clarification of findings and decisions specifically included in the written notice of decision pursuant to paragraph (9)(b) above, the local government shall issue a written clarification concerning those specific findings and decisions. Notice of the clarification shall be given in the same manner as the notice of decision pursuant to paragraph (9)(c) above.
- ◆ It may be important for a permit applicant, or some other interested party, to obtain clarification or explanation of some issue raised by the local government in its development permit decision. This paragraph authorizes the applicant for a development permit to make a request for such a clarification.
- (11) **Certificate of compliance.** The officer or body that grants a development permit shall issue a certificate of compliance if the completed development is in accordance with the conditions of the development permit that must be satisfied before a certificate of compliance can issue. The officer or body may delegate the responsibility of issuing the certificate of compliance to another officer.
- (a) The ordinance establishing the unified development permit review process may describe the type and sequence of inspections regarding development authorized by a development permit in order that a certificate of compliance may be issued at the completion of the development.
- (b) An owner of land for which a development permit has been issued may apply upon completion of the development for a certificate of compliance, and may introduce documentation and evidence, including the written reports of inspections performed according to paragraph (11)(a) above. If the agency that issued the development permit finds that the completed development was in accordance with the terms and conditions of the development permit as of a particular date, the certificate of compliance shall be effective as of that date.
- (c) The ordinance establishing the development review process may also provide for the periodic review of compliance with development permits.
- (d) A local government may bring enforcement proceedings to remedy a violation of this paragraph, as authorized by Chapter 11 of this Act.
- ◆ The usual process for the issuance of a certificate of compliance is automatic once the agency that granted a development permit determines that the development has been completed in compliance with the development permit. However, if a development was in compliance before the agency found it to be so, or the agency has not yet made a decision, or, for some reason, the local government failed to issue a certificate, and the land owner wants the certificate to be

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

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### ***Commentary: Consolidated Permit Review Process***

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

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### **10-208 Consolidated Permit Review Process**

- (1) As part of the ordinance establishing the unified development permit review process, the legislative body of each local government [shall *or* may] establish a consolidated permit review process in which an applicant for a development permit may apply at one time for all development permits or zoning map amendments needed for a development.
  - (2) If an applicant for a development permit applies for a master permit, the local government shall determine what procedures apply to the review of the development, and shall designate a permit coordinator who shall coordinate the consolidated permit review process. A consolidated permit review process may provide different procedures for different categories of development permits. If a development requires permits from more than one category of development permit as well as zoning map amendments, the local government [shall *or* may] provide for a consolidated permit review process with [1] record hearing and no more than one record appeal.
- ◆ Paragraph (2) gives the local government the flexibility to decide on the procedures that apply in a consolidated permit review process, which may include administrative reviews and record hearings. If the development requires permits from a number of permit categories as well as a zoning map amendment, the statute can either mandate or authorize a simplified review process by having one record hearing and one record appeal. This option is intended for states in which the zoning amendment is quasi-judicial.
- (3) The local government may authorize the permit coordinator to issue a master permit. The permit coordinator shall issue a master permit if all required development permits have been granted.

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

### 10-209 Appeals

- (1) An appeal of a land-use decision may be taken to an appeals board within [30] days after the decision is issued[, or within [30] days after the date the decision is deemed approved under Section [10-210]]:
  - (a) by the applicant for the development permit or land-use decision, and by any party to the record hearing, if there has been a record hearing; or
  - (b) if there has been an administrative review:
    - 1. by the applicant for the development permit; or
    - 2. by any person, neighborhood planning council, neighborhood or community organization, or governmental unit, if he, she, or it is aggrieved by the land-use decision.
- (2)
  - (a) The party appealing must file a notice of appeal specifying the grounds for the appeal with the officer or body from whom the appeal is taken, and with the appeals board. The officer or body from whom the appeal is taken shall transmit to the appeals board the record upon which the land-use decision appealed from was taken.
  - (b) The appeals board may dismiss an appeal if it determines that the notice of appeal is legally insufficient on its face.
- ◆ If a record hearing has been held on the development permit application, any person who could be aggrieved has had the opportunity to become a party to the hearing, so this section limits appeals to persons who became parties. If there has been an administrative review without a hearing there has been no opportunity to establish party status, so appeals may be taken by the applicant and by any person aggrieved.
  - (3) An appeal that is not dismissed shall stay any and all proceedings to enforce, execute, or implement the land-use decision being appealed, and any development authorized by said land-use decision, unless the officer or body from whom the appeal is taken certifies in writing to the appeals board that a stay in the decision or development thereunder would cause immediate and irreparable harm to the appellant with no comparable immediate and

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

- ◆ A stay of proceedings to carry out a land-use decision pending an appeal maintains the status quo while a land-use decision is appealed, but also creates delays for a permit applicant if the decision stayed is a favorable decision on the permit. This paragraph authorizes a procedure that prohibits a stay order only if it would cause harm or a peril to life or property. The officer or body must present a certification that these circumstances exist, and it is then up to a court to decide whether it should grant a stay. The assumption is that a court can consider the probability of success on the merits or the appeal when it decides whether to grant a stay, and so may refuse a stay if it believes the appeal is wholly without merit. In addition, if it has the authority, a court can also order the posting of a bond as a condition to a stay order.
  - (4) The appeals board shall set the time and place at which it will consider the appeal, which shall be no more than [20] days from the time the appeal was filed. The appeals board shall give at least [10] days notice of the appeal hearing to the officer or body from which the appeal was taken and to the parties to the appeal.
  - (5) (a) The appeals board shall hold a hearing on the record in a record appeal. As part of its unified development permit review process, the legislative body shall adopt rules under which the appeals board may hear arguments on the record by the parties to the record appeal.
- ◆ This paragraph is based on R.I. Gen Laws §§45-24-64 and 45-24-66, and Wash. Rev. Code § 36.70.830. They authorize an appeal on the record to the appeals board designated by the legislative body and give the board the authority to adopt rules under which it will hear argument.
  - [(b) Supplementary evidence.
    - 1. The appeals board may take supplementary evidence in record appeals only in those limited cases in which it makes a written finding that evidence proffered by any party was improperly excluded from the record hearing.
    - 2. A finding that additional evidence will be taken is an interlocutory order that is not appealable. If the appeals board decides to take supplementary evidence, it shall provide mailed notice of this decision to all parties to the record hearing that was appealed, and shall hold a record hearing as required by the local government's unified development review process.]

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

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

- (c)
  1. An appeals board shall issue a written decision after the record hearing in which it may reverse or affirm, wholly or in part, or may modify a land-use decision from which an appeal is taken, and shall have the authority in making such decision to exercise all the powers of the officer or body from which the appeal is taken, insofar as they concern the issues on appeal. A tie vote is an affirmation of the decision from which the appeal was taken.
  2. The appeals board shall not make findings of fact[, unless the board has taken evidence supplementing the record on appeal, in which case it shall make findings of fact based on this evidence and shall make a decision based on such findings as required by Section [10-207(9)]]].

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

- (6) In an appeal from an administrative review, the appeals board shall hold a record hearing and make a decision as provided in Section [10-207].
- (7) The appeals board shall mail a notice of any decision to the parties to the appeal and to the [local planning agency *or* code enforcement officer] of the local government within [30] days of the commencement of the hearing.
- (8) The appeals board shall keep written minutes of its proceedings, showing the vote of each member upon each appeal or, if absent or failing to vote, indicating that fact, and shall keep records of its official actions in its office.

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

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### *Commentary: Time Limits and Their Effect*

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

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

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

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

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

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

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

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

*Alternative 1*

the failure to act shall be deemed an approval,

*Alternative 2*

- (a) the local government shall refund to the applicant any development permit application fee paid to the local government pursuant to Section [10-211]; and
- (b) the applicant shall have a cause of action, in the nature of mandamus, in the [*name of court*] in order to compel the local government to approve, approve with conditions, or disapprove the development permit application;

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

- (2) The local government, and the applicant for a development permit, may mutually agree to an extension of the time limits for a decision specified in paragraph (1) for a period not in excess of [90] days.
- [(3) If an application for a development permit is deemed approved under this Section, the officer or body shall send by mail written notice that the permit has been deemed approved to all:

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<sup>39</sup>Or. Rev. Stat. §§215.427, 215.429, 227.178, and 227.179 (1999).

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- (a) parties to the record hearing, or
  - (b) persons, neighborhood planning councils, neighborhood and community organizations, and governmental units that submitted documents and materials to the administrative review. ]
- (4) The time limits for decision specified in this Section do not run during any period:
- (a) not to exceed [30] days, in which a local government requests additional studies or information concerning a development permit application; or
- ◆ This paragraph is based on Wash. Rev. Code §36.70B.080 and provides more flexibility to the time limits provision.
- (b) in which the local government is unable to act upon development permit applications due to circumstances beyond the local government's control, including a reasonable period for resubmission of development permit applications and related materials destroyed, damaged, or otherwise rendered unusable.

### 10-211 Fees

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

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

## HEARING EXAMINERS

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### *Commentary: Hearing Examiner System*

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

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

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

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### 10-301 Hearing Examiner System

- (1) The legislative body of each local government may adopt an ordinance, as part of its land development regulations, which establishes a hearing examiner system. The ordinance shall specify those matters on which a hearing examiner may hear and make decisions and recommendations including, but not limited to, the following:
  - (a) development permit applications;
  - (b) proposals for the adoption or amendment of a local comprehensive plan or subplan, or the text or map amendment of a land development regulation;
  - (c) the administration, interpretation, and enforcement of land development regulations;
  - (d) such other matters as the legislative body believes should be heard and decided by a hearing examiner.
- (2) The ordinance establishing a hearing examiner system may also authorize the hearing examiner to exercise some or all of the powers and duties delegated to [*insert names of officials and boards*]. Sections [10-301] to [10-307] apply to hearing examiners when they exercise the powers and duties of the [*insert names of officials and boards*].
- (3) The ordinance establishing a hearing examiner system shall specify the qualifications for hearing examiners and the terms and conditions under which they shall serve. Hearing examiners shall have such training and experience as will qualify them to conduct hearings and make decisions and recommendations as authorized by this Chapter.
- [(4) A local government may also contract with [*insert name of state official*] for the use of administrative law judges appointed under [*cite to state administrative procedure act*] to hear any matter a hearing examiner may hear.]

### 10-302 Hearing Examiner's Jurisdiction

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

- (1) an applicant for a development permit to file an application with a hearing examiner when a record hearing is required, after the local government has determined that the application is complete, or after it is deemed complete under this Chapter;
  - (2) a permit coordinator appointed under Section [10-208] to refer applications for development permits submitted in a consolidated review process to a hearing examiner;
  - (3) an appeal, within [30] days after a land-use decision is issued[, or within [30] days after the date a land-use decision is deemed approved under Section [10-210]]:
    - (a) if there has been a record hearing, by the applicant for the development permit, and by any party to the record hearing; and
    - (b) if there has been an administrative review:
      1. by the applicant for the development permit; and
      2. by any person, neighborhood planning council, neighborhood or community organization, or governmental unit, if it is aggrieved by the land-use decision.
  - (4) the legislative body, the local planning commission, the [Land-Use Review Board], and any other body or official to refer any matter delegated to them to a hearing examiner.
- ◆ The local government has the option under this Section of deciding when, and under what circumstances, a hearing examiner may take jurisdiction of a land-use matter. For example, a local government ordinance could authorize applicants to file an application with the hearing examiner only when the development permit will require a quasi-judicial hearing. An application must be complete, as required by this Chapter, before an applicant can use this option. Paragraph (3) authorizes appeals of land-use decisions to hearing examiners by persons and organizations authorized to take appeals under Section 10-209(1). The ordinance can also provide that local boards and officials can refer matters to a hearing examiner. This Section is based on statutes such as Alaska Stat. §29.40.050; Idaho Code §67-6520; Md. Ann. Code Art. 66B, §2.06; Nev. Rev. Stat. §278.262; and Wash. Rev. Code §35A.63.170.

### 10-303 Decision to Recuse

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

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

### **10-304 Decisions Based on Record Hearings**

- (1) The hearing examiner shall hold a record hearing on an application for a development permit. If a record hearing has not been held on any other matter submitted, referred, or appealed to him or her, the hearing examiner shall hold a record hearing within [15] days of receiving an a referral from an officer or body of the local government, or an appeal.
  - (2) The hearing examiner shall:
    - (a) give notice of the record hearing as required by Section [10-205], through the methods specified in the local government's unified development permit review process ordinance;
    - (b) conduct the record hearing as required by the local government's unified development permit review process; and
    - (c) make findings, make a decision or recommendations, and give notice of that decision or recommendations as required by Section [10-207(9)];
- ◆ If a record hearing has not been held on a matter referred to the hearing examiner, this Section authorizes the hearing examiner to hold a record hearing under procedures required by the unified development review permit ordinance. The Section does not authorize the hearing examiner to make a decision or recommendation without a hearing. For a provision authorizing hearing examiners to make decisions without hearings, see e.g., Ore. Rev. Stat. §§215.416(11)(a) and 227.175(10).

### **10-305 Decisions Based on Record Appeals**

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

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### ***Commentary: Effect of Hearing Examiner's Decisions***

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

Appeals to boards and officials are governed by the appeals statutes that apply, such as Section 10-209. If the examiner's decision is final, it is judicially reviewable under the judicial review provisions of this Chapter. This Section is based in part on Wash. Rev. Code §35A.63.170(2).

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### **10-306 Effect of Hearing Examiner's Decisions**

- (1) A hearing examiner's decision on the adoption or amendment of a local comprehensive plan or subplan, or the textual or map amendment of a land development regulation, shall only be given the effect of a recommendation to the legislative body.
- (2) The ordinance establishing a hearing examiner system shall specify the legal effect of all other decisions by a hearing examiner, and may provide that their legal effect may vary for the different categories of development permits, referrals, and appeals heard by the hearing examiner. The ordinance may include any or a combination of the following:
  - (a) it may give the hearing examiner's decision the effect of a recommendation to the legislative body, board or official having jurisdiction; or
  - (b) it may give the hearing examiner's decision the effect of a final decision, and may specify whether the decision is appealable to the legislative body or to a designated official or body, or whether the decision is a final decision subject only to judicial review as provided by this Chapter.

### **10-307 Review of Hearing Examiner Recommendations**

- (1) If the hearing examiner has held a record hearing on the recommendation, the legislative body, board, or officer shall consider the recommendation as a record appeal and shall make a decision on the recommendation as provided by Section [10-209].
- [(2) If the hearing examiner has not held a record hearing on the recommendation, the legislative body, board, or officer shall hold a record hearing on the recommendation and shall make a decision on the recommendation as provided by Section [10-207]
- [(3) The legislative body, board, or officer shall give [due regard *or* substantial weight] to the recommendation of the hearing examiner.]

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

### **[10-308 Filing and Publication of Hearing Examiner Decisions**

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

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

## **LAND-USE REVIEW BOARD**

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

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

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

### **10-401 Land-Use Review Board Authorized**

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

### **10-402 Organization and Procedures**

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An ordinance creating a Land-Use Review Board shall:

- (1) specify the number of members who shall serve on the Board, including alternate members;
- (2) provide for the appointment of Board members, including alternate members, and for the organization of the board;
- (3) specify the terms of members of the Board, which may be staggered;
- (4) specify the requirements for voting on matters heard by the Board, and specify the circumstances in which alternate members may vote instead of regular members; and
- (5) specify procedures for filling vacancies in unexpired terms of Board members, including alternate members, and for the removal of members, including alternate members for due cause.

### **10-403 Compensation, Expenses and Assistance**

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

### **10-404 Training**

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

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

### **10-405 Powers**

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

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

## **ADMINISTRATIVE ACTIONS AND REMEDIES**

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### ***Commentary: Authority to Approve***

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

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#### **10-501 Authority to Approve.**

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

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### ***Commentary: Conditional Uses***

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

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

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#### **10-502 Conditional Uses**

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

- (1) specify the uses, or categories of uses, requiring approval as a conditional use, and the areas or districts in which they are available; and
  - (2) provide criteria for approving each category of conditional use. The criteria shall include a determination of consistency with the local comprehensive plan pursuant to Section [8-104].
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### *Commentary: Variances*

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

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

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### **10-503 Variances**

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

- (1) provide for the approval of variances from any of the numerical dimensional requirements of the land development regulations;
  - (2) prohibit the granting of a variance for use, density, or intensity for land, buildings or structures which is not authorized by the land development regulations;
- ◆ Use variances are not permitted under this Section because they would constitute an amendment of the zoning ordinance adopted by an administrative body instead of the local legislative body.
- (3) provide that the variance requested is required by exceptional or unique hardship because of:
    - (a) exceptional narrowness, shallowness, or shape of a specific piece of property; or
    - (b) exceptional topographic conditions or physical features uniquely affecting a specific piece of property;
  - (4) require a showing that there are no other reasonable alternatives to enjoy a legally permitted beneficial use of the property if the variance is not granted;

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- (5) prohibit the granting of a variance based on a showing that a use may be more profitable or that a building or structure may be more valuable if the variance is granted; and
  - (6) require that the variance requested be consistent with the local comprehensive plan as determined pursuant to Section [8-104].
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### *Commentary: Mediated Agreement*

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

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

### **MEDIATION**

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

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<sup>40</sup>See John Delaney, “Avoiding Regulatory Wipe-Outs: Proposed Model Legislation for a Local Mechanism,” *Land-use Law & Zoning Digest* 50, No. 7 (1998): 3.

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

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

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

### CONTENTS OF THE MODEL SECTION

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

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

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<sup>41</sup>45 U.S.C. §§154, 155.

<sup>42</sup>Idaho Code § 67-6510 (2001).

<sup>43</sup>5 Me. Rev. Stat. § 3341 (2000).

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

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### 10-504 Mediated Agreement

- (1) Any owner or developer of land who:
  - (a) has made a development permit application, complete or deemed complete, for the land in question and the application was denied by the local government or approved subject to conditions; and
  - (b) believes that a land development regulation, or the land development regulations cumulatively, imposes an undue hardship upon his or her use or development of the land in question;may petition for mediation as provided in this Section.
- (2) As used in this Section,
  - (a) “**Development Agreement**” means a development agreement pursuant to Section [8-701];
  - (b) “**Mediation**” means a process of negotiation where a disinterested person assists the parties in their negotiations.
  - (c) “**Parties**” mean the owners and/or developers and the local government.
- (3) Upon the filing with the local government of a written petition for mediation, the local government shall notify the petitioner in writing within [30] days of receipt of the petition whether mediation will commence.
  - (a) The petition for mediation shall include:
    1. the name and mailing address of the petitioner;

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2. the name and mailing address of the petitioner's attorney, if any;
  3. the names and mailing addresses of all owners of the property in question, if the petitioner is not the sole owner of the property;
  4. a description of the property in question;
  5. a statement of the nature and extent of the alleged undue hardship; and
  6. an identification of the land development regulation or regulations that allegedly create the undue hardship.
- (b) Local governments may, by ordinance, specify the form and content of petitions for mediation.
- (4) The parties shall by mutual written agreement select a mediator within [30] days of the issuance of a notice by the local government that mediation shall commence. If the parties cannot agree upon a mediator within that time, the local government shall notify the [state planning agency] in writing at the end of the [30]-day period and the [state planning agency] shall select a mediator within [10] days of its receipt of the notice. The [state planning agency] shall notify the parties in writing of the selection at the time the selection is made.
- (5) Absent a written agreement to the contrary, the cost of mediation shall be divided equally between the parties.
- (6) The focus of mediation pursuant to this Section shall be the negotiation of a development agreement to remedy or ameliorate undue hardship and to resolve potential takings claims, but all appropriate remedies, measures, and responses may be considered.
- (a) The parties shall participate in the mediation in good faith.
  - (b) The mediator shall coordinate the mediation with the parties, including the date, time, and place of meetings. All meetings shall be open to the public.
  - (c) The mediator may invite any person, organization, or governmental unit to participate in the mediation. The parties may suggest persons, organizations, or governmental units to invite.
  - (d) Failure to enter into or adopt a development agreement is not a land-use decision. Mediation is not a remedy that must be exhausted pursuant to Section [10-604] as a prerequisite to judicial review pursuant to this Chapter.

### **10-505 Referral to Planning Commission**

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- (1) If the land development regulations designate an officer or body other than the planning commission to hear an application for a conditional use or variance, such officer or body may request a recommendation from the local planning commission or local planning agency. It shall report its recommendations within [30] days of the receipt of the application by such officer or body.
  - (2) If the local planning commission or local planning agency makes a recommendation, the officer or body shall give it [due regard *or* substantial weight] and make it a part of the record.
- ◆ A local government may appoint its planning commission to hear applications for the administrative remedies authorized by this Chapter. If it appoints another officer or body, this Section authorizes a referral to the planning commission or the land planning agency for a recommendation. This Section is based in part on R.I. Gen. Laws §45-24-41(B).

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### *Commentary: Imposition of Conditions*

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

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### **10-506 Conditions**

- (1) When an officer or body approves a conditional use or variance, it may adopt such conditions which, in its opinion, will promote the intent and purpose of the local comprehensive plan and land development regulations. These conditions may include, but are not limited to, conditions that:
  - (a) minimize the adverse effect of a development on the surrounding area and on any natural resources that will be affected by the development;

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- (b) require the submission and approval of a site plan, if authorized by the land development regulations, that specifies the location and nature of the development and any necessary improvements;
  - (c) guarantee the satisfactory completion and maintenance of any required improvements;
  - (d) control the sequence of development, including when it must be commenced and completed; and
  - (e) require detailed records, including drawings, maps, plats or specifications.
- (2) The officer or body shall base any conditions it adopts on competent, credible evidence it shall incorporate into the record and its decision.
  - (3) A failure to comply with an approved condition is a violation of the land development regulations.
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### ***Commentary: Integration of Procedures***

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

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

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

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### 10-507 Procedures

- (1) (a) Each local government shall adopt an application procedure for conditional uses and variances. This procedure must incorporate the procedures of the development permit review process, and a decision on an application for a conditional use or variance is a final appealable decision under this Chapter.
- (b) Applications for conditional uses and variances must be included as part of a development permit application if a development permit application is submitted. A decision on an application for a conditional use or variance must be made before a development permit may be issued, and such a decision shall become part of the application for a development permit.
- (2) The application procedure required by paragraph (1) shall:
  - (a) specify which officers and bodies shall review applications for conditional uses and variances;
  - (b) require that the review of such applications be conducted by record hearing; and
  - (c) require any development permit for such development to incorporate any conditional use or variance that has been approved for such development.

### JUDICIAL REVIEW OF LAND-USE DECISIONS

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

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

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

### **METHODS OF JUDICIAL REVIEW**

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

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

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

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

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<sup>45</sup>Advisory Committee on Zoning, U.S. Department of Commerce, *A Standard State Zoning Enabling Act* (SZA), (Washington, D.C. U.S. GPO, 1926, rev'd ed.), §7.

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

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

### TIMING OF JUDICIAL REVIEW

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

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

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

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

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

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

<sup>49</sup>Or. Rev. Stat. §197.015(10) (1998).

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

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

### **STANDING: WHO CAN BRING SUIT?**

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

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

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

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

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

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

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

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

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

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

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

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### **SCOPE OF JUDICIAL REVIEW AND REMEDIES**

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

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

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

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

### **SOME APPROACHES TO REFORM**

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

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

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<sup>54</sup>ALI Code, 366-367.

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

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

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<sup>55</sup>Or. Rev. Stat. §197.810.

<sup>56</sup>Or. Rev. Stat. §197.015(10)(a).

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

<sup>58</sup>Or. Rev. Stat. §197.830(8), (13), (14).

<sup>59</sup>Or. Rev. Stat. §197.845.

<sup>60</sup>Or. Rev. Stat. §197.835(3) - (7)(a).

<sup>61</sup>Or. Rev. Stat. §197.835(7)(a).

<sup>62</sup>Or. Rev. Stat. §§215.428(1) and 227.178(1).

<sup>63</sup>Or. Rev. Stat. §197.830 (1998).

<sup>64</sup>*Id.*, §197.840.

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

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

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<sup>65</sup>Wash. Rev. Code §§36.70C.005 *et seq.* (1998).

<sup>66</sup>Wash. Rev. Code §36.70C.040.

<sup>67</sup>Wash. Rev. Code §36.70C.060.

<sup>68</sup>Wash. Rev. Code §36.70C.040.

<sup>69</sup>Wash. Rev. Code §36.70C.090.

<sup>70</sup>Wash. Rev. Code §36.70C.120.

<sup>71</sup>Wash. Rev. Code §36.70C.100.

<sup>72</sup>Wash. Rev. Code §36.70C.130.

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

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

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### 10-601 Purposes

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

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

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

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

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<sup>73</sup>Pa. Stat. Ann. tit. 53, §10609.1to .2 (1999).

<sup>74</sup>Jan Krasnowiecki & L.B. Kregenow, “Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code,” Vill. L. Rev. 39 (1994): 879.

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

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

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

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

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### **10-602 Method of Judicial Review Exclusive**

- (1) The judicial review provided by this Chapter replaces the writ of certiorari for the review of land-use decisions and is the exclusive means for the judicial review of land-use decisions.
- (2) The judicial review provided by this Chapter does not replace or apply to judicial review of applications for:
  - (a) a writ of mandamus or prohibition;
  - (b) an injunction or declaratory judgment claiming that the adoption or amendment of land development regulations or local comprehensive plan is invalid or unconstitutional; and
  - (c) claims for monetary damages or compensation.
- (3) Any person filing a petition for judicial review under this Chapter may join with that petition any claim excluded from this Chapter by paragraph (2) above and/or a claim under Section 1983 of the Federal Civil Rights Act, 42 U.S.C. §1983.

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

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### ***Commentary: Judicial Review***

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

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

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### **10-603 Judicial Review of Final Land-Use Decisions**

- (1) Any person with standing pursuant to Section [10-607] may obtain judicial review of a final land-use decision under this Chapter by filing a land-use petition with the [*name of court*].
  - (2) A land-use decision is a “final land-use decision” if:
    - (a) an application for a development permit is complete or deemed complete pursuant to Section [10-203]; and
    - (b) the local government has approved the application, has approved the application with conditions, or has denied the application; [or]
    - [(c) the application is deemed approved under Section [10-210]].
- ◆ This provision is in brackets because “deemed approval” is an option in Section 10-210. If the alternative option is chosen, there is no “deemed approval” and this subparagraph serves no purpose.
- (3) The issuance or denial of a certificate of nonconforming use under Section [8-502] is a final land-use decision.

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

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### ***Commentary: Exhaustion of Remedies***

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

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

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

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

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

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

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### 10-604 Exhaustion of Remedies

- (1) The [*name of court*] shall have jurisdiction over a land-use petition if and when the petitioner has exhausted the appeal procedures provided under Section [10-209] and the applicable remedies available under Sections [10-502 and 10-503] of this Chapter.
- ◆ For example, if there is no conditional use provision applicable to the property in question as zoned, an applicant does not have to seek a conditional use before commencing judicial review.
    - [ (2) Exhaustion of administrative remedies under paragraph (1) is not required:
      - (a) if an appeal or an application to obtain an administrative remedy would be futile;
      - (b) if an administrative remedy is inadequate; or
      - (c) for a claim that the local comprehensive plan or land development regulations on which the local government relied for its land-use decision are facially invalid.]
  - ◆ It should be noted that different exceptions may have arisen in individual states, and such states may wish to substitute those exceptions for those provided in paragraph (2).
    - (3) The terms and provisions of this Section shall be given the meanings assigned to them by [the common law *or* case law *or* precedent].
  - ◆ The intent of this provision is to adopt the body of case law interpreting the specified terms and provisions of this Section. In some states, “common law” signifies case law or judge-made law in general. In other states, “common law” has the specific meaning of the rules of case law and certain English statutes up to a particular year, often 1776.
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### ***Commentary: Federal Claims***

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

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

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### **[10-605 Federal Claims**

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

### **10-606 Filing and Service of Land-Use Petition**

- (1) A land-use petition is barred, and a court may not grant review, unless the petitioner has timely filed the petition with the court and timely served, by summons, the petition on the following persons, who shall be parties to the review of the land-use petition:
  - (a) the local government, which for purposes of the petition is the local government's corporate entity and not an individual decision maker or officer or body;
  - (b) the applicant for the development permit and the owner of the property at issue, if the owner was not the applicant; and
  - (c) all parties to a record hearing or record appeal on the land-use decision at issue.
- (2) The petition is timely if it is filed and served on all parties listed in paragraph (1) of this Section within [21] days of the issuance of the land-use decision by the local government, or within [21] days after a decision is deemed approved under Section [10-209].

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

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### ***Commentary: Standing and Intervention***

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

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

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

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

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### 10-607 Standing and Intervention

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

- [(1) the applicant or the owner of property to which the land-use decision is directed, if the applicant is not the owner;
  - (2) the local government to which the application for the land-use decision was made;
- ◆ This provision authorizes a local government to seek judicial review of an adverse decision in a Section 10-209 appeal.
- (3) any person owning or occupying property abutting or confronting a property which is the subject of the land-use decision;
  - (4) all other persons who participated in an administrative review by right, or who were parties to a record hearing, on a development permit application that was the subject of the land-use decision; and
  - (5) any other person, neighborhood planning council, neighborhood or community organization, or governmental unit, if it is aggrieved by the land-use decision, or if it would be aggrieved by a reversal or modification of the land-use decision.]

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### 10-608 Required Elements in Land-Use Petition

A land-use petition must set forth:

- (1) the name and mailing address of the petitioner;
- (2) the name and mailing address of the petitioner's attorney, if any;
- (3) the names and mailing addresses of the applicant for the land-use decision, and of the owners of the property that is the subject of the decision, if the petitioner is not the applicant and sole owner of the property;
- (4) the name and mailing address of the local government whose land-use decision is at issue, if the petitioner is not the local government;
- (5) identification of the decision-making officer or body, together with a duplicate copy of the written decision;
- (6) identification of each person whom the petitioner knows or reasonably should know is eligible to become a party under Section [10-606(1)];
- (7) facts demonstrating that the petitioner has standing to seek judicial review under Section [10-607];
- (8) a separate and concise statement of each error alleged to have been committed in an administrative review, record hearing, or record appeal.
- (9) a concise statement of facts upon which the petitioner relies to sustain the statement of error; and
- (10) a request for relief, specifying the type and extent of relief requested.

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

### 10-609 Preliminary Hearing

- (1) When appropriate, in the petition served on the parties identified in Section [10-607(1)], the petitioner shall note, according to the rules of the [*name of court*], a preliminary hearing on jurisdictional and preliminary matters, including standing. The court shall set the preliminary hearing no sooner than [35] days and no later than [50] days after the petition is served on the parties identified in Section [10-606(1)].
- (2) The parties shall raise all motions on jurisdictional and procedural issues for resolution at the preliminary hearing, except that a motion to allow discovery may be brought sooner.

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- (3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the preliminary hearing, unless the court allows discovery on such issues.
  - (4) The petitioner shall move the court for an order at the preliminary hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.
  - (5) The parties may waive the preliminary hearing by scheduling with the court a date for the hearing or trial on the merits, and by filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in paragraphs (3) and (4) of this Section.
  - (6) A party need not file an answer to the petition.
- ◆ This Section is based on Wash. Rev. Code §36.70C.080. It authorizes a preliminary hearing at which the court can deal with motions preliminary to trial that raise standing and other jurisdictional matters. Because the petitioner may not know at the time of filing the petition whether a preliminary hearing is necessary, the Section authorizes a motion for preliminary hearing only where appropriate. A state need not adopt this Section if a preliminary hearing is authorized by court rules or another statute.

### 10-610 Expedited Judicial Review

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

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

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### *Commentary: Stays of Action*

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

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

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

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

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### **10-611 Stay of Action Pending Judicial Review**

- (1) A petitioner or other party may move the court to stay or suspend an action by the local government or another party to implement the decision under review. The motion must set forth a statement of grounds for the stay and the factual basis for the motion. The court may grant the motion for a stay upon such terms and conditions, including the filing of security, as it determines are necessary to prevent the stay from causing harm to other parties.
- (2) When a local government has approved a development in a land-use decision, or has approved a development with conditions, and a petition has been brought for judicial review of the land-use decision, the owner of the land that is the subject of the petition may move the court to order the petitioner to post security as a condition to continuing the proceedings before the court. The question whether or not such motion should be granted and the amount of the security is within the sound discretion of the court.

### **10-612 Submittal of Record for Judicial Review**

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

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- (2) If the parties voluntarily agree, or upon order of the court, the record shall be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative or not relevant to the issues to be reviewed by the court.
  - (3) The petitioner shall pay the local government the cost of preparing the record before the local government submits the record to the court. Failure by the petitioner to timely pay the local government relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition.
  - (4) If the relief sought by the petitioner is granted in whole or in part, the court shall equitably assess the cost of preparing the record among the parties. In assessing costs, the court shall take into account the extent to which each party prevailed and the reasonableness of the parties' conduct in agreeing or not agreeing to shorten or summarize the record, as authorized by paragraph (2) of this Section.
- ◆ This Section authorizes the transmittal of the record of the land-use decision to the court. It is based on Wash. Rev. Code §36.70C.110. There is no direct sanction to compel agreement on shortening or summarizing the record, but there is an indirect sanction in the court's authority to make allocation of record preparation costs depend on the willingness of a party to make such an agreement.
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### ***Commentary: Review and Supplementation of the Record***

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

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

- (1) *Time*. It is more efficient to resolve all issues recognized by the court while the parties are before the court, as opposed to the delay involved in a remand to the local governmental body.
- (2) *Fairness*. The court is a neutral arbiter, while the local governmental body may have a vested interest in, or be subjected to political pressure to make, a particular decision.
- (3) *The "Ping-Pong" Effect*. If an administrative body or officer is determined (for whatever reason) to make a particular decision, regardless of the court's judgment, it can, upon remand, make minor adjustments to its findings while coming to the same basic decision. This could create a circle of remands, "new" decisions, appeals, and further remands.
- (4) *Politically-impaired fact-finding*. Though a local body sitting quasi-judicially has a duty to make findings of fact in a neutral manner, political considerations may cause the body to make whatever findings are needed to achieve a particular outcome. And since reviewing courts are

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

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

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

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

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

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

### PROVISIONS OF THE MODEL SECTION

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

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

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### 10-613 Review and Supplementation of Record

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

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

- (a) grounds for standing, or for disqualification of a member of the body or the officer that made the land-use decision, when such grounds were unknown by the petitioner at the time the record was created;
- (b) matters that were improperly excluded from the record after being offered by a party to record hearing;
- (c) correction of ministerial errors or omissions in the preparation of the record; [or]

*Optional Paragraph (d)*

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

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

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

- (2) When a court is reviewing a land-use decision by an officer or body that did not make findings of fact in a record to support its decision, the court may supplement the record by allowing evidence of material facts that were not made part of the local government's record.
- (3) If the court allows the record to be supplemented, the court shall require the parties to disclose before the preliminary hearing or trial on the merits the specific evidence they intend to offer.

### 10-614 Discovery When Record Supplemented

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

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

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

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### **10-615 Standards for Granting Relief**

- (1) The court may grant relief only if the party seeking relief has carried the burden of establishing that one or a combination of the following standards has been met. The standards are:
    - (a) the officer or body that made the land-use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error did not do substantial harm;
  - ◆ The term “unlawful procedure” is intended to refer to procedure that violates the local government’s unified development permit review process, as required by this Chapter.
    - (b) the land-use decision is an erroneous interpretation of the law[, after allowing for such deference as is due the construction of a law by a local government with expertise];
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- ◆ The bracketed language would require a court to defer to the agency’s expertise in deciding questions of law. This language can be omitted if a state decides that a court should decide legal questions without being limited by this presumption.
  - (c) the land-use decision is not consistent with the local comprehensive plan as determined pursuant to Section [8-104], [if consistency is required by [*name statute*]], or does not comply with the land development regulations; or
- ◆ Subparagraph (c) is based on Ore. Rev. Stat. §197.835(8). It requires the land-use decision to be consistent with the local comprehensive plan and land development regulations and requires the court to make a legal judgment based on the textual provisions of the plan and regulations. The language contained in brackets should be inserted if the enabling legislation does not require all land-use decisions to be consistent with the plan. For example, it might not require site plans to meet a consistency requirement.
  - (d) the land-use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court, and any evidence submitted to the court, including such supplementary evidence as the court permitted under Section [10-613].
- ◆ The “substantial evidence” test is the standard test applied to the judicial review of findings of fact based on a record. This subparagraph modifies this test to include supplementary evidence introduced at trial. A court is not required to make findings of fact based on supplementary evidence submitted to it, but may rely on this evidence as a basis for granting relief to the plaintiff, if it believes that relief is justified.
  - (e) the land-use decision is a clearly erroneous application of the law to the facts;
  - (f) the land-use decision is outside the authority or jurisdiction of the officer or body making the decision; or
  - (g) the land-use decision violates the constitutional rights of the party seeking relief.
- (2) If a petitioner has reserved a federal claim in a petition filed under Section [10-605], the court shall note in its decision that these claims are reserved.

### 10-616 Decision of the Court

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

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- (2) If the court remands a land-use decision to the officer or body that made the decision, it may require the officer or body to consider additional plans and materials to be submitted by the applicant for the development permit, and the adoption of alternative regulations or conditions, as the court's order on remand shall prescribe.
  - (3) If the court remands the land-use decision for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local government.
- ◆ Paragraph (1) is standard language governing the availability of judicial relief. It is based on Wash. Rev. Code §36.70C.140. See also Idaho Rev. Code §67-5279. Paragraph (2) is based on Pa. Stat. Ann. tit. 53, §11006-A, and authorizes the court to require the local government to consider alternative requirements and conditions on remand. Paragraph (3) is intended to give a court broad discretion in attaching conditions to a remand. For example, a court could condition a remand with an extension or stay of compliance or enforcement proceedings. This type of order is recommended by the American Bar Association. See the guidelines on judicial relief in House of Delegates, Amer. Bar Ass'n, Resolution No. 107B (Aug. 1997). The Resolution provides guidelines for decisions when stays should be granted, and recommends against granting stays in most cases. Although these guidelines are not an interpretation binding on the model law, they can be consulted for guidance on stay orders.
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### ***Commentary: Definitive Relief***

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

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

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### 10-617 Definitive Relief

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

### 10-618 Compensation and Damages Disclaimer

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

## Appendix – Literature on Administrative and Judicial Review of Land-Use Decisions<sup>78</sup>

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## **ENFORCEMENT OF LAND DEVELOPMENT REGULATIONS**

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

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## CHAPTER 11

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### Chapter Outline

#### GENERAL

- 11-101 Enforcement Generally
- 11-102 Adoption of Administrative Enforcement
- 11-103 Election of Procedures

#### ADMINISTRATIVE PROCEDURE

- 11-201 Enforcement Notice
- 11-202 Preliminary Order
- 11-203 Enforcement Hearing
- 11-204 Enforcement Order; Remedies and Penalties

#### JUDICIAL PROCEDURE

- 11-301 Civil Proceeding
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### Cross-References for Sections in Chapter 11

Section No.	Cross-Reference to Section No.
11-101	7-103, 7-503
11-102	10-301 <i>et seq.</i> , 10-401 <i>et seq.</i> , 11-201 <i>et seq.</i>
11-103	11-102, 11-201, 11-301, 11-302
11-201	11-203
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11-301	11-204

## ENFORCEMENT OF LAND DEVELOPMENT REGULATIONS

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

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

### APPROACHES TO ENFORCEMENT IN MODEL LAWS

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

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

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

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

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

(1) “a civil action to prevent an unlawful land use from occurring, to prevent its continuance, or to restrain, correct, or abate a violation of an order, rule or ordinance”;  
and

(2) an administrative procedure to “obtain an enforcement order. . .and thereafter. . .prosecute a person who causes a violation of an enforcement order, maintain a civil action to enforce the order,. . .[or] enter upon the land and structures where the unlawful land use exists and take necessary action to correct or abate it.”<sup>4</sup>

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

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

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

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

<sup>4</sup>*Id.*, 448 (§ 10-101).

<sup>5</sup>*Id.*, 449 [§ 10-102(2) & (3)].

<sup>6</sup>*Id.*, 450-451 (§ 10-201).

<sup>7</sup>*Id.*, 452 [§ 10-202(2)].

<sup>8</sup>*Id.*, 452 [§ 10-202(4)].

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

### APPROACHES TO ENFORCEMENT IN STATE STATUTES

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

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<sup>9</sup>Id., 452 [§ 10-202(3)].

<sup>10</sup>Id. 453-454 (§ 10-203).

<sup>11</sup>Id. 455-456 (§ 10-204).

<sup>12</sup>Md. Ann. Code art. 66B, § 2.10(a).

<sup>13</sup>Mich. Comp. Laws § 125.224 (1997).

<sup>14</sup>Va. Code. Ann. § 15.2-2299 (Michie 1997).

<sup>15</sup>Wash. Rev. Code § 36.70.670 (1997).

<sup>16</sup>Wis. Stat. § 59.97(11) (1997).

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

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

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

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

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

<sup>18</sup>Neb. Rev. Stat. § 23-114.05.

<sup>19</sup>Del. Code tit. 9, § 2609.

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

<sup>21</sup>Or. Rev. Stat. § 215.185 (1997).

<sup>22</sup>Or. Rev. Stat. § 215.190.

<sup>23</sup>Vt. Stat. Ann. tit. 24, § 4444 (1997).

<sup>24</sup>Vt. Stat. Ann. tit. 24, § 4445.

<sup>25</sup>Haw. Rev. Stat. § 205-13 (1997).

<sup>26</sup>Nev. Rev. Stat. § 278.818 (1997).

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### THE COMPONENTS OF ENFORCEMENT

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

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

### ADMINISTRATIVE ENFORCEMENT

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

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

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

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

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

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

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

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

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

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

<sup>30</sup>*Morgan v. United States*, 304 U.S. 1 (1938).

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

<sup>32</sup>*Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

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

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

While administrative enforcement is encouraged by the *Guidebook*, some violations of land development regulations may be so egregious or cumulative<sup>34</sup> that immediate action is necessary. Therefore, there is a need for a preliminary order and for a procedure to issue such an order when it is needed so that the rights of the parties to due process are protected. A preliminary order should be issued along with an enforcement notice so that a violator cannot conceal or aggravate the violation between receipt of the notice and the issuance of an order. Preliminary orders should be reviewable by a hearing officer or board which must be satisfied that it is reasonable to believe that a violation is occurring that needs to be abated immediately.<sup>35</sup> For the same reason, the order should seek to preserve the status quo only and forbid further violation, but not attempt to achieve full compliance, which is the point of the hearing and enforcement order.

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

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

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<sup>34</sup>That is, the longer they continue, the worse the negative effects become.

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

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

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

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

### **CIVIL AND CRIMINAL ENFORCEMENT**

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

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

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

### GENERAL PROVISIONS

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#### *Commentary: Enforcement Generally*

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

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

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

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<sup>37</sup>Jaffe, 5.

<sup>38</sup>Jaffe, 3.

<sup>39</sup>*Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

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expectation of privacy.<sup>40</sup> Land where the owner or occupant has no reasonable expectation of privacy includes areas in plain view<sup>41</sup> and highly regulated businesses.<sup>42</sup> There is a reasonable expectation of privacy in a residence<sup>43</sup> and in the land directly surrounding a residence, even if the yard is open and unfenced, because such land, called curtilage, “warrants the Fourth Amendment protections [regarding involuntary search and seizures] that attach to the home.”<sup>44</sup> Because cooperation is the norm and many violations can be discovered in areas where there is no reasonable expectation of privacy, these provisions should be sufficient in most cases. For cases where this is not true, the Section also provides for the power to obtain an inspection warrant if there is probable cause to believe the property is not in compliance with land development regulations. The usual safeguards of the Fourth and Fourteenth Amendments to the U.S. Constitution against unreasonable searches apply, and so the procedure for obtaining a warrant is the same procedure used to obtain other inspection warrants.

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### 11-101 Enforcement Generally

- (1) The local government shall have the power and the duty to enforce land development regulations, and shall, by ordinance, delegate that power and duty to the [local planning *or* code enforcement agency]. The ordinance may provide for, among other things, the organization, staffing levels, training, and compensation of the agency and its personnel.
- ◆ This paragraph is a specific reiteration of the power and duty of a local planning agency to “administer land development regulations” pursuant to Section 7-103(2)(h). The power of the local planning agency, however, comes from the local government. Furthermore, the local government itself has the power and duty to enforce land development regulations because agencies of the local government other than the local planning agency, such as the police and the local government attorney, are also engaged in this duty.

- [(2) The local government shall allocate funding, personnel, and other resources to the [local planning *or* code enforcement agency] at levels sufficient to reasonably execute the powers and duties of enforcement. If the local government finds that it cannot allocate sufficient

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<sup>40</sup>*Katz v. United States*, 389 U.S. 347 (1967).

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

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

<sup>43</sup>*Camara v. Municipal Court*, 387 U.S. 541 (1967).

<sup>44</sup>*United States v. Oliver*, 466 U.S. 170 (1984).

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

- ◆ Depending on whether the state legislature wants to emphasize to local governments that adequate resources for enforcement are necessary, this paragraph may or may not be included. Omitting this paragraph leaves the issue of “sufficient resources” to the local government’s discretion.

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

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

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### ***Commentary: Adoption of Administrative Enforcement***

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

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

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### 11-102 Adoption of Administrative Enforcement

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

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

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

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

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### ***Commentary: Election of Procedures***

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

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

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

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

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

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

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### 11-103 Election of Procedures

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

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

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

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

### ADMINISTRATIVE PROCEDURE

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#### *Commentary: Enforcement Notice*

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

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

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

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### 11-201 Enforcement Notice

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

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

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

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

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

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### ***Commentary: Preliminary Order***

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

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

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

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

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

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### 11-202 Preliminary Order

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

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<sup>47</sup>U.S. Const., amend. V.

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

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

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

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### ***Commentary: Enforcement Hearings***

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

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

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

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

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

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

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### 11-203 Enforcement Hearings

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

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

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

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

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

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

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

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

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

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### 11-204 Enforcement Order; Remedies and Penalties

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

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

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

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

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

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

### JUDICIAL PROCEDURE

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#### ***Commentary: Civil Proceeding***

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

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

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

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

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

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

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### 11-301 Civil Proceeding

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

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<sup>49</sup>Kelly, 25.

<sup>50</sup>Kelly, 30.

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

- (2) A local government that:
  - (a) has issued an administrative enforcement order pursuant to Section [11-204], where a person or persons subject to the administrative enforcement order has not complied with or is not complying with that order; or
  - (b) issues a supplemental administrative enforcement order pursuant to Section [11-204(7)(b)] that:
    1. determines that a person or persons subject to an administrative enforcement order has not complied with or is not complying with that order, and
    2. directs that the case be referred to the local government attorney for proceedings under this Section;

has a cause of action, in the [*trial-level*] court for the county in which the property in question is located, against the person or persons in noncompliance, or determined in the supplemental administrative enforcement order to be in noncompliance.
- (3) Except as otherwise provided herein, the procedure governing a civil action pursuant to this Section shall be the procedure applicable in all civil actions by statute and by rule of court.
- (4) In any civil action pursuant to paragraph (2) of this Section:
  - (a) the administrative enforcement order and any supplemental administrative enforcement orders to which the defendant or defendants are subject shall be attached to the complaint and by such attachment shall be incorporated therein; and
  - (b) the [clerk of the court shall *or* judge may] enter the administrative enforcement order and any supplemental administrative enforcement orders as the judgment of the court after [30] days from the date upon which the last answer is due to be filed, accounting as in other civil cases for postponements in that date due to motions pursuant to [*Sections or Rules of civil procedure on motions to dismiss, to strike, and for summary judgment*], unless one or more defendants requests a trial in his or her answer. If such a default occurs and:
    1. there is no supplemental administrative enforcement order; or

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

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

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

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

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

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

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

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

- (a) an order to cease and desist from continuing and future violation of land development regulations;
- (b) an order to bring the property in question into compliance with land development regulations;
- (c) an order to perform a specific act or acts, or to refrain from a specific act or acts, which effectuates the purposes of subparagraphs (6)(a) and (b) above;
- (d) authorization for the [local planning *or* code enforcement agency] to enter upon the property and take all reasonably necessary steps to place the property in compliance with land development regulations, combined with an order to compensate the [local planning *or* code enforcement agency] for all reasonable expenses incurred pursuant to this subparagraph; and

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

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

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

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<sup>51</sup>Schilling & Hare 111.

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

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### 11-302 Criminal Proceeding

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

## **INTEGRATING STATE ENVIRONMENTAL POLICY ACTS WITH LOCAL PLANNING**

This Chapter discusses ways of evaluating the environmental effects of local comprehensive planning and the problems of integrating state environmental policy acts, where they exist, into local planning. It provides three statutory alternatives. Alternative 1 requires the local planning agency to prepare a written environmental evaluation of several elements of its local comprehensive plan in order to understand the significant effects of the plan on the natural environment. In contrast to Alternatives 2 and 3, which follow, this Alternative is not binding on the local government in a regulatory sense and does not involve a state environmental policy act that applies to specific projects or land-use actions, such as single-tract rezonings or conditional use permits. Alternative 2 presumes the existence of a state environmental policy act. The purpose of this alternative is to authorize the preparation of an environmental impact statement on a local comprehensive plan so that public agencies can avoid or carry out a more limited environmental review of land-use approvals that are based on that plan. By contrast to Alternative 1, this Alternative is more complex in that it goes beyond being a mere environmental evaluation with no regulatory implications. Finally, Alternative 3 integrates the consideration of environmental impacts under the state environmental policy act with the review and approval of land-use actions by a public agency. The focus here is on the decision to rezone or on the approval decision, and not on the project itself. An application for approval may, of course, include site-specific plans, as in the case of a special exception or a planned unit development. In these cases, the public agency will necessarily review the site-specific project plans as well as the approval request.

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### Chapter Outline

#### 12-101 (Three Alternatives)

*Alternative 1:* Evaluation of Environmental Effects of the Land Use, Housing, Transportation, and Community Facilities Elements of a Comprehensive Plan

*Alternative 2:* Environmental Impact Statement on a Comprehensive Plan

*Alternative 3:* Environmental Requirements in Local Comprehensive Plan and Land Development Regulations

**Table 12-1** Approaches to Integrating Land-Use Planning and Regulation with Environmental Reviews

**Appendix A – Articles Suggesting Improvements for SEPAs**

**Appendix B – Overview of SEPAs**

### Cross-References for Sections in Chapter 12

**Section No. Cross-Reference to Section No.**

**12-101**

*Alt. 1* 4-103, 6-201, 7-202, 7-204, 7-205, 7-206, 7-207, 7-401, 8-102

*Alt. 2* 6-201, 7-202, 7-204, 7-205, 7-206, 7-207, 8-102

*Alt. 3* 6-201, 7-202, 7-204, 7-205, 7-206, 7-207, 8-102

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### MELDING STATE ENVIRONMENTAL POLICY ACTS WITH LOCAL PLANNING

State environmental policy acts (SEPAs) bring a new dimension to land-use planning and regulation.<sup>1</sup> Plans establish policies that provide the justification for approving developments under land-use regulations. Several states also have SEPAs that require an environmental review of certain types of proposed developments. The SEPA review considers all of the significant impacts that a development can potentially have on the environment, including in some states scenic, aesthetic, and historic resources.<sup>2</sup> The land-use agency responsible for development approvals usually conducts the SEPA review, although it may delegate this responsibility to applicants.<sup>3</sup>

Problems of duplication occur when developments that require a SEPA review must also obtain approval under local land-use regulations. Duplication occurs because SEPA reviews may assess those environmental impacts previously considered in either a comprehensive plan or already addressed by development regulations. Developers may incur significant additional compliance costs, and delays may occur because agencies must consider the same environmental impacts more than once to satisfy different statutory requirements.

Conflict also arises between SEPA environmental reviews and comprehensive planning because they have different goals. One commentator stated, in a review of the California Environmental Quality Act, that it

conflicts with a major component of comprehensive planning: the long-range perspective. . . . Because CEQA emphasizes project-by-project analysis, it misses the big picture. Despite legislative and administrative mandates, CEQA in practice has not effectively addressed either cumulative or growth-inducing effects.<sup>4</sup>

Conflict could be avoided, as a governor's task force in Washington State noted, if comprehensive planning under its Growth Management Act (GMA) could be integrated with SEPA environmental reviews:

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<sup>1</sup>The commentary and model statutes in this Chapter were written by Daniel R. Mandelker, Stamper Professor of Law at Washington University in St. Louis. The introductory commentary originally appeared in a slightly different form as "Melding State Environmental Policy Acts with Land-Use Planning and Regulations," *Land Use Law & Zoning Digest* 49, no. 3 (March 1997): 3-11.

<sup>2</sup>N.Y. Envtl. Conserv. Law § 8-0105(6)(2000); Minn. Stat. Ann. §§116B.02-04 and 116D.02-02 (2000).

<sup>3</sup>A court can reject an impact statement prepared by an applicant after an environmental review if it believes the applicant was biased in its analysis. For federal cases see Daniel R. Mandelker, *NEPA Law and Litigation*, 2d ed. (Deerfield, Ill.: Clark Boardman Callaghan, 1993), §10.15 hereinafter cited as *NEPA Law*.

<sup>4</sup>Robert Olshansky, "The California Environmental Quality Act and Local Planning," *Journal of the American Planning Association* 62, No. 3 (1996): 313, 317.

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Both the GMA and SEPA seek health, sustainable communities and productive harmony between people and nature. . . . One of the promises of the GMA is to improve the planning process by allowing the cumulative impacts of development to be considered earlier in the process. In order for this promise to be met, local governments must conduct appropriate environmental reviews at the planning stage.<sup>5</sup>

This Chapter describes SEPA legislation and its environmental review requirements for those developments that must also comply with local land-use regulations based on comprehensive plans. It then proposes measures for integrating environmental review with land-use planning and regulation, drawing on experience from states that have legislated solutions to this problem.

States adopted SEPAs, in part, because planning failed to consider the environmental effects of planning policies, so proposals for integrating planning and environmental review must reconsider the role of planning in evaluating environmental impacts. The underlying questions are how to include environmental issues in decision making on land-use proposals, whether land use planning should include attention to environmental factors, and whether the independent environmental review process required by SEPAs is necessary.

In states with SEPAs that apply to land-use decisions, integration with land-use planning and regulation is crucial. Three options for integration are discussed in this paper. One requires an analysis of alternatives in a comprehensive plan. This option does not necessarily require changes in development regulations or in environmental mitigation requirements, but simply a conceptual analysis of alternatives in plans with no commitment to implementation. This is a limited approach, which deserves consideration even in a state that does not have a SEPA. It is intended to add an environmental element to comprehensive plans, but does not resolve problems of integration with SEPA reviews in states where SEPAs exist.

A second option would have a SEPA or SEPA regulations require a program environmental statement on comprehensive plans. This statement would review the environmental effects of the plan's land-use policies and would provide a basis for the environmental review of projects at the development approval stage. Only impacts not addressed by the program statement would be covered by a separate environmental review.

A third option would substitute environmental policies in a comprehensive plan and requirements in development regulations for SEPA review when a project receives development approval. An independent SEPA review of development projects is not required. A state adopting this option could take an additional step and conclude its SEPA should not even be applied to land use regulations and their implementation.

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<sup>5</sup>*Final Report of the Governor's Task Force on Regulatory Reform* (Olympia, Wash.: Washington State Office of Financial Management, Dec. 20, 1994), 36, 37. See also Appendix A to this Chapter listing articles criticizing SEPAs and offering some suggestions for improvements.

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### THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) is the prototype for the state environmental policy acts.<sup>6</sup> Since the state acts transfer NEPA's environmental review requirements to the state level, a discussion of NEPA is essential to an understanding of the state counterparts. Congress adopted NEPA in 1970 in order to require an environmental review of major “actions” undertaken, funded, or permitted by federal agencies<sup>7</sup> because these actions often create a risk of environmental harm. Congress intended NEPA to correct this problem by requiring federal agencies to conduct an environmental review of their major federal actions that create “significant” environmental impacts. “Action” is a broad term that covers everything from development projects to agency regulations.

Regulations adopted by the Council on Environmental Quality (CEQ), as supplemented by regulations adopted by federal agencies, define how agencies should carry out this responsibility.<sup>8</sup> Under NEPA practice, an agency that proposes a major federal action must first decide whether it is “categorically” excluded so that the statute does not even apply. If NEPA does apply, the agency then prepares an environmental assessment to determine whether the action's environmental impacts are significant. If the impacts are significant, the agency must then prepare a detailed environmental impact statement.

Agencies usually prepare environmental impact statements for individual actions as agencies review them, one at a time, to determine their environmental significance. This kind of environmental review may be inadequate, however, because an environmental review of individual actions may not adequately consider the collective, cumulative impact of a group of actions on environmental resources. Applications before a federal agency for number of logging permits in a national forest are one example.

To deal with this problem, court decisions and CEQ regulations authorize a document known as a “program impact statement” or “program statement” that agencies prepare on related projects that require collective review.<sup>9</sup> In the example above, the federal agency may decide to prepare a program statement that considers all the logging permit applications and the environmental impacts they collectively create.<sup>10</sup> Agencies also prepare program statements on agency plans. A forest management plan is an example. The program statement would consider the environmental impacts of all of the projects included in the plan, such as road building and logging projects.

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<sup>6</sup>See 42 U.S.C. §§4321, 4331-4335, 4341-4347.

<sup>7</sup>NEPA reaches permits for development in wetlands under § 404 of the Clean Water Act, 33 U.S.C. § 1344. Agencies must integrate permit review under this Act with environmental review under NEPA. See *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986).

<sup>8</sup>See 40 C.F.R. Pt. 1500.

<sup>9</sup> See *NEPA Law* §9.03.

<sup>10</sup>Program statements are an administrative requirement under NEPA and may be mandatory. See *NEPA Law* §9.02.

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Program statements can prevent redundant environmental review when agencies conduct a NEPA review of individual projects. A federal agency can rely on a program statement's environmental review of a forest management plan, for instance, to avoid a repetitious environmental review of a project covered by the plan. If the project has site-specific environmental impacts not covered in the program statement, however, the agency must carry out an environmental review of these impacts. Federal practice in the use of program statements provides a model for avoiding redundant environmental review when a SEPA applies to projects covered by plans and development regulations. Program statements on comprehensive plans can satisfy SEPA environmental review requirements for projects covered by the plan, if the program statement for the plan adequately considers their environmental impacts.

