

**SPECIAL AND ENVIRONMENTAL LAND
DEVELOPMENT REGULATIONS
AND
LAND-USE INCENTIVES**

This Chapter contains model statutes that address various special issues in land development regulation, including environmental issues. In a sense, this Chapter is a continuation of Chapter 8, which deals with more general or ‘typical’ land development regulations. The first three Sections are intended to implement particular elements of the local comprehensive plan, adopted pursuant to Chapter 7, Local Planning. The protection of, and regulation of development in, critical and sensitive areas and natural hazard areas is addressed in Section 9-101. Section 9-201 is concerned with transportation demand management. And Section 9-301 authorizes regulations for the protection of historic properties and districts and for the preservation of aesthetic design standards in specific districts.

The second group of statutes provides flexible tools for balancing the need to protect the public and the environment with the rights of property owners. The first two Sections in this group, 9-401 and 9-402, authorize transfer of development rights from one property to another and the purchase of development rights by the local government. The Section on conservation easements, 9-402.1, provides the legal instrument through which the transfer or purchase of development rights is implemented. And the mitigation Section, 9-403, authorizes local governments to permit development in otherwise-undevelopable critical and sensitive areas, such as wetlands, in exchange for the creation or restoration of replacement critical and sensitive areas elsewhere.

A final model statute, Section 9-501, authorizes land development regulations that provide density and intensity incentives for affordable housing, good community design, and open space donation.

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Chapter Outline

9-101	Regulation of Critical and Sensitive Areas and Natural Hazard Areas
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9-401	Transfer of Development Rights
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9-501	Land-Use Incentives for Affordable Housing, Community Design, and Open Space Dedication; Unified Incentives Ordinance

Cross-References for Sections in Chapter 9

Section No.	Cross-Reference to Section No.
9-101	7-202, 7-209, 7-210, 8-102, 8-103, 8-104, 8-201, 8-502, 9-401, 9-402, 9-403
9-201	4-103, 8-103, 8-104, 7-205
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9-402.1	9-301, 9-401, 9-402, 9-403
9-403	4-103, 7-209, 8-102, 8-103, 8-104, 9-101, 9-402.1, 10-201 <i>et seq.</i>
9-501	7-207, 7-214, 8-102, 8-103, 8-104, 8-201, 8-601, 8-602, 8-701, 10-201

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Commentary: Regulation of Critical and Sensitive Areas and Natural Hazard Areas¹

INTRODUCTION

Critical and sensitive areas and natural hazards exist in every region of the country. The following model Section is designed to allow local governments to regulate and otherwise protect these locations on their own. It is important to note that in many instances a local government will desire to regulate and protect both types of area in a single regulation, or, because regulating and protecting both may take on different forms and require differing levels of information, adopt separate ordinances. This issue is presented in greater detail within the model Section below.

CRITICAL AND SENSITIVE AREAS

Critical and sensitive areas are defined and discussed in Sections 7-101 and 7-209 of the *Guidebook*, and consist of areas that contain or constitute natural resources sensitive to excessive or inappropriate development.² These include aquifer systems, watersheds to fresh and coastal water systems, wellhead protection areas, inland and coastal wetland resources and critical habitat areas. As discussed within Section 7-209, determination and protection of certain critical and sensitive areas can only be accomplished, from both a practical and a legal perspective, if the local government has sufficient analytical support identifying the area and assessing its “critical” or “sensitive” nature.

For example, a regulation designed to protect surface water bodies must incorporate an accurate watershed delineation. The delineation must be identified on a map or maps of suitable scale and must reflect current scientific understanding regarding surface water flows and watershed dynamics. If the regulation is designed to limit contaminant transport to the water resource, the regulation must identify which contaminants are being regulated, and arguably provide a basis for the regulation’s purpose. Similarly, a regulation designed to protect drinking water wells must be linked to an accurate delineation of the zone of contribution to the wells. The delineation must reflect current analytical technique and not, as has often been the case, be based on best guesses as to groundwater flow and capture area locations. And a regulation designed to protect wetland resources must incorporate an appropriate methodology for the identifying wetland species and reflect current science on the interaction between ground and surface water systems.

¹This commentary and the following model statute were drafted by John Bredin, Esq., Research Fellow, Stuart Meck, FAICP, Principal Investigator for Growing SmartSM, and Jon Witten, Esq., an attorney and a planning consultant in Sandwich, Massachusetts.

