

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.

CHAPTER 5

Chapter Outline

SITING STATE FACILITIES

- 5-101 Purpose
- 5-102 Definitions
- 5-103 Preparation of Proposed Statement of Needs; State Facilities Map
- 5-104 Submission of Proposed Statement of Needs to State Legislature; Adoption
- 5-105 Establishment of Criteria for Siting or Expanding State Facilities
- 5-106 Establishment of Criteria for Closing or Reducing State Facilities
- 5-107 Publication and Adoption of Rules
- 5-108 Notice and Public Hearings
- 5-109 Review of Proposal and Decision by State Agency
- 5-110 Appeals

AREAS OF CRITICAL STATE CONCERN

- 5-201 Purposes
- 5-202 Designation of Areas of Critical State Concern, Generally
- 5-203 Criteria for Designation of Areas of Critical State Concern
- 5-204 Initiating the Designation of an Area of Critical State Concern
- 5-205 Preparation of a Draft Proposal for Designation of an Area of Critical State Concern
- 5-206 Public Hearings on Draft Proposal for Designation of an Area of Critical State Concern
- 5-207 Final Proposal for Designation of an Area of Critical State Concern
- 5-208 Recordation of Designation
- 5-209 State and Local Regulation and Local Plans in Areas of Critical State Concern; Availability of Grants to Local Governments
- 5-210 Interim Regulation of Development and Plans
- 5-211 Development Permission in Areas of Critical State Concern
- 5-212 Amendment of Regulations and Plans
- 5-213 Withdrawal of Areas of Critical State Concern
- 5-214 Judicial Review of Agency Decisions

DEVELOPMENTS OF REGIONAL IMPACT

- 5-301 Statement of Purpose; Source of Authority
- 5-302 Definitions
- 5-303 Statewide Standards, Criteria, and Thresholds

CHAPTER 5

- 5-304 Variations in Thresholds**
- 5-305 Determination of DRI Status**
- 5-306 Submittal of DRI Application (Two Alternatives)**
- 5-307 Review and Recommendations of Interested Agencies and Entities**
- 5-308 Notice and Public Hearings**
- 5-309 Review of DRI Application**
- 5-310 Issuance of Decision**
- 5-311 Amendments**
- 5-312 Enforcement**
- 5-313 Exemptions**
- 5-314 Development Agreements**
- 5-315 Appeals**

NOTE 5 – A NOTE ON NEW YORK CITY’S “FAIR-SHARE” PROCESS

Cross-References for Sections in Chapter 5

| Section No. | Cross-Reference to Section No. |
|--------------------|--|
| 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 |
| 5-106 | 5-101 to 5-105, 5-107 to 5-110 |
| 5-107 | 5-101 to 5-106, 5-108 to 5-110 |
| 5-108 | 5-101 to 5-107, 5-109 to 5-110 |
| 5-109 | 5-101 to 5-108, 5-110 |
| 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.

CHAPTER 5

| | |
|-------|--|
| 5-208 | 5-201 to 5-207, 5-209 to 5-214 |
| 5-209 | 5-201 to 5-208, 5-210 to 5-214 |
| 5-210 | 5-201 to 5-209, 5-211 to 5-214, 5-302 |
| 5-211 | 5-201 to 5-210, 5-212 to 5-214, 5-302 |
| 5-212 | 5-201 to 5-211, 5-213 to 5-214 |
| 5-213 | 5-201 to 5-212, 5-214 |
| 5-214 | 5-201 to 5-213 |
| 5-301 | 4-102, 4-204, 4-204.1, 4-210, 5-302 to 5-315 |
| 5-302 | 5-210, 5-211, 5-301, 5-303 to 5-315 |
| 5-303 | 4-204, 4-204.1, 5-301 to 5-302, 5-304 to 5-315 |
| 5-304 | 5-301 to 5-303, 5-305 to 5-315 |
| 5-305 | 5-301 to 5-304, 5-306 to 5-315 |
| 5-306 | 5-301 to 5-305, 5-307 to 5-315 |
| 5-307 | 5-301 to 5-306, 5-308 to 5-315 |
| 5-308 | 5-301 to 5-307, 5-309 to 5-315 |
| 5-309 | 5-301 to 5-308, 5-310 to 5-315 |
| 5-310 | 5-207, 5-301 to 5-309, 5-311 to 5-315 |
| 5-311 | 5-301 to 5-310, 5-312 to 5-315 |
| 5-312 | 5-301 to 5-311, 5-313 to 5-315 |
| 5-313 | 5-301 to 5-312, 5-314 to 5-315 |
| 5-314 | 5-301 to 5-313, 5-315 |
| 5-315 | 5-301 to 5-314 |

CHAPTER 5

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.¹

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.