### **STATE ENVIRONMENTAL POLICY ACTS**

In the decade after NEPA's adoption, several states enacted similar legislation that also requires an environmental review of projects with significant environmental impacts. Fifteen states, the District of Columbia, and the Commonwealth of Puerto Rico have environmental review legislation similar to NEPA. (See Appendix B.) Most of this legislation closely follows NEPA and requires a preliminary environmental assessment followed by an environmental impact statement on a covered project if this is necessary. Some SEPA states, especially California and Washington, have gone beyond NEPA to adopt highly detailed SEPA legislation that specifies requirements in the environmental review process.

Although NEPA applies to projects that federal agencies approve and projects they undertake, most SEPAs apply only to the environmental impacts of state and local government agency projects. Imprecise drafting in some states, however, has opened the way for unexpected court decisions that applied a SEPA to private-sector development covered by planning and development regulation. A 1974 California Supreme Court decision is an example.<sup>11</sup> Several states, notably Hawaii, Massachusetts, Minnesota, New York, and Washington have since applied their SEPAs, by statute or court decision, to private development covered by planning and development regulation. In these states, a project that requires development under land-use regulations must also receive an environmental review under the SEPA.<sup>12</sup>

### **PROBLEMS IN APPLYING SEPAS TO LAND-USE PLANNING AND REGULATION**

Differences in scope, procedures, and legal effect are the major issues in integrating planning and development regulation with environmental reviews under a SEPA. Environmental reviews are open-ended. Most SEPAs require agencies to review the “significant” environmental effects of

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<sup>11</sup>*Friends of Mammoth v. Board of Supervisors of Mono County*, 502 P.2d 1049 (Cal. 1974). The court held that CEQA applied to a conditional use permit for a development. At the time CEQA applied only to projects an agency intended to “carry out” and did not define “project.” The court held the term “project” applied to projects public agencies approve as well as projects they carry out directly.

<sup>12</sup>See *NEPA Law* §12.05[1].

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actions they propose. Some SEPA's define this term, but an environmental review can cover *any* environmental impact of a development project, even though plans and development regulations also consider the impact. Neither is a SEPA environmental review prohibited because another statutory program covers the same environmental impact of a proposed development. An environmental review must cover air pollution, for example, although air-quality legislation enacts air pollution standards.

Some states in which a SEPA applies to private development projects have legislation mandating local comprehensive plans and the consistency of development regulations with adopted plans, such as California and Washington. In these states, duplication between land-use planning and environmental review occurs because the planning legislation gives the plan a binding effect on development regulation. Land-use agencies must apply planning policies when they consider projects for development approval. However, since SEPA legislation does not make planning policies binding in an environmental review of a project, an agency can reconsider these policies when it carries out its environmental review of a project.

The SEPA's, following NEPA's lead, have also enlarged the review of development projects to consider problems that comprehensive planning often omits. The two most important additions are requirements that agencies consider the cumulative impacts of a development project and alternatives for the project. Legislation may therefore have to expand the scope of planning if plans are to provide effective substitutes for SEPA reviews.

Comprehensive planning is a decision-making process that produces land-use policies to guide future development in the community. Although it is not usually done, plans can consider alternatives to the land-use policies they propose. They cannot consider alternatives to projects likely to carry out the plan because plans do not usually include specific development proposals. For example, a plan can propose a range of densities and building types for residential development and can include a discussion of rejected alternatives, such as lower-density development options. However, the plan does not usually include site-specific development proposals that will carry out these planning policies, such as cluster development or major retail centers.

Plans can also consider the cumulative impact of planning policies on environmental resources, although this kind of analysis also is not typical in planning documents. One way a plan can consider cumulative environmental impacts is to include policies that specify limits on development in environmentally vulnerable areas. These limits then serve as a constraint on the amount of development that can occur in these areas and will prevent development that might harm the environment. Comprehensive plans can include this type of analysis, which is often known as "carrying capacity analysis."

There also are differences in substantive effect between planning and development regulation and environmental review. These differences are critical in designing integration programs because the decision about where to locate an environmental review determines its legal effect when a project receives development approval. Although a SEPA environmental review is far ranging, it

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is not substantive except possibly in a few states, such as California and Washington.<sup>13</sup> In other states, agencies need only disclose the environmental impacts of projects they review. They need not make substantive changes, and courts cannot compel agencies to make substantive changes when they review an environmental analysis of a project. Analysis and disclosure in SEPA reviews are always site specific and do not start with a baseline. If a project will have impacts on groundwater, for example, the analysis is open-ended and does not assume that any particular quality of groundwater is necessary. If there is any baseline at all in an environmental review, it is that any change in the physical environment is undesirable and requires environmental review.

Planning and development regulations are different. Comprehensive plans can include environmental land-use policies that development regulations implement through development approvals. The effect of the comprehensive plan on zoning and subdivision approvals varies. In most states, these approvals need not be consistent with a plan, although courts often require consistency if a plan does exist. As noted earlier, some states that have SEPAs, such as California and Washington,<sup>14</sup> require planning and consistency between zoning and the plan. A comprehensive plan has a substantive effect whenever a statute or a court decision requires consistency with a plan.

Requiring an environmental review in a comprehensive plan as a substitute for a SEPA review is effective only if the plan is binding when a development approval is necessary. Development regulations, however, are legally binding, and they may provide substitutes for SEPA reviews if they contain substantive requirements that adequately mitigate the environmental impacts of projects covered by a SEPA. Groundwater is an example. Development regulations can include controls that protect groundwater from contamination by new development. These regulations can eliminate the need for a SEPA review of the effects of a development has on groundwater contamination.

There are important differences in procedures between SEPA environmental reviews and development approvals that complicate efforts at integration. State legislation and local ordinances contain procedures for development approvals, such as rezonings. The purpose of development approval is to decide whether a land-use regulation authorizes a proposed use of land. Some jurisdictions require approval by the local legislative body following a recommendation by the plan commission. Statutes may also delegate the power to approve solely to the plan commission, as in subdivision approval. Development approvals often require consideration in two or more stages. Subdivisions, for example, receive a preliminary and then a final approval. A zoning amendment may require an initial recommendation by the plan commission and final approval by the legislative body. Statutes and ordinances usually require a public hearing at each stage of the approval process. Review is site-specific for some development approvals, such as conditional uses and site plan review, but a rezoning does not require a site specific review of a proposed development.

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<sup>13</sup>California legislation requires agencies to consider alternatives and mitigation measures before they approve a project. Washington legislation allows agencies to deny a proposed action based on policies incorporated into “formally designated” regulations, plans, or codes. *NEPA Law* §§12.08[2], 12.08[4].

<sup>14</sup>Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing, 1997), § 3.12; Rodney Cobb, “Mandatory Planning: An Overview,” *PAS Memo* (Chicago: American Planning Association, Feb. 1994).

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The purpose of SEPA procedures is to decide whether an environmental impact statement is necessary, and to ensure that an impact statement is adequate if an agency must prepare one. Although specifics and terminology vary, states have procedures similar to the federal procedure to determine whether an agency should prepare an environmental impact statement. As in the federal procedure, if a categorical exclusion does not apply, the agency then prepares an environmental assessment to decide whether it should prepare an environmental impact statement. In state practice, the agency adopts what is usually called a “negative declaration” if it decides that a full environmental review is not necessary. An important practice, enacted into a statute in California<sup>15</sup> and followed elsewhere, is the mitigated negative declaration. In this document, the agency describes measures that will adequately mitigate the environmental impacts of a project that the impact statement discloses. The mitigated negative declaration provides an opportunity for mitigation if the agency responsible for the environmental review can rely on mitigation measures contained in plans and development regulations.

If an agency does not adopt a negative declaration, it must conduct a full environmental review in an environmental impact statement. (California legislation calls this document an environmental impact report.) The impact statement must cover all the environmental impacts of a project, including its cumulative impact and alternatives, and agencies circulate it for comment by individuals, organizations, and other public agencies. An agency can approve an impact statement after it responds to comments if it believes that the statement satisfies statutory requirements. Judicial review is available to decide whether an impact statement is adequate. New information or a change in circumstances may require the preparation of a supplemental impact statement.

This comparison of land-use planning and regulation with environmental review under SEPAs demonstrates how duplication and conflict arise under these programs. A hypothetical will illustrate. Assume a county has adopted a comprehensive plan for an agricultural area that recommends low-density clustered residential development at a one-acre minimum in designated locations. This zoning ordinance presently zones this area for exclusive agricultural use. The plan does not include proposals for development projects.

A developer proposes a clustered residential development in this area that is consistent with the comprehensive plan. This proposal requires both rezoning and subdivision review. The county council must grant the rezoning, but the planning commission is responsible for subdivision review. These bodies are prepared to grant the rezoning and approve the subdivision, but there must be an environmental review of both actions under the SEPA before either approval may issue. The county is the lead agency for the environmental review.

Redundant environmental review is the first problem with this hypothetical. A comprehensive plan may have analyzed several issues, such as the impact of new growth and the adequacy of public services. These are issues that the environmental review will also consider. Some legislation authorizes subdivision review to consider environmental impacts. Because the issues are the same, it should not be necessary to consider them at several stages in the development approval process.

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<sup>15</sup>*NEPA Law* §12.06[2], discussing Cal. Pub. Res. Code § 21064.5.

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Note that the council should grant the zoning approval if consistency with the comprehensive plan is necessary. Agricultural impact issues considered in the plan should not require reexamination at the zoning stage, unless there are site-specific problems not addressed in the plan or the plan itself needs updating.

Multiple reviews should not be necessary for this project in the zoning, subdivision control, and SEPA processes. Multiple zoning and subdivision reviews are a standard problem in the administration of land-use regulations, except in jurisdictions that have unified development control ordinances. Integrating land-use controls with environmental review will not resolve this problem but will remove an additional layer of unnecessary review and provide a basis for integrating approvals required by development regulations.

### RECOMMENDATIONS FOR INTEGRATION

(1) **Environmental Analysis of Alternatives in Plan.** One approach to integrating land use planning with environmental review is to require an analysis of alternatives included in a comprehensive plan. The planning agency would prepare an environmental analysis of conceptual alternatives to the development proposals in the plan, perhaps through some combination of matrix and narrative. This option would only require a statutory amendment authorizing planning agencies to make this type of analysis.<sup>16</sup>

This option provides a limited approach to integration and does not necessarily require changes in development regulations or the adoption of mitigation measures. It simply requires an analysis with no commitment to implementation, although an environmental analysis in a plan would be controlling in the zoning process in states where zoning must be consistent with a plan. SEPA environmental reviews would still be required, but SEPA regulations could authorize the use of environmental analysis done in plans in SEPA reviews.

States should also consider the analysis of environmental impacts in comprehensive plans as an alternative to SEPA reviews of development projects, or the enactment of a SEPA that applies to land-use planning and regulation. This option is especially appealing in states that require comprehensive plans and that require zoning to be consistent with plans. In these states, land use agencies can use the consistency determination to apply the environmental analysis in the plan to individual projects.

There are some differences, however, between environmental review based on a plan and environmental review based on a SEPA. One is that a development project will not require environmental review based on a plan if the zoning ordinance allows it as of right. Mandatory site plan or some other discretionary review is necessary in these cases. Another difference is that environmental analysis occurs at the planning rather than the development approval stage. The purpose of project review is then to determine consistency with the plan. Project-based review for

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<sup>16</sup> For example, the regional planning statute recommended by the *Legislative Guidebook* authorizes regional plans to contain “a statement of the economic, demographic and related assumptions used and alternative assumptions considered and rejected in the preparation of the regional plan.” *Guidebook*, 6-41. Authority to consider environmental assumptions could be added to this list.

environmental effects not considered in the plan is not available unless specifically authorized by the statute.

This discussion suggests that using the comprehensive plan to do environmental analysis requires more than minimal attention to environmental impacts. Some planning laws already authorize the inclusion of environmental elements,<sup>17</sup> and statutes must authorize even more comprehensive environmental analysis to make environmental review in the comprehensive plan complete.

**(2) Program Statement Required by a SEPA.** Under this option, agencies prepare program statements on comprehensive plans and projects are exempt from repetitive SEPA review unless site-

specific environmental impacts are present that the plan does not cover. The reason for shifting environmental review to the comprehensive plan is that environmental review at the planning stage can avoid repetitive environmental review during development approval of environmental impacts covered by the plan. One major legislative issue in authorizing program statements on comprehensive plans is whether to specify the environmental analysis the program statement must contain. Another legislative issue is whether the statute should state when significant impacts created by a project will require an additional site-specific impact statement.

The New York statute that authorizes program statements for comprehensive plans does not specify the environmental analysis that the plan must contain.<sup>18</sup> Under this statute, the extent to which a plan's program statement covers later projects depends on how much environmental analysis

**Table 12-1: Approaches to Integrating Land-Use Planning and Regulation with Environmental Reviews**

<i>Approach</i>	<i>What It Does</i>
Environmental analysis of alternatives considered in plan	Review of analysis in plan with no commitment to implementation
Program statement required by SEPA or SEPA regulations	SEPA review of projects only for impacts not covered by program statement
Environmental requirements in plans or regulations as substitute for SEPA review when development approval	No SEPA review of projects when environmental impacts adequately covered by plans and regulations

<sup>17</sup> E.g., Cal. Gov't Code §65302(d) (“conservation element for the conservation, development, and utilization of natural resources”); Fla. Stat. Ann. §163.3177(6)(d) (conservation element).

<sup>18</sup>N.Y. General City Law §28-A: “A city comprehensive plan may be designed to also serve as, or be accompanied by, a generic environmental impact statement pursuant to the state environmental quality review act statute and regulations.” Note that the plan can be “designed” to serve as the program impact statement. There is similar legislation for towns and villages.

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is contained in the program statement.<sup>19</sup> The statute allows a community to decide where environmental review should occur. A community can locate that review either at the plan or the development approval stage, depending on how much environmental analysis is in the program statement on the plan.

An alternative is to provide more statutory direction for program statements on comprehensive plans through statutes that indicate when they will preempt site-specific environmental review. California has adopted several statutes that illustrate this approach.<sup>20</sup> They specify what the program statement must contain and describe when additional analysis is necessary provide guidance that can eliminate redundant environmental reviews when projects receive development approval.

A statutory model based on the California legislation could provide that the program statement must examine the cumulative, growth-inducing, and significant environmental impacts of a plan's development policies and must also examine alternatives to these policies.<sup>21</sup> The program statement also could examine the intensity and location of development types, such as multi-family housing, and the availability of adequate public services.

At the development approval stage, the agency responsible for environmental review under the SEPA would prepare an initial study. It would determine whether the development has any additional significant effects on the environment not covered in the plan's program statement. SEPA review of individual developments is unnecessary if there are no additional significant environmental effects and if no additional mitigation measures or alternatives are necessary. If an agency cannot make this finding, it must show either that measures are available to mitigate additional significant environmental effects or prepare a comprehensive or "focused" environmental impact statement. A focused impact statement need consider only those significant environmental effects that the program statement did not consider.

For example, a program impact statement on a comprehensive plan would analyze the impact on traffic of the population growth and development proposed in the plan. A "focused"

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<sup>19</sup>"No further compliance with such law is required for subsequent site specific actions that are in conformance with the conditions and thresholds established for such actions in the generic environmental impact statement and its findings." *Id.*

<sup>20</sup>The text that follows outlines, with some modifications, statutory requirements for a Master Environmental Impact Report. Cal. Pub. Res. Code §§21156-21158.5. California also authorizes program statements on comprehensive plans in a different section. *Id.*, §21083.3. The statute, generally, limits analysis of projects covered by the plan to "effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report." *Id.*, §21083.3(b). Rezonings consistent with the plan are exempt from environmental review under the SEPA. *Id.*, §21083.3(e). For discussion of these and other statutory provisions and regulations that attempt to avoid redundant environmental reviews see M. Remy, T. Thomas, J. Moose & W. Manley, *Guide to the California Environmental Quality Act (CEQA)* (Point Arena, Ca.: Solano Press, 9th ed. 1996), ch. X, hereinafter cited as *Guide*.

<sup>21</sup>The California statute also requires discussion of anticipated subsequent projects in the plan, but this condition requires the inclusion of too much detail. See *Guide* at 318-319.

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environmental impact statement would analyze the traffic impacts of a development at its site and propose mitigation measures to remedy any negative impacts.<sup>22</sup>

Washington has a similar procedure. The statute does not require the preparation of an impact statement for “planned actions.” A planned action must be a project that implements and is consistent with the plan and located in an urban growth area.<sup>23</sup> A program statement on a comprehensive plan must “adequately address” the “significant impacts” of a planned action to make it exempt from a SEPA review.

For example, a subarea plan for a city could discuss assumptions concerning future land uses, thresholds for uses and environmental impacts and mitigation measures the city will adopt to mitigate these impacts. Environmental thresholds would apply to a number of impacts, such as traffic, for which it could state a threshold in terms of maximum peak hour traffic trips. Any development consistent with the land use assumptions in the plan that either does not exceed the environmental thresholds, or whose environmental impacts are mitigated by adopted mitigation measures, would not require an additional SEPA review.<sup>24</sup>

**(3) Environmental Requirements in Comprehensive Plan and Development Regulations.** An alternate method of integration does not rely on a program statement prepared on a comprehensive plan. Rather, this method relies on environmental requirements contained in a comprehensive plan and development regulations as a substitute for SEPA environmental review when a project receives development approval. Under this approach to integration, the statute authorizing the preparation of comprehensive plans must be inclusive enough to authorize planning for environmental problems considered in environmental reviews, such as project alternatives and cumulative impacts.

This approach to mitigation must also authorize the inclusion of mitigation measures in plans and development regulations. Mitigation of significant impacts is an important factor in a SEPA review. An agency can attach mitigating conditions when it decides, after an environmental assessment, that an environmental impact statement is unnecessary. Agencies may also include mitigating conditions in environmental impact statements. Plans and development regulations can contain policies and requirements that mitigate environmental impacts. An agency can rely on these mitigation policies and requirements to avoid repetitious environmental review under a SEPA when a project receives development approval.

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<sup>22</sup> See County of Santa Barbara Planning & Development, *Orcutt Community Plan Update, Proposed Final Environmental Impact Report* (Santa Barbara, Ca.: The Department, Dec. 1995). In addition to analyzing the environmental impacts of the plan, the impact report also analyzes the environmental impacts of 45 “key sites” in the planning area on which development is expected to occur. This more detailed environmental analysis of key sites lessens further the need for focused impact reports when development on these sites is considered.

<sup>23</sup> Wash. Rev. Code §43.21C.031. This provision is in the SEPA. A planned action is still subject to “environmental review and mitigation.” *Id.*, §43.21C.031(1).

<sup>24</sup> See City of Everett, Wash. Planning & Community Development, *SW Everett/Paine Field Subarea Plan and EIS* (Everett, Wash.: The Department, Dec. 1996).

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For example, assume a site would have erosion and runoff problems when developed. If the development regulations contain runoff and erosion controls, an agency could rely on these as mitigation measures and avoid a repetitious environmental review of these environmental impacts.

To carry out this approach to integration, the statute should define the environmental analysis required in a comprehensive plan and development regulations as an alternative to SEPA review. The Washington statute handles this problem by stating that plans and regulations must “adequately address” environmental impacts. They are adequately addressed if plans and regulations identify specific environmental impacts and show they are avoided or mitigated. In addition, “[t]he legislative body of the county, city, or town [must designate] as acceptable certain levels of service, land use designations, development standards, or other land use planning required or allowed by [the planning] chapter.”<sup>25</sup> The Washington statute does not require consideration of alternatives and the mitigation of environmental impacts, although adding this requirement is desirable.<sup>26</sup>

If a plan and regulations “adequately address” environmental impacts, an agency need not conduct a repetitious environmental review under a SEPA when it considers a development for approval.<sup>27</sup> The effect on a SEPA environmental review is the same as when an agency prepares a program statement on a plan. The only difference is that planning and development regulations provide the basis for satisfying environmental review requirements. Note that development regulations can also include substantively binding environmental requirements, which plans covered by a program statement do not include.

An important question that arises when plans and regulations include environmental requirements is whether any role remains for environmental review under a SEPA. Under the Washington statute, the answer to this question depends on the adequacy of the environmental analysis in plans and regulations. A hypothetical will illustrate. Assume that a plan shows residential development in clusters on one-acre lots in a subarea covered by the plan. If the plan adequately addresses density levels and the other elements required by the Washington statute, additional analysis of these elements is not necessary at the project stage. Site-specific impacts not covered by the plan, such as impacts on groundwater supply, require analysis in the environmental review unless development regulations include adequate measures to prevent groundwater pollution.

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<sup>25</sup> Wash. Rev. Code § 43.21C.240(4)(b). For discussion of the Washington legislation see Richard Settle, *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (Seattle, Wash.: Butterworth, 1986, and Supp. 1995) 501-544.

<sup>26</sup>A more flexible statutory approach would not specify the environmental content of plans and development regulations. Legislation could simply authorize a plan and development regulations to consider the “significant environmental impacts” of development policies without detailing what plans and regulations must contain.

<sup>27</sup> Wash. Rev. Code § 43.21C.240(1). A municipality reviewing a project under the SEPA “may determine that the requirements for environmental analysis, protection, and mitigation measures in the county, city, or town’s development regulations and comprehensive plans ..., and in other applicable local, state, or federal laws and rules provide adequate analysis of and mitigation for the specific adverse environmental impacts of the project action to which the requirements apply.” See also the provisions in Wash. Rev. Code § 36.70B.030(4).

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An important effect of shifting environmental review to plans and regulations is to convert environmental disclosure under a SEPA to a substantive review. This change may provide more, not less, environmental protection but will not remedy environmental impacts not covered in the plan or regulations if the SEPA review cannot require substantive changes in the project. Disclosure of environmental impacts in an environmental review may be enough, however, if plans and regulations cover major environmental impacts and if the agency requires mitigation as a condition to its approval of an impact statement.

### **PROBLEMS IN INTEGRATING REVIEWS**

Integrating planning and development regulation with environmental review can create controversy because the participants in the environmental review process have different views on whether integration is a good idea and what it should accomplish. Developers are concerned about duplication and delays in development approvals; they support integration that can remedy this problem. They may favor shifting responsibility for environmental review to plans and development regulations in order to obtain a determination on environmental problems before they begin project planning and the development approval process. Developers may oppose any attempt to retain site-specific environmental reviews when they present their projects for development approval because it could (and sometimes does) delay development and adds to costs.

Local governments may favor integration that avoids duplication but may be reluctant to assume the cost and additional responsibility of adding environmental review and requirements to their plans and regulations. Funding for environmental review as part of the planning process is another problem. In many SEPA states, local agencies delegate the preparation and funding of impact statement preparation to applicants for project approval. Public funding is necessary if local governments assume this responsibility and may, as in Washington, require a state appropriation. Another option is to levy fees on private applicants sufficient to cover the cost of environmental reviews, although this option may require legislative authority.

Planning agencies may also need flexibility in deciding when in the planning process they should consider environmental issues. For example, they may want to defer environmental review to subarea plans if different areas have different environmental problems and if consensus is easier at the subarea planning level.

The environmental community may not fully support integration if it believes that integration will weaken the environmental reviews that are available under SEPA. It may resist any attempt at integration that eliminates or reduces the need for site-specific reviews of individual projects. To deal with this problem, a consensus is necessary on how integration will affect site-specific environmental reviews of projects. Program impact statements on comprehensive plans may have an advantage here because they are an accepted practice under SEPA statutes and so are less threatening than other alternatives.

Another problem is that integrating planning and regulations with environmental review does not remedy all of the problems of duplication and overlap that can occur in land-use regulation. Additional streamlining is possible if legislation integrates planning and regulation with environmental review through the development approval process. The land-use agency can then

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decide whether a proposed development is consistent with the comprehensive plan at the same time that it determines whether the comprehensive plan contains an adequate environmental review. Legislation can also integrate subdivision approval with environmental review<sup>28</sup> and can then combine this integrated review process with other development approvals.

Related environmental land-use legislation and ordinances, especially wetlands regulations, may also require integration with environmental reviews under SEPAs. Several states have laws authorizing state agencies to regulate land uses in wetlands through permitting.<sup>29</sup> These laws may authorize the delegation of the permitting power to municipalities, and municipalities may adopt wetlands regulations even if there is no state regulatory program.

Wetlands laws and regulations vary by state, but many base their permit reviews on environmental impact criteria similar to those contained in SEPAs. For example, a wetlands regulation may require an evaluation of environmental impacts, a consideration of development alternatives, and the inclusion of mitigation measures. When a wetlands regulation requires consideration of environmental impacts similar to those considered under a SEPA, statutes integrating planning and development regulation with SEPA reviews can include development approvals in wetlands as well. An agency can use a program statement on a comprehensive plan, for example, as the beginning point for review under the wetlands law.

Basing permit decisions under wetlands statutes on comprehensive plans or their program statements has other advantages. Wetlands regulations usually provide for permit approvals on an individual basis, with no prior planning or delineation to show where wetlands are. Comprehensive plans can remedy this omission by indicating where wetlands exist and the restraints they impose on development. Agencies can rely on this guidance when they consider developments in wetlands for permit approval.

### CONCLUSION

Environmental reviews under SEPAs provide needed protection from environmental damage by land-use development. Problems arise, however, when planning and development approvals duplicate SEPA reviews, thereby imposing additional costs and creating unnecessary delays in project development.

Integrating planning and development approval with SEPA reviews can help eliminate these problems. Legislation can require environmental analysis and requirements in comprehensive plans and development regulations, with SEPA environmental reviews performing a supplementary function. This kind of integration preserves the benefits of site-specific environmental review while

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<sup>28</sup>New York has adopted this reform. See N.Y. General City Law §32.

<sup>29</sup>E.g., Conn. Gen. Stat. §§22a-28 to 22a-45; Fla. Stat. Ann. §§403.91-403.929; Mass. Gen. Laws ch. 130, § 105; ch. 131, §40; Mich. Comp. Laws Ann. §§281.701-281.722; N.H. Rev. Stat. Ann. §§483-B:1 to 483-B:19; and N.Y. Env'tl. Conserv. Law §§25-0101 to 25-0601; 71-2501 to 71-2507.

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expanding the role of comprehensive plans and development regulations to consider the environmental impacts of land development.

Below are three alternative statutory models that offer different degrees of environmental integration with local planning, depending on the planning and regulatory climate in the state.

### *ALTERNATIVE 1*

The purpose of this Section is to require the local planning agency to prepare a written environmental evaluation of several elements of its local comprehensive plan in order to understand the significant effects of the plan on the natural environment. In contrast to Alternatives 2 and 3, which follow, this Alternative is not binding on the local government in a regulatory sense and does not involve a state environmental policy act that applies to specific projects or land-use actions, such as single-tract rezonings or conditional use permits.

#### **12-101 Evaluation of Environmental Effects of the Land Use, Housing, Transportation, and Community Facilities Elements of a Comprehensive Plan**

- ◆ This Section requires the local planning agency to prepare a written report, or “environmental evaluation,” in which it considers and evaluates the significant effects of several elements of the local comprehensive plan on the environment.
  - (1) The local planning agency shall consider and evaluate the significant environmental effects of the land-use, housing, transportation, and community facilities elements of the local comprehensive plan before it submits the plan to the local planning commission, if one exists, for its review and recommendations and to the legislative body of a local government for its review and adoption. The local planning agency may also consider and evaluate the significant environmental effects of any other element of the local comprehensive plan.
- ◆ Obviously, consideration of environmental alternatives will only be meaningful if it is carried out *before* a local planning agency makes a final recommendation on its comprehensive plan and while it is still considering a variety of options and alternatives.
  - (2) The purpose of the environmental evaluation is to ensure that an assessment is made of the significant effects, both beneficial and detrimental, of these elements on the environment, and that alternatives to these environmental effects are adequately identified. The results of the evaluation are not binding on the local government and the local government need not modify its local comprehensive plan as a result of the assessment.

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- ◆ The requirement that the local planning agency consider and evaluate alternatives is not intended to be legally binding. The text makes it clear that the local planning agency need only consider and evaluate the environmental impacts of the plan.
  - (3) As used in this Section:
    - (a) “**Plan**” includes a plan for any subarea of the local government.
    - (b) “**Significant**” means that there is a potential to substantially affect or impair the quality of the environment.
  - (4) In its environmental evaluation, the local planning agency shall consider a reasonable range of alternatives at a level of detail that matches the level of detail contained in the element of the plan that is being evaluated.
- ◆ There is no magic figure to determine what is an appropriate number of alternatives that should be explored in the environmental evaluation. The text therefore states that the local planning agency should consider a “reasonable” range of alternatives. The point is that the local planning agency should evaluate and consider *enough* alternatives so that it properly understands the repercussions of the proposed elements of the comprehensive plan on the environment and knows whether other alternatives may be less damaging environmentally. Alternatives considered may be limited to the alternatives proposed in the plan if these alternatives include what the agency believes to be a reasonable range. However, the local planning agency may also decide that it also needs to consider the environmental impacts of alternatives not included in the plan in order to truly understand the benefits and the detriments of a proposed element on the environment. At a minimum, the agency should consider an “existing trends” alternative in which the plan makes no change to existing policies. This alternative is similar to the “no action” alternative that agencies must consider under many state environmental protection acts (SEPAs). Other alternatives could include modifications of proposals made by the local planning agency. For example, if the agency is proposing a slow growth plan, one alternative could consider a plan that contemplates more rapid growth.

In addition, the level of detail considered in the alternatives should be comparable to the level of detail contained in the element itself to keep the document “balanced.” In other words, it would be awkward for an element to present a lot of technical information and the environmental evaluation to be skimpy. Of course, the level of detail in the plan will vary by element, depending on a number of factors, including the area included in the plan (e.g., an entire local government versus a subarea). Also, in many instances a plan in its early stages will be in sketch form consisting of only a series of schematics. A consideration of alternatives need then only respond to this level of detail.

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- (5) The environmental evaluation shall be in the form of a written report, which may be in both text and map form, which shall be included as an appendix to the local comprehensive plan. The report shall provide a meaningful evaluation, comparison, and analysis of alternatives to elements of the local comprehensive plan. [Where a regional plan includes data, analyses, and mitigation measures that are relevant to the environmental evaluation of alternatives, the report may consider and incorporate such data, analysis, and measures.] The report shall:
- ◆ The local planning agency may determine the format of the report, so long as it contains a “meaningful” evaluation, comparison, and analysis. By including this report as an appendix to the plan, citizens can be permanently aware that a range of alternatives was considered by the local government before the plan was adopted. In some states, regional planning agencies are authorized to prepare regional plans affecting land use and other functional areas. In these states, it may be advisable to add the bracketed language that allows an environmental evaluation to take the regional plan into account if the regional plan elements are clearly identified in the evaluation.
    - (a) describe the significant environmental effects of each alternative;
  - ◆ Subparagraph (a) requires the local planning agency to consider the “significant environmental effects” of each alternative so that it can then compare the effects of alternatives with the effects of the proposed plan. The statute defines the terms “significant.” Regulations adopted to implement the statute can further define this term. Case law under NEPA and the various SEPAs also provides guidance on when an environmental impact of an action is “significant.”
    - (b) describe how each alternative can avoid, substantially reduce, or mitigate any significant environmental effect of the element at issue; and
  - ◆ Subparagraph (b) makes it clear that the reason for considering alternatives is to identify alternatives that are less damaging environmentally, or that can avoid, reduce, or mitigate any environmental effects caused by the specific element of the comprehensive plan. Although there is no requirement that the local planning agency must adopt an environmentally superior alternative, discussion of any environmentally superior alternative should be included in the report.
    - (c) describe how alternative sites in any site-specific proposal may avoid, reduce, or mitigate any significant environmental effects of such proposal.
  - ◆ A comprehensive plan usually does not contain site-specific proposals. However, site-specific proposals may be the reason for amending a plan, and a plan may sometimes contain such proposals if it is for a limited area. When this is the case, subparagraph (c) requires the consideration of alternative sites for any site-specific proposals contained in a plan or its amendment.

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- (6) The local planning agency shall make its environmental evaluation available for inspection and comment at least (30) days prior to the public hearing on the local comprehensive plan as required by Section [7-401].
- ◆ The local planning agency should make its report on alternatives available a reasonable period of time prior to the public hearing on the adoption of the comprehensive plan. The text contains no formal mechanism through which the agency is to receive comments on the report since it is expected that comments on the report will be made when the hearing on the plan is held.
- (7) The local planning agency shall also conduct an environmental evaluation of any proposed amendment to the land-use, housing, transportation, or community facilities elements of the local comprehensive plan. The evaluation of any amendment shall be conducted in the same manner as the initial evaluation and the written report shall also be attached to the appendix of the local comprehensive plan.
- ◆ This paragraph applies the environmental evaluation requirement to amendments to a local comprehensive plan.
- (8) The [state planning agency *or* department of the environment] shall have the authority to adopt rules to administer this Section [pursuant to its authority under Section [4-103].
- ◆ This paragraph authorizes the state to establish the details of both procedure and content of the local environmental evaluation. If the state has a SEPA, these rules should be generally consistent with that statute and its regulations. The bracketed phrase refers to the basis of the state planning agency's rule-making authority, and should be removed if the power is given to the department of environment or similar agency.

### ***ALTERNATIVE 2***

Alternative 2 presumes the existence of a state environmental policy act and is based on N.Y. General City Law §28-A and similar legislation adopted for towns and villages, and on Cal. Pub. Res. Code §§21084 and 21157 to 21157.5. The purpose of this Section is to authorize the preparation of an environmental impact statement on a local comprehensive plans so that public agencies can avoid or carry out a more limited environmental review of land-use approvals that are based on that plan. By contrast to Alternative 1, this Alternative is more complex in that it goes beyond being a mere environmental evaluation with no regulatory implications.

#### **12-101 Environmental Impact Statement on a Comprehensive Plan**

- (1) The local planning agency shall prepare an environmental impact statement on a local comprehensive plan [as authorized by Section \_\_\_ of the *state environmental policy act*] and

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shall incorporate the impact statement as an appendix to that plan. [Where a regional plan includes data, analyses, and mitigation measures that are relevant to the environmental impact statement and its evaluation of alternatives, the impact statement may consider and incorporate such data, analyses, and measures.]

- ◆ Paragraph (1) authorizes the local planning agency to make an environmental impact statement a part of the local comprehensive plan. If this alternative is chosen, the agency must be careful to comply with any SEPA requirements for impact statements. Therefore, as the bracketed language indicates, it may be necessary to amend the SEPA legislation or implementing regulations to include an impact statement on a comprehensive plan. As is also the case in Alternative 1 above, there is language that addresses the incorporation of any data, analyses, and mitigation measures contained in a regional plan to minimize duplication in the statement.
  - (2) The purpose of this Section is to authorize the preparation of an environmental impact statement on a local comprehensive plan that can avoid or minimize the need for the preparation of an impact statement on a site-specific land-use action.
  - (3) As used in this Section:
    - (a) “**Consistent With a Local Comprehensive Plan**” means that the land-use action furthers the goals, policies, and guidelines of the local comprehensive plan, and is compatible with the proposed future land uses and densities and/or intensities contained in the local comprehensive plan.
    - (b) “**Feasible**” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors.
    - (c) “**Land-Use Action**” means a rezoning, an approval of a subdivision, an approval of a special exception, conditional use, or variance, and an approval of a planned unit development or similar site-specific development plan.
    - (d) “**Plan**” includes a plan for any subarea of the local government.
    - (e) “**Significant**” means that there is a potential to substantially affect or impair the quality of the environment.
- ◆ Case law under NEPA and the various SEPAs also provide guidance on when an environmental impact of an action is “significant.”<sup>30</sup>

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<sup>30</sup>See D. R. Mandelker, *NEPA Law & Litigation* (Deerfield, Ill.: Clark Boardman Callaghan, 2d ed. 1992 & Supp. 1997), §§ 8.08, 12.06.

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[(4) No further compliance with the state environmental policy act is required for a subsequent land-use action that complies with the conditions and environmental thresholds established for such action in the environmental impact statement on a local comprehensive plan.]

- ◆ This first Paragraph (4) simply excuses a land-use action from compliance with the SEPA if it complies with the environmental impact statement prepared on the plan. This provision is based on the New York law. As an option, more detailed provisions are provided in alternative Paragraphs (4) through (8) below.

[or]

[(4) Once the local planning agency has prepared an environmental impact statement on a local comprehensive plan, the public agency responsible for any subsequent land-use action that is consistent with the local comprehensive plan shall prepare an initial study of the significant environmental impacts of that action.

- ◆ Paragraph (4) requires the public agency responsible for any land-use action to prepare an initial study of that action. The public agency that does the initial study most likely will not be the local planning agency that prepared the plan. The initial study is intended to take the place of the preliminary environmental assessment that agencies do under SEPAs to determine whether an impact statement is necessary. A subsequent land-use action is covered by this Section, however, only if it is consistent with the plan. If it is not consistent, the environmental analysis in the plan will not apply.

(5) After completing its initial study, the public agency responsible for the land-use action may make written findings that an environmental impact statement is not required for the land-use action because it will not have significant effects on the environment.

- ◆ Paragraph (5) authorizes a written finding that the subsequent land-use action does not have significant environmental effects. This finding will be based on an analysis of the action's own impacts, but it is intended that the public agency can also rely on the environmental analysis in the impact statement on the plan when it determines whether the land-use action has “significant” environmental impacts.

(6) If the public agency determines that the subsequent land-use action will have significant effects on the environment, the public agency may make written findings that an environmental impact statement is not necessary if alternatives for the land-use action were adequately considered in the environmental impact statement on the local comprehensive plan, and if the significant environmental impacts of the action either:

- (a) can be mitigated or avoided on the basis of the environmental impact statement on the local comprehensive plan; or

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- (b) were examined at an adequate level of detail in the environmental impact statement on the local comprehensive plan to enable those effects to be mitigated or avoided by revisions, conditions, or other means in connection with the land-use action.
- ◆ Paragraph (6) specifies when an environmental impact statement on a local comprehensive plan can be used to avoid the preparation of a new environmental impact statement on a subsequent land-use action if that action has significant environmental impacts. The public agency must first find that the impact statement on the plan adequately considered alternatives to the land-use action. This requirement allows the public agency to reexamine alternatives if the alternatives to that action were not adequately examined in the impact statement on the plan. In addition, subparagraphs (a) and (b) require a finding that the significant environmental impacts of a land use action can be avoided or mitigated either on the basis of the impact statement on the comprehensive plan, or through revisions, conditions, or other measures in connection with the land-use action. The public agency may make the second finding only if the significant environmental impacts of the land-use action were examined at an adequate level of detail in the comprehensive plan.
  - (7) If the public agency cannot make the written findings required by subparagraphs (5) or (6), it shall prepare an environmental impact statement on the land-use action unless it incorporates feasible mitigation measures or feasible alternatives in the land-use action that will avoid or lessen the effects of the land-use action so that no significant effects on the environment will occur. The environmental impact statement on the land-use action shall consider only those environmental impacts not considered in the environmental impact statement on the local comprehensive plan.
- ◆ Paragraph (7) requires the preparation of an environmental impact statement on a land-use action if the public agency cannot rely on the impact statement on the comprehensive plan to satisfy SEPA requirements. However, the public agency is not required to prepare an environmental impact statement if it can incorporate feasible mitigation measures or alternatives in the land-use action that will avoid or mitigate its environmental impacts.

Paragraph (7) also authorizes the approach known as “tiering,” which refers to the process of preparing multiple levels of environmental review documents that first consider broad environmental issues and become more narrow as they focus on smaller areas or sites. Tiering helps to avoid repetition since issues that were adequately addressed in the broader review are not revisited. The language in Paragraph (7) incorporates “tiering” by requiring the consideration of environmental impacts of the land-use action only if they were not previously considered in the local comprehensive plan.

- (8) Prior to approving a land-use action, the public agency shall incorporate all appropriate feasible mitigation measures or feasible alternatives contained in the environmental impact statement on the local comprehensive plan or on the land-use action.]

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- ◆ Paragraph (8) reinforces the tiering process by requiring the incorporation in the land-use action of feasible mitigation measures and alternatives discussed in the environmental impact statement that are appropriate to the land-use action.
  - (9) A public agency may not comply with the requirements of this Section by relying on an environmental impact statement prepared on a local comprehensive plan if:
    - (a) more than five years have elapsed since the preparation of the environmental impact statement on the local comprehensive plan; or
    - (b) significant new circumstances or information require a new study of the environmental impacts of the local comprehensive plan.
- ◆ The purpose of this Section is to prevent reliance on a comprehensive plan impact statement that is outdated. The “significant circumstances or information” language is taken from regulations by the U.S. Council on Environmental Quality for the National Environmental Policy Act that specify when a supplemental impact statement is required under NEPA.<sup>31</sup> Some SEPA’s have similar requirements. Case law under NEPA and the SEPA’s can provide guidance on when a new study is required.<sup>32</sup>

### *ALTERNATIVE 3*

Alternative 3 integrates the consideration of environmental impacts under the state environmental policy act with the review and approval of land-use actions by a public agency. The text is based on Wash. Rev. Code Ann. §43.21C.040. The focus here is on public agency review of land-use actions such as a decision to rezone, the granting of a variance, or a decision to approve a planned unit development. In some cases a land-use action will include site-specific plans, such as a site plan. In these cases, public agency review will include a review of these plans.

This Section can be placed either in the planning and land-use statutes or in the state environmental policy act. An argument for placing it in the planning and land-use statutes is that it deals with the land-use approval process and the local comprehensive plan, and should therefore be integrated with these measures. An argument for placing it in the SEPA is that it determines when an environmental analysis is required on a land-use decision.

### **12-101 Environmental Requirements in Local Comprehensive Plan and Land Development Regulations**

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<sup>31</sup>40 C.F.R. § 1509(c).

<sup>32</sup>D. R. Mandelker, *NEPA Law & Litigation* (Deerfield, Ill.: Clark Boardman Callaghan, 2d ed. 1992 & Supp. 1997), §§ 10.18, 12.09

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- (1) The purpose of this Section is to integrate the consideration of environmental impacts under the state environmental policy act [*cite to statute*] with the review and approval of land-use actions by a public agency.
  - (2) As used in this Section:
    - (a) “**Land-Use Action**” means a rezoning, an approval of a subdivision, an approval of a special exception or variance, and an approval of a planned unit development or similar site-specific development plan.
    - (b) “**Plan**” includes a plan for any subarea of the local government.
    - (c) “**Significant**” means that there is a potential to substantially affect or impair the quality of the environment.
  - (3) If a public agency reviews a land-use action and decides that it has significant environmental impacts, it may make written findings that these impacts are adequately avoided or mitigated by the following:
    - (a) the environmental analysis and mitigation measures contained in a local comprehensive plan; and/or
    - (b) the environmental requirements in land development regulations or other local, state, or federal laws or rules.
- ◆ Paragraph (3) authorizes the public agency to make written findings that the significant environmental impacts of the land-use action are “adequately” avoided or mitigated. The statute does not define the term “adequately,” but SEPA regulations can provide guidance on this issue. Court decisions that decide when an environmental analysis in an impact statement is adequate will also be helpful.

The public agency can base its findings either on the local comprehensive plan or on land development regulations or other laws or rules. These laws or rules can be federal, state, or local. There is no problem of delegation of authority to another agency because the adoption of another law or rule is not automatic. The public agency that approves the land-use action must make a written finding that it is adequate.

Paragraph (3) applies only after a public agency has made a decision that a land-use action presented to it has significant environmental impacts. The SEPA will govern how this decision is made, and what type of analysis the public agency must conduct before it decides whether the environmental impacts of a land-use action are significant. In most states with SEPA, the public agency must carry out an environmental assessment of an action to determine whether it has significant environmental effects. If the agency decides after it completes the

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environmental assessment that an environmental impact statement is unnecessary, the environmental review under the SEPA will terminate and the public agency need not make the findings authorized by this Section.

(4) A public agency may make the written findings authorized by paragraph (3) above if:

(a) the local comprehensive plan has:

1. considered the significant environmental impacts of the land-use action and its alternatives; and
2. designates environmental thresholds, levels of public service, land-use designations and development standards;

- ◆ A public agency can rely on a local comprehensive plan to make the determination authorized by paragraph (3) if the plan has considered the environmental impacts of the land-use action and contains specified criteria, standards, and thresholds. The plan need only “consider” the environmental impacts of a land-use action. It need not decide whether these impacts are acceptable. The public agency will decide under paragraph (3) whether the plan's policies and standards have adequately avoided or mitigated the environmental impacts.

Subparagraph (4)(a)2 does not define what is meant by environmental thresholds, levels of public service, land use designations, and development standards. It is intended that public agencies should have the flexibility to decide the detail level at which they are identified in the plan and what they should contain. For example, a plan could state a threshold level for an increase in traffic that is considered environmentally significant. An impact statement would not be necessary if the traffic generated by a new development is within this threshold.

(b) land development regulations or other laws or rules include measures that will mitigate or avoid the significant environmental impacts of the land-use action; and

- ◆ Subparagraph (4)(b) contemplates that land development regulations or other laws or rules may contain environmental requirements that can avoid or mitigate the environmental impacts of the land-use action. For example, local land development regulations may contain requirements for development in floodplains. State air quality regulations may contain requirements for reducing air pollution.

(c) the public agency bases or conditions its approval of the land-use action on a finding of compliance with the local comprehensive plan and any applicable land development regulations, laws, or rules.

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- (5) In deciding whether a specific adverse environmental impact is adequately addressed by land development regulations or another rule or law, the public agency that reviews the land-use action shall:
- (a) consult orally or in writing with the agency responsible for the administration of that regulation, law, or rule, or law; and
  - (b) consider any comments on the environmental impacts of the land-use action made by such other agency.
- ◆ Under paragraph (5), the public agency's obligation is only to “consider” these comments, but case law under NEPA and the SEPA's make it clear that the public agency must give these comments serious consideration.
- (6) If a public agency decides that the local comprehensive plan, land development regulations, or other laws or rules adequately avoid or mitigate a land-use action's significant environmental impacts, the land-use action is not subject to additional environmental review under the state environmental policy act, but is subject to any applicable notice, hearing, and all other requirements contained in land development regulations or other laws or rules.
- ◆ The effect of paragraph (6) is to shift the decision on whether to prepare an environmental impact statement under SEPA to the land-use approval process, where the decision on whether an impact statement is required will be made. Although this paragraph does not require all of the public participation in this decision that SEPA's usually require, the land-use approval process requires a local notice and hearing which should help ensure adequate public participation.
- (7) If the public agency cannot make the written findings required by paragraph (3) above, it shall prepare an environmental impact statement on the land-use action unless it incorporates feasible mitigation measures or feasible alternatives in its approval of the land-use action that will avoid or mitigate its environmental effects. The environmental impact statement on the land-use action shall consider only those environmental impacts that are not addressed in the local comprehensive plan, or that are not mitigated by land development regulations or laws or rules.
- ◆ Paragraph (7) requires an impact statement if the public agency cannot make the written findings required by paragraph (3), unless the agency is able to avoid or mitigate the environmental impacts of the land-use action. If the agency does prepare an environmental impact statement, it need consider only those impacts not addressed in the local comprehensive plan or mitigated by other land development regulations, laws, or rules.
- (8) A public agency may not comply with the requirements of this Section by relying on a local comprehensive plan if:

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- (a) more than five years have elapsed since the adoption of the local comprehensive plan; or
  - (b) significant new circumstances or information require a new study of the environmental impacts of the local comprehensive plan.
- (9) Nothing in this Section limits the authority of a public agency, in its review or mitigation of a land-use action, to adopt or otherwise rely on the environmental analyses or requirements in a local comprehensive plan or on other land development regulations, laws, or rules.
- ◆ Paragraph (9) is a nonderogation provision. The purpose of this paragraph is to ensure that nothing in this Section prevents a public agency from considering an environmental analysis in a comprehensive plan, or in other regulations, laws, or rules, when it carries out other functions assigned to it under the planning and zoning enabling acts.

### Appendix A – Literature Suggesting Improvements for SEPAs

Magee, “Environmental Impact Statements: Application in Land Use Control,” 10 *Zoning & Planning L. Rep.* 113 (1987); Weinberg, “A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts,” 5 *Pace Env'tl. L. Rev.* 1 (1987); “Symposium, The Role of Impact Assessment in Environmental Decision Making in New England: A Ten-Year Perspective,” 6 *Env'tl. Impact Assess. Rev.* 101 (1986). There also are articles specific to individual states with SEPAs:

California: Catalano & Reich, “Local Government Law and the E.I.R.: The California Experience,” 9 *Urb. Law* 195 (1977); Catalano & Reich, “Local Government Response to State Environmental Impact Assessment Requirements: An Explanation and Typology,” 7 *Env'tl. L.* 25 (1977); Lichman, “Courts v. Planning: The Anatomy of Four Conflicts,” 15 *W. St. U.L. Rev.* 1 (1987); Pinkerton, “Conflicting Statutes in No-Growth Environments: CEQA and the PSA,” 4 *UCLA J. Env'tl. L. & Pol'y* 173 (1985); Rossmann, “Not So Well at Twenty,” 20 *Env'tl. L.* 10174 (1990); Sahm, “Project Approval Under the California Environmental Quality Act: It Always Takes Longer Than You Think,” 19 *Santa Clara L. Rev.* 727 (1981); Varner, “The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas For Necessary Reform,” 19 *Pepperdine L. Rev.* 1447 (1992); Comment, “Environmental Decision Making Under CEQA: A Quest For Uniformity,” 24 *UCLA L. Rev.* 838 (1977); “Comment, Land Use Aesthetics: A Citizen Survey Approach to Decision Making,” 15 *Pepperdine L. Rev.* 207 (1988). See also M. Azevedo, *Environmental Overdose: California's Environmental Law Needs Treatment* (Petaluma, Ca: Wood Rat Press, 1996).

Hawaii: Kim, “Environmental Impact Statements in Hawaii: Problems and Prospects,” 11 *Env'tl. Impact Assess. Rev.* 103 (1991).

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Indiana: Note, "The Indiana Environmental Protection Act: An Environmentalist's Weapon in Need of Repair," 22 *Val. U.L. Rev.* 149 (1987).

New York: Healy, "The Environmental Review Process in the City of New York: CEQR," 5 *Pace Env'tl. L. Rev.* 93 (1987); Nolon & Stockel, "Expanding Land Use Authority Through Environmental Legislation: The Regulation of Affordable Housing," 2 *Hofstra Prop. L.J.* 1 (1989); Sterk, "Environmental Review in the Land Use process: New York's Experience with SEQRA," 13 *Cardozo L. Rev.* 2041 (1992); Valletta, "Charter Revision: Focusing on the Essentials in Land Use Review," 33 *N.Y.L. Sch. L. Rev.* 599 (1988); "Symposium on the New York State Environmental Quality Review Act," 46 *Alb. L. Rev.* 1097 (1982); Note, "SEQRA's Emergency Provision: Exemption or Circumvention?," 2 *Hofstra Prop. L.J.* 209 (1989).

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### Appendix B – Overview of SEPAs

State	Comments
<b>Cal. Pub. Res. Code</b> §§21000-21177	Requires environmental impact report similar to federal statement and including mitigation measures and growth-inducing effects. Applies to state agencies and local governments. Detailed provisions governing preparation of impact report and judicial review. State agency to prepare guidelines. Statutory terms defined.
<b>Conn. Gen. Stat.</b> §§22a-1 to 22a -1h	State agencies to prepare environmental impact evaluations similar to federal impact statement and including mitigation measures and social and economic effects. Actions affecting environment defined.
<b>D.C. Code Ann.</b> §§6-981 to 6-990	Mayor, district agencies and officials to prepare impact statements on projects or activities undertaken or permitted b District. Impact statement to include mitigation and cumulative impact discussion. Action to be disapproved unless mitigation measures proposed or reasonable alternative substitute to avoid danger.
<b>Ga. Code Ann.</b> §§12-16-1 to 12-16-8	Applies to projects proposed by state agencies for which it is probable to expect significant effect on the natural environment. Limited primarily to land-disturbing activities and sale of state land. Decision on project not to create cause of action.
<b>Hawaii Rev. Stat.</b> §§343-1 to 343-8	State agencies and local governments to prepare impact statements on use of public land or funds and land uses in designated areas. Statements must be “accepted” by appropriate official. Judicial review procedures specified.
<b>Ind. Code Ann.</b> §§13-1-10-1 to 13-1-10-8	Similar to NEPA. Applies to state agencies.

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<p><b>Md. Nat. Res. Code Ann.</b> <b>§§1-301 to 1-305</b></p>	<p>State agencies to prepare environmental effects reports covering environmental effects of proposed appropriation and legislation, including mitigation measures and alternatives.</p>
<p><b>Mass. Gen. Laws Ann.</b> <b>ch. 30, §§61, 62-62H</b></p>	<p>State agencies and local authorities to prepare environmental impact report reports covering environmental effects of actions, mitigation measures and alternatives.</p>
<p><b>Minn. Stat. Ann.</b> <b>§§116D.01-01-116D.06</b></p>	<p>State agencies and local governments to prepare environmental impact statements covering environmental effects of actions, mitigation measures and economic, employment and sociological effects. Procedures for preparation of statements and judicial review specified. State environmental quality board may reverse or modify state actions inconsistent with policy or standards of statute.</p>
<p><b>Mont. Code Ann.</b> <b>§§ 75-1-101 to 75-1-105; 75-1-201 to 75-1-207</b></p>	<p>Similar to NEPA. Applies to state agencies.</p>
<p><b>N.Y. Env'tl. Conserv. Law</b> <b>§§8-0101 to 8-0117</b></p>	<p>State agencies and local governments to prepare impact statements similar to federal impact statement and including mitigation measures and growth-inducing and energy impacts. Statutory specified. State agency to adopt regulations on designated topics.</p>
<p><b>N.C. Gen. Stat.</b> <b>§§113A-1 to 113A-13</b></p>	<p>Similar to NEPA. Applies to state agencies. Local governments may also require special-purpose governments and private developers of major development projects to submit impact statement on major developments. Certain permits and public facility lines exempted.</p>

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<p><b>P.R.Laws Ann. Tit. 12, §§1121-1127</b></p>	<p>Similar to NEPA. Applies to Commonwealth agencies and political subdivisions.</p>
<p><b>S.D. Codified Laws Ann. §§34A-9-1 to 34A-9-13</b></p>	<p>State agencies “may” prepare environmental impact statements similar to federal impact statement and adding mitigation measures and growth-inducing “aspects.” Statutory terms defined. Ministerial and environmental regulatory measure exempt.</p>
<p><b>Va. Code §§3.1-18.8, 10.1-1200 to 10.1-1212</b></p>	<p>Similar to NEPA. Applies to state agencies for major state projects. Impact statements also to consider mitigation measures and impact on farmlands.</p>
<p><b>Wash. Rev. Code §§ 43.21C.010 to 43.21C.910</b></p>	<p>State agencies and local governments to prepare impact statements identical to federal statement but limited to “natural” and “built” environment. Proposal may be denied if it has significant impacts or mitigation measures insufficient. Judicial review procedures specified. State agency to adopt regulations on designated topics.</p>
<p><b>Wis. Stat. Ann. §§1.11</b></p>	<p>Similar to NEPA. Applies to state agencies. Statements also to consider beneficial aspects and economic advantages and disadvantages of proposals.</p>

Source: Daniel R. Mandelker, *NEPA Law and Litigation*, 2d ed. (Deerfield, Ill.: Clark Boardman Callaghan, 1992), 12-4 to 12-7. Used by permission of the publisher.

## **FINANCING REQUIRED PLANNING**

This Chapter contains various model statutes that authorize methods of financing the planning activities authorized and required elsewhere in the *Guidebook*. Sections 13-101 through 13-103 authorize local governments to adopt and impose taxes to finance planning: a property tax, real property transfer tax, and a development excise tax. Section 13-104 is concerned with the dedicated purposes to which the special tax revenue may be put.

Section 13-201 is the Smart Growth Technical Assistance Act. It creates a state program under which grants may be made to regional planning agencies and local governments to support their “smart growth” planning activities. Smart growth is a defined term with a flexible but specified meaning that at its essence is compact and mixed-use development that increases choices in transportation and opportunities for personal interaction. Additionally, the state planning agency is directed to gather and distribute model plans and ordinances that encourage smart growth and to provide educational resources, training, and other technical assistance regarding the principles and methods of smart growth.

## CHAPTER 13

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### Chapter Outline

#### LOCAL TAX FINANCING OF PLANNING

- 13-101 Real Property Tax to Finance Planning
- 13-102 Real Property Transfer Tax to Finance Planning
- 13-103 Development Excise Tax to Finance Planning
- 13-104 Disposition of Revenue From Planning Taxes

#### TECHNICAL AND FINANCIAL ASSISTANCE FOR PLANNING

- 13-201 Smart Growth Technical Assistance Act

### Cross-References for Sections in Chapter 13

Section No.	Cross-Reference to Section No.
13-102	8-103
13-103	8-103, 8-502, 10-209, 10-211, 10-601 <i>et seq.</i> , Ch. 11
13-104	7-401, 7-406, 8-104, 13-101, 13-102, 13-103
13-201	4-103

**LOCAL TAX FINANCING OF PLANNING**

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***Commentary: Local Financing of Planning Activities***

The planning activities of a local government are multifold, and are not inexpensive. Studies must be performed, data gathered, hearings held, and existing regulations reviewed. Planning agencies must employ planning professionals and clerks, provide office supplies, and purchase information resources. In the absence of a special source of funding, these activities are financed from the general fund of the local treasury. However, there may be circumstances where it is desirable for planning officials to have a separate, dedicated, revenue stream. Three means of providing such a source of funding are an assessment under the existing real property tax structure, a tax on real property transfers, and a development excise tax. The real property transfer tax is essentially a flat sum to be paid at the time of recordation of a deed or other document that transfers ownership of land within the local government. The development excise tax is rather unique, and requires a more in-depth explanation.

**DEVELOPMENT EXCISE TAXES<sup>1</sup>**

A development excise tax is different in fundamental ways from a real property tax or a real property transfer tax. It is imposed on the activity of developing land, is proportional to the density or intensity of the development, and is an obligation of the developer. This is in contrast to the real property tax, which is assessed against the value of real property and is an obligation of the property owner, or the property transfer tax, which is also paid by the land owner but in the form of a flat fee at the time he or she records the deed that grants them title.

These differences are relevant to the extent that the state constitution or statutes provide different procedural or substantive requirements for property and excise taxes. For example, uniformity clauses in state constitutions often require that all real property subject to a real property tax must constitute a single classification. For example, distinct tax rates or valuation formulas for residential and non-residential property would run afoul of such provisions.<sup>2</sup>

Development excise taxes are also distinct from impact fees. The purpose of impact fees is at least partially regulatory – to ensure that development projects pay their full cost – while the

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<sup>1</sup>An excellent discussion of development excise taxes, their advantages, and the potential pitfalls is Eric J. Strauss and Martin L. Leitner, “Development Excise Taxes: Financing Public Facilities Without the Limitations Associated with Exactions and Impact Fees,” Chapter 13 in Mark S. Dennison, ed., *1989 Zoning and Planning Law Handbook*, (New York: Clark Boardman Co., 1989), 315-328.