²For an example of a statute authorizing designation and regulation of critical areas, see Wash. Rev. Code §§36.70A.060, 36.70A.170, 36.70A.172, and 36.70A.175 (1999). Administrative rules appear at Wash. Admin. Code §365-190-080 (1999).

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NATURAL HAZARD AREAS

Natural hazard areas are discussed in Section 7-210 and include those portions of the community that pose risk to the built and natural environment and public safety from a known or potential natural hazard or disaster. A natural hazard does not even have to be wholly natural; consider ground subsidence from old mines or landslides exacerbated by the clearing of trees from hillsides. These hazards and hazard areas are numerous and unique, and specific provisions will not be made in the model Section for each natural hazard. The organization of the model Section should still be helpful in guiding the drafting of regulations to manage particular natural hazard areas. For example, the model Section below is intended to serve as the statutory authority for floodplain management ordinances.

One reason why floodplain ordinances are important is that property owners in a floodplain cannot obtain insurance under the National Flood Insurance Program³ unless the local government first adopts floodplain regulations that satisfy or exceed criteria established by the Federal Emergency Management Agency.⁴

TWO WORDS OF CAUTION

Local governments seeking to protect critical and sensitive areas and/or natural hazard areas need to ensure that their regulations do not conflict with, or are otherwise pre-empted by, state or federal law. Indeed, a state may have a separate permitting procedure for certain types of critical or sensitive areas. For example, the New Jersey Freshwater Wetlands Protection Act completely preempts local government regulation of development affecting freshwater wetlands and establishes transition zones around wetlands in which limited or no development (no structures other than temporary structures of 150 square feet or less) can take place.⁵

It is also vital to note that while the ordinances authorized by this model Section are necessary to implement the critical and sensitive areas element and natural hazards element of the local comprehensive plan, they are not the only implementation measures. This is particularly true with the natural hazards element.⁶ Emergency response plans, such as evacuation plans, must be prepared and their contents made familiar to the officials who will implement them. Building and property management codes must be updated and modified to make buildings and other structures less susceptible to damage from the natural hazard. Public infrastructure and capital improvements such as drainage culvert enlargement and strengthening of bridge and road supports may be needed. And

³42 U.S.C. §4001 *et seq.* (2000).

⁴44 C.F.R. §60.3 (2000).

⁵N.J.S.A. §§13:9B-1 *et seq.* (1999).

⁶For a discussion of planning for disasters and of the regulations and other measures needed before, during, and after a disaster occurs, see Jim Schwab with Kenneth C. Topping, Charles C. Eadie, Robert E. Deyle, and Richard A. Smith, *Planning for Post-Disaster Recovery and Reconstruction*, Planning Advisory Service Report No. 483/484 (Chicago: American Planning Association, 1998).

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ordinances managing post-disaster reconstruction must be adopted, or at least drafted, before a disaster strikes.

9-101 Regulation of Critical and Sensitive Areas and Natural Hazard Areas

- (1) Every local government, except for those which may opt out pursuant to Section [7-202(5)(b) and (c)], shall adopt and amend in the manner for land development regulations pursuant to Section [8-103 *or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinance*]:
 - (a) a critical and sensitive areas ordinance; and/or
 - (b) a natural hazards ordinance.
- ◆ Under Section 7-202(5), concerning elements of the local comprehensive plan, local governments may opt out of the natural hazards element requirement if they have no significant exposure to any natural hazard, and may opt out of the requirement for a critical and sensitive areas element if there are less than five acres of critical and sensitive area in the local government or if all critical and sensitive areas are within areas of critical state concern.
- (2) The purposes of this Section are to:
 - (a) ensure an adequate quality and quantity of drinking water;
 - (b) ensure high quality ground and surface water systems;
 - (c) conserve the natural resources of the community, both living and non-living;
 - (d) prevent contamination of the natural environment;
 - (e) protect and conserve wetlands, their resources and amenities; and
 - (f) minimize the danger to life, health, and property due to fire, flood, earthquake, severe storms and other natural hazards.
- (3) As used in this Section, and in any other Section where “critical and sensitive areas” and/or “natural hazard areas” are referred to:
 - (a) **“Alteration of Land Form”** means any human-made change in the existing topography of the land, including, but not limited to, filling, backfilling, grading, paving, dredging, mining, excavation, and drilling;

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- (b) **“Best Management Practices”** means the process of minimizing the impact of nonpoint source pollution on receiving waters or other resources, including, but not limited to, detention ponds, vegetative swales and buffers, street cleaning, reduced road salting, and public education programs;
- (c) **“Critical and Sensitive Area”** means lands and/or water bodies that:
 - 1. provide protection to or habitat for natural resources, living and non-living; or
 - 2. are themselves natural resources;requiring identification and protection from inappropriate or excessive development;

◆ This definition is also provided in Section 7-101.