¹Michael Dear, “Understanding and Overcoming the NIMBY Syndrome,” *Journal of the American Planning Association* 58, no. 3 (Summer 1992): 291-292.

CHAPTER 5

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 ² | 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.³ Generally, this meant that less affluent, minority neighborhoods bore the brunt of these sitings.⁴ 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

²The 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.

³See 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.

⁴*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.

CHAPTER 5

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.⁵

- **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.⁶
- **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.⁷
- **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.⁸

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.

⁵Id., 1028.

⁶Id., 1029.

⁷Id., 1047-48.

⁸Id., 1052-1055.

CHAPTER 5

- **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.⁹ 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.¹⁰ Under a point system, each substate district¹¹ 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.¹²

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.

⁹While 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.

¹⁰Frank Popper, “The Great LULU Trading Game,” *Planning* 58, no. 5 (May 1992): 15-17.

¹¹Although 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*.

¹²*Id.*, 16.

CHAPTER 5

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.¹³

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.¹⁴

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.¹⁵

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.¹⁶

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.

¹³Id.

¹⁴Connecticut 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.

¹⁵Id. See also Vicki Been, “Compensated Siting Proposals: Is It Time to Pay Attention?,” *Fordham Urban Law Journal* 21 (1994): 795.

¹⁶Id.

CHAPTER 5

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.¹⁷

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.

¹⁷Connecticut General Assembly, Legislative Program Review and Investigations Committee, *Siting Controversial Land Uses*, 6-7.

CHAPTER 5

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 impacts¹⁸ 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.

SITING STATE FACILITIES

Commentary: A Model Statute for Siting State Facilities

¹⁸For an analysis of the desirability of societal facilities, see Dear, "Understanding and Overcoming the NIMBY Syndrome," 291-294.

CHAPTER 5

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.¹⁹ 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 facility²⁰) 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.

¹⁹This provision is modeled after a Connecticut statute for a state facility plan, found at Conn. Gen. Stat. Ann. §§4b-23 (a)-(d).

²⁰This 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).

CHAPTER 5

Siting State Facilities - A Model State Facilities Siting Act

5-101 Purpose²¹

- (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.²²

²¹This 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).

²²Id.

CHAPTER 5

- (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.²³
- (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**”²⁴ 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].

²³Id. 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.

²⁴This 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).

CHAPTER 5

- (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*]²⁵; 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];

²⁵This 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*.

CHAPTER 5

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;

CHAPTER 5

- (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,

CHAPTER 5

- (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.

CHAPTER 5

- [(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 significance²⁶ 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 significance²⁷ 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,

²⁶Examples would include community centers, day care centers, recreation areas, courthouses, and libraries.

²⁷Examples would include hospitals, nursing homes, and recycling centers.

CHAPTER 5

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.]²⁸
- [(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.

²⁸Subparagraphs (c) through (e) are most appropriate in community districts with a high ratio of residential facility beds to population.

CHAPTER 5

- (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,²⁹ 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:

²⁹Ideally, closings or reductions should occur in areas with high ratios of service supply to service demand.

CHAPTER 5

- (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:

CHAPTER 5

- (a) the criteria established [by rule by the [state planning agency] pursuant to] [by] Sections [5-105 and 5-106³⁰] 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.³¹

³⁰If 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

³¹The 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?³²

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.³³ 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.³⁴ 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.³⁵

A state that employs the critical areas concept typically carries out its program in one of two ways.

or withdrawal of request, the decision of the commissioner and the board shall be final and binding upon the governmental unit.

³²This 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 SmartSM Working Papers, Vol. 1*, Planning Advisory Service Report No. 462/463 (Chicago: APA, March 1996), 7-8, 105-109.

³³For 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.

³⁴Daniel R. Mandelker, *Environmental and Land Controls Legislation* (New York: Bobbs-Merrill, 1976), 66.

³⁵Id. 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.

CHAPTER 5

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*.³⁶ 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).³⁷

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,³⁸ together with a reasonable amount of surrounding land; or

³⁶American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976).

³⁷L.A. Malone, *Environmental Regulation of Land Use* (Deerfield, Il: Clark Boardman Callaghan, 1994 Supp), §13.01.

³⁸The 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).

CHAPTER 5

- (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.³⁹

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.⁴⁰

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.”⁴¹ 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.”⁴² Professor Daniel R. Mandelker has commented on this approach:

³⁹ALI, *A Model Land Development Code*, §7-201(3).

⁴⁰Id., 260.

⁴¹Id.

⁴²Id.

CHAPTER 5

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.⁴³

FLORIDA

Several states⁴⁴ have adopted various permutations of the ALI Code, but Florida's approach is closest.⁴⁵ 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.⁴⁶ 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.⁴⁷ 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

⁴³D.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.

⁴⁴See, 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).

⁴⁵Florida 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.