<sup>2</sup>*John Wanamaker of Philadelphia v. School District*, 274 A.2d 524 (Pa. 1971).

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purpose of a development excise tax is to raise revenue. Therefore, a development excise tax is not subject to the “rational nexus” or “rough proportionality” requirements applicable to impact fees.<sup>3</sup>

Because of these differences, state courts are concerned with the actual nature or character of particular taxes, and may consider a tax that is called one thing to actually have the characteristics of a different class of taxes. “The nature of a tax must be determined by its operation, rather than by any particular descriptive language which may have been applied to it.”<sup>4</sup>

The single biggest legal obstacle to any tax ordinance is that it may be deemed a form of taxation which the local government has no statutory authority to adopt. The adoption of a development excise tax enabling statute like the model below should inherently resolve any issues of statutory authorization, but there are other legal issues. To ensure that an excise tax on development activities is not deemed a property tax, it should be an obligation of the developer, not the owner of the premises, it should not be secured by a lien on the property developed, and the amount of the tax should not be based on the value of the property.<sup>5</sup> In order to distinguish a development excise tax from an impact fee, it should have no regulatory functions or purposes, should tax the development activity and not the property developed, should not be an obligation of the land owner, and payment of the tax should not be a condition precedent for the issuance of a development permit.<sup>6</sup>

The dedication of development excise tax revenue to financing planning might raise some concerns, since the “earmarking” or dedication of funds is a hallmark of impact fees. However, many measures clearly intended to be revenue generators only are also dedicated, so the use of development excise tax revenue to finance planning activities alone should not be a problem unless there is clear precedent to the contrary in one’s particular state.

### STATE STATUTES

**Arizona** authorizes counties to impose a \$2 real property transfer tax in addition to the recording fee.<sup>7</sup> The statute exempts several forms of transfer that do not constitute a substantive change in ownership (placing property into or out of a trust, “straw man” transactions to create a joint or common tenancy, transfers between commonly-owned corporate entities), that transfer interests other than full legal and equitable title (mortgages, liens, and security interests; easements and profits), that clear up title without changing it (partitions, deeds to clarify or confirm earlier deeds), and that are not engaged in for financial gain (deeds of gift, deeds transferring title between spouses

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<sup>3</sup>*Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*, 141 Cal.Rptr. 36 (Cal. 1977).

<sup>4</sup>*Weaver v. Prince George’s County*, 379 A.2d 399 (Md. 1977).

<sup>5</sup>See *Commissioners of Anne Arundel County v. English*, 35 A.2d 135 (Md. 1943); *Flynn v. City and County of San Francisco*, 115 P.2d 3 (Cal. 1941).

<sup>6</sup>*Newport Building Corp. v. City of Santa Ana*, 26 Cal.Rptr. 797 (Cal. 1962); *Cherry Hill Farm v. City of Cherry Hills*, 670 P.2d 779 (Colo. 1983).

<sup>7</sup>Ariz. Rev. Stat. §§11-1131 *et seq.* (1999).

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or between parents and children).<sup>8</sup> The tax must be paid before a transfer document will be accepted for recording,<sup>9</sup> and it is a misdemeanor for an employee of the recorder to accept a document without payment of the tax or proof of an exemption.<sup>10</sup>

**California** cities and counties may adopt a real property transfer tax.<sup>11</sup> Counties, and cities where the county has not adopted a transfer tax, may impose a rate of 55 cents per \$500 of value of the property transferred.<sup>12</sup> A city located in a county with a transfer tax may collect only half that amount under its own transfer tax, and the county must grant a credit equal to the city transfer tax so that the total transfer tax does not exceed 55 cents per \$500.<sup>13</sup> The tax is payable to the county by either the grantor or the grantee,<sup>14</sup> and applies to transfers of mobile homes.<sup>15</sup> In addition to repealing many of the exemptions from the Arizona statute,<sup>16</sup> California exempts transfers pursuant to or in implementation of a bankruptcy.<sup>17</sup> No deed or other document transferring an interest in land may be filed without proof of payment of the tax or of exemption from it.<sup>18</sup>

**Illinois**<sup>19</sup> imposes a real estate transfer tax of 50 cents per \$500 of value.<sup>20</sup> It provides a list of exemptions similar to that in the Arizona statute,<sup>21</sup> and no deed or other document transferring title may be recorded unless it bears a stamp demonstrating that the tax was paid or an affidavit is

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<sup>8</sup>Ariz. Rev. Stat. §11-1134.

<sup>9</sup>Ariz. Rev. Stat. §11-1132.

<sup>10</sup>Ariz. Rev. Stat. §11-1137.

<sup>11</sup>Cal. Rev. & Tax. Code §§11901 *et seq.* (1999).

<sup>12</sup>Cal. Rev. & Tax. Code §11911(a).

<sup>13</sup>Cal. Rev. & Tax. Code §§11911(b), 11931.

<sup>14</sup>Cal. Rev. & Tax. Code §§11912, 11931.

<sup>15</sup>Cal. Rev. & Tax. Code §11913.

<sup>16</sup>Cal. Rev. & Tax. Code §§11921-11930.

<sup>17</sup>Cal. Rev. & Tax. Code §11923.

<sup>18</sup>Cal. Rev. & Tax. Code §11933.

<sup>19</sup>35 Ill. Comp. Stat. §§200/31-1 *et seq.* (1999).

<sup>20</sup>35 Ill. Comp. Stat. §200/31-10.

<sup>21</sup>35 Ill. Comp. Stat. §200/31-45.

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presented proving that the transfer is exempt.<sup>22</sup> Illinois authorizes municipalities<sup>23</sup> and home-rule counties<sup>24</sup> to impose their own real estate transfer tax, but only upon approval by referendum after holding one or more public hearings. Non-home-rule counties may impose a real estate transfer tax without referendum, but are expressly required to employ the exemptions of the state real property transfer tax statute<sup>25</sup> and are limited to a tax rate of 25 cents per \$500 of property value.<sup>26</sup> Upon the request of a county with a real property transfer tax, the tax stamp required by the state transfer tax will not be issued until the county transfer tax has also been paid.<sup>27</sup>

**Maryland** has recently adopted a development excise tax enabling statute for Cecil County.<sup>28</sup> The county cannot adopt such a tax without first holding a public hearing after due notice. The tax may be imposed on the construction of residential units anywhere in the county (including within municipalities) at the time a building permit is obtained, and may not exceed \$3500 per residential unit. The revenues from the tax are to be deposited in a capital facilities improvement fund and may be spent only on capital projects that create, or increase the capacity of, public facilities or on debt service on bonds for such capital projects.

**Massachusetts**<sup>29</sup> has a tax on real property transfers, at a rate of \$2 for a transfer of interest in land valued between \$100 and \$500 and \$2 for every \$500 thereafter (except in Barnstable county, where the excise tax is \$1.50 per additional \$500).<sup>30</sup> 42.5% of the revenue goes into the Deed Transfer Fund of the county where the land is located,<sup>31</sup> and is disbursed from there to the Corrections Fund (75%), the county general fund (15%), and for the modernization and automation

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<sup>22</sup>35 Ill. Comp. Stat. §§200/31-15, -20.

<sup>23</sup>65 Ill. Comp. Stat. §5/8-3-19.

<sup>24</sup>55 Ill. Comp. Stat. §5/5-1031.1

<sup>25</sup>35 Ill. Comp. Stat. §200/31-45.

<sup>26</sup>55 Ill. Comp. Stat. §5/5-1031.

<sup>27</sup>35 Ill. Comp. Stat. §200/31-15.

<sup>28</sup>2000 Md. Laws Ch. 163, effective July 1, 2000.

<sup>29</sup>Mass. Gen'l Laws ch. 64D, §1 *et seq.* (1999).

<sup>30</sup>Mass. Gen'l Laws ch. 64D, §1.

<sup>31</sup>Mass. Gen'l Laws ch. 64D, §11.

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of land transfer records (10%).<sup>32</sup> Transfers to or from the Federal government, the Commonwealth, or to a city or town are exempt,<sup>33</sup> and the tax is payable by either the grantor or the grantee.<sup>34</sup>

**Ohio** counties, townships, and municipalities may assess a property tax in excess of the statutory 10-mill limit for the purpose of funding regional planning, if approved by two-thirds of the legislative body and by a referendum.<sup>35</sup> Ohio law<sup>36</sup> also authorizes counties to collect a real property transfer tax, not to exceed 30 cents per \$100 of value of the property being transferred.<sup>37</sup> The statute includes a series of exemptions<sup>38</sup> which is very similar to the exemptions in the Arizona transfer tax statute. The county real property transfer tax may be accompanied by a tax on the transfer of manufactured housing, payable by the grantor, at the same tax rate as the real property transfer tax.<sup>39</sup> A reduction in the tax rate may be granted to property, either real property or manufactured housing, that has received a tax reduction certificate for its homestead status.<sup>40</sup>

### DEVELOPMENT EXCISE TAX ORDINANCES

**Boulder, Colorado.** The development excise tax ordinance in Boulder<sup>41</sup> applies equally to new development and to existing development in territory being annexed to the city,<sup>42</sup> and also applies to the addition of residential units or non-residential floor area to existing development.<sup>43</sup> Non-residential units pay a rate of \$1.97 per square foot, while attached residential units and mobile homes pay \$2,871.40 per unit and detached residential units pay \$4,460.99 each.<sup>44</sup> The tax revenue

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<sup>32</sup>Mass. Gen'l Laws ch. 64D, §12.

<sup>33</sup>Mass. Gen'l Laws ch. 64D, §1.

<sup>34</sup>Mass. Gen'l Laws ch. 64D, §2.

<sup>35</sup>Ohio Rev. Code §5705.19 (1999).

<sup>36</sup>Ohio Rev. Code §§322.01 *et seq.*.

<sup>37</sup>Ohio Rev. Code §322.01.

<sup>38</sup>Ohio Rev. Code §319.54(F)(3).

<sup>39</sup>Ohio Rev. Code §322.06.

<sup>40</sup>Ohio Rev. Code §§322.07, 323.154.

<sup>41</sup>Boulder (CO) Rev. Code §§3-8-1 *et seq.* (2000).

<sup>42</sup>Boulder Rev. Code §3-8-1.

<sup>43</sup>Boulder Rev. Code §3-8-4.

<sup>44</sup>Boulder Rev. Code §3-8-3.

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is to be paid into three special, dedicated funds: the Capital Development Fund, Transportation Development Fund, and Permanent Park and Recreation Fund.<sup>45</sup> The City Council is empowered to grant credits to developers who provide capital improvements, development improvements, or park and recreation improvements equivalent to the tax, or who provide affordable housing or engage in development in urban renewal areas.<sup>46</sup> The development excise tax constitutes a lien on the property, and unpaid development excise tax can be collected by the county treasurer if the city manager certifies the unpaid taxes to the treasurer.<sup>47</sup>

**Napa, California.**<sup>48</sup> All new residential, commercial, and industrial development in Napa must pay a development excise tax.<sup>49</sup> Each new residential unit pays \$125, while commercial development is taxed one cent per square foot and industrial development pays one-half cent per square foot (in both cases gross floor area including parking),<sup>50</sup> and the tax revenue may be spent only on the construction and expansion of “city fire stations, municipal buildings, and community parks.”<sup>51</sup> Development that replaces destroyed development is excluded from the tax so long as construction begins within six months of the destruction,<sup>52</sup> and the tax exempts development by governments, charitable, religious, and educational institutions, insurance companies, and banks.<sup>53</sup> The tax is payable by “the person by or on behalf of whom a residential, commercial or industrial unit or building or mobile home park is constructed whether such person is the owner or a lessee of the land,”<sup>54</sup> and is due before a building permit may be issued.<sup>55</sup> No construction may occur, and no constructed building may be occupied, until the tax is paid,<sup>56</sup> and the city is empowered to collect

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<sup>45</sup>Boulder Rev. Code §3-8-6.

<sup>46</sup>Boulder Rev. Code §3-8-7.

<sup>47</sup>Boulder Rev. Code §3-8-8.

<sup>48</sup>Napa (CA) Mun. Code §§3.24.010 *et seq.* (1999).

<sup>49</sup>Napa Mun. Code §3.24.020.

<sup>50</sup>Napa Mun. Code §3.24.030.

<sup>51</sup>Napa Mun. Code §3.24.120.

<sup>52</sup>Napa Mun. Code §3.24.090.

<sup>53</sup>Napa Mun. Code §3.24.100.

<sup>54</sup>Napa Mun. Code §3.24.040.

<sup>55</sup>Napa Mun. Code §3.24.070.

<sup>56</sup>Napa Mun. Code §§3.24.050, 3.24.060.

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unpaid tax through a civil action in court.<sup>57</sup> A refund is due if the developer proves to the satisfaction of the finance director that the development on which the tax was paid did not occur.<sup>58</sup>

**Overland Park, Kansas.** This large Kansas City suburb has a development excise tax that is levied against the act of subdividing or platting real property.<sup>59</sup> The tax is assessed at a rate of 14.5 cents per square foot of land as indicated on the plat, and must be paid before, and as a condition precedent of, recordation of the final plat. The tax revenue is paid into the general fund of the city treasury. Exemptions are available under the excise tax ordinance for land platted by the city itself, for land zoned agricultural where all parcels are five acres or greater, detached accessory buildings that are incidental to a main building, additions to single-family houses that will not change the primary use, and minor additions that will not change the character, extent, or intensity of the existing development and do not constitute more than 10 percent of the pre-existing floor area. There is also provision for a rebate of the excise tax where development was subject to both the excise tax and to the old exaction for thoroughfare improvements which it replaced. The Overland Park ordinance was sustained by the Kansas Court of Appeals, which held, *inter alia*, that the ordinance was not a tax upon the use of real property or upon the rendering of a service, but was nevertheless a revenue measure rather than a regulatory one.<sup>60</sup>

### PROVISIONS OF THE MODEL SECTIONS

Section 13-101 authorizes a real property tax assessment dedicated to finance planning. The Section includes a provision whereby an adopting state can set an upper limit on the tax rate, based on the particular features and circumstances of their state's real property tax system. The details of assessment, collection, distribution, and appeal or review of the tax are not addressed in the Section, as they are best handled under the state's existing statutes on real property taxes.

A tax on real property transfers is authorized by Section 13-102. The tax is collected by the county recorder of deeds at the time the document effecting a transfer is recorded, and payment is a condition precedent for recordation. The Section excludes certain transactions which theoretically constitute a transfer of an interest in land but in reality do not have the effect of changing ownership. It also exempts transfers to governmental units and donations of real property to tax-exempt not-for-profit entities.

A development excise tax is authorized by Section 13-103. The local government must expressly provide a formula for assessing the tax, a procedure for collection of the tax, a procedure for appealing assessments, and a procedure for refunding the tax when the development activity upon which the tax was paid did not actually occur. The development excise tax does not apply to

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<sup>57</sup>Napa Mun. Code §3.24.040.

<sup>58</sup>Napa Mun. Code §3.24.110.

<sup>59</sup>City of Overland Park, Kan., Ordinances No. EX-2154 and REB-2155 (1999).

<sup>60</sup>*Home Builders Association of Greater Kansas City v. City of Overland Park*, 22 Kan. App. 2d 649, 921 P.2d 234 (1996).

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development by governmental units or by tax-exempt not-for-profits engaging in development activities within the limits of that exemption. Local governments are also authorized to exempt certain socially-beneficial types of development, such as affordable housing, when a clear policy in the local comprehensive plan calls for it. Otherwise, the tax is intended to apply to all land uses and all types of development: a local government cannot adopt a development excise tax applicable only to residential property, for instance.

Section 13-104 provides that the revenue from all three taxes referred to above is to be placed in a special account, separate from the general fund of the local treasury, and spent only on planning activities, as defined in the Section. It also clarifies that the special planning taxes are not intended to be exclusive; general appropriations to finance planning activities may be made in addition to the dedicated revenue.

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### 13-101 Real Property Tax to Finance Planning

- (1) The legislative body of a local government may impose a local planning property tax in the manner provided by this Section.
- (2) The purpose of a local planning property tax is to raise revenue to finance the planning activities of the local government.
- (3) For the purposes of this Section, and any other Section where a local planning property tax is referred to, a “**local planning property tax**” is an tax levied against the value of real property in the local government pursuant to the [*cite real property tax law*] in order to finance the planning activities of the local government.
- (4) A local planning property tax:
  - (a) shall not exceed a rate of [X] mills, or [X] dollars per thousand dollars of assessed value; and
  - (b) shall be governed in all matters by the provisions of the [*cite real property tax law*], including in the manner of adoption, amendment, assessment, collection, enforcement, and review.

### 13-102 Real Property Transfer Tax to Finance Planning

- (1) The legislative body of a local government may adopt and amend a real property transfer tax to finance planning according to the procedure for the adoption and amendment of 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 purpose of a real property transfer tax pursuant to this Section is to raise revenue to finance the planning activities of the local government.

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- (3) For the purposes of this Section,
- (a) **“Real Property Transfer”** means a transaction whereby there is a transfer of title or an ownership interest in real property located within the local government. A real property transfer does not include any transfer of title or ownership interest to a governmental unit by whatever method achieved, nor does it include:
1. a transfer of title into a trust when at least one of the grantors is a trustee of the grantee trust;
  2. a transfer of title out of a trust when at least one of the grantees is a beneficiary of the grantor trust;
  3. a transfer of title or ownership, directly or through an intermediary, whereby the initial grantors and the ultimate grantees are the same persons or entities, for the purpose of creating a joint tenancy, [tenancy by the entirety,] community property estate with right of survivorship, or some similar form of ownership;
  4. a transfer of title or ownership pursuant to a merger of two or more corporations or by a subsidiary corporation to its parent corporation for no consideration, nominal consideration, or in sole consideration for canceling or surrendering the subsidiary's stock;
  5. the creation, modification, or release of a mortgage, lien, or security interest;
  6. the creation, modification, or release of an easement, servitude, or profit;
  7. a partition, pursuant to [*cite partition statute*], of property held in joint tenancy, common tenancy, [tenancy by the entirety,] community property estate with right of survivorship, or some similar form of ownership;
  8. a quitclaim deed issued solely for the purpose of quieting title;
  9. a deed or other document that solely confirms or corrects a deed or document previously recorded; or
  10. a donation, directly or through a trust, of real property to a charitable, educational, eleemosynary, or religious institution, to the extent that the donation is deductible by the donor under [*cite income tax statute re. deductible donations*];
- (b) **“Real Property Transfer Document”** means any document, such as a deed, that effects or executes a real property transfer.

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- (4) A real property transfer tax to finance planning may be adopted and amended only through a property transfer tax ordinance pursuant to this Section. A property transfer tax ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the property transfer tax ordinance;
  - (b) a statement of purpose consistent with the purposes of paragraph (2) above;
  - (c) definitions, as appropriate, for such words or terms contained in the property transfer tax ordinance. Where this Act defines words or terms, the property transfer tax ordinance shall incorporate those definitions, either directly or by reference;
  - (d) the actual amount of real property transfer tax that is to be assessed against each real property transfer, such amount to be the same for every real property transfer and not in any case to exceed \$[X] per real property transfer document;
  - (e) the amount of the administrative fee that is to be collected and retained by the county [recorder of deeds *or equivalent official*] to cover the cost of assessing and collecting the real property transfer tax on behalf of the local government. Such fee shall be based on the actual cost of performing the duties of the [recorder of deeds] pursuant to this Section, and shall not in any case exceed [5] percent of the amount of the real property transfer tax; and
  - (f) a procedure for the review of assessments of the real property transfer tax and administrative fee, which shall conform to the provisions of Chapter 10 for review of land-use decisions and with paragraphs (7) and (8) below.
- (5) Before adopting a property transfer tax ordinance, the local government shall request in writing from the county [recorder of deeds *or equivalent official*] a reasonable estimate of the cost of performing the duties of the [recorder of deeds] pursuant to this Section.
- (a) The [recorder of deeds] shall provide such an estimate in writing within [30] days of receipt of the request, which shall be based on the actual costs and expenses of the [recorder of deeds].
  - (b) The local government shall give the estimate provided due consideration in the drafting of the property tax transfer ordinance.
- (6) Within [30] days of adopting or amending a property transfer tax ordinance, the local government shall inform the county [recorder of deeds *or equivalent official*] in writing of the effective date of the ordinance and the amount of the real property transfer tax.
- (a) So long as the property transfer tax ordinance is effective, the county [recorder of deeds] shall collect the real property transfer tax and administrative fee from each

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real property transfer at the time the real property transfer document is delivered to the [recorder of deeds] for recordation.

(b) The [recorder of deeds] shall not record any real property transfer document that is subject to a property transfer tax ordinance without first collecting the real property transfer tax and administrative fee.

(c) The [recorder of deeds] shall, within [5] days after the end of each calendar month, remit to the local government the real property transfer tax collected on behalf of the local government during the calendar month.

(7) The payment of a real property transfer tax and administrative fee pursuant to this Section is the obligation of the grantee, and is a joint obligation of all grantees if there is more than one grantee.

◆ This provision is not likely to come into play in most circumstances, as the tax is to be paid before the document may be recorded. However, it is still a good idea to state clearly who has the legal obligation to pay.

(8) A grantee against whom a real property transfer tax and administrative fee have been assessed may pay the tax and fee and preserve the right to review the assessment by:

(a) paying the development excise tax and administrative fee in full as assessed; and

(b) 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 grantee intends to preserve the right of review.

◆ Without such a provision, the requirement of payment before a real property transfer document may be recorded could effectively require a grantee to waive their right to challenge the tax in order to get their deed recorded.

### **13-103 Development Excise Tax to Finance Planning**

(1) The legislative body of a local government may adopt and amend a development excise tax according to the procedure for the adoption and amendment of 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 purpose of a development excise tax is to raise revenue to finance the planning activities of the local government. It is not the purpose of a development excise tax to regulate or curtail development.

(3) As used in this Section, and in any other Section where development excise taxes are referred to:

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- (a) “**Developer**” means a person or entity that initiates, arranges and manages the financing of, and controls development activity, whether or not the person or entity is an owner of the real property on which the development activity occurs;
- (b) “**Development Activity**” means development that creates or increases the inhabitable or useable floor area of buildings or structures or increases the density or intensity of the use of the land on which the development occurs. Development activity does not include:
  - 1. development by any governmental unit, including, but not limited to, the Federal and state governments and any agency thereof;
  - 2. development by any charitable, educational, eleemosynary, or religious institution that is exempt from taxation pursuant to [*cite income tax statute re. tax-exempt entities*], to the extent that the development activity is consistent with the tax-exempt purposes or functions of the institution pursuant to that statute;
  - 3. to the extent that it is not prohibited by Section [8-502], the restoration or reconstruction of buildings or structures that were, in whole or in part, rendered uninhabitable or unusable; or
- ◆ Under Section 8-502, on the protection of nonconformities, a nonconforming building or structure that is destroyed may be rebuilt so long as less than half of its useable area was destroyed. Needless to say, if a building that is in compliance with all present land development regulations is destroyed, it may be rebuilt in compliance with those regulations regardless of the percentage of its area that was destroyed.
  - 4. 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 property in a reasonably habitable or useable condition;
- (c) “**Development Completion Date**” means either:
  - 1. the date upon which the development permit authorizing development activity expires;
  - 2. if more than one development permit authorizes development activity, the latest date upon which a development permit authorizing the development activity expires; or
  - 3. where the development activity does not require any development permit, a date fixed by the local government and provided in writing to the developer upon payment of the development excise tax. Such date shall

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allow a reasonable time period from the date of payment of the development excise tax for the completion of the development activity.

- (d) “**Development Excise Tax**” means a tax assessed against development activity, which is payable by, and an obligation of, the developer or developers.
- (4) A development excise tax may be adopted and amended only through a development excise tax ordinance pursuant to this Section. A development excise tax ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the development excise tax ordinance;
  - (b) a statement of purpose consistent with the purposes of paragraph (2) above;
  - (c) definitions, as appropriate, for such words or terms contained in the development excise tax ordinance. Where this Act defines words or terms, the development excise tax ordinance shall incorporate those definitions, either directly or by reference;
  - (d) a statement of the formula for assessing the development excise tax, which shall:
    - 1. be expressed in proportion to a quantifiable measure of development activity, such as useable floor area, floor area ratio, building coverage ratio, or density or intensity; and
    - 2. except as expressly provided in this Section, apply [at a single, uniform tax rate] to all land uses and all types of development activity;
  - (e) the procedure by which the development excise tax is to be assessed and collected, including the provision of a reasonable period within which the development excise tax is to be paid;
  - (f) provision for the enforcement of the ordinance against developers subject to and obligated to pay the development excise tax who fail to pay the tax within the time permitted pursuant to subparagraph (e) above. The local government may enforce the development excise tax ordinance pursuant to Chapter 11 in the same manner as a land development regulation;
- ◆ Under the provisions of Chapter 11, the local government may employ an administrative enforcement procedure or may resort immediately to a civil action in the courts. Criminal proceedings for intentional violations are also authorized.
- (g) the procedure, pursuant to paragraph (6) below, for review of assessments of the development excise tax and for the payment of the development excise tax under protest; and

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- (h) the procedure, pursuant to paragraph (7) below, whereby development excise tax paid in advance of development may be refunded when and to the extent that the development has not occurred.
- (5) A development excise tax ordinance may include provisions:
  - (a) requiring the payment of the development excise tax at the time development permit fees pursuant to Section [10-211] are paid, but payment of the development excise tax shall not be a condition precedent for the issuance of any development permit;
  - (b) authorizing the payment of the development excise tax in installments; and
  - [(c) exempting certain types or classes of development activity, 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 the development excise tax.
    - 1. No such exemption may be created unless there is a policy supporting the exemption expressly stated in the local comprehensive plan.
    - 2. Such an exemption provision shall state the policy underlying the exemption and shall provide the procedure for granting exemptions to particular development activities.]
- (6) Any developer against whom a development excise tax has been assessed may seek a review of the assessment. The procedure for such a review shall conform to the provisions of Chapter 10 for review of land-use decisions except where the provisions of this paragraph are to the contrary.
  - (a) There shall be a record hearing on all reviews of a development excise tax assessment.
  - (b) A developer against which a development excise tax has been assessed may pay the tax and preserve the right to review the assessment by:
    - 1. paying the development excise tax 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 developer intends to preserve the right of review.
- (7) When a developer pays development excise tax in anticipation or advance of development activity, and that development activity does not occur by the development completion date, the local government shall refund to the developer the portion of the development excise tax representing the development activity that did not occur and the interest thereon.

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- (a) The developer must apply for or request the refund according to the procedure provided in the development excise tax ordinance.
- ◆ The developer is in the best position to know how much of the projected development activity actually occurred. Also, requiring the developer to actively seek the refund will reduce the occurrence of inefficient cases where *de minimis* refunds must be processed and may be disputed.
  - (b) The local government may demand reasonable proof that the development has not occurred by the development completion date before it pays a refund pursuant to this Section.
  - (c) Refunds shall be paid in full within [60] days of an application for refund. If the local government does not pay a refund in full within that period, the developer may appeal. The procedure for appeal shall conform to the provisions of Chapter 10 for review of land-use decisions, and a record hearing shall be provided for such appeals.

### 13-104 Disposition of Revenue from Planning Taxes

- (1) All revenues generated by one or more of the following:
  - (a) a local planning property tax pursuant to Section [13-101];
  - (b) a real property transfer tax pursuant to Section [13-102]; or
  - (c) a development excise tax pursuant to Section [13-103];shall be deposited in a special interest-bearing account of the local government treasury within [5] days of their receipt by the local government.
- (2) The funds deposited into the special account, and the interest earned thereon, shall be expended only upon:
  - (a) the preparation, adoption, amendment, and review of the local comprehensive plan and any subplan required or authorized by Chapter 7 of this Act, including, but not limited to:
    - 1. research, data collection, mapping, and analysis;
    - 2. conduct of public hearings and other public participation procedures pursuant to Section [7-401];
    - 3. periodic review of the local comprehensive plan pursuant to Section [7-406]; and

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4. review of land development regulations and land-use actions pursuant to Sections [7-406] and [8-104];
  - (b) other expenses of the [local planning agency] incurred in the performance of any of its powers and duties pursuant to this Act; and
  - (c) other expenses of the [local planning commission], if one exists, incurred in the performance of any of its powers and duties pursuant to this Act.
- (3) Paragraph (2) above notwithstanding, any:
  - (a) refund of a development excise tax pursuant to Section [13-103(7)]; or
  - (b) repayment, pursuant to a review or appeal, of a portion or all of a local planning property tax, real property transfer tax to finance planning, or development excise tax;

shall be paid from the special account if the funds in question were deposited into the special account.
- (4) Nothing in this Section prohibits a local government that has imposed a local planning property tax, a real property transfer tax to finance planning, or a development excise tax from appropriating funds from other sources, including the general fund of the local government treasury, for the purposes and functions enumerated in paragraph (2) above.

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### FINANCIAL AND TECHNICAL ASSISTANCE FOR PLANNING

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#### *Commentary: Smart Growth Technical Assistance Act*

The following model is a “Smart Growth Technical Assistance Act,” based upon a bill that was introduced in the Illinois Senate in 1999.<sup>61</sup> It is intended to encourage innovation in the preparation of local comprehensive plans and land development regulations through an incentive grant program that is based on the principles of “smart growth,” a phrase that draws its definition from a 1998 Planning Advisory Service Report by APA.<sup>62</sup> Under this model, the state planning agency is charged with administering the grant program, including the adoption of rules. In addition, the model statute directs the agency to make available to regional planning agencies and local governments a variety of technical assistance materials and training. Finally, it requires the completion of an annual report to the governor and state legislature regarding activities undertaken pursuant to the Section.

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#### **13-201 Smart Growth Technical Assistance Act**

- (1) This Section shall be known as the Smart Growth Technical Assistance Act.
- (2) The purposes of this Section are to:
  - (a) define and disseminate the principles of smart growth, as described in paragraph (3) below;
  - (b) encourage [regional planning agencies] and local governments in this state to engage in innovative planning, regulatory, and development practices and techniques that conform to the principles of smart growth;
  - (c) provide demonstration grants to [regional planning agencies] and local governments to prepare and implement regional and local comprehensive plans, zoning ordinances, subdivision ordinances, and other land development regulations, including development incentives, that conform to the principles of smart growth;

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<sup>61</sup>Amendment to S.B. 907, Illinois Senate (1999).

<sup>62</sup>*The Principles of Smart Development*, Planning Advisory Service Report No. 479 (Chicago: American Planning Association, September 1998), ch. 1.

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- (d) prepare and distribute model ordinances, manuals, and other technical publications that are founded upon and promote the principles of smart growth; and
  - (e) research and report upon the results and impact of activities funded by this Section.
- (3) As used in this Section, “**Smart Growth**” means planning, regulatory, and development practices and techniques founded upon and promoting the following principles:
- (a) using land resources more efficiently through compact building forms, infill development, and moderation in street and parking standards in order to lessen land consumption and preserve historic, scenic, and natural resources;
  - (b) supporting the location of stores, offices, residences, schools, recreational spaces, and other public facilities within walking distance of each other in compact neighborhoods that are designed to provide alternate opportunities for easier movement and interaction;
  - (c) providing a variety of housing choices, so that the young and old, single persons and families, and those of varying economic ability may find places to live;
  - (d) supporting walking, cycling, and transit as attractive alternatives to driving and lowering traffic speeds in neighborhoods;
  - (e) connecting infrastructure and development decisions to minimize future costs by creating neighborhoods where more people use existing services and facilities, and by integrating development and land use with transit routes and stations; and
  - (f) improving the development review process and development standards so that developers are encouraged to apply the principles stated above.
- (4) The [state planning agency] is hereby authorized to make grants to [regional planning agencies] and local governments to develop, update, administer, and implement comprehensive plans and land development regulations, including development incentives, that conform to the principles of smart growth.
- (a) The [agency] shall, pursuant to Section [4-103], adopt rules establishing standards and procedures for determining eligibility for such grants, regulating the use of funds under such grants, and requiring periodic reporting of the results and impact of activities funded by such grants.
  - (b) No individual grant under this Section shall have a duration of more than [24] months.
- (5) The [state planning agency]:

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- (a) may prepare model ordinances, manuals, and other technical publications that are founded upon and promote the principles of smart growth; and
  - (b) shall distribute any model ordinances, manuals, and other technical publications that it prepares pursuant to this Section to all local governments, [regional planning agencies], the state library, all local public libraries, and to other organizations and libraries at its discretion.
  - (c) may provide educational and training programs in planning, regulatory, and development practices and techniques founded upon and promoting the principles of smart growth, including, but not limited to, the use and application of any model ordinances, manuals, and other technical publications that it prepares.
- (6) The [state planning agency] may employ or retain private for-profit and not-for-profit organizations, [regional planning agencies], and universities to provide consultation, technical assistance, and training regarding any activity that it undertakes pursuant to paragraph (4) above.
- (7) The [state planning agency] shall, at least annually but more often at its discretion, report in writing to the governor and [state legislature] on:
- (a) the results and impacts of the activities of [regional planning agencies] and local governments funded by the grants authorized by this Section, with a focus upon those innovative planning, regulatory, and development practices and techniques that have successfully implemented the principles of smart growth;
  - (b) the distribution of such grants;
  - (c) model ordinances, manuals, and other technical publications that it has prepared; and
  - (d) educational and training programs it has provided.

The report shall also be provided to all local governments, [regional planning agencies], the state library, all local public libraries, and to other organizations and libraries at the [state planning agency]'s discretion.

- (8) The [state planning agency] shall use monies appropriated to the Smart Growth Technical Assistance Fund, a special fund created in the state treasury, to implement and administer the purposes of this Section.

## **TAX EQUITY DEVICES AND TAX RELIEF PROGRAMS**

This Chapter discusses alternative approaches used to address fiscal disparity – differences in revenue-raising capacity among local governments that are a product of the type of development that occurs. Two model statutes are presented: (1) regional tax-base sharing legislation, by which the growth in commercial, industrial, and high-value residential components of the regional property tax base is shared among local governments; and (2) a statute permitting a voluntary intergovernmental agreement among two or more units of local government to create a joint economic development zone. The contracting governments negotiate which public services and facilities are to be provided in the area that is to be included in the zone, and which tax and other revenues that result from commercial, industrial, and other development will be shared, and in what amounts or proportions.

The Chapter also contains model legislation for redevelopment, tax increment financing, and tax abatement. It includes a model law for designating agricultural districts, special areas where commercial agriculture is encouraged and protected. Land within such areas is then assessed at its use value in agriculture rather than its market or speculative value, a concept called “differential assessment.” The Chapter concludes with a research note on public school finance and its relationship to planning and development. The note was prepared by Prof. Michael Addonizio of Wayne State University.

## CHAPTER 14

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### Chapter Outline

#### REGIONAL [METROPOLITAN] TAX-BASE SHARING

- 14-101 Findings and Purpose
- 14-102 Definitions
- 14-103 Administering Fiscal Officer
- 14-104 Assessed Valuation: Base Year and Subsequent Years
- 14-105 Increases in Assessed Valuation of Commercial-Industrial Property; Computation of Excess Residential Property
- 14-106 Computation of Areawide Tax Base
- 14-107 Distribution of Areawide Tax Base
- 14-108 Taxable Value of Component Local Units: Local and Areawide
- 14-109 Levies and Mill Rates: Local and Areawide
- 14-110 Miscellaneous Adjustments to Local and Areawide Rates and Levies
- 14-111 Changes in Status of Qualifying Local Units
- 14-112 Tax Collection and Disbursements to Qualifying Local Units
- 14-113 Separability
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#### INTERGOVERNMENTAL AGREEMENTS

- 14-201 Joint Economic Development Zone

#### REDEVELOPMENT AND TAX RELIEF

- 14-301 Redevelopment Areas
- 14-302 Tax Increment Financing
- 14-303 Tax Abatement

#### AGRICULTURAL DISTRICTS

- 14-401 Agricultural Districts; Use Valuation of Agricultural Land

#### NOTE 14 – A NOTE ON ELEMENTARY AND SECONDARY PUBLIC SCHOOL FINANCE AND THEIR RELATION TO PLANNING

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### Cross-References for Sections in Chapter 14

<b>Section No.</b>	<b>Cross-Reference to Section No.</b>
14-102	14-103, 14-302
14-105	14-104
14-106	14-103, 14-104, 14-105
14-109	14-107, 14-302
14-112	14-107
14-301	7-303, 7-502, 8-103, 8-104, 8-701, 9-301, 9-501, 14-302, 14-303
14-302	7-303, 8-103, 8-104, Ch. 10, 14-301
14-303	7-207, 7-215, 7-303, 8-103, 8-104, 8-701, 9-301, 14-301
14-401	7-202, 7-212, 8-103, 8-104

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### TAX EQUITY AND ITS RELATIONSHIP TO PLANNING

#### THE PROBLEM: DISPARITY IN LOCAL REVENUE-RAISING CAPACITY

Local governments throughout the country rely on local property taxes and, in some states, local income and sales taxes for revenues for their general operation. Therefore, it is understandable that the revenue-generating characteristics of land uses receive strong consideration in development decisions. In many circumstances, these characteristics are driving factors behind the approval process. Typically, in larger, older metropolitan areas with many local governments, reliance on a local (as opposed to a regional) tax base has produced patterns of interregional polarization and sprawling, inefficient land use.

Because of location and/or the forces of metropolitan change, such as state investment decisions on such facilities as highway interchanges, some local governments are winners and others are losers when government services are tied to a local tax base. For example, if two local governments in a region have exactly the same population, but one has extensive commercial, office, and industrial development, and the other residential development with some commercial uses, the latter government will have to increase property taxes to obtain the same amount of revenue as the former. The differences in the revenue-raising capacity of local governments in a region to support basic services is called “fiscal disparity.”

#### FISCAL ZONING

Prompted in part by fiscal concerns, local governments zone large tracts of land for commercial and industrial use, whether or not there is a presently demand for such uses. The practice of using the zoning power to achieve fiscal objectives rather than purely land-use objectives is known as “fiscal zoning.” Each local government believes it is a candidate for a large manufacturing facility, a regional shopping center, or a “big box” retail store that would enhance its financial position, either through revenues from the property tax or sales tax (especially on “big ticket” items like automobiles). Under the fiscal zoning approach, local governments will exclude any proposed development that might create a net financial burden and will encourage development that promises a net financial gain.<sup>1</sup>

A serious direct effect of fiscal zoning, according to one federal study, has been the “spate of exclusionary practices relating to residential development.”<sup>2</sup> Fiscal zoning results in efforts to keep out lower income groups, and especially large families. Low- and moderate-income housing

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<sup>1</sup>See, e.g., Duane Windsor, *Fiscal Zoning in Suburban Communities* (Lexington, Mass.: Lexington Books, 1979); B. Rolleston, “Determinants of Restrictive Suburban Zoning: An Empirical Analysis,” *Journal of Urban Economics* 22, no. 1, (1987): 1-21; M. Wasylenko, “Evidence of Fiscal Differentials and Intrametropolitan Firm Relocation,” *Land Economics* 56 (1980): 339-49; and Robert Cervero, “Jobs-Housing Balancing and Regional Mobility,” *Journal of the American Planning Association* 55, no. 2 (1989): 136-150.

<sup>2</sup>National Commission on Urban Problems, *Building the American City* (Washington, D.C.: U.S.G.P.O, 1968), 19; see also Norman Williams, “The Three Systems of Land-Use Control,” *Rutgers L.Rev.* 25 (1970): 80-85 (discussion of impact of tax system on behavior of local governments in making land-use decisions).

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produces relatively lower tax revenues in comparison to the services it requires. Consequently, local governments resist setting aside land for such uses.<sup>3</sup>

### **MISMATCH BETWEEN SOCIAL NEEDS AND LOCAL TAX RESOURCES**

“Fiscal disparity” is amplified through the process of metropolitan growth and change. The concentration of poverty in central cities and older suburbs destabilizes schools and neighborhoods. This concentration and destabilization are exacerbated by increases in crime, and result in the exodus of middle-class families and businesses. As social service needs accelerate and the obligation to repair and replace infrastructure intensifies, the property tax base and other fiscal resources to support such services erode.<sup>4</sup> In a related pattern, growing middle-income communities, dominated by smaller homes and apartments, develop without sufficient property tax base to support schools and other public services. These fiscally stressed communities will become tomorrow's declining inner-ring suburbs.

Upper-income suburbs at the metropolitan fringes are frequently the beneficiary of a disproportionate share of regional infrastructure expenditures in sewers, waterlines, and major highways, including interchanges. These suburbs capture new high-value businesses and residences. As their property tax expands, and their housing markets exclude all but high-cost residences, social needs decline proportionally.<sup>5</sup>

### **ENCOURAGEMENT OF SPRAWL**

As the waves of socioeconomic decline roll outward from the central cities and older suburbs, tides of middle-class homeowners sweep into outlying communities where they find long commutes to employment centers. These growing, outlying communities often use restricted, low-density single-family zoning to maintain a perceived quality of life. In so doing, they lock the region into low-density development patterns that require extensive automobile travel, are difficult to serve with mass transit, cause air pollution, and supplant forest and farmland in the process.<sup>6</sup>

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<sup>3</sup>Id.

<sup>4</sup>For a summary of studies on fiscal disparity among local jurisdictions in the Chicago metropolitan area and Virginia, see R.S. Richman and M.H. Wilkinson, “Interlocal Revenue Sharing: Practice and Potential,” in *Ideas and Options* 1, no. 1 (1993): 3-6, published by the National League of Cities.

<sup>5</sup>See Myron Orfield, Jr., “Tax Base-Sharing to Reduce Fiscal Disparities,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996 ), 167-170.

<sup>6</sup>Id.

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### COMPETITION FOR TAX BASE AND INTERGOVERNMENTAL TENSION

Competition for tax base engenders intergovernmental conflict through pitched battles over annexations and bidding wars for businesses that have already chosen to locate in a region. Local governments that want to grow attempt to annex unincorporated lands from the surrounding county. Neighboring municipalities may often compete with each other for the same piece of land. In some parts of the country, this competition has depleted the tax base of another governmental unit, such as a township, as high-value land has been absorbed by the annexing municipal government. Developers benefit from this system as they can pit one local government against another by searching for the most favorable terms, including public subsidies and a relaxation of land-use standards. Tensions escalate among neighboring jurisdictions.<sup>7</sup>

The late Vermont Law School Professor Norman Williams, Jr., argued that statutory reform should concentrate on “[r]emoving the presently dominant concern with encouraging good ratables and discouraging bad ratables, so that public agencies can focus their attention clearly on other planning goals.”<sup>8</sup> He added, “As long as we continue the present system of local real estate taxes to finance local public services, it will not really matter how many other innovative ideas are introduced; there will be no substantial change in how the system actually works.”<sup>9</sup>

### APPROACHES TO ADDRESS METROPOLITAN TAX EQUITY

Two approaches have emerged over the past several decades to address metropolitan tax equity issues.

(1) **Tax-base-sharing legislation.** Two regions in the U.S. have specialized legislation that shares revenues from real property taxes: the Twin Cities metropolitan area in Minnesota and the Hackensack Meadowlands area in New Jersey.

*Twin Cities.* Regional tax-base sharing was implemented in the seven-county Twin Cities area in Minnesota with the passage of the Minnesota Fiscal Disparities Act in 1971.<sup>10</sup> Under this program, each city contributes 40 percent of the growth of its commercial-industrial tax base acquired after 1971 to a regional pool. The value of properties in the regional pool is taxed at a weighted areawide rate. Funds from this areawide pool are distributed via an allocation formula that

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<sup>7</sup>See, e.g., “Fresno County, Cities Fight Over Annexation,” *California Planning & Development Report* 4, no. 8 (August 1989): 1, 4; Laurie Reynolds, “Rethinking Municipal Annexation Laws,” *Urban Lawyer* 24, no. 2 (Spring 1992): 249; and Lori A. Burkhart, “Municipal Annexation: An Update on Issues and Controversies,” *Public Utilities Fortnightly* 127, no. 9 (May 1, 1991): 47.

<sup>8</sup>Norman Williams, Jr., “Halting the Race for ‘Good Ratables’ and Other Issues in Planning Legislation Reform,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 58.

<sup>9</sup>Id.

<sup>10</sup>Minn. Stat. Ann. Ch. 473F (Metropolitan revenue distribution) (1994 and Cum. Supp. 1996).

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takes into account a local government's population and fiscal capacity (defined as per capita real property valuation). The Twin Cities system has been widely analyzed in the literature of law, planning, and economics.<sup>11</sup>

According to Minnesota State Representative Myron Orfield, Jr., the present system has reduced tax-base disparities on a regional level from 50:1 to roughly 12:1. As of 1994, about \$393 million, or about 20 percent of the property tax base, was shared regionally.<sup>12</sup> The system has survived a court test on its constitutionality<sup>13</sup> as well as an attempt to repeal it. It should be noted, for several reasons, that the Twin Cities system does not completely eliminate or solve the problem of fiscal disparity. For example, the system does not retroactively redistribute property tax revenues resulting from the existing tax base in 1971. In addition, the areawide pool of commercial and industrial property growth is not the result of an even split, but one in which 60 percent of the growth goes to the local government and the remainder to the pool. Also, the program does not generate wealth but instead redistributes it.<sup>14</sup> Communities that have the least growth in tax base and the lowest per capita commercial and industrial values are the biggest beneficiaries from the

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<sup>11</sup>Studies or commentaries on the Twin Cities tax-base-sharing system include: Gary T. Johnson, "Tax Base Sharing and Fiscal Disparities: A Retrospective," *Municipal Management* (Fall 1984): 67-72; Katharine C. Lyall, "Regional Tax Base Sharing – Nature and Potential for Success" in Robert W. Burchell and David Listokin, *Cities Under Stress* (Piscataway, N.J.: Rutgers University Center for Urban Policy Research, 1981), 493-500; Katharine C. Lyall, "Tax-Base Sharing: A Fiscal Aid Toward More Rational Land Use Planning," *Journal of the American Institute of Planners* 41, no. 2 (1975): 90-100; Note, "Minnesota's Metropolitan Fiscal Disparities Act – An Experiment in Tax Base Sharing," *Minnesota L. Rev.* 59 (1975): 927-963; Andrew Reschovsky and Eugene Knaff, "Tax Base Sharing: An Assessment of the Minnesota Experience," *Journal of the American Institute of Planners*. 43, no. 4 (1977): 361-370; Charles R. Weaver, "The Minnesota Approach to Solving Urban Fiscal Disparity," *State Government* XLV (Spring 1972): 100-105; and John W. Windhorst, "The Minnesota Fiscal Disparities Law," *Land Use Law and Zoning Digest* 28, no. 4 (1976): 7-12. See also W. Patrick Beaton, "Regional Tax Base Sharing: Problems in the Distribution Function," in Robert W. Burchell and David Listokin, *Cities Under Stress* (Piscataway, N.J.: Rutgers University Center for Urban Policy Research, 1981), 501-526; D.A. Gilbert, "Property Tax Base Sharing: An Answer to Central City Fiscal Problems," *Social Science Quarterly* 59, no. 4 (1979): 681-689; and Walter Vogt, "Tax Base Sharing: Implications from San Diego County," *Journal of the American Planning Association* 45, no. 2 (1979): 134-142.

<sup>12</sup>Myron Orfield, Jr., "Tax Base Sharing to Reduce Fiscal Disparities" in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 169.

<sup>13</sup>*Burnsville v. Onischuk*, 301 Minn. 137, 22 N.W.2d 523 (1974), cert. denied, 420 U.S. 916 (1974).

<sup>14</sup>The distribution formula itself has been the subject of some academic criticism on the grounds that if it were modified to take into account size of the population below the poverty level, the existence of special needs populations, and factors such as the age of the housing stock, the allocation to individual communities would be based on a more precise definition of need. See Gary T. Johnson, "Tax Base Sharing and Fiscal Disparities: A Retrospective," *Municipal Management* (Fall 1984): 70, citing Andrew Reschovsky and Eugene Knaff, "Tax Base Sharing: An Assessment of the Minnesota Experience," *Journal of the American Institute of Planners* 43, no. 4 (1977): 67; and D.A. Gilbert, "Property Tax Base Sharing: An Answer to Central City Fiscal Problems," *Social Science Quarterly* 59, no. 4 (1979): 684.

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program. Communities with higher-than-average per capita fiscal capacity generally receive a smaller share than they have contributed.<sup>15</sup>

*Hackensack Meadowlands, N.J.* Special tax-base-sharing legislation was adopted by the New Jersey legislature in 1968 for the Hackensack Meadowlands District, located near the New York metropolitan region. The Meadowlands is composed primarily of wetlands and extensive areas of marshland adjacent to intensive development. Through the adoption and administration of a comprehensive management plan, the Hackensack Meadowlands Development Commission oversees development in the district.<sup>16</sup>

Fourteen communities that have property partially included within the district participate in the intermunicipal revenue-sharing plan. The plan's intent was to compensate those municipalities for the fiscal impact of land-use decisions made by the commission. Each municipality contributes to an "intermunicipal account" in an amount equal to a percentage of increases in assessed valuation of property within the district, starting from the base year of 1970. The annual contribution is based on determinations of: the increase of true value of real property in the district since the base year; the total effective tax rate applicable to that property; and the percentage of the tax rate attributable to the municipality after the county portion is extracted.<sup>17</sup> Payments from the account are made on the basis of a municipality's portion of the total land area

### **Can Tax-Base Sharing be Duplicated Elsewhere?**

**Here's what Minnesota State Representative Myron Orfield, Jr., says about potential support for regional tax-base sharing elsewhere in the U.S.:**

There is a broadly shared belief that tax-base sharing came out of some cosmic consensualism in progressive Minnesota that cannot be duplicated elsewhere in the nation. This is not true.

Tax-base sharing in Minnesota has always been controversial. Many suburban governments at first feared loss of tax base and local control. But wise leaders realized the high degree to which property wealth was concentrated and developed computer runs that showed the projected amount of tax base cities would actually gain.

Most of the inner and developing middle-class suburbs were potential recipients. When these suburbs realized that tax-base sharing was likely to increase substantially their tax base and stabilize their future fiscal situation, they became supporters. As one legislator put it: "Before the runs, tax-base sharing was communism. Afterwards, it was 'pretty good policy.'"

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<sup>15</sup>R.S. Richman and M.H. Wilkinson, "Interlocal Revenue Sharing: Practice and Potential," 9.

<sup>16</sup>The legislation authorizing the Hackensack Meadowlands Commission appears at N.J.S.A. §§13:17-60 to 13:17-76.

<sup>17</sup>*Id.*, §13-17-67.

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in the district.<sup>18</sup> Municipalities may also receive compensation from the fund when land is removed from the local tax rolls for a public purpose (e.g., a park) or when new development stimulates growth in school enrollment to compensate for increased educational costs.<sup>19</sup> One assessment of the program described its impact as follows:

The New Jersey tax-sharing program appears to have evolved essentially as an intergovernmental revenue transfer mechanism. In 1991, total contributions and disbursements under the program equaled \$4.67 million for all participating localities. Exclusive of retroactive adjustments for prior years, only two jurisdictions made net contribution to the intermunicipal account in excess of \$1 million – Secaucus (\$2.81 million) and North Bergen (\$1.42 million) – while only one received a payment of more than that amount from the fund – Kearny (\$2.72 million). Of the remaining localities, one was a net contributor or recipient of more than \$500 thousand.<sup>20</sup>

(2) **Interlocal revenue-sharing agreements.** A number of states have special legislation authorizing local governments to enter into interlocal agreements to share revenues from development. These are intended to encourage intergovernmental cooperation and forestall attempts by cities to annex unincorporated territory. The legislation may authorize sharing of various types of tax revenues, including property, local income, and local sales taxes.

*Virginia.* One of the best known interlocal revenue-sharing statutes is Virginia’s. Under Chapter 26.1:1 of the Code of Virginia, counties, cities, and towns may enter into voluntary agreements to settle annexation and related issues. The statute provides that the agreement may include:

fiscal arrangements, land use arrangements, zoning arrangements, subdivision arrangements and arrangements for infrastructure, revenue and economic growth sharing, dedication of all or any portion of tax revenues to a revenue and growth sharing account, boundary line adjustments, acquisition of real property and buildings, and the joint exercise or delegation of powers as well as the modification or waiver of specific annexation, transition or immunity rights as determined by the local governing body.<sup>21</sup>

The statute requires that the agreements be reviewed by the state’s commission on local government, which must hold a public hearing on it, and then make an advisory recommendation to a special court and to the affected local governments. Prior to court action on the agreement, the affected local governments must each hold a public hearing and adopt by ordinance the original or modified agreement. The court may then affirm or reject the agreement. Upon affirmation of the

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<sup>18</sup>The statute calls this an “apportionment payment.” Id. §13:17-72.

<sup>19</sup>The statute provides for “guarantee payments” to compensate for exempt property and for “service payments” to schools. Id., §§13:17-68,- 70.

<sup>20</sup>R.S. Richman and M.H. Wilkinson, “Interlocal Revenue Sharing: Practice and Potential,” 11.

<sup>21</sup>Code of Va. §15-1-1167.1.2 (1994).

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agreement by the court, it becomes binding on the future governing bodies of participating jurisdictions.<sup>22</sup>

A number of cities and counties in Virginia have used the voluntary agreement, including the City of Charlottesville and surrounding Albermarle County, the City of Lexington and surrounding Rockbridge County, the City of Franklin and surrounding Southampton County, and the City of Franklin and Isle of Wight County.<sup>23</sup> Under the Charlottesville/Albermarle agreement, for example, the city and the county agreed to share property tax revenue in lieu of a proposed annexation. In a 1982 agreement, the city and the county established a revenue-sharing fund to which both entities contribute. The contributions to the fund were negotiated, with each jurisdiction's contribution to the fund being 37 cents per \$100 of assessed valuation.<sup>24</sup>

Under the agreement, the city decided not to initiate annexation procedures against the county and not to support any annexations initiated by private property owners. Moreover, the agreement provides:

[E]xcept for ad valorem property taxes, taxes on restaurant meals, transient lodgings or admission to public places or events and other general or selective sales or excise taxes, neither jurisdiction will . . . impose or increase any tax that would affect residents of the other jurisdiction if the other jurisdiction is not legally empowered to enact that tax at the same rate and in the same manner.<sup>25</sup>

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<sup>22</sup>Id., §§15-1-1167.1.3-6 (1994).

<sup>23</sup>R.S. Richman and M.H. Wilkinson, "Interlocal Revenue Sharing: Practice and Potential," 11-23; see also Gary T. Johnson, "Tax-Sharing as an Alternative to Annexation: A Virginia Case Study," *Urban Law and Policy* 7 (1985): 243-254 (1985) (discussion of City of Charlottesville/Albermarle County agreement).

<sup>24</sup>According to an analysis by Virginia Commonwealth University Professor Gary T. Johnson, the agreement provided for five distinct interrelated steps to distribute the fund:

First, population indices are calculated by dividing each locality's population by the combined populations of both jurisdictions. Second, "relative tax effort" indices are calculated by dividing each jurisdiction's true real property tax rate by the combined true real property tax rates of the two communities. Third, a composite index for each community is computed by averaging these two indices. Fourth, each jurisdiction's share of the fund is calculated by multiplying the community's composite index by the fund itself. Finally, net transfers of wealth are obtained by subtracting each locality's share of the fund from [its] contributions to it.

Id., 248.

<sup>25</sup>Id., citing "Annexation and Revenue Sharing Agreement of February 17, 1982," Section III (Charlottesville, Va. 1982), 6.

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*Ohio.* Ohio statutes authorize municipalities to establish “joint economic development zones”<sup>26</sup> and municipalities and townships to establish “joint economic development districts.”<sup>27</sup> A number of Ohio jurisdictions have taken advantage of the program, including the cities of Barberton and Norton,<sup>28</sup> the City of Springfield and Green Township in Clark County (for property surrounding a municipally owned airpark), and the City of Akron and Coventry, Springfield, and Copley Townships in Summit County.<sup>29</sup> The advantage of the municipal/township joint economic development district is that it allows the imposition of an income tax on individuals living or working in the district and on the net profits of businesses in the district. This is a power that, in Ohio, is otherwise granted only to municipalities and not to townships or counties that have jurisdiction over unincorporated areas. The district’s board of directors, composed of elected members of the legislative bodies and the elected chief executive officers of the contracting bodies, levy the income tax, subject to a vote by the electors of the district.

*Montgomery County, Ohio.* Although not the creature of special state legislation, a voluntary effort has been instituted for communities in the Montgomery County (Dayton), Ohio, Economic Development/Governmental Equity (ED/GE). The program consists of two separate, related funds administered by the county. The Economic Development (ED) Fund distributes approximately \$5 million per year of county sales tax revenue to finance economic development projects submitted to the county.

### Approaches to Ensure Tax Equity

<i>Approach</i>	<i>Use When There Is</i>
Regional Tax-Base Sharing	Widespread agreement in a region that communities need to work together to support sensible development patterns and reduce fiscal disparity
Intergovernmental Revenue-Sharing Agreements	A desire among local governments for flexibility to negotiate special agreements with terms and conditions that are specific to their own sets of problems, interests, and capabilities for a subsection of the region

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<sup>26</sup>Ohio Rev. Code §715.69 (1995).

<sup>27</sup>Ohio Rev. Code §§715.70 to 715.71 (1995).

<sup>28</sup>R.S. Richman and M.H. Wilkinson, “Interlocal Revenue Sharing: Practice and Potential,” 24.

<sup>29</sup>Office of Strategic Research, Ohio Department of Development, *Joint Economic Development Districts* (Columbus, Oh.: ODOD, December 1995). This report includes executive summaries of the Akron joint economic development district contracts.

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Monies from the ED fund are awarded on a competitive basis through the application of selection criteria to individual projects.

Annually, through the Governmental Equity (GE) Fund, a portion of increased property and income taxes collected as a result of economic growth of participating cities, villages, and townships in the county, is also shared with participants in the program. The distribution formula is made to each jurisdiction, based on its share of the total population of all participating jurisdictions. The two funds are intended to promote local and regional economic development objectives. Local governments that participate in the program sign a 10-year agreement with the county.<sup>30</sup>

*Other states.* Colorado, Kentucky, and Michigan have legislation authorizing voluntary revenue-sharing agreements; a number of local governments in those states have taken advantage of these statutes.<sup>31</sup> Intergovernmental agreements can offer local governments extraordinary flexibility in devising revenue-sharing arrangements. Like tax-base sharing, they will not completely remedy the problem of fiscal disparity and winner-take-all competition for tax base. However, they can lessen these problems and reduce tension among governmental units, especially those problems related to annexation. Still, they require diplomacy in their negotiation and a very good technical grasp of the economic, infrastructure, and planning issues affecting the jurisdictions entering into the agreement.