- (d) **“Critical and Sensitive Areas Overlay District”** (CSAOD) means those land areas that constitute a critical and sensitive area, designated on a zoning map as overlay districts;
- (e) **“Floodplain Management”** means the process of, and mechanisms for, minimizing the occurrence of, and damage from, flooding;
- (f) **“Habitat Management”** means the process of, and mechanisms for, maintaining wildlife habitats and the diversity of species therein, including but not limited to fish, animals, birds, and plants;
- (g) **“Hazardous Material”** means any substance defined as a “hazardous chemical” in 29 C.F.R. § 1910.1200(c) as amended;
- (h) **“Hazardous Waste”** means any [waste material *or similar term*] as defined in the [State Hazardous Waste Regulations];
- (i) **“Natural Hazard”** means any condition or area, from any cause, designated in the natural hazards element of a local comprehensive plan as a natural hazard, including but not limited to:
 - 1. hurricane or severe storm;
 - 2. tornado;
 - 3. tsunami or storm surge;
 - 4. flooding;

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5. earthquake;
 6. landslide or mudslide;
 7. volcanic eruption;
 8. snowstorm or blizzard;
 9. forest fire, brush fire, or other such fire; and
 10. [other].
- (j) “**Natural Hazard Areas Overlay District**” (NHAOD) means those land areas that contain and encompass a natural hazard, designated on a zoning map as overlay districts;
- (k) “**Mitigation Measure**” means any mechanism designed to prevent, or reduce the extent and/or magnitude of negative impacts to a critical and sensitive area, or of the natural hazards associated with a natural hazards area. Mitigation measures may include, but are not limited to:
1. alteration of land form, or prohibitions or restrictions on alteration of land form;
 2. prohibitions or restrictions upon the release of hazardous material, hazardous waste, and other substances into the ground, surface water, ground water, or atmosphere;
 3. best management practices;
 4. habitat management;
 5. floodplain management;
 6. stormwater management; and
 7. tidal management.
- (l) “**Stormwater Management**” means the process of ensuring that the magnitude and frequency of stormwater runoff does not increase the hazards associated with flooding, water quality is not impaired by untreated stormwater flow, and the integrity of riverine, estuarine, aquatic, and other habitats is not compromised;

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- ◆ If not properly managed, stormwater runoff can increase flood flows and can carry contaminants into groundwater and surface water systems, threatening receiving water quality and also habitats based in or dependent on those surface water systems.
 - (m) “**Substantial Damage**” means damage of any origin sustained by a structure whereby the cost of restoring the structure to its pre-damage condition would equal or exceed fifty percent (50%) of the market value of the structure before the damage occurred, regardless of the value of or actual cost of repair work performed; and
 - (n) “**Tidal Management**” means the process of, and mechanisms for, ensuring that the magnitude and frequency of tides and wave action does not increase the hazards associated with flooding and/or erosion. Tidal management may include, but is not limited to, breakwaters, seawalls, the expansion or restoration of beaches, and the planting of vegetation to protect beaches and soil from erosion;
- (4)
 - (a) A critical and sensitive areas ordinance shall not be adopted unless the local government has first adopted a local comprehensive plan with a critical and sensitive areas element pursuant to Section [7-209].
 - (b) A natural hazard areas ordinance shall not be adopted unless the local government has first adopted a local comprehensive plan with a natural hazards element pursuant to Section [7-210].
- (5) A critical and sensitive areas ordinance and/or a natural hazard area ordinance pursuant to this Section shall include the following minimum provisions:
 - (a) a citation to enabling authority to adopt and amend the ordinance;
 - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-103] and to the purposes of this Section;
 - (c) a statement of consistency with the local comprehensive plan, and with the critical and sensitive areas element and/or the natural hazards element in particular, that is based on findings pursuant to Section [8-104];
 - (d) definitions, as appropriate, for such words or terms contained in the ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
 - (e) procedures and criteria for the designation of critical and sensitive area overlay districts (CSAODs) and/or natural hazards area overlay districts (NHAODs);
 - (f) provisions prohibiting particular uses, activities, and structures within CSAODs and/or NHAODs;