⁴⁶Fla. Stat. §§380.05(1) to (2).

⁴⁷Fla. Stat. §380.05(1)(c).

CHAPTER 5

areas,⁴⁸ and local governments have six months to prepare consistent comprehensive plans.⁴⁹ Developments of Regional Impact (DRI) within the critical areas may proceed only under local and regional plans and regulations.⁵⁰

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.⁵¹ 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.⁵²

AD HOC LEGISLATION FOR CRITICAL AREAS

The ad hoc approach has been used with some success by California,⁵³ North Carolina,⁵⁴ and Massachusetts,⁵⁵ 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 1971.⁵⁶ 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.⁵⁷ Applicants for new land uses and development with an impact of regional significance must obtain a permit from

⁴⁸Id., §380.05(1)(b).

⁴⁹Id., §380.05(5).

⁵⁰Id., §380.06(13).

⁵¹Id., §380.05(20).

⁵²Id., §§380.05(13) and 380.07(2), respectively.

⁵³Cal. Govt. Code, §§66800-66801 (Lake Tahoe).

⁵⁴N.C. Gen. Stat., §113A *et seq.* (Coastal zone).

⁵⁵1977 Mass. Acts, Ch. 831 (Martha's Vineyard).

⁵⁶N.Y. Exec. Law, §§800-820. See Malone, *Environmental Regulation of Land Use*, §13.03[1].

⁵⁷N.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.

CHAPTER 5

the Adirondack Park Agency.⁵⁸ 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.⁵⁹

The state of New Jersey protects the ecologically important Pinelands region under the Pinelands Protection Act of 1979.⁶⁰ 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.⁶¹ 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.⁶² 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.⁶³ 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

⁵⁸The 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.

⁵⁹N.Y. Exec. Law, §813.

⁶⁰N.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].

⁶¹N.J.S.A. §52:18A-196 *et seq.*

⁶²New 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).

⁶³Va. Code §§10.1-2100-2115. See Malone, *Environmental Regulation of Land Use*, §13.03[2].

CHAPTER 5

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.⁶⁴

AREAS OF CRITICAL STATE CONCERN

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

⁶⁴Malone, *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.

CHAPTER 5

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.⁶⁵
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.⁶⁶
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

⁶⁵Regional 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*.

⁶⁶For 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.*

CHAPTER 5

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

CHAPTER 5

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.

5-201 Purposes⁶⁷

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

⁶⁷This model was drafted by James F. Berry, an attorney and professor of biology at Elmhurst College in Elmhurst, Illinois.

CHAPTER 5

- (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 areas⁶⁸], lakes, estuaries, aquifer recharge areas, geologically hazardous areas,⁶⁹ 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

⁶⁸Areas 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).

⁶⁹A 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.”

CHAPTER 5

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,⁷⁰ 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

⁷⁰For example, the state could designate a highway corridor or series of interchange areas as an area of critical state concern.

CHAPTER 5

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

CHAPTER 5

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

CHAPTER 5

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 practices⁷¹ 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;⁷² 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

⁷¹Similar 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).

⁷²On 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.

CHAPTER 5

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.

CHAPTER 5

- (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

CHAPTER 5

it is unconstitutional for a legislature to delegate that power to the executive branch.⁷³ 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

⁷³Florida 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.

CHAPTER 5

- (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.

CHAPTER 5

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]⁷⁴ area of critical state concern designation shall suspend the powers of the local [or regional]⁷⁵ 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

⁷⁴The 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).)

⁷⁵The 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.

CHAPTER 5

- (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].

CHAPTER 5

- (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

CHAPTER 5

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 states⁷⁶ 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

⁷⁶See 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.).

CHAPTER 5

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.⁷⁷

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.”⁷⁸ 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.⁷⁹ 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.

⁷⁷American Law Institute (ALI), *A Model Land Development Code* (Philadelphia, Pa.: ALI, 1976). Commentary on Art. 7, 248-254.

⁷⁸ALI Code, Art. 7, §7-301(1); 269.

⁷⁹Developments 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).

CHAPTER 5

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.⁸⁰ 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.⁸¹ These criteria include consideration of factors (again, both negative and

⁸⁰Fla. Stat. Ch. 380, esp. §380.06 (Developments of regional impact)..

⁸¹For 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.

CHAPTER 5

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.⁸² 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 1990.⁸³ (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;

⁸²For 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).

⁸³Cape Cod Commission Act, enacted by Ch. 716 of the Acts of 1989 and Ch. 2 of the Acts of 1990 (§12(c)(1-8)).

CHAPTER 5

- (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.⁸⁴

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?⁸⁵

After receiving approval of a DRI from the Commission, the developer must then complete the local government's review and permitting procedures.

⁸⁴Id.

⁸⁵Districts 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)).

CHAPTER 5

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.⁸⁶ 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.

