

CHAPTER 2

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.

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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

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

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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.”¹

The police power is inherent in the state’s sovereign power to regulate private conduct to protect and further the public welfare.² 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.”³

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

¹Advisory 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.

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

³Advisory 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.⁴

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.⁵

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.”⁶

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.⁷

⁴Advisory Committee on Zoning, *SZEA*, §3.

⁵*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.

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

⁷See, 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.⁸

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.⁹ 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.¹⁰ This approach has been incorporated in the model legislation, in Section 2-102, below.

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

⁸Robert 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”).

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

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

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state and regional plans incorporate local goals.¹¹ 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,¹² 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

¹¹For 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.

¹²Some 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

Approach	Pros	Cons
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.

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;
 - ...
 - (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.¹³ 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.¹⁴

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

¹³James 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 SmartSM Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, March 1996), 63.

¹⁴Kurt 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.”¹⁵ 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.”¹⁶ 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.

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;

¹⁵National 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.

¹⁶Richard 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.¹⁷ The following delegation of power language is adapted from the *ALI Model Land Development Code*.¹⁸ 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.”¹⁹ 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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¹⁷See American Law Institute (ALI), *A Model Land Development Code*, Note to §1-102, 9.

¹⁸*Ibid.*, §1-102.

¹⁹*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.