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- ◆ This provision allows the local government to develop a list of uses and activities that should be prohibited from the CSAOD and/or NHAOD. This list should be tailored to specific resource protection or natural hazard issues within the local government.
 - (g) provisions permitting particular uses, activities, and structures within CSAODs and/or NHAODs, subject to a conditional use permit;
- ◆ The requirement of a conditional use permit gives the local government the opportunity to carefully review the proposed use or activity to ensure its appropriateness within the CSAOD and/or NHAOD and to attach conditions, if necessary, to its approval.
 - (h) provisions exempting particular uses, activities, and structures from the ordinance, as consistent with applicable federal and state law and regulations; and
- ◆ The exemption provision gives the local government the opportunity to exempt from the regulation uses that the local government chooses to exempt, due to the nature of the natural hazard area or critical and sensitive area, state or federal supremacy issues, or local preference.
 - (i) provisions adopting and implementing standards for mitigation measures within CSAODs and/or NHAODs, said standards constituting criteria for the grant of conditional use permits pursuant to subparagraph (5)(g).
- ◆ Note that if a local government participates in the National Flood Insurance Program (NFIP), the NHAOD standards must comply with the NFIP regulations adopted by the Federal Emergency Management Agency, 44 C.F.R. §60.3.
 - (6) A critical and sensitive area ordinance and/or natural hazard areas ordinance may:
 - (a) be adopted as a single ordinance;
- ◆ There may be natural hazards that endanger critical and sensitive areas. Or there may be natural hazards that benefit critical and sensitive areas, as with limited fires in forests or prairies and certain forms of plant life. In either case, it may be appropriate for a particular local government to address its critical and sensitive areas and natural hazard areas in one cohesive ordinance.
 - (b) authorize a transfer of development rights (TDR) program pursuant to Section [9-401] and/or a purchase of development rights (PDR) program pursuant to Section [9-402]; and
 - [(c) in a natural hazard areas ordinance, include a provision that any building or structure in an NHAOD that suffers substantial damage due to one or more of the natural hazards associated with the NHAOD shall be restored or repaired only if, and to the degree that, the building or structure, and the uses and activities conducted therein,

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comply with all provisions of the ordinance adopted pursuant to subparagraphs (5)(f), (g), (h), and (i), any provision of Section [8-502] to the contrary notwithstanding].

- ◆ This requires a building or structure in a natural hazards area that is destroyed or severely damaged by that natural hazard to comply with the presently-applicable natural hazards regulations on uses prohibited, permitted, and permitted only by a conditional use permit. This is an exception to the rule of Section 8-502 that a building or structure that is destroyed may be rebuilt to its pre-destruction condition unless the destruction was due to the intentional or reckless act of the owner. Without such an exception, structures susceptible to natural hazards or that even exacerbate them could be rebuilt without restriction to their pre-damage condition, with the same result when the natural hazard strikes again.

Because this provision is an exception to the normal rule on nonconforming uses and may bar reconstruction of existing buildings, it may be controversial and is thus a bracketed option.

- (7) (a) All criteria for, boundaries and characteristics of, and standards applicable to:
 - 1. CSAODs shall be those of the critical and sensitive areas identified in the critical and sensitive areas element of the local comprehensive plan pursuant to Section [7-209]; and
 - 2. NHAODs shall be those of the natural hazards identified in the natural hazards element of the local comprehensive plan pursuant to Section [7-210].
- (b) The provisions of a critical and sensitive areas ordinance applicable to a CSAOD or NHAOD, when the boundaries of the CSAOD or NHAOD divide a lot or parcel, shall apply only to the portion of the lot or parcel that is located within the CSAOD or NHAOD boundaries.
- (c) An area may be designated both a CSAOD and an NHAOD.
- (d) Where the boundaries of a CSAOD or NHAOD are in doubt or dispute, in any hearing, review, or appeal pursuant to Chapters 10 or 11, the burden of proof shall be upon the owner of the land in question to show where the boundaries should be located. While evidence and testimony challenging the boundaries may be submitted by a professional engineer, wetlands scientist, hydrologist, or geologist, the rebuttable presumption is that the boundaries of the CSAOD and/or NHAOD as identified on the zoning map are accurate.