### REGIONAL [METROPOLITAN] TAX-BASE SHARING

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#### *Commentary: Regional [Metropolitan] Tax-Base Sharing*

The following model legislation authorizes regional or metropolitan property tax base sharing. In adapting the model, a state legislature has several policy choices:

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<sup>30</sup>Montgomery County, Ohio, *Summary of 1995 Economic Development/Governmental Equity (ED/GE) Program* (Dayton, Oh.: Montgomery County, 1995); William J. Pammer, Jr., and Jack L. Dustin, "Fostering Economic Development through County Tax Sharing," *State and Local Government Review* 25, no. 1 (Winter 1993): 57-69 (this article includes an extensive discussion of the development of the contribution and distribution formulas); Ann Schenking, "Economic Development/Governmental Equity Program: Providing a Competitive Edge for Montgomery County, Ohio," *Economic Development Commentary* 19, no. 3 (Fall 1995): 18-24; and Jack L. Dustin, *Cooperative Communities – Competitive Communities: The Role of Interlocal Tax Revenue Sharing*, Ohio Task Force on Competitiveness and Cooperation Monograph Series (Dayton, Ohio: Wright State University Center for Urban and Public Affairs, 1994).

<sup>31</sup>Colo. Rev. Stat. Ann. §29-1-203 (West 1989); K.R.S. §§ 65.210 to 65.300 (1995); K.R.S. 65.245 specifically authorizes cooperative interlocal agreements for the sharing of revenues; and Mich. Comp. Laws. §§ 124.501 to 124.512 (1991). Mich. Comp. Laws §124.505 authorizes interlocal agreements for sharing revenues and for the benefit of local government units; see also R.S. Richman and M.H. Wilkinson, "Interlocal Revenue Sharing: Practice and Potential," 26-27 (discussing an interlocal revenue-sharing and development regulation agreement between the cities of Westminster and Thornton, Colorado, and a joint economic development agreement between the cities of Detroit and Hamtramck, Michigan).

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- ◆ A state legislature can choose among two tax bases to share, selecting either or both the commercial-industrial tax base, which is the base used in the Minnesota Fiscal Disparities Act, or the excess residential property tax base. This latter tax base is that portion of the single-family residential property valued in excess of an amount specified in the statute (say, \$150,000 or \$200,000) or tied to a multiplier (say, 150 to 200 percent) of the average value of a single-family residence in the region. Use of the excess residential property tax base would redistribute revenues from those communities that have homes that are valued significantly more than typical homes in the region. The statutory floor on high-value, single-family property, when the amount is specified in the statute, must periodically be changed to reflect the impact of inflation on the region.
- ◆ A state legislature can choose among a range of percentages for the commercial-industrial tax base. Under the formula, a percentage of the growth in the commercial-industrial tax base is shared, starting from a base year to the current year. In the Twin Cities model, 40 percent of the growth goes into an areawide pool. In the following model, in Section 14-106, several alternate percentages (25, 40, or 50 percent) can be applied to determine which proportion is allocated for the areawide pool.
- ◆ A state legislature can choose from two methods for calculating the fiscal capacity of a local governmental unit: (1) the total property valuation of the unit divided by the total population; or (2) the total property valuation plus the total personal income received by residents of the unit divided by the total population of the unit.

Determining each community's contribution and share of the areawide tax base is one of the most difficult aspects of the model legislation to understand. Below are examples of typical calculations that demonstrate how contributions and shares are calculated.

### CONTRIBUTIONS

*Commercial-industrial property.* Assume that the regional tax base is 50 percent of the growth of commercial and industrial property valuation from a base year to a current year. Between the base year and year 5 of the program, the equalized assessed commercial-industrial valuation in a community grows by \$5,000,000. Under the formula, 50 percent (or \$2,500,000) of this value would represent that portion of the community's commercial-industrial tax base that would constitute the community's portion of the areawide tax base. If there were 25 communities in the region, the total commercial-industrial areawide tax base would be the product of each community's portion of the areawide tax base, times 25. (See Sections 14-105 and 14-106 of the model below.) If a community had no growth in its commercial-industrial property tax base, it would contribute nothing to the areawide tax base pool.

*Excess residential value.* If a community of 1,500 residences (both multi- and single-family) has 200 single-family homes with an average value of \$250,000 each, and the floor on the excess residential property tax base is \$200,000, \$10 million (200 x (\$250,000-\$200,000)) would be subject

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to sharing (this assumes the added increment in residential value over the floor of \$200,000 is all growth from a base year). The “excess residential contribution percentage” is determined by dividing the amount subject to sharing (i.e., \$10 million) by \$50 million (i.e., the total average value of single-family homes in the community – 200 x \$250,000), or 20 percent. (See Section 14-106, Computation of Areawide Tax Base.) If a community had no homes valued in excess of \$200,000 apiece, it would contribute nothing to the areawide tax base.

*Applicable Tax Rate.* Under the model, the community’s tax rate is calculated from the dollar amount to be levied on the taxable value of that community. The community’s tax rate on the shared tax base (commercial-industrial, excess residential, or both) will be the weighted average of all units of government in the region. (See Section 14-109, Levies and Mill Rates: Local and Areawide.) Consequently, a piece of property that is commercial or industrial land use will have two tax rates: (1) a local tax rate applied to the part of its value that remains local; and (2) an areawide tax rate applied to the part of its value that makes up the areawide tax base. Similarly, a single-family house whose value is in excess of the statutory floor will have two tax rates applied to the property: (1) a local rate on the portion at or below the statutory floor; and (2) an areawide rate for all value in excess of the statutory floor.

### **DISTRIBUTION OF REVENUES FROM AREAWIDE BASE**

In order to compute each community’s share of revenues from the areawide tax base, two calculations are made (see Section 14-107, Distribution of Areawide Tax Base).

*Calculation of a distribution index.* A local governmental unit’s distribution index is calculated as follows:

$$\text{Unit Distribution Index} = \text{Population of Unit} \times (\text{Average Fiscal Capacity} / \text{Fiscal Capacity of Unit})$$

“Fiscal capacity” is either the total property valuation of the community divided by its population, or the total property valuation, plus the sum of income received by residents of the unit, divided by the population of the unit. “Average fiscal capacity” is the sum of property tax bases (and of personal income of all qualifying units, where this is included), divided by the sum of their populations, as of a date in the same year.

*Calculation of distribution value.* To determine the share (“distribution value”) of the areawide tax base, the areawide tax base is multiplied by the proportion of each local governmental unit’s distribution index over the sum of the indices for all units. The resulting figure is the areawide tax base for any give year that is attributable to any particular unit.

$$\text{Unit Distribution Value} = \text{Areawide Tax Base} \times (\text{Unit Distribution Index} / \text{Sum of Distribution Indices for all Units})$$

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### SAMPLE CALCULATION<sup>32</sup>

To understand how the formulas work, it is useful to plug figures into the sample calculations. Using Communities X, Y, and Z, which are “qualifying local units” eligible to participate in the tax base sharing program under the model legislation, the following examples illustrate how the formulas operate with varying per capita valuation or fiscal capacity (with or without personal income included) and when the population differs. The areawide tax base described below can include the excess residential value growth component as well as the commercial-industrial growth component.

Community	Population	Per Capita Valuation/Fiscal Capacity
X (low population, high valuation)	20,000	\$200,000
Y (low population, low valuation)	20,000	\$20,000
Z (high population, low valuation)	40,000	\$20,000

Areawide tax base = \$1,000,000

Areawide population = 100,000

Total valuation for all communities = \$100,000,000

Sum of distribution indices for all communities = 200,000,000

#### Community X

$$\text{Distribution index} = 20,000 \times ((\$100,000,000/100,000)/(\$200,000/20,000)) = 2,000,000$$

$$\text{Areawide tax base} = \$1,000,000 \times (2,000,000/200,000,000) = \$10,000 \text{ (the share of the areawide tax base for Community X)}$$

#### Community Y

$$\text{Distribution index} = 20,000 \times ((\$100,000,000/100,000)/(\$20,000/20,000)) = 20,000,000$$

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<sup>32</sup>This example is adapted from Mary E. Brooks, “Minnesota’s Fiscal Disparities Bill,” *PAS Memo* No. 9 (Chicago, Ill.: American Society of Planning Officials, 1972), 3.

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**Areawide tax base** =  $\$1,000,000 \times (20,000,000/200,000,000) = \$100,000$  (the share of the areawide tax base for Community Y)

### Community Z

**Distribution index** =  $40,000 \times ((\$100,000,000/100,000)/(\$20,000/40,000)) = 80,000,000$

**Areawide tax base** =  $\$1,000,000 \times (80,000,000/200,000,000) = \$400,000$  (the share of the areawide tax base for Community Z)

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### 14-101 Findings and Purpose<sup>33</sup>

- (1) The [legislature] finds that [certain of the] metropolitan areas of the state are confronted with increasing social and economic polarization and wasteful sprawling development patterns. In these areas:
  - (a) poverty concentrates and social and economic needs grow in the central cities and older suburban communities, with older suburban areas having less resistance to these trends than central cities;
  - (b) certain suburbs are developing at the edges of regions but with insufficient property tax bases to support local services;
  - (c) in these central cities, older suburbs, and developing suburban areas with low tax bases, where the majority of the region's social needs are located, there is a comparatively small per capita property tax base that is slow growing, stagnant, or declining;
  - (d) other developing suburbs constitute a special sector of the region that dominates regional economic growth, has highly restrictive housing markets, receives a disproportionate share of local infrastructure investment, has an insufficient number of workers for local jobs, and experiences local congestion problems that cannot be solved by adding new highway capacity;
  - (e) in this special sector, the large per capita property tax base grows very rapidly in the face of slow-growing, stable, or declining social needs in the sector; and

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<sup>33</sup>The model legislation in Section 14-101 *et seq.* was drafted by the Hon. Myron Orfield, Jr., a Minneapolis attorney who is a state representative in Minnesota. It is based on the Twin Cities tax-base-sharing statute as well as a model published by the U.S. Advisory Commission on Intergovernment Relations (ACIR), "Metropolitan Tax Base Act," Bill No. 3.108 (Washington, D.C.: ACIR, 1984).

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- (f) as a consequence, the region polarizes socially and economically, with older communities experiencing decline through flight of their population base, and the competition for property tax base inducing growing fiscal inequity and sprawling wasteful development patterns.
- (2) The [legislature] further finds that tax-base sharing:
  - (a) creates greater equity among communities;
  - (b) breaks the intensifying mismatch between local needs and communities' tax bases;
  - (c) removes local economic incentives underlying exclusive fiscal zoning;
  - (d) reduces the interregional competition for a tax base; and
  - (e) facilitates regional land-use planning efforts.

### 14-102 Definitions

- (1) “**Administering Fiscal Officer**” means the [state director of finance *or* fiscal officer of a county selected pursuant to Section [14-103] below *or* fiscal officer chosen by the governing board of the council of governments or other regional body comprising the principal units of general government in the area].
- (2) “**Area**” means a metropolitan area as defined by the most recent publication of the United States Bureau of the Census and the Office of Management and Budget [*or such other definition as the state may prefer*].
- (3) “**Average Fiscal Capacity**” means the sum of the property tax bases [and of the personal income bases] of all qualifying local units in the area as of a particular date, divided by the sum of their populations, as of a date in the same year.
- (4) “**Commercial-Industrial Property**” means the categories of property set forth in [*cite statute defining this class of property*], excluding that portion of such property which: (i) constitutes the tax base for a tax increment pledged pursuant to Section [14-302], certification of which was requested prior to the effective date of this Act, to the extent and so long as such tax increment is so pledged; (ii) may, by law, constitute the tax base for tax revenues set aside and paid over for credit to a sinking fund pursuant to the direction of the governing body of a unit of local government in accordance with [*statute providing for local debt retirement through a sinking fund procedure*], to the extent that such revenues are so treated in any year; or (iii) is exempt from taxation pursuant to [*cite statute, if any, mandating or authorizing the exemption of any types of commercial-industrial or ad valorem taxes*]. [*Insert any other additions to or exclusions from the statutory definition of commercial-industrial property that are desired for purposes of this Act*].

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- (5) “**Component Local Unit**” means any [county, municipality, village, town, township], school district, or other special service district authorized to impose *ad valorem* taxes on commercial, industrial, or residential property, located wholly or partly within the area.
- (6) “**Contribution Value**” means the value of that portion of the commercial-industrial and the excess residential property tax base transferred from local to areawide taxability.
- (7) “**County or Municipal Fiscal Officer**” means the principal financial official of a county or municipal government, such as an auditor, treasurer, or director of finance.
- (8) “**Distribution Value**” means the value to a qualifying local unit of its share of the areawide property tax base.
- (9) “**Excess Residential Property**” means that portion of a component local unit’s tax base that exists in the portion of [single-family homestead] residential property valued in excess of [\$150,000 or \$200,000].<sup>34</sup>
- (10) “**Fiscal Capacity**” of a qualifying local unit means the [sum of income received by the residents of the unit and the] property tax base of such unit divided by the population of the unit.
- (11) “**Income**” means the total money from all sources as reported by the U.S. Department of Commerce Bureau of the Census [*or the latest official state estimate of income*] for general statistical purposes.
- (12) “**Levy**” means the amount certified to the county or municipal fiscal officer as being necessary to be derived from property taxation in a forthcoming year or which has been derived from that source in preceding years.
- (13) “**Qualifying Local Unit**” means any component [county, municipality, town, township, or village] with a population of [1,000 or more] that is to share in that portion of the tax base transferred from local to areawide taxability.<sup>35</sup>

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<sup>34</sup>This figure can instead be tied to some value that is a multiplier of the average value of a single-family home in the region or metropolitan area. For example, if the average value of a single-family home in a given tax year is \$100,000, the definition of “excess residential property” could be 150 percent (\$150,000) or 200 percent (\$200,000) of the average value. Using this approach would require that the average value be calculated each year but would eliminate the need to change the amount in the statute.

<sup>35</sup>Qualifying local units should be chosen so that they will cover the entire area, with no overlap, and where standard demographic information, such as population, is readily available for each unit. Generally, counties or municipalities could be used, but not both. If municipalities are used, but there are unincorporated places within the area, those places should also be treated as qualifying units. Where a population threshold is used for qualifying local units, it would be equivalent to assigning those units that fall below the threshold a contribution value and distribution value equal to zero.

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- (14) “**Population**” means the most recent estimate of the population of qualifying local units in the area made by the [U.S. Census Bureau *or state agency or the regional planning or other agency that embraces the particular metropolitan area*].
- (15) “**Property Tax Base**” means the full value of taxable property as equalized for state tax purposes by the [department of revenue *or other state agency charged with equalizing property tax assessments among local governments*].

### 14-103 Administering Fiscal Officer

- (1) The director of the state [department of finance *or other appropriate state agency*] shall serve as the administering fiscal officer and shall discharge the duties imposed upon him or her by this Act].

[or]

- (1) On or before [*date following the effective date of this Act*] and every [2] years thereafter, the fiscal officers of the counties and of the [municipalities] of [25,000] population and over within the area shall meet at the call of the fiscal officer of [*county in which the largest city of the area is located*] and shall elect from among their number a fiscal officer to serve as the administering fiscal officer for the tax base sharing plan [for a period of 2 years *or until such time as a successor is chosen in the same manner as just described*]. If a majority is unable to agree on a person to serve as administering fiscal officer, the state [director of finance] shall appoint such a person from among the group of county and municipal fiscal officers in the area. If the administering fiscal officer ceases to serve as a county or municipal fiscal officer within the area [during the term for which he or she was elected or appointed], a successor shall be chosen in the same manner as is provided for the original selection [to serve for the unexpired term]].

- (2) To perform the functions imposed by this Act, the administering fiscal officer shall use the staff and facilities of the fiscal office of the county or municipality in which he or she serves. The administering fiscal officer’s county or municipality shall be reimbursed for the marginal expenses incurred hereunder by the administering fiscal officer and staff through a contribution from each of the other qualifying local units in the area in an amount that bears the same proportion to the total expense as the population of the respective other units bears to the total population of the area. The administering fiscal officer shall annually, on or before [*date*], certify the amounts of total expenses for the preceding calendar year and the share of each unit, to [the [treasurer] of] each other unit. Payment shall be made by [the [treasurer] of] each unit to the unit incurring the expenses on or before the succeeding [*date*].

[or]

- (2) [*In the event that the state fiscal agency administers and maintains the accounts for the tax-base sharing plan or for a plan in each of two or more metropolitan areas, insert a*

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*provision here for a pro-rata contribution or other arrangement to cover operating expenses considered necessary.]*

### **14-104 Assessed Valuation: Base Year and Subsequent Years**

- (1) On or before [*date consistent with beginning date of the tax-base-sharing program*], each qualifying local unit's [county assessor] shall separately determine and certify to the administering fiscal officer the [equalized] assessed valuation for the year [19-- or 20--] of commercial-industrial and of excess residential property subject to taxation within the unit. The administering fiscal officer shall request of the [state department of revenue or state equalization agency] a similar tabulation of state-equalized assessments of such property and shall provide to the governing body of each qualifying local unit and make available to the public a tabulation of [state-equalized] valuations of commercial-industrial and excess residential property for the area as a whole. The initial year covered by the foregoing valuations shall be the base year against which subsequent changes in commercial-industrial and excess residential property tax bases shall be calculated.
- (2) On or before [*month, day*] of each subsequent year, each qualifying local unit's [county assessor] shall determine, certify, and provide to the administering fiscal officer the assessed valuation of commercial-industrial and excess residential property in the form described in paragraph (1) above, and the administering fiscal officer shall obtain, tabulate, and publish in the same manner and composition as above the [state-equalized] valuations of such property.

### **14-105 Increases in Assessed Valuation of Commercial-Industrial Property; Computation of Excess Residential Property**

- (1) On or before [2 years following the effective date of this Act], the county fiscal officer of each qualifying local unit shall determine the amount, if any, by which the equalized assessed valuation determined pursuant to Section [14-104] above, of commercial-industrial property subject to taxation within each unit in his or her county exceeds the assessed valuation in [*insert base year*] of commercial-industrial property subject to taxation within that county. On or before [2 years following the effective date of this Act], the county fiscal officer of each qualifying local unit shall determine the amount, if any, by which the equalized assessed valuation determined pursuant to Section [14-104] above, of excess residential property subject to taxation within each unit in his or her county exceeds the assessed valuation in [*insert base year*] of excess residential property subject to taxation within that county.
- (2) The increases in assessed value determined by this Section shall be reduced by the amount of any decreases in the assessed valuation of commercial-industrial and excess residential property resulting from any court decisions, court-related stipulation agreements, or abatements for a prior year, and only the amount of such decreases made during the 12-month period ending on [*date*] of the current assessment year, where such decreases, if originally reflected in the determination of a prior year's [equalized] assessed valuation

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under Section [14-104], would have resulted in a smaller base contribution from the component local unit in that year. An adjustment for such decreases shall be made only if the unit made a contribution in a prior year based on the higher valuation of the commercial-industrial and excess residential property.

### 14-106 Computation of Areawide Tax Base

- (1) Each county fiscal officer shall certify the equalized assessed valuations and increase thereof, pursuant to Sections [14-103] and [14-104] above, separately for both commercial-industrial and excess residential property to the administering fiscal officer on or before [date] of each year. The administering fiscal officer shall multiply the commercial-industrial component certified pursuant to Section [14-105]] by [.25 or .40 or .50], and shall add the resulting product to the excess residential growth component certified pursuant to Section [14-105]. The resulting amount shall be known as the “areawide tax base for (year).”
- (2) For each qualifying local unit, a “commercial-industrial contribution percentage” shall be computed as the commercial-industrial value determined in paragraph (1) above divided by the total commercial-industrial value of the qualifying local unit. For each qualifying local unit, an “excess residential contribution percentage” shall be computed as the excess residential value determined in paragraph (1) above, divided by the total excess residential value of the qualifying local unit.

### 14-107 Distribution of Areawide Tax Base

- (1) The state [commissioner of revenue] shall certify to the administering fiscal officer on or about [date] of each year, the population of each qualifying local unit, the average fiscal capacity, and the fiscal capacity of each individual qualifying local unit.
- (2) The administering fiscal officer shall determine for each qualifying local unit the product of: (a) its population, and (b) the proportion that the respective average fiscal capacity bears to the fiscal capacity of that qualifying local unit. The product shall be the areawide tax base distribution index for that qualifying local unit, provided that if a qualifying local unit is located partly within and without the area, its index shall be that which is otherwise determined hereunder, multiplied by the proportion that its population residing within an area bears to its total population as of the preceding year.
- (3) The administering fiscal officer shall determine the proportion that the index of each qualifying unit bears to the sum of the indices of all qualifying local unit(s). In the case of each qualifying local unit, the administering fiscal officer shall then multiply this proportion by the areawide tax base.
- (4) The product of the multiplication prescribed by paragraph (3) above shall be known as the “distribution value for (year) attributable to [name of qualifying local unit].” The administering fiscal officer shall certify such product to the fiscal officer of the county in which the qualifying local unit or units are located on or before [date].

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- (5) The distribution value attributable to each qualifying local unit shall be apportioned among all component local units exercising taxing authority within the qualifying local unit on the basis of the percentage of the qualifying local unit's residential property tax base lying with the component local unit.

### **14-108 Taxable Value of Component Local Units: Local and Areawide**

- (1) Each county fiscal officer shall determine the taxable value of each component local unit within the county in the manner hereby prescribed. The taxable value of a component local unit is its assessed valuation, as determined in accordance with other provisions of law, subject to the following adjustments:
- (a) there shall be subtracted from its assessed valuation, in each qualifying local unit in which the component local unit exercises *ad valorem* taxing jurisdiction, an amount equal to the qualifying local unit's commercial-industrial contribution percentage times the value of commercial-industrial property, and an amount equal to the qualifying local unit's excess residential contribution percentage, times the value of excess residential property; and
  - (b) there shall be added to the assessed valuation of each component local unit the distribution value apportioned to it under paragraph (5) of Section [14-107], from each qualifying local unit in which it exercises taxing authority.
- (2) This net resulting from the subtraction specified in subparagraph (a) and the addition specified in subparagraph (b) of paragraph (1) above represents the final assessment value for determining the tax rate for each component local unit.

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### 14-109 Levies and Mill Rates: Local and Areawide

- (1) On or before [*month, day, and year*] and each subsequent year, the county fiscal officer shall apportion the levy of each component local unit in his or her county in the manner prescribed as follows:
  - (a) determine the areawide portion of the levy for each component local unit by multiplying the mill rate of the unit, times the distribution value apportioned to it under paragraph (5) of Section [14-107] above; and
  - (b) determine the local portion of the current year's levy by subtracting the areawide portion determined above from the component local unit's current year's levy.
- (2) On or before [*month, day, and initial year*] and each subsequent year, the county fiscal officer shall certify to the administering fiscal officer the areawide portion of the levy of each component local unit determined pursuant to subparagraph (a) of paragraph (1) above. The administering fiscal officer shall then determine the rate of taxation sufficient to yield an amount equal to the sum of such levies from the areawide tax base. On or before [*month and day*] the administering fiscal officer shall certify said areawide tax rate to each of the county [fiscal officers].
- (3) If a component local unit is located in 2 or more counties, the computation and certifications required above shall be made by the county fiscal officer who is responsible under other provisions of law for allocating between and among the affected counties.
- (4) Within each qualifying local unit, the taxation of each parcel of commercial-industrial property, [including property located within a tax increment financing district, as defined in Section [14-302], shall be determined as follows: the areawide tax rate shall be applied to that percentage of the property equal to the commercial-industrial contribution percentage; the tax rate from all jurisdictions exercising taxing authority over the property shall apply to the remainder of the property.
- (5) Within each qualifying local unit, the taxation of each parcel of residential property shall be determined as follows: the value of the property that is not defined as excess residential property is taxed at the rate applicable by all qualifying local units exercising taxing authority over the property; the areawide tax rate shall be applied to that percentage of the excess residential portion of the property equal to the excess residential contribution percentage; the tax rate from all jurisdictions exercising taxing authority over the property shall apply to the remainder of the excess residential portion of the property.
- (6) The administering fiscal officer shall determine for each county the difference between the total levy on distribution value within the county and the total tax on contribution value within the county. On or before [*month, date*] of each year, he or she shall certify the difference so determined to each county fiscal officer. In addition, the administering fiscal officer shall certify to those county [fiscal officers] for whose county the total tax on

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contribution value exceeds the total levy on distribution value the settlement the county is to make to the other counties of the excess of the total tax on contribution value over the total tax levy on distribution value in the county. On or before [month, date] and [month, date] of each year, each county [treasurer] in a county having a total tax on contribution value in excess of the total levy on distribution value shall pay the excess to the other counties in accordance with the certification of the administering fiscal officer.

### 14-110 Miscellaneous Adjustments to Local and Areawide Rates and Levies

*[Insert adjustments required by virtue of other provisions of law, such as: (a) the proration of such debt or expenditure limitations as are related to the value or valuation of taxable real or personal property; (b) adjustments in assessed valuation required by equalization authorities; (c) changes in required certification dates for tax rolls and the setting of tax rates; (d) adjustments necessitated by reassessments or by properties erroneously omitted from tax rolls; and (e) late or incorrect certifications of levies or tax rates.]*

### 14-111 Changes in Status of Qualifying Local Units

- (1) If a qualifying local unit is dissolved, is consolidated with all or part of another local unit, annexes territory, has a portion of its territory detached from it, or is newly incorporated, the [secretary of state] shall immediately certify that fact to the [commissioner of revenue]. The [secretary of state] shall also certify to the [commissioner of revenue] the current population of the new, enlarged, or successor qualifying local unit, if determined by the [state or local boundary adjustment agency] incident to the consolidation, annexation, or incorporation proceedings. The population so certified shall govern for purposes of this Act until the [state or regional planning agency] files its first population estimate as of a later date with the [commissioner of revenue]. If an annexation of unincorporated land occurs, the population of the annexing qualifying local unit as previously determined shall continue to govern for purposes of this Act until the [state or regional agency] files its first population estimate as of a later date with the [commissioner of revenue].
- (2) In determining the own source revenues or equalized assessed value of property attributable to a successor qualifying local unit for a year prior to a change in status, such amount shall be deemed the sum of the amounts of its predecessor units. If any of the predecessors were divided incident to the change, then for the purposes of this Act, its own source revenues shall be apportioned among its successors in proportion to the division of the population between them, and the equalized assessed value of property located therein shall be allocated to the successor in which the property is located.

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### 14-112 Tax Collection and Disbursements to Qualifying Local Units

- ◆ The provisions dealing with collection and disbursement may be addressed elsewhere in the property tax code. The following language is presented if it is desired to modify those provisions.
  - [(1) Tax bills rendered to owners of commercial-industrial property shall, among other items, include: (a) the total assessed value of the property; (b) the value of the areawide portion, the areawide tax rate, and the amount due on the areawide portion; and (c) the value of the local portion, the local tax rate, and the amount due on the local portion. Remittances shall be made to the county [collector(s) of revenue] of the area county or counties in which the property is located.
  - (2) Tax bills rendered to owners of residential property shall, among other items, include: (a) the total assessed value of the property; (b) the value of the areawide portion, the areawide tax rate, and the amount due on the areawide portion; and (c) the value of the local portion, the local tax rate, and the amount due on the local portion. Remittances shall be made to the county [collector(s) of revenue] of the area's county or counties in which the property is located.
  - (3) The county fiscal officer of each county shall transfer to the component taxing jurisdictions within the county, the amounts attributable to respective local rates and to the qualifying local units their respective distributive shares of the areawide tax, as calculated pursuant to Section [14-107] of this Act.]

**14-113 Separability** [*Insert separability clause.*]

**14-114 Effective Date** [*Insert effective date.*]

## INTERGOVERNMENTAL AGREEMENTS

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### ***Commentary: Intergovernmental Agreement for a Joint Economic Development Zone***

The following model provides for a voluntary intergovernmental agreement among two or more units of local government to establish a joint economic development zone. The statute is based on legislation from Michigan, Ohio, and Virginia.<sup>36</sup> Under this model, the zone may be located within the boundaries of one or more local government units. The local governments negotiate what public

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<sup>36</sup>Mich. Comp. Laws §124.505 (1991); Ohio Rev. Code §§715.69 to 715.71 (1995) (these sections cover “joint economic development zones” for municipalities and “joint economic development districts” for municipalities and unincorporated townships); and Code of Va., Ch. 26.2:1 (1994).

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services and facilities are to be provided to the area included in the zone, and which tax and other revenues that result from commercial, industrial, and other development will be shared, and in what amounts or proportions. Local governments may also address joint planning and joint administration of development regulations in the agreement. In addition, as a quid pro quo, a municipality may agree not to annex land in an unincorporated area in exchange for sharing of revenue. Or a municipality may annex land from the unincorporated area and share the resulting revenues with the county or township.

The model statute lists the typical taxes – real property, sales, and income – that states generally authorize as potential sources of revenue for voluntary sharing. Some states may also permit local lodging, restaurant, or specialized sales taxes. Because each state has its own suite of taxes and other revenue sources that may be levied by local governments, this model must be adapted to address those sources.

It should be noted, however, that the model statute does not contemplate extraterritorial taxation. For example, if the state permits municipalities to levy local income taxes, and the joint economic development zone is located in an unincorporated area, then the municipality could not impose its local income tax on residents and business in that area. But, if the economic development zone were located in the municipality, then the municipality could collect its income tax and share its benefits with the county, township, or other unincorporated unit under a distribution formula contained in the agreement.

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### **14-201 Joint Economic Development Zone**

- (1) Two or more local governments may enter into a contract whereby they agree to share in the costs of improvements and/or services and in the revenues from taxes and other revenue sources for an area located in one or more of the contracting local governments that they designate as a joint economic development zone for the purposes of facilitating new or expanded growth for commercial and/or industrial development in the state, ensuring the equitable sharing of resources and liabilities among the contracting local governments, and providing an alternative to annexation. The zone created shall be located within the territory of one or more of the contracting local governments and shall consist of all or a portion of such territory.
- (2) The contract shall set forth:
  - (a) the names of the contracting local governments;
  - (b) a legal description of the area to be designated as the joint economic development zone, including a map in sufficient detail to denote the specific boundaries of the area or areas;
  - (c) the amount or nature of the contribution of each contracting local government to the development and operation of the zone. The contributions may be in any form to

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- which the contracting governments agree and may include, but shall not be limited to, the provision of services, money, real or personal property, facilities, or equipment. The contract shall provide a schedule for the provision of any new, expanded, or additional services and facilities;
- (d) any other terms and conditions identified pursuant to paragraphs (3) (4), (5), and (9) of this Section; and
  - (e) terms setting forth the duration of the contract.
- (3) The contract shall set forth the formula or formulas for allocating any tax and other revenues to be shared from the joint economic development zone and a schedule and method of distribution of the shared revenues, as may be agreed upon by the contracting local governments. Taxes and other revenues to be shared may include:
- [(a) any [municipal *or* local] income tax revenues derived from the income earned by persons employed by businesses that located within the economic development zone after it is designated as such by the contracting local governments and from the net profits of such businesses;]
  - [(b) any local real property tax revenues derived from commercial and industrial real property located in the economic development zone after it is designated as such by the contracting local governments;]
  - [(c) any local revenues resulting from fees, charges, and fines derived from commercial and industrial real property located in the economic development zone after it is designated as such by the contracting local governments;]
  - [(d) any local sales tax revenues derived from sales from businesses located in the economic development zone after it is designated as such by the contracting local governments] and;
  - [(e) [*add other taxes that could be shared*].]
- (4) The contract may provide for the joint comprehensive planning of the economic development zone and the administration of zoning, subdivision, and other land-use regulations, building codes, inspection of public improvements, and other regulatory and proprietary matters that are determined, pursuant to the contract, to be for a public purpose and to be desirable with respect to the operation of the economic development zone or to facilitate new or expanded economic development, provided that no contract shall exempt the territory within the zone from procedures and processes of land-use regulation applicable pursuant to local regulations or ordinances.

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- (5) The contract may provide for a waiver of annexation rights pursuant to [*the state annexation statute*] and such other provisions as the contracting local governments may deem in their best interests.
- (6) Before the legislative authority of any of the contracting local governments enacts an ordinance approving a contract to designate a joint economic development zone, the legislative authority of each of the contracting local governments shall hold a public hearing concerning the proposed zone and contract. Each such legislative authority shall provide at least [30] days notice of the public hearing in a newspaper of general circulation in the area served by the local governments [and may give notice by publication on a computer-accessible information network or by other appropriate means].
- (7) The public notice advertising the hearing shall:
  - (a) contain a statement of the substance of the hearing and a description, including a map, of the proposed joint economic development zone;
  - (b) specify the officer(s) or employee(s) of the legislative authority from whom additional information may be obtained;
  - (c) contain a statement that a true copy of the contract is available for public inspection in the office of the [clerk of the legislative authority] of each of the contracting local governments; and
  - (d) specify the date, time, place, and method for presentation of statements by interested persons.
- (8) After the public hearings required by this Section have been held, the legislative body of each contracting local government may enact an ordinance approving the contract to designate the joint economic development zone. Prior to the enactment of the ordinance, the legislative bodies of the contracting local governments may modify the contract as a consequence of statements made at the public hearings or for any other reason without holding additional public hearings.
- (9) A contract entered into pursuant to this Section may be amended, and may be renewed, canceled, or terminated as provided in or pursuant to the contract. The contract shall continue in existence throughout its term and shall be binding on the contracting parties and on any entities succeeding to such parties, whether by annexation, merger, or otherwise.
- (10) Upon the enactment of an ordinance approving a contract to designate a joint economic development zone or any amendments to the contract, the contracting party shall certify a copy of the ordinance and the contract to the director of the [state department of development *or* state planning agency], who shall maintain a list of local governments in the state that have established joint economic development zones.

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### REDEVELOPMENT AND TAX RELIEF

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#### *Commentary: Redevelopment Areas*<sup>37</sup>

##### **THE BENEFITS AND PROBLEMS OF REDEVELOPMENT**

Redevelopment, as the name implies, involves the development or improvement of an area that has at some time (recent or distant) undergone development but has since deteriorated socially or physically, suffered some calamity, or that development has become obsolete. As this Section uses the term, redevelopment applies to areas where market forces are not providing sufficient capital and economic activity for a recovery; where public investment, capital improvements, or promotion and technical assistance are required to “prime the pump.”

The methods for achieving redevelopment are many. The local government may improve the business climate or livability of the area, and demonstrate confidence in its recovery, by making capital improvements and improving public services – fixing and upgrading streets and sidewalks, providing better parks and playgrounds, repairing and expanding schools and libraries, hiring street cleaners. It may improve the image of the area among potential investors, merchants, and residents with advertising and marketing. Assistance in the form of advice and information may be provided to new and existing businesses in the area. Loans may be made to persons renovating their residence or business, or the local government may secure such loans made by private lenders. Grants and tax breaks may be provided for residential or business improvements. Larger businesses may be encouraged with financial and other incentives to locate facilities in the area.

Every state has at least one statutory system for creating, financing, and operating redevelopment areas. The problem is that most states have several such systems, each with different purposes, adoption procedures, financing, and methods of redevelopment. Many of these separate laws overlap; several different statutory schemes potentially apply to the same area in need of redevelopment. These separate statutes were often created to receive or transmit funding or other assistance from particular Federal or state programs.

Since one of the functions of redevelopment is to make investment in the redevelopment area more straightforward and certain, there is a need to replace this confusing multiplicity of enabling legislation with a single, flexible redevelopment statute. While there are as many different redevelopment programs as there are reasons or causes for redevelopment, there are many common elements in redevelopment that can be addressed by a statute that is sufficiently specific to provide guidance to local governments while being general enough that redevelopment programs are tailored to the particular redevelopment area.

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<sup>37</sup>See generally Donald G. Haman and Julian C. Juergensmeyer, “Urban Renewal and Downtown Revitalization,” in *Urban Planning and Land Development Control Law*, (2<sup>nd</sup> Ed.) (St. Paul, Minn.: West, 1986), 526-553; Daniel R. Mandelker, Gary Feder, and Margaret Collins, *Reviving Cities with Tax Abatement* (New Brunswick, N.J.: Center for Urban Policy Research, 1980) (analysis of impact of Missouri Urban Redevelopment Corporations Law).

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### FEDERAL STATUTES ON REDEVELOPMENT

There have been several Federal programs for providing financial assistance to local redevelopment activities, going back to the Federal Housing Act of 1949,<sup>38</sup> if not further to New Deal programs. The earlier programs took the form of “urban renewal” or “slum clearance”: in areas characterized by large numbers of inadequate or dangerous buildings, the local government, with Federal financial assistance, would condemn property containing such buildings, raze the substandard structures, build new buildings, and sell or lease the new property to private owners. These projects were often large, involving the consolidation of dozens of separate lots or parcels under local government ownership and their subsequent redivision after the new buildings and structures were completed.

However, in some instances, entire blocks or neighborhoods of viable buildings were razed due to age and perceived obsolescence, residents and businesses were displaced for months of reconstruction, and the replacement buildings were sometimes priced beyond the means of the previous residential and commercial tenants. In response to some of these excesses, Congress replaced the earlier statutes that authorized major, sweeping, projects with more modest programs that focus on renovating existing buildings where possible, such as the Community Development Block Grant program.<sup>39</sup>

Another response to urban renewal “horror stories” was a statute<sup>40</sup> that sets uniform policies for real property acquisition and relocation assistance on Federal projects and federally funded local projects. Negotiated purchase of property is preferred over the employment of eminent domain, and persons and businesses displaced by the renovation or demolition of buildings are to receive compensation for certain expenses incurred as a result of the displacement.

### EXISTING STATE REDEVELOPMENT STATUTES

**California** has a comprehensive Community Redevelopment Law.<sup>41</sup> Before any local government may engage in redevelopment, it must have a planning agency and have adopted a comprehensive plan.<sup>42</sup> The local government must adopt a redevelopment area plan after due notice and a public hearing, and similar public participation is required for the amendment of a redevelopment area plan.<sup>43</sup> The required and authorized content of redevelopment area plans is spelled out in detail, as is an express requirement that the redevelopment area plan be consistent with

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<sup>38</sup>42 U.S.C. §§1441 *et seq.* (1999).

<sup>39</sup>Federal Housing and Community Development Act, 42 U.S.C. §§5301 *et seq.*.

<sup>40</sup>42 U.S.C. §§4601 *et seq.*.

<sup>41</sup>Cal. Health & Safety Code §§33000 *et seq.*.

<sup>42</sup>Cal. Health & Safety Code §§33301, 33302.

<sup>43</sup>Cal. Health & Safety Code §§33450 *et seq.*.

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the comprehensive plan.<sup>44</sup> Redevelopment areas must be found to be predominantly blighted.<sup>45</sup> In order to avoid some of the excesses of urban renewal in the past, and to avoid appearances of corruption and favoritism, there are detailed provisions governing the purchase and condemnation of real property,<sup>46</sup> the management of property owned for redevelopment,<sup>47</sup> and requirements regarding relocation assistance to residents displaced by redevelopment activities.<sup>48</sup> Also, where a redevelopment area receives tax increment financing, 25 percent of that revenue must be set aside for low and moderate income housing, though not necessarily located within the redevelopment area.<sup>49</sup> Redevelopment may be financed by tax increment financing, by the issuance of bonds or notes, or by appropriations by the local government from any tax it is authorized to impose.<sup>50</sup> Within redevelopment areas, the power to approve development may be designated by the plan to the redevelopment agency or the local planning agency.<sup>51</sup>

Industrial development in economically depressed areas is encouraged by authorizing local governments to create industrial development authorities, financed by the issuance of industrial revenue bonds. Community facilities districts<sup>52</sup> and community rehabilitation districts<sup>53</sup> may be created by local governments to construct or rehabilitate, respectively, public capital improvements in underdeveloped areas, financed by the issuance of bonds and/or the imposition of special tax levies. Infrastructure finance districts,<sup>54</sup> governed by an infrastructure financing plan and funded through tax increment financing, are also authorized.

**Florida's** Community Redevelopment Act<sup>55</sup> authorizes counties and municipalities to adopt community redevelopment plans for areas where the legislative body has “determined such area to

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<sup>44</sup>Cal. Health & Safety Code §§33330 *et seq.*.

<sup>45</sup>Cal. Health & Safety Code §§33030 *et seq.*.

<sup>46</sup>Cal. Health & Safety Code §§33390 *et seq.*.

<sup>47</sup>Cal. Health & Safety Code §§33400 *et seq.*.

<sup>48</sup>Cal. Health & Safety Code §§33410 *et seq.*.

<sup>49</sup>Cal. Health & Safety Code §33607.5.

<sup>50</sup>Cal. Health & Safety Code §§33330 *et seq.*.

<sup>51</sup>Cal. Health & Safety Code §§33210 *et seq.*.

<sup>52</sup>Cal. Gov't Code §§53311 *et seq.*.

<sup>53</sup>Cal. Gov't Code §§53370 *et seq.*.

<sup>54</sup>Cal. Gov't Code §§53395 *et seq.*.

<sup>55</sup>Fla. Stat. §§163.330 *et seq.*.

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be a slum area, a blighted area, or an area in which there is a shortage of housing affordable to residents of low or moderate income, including the elderly, or a combination thereof, and designated such area as appropriate for community redevelopment.”<sup>56</sup> The community redevelopment plan must be preceded by a notice and public hearing, and is required to be consistent with the county or municipal comprehensive plan.<sup>57</sup> Before a community redevelopment plan or redevelopment ordinances may be adopted, written notice must be given to all taxing bodies in the redevelopment area.<sup>58</sup> Open land may not be acquired by the county or municipality for redevelopment unless the plan includes a series of specific findings provided in the Act.<sup>59</sup> Counties and municipalities engaging in redevelopment are required to “afford maximum opportunity, consistent with the sound needs of the county or municipality as a whole, to the rehabilitation or redevelopment of the community redevelopment area by private enterprise.”<sup>60</sup>

In order to implement the community redevelopment plan, counties and municipalities are authorized to enter into contracts, acquire and sell land and structures, demolish, renovate, and construct buildings, mortgage real property, acquire and develop air rights over highways and railways, borrow money and receive loans and grants, engage in community policing, and employ several other enumerated powers.<sup>61</sup> They may utilize eminent domain,<sup>62</sup> issue bonds secured by redevelopment revenue,<sup>63</sup> and employ tax increment financing.<sup>64</sup> Technical assistance<sup>65</sup> and state grants<sup>66</sup> are available for community redevelopment. For the state grant program, there are detailed reporting and evaluation requirements that measure redevelopment progress – and how efficiently state funds are being used – with several concrete numerical measures.<sup>67</sup>

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<sup>56</sup>Fla. Stat. §163.360.

<sup>57</sup>Fla. Stat. §163.360.

<sup>58</sup>Fla. Stat. §163.346.

<sup>59</sup>Fla. Stat. §163.360.

<sup>60</sup>Fla. Stat. §163.345.

<sup>61</sup>Fla. Stat. §163.370.

<sup>62</sup>Fla. Stat. §163.375.

<sup>63</sup>Fla. Stat. §163.385.

<sup>64</sup>Fla. Stat. §163.387.

<sup>65</sup>Fla. Stat. §163.445.

<sup>66</sup>Fla. Stat. §163.458.

<sup>67</sup>Fla. Stat. §163.461.

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Florida also has a Uniform Community Development District Act, adopted in 1990.<sup>68</sup> It replaces former laws on community development districts, although pre-existing community development districts were allowed to continue under their old enabling act.<sup>69</sup> Districts are granted the usual powers of a body politic and corporate (buy, own, and sell land, form contracts, borrow money, sue and be sued, employ workers as state employees, enact rules, etc.) and are granted the authority to levy fees and taxes as well.<sup>70</sup> They are governed by a board of supervisors, elected for four-year terms by the landowners of the district, who are allotted one vote per acre owned.<sup>71</sup> Districts may construct and operate public improvements such as water, sewer, highway, transit, and park systems and conservation works.<sup>72</sup> Though an annual budget is required,<sup>73</sup> as is a water management plan when the district provides water service,<sup>74</sup> there is no requirement of a plan governing the development of the district.

**Illinois** is the classic case of a state with a plethora of similar redevelopment statutes for various purposes. The Industrial Project Revenue Bond Act,<sup>75</sup> commercial renewal and redevelopment areas statute,<sup>76</sup> business district development and redevelopment statute,<sup>77</sup> and the Tax Increment Allocation Redevelopment Act<sup>78</sup> all authorize local governments to address different aspects of redevelopment, as the names imply. To administer redevelopment, land clearance commissions,<sup>79</sup>

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<sup>68</sup>Fla. Stat. §§190.001 *et seq.*.

<sup>69</sup>Fla. Stat. §190.004.

<sup>70</sup>Fla. Stat. §§190.011, 190.021.

<sup>71</sup>Fla. Stat. §190.006.

<sup>72</sup>Fla. Stat. §190.012.

<sup>73</sup>Fla. Stat. §190.008.

<sup>74</sup>Fla. Stat. §190.013.

<sup>75</sup>65 Il. Comp. Stat. §§5/11-74-1 *et seq.*.

<sup>76</sup>65 Il. Comp. Stat. §§5/11-74.2-1 *et seq.*.

<sup>77</sup>65 Il. Comp. Stat. §§5/11-74.3-1 *et seq.*.

<sup>78</sup>65 Il. Comp. Stat. §§5/11-74.4-1 *et seq.*, discussed in more detail in the Commentary to Section 14-302, Tax Increment Financing.

<sup>79</sup>Pursuant to the Blighted Areas Redevelopment Act, 315 Il. Comp. Stat. §§5/1 *et seq.*, Illinois' "traditional" urban renewal statute.

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neighborhood redevelopment corporations,<sup>80</sup> or community development finance corporations<sup>81</sup> may be created.

Despite their varied titles and purposes, there are some similarities between these statutes. Most establish specific criteria for an area to qualify for assistance and specify a relatively narrow set of purposes and forms of assistance. Most require the adoption of a plan governing the redevelopment of the area. The purchase and improvement of real property is expressly authorized in most of the statutes. And they tend to focus intensively on the details on the issuance, redemption, etc. of bonds and other obligations.

**Oregon** empowers local governments to create urban renewal agencies for the redevelopment of blighted areas pursuant to an urban renewal area plan.<sup>82</sup> Tax increment financing to pay off urban renewal bonds and notes is expressly authorized.<sup>83</sup> Local governments may offer property tax exemptions (with certain conditions ensuring affordability) for new single-family residential construction in distressed areas, to encourage the revitalization of the area and the provision of affordable housing.<sup>84</sup>

The unification of economic development activities at the regional level is encouraged.<sup>85</sup> Contiguous counties may prepare, with notice and a public hearing, a regional investment plan to govern economic development in the region; the statute specifies the contents of such a plan, and the plan takes effect upon adoption by the governor. The counties may then create a board representing the participating counties to implement it.

Oregon authorizes local governments to engage in business development projects.<sup>86</sup> The project must be both feasible (development will likely occur) and necessary (development would not occur without the project, and there must be private business participation before the state will grant or lend any money for the project).

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<sup>80</sup>315 Il. Comp. Stat. §§20/1 *et seq.*.

<sup>81</sup>315 Il. Comp. Stat. §§15/1 *et seq.*.

<sup>82</sup>Or. Rev. Stat. §§457.010 *et seq.*.

<sup>83</sup>Or. Rev. Stat. §§457.420 *et seq.*.

<sup>84</sup>Or. Rev. Stat. §§458.005 *et seq.*.

<sup>85</sup>Or. Rev. Stat. §§285B.230 *et seq.*.

<sup>86</sup>Or. Rev. Stat. §§285B.050 *et seq.*.

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### **BROWNFIELDS**<sup>87</sup>

A “brownfield” has been defined as “abandoned, idled, or underused industrial and commercial facilities where expansion or redevelopment is complicated by a real or perceived environmental contamination.”<sup>88</sup> Since one cannot be aware with certainty of all the chemicals and materials ever used on industrial or commercial premises, or of the level of care with which they were stored, used, and disposed of, the class of land with “perceived environmental contamination” can potentially encompass any lot or parcel ever used for industrial purposes and even for certain commercial purposes (auto repair shops, for instance).

The brownfield problem – a reluctance to purchase and develop already-developed sites due to a perception that they may be polluted – exists to the degree that it does because of the nature of liability under Federal and state laws regarding the cleanup of contaminants and the assessment of the costs of that cleanup. The Comprehensive Environmental Response, Compensation, and Liability Act,<sup>89</sup> commonly called CERCLA, was adopted with the purpose of holding parties responsible for the pollution of land liable for the costs of removing the pollution and restoring the land to its natural state. However, the language of the statute is somewhat broader: the past and current owners and operators of premises where hazardous substances have been released are financially responsible for the cleanup of the contamination.<sup>90</sup> There is an exception for parties whose ownership interest exists solely to secure a loan or obligation and entails no control of the premises.<sup>91</sup> There is also an “innocent owner” exception, but it applies only to parties who “unknowingly acquired contaminated property ... and who undertook all appropriate inquiry at the time of acquisition.”<sup>92</sup> Therefore, CERCLA essentially imposes liability for contamination of land upon the past and present owners and users of the land regardless of their lack of culpability in actually polluting it. Several states

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<sup>87</sup>An interesting and useful book on brownfields is Todd S. Davis and Kevin D. Margolis, eds., *Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property*, (Chicago: Amer. Bar Ass’n, 1997). See also Michael B. Gerrard, *Brownfields Law and Practice*, 2 vol. (New York: Matthew Bender, 1999); Peter B. Meyer and Thomas S. Lyons, “Lessons from Private Sector Brownfields Redevelopers: Planning Public Support for Urban Regeneration,” *Journal of the American Planning Association*, 66, No. 1 (Winter 2000):46-57.

<sup>88</sup>U.S. Environmental Protection Agency, Region 5 Office of Public Affairs, *Basic Brownfields Fact Sheet*, (Chicago, 1996).

<sup>89</sup>42 U.S.C. §§9601 *et seq.* (1999).

<sup>90</sup>42 U.S.C. § 9607(a)(1).

<sup>91</sup>42 U.S.C. §9601(20)(A). Conversely, the courts have found lenders with a role in the management of the premises to be liable for cleanup costs. *U.S. v. Fleet Factors Corp.*, 901 F.2d 1550 (11<sup>th</sup> Cir. 1990).

<sup>92</sup>42 U.S.C. §§9601(35)(A), 9607(b)(3).

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have adopted statutes modeled on CERCLA,<sup>93</sup> and indeed some states<sup>94</sup> have imposed legal frameworks stricter than CERCLA.

While CERCLA and its state counterparts were adopted for the useful and indeed necessary purposes of ensuring a cleaner environment and reducing the exposure of the public to toxic chemicals, there is a negative side effect to the strict liability rule. Potential purchasers and developers of parcels that were once used for industrial purposes become wary of buying and developing such a parcel for fear that they will become responsible for the high cost of cleaning up any contamination caused by previous users. As the potential liability for cleanup of badly contaminated land can total in the millions of dollars, some developers will not even consider parcels that were used for potentially contaminating industrial or commercial purposes. Instead, they will construct their developments on previously undeveloped – and therefore presumably pristine – land. Since “brownfields” are usually located in the 19th and early 20th Century industrial districts of cities and their close-in suburbs, while the most certain place to find untouched “greenfields” near urban labor and markets is just beyond the (present) extent of urban development, sprawl is encouraged. Thus the negative effect on the development of old industrial sites links the “brownfields” problem to redevelopment.

Recognizing the “brownfields” problem, many states have adopted amendments to their environmental protection statutes. These new rules often create exceptions to strict liability,<sup>95</sup> create voluntary cleanup programs that provide protection from suit for owners who remediate the contamination of their property according to a state-approved plan,<sup>96</sup> authorize remediation measures that are appropriate to the intended use of the property,<sup>97</sup> or some combination of these. The U.S. Environmental Protection Agency has assisted in this effort by recognizing the intended land use of contaminated premises as a consideration in the degree or level of cleanup,<sup>98</sup> and by entering into

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<sup>93</sup>Davis, 17.

<sup>94</sup>See, e.g., N.J. Stat. Ann. §58:10-23.11b.

<sup>95</sup>Del. Code Ann. tit. 7, § 9105; 415 Il. Comp. Stat. §5/58.9 (liability for costs for voluntary cleanup assigned on a fault basis, damages proportional to polluter’s portion of fault); Ohio Rev. Code §3746.26(A)(1)(b) (lenders not liable so long as they do not actually manage or operate any hazardous waste activities on the premises, even if they have the power to manage the premises); 35 Pa. Cons. Stat. Ann. §§6027.1 *et seq.* (lenders liable for contamination only if they caused or exacerbated contamination, or compelled their borrower to do so).

<sup>96</sup>This is the most common approach, adopted by at least 25 states. See e.g., Cal. Health & Safety Code §§25300 *et seq.*; Mich. Comp. Laws §§20101 *et seq.*; Me. Rev. Stat. tit. 38, §343-E; Minn. Stat. §115B.175; Neb. Rev. Stat. §§81-15,181 *et seq.*; Ohio Rev. Code §3746.01 *et seq.*; Pa. Stat. tit. 35, §§6026.101 *et seq.*; Wisc. Stat. §§292.11 *et seq.*.

<sup>97</sup>Colo. Rev. Stat. §25-16-305(1); N.J. Stat. Ann. §58:10B-12; Pa. Cons. Stat. Ann. §§6026.301 *et seq.*.

<sup>98</sup>U.S. EPA, “Land Use in the CERCLA Remedy Selection Process,” OSWER Directive No. 9375.6-11 (May 3, 1995).

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agreements not to sue with the buyers of premises that the EPA regulates.<sup>99</sup> It has also entered into memoranda of understanding with some state environmental protection agencies, agreeing to refrain from enforcement against premises that the state agency is regulating when that agency finds that no further remediation of pollutants is required.<sup>100</sup> Also, the EPA is permitted, indeed required, by CERCLA to reach a settlement with land owners who (basically) did not store, process, or dispose of hazardous materials on the premises and who had no actual or constructive knowledge that the land had been previously used for the storage, processing, or disposal of hazardous substances, when the settlement involves only a minor portion of the cleanup costs.<sup>101</sup> However, the condition that settlement concern only a minor portion of the costs means that this provision, by itself, assists the non-polluting owner only when the actual polluting party or parties can be discovered and made to pay under CERCLA.

### CONTENTS OF THE MODEL STATUTE

Section 14-301 below provides a uniform but flexible framework for the redevelopment of areas that require development assistance. There are several authorized grounds for the creation of a redevelopment area; the existence of any two is sufficient authorization to engage in redevelopment. Similarly, a broad range of redevelopment tools is authorized; the local government is empowered to select the tool or tools most appropriate to the particular redevelopment area.

The key to the proper selection of redevelopment tools is the redevelopment area plan, adopted pursuant to Section 7-303. It provides the considered guidance that is crucial to the success of redevelopment. Indeed, it is so essential to redevelopment that without it, the local government is not authorized to create a redevelopment area.

In order to provide the necessary money for redevelopment, the Section authorizes the local government to borrow money and issue bonds secured by the redevelopment property and revenue or by the general revenues of the local government. The local government is also directed to seek out assistance under all applicable state and Federal programs. If the local government decides that the nature or scope of the redevelopment requires a separate entity to conduct redevelopment activities, it may create a redevelopment authority with the powers of a non-profit corporation.

The Section also authorizes the creation of business improvement programs. Essentially the equivalent of business improvement districts (BIDs), these are ongoing programs whereby marketing, capital improvements, and increased services in a business district are financed by a special assessment on the businesses and owners of the district or by tax-increment financing. Their ongoing nature is tempered by the fact that they are subject to periodic review.

All new or renovated housing in a redevelopment area must include affordable housing units, at least 15 percent but no more than 50 percent. Not only does this promote affordable housing as a

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<sup>99</sup>Davis, 25-26.

<sup>100</sup>Davis, 26, 48-49.

<sup>101</sup>42 U.S.C. §9622(g)(1).

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general policy, it ensures the success of the redevelopment area. It is clearly wrong to concentrate all lower-income residences in a particular area, so that lower-income households are the sole or predominant residents of the area. A neighborhood needs a significant proportion of middle-class residents to be economically viable. However, gentrification – the complete or near-complete replacement of affordable housing with relatively expensive market-rate housing – is also undesirable.<sup>102</sup> A balance of affordable housing and market-rate residential units is therefore one of the goals of this Section.

Two provisions are included to preclude some of the excesses sometimes attributed to urban renewal. Purchase of land is favored over the employment of eminent domain except where an agreed purchase would be unfeasible. And structurally sound buildings must be renovated instead of destroyed unless the redevelopment area plan provides otherwise. Note that these are not outright prohibitions by any stretch: a local government intent on buying up all the land in a redevelopment area at cheap prices, or on removing all existing buildings from a redevelopment area, could do so by drafting the redevelopment area plan accordingly. The purpose of this provision is to compel the local government to make potentially destructive decisions openly and after public consideration and to ensure that such decisions are consistent with the policies of the local comprehensive plan.

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### 14-301 Redevelopment Areas

- (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 ordinance*] redevelopment area ordinances pursuant to this Section.
- (2) The purposes of a redevelopment area are to encourage reinvestment in and redevelopment and reuse of areas of the local government that are characterized by two or more of the following conditions or circumstances:
  - (a) loss of retail, office, and/or industrial activity, use, or employment;
  - (b) [40] percent or more of households are low-income households;
  - (c) a predominance of residential or nonresidential structures that are deteriorating or deteriorated;
  - (d) abandonment of residential or nonresidential structures;
  - (e) environmentally contaminated land;

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<sup>102</sup>See Diane R. Suchman, “Mixed-Income Housing” in *Developing Infill Housing in Inner-City Neighborhoods* (Washington, D.C.: Urban Land Institute, 1997), 59-81; Jon C. Teaford, *The Rough Road to Renaissance* (Baltimore, Md.: Johns Hopkins University Press, 1990), 249-250, 305.

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- (f) the existence of unsanitary or unsafe conditions that endanger life, health, and property;
  - (g) deterioration in public improvements such as streets, street lighting, curbs, gutters, sidewalks, related pedestrian amenities, and parks and recreational facilities;
  - (h) tax or special assessment delinquency exceeding the fair market value of the land;
  - (i) recent occurrence of a disaster, as declared by the governor or the President of the United States; or
  - (j) any combination of factors that substantially impairs or arrests the sound growth and economic development of the local government, impedes the provision of adequate housing, or adversely affects the public, health, safety, morals, or general welfare due to the redevelopment area's present condition and use.
- (3) As used in this Section, and in any other Section where “redevelopment areas” are referred to:
- (a) **“Affordable Housing”** means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate- or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which annual housing costs constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the affordable rent is no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.
  - (b) **“Affordable Housing Cost”** means the sum of actual or projected monthly payments for any of the following associated with for-sale affordable housing units: principal and interest on a mortgage loan, including any loan insurance fees; property taxes and assessments; fire and casualty insurance; property maintenance and repairs; homeowner association fees; and a reasonable allowance for utilities.
  - (c) **“Affordable Rent”** means monthly housing expenses, including a reasonable allowance for utilities, for affordable housing units that are for rent to low- or moderate-income households.
  - (d) **“Affordable Sales Price”** means a sales price at which low- or moderate-income households can qualify for the purchase of affordable housing, calculated on the basis of underwriting standards of mortgage financing available for the housing development.