⁸⁶Report of the Cape Cod Commission Regulatory Review Task Force, September 7, 1994.

CHAPTER 5

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.⁸⁷ 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.⁸⁸

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.⁸⁹

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.⁹⁰ 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.

⁸⁷Vt. 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.

⁸⁸Vt. Stat. Ann., Tit. 10, Ch. 151, §§6086(a)(9)(A)-(L).

⁸⁹John DeGrove, *Land, Growth, and Politics* (Chicago: Planners Press, 1984), 75.

⁹⁰Minn. Stat. §473.173.

CHAPTER 5

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.”⁹¹

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

⁹¹Norman Williams, *American Land Planning Law* 5, §160.28 (Deerfield, Ill.: Clark Boardman Callaghan, 1985), 682.

CHAPTER 5

residential DRI is 250 dwelling units.⁹² By contrast, in areas of Vermont, the DRI process is activated by any housing development consisting of at least 10 dwelling units.⁹³ The Cape Cod Commission reviews as a DRI any wholesale, business, office, or industrial development of 10,000 square feet or more.⁹⁴ Georgia's threshold for similar facilities is 250,000 square feet.⁹⁵ 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.⁹⁶

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.

⁹²Fla. Admin. Code, Ch. 28-24.010. Developments Presumed to be of Regional Impact.

⁹³Vt. Stat. Ann. Tit. 10, Ch. 151 §§6081-6091.

⁹⁴Cape Cod Commission Act §12(c)(6).

⁹⁵*Procedures and Guidelines for the Review of Developments of Regional Impact*, Georgia Department of Community Affairs, November 1991.

⁹⁶See Cape Cod Commission Enabling Regulations Governing Review of Developments of Regional Impact.

DEVELOPMENTS OF REGIONAL IMPACT

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.

CHAPTER 5

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

CHAPTER 5

Procedures”⁹⁷ as the primary reviewing and permitting agency for DRIs.⁹⁸ 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.

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

⁹⁷ALI Code, Art. 2, §2-201.

⁹⁸Id., Art. 7, §7-303.

CHAPTER 5

- (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.

CHAPTER 5

- (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;

CHAPTER 5

- (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

CHAPTER 5

- (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.⁹⁹ 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].¹⁰⁰

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

⁹⁹The 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.

¹⁰⁰States 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.

CHAPTER 5

its review.¹⁰¹ 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.

¹⁰¹The 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.

CHAPTER 5

- (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.

CHAPTER 5

- (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.

CHAPTER 5

- (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,¹⁰² [*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

¹⁰²Upon 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.

CHAPTER 5

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].¹⁰³ 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.

¹⁰³For 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 SmartSM Working Papers*, Planning Advisory Service (PAS) Report 462/463 (Chicago: APA, March 1996), 31-37.

CHAPTER 5

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.

CHAPTER 5

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 facilities¹⁰⁴ 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 1989.¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ 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.¹⁰⁸ The city, however, may consider the locations of these facilities when siting city facilities.¹⁰⁹

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.¹¹⁰ 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.¹¹¹

HOW THE FAIR-SHARE PROCESS WORKS

¹⁰⁴New York Department of City Planning, “Locating City Facilities: A Guide to the ‘Fair Share’ Criteria,” (New York: N.Y.: The Department, June 1991), 1.

¹⁰⁵William 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).

¹⁰⁶Valletta, “Siting Public Facilities on a Fair Share Basis in New York City,” 2.

¹⁰⁷New York Department of City Planning, “Locating City Facilities: A Guide to the ‘Fair Share’ Criteria,” 3.

¹⁰⁸*Id.*, 5.

¹⁰⁹*Id.*

¹¹⁰*Id.*, 6.

¹¹¹*Id.*

CHAPTER 5

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).¹¹² 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."¹¹³ 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."¹¹⁴ 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.¹¹⁵

¹¹²N.Y.C. Charter §197-c.

¹¹³Valletta, "Siting Public Facilities on a Fair Share Basis in New York City," 5.

¹¹⁴Id., 8, citing N.Y.C. Charter §§204(a); 204(e)(2); 204(f); and 204(g)(1).

¹¹⁵Valletta, "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.

CHAPTER 5

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 1995.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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

¹¹⁶New 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).

¹¹⁷*Id.*, 14.

¹¹⁸*Id.*, 29-30.

¹¹⁹New York City Department of City Planning, “Fair Share: An Assessment of New York City’s Facility Siting Process,” 20.

CHAPTER 5

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."¹²⁰ 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.

¹²⁰Id., 21.

CHAPTER 5

- 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.

CHAPTER 5

...

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

CHAPTER 5

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.¹²¹

¹²¹New York City Planning Commission, "Criteria for the Location of City Facilities," (adopted on December 3, 1990).