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*Commentary: Transportation Demand Management*⁷

INTRODUCTION⁸

Transportation demand management (TDM) is a term used for a set of mechanisms intended to influence individual travel behavior. Such measures include both incentives (“carrots”) to encourage desirable behavior and disincentives (“sticks”), which discourage undesirable behavior. In economic terms, TDM is a demand-side strategy as opposed to the traditional supply-side strategy of increasing the transportation system’s carrying capacity by building more roads.

Demand management offers a tool for addressing several issues. A principal (perhaps obvious) goal of TDM is to relieve traffic congestion by reducing the number of auto trips taken, vehicle trips during peak travel times, and the drive-alone rate. Another commonly-cited goal is diminishing air pollution; while a third is reducing fossil fuel consumption. TDM may also affect highway safety, including accident-related injuries, fatalities, and property damage to vehicles, transportation infrastructure, and other property; the opportunity cost incurred when land that could have been used for some other purpose is used for car-related infrastructure; and environmental degradation resulting from surface water runoff from roadways which, in addition to containing road salt in some areas, may contain petroleum products and other contaminants.

EXISTING TDM STATUTES

Numerous states have statutes authorizing or related to transportation demand management.⁹ A variety of approaches to TDM could be observed in these statutes. In fact, the breadth of approaches

⁷This Section is adapted from Deborah L. Johnson, “Suggestions for Model Transportation Demand Management Legislation,” *Modernizing State Planning Statutes: The Growing SmartSM Working Papers*, Vol. 1, Planning Advisory Service Report No. 462/463 (Chicago: American Planning Association, 1996) 133-146.

⁸See, generally, Erik Ferguson, *Transportation Demand Management*, Planning Advisory Service Report No. 477 (Chicago: American Planning Association, 1998); Mark E. Hanson, “Automobile Subsidies and Land Use: Estimates and Policy Responses,” *Journal of the American Planning Association* 58, No. 1: 60-71; Peter Schauer, “Issues of Time and Space: Transportation Demand Management, A Solution For 21st Century Congestion,” *The Western Planner* (April/May 1994): 5-8; Anthony Downs, *Stuck In Traffic: Coping With Peak-Hour Traffic Congestion*, (Washington D.C.: Brookings Institution, 1992).

⁹A total of 17 states were examined. Arizona: Ariz. Rev. Stat. §§49-581 *et seq.* (1998); California: Cal. Gov’t Code §§65088-65089.9 (1999), Cal Pub. Res. Code §§25480-25486, Cal. Str. & H. Code §149.1; Colorado: Colo. Rev. Stat. §§43-1-1101 *et seq.* (1998); Connecticut: Conn. Gen’l Stat. §§13b-38a *et seq.* (1998); Delaware: Del. Code §§1903-1905 (1999); Florida: Fla. Stat. §§339.177, 341 (1999); Georgia: Ga. Code §§32-9-4 *et seq.* (1998); Hawaii: Haw. Rev. Stat. §§226-17 *et seq.* (1999); Illinois: 625 Ill. Comp. Stat. §§32/1 *et seq.* (1999); Maine: 10 Me. Rev. Stat. §1461 *et seq.* (1998); Massachusetts: Mass. Gen’l Laws tit. 63, §§31D, 31F (1998); New Jersey: N.J. Stat. Ann. §§27:26A-1 *et seq.* (1999); Oregon: Ore. Rev. Stat. §184.730 (1999); Pennsylvania: 35 Pa. Stat. §4007.10, 74 Pa. Comp. Stat. §§1301-1302 (1999); Rhode Island: R.I. Gen’l Laws §37-5-7 (1999); Washington: Wash Rev. Code §§46.16.023, 46.74, 47.06, 47.66, 47.80, & 70.94.521 (1998); Wisconsin: Wis. Stat. §144.3712 (1998).

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challenged research because they are codified, variously, under health and safety, environment, transportation, highways, motor vehicles, planning and zoning, public works, executive office, commerce and trade, and taxation titles. Many states have adopted TDM mechanisms principally to comply with these federal Clean Air Act Amendments¹⁰ and with ISTEA¹¹ and its successor, the Transportation Equity Act for the 21st Century (TEA-21).¹² It seems merely incidental that these state statutes constitute a coherent TDM strategy.¹³ For this reason, existing statutes do little to suggest an extensive spectrum of specific elements that should be included in TDM legislation.