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- (e) **“Area-Based Finance Method”** means one or both of the following, employed within a redevelopment area in order to finance the provision of redevelopment assistance tools within the redevelopment area:
1. tax increment financing pursuant to Section [14-302]; and
  2. special assessments pursuant to [*cite to special assessment statute*].
- (f) **“Business Improvement Program”** means the employment of one or more of the following in a redevelopment area, financed solely by area-based finance methods and/or loans, bonds, and notes secured by the revenue from area-based finance methods and/or the revenue generated by employment of the redevelopment assistance tools:
1. programs to market and promote the redevelopment area and attract new businesses or residents thereto;
  2. local capital improvements within the redevelopment area, including, but not limited to, the installation, construction, or reconstruction of streets, lighting, pedestrian amenities, public utilities, parks, playgrounds, recreational facilities, and public buildings and facilities; and
  3. improved or increased provision of public services within the redevelopment area, including, but not limited to, police or security patrols, garbage collection, and street cleaning.
- (g) **“Direct Development”** means the acquisition and disposition by the local government or the redevelopment authority of real property in a redevelopment area, and may include one or more of the following:
1. assembly and replatting of lots or parcels;
  2. remediation of environmental contamination;
  3. rehabilitation of existing structures and improvements;
  4. demolition of structures and improvements and construction of new structures and improvements;
  5. programs of temporary or permanent relocation assistance for businesses and residents; and
  6. the sale, lease, donation, or other permanent or temporary transfer of real property to public agencies, persons, and entities both for-profit and not-for-profit.

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- (h) **“Greenfields Area”** means a contiguous area that has never been developed or that has been used solely for agricultural or forestry uses;
- (i) **“Low-Income Household”** means a household with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (j) **“Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (k) **“Moderate-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (l) **“Redevelopment Area Plan”** means the subplan or subplans of the local comprehensive plan authorized by Section [7-303];
- (m) **“Redevelopment Assistance Tool”** means one or more of the following:
  - 1. technical assistance programs to provide information and guidance to existing, new, and potential businesses and residences in the redevelopment area;
  - 2. programs to market and promote the redevelopment area and attract new businesses and residents thereto;
  - 3. grant and loan programs to encourage the rehabilitation of residential and non-residential buildings, improve the appearance of building facades and signage, and stimulate business start-ups and expansions within the redevelopment area;
  - 4. programs to:
    - a. guarantee or secure; and/or
    - b. obtain a reduced interest rate, down payment, or other improved terms for

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loans made by private, for-profit or not-for-profit, lenders to encourage the rehabilitation of residential and non-residential buildings, improve the appearance of building facades and signage, and stimulate business start-ups and expansions within the redevelopment area;

5. tax abatement pursuant to Section [14-303];
  6. local capital improvements within the redevelopment area, including, but not limited to, the installation, construction, or reconstruction of streets, lighting, pedestrian amenities, public utilities, public transportation facilities, parks, playgrounds, recreational facilities, and public buildings and facilities;
  7. improved or increased provision of public services within the redevelopment area, including, but not limited to, police or security patrols, garbage collection, and street cleaning;
  8. provision of land-use incentives within the redevelopment area, pursuant to Section [9-501];
  9. provision of assistance, technical, financial, or otherwise, with:
    - a. applications to the [state environmental protection agency]; and/or
    - b. site remediation to remove environmental contaminationfor the redevelopment area or lots or parcels within it, pursuant to [*cite brownfields statute and/or regulations*];
  10. direct development; and
  11. implementation agreements entered into pursuant to Section [7-503].
- (n) **“Redevelopment Authority”** means an entity created pursuant to paragraph (6) of this Section for the purpose of implementing a redevelopment area ordinance.
- (o) **“Redevelopment Program”** means a program pursuant to Federal or state statute that provides redevelopment assistance tools or assists local governments in the provision of redevelopment assistance tools.
- (4) A redevelopment area may be established only pursuant to a redevelopment area ordinance adopted pursuant to this Section.

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- (a) A redevelopment area ordinance shall not be adopted unless the local government has first adopted a local comprehensive plan with a redevelopment area plan pursuant to Section [7-303].
  - (b) A redevelopment area shall not consist of, or include, more than [10 *or* 25] percent greenfields area, except for redevelopment areas adopted pursuant to paragraph (2)(i) above. Redevelopment within greenfields areas pursuant to paragraph (2)(i) shall not result in greater area, or density or intensity, of development than that in place before the occurrence of the disaster.
- ◆ The purpose of this provision is to prevent the use of redevelopment tools for the initial development of undeveloped territory. However, an absolute limitation would preclude the employment of redevelopment tools by a rural local government to recover from a disaster, and therefore an exception for such a circumstance is necessary. This provision is intended to strike a balance, limiting post-disaster redevelopment in greenfields areas to the restoration of the status quo before the disaster.
- (c) The use of redevelopment assistance tools shall not, in any case, result in any net loss of greenfields area, with the exception of *de minimis* losses.
- ◆ An example of a *de minimis* loss of greenfields due to redevelopment activities would be an addition to a visitor center, or the construction of handicapped-accessible walkways, in a park or forest.
- (5) A redevelopment area ordinance pursuant to this Section shall include the following minimum provisions:
    - (a) a citation to enabling authority to adopt and amend the ordinance;
    - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-103] and the purposes of this Section;
    - (c) a statement of consistency with the local comprehensive plan, and with the redevelopment area plan in particular, that is based on findings pursuant to Section [8-104];
    - (d) definitions, as appropriate, for words or terms contained in the ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
    - (e) specific findings, pursuant to the redevelopment area plan and consistent with the purposes of this Section pursuant to paragraph (2) above, supporting the need to employ redevelopment assistance tools in the redevelopment area;

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- (f) a description, both in words and with maps, of the limits or boundaries of the redevelopment area pursuant to the redevelopment area plan;
- (g) a detailed description of the redevelopment assistance tools that will be employed in the redevelopment area and the manner and locations in which they will be employed. Where direct development is to be employed and 42 U.S.C. §§4601 *et seq.*, as amended, is applicable, the local government shall adhere to the uniform relocation assistance and real property acquisition policies pursuant to that statute;
- (h) for any redevelopment area plan that includes or encompasses residential uses, a requirement that any new or renovated housing development that shall receive assistance through any redevelopment assistance tools shall include affordable housing units in a proportion determined by the redevelopment area ordinance but in any case not less than [15] percent nor more than [50] percent. The redevelopment area ordinance shall also include provisions, pursuant to paragraph (9) below, to ensure that affordable housing remains affordable.
- (i) an enumeration of all redevelopment programs for which the redevelopment area may be eligible, and an instruction to the agency or entity designated to oversee and administer implementation of the ordinance pursuant to subparagraph (k) below to apply for and seek inclusion in such redevelopment programs;
- (j) a detailed financial plan, consistent with the local government's budget and its capital improvement program pursuant to Section [7-502], containing reasonable projections of the:
  - 1. cost of the redevelopment assistance tools to be employed; and
  - 2. sources of funding for such costs, including, but not limited to, redevelopment programs and/or area-based finance methods where applicable;
- (k) the designation of one or more public agencies or not-for-profit entities to oversee and administer the implementation of the ordinance. If more than one agency or entity is designated, the ordinance shall specify the jurisdiction or responsibility of each agency or entity in a manner that the relative powers and duties of each are reasonably clear;
- (l) a requirement that any non-governmental entity that receives financial assistance, whether a grant, loan, or loan guarantee, under the redevelopment area ordinance shall make reasonable periodic accountings to the designated agency or entity; and
- (m) either one of the following:

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1. a statement of a specific date after which the redevelopment assistance tools will not be employed within the redevelopment area; or
2. provision for periodic analysis and review by the [local planning agency] of the development activity in the redevelopment area, in light of the purposes of this Section pursuant to paragraph (2) above, regarding the need to employ redevelopment assistance tools in the redevelopment area. Such analysis shall be in writing and shall be submitted to the local legislative body.

except that where the redevelopment assistance tools constitute or include a business improvement program, subparagraph (5)(m)1 shall not apply.

- ◆ Business improvement programs are intended to be ongoing, though not automatically permanent, and therefore are exempted from the absolute time limit “sunset” requirement but are still subject to periodic review.

- (n) provision for the complete disposition of assets, collection of obligations, and repayment of debts remaining at the termination of the redevelopment assistance tools pursuant to paragraph (5)(m) above.

- (6) Consistent with the detailed financial plan of the redevelopment area ordinance pursuant to paragraph (5)(j) above, a redevelopment area ordinance pursuant to this Section may authorize and direct the local government to borrow money through loans, bonds, or notes, which may be unsecured or which may be secured by one or more of the following:

- (a) revenues from area-based finance methods and/or revenues generated from employment of the redevelopment assistance tools;
- (b) real property and other assets held pursuant to the redevelopment area ordinance, including the provision of mortgages, liens, or security interests on the same; and
- (c) the general revenues of the local government.

The redevelopment area ordinance may authorize and direct the local government to guarantee and secure loans made by private lenders by the same means.

- (7) A redevelopment area ordinance pursuant to this Section may create a redevelopment authority and designate it to oversee and implement the redevelopment area ordinance or a portion thereof pursuant to subparagraph (5)(k) above.

- (a) The redevelopment authority shall be governed by a board of directors, consisting of an odd number of directors.

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1. The chairperson of the local planning commission, or the director of the local planning agency if there is no local planning commission, shall be a director *ex officio*. The development area ordinance may specify that other directors shall be local government officials sitting *ex officio*, but no more than half of the directors may be directors *ex officio*.
  2. The other directors shall be [bona fide residents of the local government] appointed by the chief executive officer of the local government with the approval of the local legislative body for a term of [2] years or the duration of the development area pursuant to subparagraph (5)(m) above, whichever is shorter. The redevelopment area ordinance may provide for the staggering of terms of these directors, so that, in each year, half of the directorships under this paragraph (7)(a)2 are subject to appointment.
- ◆ The residency requirement is optional because some adopting legislatures may feel strongly that having outside expertise on the board is more important than having an all-resident board.
3. Except as provided in subparagraph 4 below, or when the redevelopment area has no residents and no business enterprises located in it, at least one director, but no more than half of the directors, shall be:
    - a. a resident of the redevelopment area, if the redevelopment area is predominantly residential in use;
    - b. an officer of a business entity operating a business enterprise in the redevelopment area, or an owner of a more than [10] percent in a business entity operating a business enterprise in the redevelopment area, if the redevelopment area is predominantly commercial or industrial in use; or
    - c. one of each of the above two, if the redevelopment area contains areas of both residential and nonresidential uses.
  4. Where the redevelopment authority is to implement a business improvement program, at least a majority of the directors other than the director or directors *ex officio* shall be officers of business entities operating a business enterprise in the redevelopment area, owners of a more than [10] percent in business entities operating business enterprises in the redevelopment area, or residents of the development area. No two or more directors shall be officers of, or owners of a more than [10] percent interest in, the same business entity.
  5. For the purposes of this paragraph (7)(a), “redevelopment area” includes all redevelopment areas operated or implemented by the same redevelopment authority.

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- ◆ Therefore, if a single non-profit organization is selected to operate multiple redevelopment areas in a local government, the residency or business location requirements do not prevent this.

6. Directors shall be reimbursed for any reasonable expenses incurred in the performance of their duties. Directors pursuant to subparagraph (7)(a)3 or 7(a)4 above shall receive reasonable compensation, as determined by the local legislative body.

(b) Upon the filing of a copy of the redevelopment area ordinance with the [Secretary of State *or other corporate registry*], the redevelopment authority shall have the powers and duties of a not-for-profit corporation pursuant to the [*cite not-for-profit corporation statute*], including, but not limited to:

1. purchasing, holding, improving, mortgaging, selling, leasing, and otherwise conveying property and interests in property;
2. forming, performing, and enforcing contracts, including contracts for the employment of staff and other employees;
3. lending and borrowing money, including loans, bonds, and notes secured by the revenues or assets of the redevelopment authority. However, no debt or obligation of the redevelopment authority shall be an obligation of the local government, or secured by revenues from area-based finance methods or by the general revenues of the local government, unless it is first approved by the local legislative body; and
4. suing and being subject to civil suit.

All amendments to the redevelopment area ordinance shall be filed with the [Secretary of State *or other corporate registry*] in the same manner as the original ordinance.

- ◆ The recording of the redevelopment area ordinance, and any amendments thereto, both emphasizes the corporate nature of the redevelopment authority and makes the powers and duties of the authority clearer to the public.

(c) The redevelopment area ordinance may delegate to the redevelopment authority the power to exercise eminent domain pursuant to [*cite eminent domain statute for local governments*].

(d) The redevelopment area ordinance shall describe the amounts, sources, and nature of the capitalization of the redevelopment authority.

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1. It may provide that revenue from area-based finance methods shall be conveyed to the redevelopment authority to finance its implementation of the redevelopment area ordinance.
  2. It shall provide for the complete disposition of any assets, profits, and/or debt of the redevelopment authority remaining at the conclusion of the redevelopment area ordinance pursuant to subparagraph (5)(m) above. Where a redevelopment authority manages or operates more than one redevelopment area, the ordinance may provide for final disposition when all redevelopment areas managed or operated by the redevelopment authority conclude pursuant to subparagraph (5)(m).
- ◆ It is therefore up to the local legislative body whether each redevelopment area operated by a common redevelopment authority is accounted for, and thus liquidated, separately or jointly.
- (e) The redevelopment authority shall make, to the local legislative body:
    1. annual reports and accountings; and
    2. other accountings as required by the local legislative body.
  - (8) No director, official, or employee of any agency or entity designated to oversee and implement the redevelopment area ordinance or a portion thereof pursuant to subparagraph (5)(k) above, shall:
    - (a) have any substantial financial interest in any land or business enterprise located in the redevelopment area, including such an interest held by a relative by blood, adoption, or marriage or by a business entity in which the official or employee has more than a [10] percent interest. The ownership or rental of one's primary residence within the redevelopment area is not by itself a substantial financial interest for the purposes of this paragraph;
    - (b) own or control, directly or indirectly, more than a [10] percent interest in a business entity that has been or will be awarded, or is under consideration for the awarding of, a contract pursuant to the implementation of the redevelopment area ordinance; or
    - (c) accept or receive, directly or indirectly by rebate, gift, or otherwise, money or any other thing of value from an individual or business entity to whom a contract may be awarded pursuant to the implementation of the redevelopment area ordinance.

The provisions of subparagraphs (a) [and (b)] above shall not apply to directors of a redevelopment authority that are appointed pursuant to subparagraphs (7)(a)3 or 7(a)4 above. However, such directors shall recuse themselves from the [consideration and] decision of all matters that directly affect their property or enterprise in the redevelopment area.

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- ◆ Without this last provision, directors appointed to represent the residents or businesses of the redevelopment area would inherently run afoul of these conflict-of-interest provisions.
  - (9) To ensure that residential development subject to a condition pursuant to paragraph (5)(h) above provides affordable housing, a local government shall enter into a development agreement, pursuant to Section [8-701], with the owner of real property subject to such a condition before it employs redevelopment assistance tools in relation to those premises.
    - (a) The development agreement shall provide for a period of availability for affordable housing as follows:
      - 1. Newly constructed low- and moderate-income sales and rental dwelling units shall be subject to affordability controls for a period of not less than [15] years, which period may be renewed pursuant to the development agreement;
      - 2. Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
      - 3. Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
      - 4. Any dwelling unit created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to affordability controls as delineated in subparagraph (9)(a)1 above.
      - 5. Affordability controls on owner- or renter-occupied accessory apartments shall apply for a period of at least [5] years.
      - 6. Alternatives not otherwise described in this subparagraph shall be controlled in a manner deemed suitable to the local government and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.
    - (b) In the case of for-sale housing developments, the development agreement shall include the following affordability controls governing the initial sale and use and any resale:
      - 1. All conveyances of newly constructed affordable housing dwelling units that are for sale shall contain a deed restriction and mortgage lien, which shall be recorded with the county [recorder of deeds *or equivalent official*]. Any restrictions on future resale shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies.

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2. Affordable housing units shall, upon initial sale, and resale in the period covered by the development agreement, be sold to eligible low- or moderate-income households at an affordable sales price and affordable housing cost.
  3. Affordable housing units shall be occupied by eligible low- or moderate-income households during the period covered by the development agreement.
- (c) In the case of rental housing developments, the development agreement shall include the following affordability controls governing the use of affordable housing units during the use restriction period:
1. rules and procedures for qualifying tenants, establishing affordable rent, filling vacancies, and maintaining affordable housing rental units for qualified tenants;
  2. requirements that owners verify tenant incomes and maintain books and records to demonstrate compliance with the agreement and with the ordinance; and
  3. requirements that owners submit an annual report to the local government demonstrating compliance with the agreement and with the ordinance.
- (d) The development agreement shall include a schedule that provides for the affordable housing units to be built or rehabilitated concurrently with the units that are not subject to affordability controls.
- (10) The local government [or the redevelopment authority] shall acquire real property in a redevelopment area by eminent domain only where and to the extent that the redevelopment area ordinance, as amended, specifically states, supported by findings therein including substantial and specific financial and appraisal information, that purchase of the real property would be unfeasible. Purchase shall be deemed unfeasible where it would increase the cost of acquisition beyond the funding available or where it would unreasonably delay the implementation of the redevelopment area plan.
- ◆ Therefore, it is not sufficient for the implementing agency or entity to determine that purchase would be unfeasible. The local legislative body must agree, and there must be data to support the findings.
- (11) (a) Wherever it is not inconsistent with the redevelopment area plan, structurally-sound buildings and structures that are designated for redevelopment pursuant to the redevelopment area ordinance shall be renovated and not destroyed.

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- (b) A historic landmark, as defined in Section [9-301], shall not be destroyed or demolished pursuant to the redevelopment area ordinance unless the redevelopment area plan specifically declares, upon reasonable findings, that the landmark building or structure is not structurally sound and cannot be rendered structurally sound and habitable except at a prohibitive cost. Such findings shall specifically include a reasonable estimate of the cost of rendering the building or structure sound and habitable.

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### *Commentary: Tax Increment Financing*

#### **BASICS**<sup>103</sup>

Tax increment financing, or “TIF,” is a method of financing redevelopment activities that is directly tied to the success of those activities. With some exceptions, an economically depressed area of a local government brings in much less tax revenue than an economically healthy area of equivalent size and population. If such an area can be made attractive to developers, and tax-generating private development occurs where it has not in recent years, then the tax revenue collected from the area should rise. Tax increment financing taps into this increase in tax revenue to finance the improvements and activities that make redevelopment occur.

Essentially, the local government determines the property tax revenue it is collecting in the given area before redevelopment occurs. The local government then borrows money, with loans or by the sale of bonds. The borrowed funds are used in various ways to improve the development prospects of the area: loans to new businesses, capital improvements, new services such as improved street cleaning and security patrols, advertising and marketing. As development occurs in the area, tax revenue increases, and the excess above pre-redevelopment property tax revenue in the area is used to pay off the loans or bonds and to finance further redevelopment activities. That excess is the “tax increment” in tax increment financing.

#### **TIF ISSUES**

Tax increment financing sounds very attractive – the local government is (theoretically) not giving up any revenue, as the tax increment would not (again, theoretically) exist were it not for the

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<sup>103</sup>A good introduction to tax increment financing is Sam Casella, Tschangho John Kim, Clyde W. Forrest, and Karen A. Przepyszny, *Tax Increment Financing Planning Advisory Service Report No. 389* (Chicago: Amer. Planning Ass’n, 1985). See also Donald G. Haman and Julian C. Juergensmeyer, *Urban Planning and Land Development Control Law, 2nd Ed.* (St. Paul, Minn.: West, 1986), 551-553; Jonathan Davidson, “Tax-Related Development Strategies for Local Government,” in J. Benjamin Gailey, ed., *1985 Zoning and Planning Law Handbook*, (New York: Clark Boardman Co., 1985) 234-241; Christina G. Dudley, “Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast,” *U. Mo. K.C. L. Rev.* 54. (1985): 77; Jonathan M. Davidson, “Tax Increment Financing as a Tool for Community Development,” *U. Det. J. Urb. L.* 56 (1979): 405.

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redevelopment activities financed by that increment. However, there are potential problems with TIF.

If tax increment financing is imposed where it is not needed to encourage development – where development would have occurred in the absence of TIF – then the tax increment does not represent (or only a portion represents) local government revenues that would not have otherwise been collected. Instead, the tax increment cuts into general revenue that the local government would have otherwise received.

This is especially problematic when the tax increment consists not only of the “additional” property tax revenue otherwise payable to the local government but of a general cap at pre-TIF levels on property valuations or tax assessments. If tax increment financing is structured in this manner, and is imposed when not necessary, the tax increment also deprives other governmental bodies that receive property tax revenue – school districts, other special districts, the county, and so forth – of the increase they would otherwise have received.

### LEGAL CHALLENGES TO TIF

Statutes authorizing tax increment finance have been challenged in the courts on a variety of theories. The most broadly-applicable grounds – basic constitutional arguments of due process and equal protection – have also been the least successful. Since the property tax assessed and collected from the landowner remains the same, property in the TIF district is not being classified separately from land outside the district for purposes of equal protection and uniform taxation clauses.<sup>104</sup> Courts have rejected claims by taxpayers outside a TIF district that the shifting of tax revenues under tax increment financing causes them to bear a burden for which they receive no benefit.<sup>105</sup> The allocation of TIF money to private development has been upheld against legal challenge when the private benefits were incidental to the implementation of a redevelopment plan that served a valid public purpose.<sup>106</sup> Allegations that TIF constitutes a taking have also been unsuccessful,<sup>107</sup> as have claims that the allocation of TIF revenue to a religiously-affiliated entity in the redevelopment area constituted a violation of the establishment of religion clause of the First Amendment (and its state-constitution equivalents).<sup>108</sup>

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<sup>104</sup>*State ex rel. Schneider v. City of Topeka*, 605 P.2d 556 (Kan. 1980); *Metropolitan Dev. & Housing Agency v. Leech*, 591 S.W.2d 427 (Tenn. 1979).

<sup>105</sup>*South Bend Pub. Trans. Corp. v. City of South Bend*, 428 N.E.2d 217 (Ind. 1981).

<sup>106</sup>*Meierhenry v. City of Huron*, 354 N.W.2d 171 (S.D. 1984); *Short v. City of Minneapolis*, 269 N.W.2d 331 (Minn. 1978); *Tribe v. Salt Lake City Corp.*, 540 P.2d 499 (Utah 1975).

<sup>107</sup>*Metropolitan Dev. & Housing Agency v. Leech*, 591 S.W.2d 427 (Tenn. 1979); *Richards v. City of Muscatine*, 237 N.W.2d 48 (Iowa 1975).

<sup>108</sup>*In re Minneapolis Community Dev. Agency*, 439 N.W.2d 708 (Minn. 1989), cert. den'd 493 U.S. 894 (1989).

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On the other hand, specific provisions in state constitutions have been the basis for successful challenges to TIF statutes and ordinances on some occasions. Several states impose debt limits on local governments, and while some courts have found that bonds financed with tax increments do not apply to the debt limit, on the grounds that the increment would not exist in the absence of TIF,<sup>109</sup> other courts have found that a local government exceeded its limits by issuing TIF-secured bonds.<sup>110</sup> Similarly, some courts have struck down TIF ordinances that included a bond issue on the basis that the issuance of any local government bonds secured by *ad valorem* taxes must be approved by referendum.<sup>111</sup> Other states, where only measures that would increase taxes or the tax obligation require approval by the voters, rejected this argument.<sup>112</sup> Another effective basis for legal attacks on TIF has been specific constitutional provisions that school taxes could be spent only for the support of public schools; a tax increment on the portion of property taxes intended to fund public schools was deemed an improper diversion of educational funding to non-educational purposes.<sup>113</sup>

### STATE TIF STATUTES

Nearly every state has adopted statutes authorizing tax increment financing programs to raise funds for redevelopment.<sup>114</sup>

**California** pioneered tax increment financing and is one of the leading users of TIF. Under its statute,<sup>115</sup> TIF may be imposed only where it “shall be necessary for effective redevelopment.” TIF-eligible redevelopment areas must be blighted, though it is expressly provided that not all property or buildings in the area need be in a blighted condition so long as “such conditions predominate.” Redevelopment areas need not be contiguous. TIF may be applied specifically to promote affordable

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<sup>109</sup>*State v. Miami Beach Redev. Agency*, 392 So.2d 875 (Fla. 1980); *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374 (Colo. 1980).

<sup>110</sup>*Richards v. City of Muscatine*, 237 N.W.2d 48 (Iowa 1975).

<sup>111</sup>*City of Tucson v. Corbin*, 623 P.2d 1239 (Ariz. Ct. App. 1980); *Miller v. Covington Dev. Auth.*, 539 S.W.2d 1 (Ky. 1975). But see *Metropolitan Dev. & Housing Agency v. Leech*, 591 S.W.2d 427 (Tenn. 1979).

<sup>112</sup>*Tax Increment Fin. Comm’n of Kansas City v. J.E. Dunn Constr. Co.*, 781 S.W.2d 70 (Mo. 1989).

<sup>113</sup>*Miller v. Covington Dev. Auth.*, 539 S.W.2d 1 (Ky. 1976).

<sup>114</sup>Alan C. Weinstein & Maxine Goodman Levin, “Tax Increment Financing,” Chapter 33B in Patrick J. Rohan & Eric D. Kelly, eds., *Zoning and Land Use Control*, Vol. 6 (New York: Matthew Bender & Co. 1998).

<sup>115</sup>Cal. Health & Safety Code §§33000 *et seq.*

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housing in non-blighted areas by financing a Low- and Moderate-Income Housing Fund. A redevelopment plan for the TIF area must be adopted, and it must contain a time limit, which for the exercise of eminent domain can be no more than 12 years from the plan's adoption.

The local government may issue bonds or obligations secured by revenue from the TIF, from the affected or other redevelopment projects, from general local government taxes, or from state and federal assistance funds. The TIF revenue must be deposited into a separate account for the redevelopment area. At least 20 percent of the increment revenue must be spent on low- and moderate-income housing for displaced residents unless housing needs in the local government are already met.

**Illinois'** Tax Increment Allocation Redevelopment Act<sup>116</sup> was the model for the TIF statutes in **Missouri**<sup>117</sup> and **South Carolina**.<sup>118</sup> The area must be found to be "blighted" (several factors constituting blight are defined) or to constitute a "conservation area" (areas with at least half the housing over 35 years old that are not blighted but may become blighted due to certain enumerated factors) to qualify for tax increment financing. Redevelopment areas must consist of contiguous properties. A redevelopment plan must be adopted for the area before it is created, and the plan must be consistent with the comprehensive plan and found to be necessary to the development of the area. There must be notice – to the public, property owners and residents of the area, and affected taxing units – and a hearing before the redevelopment area can be declared and tax increment financing imposed. The redevelopment area cannot be in effect more than 23 years, and no bond or obligation to finance redevelopment can last longer than the redevelopment area.

The property tax increment itself is derived as follows: The property tax assessments of all the land in the redevelopment area at the time of the adoption of the TIF ordinance are added together. The property tax rates of the various taxing units are then applied to that figure rather than to the present assessed value of the properties, and the sums derived are paid to the taxing units as in the absence of TIF. What is left over from the application of the tax rates to the present assessed values once that sum is paid goes into a special account to cover redevelopment costs and/or debt service on bonds issued to pay redevelopment costs. Under the Illinois statute, local sales taxes may also be subjects of tax increment financing.

To finance redevelopment, the local government may issue bonds and other obligations, secured not only by TIF revenue, but also by general tax revenue, revenues from redevelopment activities, mortgages on redevelopment property, or even the full faith and credit of the local government.

**Minnesota**, along with California as mentioned above, is one of the leading states in employing tax increment financing. Its statute<sup>119</sup> provides that TIF may be applied in certain "redevelopment

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<sup>116</sup>65 Il. Comp. Stat. §§5/11-74.4-1 *et seq.*.

<sup>117</sup>Mo. Rev. Stat. §§99-800 *et seq.*.

<sup>118</sup>S.C. Code §§31-6-10 *et seq.*.

<sup>119</sup>Minn. Stat. §§469.174 *et seq.*.

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districts” and “housing districts” as defined by certain criteria, and in catch-all, less-stringent “economic development districts.” To exclude farmland and undeveloped land from TIF districts, TIF areas cannot include vacant land unless that land meets very specific and narrow criteria. Redevelopment and housing districts may have a duration of 25 years, while economic development districts can last no more than the shorter of 10 years from the adoption of the tax increment financing plan or 8 years from the receipt of the first tax increment. A tax increment financing plan must be adopted for the TIF district after notice and a hearing, and it must specify the redevelopment tools and activities it will be financing. The entire tax increment may be applied to redevelopment costs and debt service pursuant to the TIF plan.

Ohio’s statute<sup>120</sup> addresses the issue of property taxes assessed on behalf of other governmental units. School districts that are affected by a TIF district must be notified of its creation. The school board must approve the TIF, or a payment in lieu of taxes must be made to the school district, if it will exist more than ten years or affect more than a certain percentage of the assessed valuation. Agreements exempting a portion of the tax increment (that is, paying part of the tax increase to the school district) may also be entered into by the local government and the school district. [Other states have also addressed this issue. **New York**<sup>121</sup> and **Florida**<sup>122</sup> exempt school districts from the application of tax increment financing. **Kentucky**<sup>123</sup> allows taxing units to exempt themselves – a taxing unit must agree with the local government for its tax revenue to be subject to the tax increment.]

More generally, the Ohio TIF statutes provide that a tax increment financing district must be created by ordinance. The ordinance must include a fixed term for the district, not to exceed thirty years, and must be filed with the state Department of Development. The local government must also file annual status reports with the Department for the duration of the TIF district.

### CONTENTS OF THE MODEL STATUTE

One of the central features of Section 14-302 below is that tax increment financing is intrinsically linked to the broader redevelopment program it is intended to finance. A TIF ordinance cannot be adopted unless there is a redevelopment area plan in place and an ordinance to implement that plan has been adopted. As with all other land development regulations, a TIF ordinance must be consistent with the development area plan. In this manner, TIF is coordinated with the broader efforts to redevelop a “depressed” or underdeveloped area. Unlike the TIF statutes of some states, this model does not describe how TIF money is to be spent; this is determined by the redevelopment area plan and the redevelopment area ordinance implementing it.

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<sup>120</sup>Ohio Rev. Code §§5709.40 *et seq.* (municipalities), §§5709.73 *et seq.* (townships), and §§5709.77 *et seq.* (counties).

<sup>121</sup>N.Y. Gen. Mun. Law §970-n.

<sup>122</sup>Fla. Stat. §163.340(2).

<sup>123</sup>Ky. Rev. Stat. §§99.751(8), 99.761.

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Another important element of the Section, derived from several of the existing state statutes, is that tax increment financing must be found to be essential; that is, without TIF, the redevelopment area plan could not be implemented. As discussed above, tax increment financing is a special tool to be used only where necessary. On the other hand, redevelopment activity is generally desirable and encouraged, and the *Guidebook* generally does not apply a necessity test to the adoption of a redevelopment area plan or ordinance. Therefore, the necessity requirement has been placed in brackets so that it is optional: each adopting legislature may include or remove it.

There are several places in the text where “on behalf of the local government” is in brackets. This is alternative language, creating two different approaches to property tax increments. With the bracketed phrase omitted, the tax increment represents all new or additional property tax revenue in the redevelopment area, whether collected on behalf of the local government or some other taxing entity (school districts, for instance). When the bracketed language is included, only the additional property tax revenue collected for the local government is included in the tax increment, eliminating claims that TIF is cutting into the tax revenues of other government bodies.

The Section authorizes local governments, at their option, to impose tax increment financing on local sales taxes. Unlike real property taxes, it is typical for local governments to collect their own sales taxes. Therefore, TIF applies under the Section only to the local government’s own sales taxes; there is no alternative language as with the real property tax increment.

The model statute provides for the deposit of the tax increment revenue in a special account and for the distribution of any funds remaining in that account when redevelopment activities terminate. Since the total tax increment represents revenue that was collected pursuant to the regular real property and/or sales taxes but was set aside for a special purpose – redevelopment – when that special purpose terminates, those funds should go where tax revenue normally goes. If the tax increment applies only to the property and sales tax assessed on behalf of the local government, the leftover money goes into the local government’s general fund. If the tax increment represents the additional property and sales taxes that would have gone to all taxing units, the funds are distributed to the taxing units *pro rata*. Unused sales tax increment go back to the local government, since the increment is upon only the local government’s sales tax.

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### 14-302 Tax Increment Financing

- (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 ordinance*] a tax increment finance ordinance pursuant to this Section.
- (2) The purposes of tax increment financing are to:
  - (a) finance the redevelopment of duly-established redevelopment areas;

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- (b) raise funds for such redevelopment without unduly burdening the public at large; and
  - (c) account for the costs and benefits of such funding in a manner transparent to the public.
- (3) As used in this Section, and in any other Section where “tax increment financing” is referred to:
- (a) **“Base Individual Property Tax”** means the real property tax assessed [on behalf of the local government] on an individual lot or parcel in the redevelopment area at the last assessment of real property taxes before the adoption of the tax increment finance ordinance;
  - (b) **“Base Sales Tax”** means the taxes levied by, and collected by or on behalf of, the local government pursuant to [*cite sales tax statutes*] on transactions at places of business located within the redevelopment area for the [6] months preceding the calendar month in which the tax increment finance ordinance becomes effective;
  - (c) **“Individual Property Tax Increment”** means the difference between the base individual property tax and the present individual property tax;
  - (d) **“Present Individual Property Tax”** means the real property tax assessed [on behalf of the local government] on an individual lot or parcel in the redevelopment area at the most recent assessment of real property taxes;
  - (e) **“Present Sales Tax”** means the taxes levied by, and collected by or on behalf of, the local government pursuant to [*cite sales tax statutes*] on transactions at places of business located within the redevelopment area for every [6] month period, commencing with the calendar month directly following the month in which the tax increment finance ordinance becomes effective;
  - (f) **“Sales Tax Increment”** means the difference between the base sales tax and the present sales tax;
  - (g) **“Total Base Property Tax”** means the real property tax assessed [on behalf of the local government] on all lots or parcels in the redevelopment area at the most recent assessment of real property taxes;
  - (h) **“Total Present Property Tax”** means the real property tax assessed [on behalf of the local government] on all lots or parcels in the redevelopment area at the most recent assessment of real property taxes;
  - (i) **“Total Property Tax Increment”** means the difference between the total base property tax and the total present property tax; and

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- (j) **“Total Tax Increment”** means the sum of the total property tax increment and the sales tax increment.
- ◆ The total property tax increment should also constitute the sum of all individual property tax increments in the redevelopment area.
- (4) Tax increment finance may be established only pursuant to a tax increment finance ordinance adopted pursuant to this Section.
- (a) A tax increment finance ordinance shall not be adopted unless the local government has adopted:
1. a local comprehensive plan with a redevelopment area plan pursuant to Section [7-303]; and
  2. a redevelopment area ordinance pursuant to Section [14-301].
- [(b) A tax increment finance ordinance shall not be adopted unless:
1. redevelopment would not occur in the redevelopment area without employing redevelopment assistance tools as described in the redevelopment area plan; and
  2. the redevelopment area plan could not be implemented without tax increment financing.]

(5) A tax increment finance ordinance pursuant to this Section shall include the following minimum provisions:

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

(b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-103] and the purposes of this Section;

(c) a statement of consistency with the local comprehensive plan, and with the redevelopment area plan in particular, that is based on findings pursuant to Section [8-104];

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

[(e) specific findings, pursuant to the redevelopment area plan, supporting that:

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1. redevelopment would not occur in the redevelopment area without employing redevelopment assistance tools as described in the redevelopment area plan; and
  2. the redevelopment area plan could not be implemented without tax increment financing;]
- (f) a description, both in words and with maps, of the limits or boundaries of the redevelopment area pursuant to the redevelopment area plan;
- (g) the procedure for review of the determination of individual property tax increments or the total property tax increment, pursuant to paragraph (9) below; and
- (h) provision that the tax increment finance ordinance shall not become effective until the redevelopment area ordinance pursuant to Section [14-301] becomes effective.
- (6) A tax increment finance ordinance pursuant to this Section may establish sales tax increment financing.
- (a) Before the end of the calendar month in which the tax increment finance ordinance becomes effective, the local government shall determine the base sales tax.
- (b) Every [6] months, commencing with the calendar month directly following the month in which the tax increment finance ordinance becomes effective, the local government shall:
1. determine the present sales tax;
  2. from that number and the base sales tax, calculate the sales tax increment; and
  3. deposit the sales tax increment in the special or separate account pursuant to paragraph (10) below within [15] days of the calculation.
- (c) If the sales taxes levied by the local government are collected by another governmental unit, that unit shall:
1. at least [15] days before the effective date of the ordinance, be provided by the local government with a description and map of the boundaries of the redevelopment area pursuant to the redevelopment area plan, and with the effective date of the tax increment finance ordinance; and
  2. make the calculations required by this paragraph every (6) months and remit the sales tax increment to the local government within [15] days of the calculation, whereupon the local government shall deposit the increment in

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the special or separate account pursuant to paragraph (10) below within [15] days of receipt.

- (7) Upon the request of a local government that is preparing a tax increment finance ordinance, said request including:
- (a) a description and map of the boundaries of the redevelopment area pursuant to the redevelopment area plan, with the map delineating the boundaries of the district in relation to tax parcel boundaries; and
  - (b) a list of the tax identification numbers for all lots or parcels in the redevelopment area,

the county [assessor *or equivalent official*] shall provide the local government with an enumeration of the total base property tax and all base individual property taxes for the redevelopment area.

- (8) Upon the adoption of a tax increment finance ordinance, the local government shall notify the county [assessor *or equivalent official*] of such adoption, including the boundaries of the redevelopment area. Thereafter, until the termination of the redevelopment area ordinance pursuant to Section [14-301(5)(m)], the county [assessor *or equivalent official*] shall, upon each assessment of property taxes pursuant to [*cite real property tax statute*]:
- (a) determine the present individual property taxes, individual property tax increments, total present property tax, and total property tax increment for the redevelopment area.
    - 1. The present individual property taxes for all lots or parcels in the redevelopment area shall be determined in the same manner as for any lot or parcel pursuant to [*cite real property tax statute*].
    - 2. The county [assessor *or equivalent official*] shall compare the total property tax increment to the sum of the individual property tax increments, and shall confirm that the total property tax increment equals the sum of the individual property tax increments;
  - (b) include the amount of the base individual property tax and individual property tax increment, along with a brief description of tax increment financing and redevelopment, on each real property tax bill for the redevelopment area; and

- ◆ Taxpayers in the redevelopment area are thus informed of the manner in which their property taxes are being spent, and are aware that increases are not going into the general fund but specifically into the redevelopment of their area.

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- (c) remit the total property tax increment to the local government and provide the local government with the data on present individual property taxes, individual property tax increments, total property present tax, and total property tax increment for the redevelopment area.
  - (9) Any governmental unit that receives real property tax revenue and/or sales tax revenue from the redevelopment area may seek a review by the local legislative body of the determination of property tax increments and/or sales tax increments, as applicable. The procedure for such a review shall conform to the provisions of Chapter [10] of this Act for land-use decisions, and there shall be a record hearing on all such reviews.
  - (10) The total tax increment, and all revenue from the sale of bonds or notes secured by total tax increment pursuant to Section [14-301(6)(a)], shall be deposited in a special interest-bearing account of the local government treasury, except as provided below.
    - (a) If the redevelopment area ordinance is to be implemented by a redevelopment authority pursuant to Section [14-301], the total tax increment, and all revenue from the sale of bonds or notes secured by total tax increment, may be deposited in a separate interest-bearing, federally-insured account at a bank.
- ◆ This provision allows the TIF funds to be deposited in a stable, but privately-owned, institution if and where the intent is to create a redevelopment authority that has a degree of independence from political influence.
- (b) Except as provided in paragraph (10)(c) below, the funds deposited into the special or separate account, and the interest earned thereon, shall be expended only pursuant to the development area plan, as implemented by the development area ordinance pursuant to Section [14-301], to:
    - 1. finance the employment of redevelopment assistance tools and the implementation of the development area ordinance; and
    - 2. pay principal and interest on bonds or notes issued pursuant to Section [14-301(6)(a)] and secured by the total tax increment.
  - (c) If a redevelopment area ordinance is terminated pursuant to Section [14-301(5)(m)] and any funds are remaining in the special or separate account at that time, the funds shall be

*Alternative 1*

remitted to the general fund of the local government treasury.

*Alternative 2*

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conclusively presumed to constitute property tax increments and sales tax increments in the proportion in which such funds were deposited into the account and:

1. to the extent derived from property tax increments, remitted to the county [assessor *or equivalent official*] and distributed to all governmental units that receive property tax revenue from the redevelopment area in proportion to their real property tax rates; and
  2. to the extent derived from sales tax increments, remitted to the general fund of the local government treasury.
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### ***Commentary: Tax Abatement***

#### **BASICS**

One of the most powerful positive tools for affecting public behavior that government has is the tax system. Deductions, exemptions, and credits exist under the federal and state income tax systems to encourage or protect particular activities, such as investing, buying a house on mortgage, and donating to charity. This is no less true for the property and sales tax. In a modern world where business competes globally and can locate nearly anywhere, lower taxes in a given area can be a strong incentive to locate one's business or residence there. Therefore, the ability to reduce taxes in a redevelopment area should be considered as a useful method for bringing about the economic resurgence of a depressed area. And tax abatement can be used for other purposes. A tax break for historic properties can offset some or all of the cost to the landowner of maintaining their property in a historically correct state. Or the developers of residential projects can be encouraged to include affordable dwelling units with the prospect of a significant tax break.

Tax abatement can take two basic forms. The simpler method is to apply a lower tax rate. This can apply to property taxes or to sales taxes. The reduction of sales tax rates can be an especially effective tool for the rapid revival of an area's retail trade. While moving one's business or residence is a long-term decision made infrequently, retail purchases are made every day by almost every person, and are much more susceptible to immediate change.

The more complex method of abating taxes is the property tax freeze. The assessed valuation of real property in the redevelopment area is "frozen" as of a specified date, and real property taxes are levied against that property according to the assessed value on the specified date instead of the present value of the property. Therefore, any increases in the value of real property, whether due to capital improvements to the particular property or to the general economic improvement of the neighborhood, will not result in a higher tax bill that could act as a disincentive to further investments or improvement.

In theory, a property tax freeze should not reduce tax revenues, since the increase in property values in a redevelopment area is attributable to the redevelopment program, including the tax abatement, and would not have occurred in its absence. However, as with tax increment financing

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(Section 14-302), there can be a significant difference between theory and reality: if a tax freeze is applied in an area that would develop and grow without it, then the abatement of property taxes involves forgoing an increase in tax revenue that would have occurred anyway. And as with tax increment financing, this may especially incite resistance from other taxing bodies if a tax freeze applies to all property taxes in the redevelopment area and not just that of the local government instituting the freeze. And it is not at all clear whether tax abatement commonly results in a permanent increase in economic activity and jobs – it is certainly not unknown for businesses to locate in an area due to tax incentives but leave when the incentives are no longer available.<sup>124</sup> These problems are not pointed out to discourage the use of tax abatement in general, or property tax freezes in particular, but to encourage the careful consideration and evaluation of their use.

A tool closely related to tax abatement is the payment in lieu of taxes, or PILOT. The owners of an individual lot or parcel of land agree with the local government that a portion or all of the tax liability for that property will be satisfied by a payment determined by the agreement. The payment may take the form of a fixed amount, or may be a percentage of the revenue or profits generated on the property. The payments are typically less than the property tax they replace, and there is greater certainty for both the local government and the property owner when the amount due is easily determined beforehand.

### STATE STATUTES

**Connecticut**<sup>125</sup> authorizes municipalities to employ tax abatement for “housing solely for low or moderate-income persons or families.” The abatement is implemented through individual contracts between municipalities and the landowners receiving the tax abatement, under which the landowner must spend an amount equal to the abatement on affordable housing and ceases to receive the abatement when the housing is no longer set aside for low or moderate-income households.

**Florida** law<sup>126</sup> provides that local governments may exempt sales within “urban infill and redevelopment areas” from the local-option sales surtax upon the application of qualified businesses.

**Illinois**<sup>127</sup> authorizes municipalities to enter into “economic incentive agreements” to share or rebate the retailers’ occupation tax with businesses that are developing vacant or underutilized land

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<sup>124</sup>There is considerable literature on the subject of the effectiveness of tax incentives. Some useful examples are Timothy Bartik, *Who Benefits from State and Local Economic Development Policies?* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1991); Roger Wilson, *State Business Incentives and Economic Growth: Are They Effective? A Review of the Literature* (Lexington, KY: Council of State Governments, 1989); Rachel Weber, “Why Local Economic Development Incentives Don’t Create Jobs: The Role of Corporate Governance,” *Urban Lawyer* 32, no. 1 (winter 2000): 97; Margaret Dewar, “Why State and Local Economic Development Programs Cause So Little Economic Development,” *Econ. Dev. Q.* 12 (1998): 68; and Michael Wolkoff, “Chasing a Dream: The Use of Tax Abatements to Spur Urban Economic Development,” *Urban Studies* 22 (1985):305-315.

<sup>125</sup>Conn. Gen’l Stat. §8-215 (1999).

<sup>126</sup>Fla. Stat. §163.2517 (2000).

<sup>127</sup>65 Ill. Comp. Stat. §5/8-11-20 (1999).

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and creating or retaining jobs, where the tax break is necessary to increase the local tax base and/or improve the commercial sector of the municipal economy.

**Maryland** requires counties and municipalities to grant a property tax credit to all qualified property within an enterprise zone.<sup>128</sup> It also authorizes them to provide a tax credit, tied directly to the increase in valuation due to redevelopment (and therefore similar to a “freeze”), to qualified brownfields property.<sup>129</sup> Maryland has also authorized the use of payments in lieu of taxes, or PILOT, agreements for leaseholds on government-owned land,<sup>130</sup> low-income multifamily rental housing in various forms,<sup>131</sup> rental housing which becomes tenant-owned or cooperative and preserves at least 10 percent of the units for low and moderate income tenants,<sup>132</sup> land in Baltimore City subject to an urban renewal land disposition agreement,<sup>133</sup> certain land in Baltimore City’s “Downtown Management District,”<sup>134</sup> and certain “economic development projects” in urban renewal areas of Baltimore City.<sup>135</sup>

**Ohio**<sup>136</sup> authorizes the exemption of improvements to property in a locally declared blighted area, up to the full value of the improvements if the affected school districts agree to participate and 75 percent of the value if they do not. School districts are expressly authorized to condition their approval on entering into a mutually acceptable compensation agreement with the local government. The exemption can last for up to 30 years for residential properties of three units or smaller and 20 years for all other property.

**Oregon**<sup>137</sup> authorizes cities to designate, by ordinance, distressed areas, not to exceed 20 percent of the city’s total area, in which qualified single-family dwellings may be extended a real property tax exemption for up to 10 years. Generally, the tax exemption applies only to the city’s taxes and the taxes of any governmental body that agrees to the exemption, but the exemption applies to all

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<sup>128</sup>Md. Code §9-103 (1999).

<sup>129</sup>Md. Code §9-229.

<sup>130</sup>Md. Code §7-501 (2000).

<sup>131</sup>Md. Code §§7-502, -503, -505, -506, and -506.1.

<sup>132</sup>Md. Code §7-506.2

<sup>133</sup>Md. Code §7-504.

<sup>134</sup>Md. Code §7-504.2.

<sup>135</sup>Md. Code §7-504.3.

<sup>136</sup>Ohio Rev. Code §1728.10 (2000).

<sup>137</sup>Or. Rev. Stat. §§458.005 - 458.065 (1999).

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taxes on the exempt property when the taxes of the city and all agreeing governmental units are 51 percent or more of the property taxes levied on the property in question.

**Texas**<sup>138</sup> authorizes tax abatement in designated “reinvestment zones.” A reinvestment zone must be eligible for federal assistance, and the municipality must find that the area arrests or impairs the sound growth of the municipality, retards the provision of affordable housing, or constitutes an economic or social liability. Abatement is extended by taxing bodies to particular property within a reinvestment zone through an abatement agreement, whereby the owner agrees to spend the abated taxes on improvements specified in the agreement and to allow the local government to inspect the premises to ensure the improvements are made. The agreement must also provide for the recapture of abated taxes if the improvements specified are not made. Abatement agreements cannot extend beyond ten years, and their adoption or amendment must be approved by a majority of the taxing body’s governing body. Before a taxing body may enter into abatement agreements, it must adopt guidelines and criteria for such agreements. And before an individual abatement agreement can take effect, the local government must notify all other affected taxing bodies of the proposed agreement and hold a hearing to determine whether “the improvements sought are feasible and practical and would be a benefit to the land to be included in the zone and to the municipality after the expiration of an agreement entered into.”

**Vermont**<sup>139</sup> enables local governments to enter into tax stabilization agreements with the owners of “agricultural, forest land, open space land, industrial or commercial real and personal property and alternate-energy generating plants,” under which assessed values, tax rates, or the total tax payment can be frozen. The agreements generally cannot last more than 10 years and must be approved at a town meeting by two-thirds of those present for commercial or industrial property or a majority for other authorized property.

### STATE CASE LAW

Many if not most state constitutions include a provision mandating uniformity of taxation. The requirement of uniformity is not absolute, however, and reasonable distinctions and classifications have generally been upheld against challenges based on uniformity provisions.<sup>140</sup> Specifically, state courts tend to uphold tax exemptions granted against local taxes pursuant to officially approved redevelopment plans.<sup>141</sup>

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<sup>138</sup>Texas Tax Code §§312.001 *et seq.*

<sup>139</sup>Vt. Stat., tit. 24 §2741 (2000).

<sup>140</sup>*Deluxe Theatres, Inc. v. City of Englewood*, 198 Colo. 85, 596 P.2d 771 (1979); *508 Chestnut Inc. v. St. Louis*, 389 S.W.2d 823 (Mo. 1965); *Visina v. Freeman*, 252 Minn. 177, 89 N.W.2d 635 (1958); *Dole v. Philadelphia*, 337 Pa. 375, 11 A.2d 163 (1940).

<sup>141</sup>*Denver Urban Renewal Authority v. Byrne*, 618 P.2d 1274 (Colo. 1980); *American Linen Supply Co. v. Dep’t of Revenue*, 617 P.2d 131 (Mont. 1980); *State ex rel. Atkinson v. Planned Industrial Expansion of St. Louis*, 517 S.W.2d 36 (Mo. 1975); *Dayton v. Cloud*, 30 Ohio St.2d 295, 285 N.E.2d 42 (1972).

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### CONTENTS OF THE MODEL STATUTE

The Section below, 14-303, is intended to operate integrally with the relevant elements of the local comprehensive plan. For redevelopment, this is the redevelopment area plan pursuant to Section 7-303 and the redevelopment area ordinance under Section 14-301. It is in the plan that the local government makes the finding that an area of the local government is underdeveloped or has deteriorated, sets the boundaries of the redevelopment area, and makes the general decisions on the appropriate tools for redevelopment in that area. The redevelopment area ordinance – and this Section – flesh out and implement the policy decisions of the plan. Tax abatement cannot commence before the redevelopment area ordinance takes effect, and tax abatement must terminate when the local government makes the decision (under Section 14-301) that redevelopment tools are no longer needed in the area. Similar provisions tie tax abatement for affordable housing to the housing element of the local comprehensive plan (Section 7-207), and abatement to support historic preservation is linked to the historic preservation element (Section 7-215).

The Section authorizes the “freezing” of property tax assessed values, the reduction of property tax rates, and/or the reduction of sales tax rates. As was stated earlier, the freezing of all property taxes in a given area or for a particular property may be controversial and objectionable to the other taxing bodies levying property tax in the freeze area. Therefore, in adopting the Section, a state legislature must decide whether valuation freezes apply only to the local government’s own property tax or to all property taxes levied in the freeze area by any taxing body. A related optional provision for redevelopment-focused abatement requires, as a prerequisite to a property tax freeze, that the local government make specific findings, supported by evidence, that a tax freeze is necessary for the development of the redevelopment area.

The impact of removing a freeze and suddenly reapplying present valuation could be a sudden “shock” to the economy of the freeze area and a potential setback to the development already achieved. Therefore, the Section authorizes local governments to phase in present assessed valuation at the end of a property tax freeze.

The Section also authorizes the use of payments in lieu of taxes, or PILOTs. As provided below, the local government and a landowner may enter into a development agreement pursuant to Section 8-701 whereby the landowner makes payments in lieu of a portion or all of the applicable property. The payment may be a fixed sum, a percentage of the gross profits generated on the premises, some combination of the two, or any other method chosen by the parties. Since the revenue is a substitute for general property taxes, the payments in lieu may be applied in whole or in part to the general fund of the local treasury. This distinguishes PILOTs from tax increment financing pursuant to Section 14-302. The creation of PILOT agreements with multiple taxing bodies as parties is expressly authorized, so that PILOT arrangements may be applied to property taxes beyond those imposed by the local government.

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### 14-303 Tax Abatement

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- (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 ordinance*] a tax abatement ordinance pursuant to this Section.
- (2) The purposes of tax abatement are to:
  - (a) encourage and foster the redevelopment of economically depressed areas;
  - (b) reduce the burden of maintaining historically or culturally significant property in proper condition; or
  - (c) encourage the inclusion of affordable housing units in new and renovated development; and
  - (d) provide a practical framework through which the impact of property and/or sales taxes may be reduced in order to achieve the aforementioned purpose.
- (3) As used in this Section, and in any other Section where “tax abatement” is referred to:
  - [(a) **“Affected Governmental Unit”** mean any governmental unit that levies real property tax upon property included in a real property tax freeze pursuant to a tax abatement ordinance.]
  - (b) **“Affordable Housing”** means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate- or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which annual housing costs constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the affordable rent is no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.
  - (c) **“Affordable Housing Cost”** means the sum of actual or projected monthly payments for any of the following associated with for-sale affordable housing units: principal and interest on a mortgage loan, including any loan insurance fees; property taxes and assessments; fire and casualty insurance; property maintenance and repairs; homeowner association fees; and a reasonable allowance for utilities.
  - (d) **“Affordable Rent”** means monthly housing expenses, including a reasonable allowance for utilities, for affordable housing units that are for rent to low- or moderate-income households.

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- (e) **“Affordable Sales Price”** means a sales price at which low- or moderate-income households can qualify for the purchase of affordable housing, calculated on the basis of underwriting standards of mortgage financing available for the housing development.
- (f) **“Freeze Date”** means the date, determined in the tax abatement ordinance, whereupon the assessed value of real property shall be employed as the assessed value for levying the real property tax [on behalf of the local government] so long as the tax abatement ordinance is in effect;
- (g) **“Freeze Value”** means the assessed value of real property as of the freeze date;
- (h) **“Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (i) **“Moderate-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (j) **“Non-Freeze Value”** means the assessed value that would be employed in the absence of a real property tax freeze.
- (k) **“PILOT Agreement”** means a development agreement, pursuant to Section [8-701], whereby a landowner makes payments in lieu of a portion or all of the real property taxes levied on behalf of the local government;
- (l) **“Real Property Tax”** means the tax created by and levied pursuant to [*cite real property tax statute*];
- (m) **“Real Property Tax Freeze”** means the levying of the real property tax [on behalf of the local government] against the freeze value regardless of subsequent increases in value or improvements to the real property;
- (n) **“Sales Tax”** means the tax created by and levied pursuant to [*cite sales tax statute or statutes*].