Nonetheless, commonalities among existing statutes do exist. There are two general approaches as to whether TDM measures are mandatory or merely authorized. One approach consists of enabling legislation that conveys specific authority for the creation, governance, and enforcement of rules to the administrative level. The other comprises legislative mandates that set rules into law and identify the responsible body for effectuating those laws.

A distinguishing characteristic of enabling legislation is that it transfers authority from the legislative to the administrative level by delegating the power and duty to adopt and implement trip reduction goals and measures to a specific governmental unit or units. The majority of the states examined used this approach. In some cases, general parameters for the administrator's activities are set by the use of compelling language; however, in others the administrator is simply given authority without any minimal requirements.

An example of broad authorization is **Georgia's** statute, which enables the state Department of Transportation (DOT) to participate in the establishment and operation of ridesharing programs both on its own and in cooperation with others; subject only to general appropriations for doing so and to its own rules and regulations.¹⁴ Other than a brief definition of a ridesharing program, this constitutes the entire TDM statute. Another good illustration is **Rhode Island's** commuter parking facilities statute, which authorizes its public works department and director to plan, construct and maintain, or to enter into agreements with other agencies for commuter parking facilities to encourage the use of mass transportation and reduce peak traffic demands on highway systems¹⁵ In this instance, some additional specific authorities are granted to the director, although the director is not compelled to carry them out.

¹⁰42 U.S.C. §§7401 *et seq.* (1999).

¹¹Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 as amended.

¹²P.L. 105-178, as amended by P.L. 105-206, the TEA-21 Restoration Act (1998).

¹³For example, Illinois' TDM legislation, the Employee Commute Options Act, is subject to automatic repeal upon the repeal of the Clean Air Act Amendments. 625 Ill. Comp. Stat. §32/75 (1999). This suggests that Illinois' predominant interest in adopting its Employee Commute Options Act was meeting the federal mandate rather than employing TDM.

¹⁴Ga. Code Ann. §32-9-5 (1998).

¹⁵R.I. Gen'l Laws §37-5-7(1998).

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The principal advantage of a broad authorization is that it offers the greatest deal of flexibility in which endeavors the state might get involved in and allows a more direct means of incorporating “cutting-edge” concepts into practice. By effectively saying, “You’re the professionals in this field; you do what is most appropriate,” legislators resist micromanaging at the macro level and better enable administrators to coordinate with the local level. However, a fundamental drawback is that each of these measures is devoid of a context in which it is to operate. No clear direction is adopted for either ridesharing programs or commuter parking facilities, and their place in the overall transportation planning system is left to the imagination.

A more detailed type of enablement is seen in the **Illinois** Employee Commute Options Act.¹⁶ Illinois authorizes its DOT to adopt necessary rules to accomplish the purposes of the legislation. However, the Act goes on to list some specific activities of the department in carrying out its actions and enlists an advisory board to advise the department in its activities. A part of the Act does contain a legislative mandate applicable to affected employers. In **Maine**, a matching fund is established for regional rideshare services.¹⁷ The statute lists minimal rules and regulations that shall be used by its department of economic and community development in disbursing funds, although it allows the department to construct additional rules and requires a certain level of reporting. A statute like Maine’s offers basically the advantages of a broader authorization but with a higher level of accountability and a greater sense of the broader context for trip reduction regulations.

Legislative mandates also run the spectrum from broad to narrow. For instance, **Colorado** mandates the creation of a 20-year transportation plan (including transportation control measures) for certain regions.¹⁸ But while it requires certain elements within that plan and creates an advisory committee, it also leaves the minute technical aspects of the plan up to its Department of Transportation. By contrast, **New Jersey’s** Traffic Congestion and Air Pollution Control Act¹⁹ provides more specific requirements to its DOT.

CONTENT OF THE MODEL SECTION

Section 9-201 below is intended to provide a strong framework for the implementation of a full range of TDM measures within a comprehensive planning context. The state adopts rules and guidelines to assist the local governments in their adoption of trip reduction ordinances. Such ordinances must be adopted by populous local governments, and local governments with at least one major employer or major worksite and located in a populous region. Other local governments are authorized to adopt trip reduction ordinances. In either case, trip reduction ordinances must be

¹⁶625 Ill. Comp. Stat. §§32/1 *et seq.*

¹⁷Me. Rev. Stat. Ann. tit. 216 (1998).

¹⁸Colo. Rev. Stat. Ann. §43-1-1103 (West 1998).