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- (4) Tax abatement may be established only pursuant to a tax abatement ordinance adopted pursuant to this Section, and a PILOT agreement may be adopted only pursuant to this Section.
- (a) A tax abatement ordinance or PILOT agreement shall not be adopted unless the local government has adopted a local comprehensive plan with:
1. a redevelopment area plan pursuant to Section [7-303], accompanied by a redevelopment area ordinance pursuant to Section [14-301];
  2. a historic preservation element pursuant to Section [7-215], accompanied by a historic preservation ordinance pursuant to Section [9-301]; and/or
  3. a housing element pursuant to Section [7-207].
- (b) A tax abatement ordinance or PILOT agreement adopted pursuant to:
1. paragraph (2)(a) and (4)(a)1 above shall not employ tax abatement outside a redevelopment area [and shall not employ a real property tax freeze unless development would not occur in the redevelopment area without employing a real property tax freeze as described in the redevelopment area plan];
- ◆ The optional bracketed provision exists to prevent local governments from abusing its redevelopment powers by freezing real property taxes where development would occur whether taxes were frozen or not. The provision may be especially desirable where the legislature decides to apply property tax freezes to all real property taxes levied in the redevelopment area, by the local government and by other taxing bodies.
2. paragraph (2)(b) and (4)(a)2 above shall employ tax abatement only for property designated as a historic landmark or within a designated historic district pursuant to Section [9-301]; and
  3. paragraph (2)(c) and (4)(a)3 above shall employ tax abatement only for property where affordable housing units shall be created, either by construction, renovation, or the designation of existing housing units as affordable housing units.
- (5) A tax abatement ordinance may provide for one or more of the following:
- (a) a real property tax freeze;
  - (b) a reduction in the rate levied by the local government under the real property tax; and/or

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- (c) a reduction in the rate levied by the local government under the sales tax.
- (6) A tax abatement ordinance pursuant to this Section shall include the following minimum provisions:
  - (a) a citation to enabling authority to adopt and amend the ordinance;
  - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-103] and the purposes of this Section;
  - (c) a statement of consistency with the local comprehensive plan, and with the:
    - 1. redevelopment area plan and ordinance;
    - 2. historic preservation element and ordinance; or
    - 3. housing element;in particular, that is based on findings pursuant to Section [8-104];
  - (d) definitions, as appropriate, for such words or terms contained in the ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
  - [(e) where the ordinance is adopted pursuant to paragraph (2)(a) and (4)(a)1 and authorizes a real property tax freeze, specific findings, pursuant to the redevelopment area plan, supporting that development would not occur in the redevelopment area without employing a real property tax freeze;]
- ◆ This paragraph is included or deleted in conjunction with the optional language of paragraph (4)(b)1 above.
  - (f) for tax abatement pursuant to paragraphs (2)(a) and (b) and (4)(a)1 and 2, a description, both in words and with maps, of the limits or boundaries of the property eligible for tax abatement. For redevelopment areas, this shall be the boundaries of the area pursuant to the redevelopment area plan, and for historic districts or landmarks it shall be the boundaries of the historic district or landmark pursuant to the historic preservation element;
  - (g) procedures for the review of applications for tax abatement, including the designation of an officer or body to review and approve applications for tax abatement;
  - (h) a statement of:

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1. the freeze date, which shall be the effective date of the tax abatement ordinance if a separate freeze date is not stated; and/or
  2. the reduced tax rate or rates that will be applied;
- (i) a requirement that tax abatement pursuant to paragraphs (2)(c) and (4)(a)3 shall not apply to particular property unless and until the owners of the property enter into a development agreement with the local government, pursuant to Section [8-701] and paragraph (10) below, to ensure the continuing availability of affordable housing for sale or rent; and
  - (j) a provision that a tax abatement ordinance for redevelopment shall not become effective until the applicable redevelopment area ordinance pursuant to Section [14-301] becomes effective and shall terminate upon the termination of the applicable redevelopment area ordinance as provided in Section [14-301(5)(m)]. Notice of said termination shall be transmitted in writing, at least [15] days before the effective date of the termination, to the county [assessor *or equivalent official*][ and all affected governmental units].
- (7) A tax abatement ordinance:
- (a) may provide that tax abatement shall not apply to particular property unless and until the owners of the property enter into a development agreement with the local government, pursuant to Section [8-701], containing reasonable conditions to ensure that the purposes of this Section and the public policies of the local government are implemented.
  - (b) that authorizes a real property tax freeze may include a provision for, upon the termination of tax abatement, a gradual transition from applying the freeze value to applying the non-freeze value.
    1. The tax abatement ordinance shall specify in detail the nature and method of the gradual transition.
    2. The local government shall notify the county [assessor *or equivalent official*] [and all affected governmental units], in writing and at least [15] days before their effective date, of the provisions of the tax abatement ordinance regarding gradual transition, and the county [assessor *or equivalent official*] shall implement the gradual transition provisions as notified.
- (8) Upon the adoption of a tax abatement ordinance that authorizes a real property tax freeze and its application to particular property pursuant to the ordinance, the local government shall notify the county [assessor *or equivalent official*][and all affected governmental units] of such adoption and application, including the boundaries of the affected area and the freeze

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date. Thereafter, until the termination of tax abatement pursuant to paragraph (6)(i) above, the county [assessor *or equivalent official*] shall:

- (a) determine the freeze values of all taxable real property in the affected area;
  - (b) upon each assessment of property taxes pursuant to [*cite real property tax statute*], assess and collect the real property tax [of the local government] within the affected area by applying the freeze value instead of the non-freeze value;
  - (c) include the freeze value and the non-freeze value, along with a brief description of tax abatement and the purpose for which it was adopted by the local government, on each real property tax bill for real property in the affected area; and
  - (d) report annually in writing to the local government [and all affected governmental units]:
    1. the difference between the real property tax that was collected in the last year pursuant to the tax abatement ordinance and the real property tax that would have been collected in the last year in the absence of the tax abatement ordinance; and
    2. where the tax abatement ordinance provides for a real property tax freeze, the non-freeze value for the affected area as a whole.
- (9) A local government may enter into a PILOT agreement as provided in this Section and Section [8-701].
- (a) A PILOT agreement may include the abatement of property taxes, and payment in lieu of said taxes, for any governmental unit levying real property tax upon the affected property that enters into the PILOT agreement with the consent of all other parties.
  - (b) A PILOT agreement shall include, in addition to the requirements of Section [8-701], the following minimum provisions:
    1. the amount of the real property tax of the local government that is abated by the agreement, expressed as a percentage of the tax due, a tax rate, an assessed valuation, or some other reasonably clear method;
    2. the amount of the payments in lieu of the real property tax abated, including the reasonably clear method by which the amount is calculated if it is not a fixed sum;
    3. the dates on which the payments are due; and

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4. for a PILOT agreement pursuant to paragraph (2)(c) and (4)(a)3, the provisions required by paragraph (10) below.
  - (c) A PILOT agreement may contain other reasonable terms and conditions to ensure that the purposes of this Section and the public policies of the local government are implemented.
  - (d) A copy of the PILOT agreement shall be provided to the county [assessor *or equivalent official*]. Thereafter, until the termination of the PILOT agreement according to its terms and conditions, the county [assessor *or equivalent official*] shall levy the real property taxes of the local government, and any other governmental unit that is a party to the PILOT agreement, according to the terms and conditions of the PILOT agreement.
- (10) A development or PILOT agreement pursuant to paragraphs (6)(i) or (10)(b)4 shall include provisions to ensure the availability of affordable housing for sale or rent.
  - (a) The development agreement shall provide for a period of availability for affordable housing as follows:
    1. Newly constructed low- and moderate-income sales and rental dwelling units shall be subject to affordability controls for a period of not less than [15] years, which period may be renewed pursuant to the development agreement;
    2. Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
    3. Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
    4. Any dwelling unit created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to affordability controls as delineated in subparagraph (a) 1 above.
    5. Affordability controls on owner- or renter-occupied accessory apartments shall be applicable for a period of at least [5] years.
    6. Alternatives not otherwise described in this subparagraph shall be controlled in a manner deemed suitable to the local government and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.

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- (b) In the case of for-sale housing developments, the development agreement shall include the following affordability controls governing the initial sale and use and any resale:
1. All conveyances of newly constructed affordable housing dwelling units subject to the affordable housing incentives ordinance that are for sale shall contain a deed restriction and mortgage lien, which shall be recorded with the county [recorder of deeds *or equivalent official*]. Any restrictions on future resale shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies.
  2. Affordable housing units shall, upon initial sale, and resale in the period covered by the development agreement, be sold to eligible low- or moderate-income households at an affordable sales price and housing cost.
  3. Affordable housing units shall be occupied by eligible low- or moderate-income households during the period covered by the development agreement.
- (c) In the case of rental housing developments, the development agreement shall include the following affordability controls governing the use of affordable housing units during the use restriction period:
1. rules and procedures for qualifying tenants, establishing affordable rent, filling vacancies, and maintaining affordable housing rental units for qualified tenants;
  2. requirements that owners verify tenant incomes and maintain books and records to demonstrate compliance with the agreement and with the ordinance;
  3. requirements that owners submit an annual report to the local government demonstrating compliance with the agreement and with the ordinance.
- (d) Where affordable housing is being created by construction or renovation, the development agreement shall include a schedule that provides for affordable housing units to be created concurrently with the units that are not subject to affordability controls.

## AGRICULTURAL DISTRICTS

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### *Commentary: Agricultural Districts*<sup>142</sup>

Agricultural district statutes allow the establishment of special areas where commercial agriculture is encouraged and protected. Land within such areas is then assessed at its use value in agriculture rather than its market or speculative value, a concept called “differential assessment.”<sup>143</sup> The theory is that, if land is taxed in this way, it will remove the financial pressure that comes about from rising land values, particularly on the fringes of metropolitan areas, and from resulting higher property taxes on farmland to convert that land to nonagricultural use. Some statutes require landowners to enter into agreements that specify minimum periods that land must be retained in agriculture; if land is converted to nonagricultural use before the end of that period, there is a penalty. The statutes may, for example, limit the use of eminent domain in the agricultural districts, prohibit, without the permission of the landowner, special assessments, restrict the ability of local governments to regulate agricultural use through zoning or other measures, and provide protection for the agricultural landowner against nuisance suits. In some cases, there is a relationship between the establishment of the agricultural district and local comprehensive plans.

### STATE STATUTES

According to the American Farmland Trust, every state provides property relief, in some form or another, to farmland, and 49 states specifically use differential assessment. Sixteen states have enacted agricultural district legislation. Two states, Minnesota and Virginia, have two agricultural district programs each.<sup>144</sup>

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<sup>142</sup>The American Farmland Trust, at [www.farmland.org](http://www.farmland.org), is an excellent clearinghouse of resources on agricultural preservation. A good specific document to examine is American Farmland Trust, *Saving American Farmland: What Works* (Washington, D.C.: American Farmland Trust, 1997).

<sup>143</sup>For an early evaluation of differential assessment of farms and open space, see John C. Keene et al., *Untaxing Open Space*, prepared for the U.S. Council on Environmental Quality (Washington, D.C. : U.S. GPO, April 1976).

<sup>144</sup>American Farmland Trust, *Saving American Farmland: What Works* (Washington, D.C.: American Farmland Trust, 1997), ch. 7 (Agricultural District Programs), 197. The states include Delaware (Del. Code tit. 3, §§901 to 930), Illinois [35 Ill. Comp. Stat. §§200/10-110 to -147 (differential assessment in agricultural districts), 55 Ill. Comp. Stat. §§5/5 -12001, -12007 to -12019 (restriction on county’s power to regulate agricultural uses), 505 Ill. Comp. Stat. §5/1-20.3 (creation of agricultural districts), 740 Ill. Comp. Stat. §§70/0.01 to 5 (limit on nuisance liability for farming)], Iowa (Iowa Code §§335.27, 352.1 to .13), Kentucky (Ky. Rev. Stat. Ann. §262.850), Maryland (Md. Code Ann., Agric. §§2-501 to -516; Tax & Prop. §8-209), Massachusetts (Mass. Gen’l Laws ch. 40L, §§1 *et seq.*), Minnesota (Minn. Stat. §§40A.01 *et seq.*, 473H.01 *et seq.*), New Jersey (N.J. Rev. Stat. §§4:1C-1 to -55), New York (N.Y. Agric. & Mkts. Law §§300 to 310), North Carolina (N.C. Gen. Stat. §§106-735 to -744), Ohio (Ohio Rev. Code Ann. §§929.01 to .05), Pennsylvania (3 Pa. Cons. Stat. §§901 to 915), Tennessee (Tenn. Code Ann. §§43-34-101 to -108), Utah (Utah Code Ann. §§17-41-401 to -406), and Virginia (Va. Code Ann. §§15.1-1506 to -1513, 58.1-3229 to -3252). The entire set of statutes may be viewed at: <http://www.farmlandinfo.org/fic/laws/kwagdis.html>

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**California's** Williamson Land Conservation Act dates from 1965, although it has been amended numerous times. It allows cities and counties to create agricultural preserves; the minimum size requirement for a preserve is 100 acres, but a local government can depart from this minimum if supported by the local general plan (the California term for a comprehensive plan).<sup>145</sup>

Any proposal to establish an agricultural preserve must be submitted to the planning department of the county or city having jurisdiction over the land. If the county or city has no planning department, a proposal to establish an agricultural preserve shall be submitted to the planning commission. Within 30 days after receiving such a proposal, the planning department or planning commission must submit a report thereon to the board or council. However, the board or council may extend the time allowed for an additional period not to exceed 30 days. The report must include a statement that the preserve is consistent with the general plan, and the board or council shall make a finding to that effect. Final action upon the establishment of an agricultural preserve may not be taken by the board or council until the report required by this section is received from the planning department or planning commission, or until the required 30 days have elapsed and any extension granted by the board or council has elapsed.<sup>146</sup> Landowners who wish to have their agricultural property valued at its use value enter into a contract with the local government; the contracts are for a minimum of 10 years, although the contracts can be extended on an annual basis.<sup>147</sup> Once the land is subject to contract, it is valued for agricultural purposes under a "capitalization of income" approach under state law.<sup>148</sup> If the contract is cancelled before the end of its expiration date, the owner is obligated to pay the actual deferred taxes as well as a cancellation fee of 12.5 percent of the fair market value of the property.<sup>149</sup> The California law also contains limitations on the ability to subdivide contracted lands.<sup>150</sup>

**New York's** statute allows the creation of an agricultural district.<sup>151</sup> Land in the district that is used for agricultural production is eligible for an agricultural assessment. Creation of the district is initiated by property owners, but the county legislative body, after holding a public hearing, and receiving a recommendation from the county planning board and from a specially-created county agricultural and farmland protection board, may establish the district. The proposal to establish the district may recommend an appropriate review period of either eight, twelve, or twenty years. The

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<sup>145</sup>Cal. Gov't Code §51230 (1999). For an excellent review of this act, see Dale Will, "The Land Conservation Act at the 32 Year Mark: Enforcement, Reform, and Innovation," *San Joaquin Agricultural L. Rev.* 9 (1999): 1

<sup>146</sup>Cal. Gov't Code §51234.

<sup>147</sup>Cal. Gov't Code §51244.

<sup>148</sup>Cal. Rev. & Tax. Code §423 (1999).

<sup>149</sup>Cal. Gov't Code §§51283, 51283.1.

<sup>150</sup>Cal. Gov't Code §51230.2.

<sup>151</sup>N.Y. Agric. & Mkts. Law §§301 *et seq.* (McKinney 1999).

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plan as adopted must, to the extent feasible, include adjacent viable farmlands, and exclude, to the extent feasible, nonviable farmland and non-farmland. The statute requires a review of the proposal by the state commissioner of agriculture and markets, who may modify the proposal, although the county legislative body has final authority over the district's establishment.<sup>152</sup> The statute contains detailed provisions for the valuation of land for agricultural use. If land that received an agricultural assessment is converted to agricultural use, the land is subject to payments equaling five times the taxes saved in the last year in which the land benefitted from the agricultural assessment, plus a interest of six percent a year compounded annually for each year in which an agricultural assessment was granted, not exceeding five years.<sup>153</sup> The state also contains limitations on the exercise of eminent domain and the advance of public funds that would adversely affect agriculture.<sup>154</sup>

One of the **Minnesota** statutes, the "Metropolitan Agricultural Preserves Act," applies to the seven-county Twin Cities metropolitan area.<sup>155</sup> Local governments in the region must certify to the metropolitan council (the regional planning body for the area) which agricultural lands are eligible for designation as agricultural preserves.<sup>156</sup> Under the statute, land ceases to be eligible for designation as an agricultural preserve when the comprehensive plan and zoning for the area have been amended so that the land is no longer planned for long-term agricultural use and is no longer zoned for agricultural use, evidenced by a maximum residential density permitting more than one unit per 40 acres.<sup>157</sup> Owners of certified long term agricultural land may apply to the local government for agriculture assessment and, in so doing, must agree to keep the land in agricultural use through a restrictive covenant; the local government forwards the application, once approved, to the county assessor, the county recorder, the metropolitan council, and the county soil and water conservation district.<sup>158</sup> Agriculture preserves continue until either the landowner or the local government initiates expiration. The preserves have a duration of at least eight years.<sup>159</sup> The

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<sup>152</sup>Id., §303.

<sup>153</sup>Id., §305.

<sup>154</sup>Id., §305.4.

<sup>155</sup>Minn. Stat. Ann. §§47H.02 to 47H.18 (1999).

<sup>156</sup>Minn. Stat. Ann. §47H.04, subd. 1.

<sup>157</sup>Minn. Stat. Ann. §47H.04, subd. 2. Under the statute, "long-term agricultural land" eligible for designation as an agricultural preserve means land in the metropolitan area designated for agricultural use in local or county comprehensive plans and which has been zoned specifically for agricultural use permitting a maximum residential density of not more than one unit per quarter/quarter. Id., §47H.05, sub. 7.

<sup>158</sup>Minn. Stat. Ann. §47H.05-.06.

<sup>159</sup>Minn. Stat. Ann. §47H.08.

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restrictive covenant terminates on the date of expiration.<sup>160</sup> The statute limits the ability of local governments to regulate agricultural use in the preserves, unless the restriction “bears a direct relationship to an immediate and substantial threat to the public health and safety.”<sup>161</sup> The act requires the metropolitan council to maintain agricultural preserve maps that illustrate certified long term agricultural lands and lands actually covenanted as agricultural preserves. The council must make yearly reports on the agricultural preserves to the state department of agriculture.<sup>162</sup>

**Ohio** allows owners of agricultural land to apply to the county auditor to place the land in agricultural districts for five years. For the previous three years, the land in a proposed district must have been devoted exclusively to agricultural production and devoted to or qualified for payments and other compensation from a federal land retirement or conservation program. The land area must be at least ten acres, or the activities conducted on the land must have produced an average yearly gross income of at least \$2500 during the three-year period, or the owner must have evidence of an anticipated gross income of that amount from those activities. If the owner withdraws the land from the district, then he or she must pay the county auditor a withdrawal penalty. Land in the district cannot be assessed for sewer, water, or electrical service without permission of the owner. The statute provides a defense from civil nuisance actions for certain agricultural activities.<sup>163</sup>

### STATE COURT CASES

In Iowa, the Supreme Court was presented with a case<sup>164</sup> in which the owners of agricultural land were challenging the refusal of a county to include their land in an agricultural district. The Iowa statute<sup>165</sup> specifically requires the local government to consider, among other factors, the effect of the agricultural district on private property rights in determining the existence and boundaries of the district. Since the Iowa statute affects the right of a landowner to commence a civil action for nuisance, and since objectors to the county claimed that the animal-confinement operation the landowners operated constituted a nuisance to its neighbors, the court found that it was a legitimate concern of the county legislative body and a legitimate basis for rejecting the plaintiff’s application.

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<sup>160</sup>Minn. Stat. Ann. §47H.18.

<sup>161</sup>Minn. Stat. Ann. §47H.18.

<sup>162</sup>Minn. Stat. Ann. §47H.06, subd. 5.

<sup>163</sup>Ohio Rev. Code §§929.02 to 929.05 (1999).

<sup>164</sup>*Peterson v. Harrison County*, No. 126 / 96-1755 (Iowa Sup. Ct., 1998).

<sup>165</sup>Iowa Code ch. 352 (1999).

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The Wisconsin Supreme Court considered a case<sup>166</sup> in which that state's agricultural districting, specifically the tax provisions,<sup>167</sup> were challenged as a violation of the uniformity clause of the state constitution. The property tax portions of the statute created a system by which a portion of property taxes for qualified agricultural property is based on a "frozen" 1995 valuation and the rest on an agricultural use valuation. As to the uniformity clause, many states have such a constitutional provision, which requires the property tax valuation and assessment procedures be uniform for all property of the same class. The court found that the constitution requires practical uniformity rather than absolute uniformity and that the case was premature. It therefore dismissed the case. The court further stated that "[t]o prove the statute unconstitutional, an owner of agricultural land will have to (1) satisfy the initial burden by proving that his agricultural land is over assessed and that other agricultural land is under assessed as a result of the statute, and (2) demonstrate beyond a reasonable doubt that [the statute] does not create uniform taxation of agricultural land to the extent practicable."

### THE MODEL STATUTE

Section 14-401 below is an adaptation of the California, Minnesota New York, and Ohio agricultural district statutes. Under this model, a local government must have first adopted a local comprehensive plan that contains an agricultural and forest preservation element. It may then adopt an ordinance establishing an agricultural district, which will be effective for ten years and may be reenacted at the legislative body's discretion. The ordinance establishing the district must identify, in both mapped and written form, the affected parcels. It must also establish a maximum density of one dwelling unit per 40 acres in order to create a true agricultural area rather than simply another low-density single-family residential environment.<sup>168</sup>

Once the agricultural district is established, a landowner whose property is within it may apply to the county assessor for an agricultural assessment, provided the landowner's property meets certain minimum area (at least 40 acres) and agricultural production requirements. As part of the initial application, the owner must record a restrictive covenant that limits the use of the property to agriculture for a period of nine years. If the application is granted, the land is assessed at its agricultural rather than its market value, and may not be subject to special assessments for water, sewer, streetlights, and sidewalks, without the owner's permission.

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<sup>166</sup>*Norquist v. Zeuske*, No. 96-1812-OA (Wisc. Sup. Ct. 1997).

<sup>167</sup>Wis. Stat. §70.32 (1999).

<sup>168</sup>It is important to note that the average size of an economically viable farm may differ from state to state and indeed from region to region within a state. It is recommended that the most current U.S. Census of Agriculture be consulted for average farm size when setting the minimum size requirement for parcels or combination of parcels under common ownership to be eligible for an agriculture assessment. For a good discussion of this issue, see Robert E. Coughlin, "Formulating and Evaluating Agricultural Zoning Programs," *Journal of the American Planning Association* 57, No. 2 (Spring 1991): 183-192, esp. 189 (discussion of preferred density at which land use conflicts between agricultural activity and nonfarm residential uses will be acceptably low to farmers).

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Certain procedures must be followed before eminent domain (for acquisition of more than ten acres) can be used or expenditure of public funds, by grant, loan, interest subsidy, or otherwise, for the construction of nonfarm housing, or commercial or industrial facilities to serve nonagricultural uses of land can occur within the district. Local governments are barred from enacting ordinances that unreasonably restrict or regulate normal farm structures or agricultural use or practices, unless the restriction or regulation bears a direct relationship to an immediate and substantial threat to the public health or safety. The model provides a defense from civil nuisance actions for agricultural activities conducted on land within an agricultural district.

If the land that has been granted an agricultural assessment is converted to nonagricultural use before the nine-year period has lapsed (conversion includes subdivision for nonfarm uses), the owner, or his or her successor, is liable for a penalty equal to five times the taxes saved during the past year (the difference between the taxes that would have been collected if the land had been assessed at its market value and its agricultural value), interest for each year the agricultural assessment has been in effect, up to five years, and any uncollected special assessments. If the district is terminated or not reenacted by the local government, if land is removed from the district, such as by amendment, or if land is acquired through eminent domain, there are no required payments and penalties on the part of the landowner. The model statute requires the landowner to notify the county assessor if conversion takes place.

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### 14-401 Agricultural Districts; Use Valuation of Agricultural Land

- (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 provision, such as a municipal charter or state statute governing the adoption of ordinances*] an ordinance establishing an agricultural district.
- (2) The purposes of an agricultural district ordinance are to:
  - (a) implement the agricultural and forest preservation element of the local comprehensive plan;
  - (b) encourage landowners to make a long-term commitment to agriculture by offering them financial incentives and security of land use;
  - (c) protect land within such districts from the imposition of certain special assessments; and
  - (d) protect land within such districts from acquisition through eminent domain.
- (3) As used in this Section:

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- (a) “**Agricultural District**” means a contiguous area of at least [100] acres in size created under this Section within which parcels of land shall be eligible for assessment for agricultural use and other benefits and protections;
  - (b) “**Agricultural Use**” means the employment of land for the primary purpose of obtaining a profit in money by raising, harvesting, and selling crops, or feeding (including grazing), breeding, managing, selling, or producing livestock, poultry, fur-bearing animals, or honeybees, or by dairying and the sale of dairy products, by any other horticultural, floricultural, viticultural use, by animal husbandry, or by any combination thereof. It also includes the current employment of land for the primary purpose of obtaining profit by stabling or training equines including, but not limited to, providing riding lessons, training clinics, and schooling shows. Wetlands, pasture and woodlands accompanying land in agricultural use shall be deemed to be in agricultural use;
  - (c) “**Conversion to Non-Agricultural Use**” means one or more of the following:
    - 1. the explicit removal of land from an agricultural district by petition of the landowner to the local government that established the district;
    - 2. conversion of land in an agricultural district to use for purposes other than agricultural production, including subdivision for nonfarm-related housing, or commercial or industrial land use, but excluding those uses exempted by subparagraph (4)(f)2 below; and
    - 3. withdrawal of land from a land retirement or conservation program for purposes other than agricultural production;
  - (d) “**Covenant**” means a real covenant or conservation easement initiated by the owner and contained in the application provided for in paragraph (7) below, whereby the owner places limitations on specified land and receives protections and benefits as provided in this Section; and
  - (e) “**Family**” means persons related by blood, adoption, or marriage.
- (4) An agricultural district ordinance shall be adopted and amended pursuant to this Section and shall:
- (a) be adopted or amended by the legislative body of a local government only after it has adopted a local comprehensive plan that includes the elements required by Section [7-202(2)] and that also includes an agriculture and forest preservation element as authorized by Section [7-212];
  - (b) contain a description of the district, which shall include tax map identification numbers for all parcels within the district, and a map delineating the exterior

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boundaries of the district in relation to tax parcel boundaries and the tax parcels contained within the district;

- (c) include a statement of consistency with the local comprehensive plan, and with the agricultural and forest preservation element in particular, that is based on findings pursuant to Section [8-104];
  - (d) include definitions, as appropriate, for such words or terms contained in the ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
  - (e) be effective for a period of [10] years from the date of enactment, and may be reenacted for additional periods of [10] years; and
  - (f) include amendments to the zoning ordinance, applicable to all land within the district, that:
    - 1. limit the density to one dwelling unit per [40] acres; and
    - 2. prohibit commercial and industrial land uses, except as follows:
      - a. storage use of farm buildings that does not disrupt the integrity of the agricultural district;
      - b. commercial use of farm buildings for trades not disruptive to the integrity of the agricultural district, such as carpentry shops, small scale mechanic shops, and similar activities that a farm operator might conduct;
      - c. farm markets that sell agricultural products that are produced by the seller on the premises from which they are sold; and
      - d. [other].
- (5) An agricultural district shall:
- (a) not include any land that is contained in an urban growth area; and<sup>169</sup>
  - (b) include not less than [80] percent of its area in agricultural use.

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<sup>169</sup>See Arthur C. Nelson, "Preserving Prime Farmland in the Face of Urbanization," *Journal of the American Planning Association* 58, No. 4 (Autumn 1992): 467-488.

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- (6) Upon adoption of an agricultural district ordinance, the clerk of the local government shall, within [30] days, certify a copy of the ordinance to the county [assessor *or equivalent official*], to the [state planning agency], and to the state department of agriculture.
- (7) (a) Any owner of land used in agricultural production within an agricultural district shall be eligible to apply for an agricultural assessment, effective for [9] years.
1. An agricultural assessment shall be granted only upon an application by the owner of such land on a form prescribed by the state [tax commissioner *or other official*]. The applicant shall furnish to the county [assessor] such information as the state [tax commissioner *or other official*] shall require, including classification information prepared for the applicant's land or water bodies used in agricultural production by the soil and water conservation district office within the county, and information demonstrating the eligibility for agricultural assessment of any land used in conjunction with rented land.
  2. Such application shall be filed with the county [assessor] on or before the appropriate taxable status date.
  3. If an applicant rents land from another for use in conjunction with the applicant's land for the production for sale of crops, livestock or livestock products, the gross sales value of such products produced on such rented land shall be added to the gross sales value of such products produced on the land of the applicant for purposes of determining eligibility for an agricultural assessment on the land of the applicant.
- (b) Land for which an agricultural assessment is sought:
1. shall have been devoted exclusively to agricultural production, or devoted to or qualified for payments or other compensation from a federal land retirement or conservation program, for the previous three years;
  2. shall have produced an average yearly gross income of at least \$[5,000] during that previous three-year period; and
  3. shall total at least [40] acres, provided, however, that two or more contiguous parcels of land may be combined to meet this minimum area requirement if they are in common ownership or if they are owned separately by members of the same family.
- (c) The application shall include a covenant by the owner, binding on the owner and the owner's successors or assignees and running with the land, that the land shall be kept in agricultural use for a period of [9] years from the date of application. Such

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covenant shall be recorded with the county [recorder of deeds *or equivalent official*] within [15] days of the approval of the application.

- (d) If the county [assessor] is satisfied that the application meets the requirements of this Section and that the applicant is entitled to an agricultural assessment, the [assessor] shall approve the application and the land shall be assessed pursuant to this Section.
  - 1. Not less than ten days prior to the date for hearing complaints in relation to assessments, the [assessor] shall mail to each applicant, who has included with the application at least one self-addressed, pre-paid envelope, a notice of the approval or denial of the application. Such notice shall be on a form prescribed by the state [tax commissioner *or other official*] which shall indicate the manner in which the total assessed value is apportioned among the various portions of the property subject to agricultural assessment and those other portions of the property not eligible for agricultural assessment as determined for the tentative assessment roll and the latest final assessment roll.
  - 2. Failure to mail any such notice or failure of the owner to receive the same shall not prevent the levy, collection and enforcement of the payment of the taxes on such real property.
- (e) The county [assessor] shall keep a record of all land in the county that is within an agricultural district and that has been granted an agricultural assessment pursuant to this Section.
- (f) Any time after [90] days before an agricultural assessment is due to terminate, the owner of land in the agricultural district that has been granted an agricultural assessment may file a renewal application to continue the agricultural assessment of that land for a period of [9] years.
  - 1. The requirements for continuation of the agricultural assessment and the renewal application procedure shall be the same as those required for the original application for agricultural assessment. An application for renewal of an agricultural assessment shall be denied on the grounds of the imminent termination of the agricultural district only where the district is due to terminate within one year.
  - 2. The county [assessor] shall notify owners of land granted an agricultural assessment within [90] days of the termination of the agricultural assessment of the necessity of filing a renewal application to continue valuing the land at agricultural use value. If the owner has not filed a renewal application within [30] days of the termination of the agricultural assessment, the [assessor] shall forthwith notify such owner by certified mail that unless a renewal application is filed within the next [15] days, the

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land will be removed from agricultural assessment upon its termination date.

3. An approved renewal application is effective on the termination date of the preceding agricultural district. Failure of an owner to file a renewal application within [15] days preceding the termination of the owner's agricultural assessment shall not prevent the owner from filing an application for an agricultural assessment.
- (g) Land that is transferred to a new owner during the period in which the land is in an agricultural district and has been granted an agricultural assessment shall continue to receive the agricultural assessment unless the new owner elects to discontinue agricultural use of the land and files the election with the county [assessor] within sixty days after the transfer. Failure of the new owner to continue agricultural use for the duration of the period specified in the covenant is subject to the payments and penalties required by paragraph (9) below.
- (8) All land within an agricultural district that has been granted an agricultural assessment pursuant to this Section shall be valued solely with reference to its appropriate agricultural classification and value. In determining the value for ad valorem tax purposes, the county [assessor] shall not consider any added value resulting from nonagricultural factors. [*Add other language specifying the manner in which agricultural value is to be determined as appropriate.*]
- (9) (a) Except as provided in subparagraph (9)(f) below, if land within an agricultural district which received an agricultural assessment is converted to nonagricultural use before the end of the duration of the covenant, it shall be subject to payments equaling:
1. [five] times the taxes saved in the last year in which the land benefitted from an agricultural assessment;
  2. any uncollected special assessments; and
  3. interest of [6] percent per year on the above, compounded annually for each year in which an agricultural assessment was granted, not exceeding five years.
- (b) The amount of taxes saved for the last year in which the land benefitted from an agricultural assessment shall be determined by applying the applicable tax rates to the excess amount of assessed valuation of such land over its agricultural assessment as set forth on the last assessment roll which indicates such an excess.
1. If only a portion of a parcel as described on the assessment roll is converted, the assessor shall apportion the assessment and agricultural assessment

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- attributable to the converted portion, as determined for the last assessment roll for which the assessment of such portion exceeded its agricultural assessment.
2. The difference between the apportioned assessment and the apportioned agricultural assessment shall be the amount upon which payments shall be determined.
  3. Payments shall be added by or on behalf of each taxing jurisdiction to the taxes and special assessments levied on the assessment roll prepared on the basis of the first taxable status date on which the assessor considers the land to have been converted; provided, however, that no payments shall be imposed if the last assessment roll upon which the property benefitted from an agricultural assessment, was more than five years prior to the year for which the assessment roll upon which payments would otherwise be levied is prepared.
- (c) Whenever a conversion to nonagricultural use occurs, the landowner shall notify the county assessor in writing within [90] days of the date such conversion is commenced. If the landowner fails to make such notification within the [90]-day period, the assessor shall impose a penalty on behalf of the assessing unit of up to two times the total payments owed, but not to exceed a maximum total penalty of \$[500] in addition to any payments owed.
- (d) A county [assessor] who determines that there is liability for payments and any penalties assessed pursuant to subparagraph (a) above shall notify the landowner by mail of such liability at least ten days prior to the date for hearing complaints in relation to assessments. Such notice shall indicate the property to which payments apply and describe how the payments shall be determined. Failure to provide such notice shall not affect the levy, collection or enforcement or payment of payments.
- (e) Liability for payments shall be subject to administrative and judicial review as provided by law for review of assessments.
- (f) Land that is deemed converted to nonagricultural use by:
1. action of eminent domain by a governmental unit;
  2. termination of the agricultural district;
  3. denial of an application for agricultural assessment, or for renewal of agricultural assessment, on the grounds of imminent termination of the agricultural district; or

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4. removal from the agricultural district by action of the local governmental that established the district;

shall not liable for payments and penalties under this paragraph, and the covenant may be terminated by the owner at any time after the conversion by filing a document to that effect with the county [recorder of deeds *or equivalent official*].

- (10) (a) No governmental unit with authority to levy special assessments on real property shall collect an assessment for purposes of:

1. sewer, water, or streetlight systems,
2. sidewalks, or
3. [other];

on real property that is within an agricultural district and that is subject to an agricultural assessment pursuant to this Section without the permission of the owner, except that any assessment may be collected on a lot surrounding a dwelling or other structure not used in agricultural production that does not exceed one acre.

- (b) For each special assessment levied for the purposes described in subparagraph (10)(a) by a governmental unit on real property within an agricultural district, the county assessor shall make and maintain a list showing:

1. the name of the owner of each parcel of land that is exempt from the collection of the special assessment under this Section;
2. a description of the exempt land;
3. the purpose of the special assessment; and
4. the amount of the uncollected assessment on the exempt land.

The recording of the assessments does not permit the collection of the assessments until such time as exempt lands are converted to nonagricultural use.

- (11) Except as provided in this paragraph, no entity possessing power of eminent domain under the laws of this state, whether a governmental unit or a corporation, shall acquire any land or easements having a gross area greater than [10] acres in size within agricultural districts. Except as provided in this paragraph, no governmental unit shall advance public funds, whether by grant, loan, interest subsidy, or otherwise, within an agricultural district for the construction of nonfarm housing, or commercial or industrial facilities to serve nonagricultural uses of land.

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- (a) At least [60] days prior to such an acquisition or advance, notice of intent shall be filed with the director of the [department of agriculture] containing information and in the manner and form required by the director. The notice of intent shall contain a report explaining the proposed action, including an evaluation of alternatives which would not require acquisition or advance within agricultural districts.
- (b) The director, in consultation with affected units of government, shall review the proposed action to determine the effect of the action on the preservation and enhancement of agriculture and agricultural resources within agricultural districts and the relationship to local and regional comprehensive plans.
- (c) If the director finds that the proposed action might have an unreasonable effect on an agricultural district, the director shall issue an order within the [60]-day period for the party to desist from such action for an additional [60]-day period.
- (d) During the additional [60]-day period, the director shall hold a public hearing concerning the proposed action at a place within the affected agricultural district or otherwise easily accessible to the agricultural district. The director shall provide notice of the hearing within [30] but not less than [15] days before the hearing:
  - 1. in a newspaper having a general circulation within the area of the agricultural district;
  - 2. in writing delivered by mail, to the local governments whose territory encompasses the agricultural district;
  - 3. in writing delivered by mail, to the entity proposing to take the action; and
  - 4. in writing delivered by mail, to any governmental unit having the power of review or approval of the action.
- (e) The review process required by this paragraph may be conducted jointly with any other environmental impact review required by law.
- (f) The director shall be empowered to suspend for up to [1] year any eminent domain action which he or she determines to be contrary to the purposes of this Section and for which he or she determines there are feasible and prudent alternatives which have less negative impact on agricultural districts.
- (g) The director may request the attorney general to bring a civil action to enjoin any governmental unit or corporation from violating the provisions of this paragraph.
- (h) This paragraph shall not apply to:

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1. any utility facilities, including, but not limited to, electric transmission or distribution facilities or lines, facilities used for exploration, production, storage, transmission, or distribution of natural gas, synthetic gas, or oil, or telephone lines and telecommunications facilities; or
  2. any emergency project that is immediately necessary for the protection of life and property.
- (12) Except as provided in this Section, a local government shall be prohibited from enacting or enforcing land development regulations, or other ordinances or regulations, within an agricultural district that would, as adopted or applied, unreasonably restrict or regulate normal farm structures or agricultural use or practices, unless the restriction or regulation bears a direct relationship to an immediate and substantial threat to the public health or safety. This prohibition shall apply to the operation of farm vehicles and machinery, the type of farming, and the design of farm structures, exclusive of residences.
- (13) In a civil action for nuisance involving agricultural activities, it is a complete defense if:
- (a) the agricultural activities were conducted within an agricultural district;
  - (b) agricultural activities were established within the agricultural district prior to the plaintiff's activities or interest on which the action is based;
  - (c) the plaintiff was not involved in agricultural production; and
  - (d) the agricultural activities were not in conflict with federal, state, and local laws and rules relating to the alleged nuisance or with generally accepted agriculture practices.

The plaintiff may offer proof of a violation independently of any proof of violation or conviction provided by any public official.

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### **NOTE 14 – A NOTE ON ELEMENTARY AND SECONDARY PUBLIC SCHOOL FINANCE AND ITS RELATION TO PLANNING**

**By Michael Addonizio, Associate Professor of Education,  
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Local land-use planning decisions affect public schools and school finance in several ways. First, these local decisions influence the location, construction, and reuse of school buildings. Local comprehensive plans include population projections that can be used to identify the growth in school age populations. These plans also include locational criteria for school sites. Further, local comprehensive plans may identify schools that need rehabilitation or closing and reuse of the

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building or site. School closings and school building demolitions are particularly controversial. In many communities, public schools are centers of community activity and symbols of community identity. School buildings may have historical or architectural significance.

A second connection between land use and public schools involves the approval of school facility construction. Such approval is often given through a conditional use permit issued by a local government (e.g., planning commission, board of zoning appeals, or legislative body) following a public hearing.

Finally, because local governments rely on the property tax (and, to a lesser extent, sales tax) to finance local public services, including schools, they often design their land use controls to attract “good ratables;” that is, those types of land use that raise a lot of property tax revenue while creating little need for additional public services. Examples include commercial and industrial facilities and expensive single-family homes. At the same time, land use for “bad ratables” that generate little tax revenue and substantial demand for public services (for example, low- and moderate-cost housing) is often discouraged.<sup>170</sup>

An inevitable result of this local competition for “good ratables” is the enormous disparities in the fiscal capacity of local communities to support public education. That is, new investment will seek those local communities with great taxable wealth and correspondingly low tax rates, while low-wealth communities struggle with high rates to finance basic services, including public schools. In view of the importance we attach to education in preparing our children for citizenship and economic participation, such disparities seem unfair and undemocratic. These concerns, which have been the subject of considerable political and judicial activity, have led states to pursue school funding systems that seek to neutralize these disparities.

This research note summarizes the development of contemporary law and policy governing the financing of public elementary and secondary schools in the United States. The note examines the workings of the basic models and methods used by states to fund both school operations and capital projects and analyzes landmark litigation that gave rise to these state programs. As such, this note is intended to be a concise reference for policymakers at all levels of government, including governors and legislators, their staffs, and other state and local officials with responsibilities related to a wide array of public issues, including planning, economic development, housing, transportation, community revitalization, and the environment. Clearly, the quality of our public school systems is a matter of paramount importance to the public and their elected and appointed leaders. An understanding of the financing of those systems may inform our work in other parts of the public sector.

### **SCHOOL FINANCE: A BRIEF HISTORY**

The idea of free, tax-supported schools did not gain stature in the United States until the nineteenth century. American schools began as local entities, largely private and religious during

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<sup>170</sup>Norman Williams, Jr., “Halting the Race for ‘Good Ratables’ and Other Issues in Planning Legislation Reform,” in *Modernizing State Planning Statutes: The Growing Smart<sup>SM</sup> Working Papers, Vol. 1*, Planning Advisory Service Report 462 (Chicago: American Planning Association, 1996): 57-61.

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the seventeenth, eighteenth and early nineteenth centuries. As in England, educating children was considered a private matter, the responsibility of families, not government. The eighteenth century leaders of the new republic considered education as a means to prepare citizens to actively participate in democratic government and exercise the liberties guaranteed by the Constitution. However, while Thomas Jefferson advocated the creation of free elementary schools, his proposal was not adopted on a statewide basis until the mid-nineteenth century, when Horace Mann and Henry Barnard, state superintendents of Massachusetts and Connecticut, respectively, led efforts to establish publicly-supported “common schools.”<sup>171</sup>

From the mid-seventeenth through mid-eighteenth centuries, one-room elementary common schools were established in local communities, generally supported by a small local tax. Each locality operated independently, since there were no state laws or rules governing public education. At the same time, several large school systems evolved in the big cities of most states. As early as the seventeenth century, these local educational systems reflected differences in the local ability to support them. Big cities were generally quite wealthy, while the small, rural systems were quite poor and had great difficulty supporting a one-room school.

As the number of local school systems grew and education came to be viewed as an essential unifying force for the growing republic, political and educational leaders sought to establish state educational systems. By 1820, 12 of the then 23 states had constitutional provisions, and 17 had statutory provisions, regarding education. In some states, new constitutional articles not only mandated the creation of statewide systems of public education, but assigned government responsibility for the financing of public schools.

The creation of state-controlled and publicly financed “common schools” raised many fundamental issues of school finance, including the relative roles of state and local government in supporting public schools and whether funding levels should be substantial and at least roughly equal across local districts. Specifically, questions arose regarding the meaning of new constitutional phrases such as “general and uniform,” “thorough and efficient,” “basic,” or “adequate,” words and phrases appearing in the education clauses of many state constitutions. Did such language require equal per pupil spending for every pupil in the state or merely a basic educational program for every child, with local per pupil spending determined locally? These issues persist today and have been resolved in different ways across the states.

In the mid-to-late 1800s, most states required local school districts to fund their public schools entirely with local property taxes. At the same time, however, when states determined local district boundaries, the districts often varied enormously in their local property wealth per pupil and, thus, in their ability to raise school revenue. Property-rich districts were able to support relatively high

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<sup>171</sup>Government financing of schools began in Massachusetts in 1647, when the state’s General Court passed the famous Old Deluder Satan Act, which required every town to set up a school or pay a sum of money to a larger town to support education. The act required towns with at least 50 families to appoint a teacher of reading and writing, and required towns with more than 100 families to also establish a secondary school. The Act required that these schools be supported by masters, parents, or local citizens, thereby providing for the financing of schools through local taxation. The first local property tax for schools was levied in Dedham, Massachusetts, in 1648. John D. Pulliam, *History of Education in America*, 4th ed. (Columbus, Ohio: Merrill, 1987).

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per pupil spending with relatively low tax rates while the opposite was true for property-poor communities. School finance policy throughout the twentieth century has attempted to address these fiscal inequities. While some writers and policymakers focused on local spending differences *per se*,<sup>172</sup> most policy debate addressed the dependence of local school revenue on local property wealth.<sup>173</sup>

(1) *Flat Grant Programs*. By the mid-nineteenth century, the inequities arising from locally-financed public schools, including the inability of some poor localities to finance any public school, led states to provide a lump-sum or flat grant, usually on a per school basis, to help support their local elementary school. However, while this approach guaranteed every locality some resources for public schools (including those that raised no local resources) and increased overall support for public schools, the flat-grant approach made no distinction among districts; rich and poor alike all received equal state support.

As school enrollments grew, states increased their levels of support and changed from school-based to classroom, and eventually pupil-based or teacher-based grant formulas. By the turn of the century, the dramatic growth of public school enrollments had rendered flat grant formulas very expensive and required substantial state payments to relatively affluent communities. Consequently, rising levels of state school aid failed to measurably reduce the funding inequities in states with local districts of varying levels of per pupil property wealth.

(2) *Foundation Programs*. As the shortcomings of flat-grant aid formulas became evermore apparent by the start of the twentieth century, researchers and policymakers sought a more effective way to reduce inequities in public school finance. An ingenious solution was devised by George Strayer and Roger Haig, professors at Columbia University, whose proposed formula would come to dominate public school finance throughout the twentieth century.

The Strayer-Haig (or “minimum”) foundation program was designed to assure all local districts of a level of resources sufficient to provide an educational program of minimally acceptable quality. Flat grants failed in this regard because of their low levels resulting from the spread of state aid across all local districts, rich and poor alike. The foundation formula solved this problem by financing the per pupil spending target through a combination of state and local revenue. That is, the foundation program requires the levy of a minimum local tax rate as a condition of receiving state aid. The required tax rate is applied to the local tax base. The state foundation grant is equal to the difference between the state’s foundation per pupil revenue level and the local per pupil revenue raised by the required tax rate.

The genius of the Strayer-Haig foundation formula is its substitution of local revenue for state aid in relatively wealthy districts, thereby allowing greater state support for property poor districts. This substitution allowed for a substantial increase in minimum per pupil spending over flat-grant

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<sup>172</sup>A. Wise, *Rich Schools–Poor Schools: A Study of Equal Educational Opportunity* (Chicago: University of Chicago Press, 1969).

<sup>173</sup>J. Coons, W. Club, and S. Sugarman, *Private Wealth and Public Education* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1970).

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formula levels and emphasized the importance of a coordinated state and local partnership in funding public schools. Thus, a foundation aid formula has several attractive attributes. First, it finances a minimum educational program in every district. Second, it provides general aid in inverse relation to local district property wealth (that is, the formula equalizes local fiscal capacity). Third, it requires a local contribution.<sup>174</sup>

At the time of its introduction in the early twentieth century, the foundation program was a major policy innovation that enabled states to implement a finance system that could substantially improve educational programs in the previously lowest-spending districts. That is, even the poorest of districts could offer at least a minimally adequate educational program. In 1986-87, 30 states had a foundation funding structure<sup>175</sup> and by 1993-94 the number had risen to 40.<sup>176</sup>

The current popularity of the foundation approach evolved with progress in education research, judicial challenges to state school finance structures, and state legislation. The next section will examine major judicial and legislative reforms that have shaped the landscape of our current school finance systems.

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<sup>174</sup>As noted by Odden and Picus, states have differed in their approach to the local contribution. Though most districts levy a tax rate at or above the minimum required local rate, a few do not. A policy issue for states is whether to impose the minimum rate on such districts or reduce their state foundation aid. The difficulty with such draconian state measures arises from the fact that many of these low-tax districts are also quite poor, with low property wealth and low income. Generally, states have not enforced the minimum tax in these districts. Rather, some states (e.g., New York and Michigan) make full foundation aid payments to districts regardless of local tax effort. In this way, low-tax districts sustain only a local revenue loss. Other states (e.g., Texas) reduce state foundation aid in the same proportion that the local tax rate falls below the designated minimum rate. See A. Odden and L. Picus, *School Finance: A Policy Perspective*, 2d ed. (Boston: McGraw Hill, 2000).

<sup>175</sup>Richard Salmon, Christina Dawson, Stephen Lawton, and Thomas Johns, *Public School Finance Programs of the United States and Canada: 1986-87* (Sarasota, FL: American Education Finance Association, 1988).

<sup>176</sup>Steven D. Gold, David M. Smith, and Stephen Lawton, *Public School Finance Programs of the United States and Canada: 1993-94* (New York: Center for the Study of the States, the Nelson A. Rockefeller Institute of Government, and the American Education Finance Association, 1995). In a widely-heralded school finance reform effort, Michigan adopted a foundation funding system in 1994-95. For an analysis of this reform, see M. Addonizio, C.P. Kearney, and H.J. Prince, "Michigan's High Wire Act," *Journal of Education Finance* 20 (Winter 1995): 235-269.

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### MODERN REFORMS IN SCHOOL FINANCE DUE TO LITIGATION

Differences across local school districts in per pupil expenditures, generally arising from differences in local taxable wealth, have been a concern for most states for the past century.<sup>177</sup> During this time, issues of equity and adequacy have received much attention from educators and policymakers and became the subject of litigation and resultant finance reforms starting in the late 1960s. In this policy area, equity refers to the elimination or diminution of the relationship between local wealth and local per pupil spending, while adequacy refers to the availability in every local district of per pupil spending that is sufficient to bring students to minimally acceptable levels of achievement. Such levels are generally established by the state.

Contemporary school finance litigation dates back to the late 1960s, when suits were filed in Illinois and Virginia challenging the constitutionality of spending differences across local districts.<sup>178</sup> In each case, plaintiffs argued that the finance systems were unconstitutional because education was a fundamental right and the wide differences in local school spending were not related to differences in educational need. Rather, spending differences arose from differences in local taxable wealth. However, when plaintiffs were unable to provide the court with a standard by which to identify and measure “educational need,” both courts ruled that the suits were non-justiciable and dismissed plaintiffs’ claims. To succeed in future litigation, plaintiffs needed to develop a standard with which the courts could assess plaintiffs’ claims – that state school funding systems failed to meet the requirements of equal protection.

In the late 1960s, Northwestern University law professor John Coons and two students, William Clune and Stephen Sugarman, formulated a theory that local school districts were creations of state government and that by creating a funding system that was heavily dependent on local tax revenue, states were denying local districts equal opportunity to raise school revenue. In so doing, states were creating a suspect classification defined by district per pupil property wealth.<sup>179</sup> By this argument, a state school finance system that resulted in unequal per pupil funding across districts would be subject to “strict judicial scrutiny.” That is, the state would be required to demonstrate a “compelling state interest” for its finance system and that “no less discriminatory” policy is available to the state to serve that compelling interest. When courts invoke this test, states are generally unable to make these demonstrations and, therefore, lose the case.

Coons, Clune, and Sugarman argued that systems of school finance should be “fiscally neutral,” that is, per pupil revenue in a local district should not be related to the wealth of that local district. Rather, it should be related to the wealth of the state as a whole. This standard of fiscal neutrality, moreover, was easily applied. One need only measure the statistical relationship between local per

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<sup>177</sup>E.P. Cubberly, *School Funds and Their Apportionment* (New York: Teachers College Press, 1905).

<sup>178</sup>*McInnis v. Shapiro*, 293 F.Supp. 327 (N.D.Ill.1968), affirmed sub nom. *McInnis v. Ogilvie*, 394 U.S. 322, (1969), and *Burruss v. Wilkerson*, 310 F.Supp. 572 (W.D.Va.1969), affirmed 397 U.S. 44 (1970).

<sup>179</sup>J. Coons, W. Clune, and S. Sugarman, *Private Wealth and Public Education* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1970).

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pupil property wealth and local per pupil revenue within the state. Further, as demonstrated below, a fiscally neutral state school finance formula could be devised with relative technical (if not political) ease.

Thus, this new strategy rested upon two arguments: first, that education is a fundamental right and second, that local property wealth per pupil is a suspect class. At the time, neither argument had been accepted by the courts. The second argument was particularly controversial, since the characteristic pertained not to individuals, as all previous suspect classes had, but to a governmental unit.

The first case filed using this strategy was *Serrano v. Priest* in California.<sup>180</sup> The case was filed in 1968 and defendants immediately moved to dismiss, claiming that school finance cases were non-justiciable, and relying on two earlier federal cases, *McInnis v. Shapiro* and *Burrus v. Wilkerson*. The trial court dismissed the case on that basis and plaintiffs appealed to the California Supreme Court. Relying on both the Fourteenth Amendment to the U.S. Constitution and the equal protection clause of the California constitution, the California Supreme Court ruled that: (1) the case was justiciable and the standard of fiscal neutrality applied; (2) education is a fundamental right and property wealth per pupil is a suspect class; and (3) if the facts were as alleged, California's school finance system was unconstitutional. This precedent-setting opinion, rendered in August 1971, commanded national attention and triggered similar court challenges in other states. It also led to California's adoption of a guaranteed tax base (GTB) school aid system, described below.

One landmark case following closely upon *Serrano* was *San Antonio School District v. Rodriguez*<sup>181</sup> in Texas. Significantly, this case was filed in federal court and heard initially by a three-judge district court panel. The panel found for the plaintiffs, finding education to be a fundamental right and property wealth per pupil to be a suspect class. Accordingly, the district court ruled that the Texas school finance system violated the equal protection clause of the U.S. Constitution and ordered the legislature to design a constitutional system.

The case was immediately appealed to the U.S. Supreme Court. In March 1973, in a 5-4 decision, the U.S. Supreme Court held that the Texas school finance system did not violate the U.S. Constitution. The majority held that while education was important preparation for citizenship in the U.S., it was not mentioned in the Constitution. The majority also held that property wealth per pupil was not a suspect class because it described governmental units and not individuals. Accordingly, in the absence of a finding of discrimination based either on suspect classifications (e.g., race, gender, national origin) or on the impairment of a fundamental right (i.e., a right expressly or implicitly guaranteed by the U.S. Constitution), the Court invoked the relative lenient rational relationship test. The state successfully responded that its school finance system was related to the principle of local control.

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<sup>180</sup>*Serrano v. Priest*, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971).

<sup>181</sup>*San Antonio Independent School District v. Rodriguez*, 411 U.S. 45 (1973), rehearing denied by 411 U.S. 959 (1973).

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The *Rodriguez* decision effectively eliminated the U.S. Constitution as a vehicle for public school finance reform and returned this litigation to state courts. As noted by the *Rodriguez* majority, most state constitutions not only mention education but have clauses explicitly assigning responsibility for providing access to free, public education. School finance reform litigation would now proceed state by state on the basis of state equal protection clauses and state education clauses.

### **School Finance Challenges in State Courts**

Just one month after the *Rodriguez* decision, the New Jersey Supreme Court decided *Robinson v. Cahill*.<sup>182</sup> While acknowledging that education is mentioned in the New Jersey constitution, the court held it is not a fundamental right. Further, while recognizing the existence of wealth-related per pupil spending disparities across local districts, the court held that property wealth per pupil was not a suspect class. Accordingly, the court found that the New Jersey school finance system did not violate the New Jersey equal protection clause.

However, the court did overturn the New Jersey school finance system on the basis of the state constitution's education article, which requires the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools." Construing the education article as a guarantee for all children of "that educational opportunity...needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market", the court ruled that "the state must meet that obligation itself or if it chooses to enlist local government it must do so in terms which will fulfill that obligation"<sup>183</sup> The court concluded the constitutional guarantee had not been met because of the fiscal disparities across school districts.

*Robinson* was important for three reasons. First, it kept school finance litigation alive after *Rodriguez*. Second, it established a precedent for challenging school finance systems through the "direct application" of state education articles, a substantively different approach than making an equal protection challenge.<sup>184</sup> Third, the case foreshadowed subsequent challenges that came to be known as "adequacy" litigation. These cases expanded the notion of school finance equity beyond finance to the breadth and depth of educational programs provided to all children. Specifically, a key question for the courts in adequacy cases is whether all children have an opportunity to achieve at high levels<sup>185</sup>

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<sup>182</sup>*Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973)

<sup>183</sup>*Id.*, at 63 N.J. 510.

<sup>184</sup>The education article of a state constitution may also be invoked by "indirect application," through arguments that the article's language establishes education as a fundamental right with equal protection guarantees requiring strict scrutiny analysis.

<sup>185</sup>See Odden and Picus, *supra*.

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A notable direct application of a state education article and a forerunner of the concept of educational “adequacy” as articulated in prominent cases in the 1990s is *Pauley v. Kelley*,<sup>186</sup> in which the West Virginia Supreme Court of Appeals considered the constitutional provision that “the Legislature shall provide, by general law, for a thorough and efficient system of free schools.” The court held that, under equal protection guarantees, any discriminatory classification in state’s educational financing system cannot stand unless state can demonstrate some compelling state interest to justify the unequal classification, and that the “thorough and efficient” clause contained in West Virginia Constitution requires that the state legislature develop certain high quality statewide educational standards; if these values are not being met it must be ascertained that failure is not a result of inefficiency and failure to follow existing school systems. The high court remanded the case to the circuit court with orders to develop “thorough and efficient” education standards.

This case is noteworthy for the detail of the standards (or “Master Plan”) thus developed, including requirements for curriculum, personnel, facilities, and equipment for all school programs, along with the resources needed to meet those standards. The circuit court found the existing systems “woefully inadequate” by comparison and invalidated both the state school finance system and state procedures regarding local property tax assessments. It was not until 1997, however, that a court ordered the state to fully fund the plan.

The adequacy approach to interpreting state education clause requirements matured in the 1990s, with notable cases including Kentucky, Massachusetts, Alabama, and New Jersey. In *Rose v. Council for Better Education, Inc.*<sup>187</sup>, the Kentucky Supreme Court considered in 1989 whether the Kentucky General Assembly has complied with its constitutional mandate to “provide an efficient system of common schools throughout the state” Upon reviewing the evidence, the high court concluded that Kentucky’s wide variation in fiscal and educational resources resulted in unequal educational opportunities across local districts. Noting large interdistrict variances in both per-pupil property wealth and curricula, the court also cited resource-related disparities in pupil achievement test scores and expert opinion presented at trial that clearly established a positive correlation between such test scores and district wealth.<sup>188</sup>

### **Guaranteed Tax Base Programs**

Guaranteed tax base (GTB) programs were introduced in the early 1970s in response to school finance litigation in California. Like the foundation program, a GTB program is designed to remedy the basic structural flaw in the traditional approach to the local financing of public schools; namely, the unequal distribution of property wealth across local school districts. A GTB program guarantees

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<sup>186</sup>*Pauley v. Kelley*, 162 W.Va. 672, 255 S.E.2d 859 (1979).

<sup>187</sup>*Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (1989).

<sup>188</sup>Further, in a somewhat unusual turn, the court compared Kentucky’s elementary and secondary education system with national and neighboring norms in terms of fiscal performance and student achievement, finding Kentucky substandard in both instances.

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every local district a minimum per pupil revenue yield for each mill of tax effort. Put another way, a district's per pupil revenue level depends entirely upon its tax effort and not at all upon its tax base, because each district is guaranteed, through state aid grants, the equivalent of a state-designated property tax base.

Guaranteed tax base programs were first enacted in the early 1970s, at the same time of the first successful judicial challenges of state school finance systems. The object of these challenges was the relationship between school revenue and property wealth, stemming from the unequal distribution of local per pupil property wealth. In effect, GTB systems, also known as district power equalizing, guaranteed yield or equal yield systems, seek to guarantee all local districts equal access to school revenue through the local property tax.

In a GTB system, state aid varies inversely with local property wealth per pupil and directly with local tax effort. Districts can raise revenue in exactly the same manner as if they have a local tax base equal to the GTB. Further, unlike the foundation program which assigns determination of the tax rate to the state, the GTB program reserves that important decision to the local district voters. Thus, once local voters determine their desired per pupil spending level, they simply divide that figure by the GTB to determine their local tax rate. Then, they can multiply their local per pupil property wealth by their tax rate to determine their local share of school funding. For example, assume a local district in a state with a GTB program has per pupil property wealth in the amount of \$60,000 and a preferred spending level of \$6,000 per pupil and that the state's GTB is \$120,000. The district's required tax rate would be  $6,000/120,000 = 0.05$ ; that is, 5 percent or 50 mills. Their local per pupil contribution would be  $\$60,000 \times .05 = \$3,000$  and their per pupil GTB aid would be  $\$(120,000 - 60,000) \times .05 = \$3,000$ .

Another important feature of GTB is that both local revenue and state aid increase with increases in the local tax rate. That is, the GTB is a matching grant formula, with a district's matching rate inversely proportional to its per pupil tax base. In the example above, the local district's matching rate is 1.0. That is, for each local dollar raised for schools, the state will contribute one dollar. In the jargon of public finance, the local marginal tax price of a one dollar increase in per pupil spending in this example is fifty cents. Matching formulas, therefore, create an incentive for increasing expenditures on the supported service. This local discretion as to school spending level and the occasional unpredictability of local voter response to the GTB incentive have led many states to reject this funding program.<sup>189</sup>

The key question for a state with GTB program is the selection of the per pupil tax base level that the state will guarantee. The ideal level would be, of course, the level enjoyed by the most property rich school district. However, while this would ensure all districts access to the same effective tax base, it is prohibitively expensive. On the other hand, a low tax base guarantee (say, the statewide tax base per pupil) would leave all districts of above-average per pupil taxable wealth

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<sup>189</sup>The Kalkaska School District in Michigan closed its doors in mid-March of 1993 after local voters defeated a millage renewal. This early school closing, which received national attention, was a critical factor in Michigan's abandonment of GTB and adoption of its current foundation funding system the following year. For a full account and analysis, see Addonizio, Kearney, and Prince *supra*.

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with a fiscal advantage over all the rest. That is, at the same tax rate, these “out-of-formula” districts would be able to raise more per pupil revenue through their local property tax than the “in-formula” districts could raise through a combination of local property tax revenue and state GTB aid. The existence of such “out-of-formula” districts is contrary to the purpose of GTB, which seeks to offset school spending differences that stem from differences in local taxable wealth.

While there are no absolute standards with which states establish their GTB guarantee levels, Odden and Picus point to several possible benchmarks.<sup>190</sup> In states that have defended court challenges to their school finance systems, guarantee levels have been set from the 75<sup>th</sup> to the 90<sup>th</sup> percentile of students. A subsidiary issue for GTB states is whether to impose a limit on either the tax rate to be equalized or the local rate, or both. Under the former limit, state GTB aid would be paid up to the designated maximum rate and any local millage levied in excess of that rate would raise only local revenue. The principal weakness of this approach, of course, is that the unequalized portion of the revenue structure could swamp the equalizing effects of the GTB formula. The second type of limit is imposed on the local tax rate, resulting in a cap on per pupil expenditures. While such a limit would detract from local control, it would also limit variation across districts in per pupil expenditures. Kentucky’s 1990 school finance reforms included both of these reforms.

Although the GTB formula is designed with mathematical precision to equalize the tax bases available to local districts, two problems arise with this program. First, as mentioned above, states generally cannot afford to equalize all districts up to the level of the most property-rich communities. Second, even for those districts within reach of the formula, GTB programs often fail to eliminate the link between local school spending and local property wealth. That is, among GTB recipients, those with higher income and property wealth tend to levy higher local school tax rates than their less wealthy counterparts; wealthier voters tend to be more responsive to the price effects of the GTB formula, electing to purchase more of the subsidized good.

### **Combining Foundation and GTB Programs**

Some states combine foundation and GTB programs in an effort to ensure both an adequate funding level in every district and some measure of local discretion about school spending. These combination programs can be viewed as two-tiered, with the first tier consisting of a foundation program and a state-mandated tax and the second tier a GTB program providing local district voters with the option of levying equalized millage in excess of the state mandate.

Missouri has had such a two-tiered program since 1977.<sup>191</sup> In that year, the legislature placed a GTB program on top of their pre-existing foundation formula. In 1993, the legislature set the foundation level at just below the previous year’s statewide average expenditure per pupil and the GTB level at the per pupil property wealth of the district at the 95th percentile on that measure.

Combination formulas were also adopted in response to two widely-heralded and successful judicial challenges to school funding system in Texas and Kentucky. In Texas, the 1989-90

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<sup>190</sup>Odden and Picus, *supra*.

<sup>191</sup>*Id.*

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foundation program provided all districts with base per pupil revenue equal to 42 percent of the state average per pupil revenue.<sup>192</sup> This relatively low foundation was supplemented by a GTB program that guaranteed every district an effective per pupil tax base just below the statewide average. However, the state limited this guarantee to 3.6 mills over the required foundation tax rate. Districts were also allowed to levy unequalized local millage in excess of this limit.

The Kentucky legislature established a foundation base for 1989-90 equal to about 77 percent of the statewide average.<sup>193</sup> The legislature also placed a GTB program on top of this foundation, with a guarantee of approximately 150 percent of the state average. Kentucky's GTB program included two tiers, each with a tax rate limit. The first tier limited local districts to a 15 percent increase over the foundation level in revenue per pupil in combined local tax revenue and GTB aid. The second tier allowed local voters to raise up to an additional 15 percent of the foundation level through additional but unequalized millage. Put another way, Kentucky limited local revenue per pupil to 30 percent over the foundation level, with half of this "excess" revenue available through equalized millage.

This combination approach provides a means to meet a state objective of ensuring minimally adequate per pupil spending in all districts while allowing some measure of local discretion about spending above the foundation level- through an equalized local tax. Such local discretion allows districts to respond not only to local preferences regarding educational programs, which generally vary across localities, but also to differences in the price of educational resources, including teacher salaries. Such prices are generally higher in urban districts.

### **Adjustments to Basic Funding Levels**

Odden and Picus cite four types of adjustments that states could reasonably be expected to make to their base per pupil allocations: special pupil needs (e.g., children from poor families, children with physical or mental disabilities, or children with limited English proficiency); education level (elementary and secondary); economies and diseconomies of scale; and price differences, noted above.<sup>194</sup> Of these adjustments, the matter of special pupil needs is arguably the most important and has received far more attention by policymakers than the other issues. The attention stems from the uneven distribution of special needs children across local districts. For example, children from households with incomes below the poverty level tend to be concentrated in large, urban districts and small, generally rural districts. Such districts are also home to concentrations of students from whom English is not the primary language.

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<sup>192</sup>Id.

<sup>193</sup>Id.

<sup>194</sup>Id.

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Children raised in poverty and children with limited English proficiency have much greater than average risk of not graduating from high school.<sup>195</sup> Accordingly, such students require various types of supplemental educational services. Like regular education services, the cost of supplemental services varies considerably across local districts. Large urban districts generally face higher prices for these services while serving larger concentrations of special needs students. At the same time, such districts are generally property-poor as compared with statewide averages. Consequently, most states and the federal government recognize a responsibility to assist districts in financing these supplementary programs. Such aid, however, is small in comparison to general school revenue and is distributed to local districts according to the numbers of special needs pupils and not local taxable wealth.

### NOTABLE STATE SCHOOL FINANCE REFORMS

The foregoing analysis addresses the goals of state school finance systems and the mechanisms designed to achieve them. This section will examine finance reforms in four notable reform states: Kentucky, Texas, Michigan and Vermont. These states addressed issues of taxation and educational funding with bold remedies, some in response to adverse judicial decisions and others in response to political pressures.

(1) *Kentucky*. In 1989, as noted above, the Kentucky Supreme Court ruled that the state's entire elementary and secondary public school system was unconstitutional (*Rose v Council for Basic Education, Inc.*, 790 S.W. 2nd 186 (Ky. 1989)). This landmark decision resulted from an earlier and more limited school finance case in which plaintiffs challenged the constitutionality of the Kentucky funding formula on grounds that it was inequitable and therefore in violation of the education clause of the state constitution, which requires that school funding be "efficient." The district court found for the plaintiffs. On appeal, the Supreme Court expanded the scope of the decision to include not only school finance but the entire public education system and directed the legislature to recreate the entire education structure, including school governance, finance and curriculum.

The finance reform, known as Support Educational Excellence in Kentucky (SEEK), consists of four parts: an "adjusted base guarantee" (ABG), a required local tax effort, and two "tiers" which allow local districts to supplement their basic guarantee through a combination of state and local revenue.<sup>196</sup> The ABG provides local districts with a foundation payment for each student. This base revenue level is set by the General Assembly and is constant across all districts. The base is then adjusted by four factors associated with the costs of special services: services for exceptional children, services for educationally at-risk children (generally, low-income), pupil transportation and home and hospital instruction. The minimum local tax effort required for the ABG grant is 30 cents per \$100 of assessed valuation. Tier I provides local districts with an option to supplement their

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<sup>195</sup>H. Levin, "The Economics of Education for At-Risk Students," in *Essays in the Economics of Education*, E. Hoffman, ed. (Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, 34-73).

<sup>196</sup>For a more complete discussion of SEEK, see J.E. Adams and W.E. White, "The Equity Consequence of School Finance Reform in Kentucky," *Educational Evaluation and Policy Analysis* 19 (1997): 165-184.

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ABGs by a maximum of 15 percent. School boards may levy taxes and the state matches this local effort with equalization aid for districts with property wealth per pupil below 150 percent of the state average. Tier II allows school districts to raise up to 30 percent of combined ABG and Tier I revenue. Local levies permitted under Tier II must be voted by the local electorate and are not equalized by the state.<sup>197</sup>

Kentucky's Office of Education Accountability reports that total state and local support for K-12 education rose from about \$2 billion in 1989-90 to \$3.4 billion in 1997-98, an increase of 70 percent. Per pupil revenue rose from \$3,161 to \$5,306 over this period, an increase of nearly 68 percent. At the same time, school funding has become more equitable, with the difference between mean per-pupil revenues in the highest and lowest quintiles falling from \$1,516 in 1989-90 to \$209 in 1997-98, a decrease of 86 percent. Similarly, the coefficient of variation fell from 0.193 in 1989-90 to 0.090 in 1996-97, indicating that two-thirds of all pupils in Kentucky were within 9 percent of the statewide average per pupil revenue.<sup>198</sup>

(2) *Texas*.<sup>199</sup> Public school funding in Texas has been shaped by a series of lawsuits filed in the state courts over the 1985 to 1995 period.<sup>200</sup> At issue in this litigation was the heavy reliance on local property taxes to fund public schools and the great disparity in property values across the state. These wealth disparities had to be neutralized by the state in order to provide local districts with equal access to school revenue. The litigation prompted the Texas legislature to pass a system of aid formulas that comprise the Foundation School Program (FSP). The FSP equalizes funding for public education in Texas by supplementing local school revenue with state aid and by limiting school funding in very wealthy districts. As such, the FSP provides substantially equal revenue per pupil at equal local tax rates.

Tier 1, or the foundation, of the FSP provides each local district with a "basic allotment" that is then adjusted to reflect differences in costs and educational needs. State aid under Tier 1 is inversely related to local property wealth per student. The resulting combination of state and local funds provides local districts with equal levels of educational resources for equal tax effort. To participate in this program, local districts are required to levy a "Local Fund Assignment" tax rate of \$0.86 per \$100 of property value.

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<sup>197</sup>In 1996-97, 161 of Kentucky's 176 school districts participated in Tier I at the maximum level, while the remaining 15 participated to some degree. In addition, 161 districts participated in Tier II to some extent. Office of Educational Accountability, *1997 Annual Report* (Frankfort, Ky.: Kentucky General Assembly, 1997).

<sup>198</sup>J.E. Adams, "Kentucky: A Decade Since *Rose*," in *The Political Economy of Education: The State of the States and Provinces 1999*, B. Brendt., ed. (Rochester, N.Y.: University of Rochester, 1999), 77-82.

<sup>199</sup>This section draws on C. Clark, "Introduction to Texas School Finance," in *The Political Economy of Education: The State of the States and Provinces 1999*, B. Brent, ed. (Rochester, N.Y.: University of Rochester, 1999), 197-202.

<sup>200</sup>*Edgewood Independent School District v. Kirby*, 777 S.W. 2d 391 (Tex. 1989); *Edgewood v. Meno*, 917 S.W. 2d 717 (Tex. 1995).

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Tier 2 provides equalization funds to local districts in excess of the base funding level of Tier 1. Unlike Tier 1, participation in this program is discretionary. Districts may levy up to \$0.64 of tax per \$100 of property value and will be guaranteed \$21 per student for each penny of tax rate in combined state and local funds. Districts with per student property wealth in excess of \$210,000 will receive no state aid.

A third part of the funding structure provides for so-called “wealth sharing.” Specifically, districts with property values greater than \$280,000 per pupil are required by Chapter 41 of the Texas Education Code to reduce their wealth by one of five wealth sharing options. These options include school district consolidation, detachment of property and annexation of that property to a low-wealth district, purchase of attendance credits from the state, contracting for the education of students in another school district, and consolidation with lower wealth districts. Of the 93 districts subject to the Chapter 41 wealth sharing provisions in 1998-99, all chose either the purchase of attendance credits or contracting for the education of nonresident school districts. These measures, commonly referred to as “Robin Hood” requirements, have combined with Tiers 1 and 2 to measurably improve the equity of public school funding in Texas.

(3) *Michigan*. Prior to 1973-74, Michigan distributed general aid to local schools through a foundation aid system that guaranteed a minimum expenditure per pupil in every local district. However, by 1973, Michigan’s highest-spending district tripled the per-pupil expenditures of the state’s poorest district. Facing disparities of this magnitude, along with a court challenge of the constitutionality of Michigan’s aid system,<sup>201</sup> the legislature replaced the foundation formula with a guaranteed tax base (GTB) formula, effective for the 1973-74 fiscal year. In that first year, more than 90 percent of Michigan’s school districts received GTB aid. By 1993-94, however, this percentage had fallen to approximately two-thirds and the ratio of per student spending between the highest- and lowest-spending districts had risen to the levels of the early 1970s. Further, property tax rates had risen to unacceptably high levels for many residents and 122 districts were within four mills of the state’s constitutional 50-mill limit.

Voter ambivalence toward Michigan’s property tax and school funding systems was reflected in a string of 12 consecutive failed statewide ballot proposals spanning more than a decade in the 1980s and early 1990s. Then, in late July of 1993, in a stunning development, the Michigan legislature eliminated the local property tax as a source of operating revenue for the public schools, thereby lowering K-12 operating revenue by more than \$6.5 billion. In March of 1994, Michigan voters approved a constitutional amendment (Proposal A) increasing the state sales tax from 4 to 6 percent. In addition, the state’s flat rate income tax was lowered from 4.6 to 4.4 percent, the cigarette tax was raised from 25 to 75 cents per pack, and a per-parcel cap on assessment growth was set at the lesser of inflation or five percent (reassessed at 50 percent of market value on sale). Property taxes for school operations were restored at dramatically lower levels than before – to six mills on homestead property and 24 mills on non-homestead property in most districts.

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<sup>201</sup>*Milliken v. Green*, 389 Mich. 1, 203 N.W. 2d 457 (1972), opinion vacated by 390 Mich. 389, 212 N.W.2d 711 (1973).

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On the allocation side, new legislation returned Michigan from a GTB formula to a foundation program as the core of state school funding. A district's 1993-94 combined state and local operating revenue per pupil (primarily local property taxes, state aid and most categorical aid) formed the basis for determining its 1994-95 foundation allowance. The legislation provided that every district have a foundation of at least \$4,200 per pupil. In addition to establishing a minimum (local) foundation allowance, the legislation set a state basic foundation allowance at \$5,000 per pupil for 1994-95. This allowance is changed annually through application of revenue growth and enrollment growth indices. Districts spending more than the state foundation will receive per-pupil revenue increases equal to the annual dollar increase in the basic foundation allowance, while districts spending less than the basic allowance will receive increases up to twice that amount. Thus, this basic allowance, which rose to \$5,153 in 1995-96, \$5,308, \$5,462 in 1997-98 and 1998-99 and \$5,696 in 1999-00, will constrain per pupil spending growth in more districts each year and exert a "range preserving" effect on interdistrict spending disparities.<sup>202</sup>

Michigan's school finance reforms were intended to achieve four objectives: (1) substantially reduce property taxes; (2) increase the state share of total K-12 revenue; (3) reduce interdistrict disparities in per-pupil revenue; and (4) assure all local districts a minimum level of resources with which to meet state and local education standards. It appears that the first two objectives have been accomplished. Proposal A reduced total property taxes by about 26 percent. For homeowners, the reduction is about 32 percent, while the cut for businesses is about 13 percent. Further, the state share of K-12 revenue has risen from about 45 percent in 1993-94 to over 80 percent in 1999-2000. Measurable progress has also been made toward objective three.<sup>203</sup>

Progress toward objective four, however, is more problematic. While the reforms established minimum funding levels for local districts and substantially increased aggregate K-12 revenue in 1994-95, including proportionately large increases for low-spending districts, aggregate revenue growth has slowed since then. With new constraints on local revenue growth and a greater reliance on more income-elastic revenue sources, overall real spending levels could fall during a recession. Centralization and equalization of public school funding along the lines of the Michigan reforms have led to slower revenue growth in other states.<sup>204</sup>

(4) *Vermont*. In February 1997, the Vermont State Supreme Court unanimously ruled that the state's school finance system was unconstitutional.<sup>205</sup> Prior to the ruling, Vermont's public school

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<sup>202</sup>For a detailed analysis of the Michigan foundation program and related reforms, see M. Addonizio, C.P. Kearney, and H.J. Prince, "Michigan's High Wire Act," *Journal of Education Finance* 20 (Winter 1995): 235-269.

<sup>203</sup>M. Addonizio, "You Can't Always Get What You Want: Property Tax Relief and School Funding in Michigan," in *The Political Economy of Education: The State of the States and Provinces 1999*, B. Brendt., ed. (Rochester, N.Y.: University of Rochester, 1999), 111-116.

<sup>204</sup>See, e.g., T. Downes, "Evaluating the Impact of School Tax Reform on the Provision of Public Education: The California Case," *National Tax Journal* 45 (December 1992), 405-419.

<sup>205</sup>*Brigham v. State of Vermont*, 166 Vt. 246, 629 A.2d 384 (1997).

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finance system was characterized by large disparities in local tax burdens and per pupil expenditures. Local school tax rates ranged from \$0.02 to \$2.40 per \$100 valuation, while per pupil spending varied from \$2,961 to \$7,726. The court held that state's system of financing public education did not satisfy requirements of education clause and the common benefits clause of Vermont Constitution; these clauses, said the supreme court, require the state to ensure substantial, rather than absolute equality of educational opportunity throughout Vermont. Equal per pupil funding, the court ruled, was neither a constitutional requirement nor a desired policy goal. Rather, the court held that a constitutional funding system required that educational opportunity not be a function of local wealth.

In response to this ruling, the legislature passed Act 60, which established a two-tiered funding formula consisting of a foundation program at its base and a guaranteed tax base (GTB) program as a supplement. The foundation level was set at \$5,010 per pupil and indexed to the cost of government goods and services, while the GTB was set for FY 2000 at \$40 per pupil for each 1 cent increase per \$100 valuation in the local property tax. The program is funded by a new statewide property tax set at \$1.11 per \$100 valuation in FY 1999. The system includes a controversial redistributive mechanism, or “recapture” provision, whereby property-rich towns that generate local revenues in excess of either the foundation level with the statewide tax or the GTB level with the local tax pay these excess funds to the state. These funds are then redistributed to districts statewide. Both the tax and expenditure features of the new system have been roundly criticized by residents of property-rich districts, some of whom have experienced a doubling or tripling of their school taxes while facing lower growth in per pupil revenue.<sup>206</sup>

### **FINANCING CAPITAL PROJECTS<sup>207</sup>**

Local school districts are generally unable to finance the construction of new facilities, renovation of older buildings or the acquisition of large equipment (e.g., buses, technology) from operating revenue. Rather, they need authority to sell bonds to spread payments over a long period. At the same time, states regulate such borrowing to ensure the responsible use of this debt and prevent defaults or large, long-term deficits.

While most states provide modest financial assistance to their local districts for capital projects, most long-term debt is repaid with local property tax revenue. Consequently, the quality of public school facilities often depends upon local district fiscal capacity, precisely the equity problem addressed in *Serrano* and other cases with respect to school operating revenues. State responses to this equity issue, have been decidedly less substantial regarding capital outlay. As Alexander and Salmon have observed: “The problems of providing modern school plants, not only in the ghetto

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<sup>206</sup>W.J. Mathis, “The State of the State: Vermont’s Act 60 Finance Reform,” in *The Political Economy of Education: The State of the States and Provinces 1999*, B. Brendt., ed. (Rochester, N.Y.: University of Rochester, 1999), 209-212.

<sup>207</sup>This section is based, in part, on a more complete discussion in K. Alexander and R.G. Salmon, *Public School Finance* (Needham Heights, Mass.: Allyn and Bacon, 1995).

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areas of cities but also in many rural and metropolitan area school districts, cannot be resolved until appropriate new designs, provisions, and procedures for financial support are developed and implemented.”<sup>208</sup>

Although states have adopted a variety of state capital-outlay and debt-service-assistance programs, the tradition of local financing of public school facilities continues in most states today. Given the limited funds available from state-supported capital-outlay and debt-service programs, local districts rely on one or more of the following three options:

(1) *Current revenues*. Some very large or very affluent school districts are able to finance school construction projects on a “pay-as-you-go” basis. By this method, the entire cost of a project is accrued from the revenues of one fiscal year’s local tax levy. This method is ideal because it eliminates costs associated with interest payments, bond attorney fees, and local tax elections. Two disadvantages are the failure to distribute capital costs over those future generations that will benefit from the facility and the failure to capitalize on lower real borrowing costs during periods of inflation. In any event, few local districts are able to finance large capital projects with current revenues.

(2) *Building Reserve Funds*. Some states permit local districts to accumulate tax revenues for the purpose of funding the construction of future school facilities. These building reserve funds are kept separate from current operating revenues and are generally raised through earmarked tax levies. In most cases, state laws limit the investment of these revenues to low-risk, low-yield options. Building reserve funds enable a local district to undertake a capital project without the delays and costs associated with obtaining voter approval for the sale of the bonds. In addition, debt service costs are avoided as are local restrictions on tax or debt limitations.<sup>209</sup> Such funds are used by several states but raise a relatively insignificant proportion of K-12 capital funding.<sup>210</sup>

(3) *General Obligation Bonds*. The vast majority of public school facilities is financed through the sale of general obligation bonds. School bonds, along with other municipal bonds, are legal instruments sold by the borrower as evidence of debt, which specify interest rates, payment schedules, and security. Municipal bonds are exempt from the federal personal income tax and the personal income tax in most states, making them particularly attractive for investors facing high marginal income tax rates.

Municipal bonds are a relatively low-risk investment. Moreover, general obligation bonds (one type of municipal bond) are secured by the full faith, credit and taxing authority of the issuer. As such, general obligation bonds are usually considered the most secure of the municipal bonds.

Constraints imposed on the issuance of general obligation bonds vary considerably across the states and, in some cases, across local school districts within states. Most states limit local school

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<sup>208</sup>Id., at 335.

<sup>209</sup>K. F. Jordan, M. McKeown, R. D. Web, *School Business Administration* (Newbury Park, Calif.: Corwin Press, 1985), 272-278.

<sup>210</sup>K. Alexander and R.G. Salmon, *supra*, at 337.

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district debt, a constraint that is particularly troublesome for property-poor districts. States also impose various requirements on local districts seeking approval of the sale of general obligation bonds. Some states require a simple majority of those voting at referendum, while others require a supermajority.

### **State Options for Capital Expenditure Financing**

By 1993-94, 35 states provided financial support to local districts for capital expenditures.<sup>211</sup> This support was provided through one of the following mechanisms: (1) complete state support; (2) grants-in-aid; (3) loans; or (4) building authorities. Each is discussed briefly below.

(1) *Complete State Support.* Under this option, the funding of all capital and debt-service expenditures of the public schools is borne entirely by the state. One obvious advantage of this approach is statewide fiscal equalization across local districts of varying property wealth. Further, states generally have access to a greater variety and level of resources than do local units of government and face lower borrowing costs. Such programs, however, are rare. In 1993-94, complete-state-support programs were operating in Alaska, California, and Hawaii.<sup>212</sup>

(2) *Grants-in-aid.* Such grants generally take one of three forms. *Equalization grants* are designed to allocate aid in inverse relation to local district property wealth per pupil. This approach, which is widely used by states to distribute operating revenue to local school districts, allows local districts to finance school facilities of comparable quality despite variations in local taxable wealth. Further, these grants require some local contribution, creating an incentive for greater efficiency in capital spending. *Percentage-matching grants* provide a fixed percentage of state support for each local capital project. Unlike equalization grants, these grants do not vary with local fiscal capacity. This approach is viewed by critics as overly burdensome to property-poor districts where voters may need to levy high local tax rates in order to obtain the required local matching funds. Consequently, states have abandoned this approach, with its last proponent, Delaware, changing to an equalization approach in 1992. *Flat grants* provide local districts with a fixed amount of revenue for each state-approved capital project or each pupil. In either case, this approach shares with percentage-equalizing grants the drawback of ignoring local district fiscal capacity. The adverse consequences become greater, of course, when the flat grant aid is a small proportion of total capital spending.

(3) *Loans.* Some states have established one or more funds, often through the use of earmarked revenues, with which to provide low-interest loans to local districts. In most cases, these loan programs do not consider the relative fiscal capacities of local districts and thus, do not achieve any significant degree of fiscal equalization.

(4) *Building Authorities.* Public school building authorities are agencies established by the state to allow local districts to circumvent restrictive tax or debt limitations otherwise imposed on local

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<sup>211</sup>*Public School Finance Programs of the United States and Canada*, Steven D. Gold, David M. Smith and Stephen B. Lawton, eds. (Albany, NY: American Education Finance Association and Center for the Study of the States, The Nelson A. Rockefeller Institute of Government, State University of New York, 1995), 48-52.

<sup>212</sup>*Id.*

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governments. Since these authorities are separate government agencies and do not operate schools, tax or debt limitations for the school district are thereby averted. Not all states permit the use of building authorities to construct school facilities. Often, local school districts can use building authorities without obtaining local voter approval. These authorities, however, generally suffer the disadvantage of using revenue bonds to finance capital projects, thereby incurring higher interest costs as compared with the interest costs of more secure general-obligation bonds.

### Site Selection and Acquisition

Acquiring a proper site for a school is a critically important public service. However, obtaining good sites for schools is becoming increasingly difficult.<sup>213</sup> Problems in site acquisition include competition for sites with the commercial sector; the increase in site size to accommodate a widening range of educational programs; the rise in land prices; and, in urban areas, the scarcity of open land. As a result, education planners now must consider less than optimal sites. Further, while communities want a new school when enrollments rise sufficiently, no one wants a new school located next to their property. Reasons include noise and congestion and the perception that an adjacent school site will lower property values.

The selection of a school site is one of the most controversial issues involved in planning a new school. Consequently, some local school officials choose not to involve members of the community in the site selection process. This is particularly true in large districts, where local school politics can be particularly contentious. In a survey of the ten largest school districts in the country, respondents in a majority of the districts indicated they do not include local residents in the location decision for fear that disagreements could delay or prevent site acquisition.<sup>214</sup> Resort to such a closed decision-making process, however, is not universal. Many local districts, as a matter of policy, involve community members in the site selection process. Participants in this process analyze data and information from several sources, including regional, urban or community land use maps, aerial photographs, re-development authority maps, and a tour of the areas to be served by the new school.<sup>215</sup>

The final criterion for school site selection is political acceptability. In more heavily populated areas, a school site is usually designated well in advance of need by the local governing body in accordance with their long-range development plan. Such a plan generally addresses the placement of all important community resources, including schools, recreation areas, parks, libraries and other amenities intended to serve the entire community.<sup>216</sup>

### Impact Fees

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<sup>213</sup>G.I. Earthman, "Facility Planning and Management," in *Principles of School Business Management* (Reston, Va.: Association of School Business Officials International, 1986), 611-649.

<sup>214</sup>G.I. Earthman and J. Bailey, "The Politics of Site Selection," *CEFP Journal* 13, No. 5 (October 1975): 4-8.

<sup>215</sup>G.I. Earthman, *supra*.

<sup>216</sup>*Id.*

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Local governments across the U.S. have adopted various forms of impact or developer charges as a means of financing the timely installation of public facilities, including public schools. These charges imposed as a condition of development approval include impact fees, special assessments, development agreements, user fees and connection fees. Impact fees are imposed on developers to ensure sufficient funding for those capital services and facilities needed to support the new development. Such public services and facilities include roads, parks, police, fire, sewer, water, libraries, and schools. Some states expressly authorize impact fees for schools.<sup>217</sup>

### CONCLUSION

Local school districts across the U.S. vary enormously in income and property wealth. Fueled in large part by local land use decisions and other economic development measures designed to attract investments, these local fiscal disparities pose a challenge to education policymakers and others who seek equal educational opportunities for our children. Such opportunities can arise only through the workings of state school finance structures that effectively neutralize the often substantial differences in local school district fiscal capacity. The structures have been shaped, in large part, by judicial decisions about states' constitutional responsibilities for funding public schools.

Following the landmark U.S. Supreme Court decision in *San Antonio Independent School District v. Rodriguez*, which effectively closed the door on education finance equity litigation in the federal courts, reform advocates have turned to state courts and legislatures to pursue equity and adequacy in public school finance. These reforms seek to neutralize differences in property wealth across local communities. Without such state intervention, children fortunate enough to live in wealthy enclaves will have access to a rich array of educational resources while those in poor communities will face relatively meager school programs. In view of the importance attached to education in preparing our children for participation in public and economic life, such a situation seems unfair and undemocratic.

In response to these concerns, states have adopted school funding structures designed to offset differences in local property wealth. These structures, which are much more prominent in the funding of school operations than school construction and rehabilitation, provide state school aid in inverse proportion to local taxable wealth. Guaranteed tax base (GTB) and conceptually equivalent district power equalizing programs allow local voters to determine their tax and school spending levels and seek to assure local districts equal revenue per pupil for equal tax effort. In contrast, foundation programs limit local voters' ability to exceed those rates. Some states employ a combination of these two approaches.

While these state initiatives have succeeded in measurably improving the equity of school funding across the states, funding disparities remain as local economic development proceeds unevenly across communities. As long as local governments vary in their abilities to attract high

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<sup>217</sup>See the discussion of state impact fee enabling statutes preceding Section 8-602 (Development Impact Fees) of the *Legislative Guidebook*. See generally C.L. Siemon and M.J. Zimet, "School Funding in the 1990s: Impact Fees or Bake Sales," *Land Use Law and Zoning Digest* 44, No. 7 (July 1992): 3-9.

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value commercial, industrial and residential investment, their capacities to support public education systems will vary as well. As a result, the task of achieving equal educational opportunity for our children will remain a responsibility of the states.

**STATE-LEVEL GEOGRAPHIC INFORMATION SYSTEMS  
AND  
PUBLIC RECORDS OF PLANS, LAND DEVELOPMENT  
REGULATIONS, AND DEVELOPMENT PERMITS**

This Chapter proposes model legislation for state-level geographic information systems (GIS). GIS is a computerized system that stores and links spatial or locationally defined data. Increasingly, state governments are establishing, by statute or administrative or executive measures, formal structures within them to manage, coordinate, and analyze geographic information. Section 15-101 establishes a division of geographic information in the state planning agency (although the function could be placed in any appropriate state department). The division is charged with operational responsibility for establishing and maintaining the state GIS, along with affiliated functions such as administering grant programs to local government and providing access to training. It also has rule-making authority. A Geographic Information Advisory Board provides general policy advice to the division under Section 15-102.

The Chapter also proposes statutes, in Sections 15-201 to 15-203, to ensure a permanent, easily accessible central storage of the rules and decisions that control or guide land development, including plans, land development regulations, and development permits through a system of public records.

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## CHAPTER 15

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### Chapter Outline

#### STATEWIDE GEOGRAPHIC INFORMATION SYSTEMS

- 15-101 Division of Geographic Information
- 15-102 Geographic Information Advisory Board

#### PUBLIC RECORDS OF PLANS, LAND DEVELOPMENT REGULATIONS, AND DEVELOPMENT PERMITS

- 15-201 Filing Requirements for Development Permits and Land Development Regulations Affecting Specific Lots or Parcels
- 15-202 Recording Requirements for Plans and Land Development Regulations of General Applicability
- 15-203 Duties of [State Planning Agency] regarding Forms and Tract Index

#### Cross-References for Sections in Chapter 15

Section No.	Cross-Reference to Section No.
15-101	4-103, 4-104, 15-102
15-102	15-101
15-201	8-301, 8-502, 9-401, 10-201 <i>et seq.</i> , 15-202, 15-203
15-202	5-207, 5-208, 5-209, 7-201, 8-102, 15-203
15-203	15-201, 15-202

**STATEWIDE GEOGRAPHIC INFORMATION SYSTEMS**

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***Commentary: State-level Geographic Information Systems***

The term “geographic information system” (GIS) refers to a computerized system that stores and links spatial or locationally defined data in order to allow a wide range of information processing and display operations as well as map production, analysis, and modeling. GIS data can include property records, land, water, air, mineral, biological, and other natural resources, boundaries of governmental units, the distribution of plant, animal, and human populations, and the location of historically and culturally significant areas.

GIS is increasingly viewed as a transforming technology and a tool to democratize data. It enables governments to more quickly and better portray, communicate, and analyze existing and potential conditions from a visual perspective, making it more understandable. At the same time, GIS enables the public and other organizations to be better informed and more effectively involved in the governing process.

GIS is an important planning tool. GIS systems can produce maps of existing and future land uses, watersheds, aquifers, vegetation, buildings, zoning, and transportation and community facilities systems and can track information over time, such as the availability of vacant, buildable land, or changes in population characteristics. GIS can also be used to help analyze conditions and scenarios in new ways to empower planners and others to make decisions more effectively and efficiently.

In some states, the function is established by statute (see discussion below), in others by an executive order, and in still others by some other device, such as a memoranda of understanding. Many states adopt plans, policies, and standards to improve GIS technology availability and sharing among public, and, sometimes, private, organizations.

More states have been formally establishing the position of GIS coordinator, generally intended to provide a clearinghouse and educational functions. In 1985, there were 17 states with GIS coordinators, either established formally (10 states, through statutes or administration measures described above) or informally (7 states – a defacto designation occurring by tradition). As of 1995, that figure had risen to 41 states with 33 states where the position was formally established and 8 states where the position was informal in nature.<sup>1</sup> State governments that had geographic information coordinators, placed them in different agencies: 18 were in an information policy or technology agency, 12 were in an environmental or natural resources agency, 8 were in a planning, policy, or administrative agency, 2 were in another state agency, and 1 was in a non-governmental

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<sup>1</sup>Lisa Warnecke, *Geographic Information/GIS Institutionalization in the 50 States: Users and Coordinators* (Santa Barbara, Calif.: National Center for Geographic Information and Analysis, University of California, 1995).

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organization.<sup>2</sup> Table 15-1 shows, the different ways that state governments had been using GIS technology as of 1995, regardless of whether there was a coordinator.

**Arizona** places the function in a resource analysis division in the state land department. The division includes a state cartographer.<sup>3</sup> Among the division's responsibilities are providing an information clearinghouse and central repository for map and imagery products and digital cartographic data. It is charged with creating a GIS for that state that "shall be capable of input, processing, compositing, analysis, synthesis and manipulation of data from maps, aerial photos, orthophotos, remote sensing devices, and other spatial data sources."<sup>4</sup>

**Arkansas** has a state land information board which is assigned to "write guidelines and develop a strategy for statewide" GIS, develop "standard metadata reports," and direct available funds to mapping and land records modernization projects – a big emphasis in the statute – at various levels of government. The board can contract with the state department of information systems to act as the state clearinghouse and to provide digital maps or metadata for all agencies and units of government.<sup>5</sup>

**Florida's** statute is extensive. It provides for a geographic information advisory board in the executive office of the governor. The board is charged with facilitating the identification, coordination, collection, and sharing of geographic information among federal, state, region, and local agencies, and the private sector. In particular, the board must promote consistency of data elements by establishing standard data definitions and formats. The board can also issue guidelines on recommended best practices for GIS. Members of the board include representatives of state agencies, local governments, regional planning councils, water management districts, and county property appraisers. The statute also creates a geographic information advisory council, also composed of representatives from state agencies and a variety of interest groups, to assist the state board. The statute contains language that provides that if a state agency fails to comply with requirements of the law without "good cause," the executive office of the governor may withhold releases of appropriations of those portions of the agency's operating budget.<sup>6</sup>

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<sup>2</sup>Lisa Warnecke, "Governing Geographically: State Legislative Direction to Institutionize Geographic Information Coordination and Technology," prepared for the American Planning Association (June 1999, unpublished), Table 3.

<sup>3</sup>Az. Rev. Stat. §37-172 (2000).

<sup>4</sup>Id., §37-173.1 to .2.

<sup>5</sup>Ar. Code §§ 15-21-501 et seq. (2000).

<sup>6</sup>Fl. Stat. §282.404 (2000).

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**Table 15-1**  
**GIS Use in State Government, 1995, Classified by Function**  
**(in states that apply GIS by such function)**

General State Government	Environment & Natural Resources	Cultural Resources	Infrastructure	Human Services	Other
13 – Revenue, including property taxation 13 – Census data center 12 – State planning 9 – Budget, finance, comptroller, state property management 3 – Library 1 – Banking regulation	49 – Water: quantity, quality, rights, or drinking 42 – Wildlife, game fish, or biological resources 39 – Waste management, including solid 29 – Air quality 27 – State forestry organization 27 – Agriculture 24 – Oil, gas, mining regulation and reclamation 22 – Public lands mgt. 22 – Parks mgt. 20 – Natural heritage program 18 – Coastal resources 12 – Energy	19 – Coastal resources 14 – Archaeology 1 – Other (museum)	50 – Transportation 9 – Utility regulatory commissions	25 – Health (primarily epidemiology) 6 – Social services 4 – Employment security and labor 3 – Education	24 – Public safety, emergency mgt. and military 20 – Economic development 20 – Community and local affairs 3 – Education

Source: Lisa Warnecke, *Geographic Information/GIS Institutionalization in the 50 States: Users and Coordinators* (Santa Barbara, Calif.: National Center for Geographic Information and Analysis, University of California, 1995).

Like Florida, **Kentucky's** statute creates a 26-person geographic information advisory council that is responsible for establishing and adopting statewide policies and procedures for GIS.<sup>7</sup> The council is staffed by an office of geographic information, in the office of the secretary of the state

<sup>7</sup>Ky. Rev. Stat. §§61.598 et seq. (2000)

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finance and administration cabinet. Among its charges is coordinating multiagency GIS projects and providing education and training on GIS to state and local agencies. It also functions as an internal consultant to other state agencies, upon request.<sup>8</sup>

In **Minnesota**, the land management information center is located in the state office of strategic and long-range planning. The center's purpose is to "foster integration of environmental information and provide services in computer mapping and graphics, environmental analysis, and small systems development."<sup>9</sup> **New Hampshire** charges the office of state planning, which is within the office of the governor, with developing and maintaining a statewide GIS.<sup>10</sup>

**Utah**'s GIS function is housed in the "Automated Geographic Reference Center," in the division of technology services. The division manages the state GIS, establishes standard formats, make rules and establish policies to govern the center and its operations, and sets fees for the services provided by the center, a common provision in state statutes.<sup>11</sup> **Virginia** has established a department of technology planning and, within it, a geographic information network division, which is to "foster the creative utilization of geographic information and oversee the development of a catalog of GIS data" available in the state.<sup>12</sup> It has also created a Virginia Geographic Information Network Advisory Board, which advises the division.<sup>13</sup> An interesting provision in the Virginia statute states that "Nothing in this article shall be construed to require that GIS data be physically delivered to the [geographic information network division]."<sup>14</sup> Instead, state agencies that maintain GIS databases must report to the division the details of the data they develop, acquire and maintain.

In 1989, **Wisconsin** created a Land Information Board, staffed by the department of administration, and established a land information program that is used to develop and implement countywide plans for land records modernization, which typically involve GIS. The board includes state and local government and private members and is authorized to direct and supervise the land information program and serve as the state clearinghouse for land records modernization.<sup>15</sup> The board provides grants for land modernization to counties that have established a land information

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<sup>8</sup>Id., § 42.650.

<sup>9</sup>Minn. Stat. §4A.05 (1999).

<sup>10</sup>N.H. Stat. Ann. § 4-C:3 (1999).

<sup>11</sup>Ut. Code §63A-6-202 (1999).

<sup>12</sup>Va. Code §2.1-563.37 (1999).

<sup>13</sup>Id., §2.1-563.41.

<sup>14</sup>Id., §2.1-563.38.7.

<sup>15</sup>Wis. Stat. §§16.966 to 16.967 (1999).

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office.<sup>16</sup> Nonetheless, the department of administration is charged by statute with developing and maintaining GIS in the state.<sup>17</sup>

### MODEL STATUTES

The models in Sections 15-101 and 15-102 are based chiefly on the Florida, Kentucky, and Virginia statutes, but also incorporate ideas contained in the Utah statutes. Section 15-101 establishes a division of geographic information in the state planning agency (although the function could be placed in any appropriate state department). The division is charged with operational responsibility for establishing and maintaining the state GIS, along with affiliated functions such as administering grant programs to local government and providing access to training. It also has rule-making authority. A Geographic Information Advisory Board provides general policy advice to the division.

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#### 15-101 Division of Geographic Information

- (1) There is hereby established a division of geographic information, referred to in this Section as the “division,” in the [state planning agency *or other state department*].
- (2) The director of the [state planning agency *or other state department*] shall appoint a person of suitable training, experience, and knowledge to manage the division and who shall serve at the pleasure of the director.
- (3) As used in this Section and in Section [15-102], “**Geographic Information System**” or “**GIS**” means computer software programs that allow the analysis of data or databases in which location or spatial distribution is an essential element, including, but not limited to, land, air, water, and mineral resources, the distribution of plant, animal, and human populations, real property interests, zoning and other land development regulations, and political, jurisdictional, ownership, and other artificial divisions of geography.
- (4) The division may solicit, receive and consider proposals for funding from any state agency, federal agency, local government, university, nonprofit organization, or private person or corporation. The division may also solicit and accept money by grant, gift, bequest, legislative appropriation, or other conveyance.
- (5) The division shall:
  - (a) provide staff support and technical assistance to the Geographic Information Advisory Board established pursuant to Section [15-102];

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<sup>16</sup>Id., §16.967(7).

<sup>17</sup>Id., §16.966(3).

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- (b) establish a central statewide geographic information clearinghouse to maintain data inventories, information on current and planned geographic information systems applications, information on grants available for the acquisition or enhancement of geographic information resources, and a directory of geographic information resources available within the state or from the federal government;
  - (c) administer any grant programs for local governments or other governmental units to establish and maintain geographic information systems as such programs may be established by the [state legislature];
  - (d) coordinate multiagency geographic information system projects, including overseeing the development and maintenance of statewide data and geographic information systems;
  - (e) provide access to both consulting and technical assistance, and education and training, on the application and use of geographic information technologies to state and local agencies;
  - (f) develop, maintain, update and interpret geographic information and geographic information systems standards, under the direction of the Geographic Information Advisory Board;
  - (g) provide geographic information system services, as request, to agencies wishing to augment their geographic information system capabilities;
  - (h) in cooperation within other agencies, evaluate, participate in pilot studies, and make recommendations on geographic information system hardware and software;
  - (i) prepare proposed legislation and funding proposals for the [state legislature] that will further coordinate and expedite implementation of geographic information systems;
  - (j) address data sensitivity issues so that information is available to the public while protecting needed confidentiality; and
- ◆ For example, property ownership data, or the habitat of a protected animal species subject to poaching.
- (k) contribute to the biennial report of the [state planning agency], as required by Section [4-104].
- (6) Pursuant to Section [4-103], the division may adopt rules, issue orders, and promulgate guidelines in furtherance of this Section. The division may request the advice of the Geographic Information Advisory Board before adopting rules, issuing orders, and promulgating guidelines.

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### 15-102 Geographic Information Advisory Board

- (1) There is hereby established a Geographic Information Advisory Board, referred to in this Section as the “board.”
  - (a) The board shall be located, for administrative purposes, in the [state planning agency]. The division of geographic information shall provide the board with staff support.
  - (b) All state agencies and officers shall provide the board with the necessary assistance, resources, information, records, or advice as it may require to fulfill its duties.
- (2) The board shall be composed of:
  - (a) *[List state agency heads or other relevant state officials, or their designees, who serve by virtue of their positions];*
  - (b) *[List appointed members who are not state agency heads, but who are appointed by the governor for four-year terms, such as representatives of counties, municipalities, regional planning agencies, local law enforcement agencies, city and regional planners, public utility representatives, surveyors, geologists, etc].* The governor shall initially appoint *[insert number]* to serve [2]-year terms and *[insert number]* members to serve [4]-year terms. Thereafter, the terms of all appointed members shall be [4] years and the terms must be staggered. Members may be appointed to not more than [3] successive terms and incumbent members may continue to serve on the board until a new appointment is made.
  - (c) [2] nonvoting legislative liaisons, [1] to be appointed by and to serve at the pleasure of the speaker of the house of representatives and [1] to be appointed by and serve at the pleasure of the president of the senate.
- (3) [The director of the state planning agency, or his or her designee, shall serve as chair of the board *or* The board shall select from its membership a chair and any other offices it considers essential.] A majority of the membership of the board constitutes a quorum for the conduct of business. The board shall meet at least twice each year, and the chair may call a meeting of the board as often as necessary to transact business.
- (4) A member of the board shall not:
  - (a) be an officer, employee, or paid consultant of a business entity that has, or of a trade association for business entities that has, a substantial interest in the geographic information industry and is doing business with state agencies or other governmental units of the state;

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- (b) own, control, or have directly or indirectly, more than [10] percent interest in a business entity that has a substantial interest in the geographic information industry and is doing business with state agencies or other governmental units of the state;
  - (c) be in any manner connected with any contract or bid for furnishing any contract or bid for furnishing any governmental body of the state with geographic information systems, the computers on which they are automated, or a service related to geographic information systems;
  - (d) be a person required to register as a lobbyist because of activities for compensation on behalf of a business entity that has, or on behalf of a trade association of business entities, that have substantial interest in the geographic information industry; or
  - (e) accept or receive money or another thing of value from an individual, firm, or corporation to whom a contract may be awarded, directly or indirectly, by rebate gift or otherwise.
- (5) The duties of the board shall include the following:
- (a) advising the division of geographic information in the adoption of policies and procedures related to geographic information systems;
  - (b) overseeing the development of a strategy for the implementation and funding of a statewide geographic information system;
  - (c) overseeing the development and recommending statewide standards on geographic information and geographic information systems to promote consistency of data elements;
  - (d) overseeing the development, delivery, and periodic revision of a statewide geographic information plan and annually reporting to the governor, the legislature, and the judicial branch. Such a plan shall include provisions for training and education;
  - (e) overseeing the assessment of state agency plans for geographic information systems standards compliance;
  - (f) promoting collaboration and sharing of data and data development as well as other aspects of geographic information systems; and
  - (g) appointing, as necessary, ad hoc technical advisory committees.
- (6) Neither the board nor its members shall have the power to form or award contracts or to employ staff. Members appointed under subparagraph (2)(b) above shall serve without compensation. Members shall be reimbursed for their expenses.

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- (7) If any specified state agency fails to comply with this Section or with Section [15-101] without good cause, the [office of the governor *or* state controlling board] may withhold releases of appropriations of those portions of the agency's operating budget that pertain to the collection and analysis of geographic information. The [governor *or* board] may, before withholding releases of such appropriations, request a recommendation from the board.

### **PUBLIC RECORDS OF PLANS, LAND DEVELOPMENT REGULATIONS, AND DEVELOPMENT PERMITS**

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#### ***Commentary: Public Records of Plans, Land Development Regulations, and Development Permits***

How does a citizen find out if and when a development permit has been issued for a particular piece of property or if a particular piece of property is subject to a special restriction like a historic district? How that information is accessed depends on state requirements for maintaining public records of planning-related documents. This has been an area in which there is scant guidance in state legislation. What there is available is concentrated in requirements for official recording of plans and land development regulations of general application. For example, **Washington** requires counties planning under the state growth management act to file with the county assessor a copy of the county's comprehensive plan and development regulations that have been adopted before July 31<sup>st</sup> of each year.<sup>18</sup> **Ohio** calls for a county or township board of trustees (but not a municipal legislative body) to file the text and maps of a zoning resolution with the office of the county recorder and with the regional or county planning commission, if one exists, within five days after the amendment's effective date. However the failure to file such an amendment does not invalidate the amendment or provide grounds for an appeal of any decision to the board of zoning appeals.<sup>19</sup> **Minnesota** has a similar law requiring the filing of any "official control" with the county recorder.<sup>20</sup>

Once it is issued, a development permit becomes part of the legal history of the particular lot or parcel (the words are used interchangeably) of the land to which it applies.<sup>21</sup> For example, the development permit and the documents that support it, like site plans, show the application of the development regulations as of the date of the permit. This is essential in establishing whether the resulting development in fact conforms with what is authorized by the development permit and, if

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<sup>18</sup>Wash. Rev. Code. §36.70.495 (1999).

<sup>19</sup>Oh. Rev. Code §§303.12(H), 519.12(H) (1999).

<sup>20</sup>Minn. Stat. §395.35 (1999).

<sup>21</sup>American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia, Pa.: ALI, 1976), 458-459 (Commentary on Article 11, Public Records of Development Regulations).

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so, whether a certificate of compliance can be issued. If a development permit for a commercial use is authorized and that use is lawfully established, and the zoning regulations are later changed to prohibit that use, the development permit and certificate of code compliance will be invaluable in determining the nonconforming status of the property.

### MODEL STATUTES

The critical issue then is to ensure a permanent, easily accessible central storage of the rules and decisions that control or guide land development. The three Sections below are adaptations and revisions of portions of Article 11 of the American Law Institute's *Model Land Development Code* that are intended to achieve that objective.<sup>22</sup> Section 15-201 establishes filing requirements for development permits, land development regulations affecting specific lots or parcels (such as overlay zones or historic districts), and related actions (such as development agreements, certificates of compliance, and certificates of nonconformity). It assigns the responsibility of maintaining an index of this information to an official of the local government, so as to allow retrieval of this information by any person seeking data regarding a particular lot or parcel without knowing the identity of the owner. Such a method of indexing information by parcel instead of by owner's name has become vastly more simple with the use of geographic information systems, which allow the user to access the information by pointing to the property on an electronic map.

Section 15-202 addresses public records for plans and land development regulations of general applicability. It provides for a notice to be filed by each local government in the office where deeds of land are recorded. The notice must specify the existing of plans and land development regulations and the office of the local government where they may be examined. The recorder must maintain this information according to the name of each governmental agency presenting notices for recording. Until this notice is filed in the manner required by the Section, the plans and the land development regulations are not effective. This is no different than the laws of many states which require the recordation of deeds and other documents transferring interests in land for those documents to be effective by or against third parties.

Section 15-203 authorizes the state planning agency to establish uniform forms for use in filing. It also authorizes the agency to approve a tract index different from the one required by Section 15-203 that may be proposed by a local government.

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### 15-201 Filing Requirements for Development Permits and Land Development Regulations Affecting Specific Lots or Parcels

- (1) The following development permits, land development regulations, and related documents shall be filed as provided in this Section:

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<sup>22</sup>Id., §§11-101 et seq.

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- (a) any development permit; provided that this does not negate the requirement of Section [8-301(4)] that minor subdivision, resubdivision, or final subdivision plats shall be recorded with the county [recorder of deeds *or similar official*];
  - (b) land development regulations designating a lot or parcel of land as being included in a critical and sensitive area overlay district or a natural hazards area overlay district.
  - (c) land development regulations designating a lot or parcel as being included in a historic or design review district or as a historic landmark;
  - (d) land development regulations designating a lot or a parcel as a sending or receiving area for a transfer of development rights program and any certificate issued pursuant to Section [9-401(4)(k)];
  - (e) development agreements;
  - (f) certificates of nonconformity;
  - (g) certificates of compliance; and
  - (h) enforcement orders and judgments, administrative or judicial, in enforcement actions pursuant to Chapter [11].
- (2) As used in this Section and Section [15-203], the “**Clerk**” means the clerk of the local government or the [local planning agency], as designated by ordinance. For the purposes of Section [15-202], the “**Recorder**” means the county [recorder of deeds *or similar official*].
- (3) The filing required by this Section shall be considered to be completed when the following acts have been performed:
- (a) delivery to the clerk of the information to be filed, in proper form;
  - (b) payment to the clerk, or arrangement with the clerk for payment, of the required filing fee as part of a development permit fee, except that there shall be no fee for the filing of land development regulations enacted by the local government, as described in subparagraphs (1) (b) to (d) above; and
  - (c) entry of the required identifying reference in the index.
- (4) The information concerning development permits, land development regulations, and related actions is sufficient for filing if it includes:
- (a) a description of the lot or parcel involved sufficient to enable a property entry to be made by the index required by paragraph (6) below;

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- (b) the name of the office of the local government and its address at which an inspection can be made of the development permit, land development regulations, or related action and any plans or specifications referred to or incorporated therein; and
  - (c) a general description of the effect of development permit, land development regulations, or related action.
- (5) A document is sufficient for filing if:
- (a) it is a copy of all, or a portion of, the development permit, land development regulations, or related action, so long as it contains the information required by paragraph (4) above; or
  - (b) it is presented on a form prescribed under Section [15-203].

A document is sufficient if it substantially complies with the requirements of this Section even though it contains minor errors that are not misleading.

- (6) The clerk shall establish an index of the matters required to be filed by this Section, arranged in such a manner that a search starting with an identification of the lot or parcel will disclose all development permits, land development regulations, and related actions with respect to that lot or parcel.
- (a) Unless the clerk has obtained approval of a different index system as provided in Section [15-203(2)] below, the index shall be a tract index system, based on the lot or parcel identifier used to enable discovery of the assessed value for real property tax purposes when the name of the taxpayer is not available but the location of the lot or parcel is known.
  - (b) Under the lot or parcel identifier established for each lot or parcel of land, the clerk shall enter a reference to the matter filed in the clerk's office sufficient to enable the matter to be found and examined.
  - (c) The clerk shall maintain maps, including maps contained in geographic information systems, and other aids to help searchers determine the lot or parcel identifier on which the index is based.

### **15-202 Recording Requirements for Plans and Land Development Regulations of General Applicability**

- (1) The following plans and land development regulations are not effective until the recording requirements of this Section have been completed:
- (a) a local comprehensive plan, including any optional elements, or amendments thereto, under Section [7-201];

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- (b) any subplan, or amendments thereto, of a local comprehensive plan under Section [7-201];
  - (c) land development regulations, or amendments thereto, under Section [8-102]; and
  - (d) a rule that is a final proposal for designation of an area of critical state concern by the [state planning agency *or* governor *or* legislature] under Sections [5-207] and [5-208] and state or local land development regulations, or amendments thereto, under Section [5-209].
- (2) The notice described by this Section shall be recorded in each public office where the deeds of land subject to the plans and land development regulations would be recorded.
  - (3) The recorder shall maintain an index that arranges the notices required by this Section alphabetically according to the name of each governmental agency presenting notices for recording. At the appropriate place in the index the recorder shall enter an identifying reference to the notices recorded by that agency sufficient to permit the information in the office to be traced and examined. The index shall also state the date on which the recording of each entry was completed.
  - (4) The information concerning plans, land development regulations, or rules subject to this part is sufficient for recording if it gives:
    - (a) the name of the local government or state agency and the name and address of the office where a copy of the plan, land development regulations, or rule may be examined; and
    - (b) a brief general description of the nature of the plan, land development regulations, or rule.
  - (5) A document is sufficient for recording if:
    - (a) it is a copy of the plan, land development regulation, or rule, so long as it contains the information required by paragraph (4) above; or
    - (b) it is presented to the recorder on a form prescribed under Section [15-203].

### **15-203 Duties of [State Planning Agency] regarding Forms and Tract Index**

- (1) The [state planning agency] shall by rule:
  - (a) specify the contents for notices under Sections [15-201] and [15-202]; and
  - (b) adopt such other official forms as are useful to improve the operation of the filing process required under this Section and Sections [15-201] and [15-202].

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- (2) If a clerk wishes to establish a tract index system different from the one required by Section [15-201], or to modify an index previously established under that Section, the clerk shall use the following procedure:
- (a) The clerk shall establish an advisory committee of users of the records to consult with the officer on the indexing and filing system.
  - (b) After taking into account recommendations made to the clerk by the advisory committee and by any other person, the clerk shall propose a new index system to the [state planning agency] for approval.
  - (c) The [state planning agency] shall by rule approve or disapprove the index system proposed by the clerk and shall inform the clerk of its findings and conclusions. The index system shall become effective at the time specified by the [agency] in its approval.

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### APPENDIX Statements from Members of the Growing Smart<sup>SM</sup> Directorate

A project Directorate, consisting of representatives of national organizations and representatives for the built and natural environments and local government law, plus APA, advised the Growing Smart<sup>SM</sup> project team. A list of Directorate members appears in the Foreword and Acknowledgments of the *Legislative Guidebook*; APA Research Director William R. Klein, AICP, chaired the Directorate meetings. The practical counsel of Directorate members was invaluable in guiding the project. Operating under a charter—a set of bylaws for its operation—and working by consensus with its facilitator, Dr. Joseph Whorton, the Directorate met 13 times during the course of the project (from 1995 to 2001) to review and suggest changes, including alternatives not previously considered, in drafts of Chapters of the *Legislative Guidebook* and other work products, such as the *User Manual*. Directorate members also reviewed proposals and comments on the project materials from organizations and persons not represented on the Directorate but affected by legislative reform. Membership on the Directorate, however, does not imply or mean endorsement of any aspect of the Growing Smart<sup>SM</sup> project; each member organization retains its right to act independently with respect to any proposal contained in the *Guidebook*.

The project team retained editorial control over the content of the *Guidebook*; however, more often than not, when an alternative or change was suggested, the team found a way to modify the draft statutory language or commentary to accommodate the suggestion. As in any professional research project, the project team made judgments, and there was not always consensus about the approach. Under the charter, individual Directorate members could submit individual statements regarding the *Guidebook's* range of recommendations. Two Directorate members, James McElfish, who represented the interests of the natural environment, and Paul Barru, who represented the interests of the built environment, have elected to do so. Their statements appear below.

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### **Statement of James M. McElfish, Jr. Directorate Member for the Natural Environment**

#### **OVERVIEW**

The Growing Smart<sup>SM</sup> *Legislative Guidebook* represents a substantial investment of time and effort by the Research Staff of the American Planning Association. As a participant in the advisory group referred to as the “Directorate,” I was privileged to participate in discussions of various topics and of the model language. However, the final decisions about what to include or not to include were made by the project staff without a poll of the Directorate members or review by APA’s governing board or committees. Thus, users of the *Guidebook* should be aware that while it contains much valuable information, it represents neither a consensus statement nor a statement of APA policy. It is, simply, a research document.

As a research document, the *Guidebook* contains a great deal of information that can be found nowhere else. Its most valuable contribution to the work of state legislators, legislative staff, advocates for various interest groups, and planners is undoubtedly its detailed survey of the existing state laws on each of the hundreds of topics covered in the *Guidebook*. Even more than the model statutory language, the citations to legislation in specific states will be useful to the entire land-use profession. *The specific approaches recommended in the model language, however, will need to be evaluated carefully by Guidebook users.* In some instances the model language reflects excellent practice and well-supported approaches; in others it reflects merely a middle-the-of-road approach that is unobjectionable but far from the state of the art in statutory drafting of land-use tools; and in still others (but only a few others) it offers approaches that are risky and that defeat the objectives of sound planning.

This brief statement is intended to highlight those issues that will require particular care from users of the *Guidebook*. Before turning to these few areas, however, I want to express my appreciation to the authors of this substantial work. They have made an immense contribution to our understanding of state enabling legislation nationwide, and more often than not, have identified good practices worthy of consideration by legislators, planners, and advocates. The fact that some problems remain does not diminish their achievement.

#### **PROBLEM AREAS: PROCEED WITH CAUTION**

##### ***Section 7-202 Comprehensive Plan Elements - Major Deficiencies***

The model language for comprehensive plan elements includes no required element for the protection of natural and historic resources. This is far from the best practice in state enabling legislation; indeed it is a step backward. The *Guidebook*’s model statute requires no natural resources element at all and makes it possible for a local government to “opt out” of preparing a “critical and sensitive areas element” by finding that the area potentially subject to such an element is either less than five acres or is already designated as an area of critical state concern. But it takes assessment and planning to determine what areas may be critical or sensitive; thus, the opt-out provision makes no sense. Moreover, even 5-acre areas, such as those along river banks and key

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habitat areas, can be extremely important. State-designated areas also often require special attention from local governments to assure that local activities and ordinances are compatible. The deficiency in § 7-202 is particularly significant because Chapter 9 of the *Guidebook* prohibits local governments from adopting conservation ordinances and mitigation requirements without a critical and sensitive areas plan element.

In addition, a historic preservation plan element is *entirely* optional under § 7-202. This too is poor practice. Even the newest of communities has some need to plan for historic preservation. Without such a plan, local governments will find themselves playing catch-up years later when it is far too late.

As the commentary to Chapter 7 points out, numerous state enabling laws expressly *require* comprehensive planning elements to cover natural and historic resources. In its “Growing Smarter” amendments to the state Municipalities Planning Code enacted last year, for example, Pennsylvania required all comprehensive plans to include “A plan for the protection of natural and historic resources to the extent not preempted by federal or state law. This clause includes, but is not limited to, wetlands and aquifer recharge zones, woodlands, steep slopes, prime agricultural land, flood plains, unique natural areas and historic sites.” MPC § 301(a)(6). The *Legislative Guidebook* should have done no less.

### ***Section 9-101 Critical and Sensitive Areas, Section 9-403 Mitigation – Ordinance Limitations***

Chapter 9 relies almost entirely on the device of overlay districts to protect natural resources, waterways, forest cover, habitat connections, etc. § 9-101(5). While this is an important and useful tool, it represents old-style thinking about natural resources and landscapes. Many important landscape features and elements are not simply limited to “critical and sensitive areas” but are more pervasive; and impacts on the environment are now understood to be cumulative as well as acute. Thus, many local jurisdictions have enacted stormwater management ordinances, limitations on impervious surfaces, requirements to avoid introducing non-native plants, requirements for water conserving design and xeriscaping, mitigation requirements for removal of forest cover, matching up of open space areas on adjacent cluster developments to provide for habitat corridors, and similar provisions. Many of these ordinances are not limited to overlay districts because they address a cumulative effect of development activities throughout the jurisdiction. But the *Guidebook* overlooks this. It relies on requiring overlays as the basis of conservation. § 9-101(5). And it allows mitigation ordinances only where a local government has adopted a critical and sensitive areas element and then only to mitigate for activities in such areas. § 9-403. Thus, adoption of the model language could prevent the use of modern protective tools such as Maryland’s Forest Conservation Act, mentioned on p. 9-80, which does not limit local forest conservation and mitigation ordinances only to “forest areas” of local jurisdictions but rather applies them to all development activities throughout every jurisdiction in the state (with an exception for the two most forested counties). Md. Nat. Res. Code § 5-601 et seq. Rather than relying solely on model sections § 9-101 and § 9-403, which are too constrained in comparison with modern practice, state legislatures should adopt additional enabling language (or savings language) that authorizes local governments to adopt protective and mitigative ordinances that apply beyond critical and sensitive overlay areas.

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### ***Section 8-501 Vested Rights - Risky Experiment***

The *Guidebook* has a lengthy discussion of vested rights and before offering two model alternatives notes that “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 [model] alternatives...or even to adopt no vesting statute and rely on existing case law precedent.” This is good advice, because Alternative 1, if adopted, would be the most liberal vesting standard in the United States. Its approach has never been enacted by any legislature nor adopted by any court, and for good reason. It would freeze the land development regulations as of the date of any application (even an entirely incomplete application with no reliance interest whatever), and allow the cure of the incomplete application later. If anything will produce a race to file, this standard will. This is bad policy, and its adoption would hamstring local governments by vesting development rights with no showing of reliance by, or detriment to, the applicant.

### ***Section 10-210 Time Limits on Land-Use Decisions – Undermining the Comprehensive Plan***

The *Guidebook* offers model language to promote timely decisionmaking by local governments. The first alternative it offers, however, badly undermines the comprehensive plan. It provides that if a local government does not render a decision on a development application (ANY development application) within the number of days prescribed by the state legislature or established by local ordinance, the development is “deemed approved.” This means that the adverse outcome of this missed deadline falls entirely on the public, and it means that comprehensive plans may be overturned by a missed deadline – without regard to whether the applicant suffered any harm thereby and without regard to whether the approval contained elements that should be and still could be ameliorated. This is bad policy and bad law, and it does not represent best practice among the states. While a footnote in the commentary lists states that have “deemed approved” provisions, examination of these laws show that most of these apply them only to subdivisions. This may make some sense, as recording a subdivision is a straightforward process largely circumscribed by subdivision regulations. But requiring “deemed approval” for all development decisions – including new towns, PUDs, and numerous other actions – is far from smart growth. And the model provision that only one extension of [90] days can be had by agreement badly constrains the whole process. Large-scale developments, and even many PUDs require far more time.

The “deemed approved” alternative purports to be based on Cal. Govt. Code § 65950. But this California statute is extraordinarily inapplicable as a basis for this *Guidebook* alternative. That California law does grant “deemed approval” for development applications, but the time period does not even commence running until *after* the *completion* of the entire California Environmental Quality Act (CEQA) process – a process that requires at least six months (and often a year or more) of public notice and comment and environmental studies. And the period for deemed approval, which runs from the date of certification of the final environmental impact report (EIR) is *180 days*. (Shorter periods are allowed only for EIRs for low income housing, publicly financed works, and categorically excluded and negative declaration projects - typically very small routine projects). In reality, California’s statute is not a model for Alternative 1.

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Alternative 1 creates a “deemed approved” provision that is far more sweeping in scope than anything now found in state planning laws. In doing so, it creates a grave potential for litigation, creates incentives for local governments to find technical reasons to deny applications rather than face the time limits, and thwarts the reasoned interchange and give-and-take that characterizes good development review. Timely decisionmaking is important, indeed critical, for land-use planning and development. But the solution should promote better decisions, not subversion of the comprehensive plan. The second alternative offers at least one way to assure timely review without these ill effects.

### ***Section 9-301 Historic Preservation and Design Review – An Awkward Alliance***

Historic preservation and design review are both important local government functions that affect community values. The *Guidebook*, however, places these two functions in an awkward alliance with one another in a single model provision that is not based on existing law. Indeed, the Commentary to this Section notes that “the objectives of the two laws differ significantly” (p. 9-26) and then proceeds to join them together. The Section in general works better for design review than it does for historic preservation. Legislatures may well want to adopt it for design review only and to adopt a separate provision for historic preservation.

Section 9-301 excludes a number of tools recommended by the experts in this field, the National Trust for Historic Preservation ([www.nthp.org](http://www.nthp.org)). For historic preservation it does not provide suitable temporary protection for threatened structures (except through a development moratorium). The National Trust strongly recommends that interim protection provisions be included in historic preservation ordinances in order to protect properties that might otherwise be demolished during the historic property designation review process. The moratorium option offered in the *Guidebook* would not suffice in these situations. Under the proposed moratorium option, protection of historic properties would not be triggered until after broad public hearings, findings, and processes not tailored to provide certainty for all interested parties. The *Guidebook* also fails to include an economic hardship provision that could help accommodate protections to take into account effects on landowners. The National Trust strongly recommends that all local historic preservation ordinances include provisions for economic hardship rather than reliance on the “mediation process” recommended in the *Guidebook*. Economic hardship provisions have been essential components of modern preservation ordinances for at least 15 years; they provide important standards and processes to ensure fairness for property owners and protection for historic resources. When a state legislature wants to adopt historic preservation enabling legislation, it should consult with the Trust before relying on this portion of the *Guidebook*.

## **SOME HONORABLE MENTIONS**

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Despite the concerns and problem provisions noted above, the *Guidebook* does offer some substantial opportunities in its model language. I want to highlight just a few areas as worthy of particular attention:

### ***State Planning Goals***

The *Guidebook's* emphasis on State Planning Goals and integration of local land-use planning with state goals is quite important because a century of land-use regulation has demonstrated that the township, city, or even county scale is too limited for many purposes – including habitat, economic development, transportation, and housing. Legislatures should find much of value in Chapter 4.

### ***State Biodiversity Conservation Plans***

The *Guidebook's* provision for State Biodiversity Conservation Plans provides a framework for the kind of activity that is now being pursued in nearly two dozen states without such clear authorization. § 4-204.1. Both the commentary and the model language contain comprehensive guidance on studies necessary to support the plan; goals, mapping, and implementation activities that should be developed in the plan; and procedural issues related to development of the plan. It is particularly appropriate that the *Guidebook* contains language that the governor's office may review the State Land Development Plan and the state functional plans (for transportation, economic development, telecommunications) for consistency with the biodiversity conservation plan. In addition, the "Procedures Related to State Plan Making, Adoption, and Implementation," which apply to the State Biodiversity Conservation Plan, ensure two important outcomes: 1) the Plan will be developed in an open process that includes public input, and 2) the activities of multiple state agencies will be reviewed for their consistency with the Plan. States that adopt a biodiversity conservation plan will avoid the all-too-common situation of investing in biodiversity conservation through land acquisition and state agency activities while simultaneously supporting activities that would undermine those efforts.

### ***Standing to Participate***

The *Legislative Guidebook* adopts a reasonable middle ground on standing to participate in review of land-use decisions. § 10-607. It is important that the public, and those affected by land-use decisions, be able to participate in the planning process, the adoption of ordinances, and the review of applications. While broader standing might have been desirable, the *Guidebook* properly resisted attempts to exclude the public and local property owners from decisions that affect their communities.

### ***Regulatory Takings***

The *Guidebook* largely avoids integration of "regulatory takings" provisions into the many places where some sought language that would create new rights and expose state and local governments to demands for payment and to litigation. The *Guidebook* sets forth a straightforward

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set of processes and does not fall into the trap of introducing new uncertainties and untested remedies.

### ***Tax-Base Sharing***

I am pleased that the *Guidebook* was able to include, at least in a modest form, some attention to local taxing provisions as Professor Norman Williams recommended at the outset of this project so many years ago. While there is much to be done in this area, the provisions for tax-base sharing in chapter 14 (§§ 14-101 to -114, -201) do emphasize the importance of cooperation among jurisdictions to assure that new development does not become a zero-sum game of winners and losers to the detriment of both the natural environment and the vitality of older communities.

James M. McElfish, Jr.  
Director, Sustainable Land Use Program  
Environmental Law Institute  
Washington, D.C.  
November 9, 2001

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### Statement of Paul S. Barru Directorate Member for the Built Environment

Note: Comments are based on final draft *Guidebook* language posted on Internet and dated October 26, 2001

#### PREFACE

As the member of the Growing Smart<sup>SM</sup> Directorate representing the “built environment”, I speak for the citizens who own land and who, in any proposed use of such land, would be subject to the rules and processes proposed in the *Guidebook* if adopted by states, regions, counties, or municipalities. I submit this on behalf of the home builders, office and industrial developers, real estate agents, general contractors, road builders, engineers, architects, and others who are generally classed as the built environment.

Clearly, I will not presume to comment on the whole of this monumental work, but only briefly on three things: 1) assumptions that either do or should underlay the process; 2) a major disappointment in the *Guidebook*; and 3) a selected group of specific issues of such major import to the whole enterprise of Smart Growth and its twin, Smart Process, that if not implemented and managed properly, have the potential to undermine much of the value that has been achieved.

#### ASSUMPTIONS

**Smart Growth means planning for growth, not slowing growth or no growth.** The *Guidebook* is successful in reaching its objective of Smart Growth and its twin, Smart Process, in some specific areas. However, on the whole, it falls far short of what might have been achieved. This is hardly a surprise when you consider the current state of growth management and the constant battleground it has become. I feel the process began to come undone as it moved ahead with a broad vision of Smart Growth, because working assumptions and definitions were not constantly revisited to see if they had continuing validity. In the end, the process sought to satisfy two or more visions, often imposed from outside of the staff and Directorate, by presenting alternatives rather than doing the harder job of reaching consensus on a common vision. Alternative choices for managing growth—within a common vision of Smart Growth that means planning for growth as needed, not stopping it—are what is needed to meet the needs of divergent communities.

**Any approach to Smart Growth must be comprehensive.** This means that it must include concerns for the environment, the economy, and social equity or justice. **These three elements must be balanced.** Like a three-legged stool, if the legs are not the same length, it will not provide a solid base to stand on; and if one leg is too long, the stool will tip over.

The natural environment needs strong protection, but protection comes in many forms. Some lands need to be preserved in public ownership, while others are best protected by environmentally sensitive development. Still other lands are suitable for intense development to allow a community to accommodate its projected development needs. The *Guidebook* falls short in identifying various types of land that require protection and criteria to judge the best protection techniques. While

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limited in scope, the *Guidebook* focuses on limiting development in “sensitive areas” with little guidance on defining what they are and the best ways to protect them.

The absence of an economist on the Directorate or of any significant economic or tax studies is an indication that the economics of Smart Growth were only peripherally addressed. When essential economic issues began to emerge, there was little willingness to indicate at the very least that they were important and needed to be considered, even if they were not included in any depth within the *Guidebook*. To deal with the economy seriously, beyond the *Guidebook*'s modest efforts, you must include a consideration of economic development and job generation, especially how they interact in creating land-use demand. Other related topics that need to be understood include how taxation policy drives land-use decisions, favoring job generation without always addressing the provision of adequate housing to match those jobs; how housing, commercial, and retail markets interact in creating growth pressure; how you plan for, build, and finance infrastructure in a timely and cost-effective manner; among many other items that affect the economy.

In the simplest terms, social equity is concerned with how well people can live in a community on the wages they are able to earn in jobs created by economic development and the degree to which growth benefits all segments of society. The *Guidebook* gives considerable protection from the adverse consequences of growth but does not adequately address the equity issues inherent in a community's failure to ensure that affordable housing for all income segments is available. The inclusions in the *Guidebook* are not sufficient.

To judge APA adversely for not having predicted that “comprehensive planning” for Smart Growth included such a broad array of issues is unfair. This is an area of inquiry that grows as the interrelatedness of many issues and their importance to the whole emerges. While it might have been impossible to include all of these within the scope of the original enterprise, the work suffers by not indicating that these gaps exist. I hope that if the *Guidebook* undergoes revisions in future years, the APA will consider analyzing some of these areas and that broad advisory input from affected interest groups will be incorporated in such revisions. In the meantime, the absence of these issues in this *Guidebook* compromises its goal of providing pathways for Growing Smart<sup>SM</sup>.

**Growing Smart<sup>SM</sup> requires a blueprint or comprehensive plan that, when adopted, becomes public policy.** The process for developing any effective public policy must be inclusive, deliberate, and, to the greatest degree possible, achieved by consensus. It cannot be a top-down process, with public officials and staff driving and controlling the process. Rather, they need to enable the broadest possible community of voices and viewpoints to be heard and to participate. This should also include private sector business people, who are often excluded from the public debates. After all, they are the ones who take many of the risks involved in implementing the growth plan. The goal is to achieve a community vision that balances as many needs and desires of the community as possible. This vision takes tangible form as public policy known as an adopted comprehensive plan. Elected officials then need to legislate the most effective structure for the efficient, timely, and cost-effective implementation of this public policy.

**Smart growth requires a smart process to fully implement what the community seeks from its smart growth public policy.** When a landowner or any other citizen seeks to use their land or any other outcome in strict conformity to the provisions of the master plan/public policy, they have

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a right to expect a process that allows only directly and significantly affected parties to participate. Unforeseen and unexpected negative consequences of the proposed implementation need to be dealt with equitably. The benefits to the community and the applicant will be fidelity to the community's growth vision, the elimination of unnecessary risk and time, and significant cost savings to all parties, not the least being for taxpayers/consumers.

A basic philosophical premise of smart growth should be that comprehensive plans be implemented, not nullified in piecemeal fashion through the development review process. Issues settled during the comprehensive plan debate should not be reopened for a period of time following adoption if the plan and the process are to be meaningful.

### **MAJOR DISAPPOINTMENT**

At best, this is a complex document that requires a good deal of knowledge to even begin to use. A solid index is only a partial and incomplete solution. The cross-referencing list now included at the beginning of each chapter is a good start, but to make this work truly useful requires extensive cross-referencing within the text itself, section-by-section, subsection-by-subsection. This is a major but absolutely essential task for effective and complete use.

### **SPECIFIC ISSUES IN THE *GUIDEBOOK***

**My objections and recommendations relate to the eight most critical areas of concern: standing and reopening of settled issues, supplementation of the record, sanctions on local government for failure to update plans, exhaustion of remedies, moratoria, vested rights, third-party initiated zoning petitions, and designation of critical and sensitive areas.**

#### **Standing and Reopening of Settled Issues**

After embracing the traditional standard of "aggrievement" as the basis for standing to petition for judicial review of a land-use decision (September 2001 Draft of the *Guidebook*, hereinafter "September 2001 Draft"), the most recent draft (hereinafter, the "October 2001 Draft") inexplicably dilutes the definition of "aggrieved" and adds other options that effectively allow any person with any ax to grind to pursue a court challenge, whether or not he or she will actually suffer any special harm or injury, has appeared at or offered evidence during a public hearing, or even lives in the impacted community. This expansive approach to standing fundamentally alters the system now in place across the nation, which requires a party challenging a land-use decision to take part in the approval process and offer comments, to actually live in the community in question, and to demonstrate that the proposed use will cause special injury or harm to them over and above its impact upon the public generally. These liberal standing provisions will increase the amount of litigation that communities will face and it is more likely the government will be sued rather than a developer.

The objectionable provisions of the *Guidebook* with respect to issues of standing seem to be motivated by a desire to be inclusive, that is, to apply a liberal standard that is easily met. Section 10-607(4) no longer includes an aggrievement test when determining who can petition the courts on a land-use matter, and Section 10-607(5) is acknowledged in the commentary to afford standing

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to persons who haven't even participated in the agency's hearings. **Perhaps this approach follows from the current trend of greater public participation in planning. I wholeheartedly support the idea of extensive public participation in *planning*. However, it does not follow from this that broad public participation in development review or in judicial review of site-specific development proposals is a good thing. On the contrary, such participation would be detrimental and open the door to undermining the work of the greater citizenry that helped to produce and articulate the broad public policy themes of the comprehensive plan. Liberal standards of public involvement are appropriate at the level of planning, policy, and broad regulatory enactments such as comprehensive zoning and zoning ordinance text amendments. But the standards should become stricter as we move down to levels of post-zoning implementation, such as site-specific project review, and judicial review.**

The public generally shares this view as evidenced by the overwhelming rejection of Amendment 24 in Colorado and of Proposition 202 in Arizona in the November 2000 elections. **A specific development proposal that is consistent with the comprehensive plan and development regulations is also consistent with the greater public's "vision" for the future.** It does violence to this vision when we open the appeal process liberally to active special interests, no matter how well intentioned, and permit them to derail worthy projects that do not comport with their particular vision. A community cannot achieve its vision of "smart growth" without a smart process that preserves and protects its adopted vision from naysayers in the community.

**Major issues decided at the comprehensive planning and zoning stage, such as use, density or intensity, should *not* be revisited in the post-zoning site-specific proceeding *unless* the application does not comply with these decisions. It is critical that this principle be recognized in the *Guidebook*.** Otherwise, there will be no protection or political cover for decision-makers from the onslaught of entrenched growth opponents who reside in areas planned for growth. They could stop the proposed growth allowed in the Master Plan, oppose adopted public policy and create costly delays.

### LEGAL ANALYSIS OF THE *GUIDEBOOK'S* APPROACH TO STANDING

- **After previously acknowledging that "aggrieved" status (with the twin elements of special harm or injury distinct from any harm or injury caused to the public generally) should be the primary criterion in determining one's standing to petition for judicial review of a land-use decision, the final draft *Guidebook* guts any such requirement. First, the definition of "aggrieved" in Section 10-101 has been revised to make both "special" and "distinct from any harm or injury caused to the public generally" optional. The principal definition now requires merely an undefined generalized showing of "harm or injury" in order for one to have standing.** (This is similar to the discredited "may be prejudiced" test advanced in prior drafts, and is also contrary to the understandings reached at the Directorate's final meetings on September 23-24, 2001.)

- **Second, Section 10-607(4) now broadly allows "all other persons" who participated by right in an administrative review or who were "parties to a record" to seek judicial review without *any* showing of aggrieved status.** This appears to be based upon comments by the Staff

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in an October 12, 2001, Memorandum to Directorate members suggesting that a showing of aggrievement on judicial review is unnecessary in a record appeal when the challenger has already been deemed to be aggrieved by the local government agency (October 12, 2001, Memorandum, p. 5). This view is contrary to established legal precedent, since it is within the purview of the court – not the administrative agency whose decision is under review – to determine whether or not the challenger is aggrieved. The court’s authority cannot be usurped by an agency determination regarding aggrieved status. See, e.g., *Sugarloaf Citizens Assn. v. Department of Environment*, 686 A.2d 605 (Md. 1996), discussing the difference between administrative standing before an agency and the requirement for standing to challenge the agency’s decision in court. While the former rule is not very strict, “judicial review standing” requires that one be both a party before the agency and “aggrieved” by the agency’s final decision (*i.e.*, specifically affected in a way different from the public at large). Determination of judicial review standing is exclusively a judicial function and the court need give no deference to the agency’s finding in this regard. *Id.* Section 10-607(4) is a legally flawed criterion, which effectively allows the administrative agency whose decision is under review to determine who shall be “aggrieved.”

- **Third, Section 10-607(5) allows “any other person,” including persons who have skipped the agency proceedings altogether, to seek judicial review merely upon a showing that they are “aggrieved” under the expansive new definition of that term in Section 10-101.**

- **Treatise writers favor the traditional aggrievement standard.** As can be seen from the following examples, the views expressed herein regarding Sections 10-101 and 10-607(4) and (5) are shared almost universally by treatise writers and courts.

- “Almost all state statutes contain the ‘person aggrieved’ provision but only a minority extend standing to taxpayers . . .

*Under the usual formulation of the rule, third-party standing requires ‘special’ damage to an interest or property right that is different from the damage the general public suffers from a zoning restriction.* Competitive injury, for example, is not enough. This rule reflects the nuisance basis of zoning, which protects property owners only from damage caused by adjacent incompatible uses. Although the special damage rule is well entrenched in zoning law, a few courts have modified it. New Jersey has adopted a liberal third-party standing rule that requires only a showing of “a sufficient stake and real adverseness.” Daniel M. Mandelker, *Land Use Law* § 8.02 at 337 (4th ed. 1997) (emphasis added) (citations omitted).

- The requirement that a person must be ‘aggrieved’ in order to appeal from the board of adjustment to a court of record was originally included in the Standard State Zoning Enabling Act and has been adopted by most of the states. See Kenneth H. Young, *Anderson’s American Law of Zoning* § 27.09 (4th ed. 1997).

- “To be a person aggrieved by administrative conduct, it is necessary to have a more specific and pecuniary interest in the decision of which review is sought. A Connecticut court said that in order to appeal, *plaintiffs are required to establish that they were aggrieved by*

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*showing that they had a specific, personal and legal interest in the subject matter of the decision as distinguished from a general interest such as is the concern of all members of the community and that they were specially and injuriously affected in their property or other legal rights.”* *Id.*, § 27.10 at 523-24 (Citations omitted.) (Emphasis added.)

- **Case law in many jurisdictions is in accord with the special injury rule.** See, e.g., *Hall v. Planning Comm’n of Ledyard*, 435 A.2d 975 (Conn. 1980); *DeKalb v. Wapensky*, 315 S.E.2d 873 (Ga. 1984); *East Diamond Head Ass’n v. Zoning Bd. Of Appeals of City and County of Honolulu*, 479 P.2d 796 (Haw. 1971); *Sugarloaf Citizens Ass’n v. Department of Env’t*, 686 A.2d 605 (Md. 1996); *Bell v. Zoning Appeals of Gloucester*, 709 N.E.2d 815 (Mass. 1999); and *Copple v. City of Lincoln*, 315 N.W.2d 628 (Neb. 1982).

- **In view of these and other long-established precedents for establishing aggrievement as the standard for participating in the proceedings of local government agencies and thereafter, for challenging their decisions in court, it is disappointing that gaping loopholes have been inserted in the *Guidebook* that (a) allow persons who are not aggrieved to gain standing before agencies and thereafter in court to contest an agency decision (§ 10-607(4)), and (b) allow other persons, including adjacent residents – thus *prima facie* aggrieved – to bypass the agency proceeding altogether and hold their challenge for court (§ 10-607(5)).**

RECOMMENDED SOLUTION:

### ***AVOIDING REOPENING OF SETTLED ISSUES***

To avoid reopening issues settled in the adoption of a comprehensive plan, a ninth item should be added to Section 10-207 (Record Hearings) to state that when any site specific development application is submitted for review under this section within six years of the adoption or amendment of the plan, major issues such as land use, density or intensity *shall not be reargued or reconsidered*. The only limited exceptions to this prohibition should be if the proposed use of the site is not in accordance with the plan, or if the density or intensity proposed for the site exceeds that in the plan and applicable zone.

This is based on the sound premise that the site-specific proceeding should not become a forum to reopen debate on the community’s already decided broad land-use and growth policies. See J. Tryniecki, *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law* 323 (American Bar Assn. 1998).

### ***STANDING TO SEEK JUDICIAL REVIEW***

Items (4) and (5) of Section 10-607 (Standing and Intervention) should be deleted and new Sections 10-607 (4) and (5) should be added to provide that only those persons who both participated in the record hearing and are aggrieved (i.e., will suffer special harm or injury distinct from that caused to the public generally) by the land-use decision has standing to intervene in the land-use decision.

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### **Supplementation of the Record**

**In a proposal that closely mirrors expanded standing, an optional provision in the *Guidebook* would allow for expansion of the record by the court that hears a land-use challenge. Parties would be able to introduce new studies, new testimony and new exhibits that were never made available to the local jurisdiction that issued the land-use decision in the first place.** Neither would the applicant have had an opportunity to challenge, verify, or modify them in a deliberative process. Such a proposal would turn courts into planning and zoning appeals boards, allowing them not only to second guess a local decision, but to make a decision entirely on their own with no deference to local concerns.

In the final meeting of the Directorate, it was my understanding that the commentary would be modified to include a statement that remand is preferable to supplementation where the evidentiary record is inadequate. The statement added to the October 2001 Draft of the *Guidebook* leaves the issue ambiguous and open to interpretation that is destructively broad.

Section 10-613 and the commentary preceding it address the pros and cons of courts supplementing the record. The commentary mentions such factors as time, fairness, cost, experience, etc. that should be weighed but neglects one very important consideration that I believe may override the others. That is the importance of maintaining a separation of power between the legislature and the judiciary. It is acknowledged that local legislative bodies may be subject to political pressure, but that is the essence of representative democracy. In our system of government, it is the job of legislative bodies to debate public policy and in the end to make decisions that reflect the dominant view. In contrast, the job of the judiciary in record appeals from decisions of local government legislative and administrative bodies is to review the decision-making process to ensure fairness, to see that the decision is in accordance with the law, and to review the record based upon a reasonableness standard (i.e. substantial evidence/nor clearly erroneous), **but not to substitute its judgment for that of the local government decisionmaker.**

I believe subsections 10-613(1)(d) and 10-613(2) blur the distinction between the acts of local government legislatures and administrative bodies on the one hand and the judiciary on the other and permit the judiciary to usurp the proper role and powers of these bodies. Land-use decisions are by nature political decisions, thus the proper places for the resolution of competing views are the local legislature, planning board, or board of appeals, not the courtroom. **If, upon review of the record, it is found that the decisionmaker did not consider essential information, the judge should remand the case back to it with instructions to consider the missing information and then make the decision.** In our view judges should strongly resist the urge to rule on the substantive merits of a land-use controversy. Unlike other cases that come before a judge, there may be no “right” or “wrong” in land use. Instead, the question is likely to be, “what decision provides the greatest good for the greatest number?” and that is the business of the local legislative body.

### LEGAL ANALYSIS OF SUPPLEMENTATION ISSUES

- **Courts conducting “record reviews” of land-use decisions should exercise judicial restraint, particularly with respect to agency findings of fact on evidentiary matters, and should not allow the record to be supplemented with additional substantive evidence on**

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**appeal**, or take other actions that would usurp the traditional authority of local government in the land-use approval process. The *Guidebook* would broadly allow supplementation of the record by reviewing courts, a dangerous precedent as it would make the court – not the local government – the final decisionmaker in land-use cases.

- The most objectionable provision is Optional Section 10-613(1)(d), which states that a reviewing court “may supplement the record with additional evidence” if it relates to “matters indispensable to the equitable disposition of the appeal.” **This is an open-ended invitation to abuse.**

- **Treatise writers and court decisions have narrowly construed the role of courts on judicial review.**

- **“The local government, not the court, should be the final decision-maker in land use cases.** Generally, the judge’s role in land use litigation is “to provide a forum for serious and disinterested review of the issues, sharply limited in scope but independent of the immediate pressures which often play upon the legislative and administrative decision-making processes.” Williams, *American Land Planning Law* § 4.05 at 100 (1988 Revision) (emphasis added).

- Historically, reviewing courts have emulated the Uniform Administrative Procedure Act by limiting their review of an agency action to the question of whether that action was arbitrary, capricious, unreasonable or illegal. Where the agency record is inadequate to support its action, the proper practice is to remand the matter to the agency for rehearing and redetermination. *Carbone v. Weehawken Township Planning Bd.*, 421 A.2d 144 (N.J. Super. 1980). *See also, Yokely’s Law of Subdivisions* § 69(c) (2d ed. 1981). *See also, Kenneth H. Young, Anderson’s American Law of Zoning* §27.29 at 605 (4th ed. 1997): (“Reviewing courts say they are not superzoning boards and that they will not weigh the evidence.”)

- **These authorities and numerous other reported cases reflect the overwhelming consensus that an appellate court or a trial court should not be second-guessing an administrative finding.**

- Federal Circuit

*SFK USA INC. v. United States*, No. 00-1305, 2001 WL 567509 (Fed. Cir. May 25, 2001) (Where an administrative agency defends its decision before reviewing court on the grounds it previously articulated, the court’s obligation is clear: it reviews the agency’s decision under Administrative Procedure Act (APA) and any other applicable law, and based on its decision on the merits, it affirms or reverses, with or without a remand. 5 U.S.C.A. § 551 et seq.);

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### ➤ State Courts

Numerous state courts, including courts in California, Connecticut, Maryland and Pennsylvania, hold that the scope of judicial review is narrow; that remand is the appropriate remedy when an agency has applied the wrong legal standard; and that the court should not substitute its judgment for that of the agency.

RECOMMENDED SOLUTION: Delete optional § 10-613(1)(d) and § 10-613(2) as authority for a court to supplement the record.

### **Sanctions for Inconsistency and Lack of Periodic Review**

The desire for some “stick” to compel local governments to comply with state statutes regarding consistency of regulations with plans and for periodic reviews of plans and regulations is understandable. However, I have made known my opinion on several occasions that the sticks proposed—voiding and loss of the presumption of reasonableness of local land development regulations—are poor ones. **This approach unfairly jeopardizes the status of development approvals already issued or under review, threatens the stability of the land development process, and introduces unacceptable risk into development financing.**

### LEGAL ANALYSIS OF SANCTION PROVISIONS

- **Unwise sanctions are imposed for failure of local governments to timely meet statutory milestones, *i.e.*, failure to:**

- **adopt regulations consistent with the comprehensive plan (§ 8-104);**
- **review development regulations (§ 8-107);**
- **update development standards (§ 8-401); and**
- **record the comprehensive plan and regulations in the GIS Index (§ 15-202).**

- **Missing these milestones has the effect of making local government regulations or comprehensive plans “void,” “voidable,” “not effective;” or subject to losing their “presumption of reasonableness.”** These are strong terms with serious legal implications that can **place the regulatory framework in legal limbo and undermine the process by which land development is reviewed and financed.** The following statements illustrate why.

- “We recognize the uncertainty and possible chaos that might accompany invalidation of the County’s existing zoning scheme.” *Pennington County v. Moore*, 525 N.W.2d 257, 260, n.3 (S.D. 1994).

- Void conditions are subject to collateral attack at any time. *Elkhart County Bd. of Zoning Appeals v. Earthmovers, Inc.*, 631 N.E.2d 927, 931 (Ind. Ct. App. 1994); *Sitkowski*

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*v. Zoning Bd. of Adjustment of Borough of Lavalette*, 569 A.2d 837 (N.J. Super. Ct. App. Div. 1990).

- Avoidable provision is “valid until annulled and is “capable of being affirmed or rejected at the option of one of the parties.” Black’s Law Dictionary 1569 (1979).
- “The importance of the presumption [of validity] is that it formally fixes the responsibility for planning policy in the legislature, and prompts a reviewing court to exercise restraint. 1 *Anderson’s American Law of Zoning* § 3.13 at 117 (4th ed. 1996).
- *Ching v. San Francisco Bd. of Permit Appeals (Harsch Inv. Corp.)*, 60 Cal. App. 4th 888 (Cal. Ct. App. 1998) (statute imposed 90-day limitations period for attacking a local zoning decision).

“The clear legislative intent of this statute is to establish a short limitations period in order to **give governmental zoning decisions certainty, permitting them to take effect quickly and giving property owners the necessary confidence to proceed with approved projects.**” *Id.* at 893. (Emphasis added.)

- The October 2001 Draft has addressed these concerns with respect to Section 8-107. **However, the same defects in Sections 8-104, 8-401, and 15-202 remain unaddressed.**

### RECOMMENDED SOLUTION:

The section entitled Consistency of Land Development Regulations with Local Comprehensive Plan states that actions not consistent with the comprehensive plan shall be voidable. This section *should not provide* that a failure to comply with timeframes for updating comprehensive plans will affect the validity of any land development regulation or land-use action of the local government. The Section on Uniform Development Standards should not provide that the failure of state planning agencies to conduct a timely general review and report of uniform development standards will result in the standards losing their presumption reasonableness. This section should state that failure to file a timely report as required by this section *shall not* affect the validity or presumption of reasonableness of existing uniform development standards, nor of permits issued pursuant to such standards.

Section 15-202 (Recordation Requirements) should not suggest that the failure to comply with recording requirements will render comprehensive plan, subplans, and land development regulations “not effective.” Instead, this section should state that the failure to comply with the recording requirements of this Chapter shall not affect the validity, effectiveness, or presumption of correctness of any plan or land development regulation.

### Exhaustion of Remedies

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An essential element of smart process is a means of establishing when the approval process has run its full course and a land development decision is final. If the decision process is open-ended and lacks closure, then it is also unpredictable. Unpredictability adds delay and risk, and the costs associated with risk and delay are ultimately paid by consumers as well as by taxpayers.

I applaud the authors of the *Guidebook* for the needed and progressive reform proposed in Section 10-603 on the finality of land-use decisions. Unfortunately, this important reform is contradicted and negated by the provisions of Section 10-604, Exhaustion of Remedies. To support the provisions on finality the *Guidebook* should have provided here for streamlined qualification for appeals and made clear that in normal circumstances an applicant need only apply for remedies that are actually available. The *Guidebook* also fails to consider and include among its criteria for finality important guidelines from the Supreme Court's recent decision in *Palazzolo v. Rhode Island*.

### LEGAL ANALYSIS OF ADMINISTRATIVE EXHAUSTION

• **The well-conceived ripeness reforms (§§ 10-201, 10-202, 10-203, 10-210, and 10-603) may have been undone by overly complex requirements for exhaustion of remedies.** The Model requires an applicant to exhaust *three* additional remedies *after* the initial agency decision before seeking judicial review (§ 10-604). (This has always been a “ripe” area for abuse of process.)

- Unless the administrative remedy is futile or inadequate, applicants must:
  - appeal for administrative review (§ 10-209);
  - apply for a conditional use (§ 10-502); and
  - seek a variance (§ 10-503).
  
- **Exhaustion of these “remedies” could add years to the review process and effectively gut the ripeness reforms.** This, on top of a growing trend in state courts to apply the draconian ripeness standards used in federal courts. *See* Daniel R. Mandelker, *Land Use Law* § 8.08.10 (4th ed. & Supp. 2000).

Professor Daniel Mandelker, although a self-described “regulatory hawk”, has long been a critic of abusive practices in agencies and courts regarding the finality doctrine as espoused in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See* Testimony of Daniel R. Mandelker regarding HR 1534 before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, September 25, 1997. *See also* Amicus Brief of the American Planning Association in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). This portion of APA's brief was later “repudiated” by APA in its testimony to Congress opposing HR 1534. *See* letter of September 16, 1997, from APA President, Eric Damian Kelly, to the Honorable Henry J. Hyde, Chair, House Judiciary Committee. These practices have made it virtually impossible for Fifth Amendment Takings claimants to gain access to federal courts. *See* J. Delaney and D. Desiderio, *Who Will Clean Up The Ripeness Mess? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 13 Urb. Law. 195 (1999).

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➤ **Public agency abuse of the land-use review process has long been a concern.**

An excellent discussion and compilation of some of the numerous commentaries on this serious problem may be found in the June 2001 issue of ZONING AND PLANNING LAW REPORT. See Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, ZONING AND PLANNING LAW REPORT, Vol. 24, No. 6.

- **Palazzolo: The Supreme Court’s Latest Statement on Ripeness.** In *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), which is not mentioned in the October 2001 Draft’s commentary on Section 10-604, six members of the United States Supreme Court provided important direction on the issue of ripeness. The Court stated:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

RECOMMENDED SOLUTION: At the final meeting of the Directorate, I understood that the final draft would be amended to add that an applicant should not have to seek approval of a conditional use when such a use would not be practical for the applicant. Instead, Section 10-604(1) uses the more ambiguous term “applicable” regarding both conditional uses and variances. The explanatory language states that “if there is no conditional use provision applicable to the property” as zoned, the applicant does not have to seek a conditional use before commencing judicial review. This is not the problem I was concerned about. For example, an applicant seeking approval of a 10-lot residential subdivision would not be interested in having to file for a group home or medical clinic—even if available in the zoning ordinance. To avoid abuse and unnecessary filing of applications, as discussed in *Palazzolo*, Section 10-604(1) should be revised to delete the requirement to seek approval of a conditional use (as provided in § 10-502) and to limit the exhaustion requirement to a *practical* remedy, which *might be* either an appeal for administrative review (§ 10-209) or filing for a variance (§ 10-503).

### **Moratoria**

**Moratoria are indicators of planning failure. Clearly, absent some catastrophe or unforeseeable event, a reasonable planning process should not lead to a pass where growth is brought to a stop by fiat.** But, catastrophes and unforeseen events do occur from time to time, and the law in most states allows for temporary moratoria to protect public health and safety. However, when the difficulty arises because of a failure to plan or inadequate planning, those responsible should not escape the consequences of their failure. Nor should the building industry and housing consumers suffer from the failure of others to do their jobs properly.

**It is recognized that local communities are often challenged by the impacts of growth, particularly impacts on infrastructure. That is why it is so important to plan for infrastructure**

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**at the same time the community is planning for the expansion of population, jobs, and housing.** While it is one thing to create a plan for the provision of public facilities, it is another thing to finance and implement that plan. Not every community does a good job getting infrastructure built. Other spending priorities and pressure to keep taxes low make it difficult to keep up with infrastructure demands. Nonetheless, getting infrastructure built is a public sector responsibility. It is too easy to use moratoria to escape this responsibility.

The October 2001 draft deletes the provisions in the *Guidebook* that would have permitted moratoria to be imposed on the grounds of “any significant threat to the... environment,” and in lieu thereof inserts protection of the “general welfare” as an additional ground for imposing moratoria. While “general welfare” is an improvement over singling out “the environment” as one element of public policy that should be allowed to trump other pressing public needs, such as affordable housing and jobs, it is a broad standard that can be used to allow moratoria to be imposed for virtually any reason. At the final Directorate meeting, it was agreed that the “or the environment” standard would be excised wherever it appeared in the *Guidebook*. This has apparently not been done. *See, e.g.*, optional §8-604(4), which was the section under discussion, let alone other possible sections in the *Guidebook*.<sup>1</sup>

The *Guidebook* also permits moratoria while the government prepares, adopts or amends comprehensive plans, historic preservation plans or land development regulations, absent any looming threat to public health or safety (Section 8-604 (3)(b) and (c)). The provisions for potentially indefinite, open-ended moratoria (see for e.g., Sections 8-604(3)(b) under Alternative 2, 8-604(8) and 8-604(10)) are inappropriate. Moratoria should be for a definite, fixed period, in no case to exceed one year.

Moratoria are serious, last-resort measures that should be judiciously applied. When the legal criteria for moratoria are difficult to satisfy, an incentive is created to plan more carefully. The whole point of the Growing Smart exercise is to change and improve the level of planning, and incentives have a role in bringing that about.

**Accordingly, a strict standard of “danger to public health and safety” that must be established before a moratorium may be declared would be fitting. This standard, observed by several states, reflects a public policy that moratoria are serious matters not to be used as a convenience, but as a last resort. While a moratorium may stop the issuance of development permits, it has no effect on housing demand. Its effect may thus be to direct growth outside the boundaries of the government that declared the moratorium and thereby contribute to sprawl.** For this reason, states may wish to limit local governments’ power to use this tool by adopting a strict standard. In addition, states may wish to adopt a strict standard to ensure that local governments take seriously their responsibility to plan for and build infrastructure. If the standards for use of moratoria are set too low, then there is less incentive to do a good job of planning. With

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<sup>1</sup>**General Editor’s Note:** As was pointed out to Mr. Barru in a detailed critique of the accuracy of an earlier draft of his statement, this change indeed was made in the final published draft of the *Legislative Guidebook*. Memo to Paul Barru from Stuart Meck, FAICP, Principal Investigator, November 11, 2001. Nonetheless, Mr. Barru insisted on retaining this statement, even after the language had been corrected.

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proper planning, most conditions that might give rise to use of moratoria should be avoidable. In rare cases, where even good planning cannot prevent an unforeseen danger to public health and safety, the statutory language in this alternative would permit limited use of a moratorium.

### LEGAL ANALYSIS OF MORATORIA PROVISIONS

**The *Guidebook* authorizes moratoria on a virtual open-ended basis (up to 1.5 years or more), and “planning moratoria” (up to 2 years or more) are also authorized (§ 8-604). In addition, no meaningful restrictions on moratoria are provided in designated growth areas.**

- In designated Smart Growth areas, moratoria should be:
  - limited to circumstances in which a serious threat to public health or safety exists;
  - limited as to duration; and
  - the government entity imposing the moratorium should be required to immediately address and resolve the problems giving rise to the moratorium. *See Westwood Forest Estates v. Village of S. Nyack*, 244 N.E.2d 700 (N.Y. 1969).
  
- Moratoria are not part of the planning and zoning process. Rather, they are often the result of a failure to properly plan.
  - **“Planning moratoria” should generally be prohibited or severely limited.**

“Even construing the provisions of the [enabling act] liberally, we find that the power to enact a zoning ordinance, for whatever purpose, does not necessarily include the power to suspend a valid zoning ordinance to the prejudice of a land owner... *More significantly, the power to suspend land development has historically been viewed in this Commonwealth as a power distinct from and not incidental to any power to regulate land development.* Accordingly, as the [enabling act] is silent regarding land planning through the temporary suspension of development, we decline to condone a municipality’s exercise of such power.” *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001) (emphasis added).
  
- Moratoria raise takings issues as well. *See* D.R. Mandelker and J.M. Payne, *Planning and Control of Development, Cases and Materials* 642 (5th ed. 2001).
  - Significantly, on June 28, 2001, the United States Supreme Court granted certiorari in the case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998 (9th Cir. 2000), *cert. granted*, 121 S.Ct. 2859, 150 L. Ed. 2d 749 (U.S. June 28, 2001). Certiorari was granted on the question “[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the takings clause of the United States Constitution.”

RECOMMENDED SOLUTION: Delete Alternative 1 in § 8-604(3), as it would authorize moratoria to be imposed for virtually any reason.

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Delete Alternative 2 in § 8-604(3), particularly §§ 8-604(3)(b) and (c), allowing planning moratoria of 2 years (or more). Planning moratoria should not be allowed, and if allowed, should *never* exceed six months.

Revise § 8-604(8) to limit extensions of moratoria – other than planning moratoria, which should not be extended – to not more than one six-month period, and only upon a finding of “compelling need” as defined in § 8-604 Alternatives (2)(d) and (3)(b).

Delete § 8-604(10)(a) and (b) which allow state or local governments to impose additional “temporary moratoria” upon already issued permits or to adopt “temporary policies” against approving zoning map amendments. Alternatively, these additional restrictions should only be imposed upon a finding of “compelling need” as defined in §§ 8-604(2)(d) and (3)(b).

### **Vested Right to Develop**

**Traditional late vesting rules in effect in most states are out of date and unfair.** These require issuance of a building permit and commencement of construction (or other acts of reliance) in order for rights to vest. Late vesting rules do not recognize the complexity of the modern regulatory environment, or the difference between a single building project on the one hand, and long-term land development or multi-building projects on the other. Statutory reform is urgently needed in this area and the *Guidebook* has taken steps to provide it. Vesting of development rights should be recognized earlier in the process, such as at the time of subdivision or site plan approval, or at the time of filing of a complete application for subdivision/site plan approval.

A legally vested right to develop land is essential to the stability of development processes and real estate markets. The *Guidebook*, in Section 8-501, provides two alternatives. The first alternative is a vesting model that establishes a vested right to develop (which includes design, planning and preparation of the land for development, as well as construction) as soon as a complete development application is filed. The second alternative has been modified from the previous second alternative that required the issuance of a permit *and* “substantial and visible construction” to one that allows vesting based upon “significant and ascertainable development” pursuant to a development permit. This is much more equitable than the original second alternative since it appears to recognize expenditures (and other acts of reliance) based on the *development of the property*, rather than merely on construction of one or more buildings. The development process, from design to approval to construction, is significantly more complex today than it was fifty years ago.

**Although the proposed first alternative allowing vesting to occur upon submission of a complete application is laudable and is recognized in some states, it may be more reform than some other states are willing to undertake. Thus, the second alternative proposed in the October 2001 Draft is also appropriate *if* it is interpreted as recognizing vested rights based upon *development* work pursuant to appropriate approvals, rather than upon construction of a building or buildings pursuant to a building permit. (See Legal Analysis.)**

### LEGAL ANALYSIS OF VESTING PROVISIONS

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- In today’s world, the land-use regulatory process has become increasingly elongated and complex, with environmental permitting often overlaying the traditional review process, regulations proliferating, more reviewing agencies in the mix, and more public hearings. All of these factors, and the increasing uncertainty that accompanies them, have led to a serious problem, particularly for long-term, multi-building projects, which must receive many development approvals before the first building permit is obtained. The design and approval phases of any development, particularly one which involves multiple buildings, is time consuming and expensive. Before a single footing is poured, architects and experts must be hired, attorneys retained, engineering started, a series of regulatory systems navigated, equipment leased, materials ordered, financing arranged and site development work commenced. Thus, it is appropriate that “development” activity pursuant to government approvals, and not merely “construction” of a building or buildings pursuant to a building permit, be the criterion for recognizing vested rights.
- However, it must be noted that the *Guidebook’s* definition of “development permit” lists a number of approvals, *including* a “building permit” (§ 10-101), could be interpreted to apply solely to a building permit. If this were to be the interpretation, the language would have the exact opposite effect of what was intended, which was to suggest an early vesting rule that recognizes the huge expense and commitments required to prepare a development plan and proposal. Thus, the revised second alternative in Section 8-501, if it were to be interpreted to be applicable only to a building permit, could also be construed as authorizing a late vesting rule – similar to the common law vesting rule in effect in approximately 30 states – that would not confer vested status on a project until after a *building permit* has been issued and significant and ascertainable construction thereunder has occurred. This would be a draconian imposition of the rule in today’s multi-layered regulatory environment because it ignores the often numerous development approvals that a project may have previously received and implemented. If applied in this manner, the revised section relating vested status to significant and ascertainable development pursuant to a development permit would not affect meaningful reform and instead would only embalm the status quo. (Unfortunately, the *Guidebook’s* definition of “development permit” does not include preliminary subdivision plans.)
- Approximately 12 states have enacted vesting laws, several of which recognize one’s right to proceed with development under the law in effect at the time of approval of a site-specific application, such as a preliminary subdivision plan. Other states’ laws (*e.g.*, Connecticut) allow vesting even earlier, such as at the time of submission of the initial development application. Both of these approaches are reasonable.
- Maryland is cited in the *Guidebook* as a primary source of the late vesting rule, which is as it should be, since Maryland’s “very late” vesting rule is among the most inflexible in the country. Indeed, Maryland courts have not recognized vested rights under this rule *even in circumstances where the landowner’s failure to acquire the requisite building permit and commence construction is the result of previously adjudicated or acknowledged unlawful conduct of the government*. See, *e.g.*, *Sycamore Realty Co. Inc. v. People’s Counsel of Baltimore County*, 684 A.2d 1331 (Md. 1996); *Rockville Fuel & Feed Co. v. Board of Appeals*, 291 A.2d 672 (Md. 1972).

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RECOMMENDED SOLUTION: Retain Alternative 1 and revise Alternative 2 to clarify that vesting upon commencement of ascertainable development does not require that the project must have received a building permit. Amend the definition of “development permit” in Section 10-101 to include preliminary subdivision plans or plats. Commonly, most of the detailed (and expensive) engineering design work must be accomplished in preparation at the preliminary plat stage.

### **Third-party Initiated Zoning Petitions**

**I strongly object to subsections 8-103(1)(d) and (e), which allow new land development regulations (and zoning changes) to be initiated either by petition of owners of record lots constituting “51% of the area that is to be the subject of the proposed ordinance,” or by petition of a stated minimum number of “bona fide adult residents of the local government [sic].”** At the final Directorate meeting, it was indicated that the text would include a statement that petitions of this nature should be disfavored. The language that has been added does not adequately convey that the initiative process is extremely destabilizing to orderly planning and social equity and undermines settled planning and zoning decisions. It is all the more so when it can be accomplished by a mere plebiscite of a neighborhood. Neighborhood plebiscites to effect zoning changes are unlawful in many states. See, for example, *Benner v. Tribbit*, 57 A.2d 346 (Md. 1948). There is an excellent discussion of this problem in the case of *Township of Sparta v. Spillane*, 312 A.2d 154 (N.J. Super. 1973). The fact that a minority of states authorizes the initiative process through their constitutions or state enabling laws by no means establishes the wisdom of this process, or its value in achieving the goals of Smart Growth. It is helpful that the final draft has been amended to recognize this point.

### LEGAL ANALYSIS OF THIRD PARTY ZONING PETITIONS

- The *Guidebook* acknowledges that some states authorize land development regulations to be initiated:
  - By 51% or more of record lot owners “in the area that is to be the subject of the proposed ordinance” (§ 8-103(1)(d)), or
  - By “petition of a minimum percentage of bona fide adult residents” of the jurisdiction (§ 8-103(1)(e)).
  
- **Allowing local land-use regulations to be enacted via voter initiative or by a neighborhood plebiscite can completely destabilize the land-use regulatory process and promote exclusionary zoning.** The fact that the local legislative body would make the final decision regarding enactment of the proposed legislation does not ameliorate the mob hysteria that often accompanies such initiatives. See, e.g., *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), *United States v. City of Black Jack*, 508 F.2d 1179 (8<sup>th</sup> Cir. 1974), *cert den.*, 422 U.S. 1042 (1975). Neighborhood plebiscites are often used to affect the civil rights or property rights of others.

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- Of course, initiatives that are authorized by State Constitutions are likely beyond the reach of remedial legislation. **However, the *Model* should not encourage the use of initiatives as they have been almost universally criticized as antithetical to good governance and good planning.** See, e.g., David Broder, *Democracy Derailed – Initiative Campaigns and the Power of Money* (Harcourt) (author is a senior columnist for the *Washington Post*).

- **Criticism of the initiative as a tool for planning and zoning has been particularly harsh and widespread.** See, e.g., Nicholas M. Kublicki, *Land Use by, for, and of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 Pepp. L. Rev. 99, at 104, 105, 155, 157-158 (1991).

- **Courts have been equally suspicious of the initiative and referendum.** See, for example: *Township of Sparta v. Spillane*, 321 A.2d 154, 157 (N.J. Super. 1973) (“Among other things, the social, economic, and physical characteristics of the community should be considered. The achievement of these goals might well be jeopardized by piecemeal attacks on the zoning ordinances if referenda were permissible for review of any amendment. Sporadic attacks on a municipality’s comprehensive plan would tend to fragment zoning without any overriding concept.”). To the same effect are: *Benner v. Tribbit*, 57 A.2d 346, 353 (Md. 1948); *Leonard v. City of Bothell*, 557 P.2d 1306, 1309-10 (Wash. 1976); *City of Scottsdale v. Superior Court*, 439 P.2d 290, 293 (Ariz. 1968).

RECOMMENDED SOLUTION: Delete § 8-103(1)(d) authorizing ordinance text and map amendments to be “initiated” by 51 percent of the owners of lots of record in “the area” that is to be the subject of the proposed ordinance, and replace it with a new § 8-103(1)(d), which would allow owners of lots of record to *apply* to the local government legislature for regulatory relief in situations affecting their property or the general community. The local government would retain the discretion whether to accept or consider the amendment application.

Of course, a landowner’s right to seek redress of a site-specific problem through legislation (such as a zoning text amendment) would not absolve the local government from evaluating the proposed amendment on the basis of whether it would promote the health, safety, and welfare of the general public.

Similarly, optional Section 8-103(1)(e), authorizing a specified percentage of adult residents of the local government to petition for ordinance amendments, should be deleted. If a single category, or a group of citizens, have a meritorious case for amending an ordinance, they can pursue it under §§ 8-103(1)(a), (b) and (c) by convincing their legislative body or planning agency of the merits of their proposal. If they are dissatisfied with the outcome, they can voice their displeasure in the next election.

### **Designation of Critical and Sensitive Areas**

The *Guidebook* defines “critical and sensitive areas” as those areas that contain or constitute natural resources sensitive to excessive or inappropriate development. (Section 9-101(3)(c)). This definition is extremely broad. All areas can contain or constitute some natural resource. Certainly, any undeveloped property could easily be categorized as containing or

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constituting a “natural resource.” In fact, no definition of “natural resource is provided within the text. Furthermore, the *Guidebook* definition refers to “excessive or inappropriate development” but does not attempt to define what these terms mean. Without a clear, concise definition, any development could be identified as “excessive or inappropriate.” *Such lack of clarity or of any definition altogether could easily allow a local government to restrict any type of development in any area.*

The *Guidebook* language provides that local governments can opt out of adopting regulations for critical/sensitive areas if all critical/sensitive areas in their jurisdiction are designated as areas of “state” critical concern (Section 9-101(1)). However, just as importantly, the local government should be able to avoid adopting regulations for critical/ sensitive areas that have been designated as “critical” by the Federal government. For example, the U.S. Endangered Species Act of 1973 (ESA) requires the Federal government to designate “critical habitat” for endangered or threatened species. The ESA provides extensive protection of “critical habitat.” The ESA requires an applicant to apply for a permit from the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) if their action will likely impact an endangered or threatened species (which would likely occur in an area designated as critical habitat). The Act also requires projects within critical habitat, needing a Federal permit, approval or funding to go through a consultation process with FWS or NMFS. If the outcome of the consultation determines that the activity will likely adversely affect the survival and recovery of the species, the applicant will be required to minimize or mitigate the impacts of the activity.

**RECOMMENDED SOLUTION:** Provide a definition for “natural resources” similar to the following: natural resources are plants, animals, or useful minerals indigenous to a specific site that provide benefits not only to the owner of the site but to the public generally and that the exploitation of which would have a detrimental effect on the public welfare.

Amend the definition of “critical and sensitive areas” to include: lands and/or water bodies containing natural resources and/or which are themselves natural resources the exploitation of which would cause a threat to the public health, safety, or welfare.

Provide a definition for “excessive or inappropriate development” similar to the following: excessive or inappropriate development is grading, construction, or site disturbance that is unlawful or not in compliance with duly adopted regulations or not in compliance with duly issued permits.

Provide in Section 9-101(1) and/or in Section 7-202 (5) an opt-out provision for lands designated as “critical” by the federal government.

### CONCLUSION

While many of my comments have been frankly critical, hopefully they will be perceived as constructive in their intent. Stuart Meck, his able staff, and important outside consultants have produced an impressive and very useful piece of work. The thoughtful and diligent work of a dedicated Directorate who read and commented extensively and constructively on literally thousands

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of pages of text is not to be overlooked. That the *Guidebook* can and should be made better is not a detraction of the work as it stands, but rather on the broad scope and great complexity of the undertaking. I consider it a privilege and a great learning opportunity to have been allowed to work on the Growing Smart<sup>SM</sup> Directorate.

Paul S. Barru

**The following associations representing constituencies of the “built environment” hereby join in this report:** National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Realtors; International Council of Shopping Centers; Self Storage Association; National Multi Housing Council/National Apartment Association; American Road and Transportation Builders Association.



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