¹⁹N.J. Stat. Ann. §§27:26A-1 *et seq.* (1998).

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consistent with the local comprehensive plan, and the transportation element of the plan in particular; no such ordinance may be adopted if the local government does not have a local comprehensive plan. Trip reduction ordinances are the primary tool for identifying commute trip reduction zones (areas with a similar level of traffic congestion and/or percentage of people driving alone) and for requiring commute trip reduction programs from all major employers, and employers at major worksites, in those local governments. The Section requires analysis of the existing commute situation, the setting of clear and achievable goals for the reduction of single-occupancy vehicle commute trips (people driving alone to and from work), and suggests measures for achieving those goals.

One notable aspect of the Section is the authorization for local governments to designate transit zones and for employers to relocate their worksites to transit zones as a commute trip reduction measure. This is in addition to typical trip reduction measures such as discouraging parking, encouraging transit use, carpooling, and vanpooling, and implementing telecommuting and flexible work hours. Transit zones are defined as areas with a high level of transit service, and rules of the state Department of Transportation would set more specific criteria. The intent of this provision is to direct employment into downtowns and other central business districts, where existing public transit infrastructure exists and where the additional density and intensity of development will support further transit improvements.

9-201 Transportation Demand Management

- (1) The [*name state*] Department of Transportation shall adopt and implement a transportation demand management program, and local governments shall adopt and implement trip reduction ordinances, in the manner prescribed in this Section.
- (2) The purposes of this Section are to:
 - (a) reduce the number of single-occupant motor vehicle trips;
 - (b) encourage the location of major workplaces in central business districts and similar areas conducive to public transit, pedestrian, and bicycle commuting;
 - (c) encourage telecommuting and alternative work schedules;
 - (d) encourage commuting and other transportation by pedestrian, bicycle, public transit, ridesharing, carpool, and vanpool modes;
 - (e) create and implement effective methods or measures, responsive to the needs of the various constituencies and communities of the state, for achieving the aforementioned purposes; and

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- (f) facilitate cooperation by the state, state agencies, [regional planning agencies], regional transportation agencies, local governments, transit agencies, business, industry, and the general public in achieving the aforementioned purposes.
- (3) As used in this Section and in any trip reduction ordinance:
- (a) “**Carpool**” means a group of [two *or* three] or more persons commuting on a regular basis to and from work by means of a vehicle with a seating capacity of nine persons or less;
 - (b) “**Commute Trip**” means trips between home and a worksite, including incidental trips during the trip between home and a worksite, that occur during peak travel periods;
 - (c) “**Commute Trip Reduction Zones**” mean areas, such as census tracts or combinations of census tracts, within or encompassing a local government that are characterized by similar employment density, population density, level of transit service, parking availability, access to high-occupancy vehicle facilities, and other factors that are determined to affect the level of single-occupancy vehicle commuting;
 - (d) “**Commute Trip Vehicle Miles Traveled Per Employee**” means the sum of the individual vehicle commute trip lengths in miles over a set period of time divided by the number of full-time employees during that period;
 - (e) “**Department**” means the state Department of Transportation;
 - (f) “**Major Employer**” means a private or public employer that employs [100] or more full-time employees at a single worksite who begin their regular work day during the peak travel period for 12 continuous months during the year; or nine continuous months in the case of schools and facilities of higher learning;
 - (g) “**Major Worksite**” means a building or group of buildings on physically contiguous parcels of land or on parcels separated solely by private or public roadways or rights of way, at which there are [100] or more full-time employees who begin their regular work day during the peak travel period for 12 continuous months during the year, or nine continuous months in the case of schools and facilities of higher learning;
 - (h) “**Peak Travel Period**” means the time period between 6:00 and 9:00 a.m. on weekdays, exclusive of state and national holidays;
 - (i) “**Proportion of SOV Commute Trips**” means the number of commute trips made by SOVs divided by the number of full-time employees;

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- (j) “**Single-Occupant Vehicle**” or “**SOV**” means a passenger motor vehicle occupied by only one person;
- (k) “**Task Force**” means the Commute Trip Reduction Task Force;
- (l) “**Transit Zone**” means a commute trip reduction zone with a high level of transit service;
- (m) “**Transportation Demand Management**” (TDM) means a measure generally designed to limit the demand for transportation infrastructure, usually through reducing the number of SOV trips;
- (n) “**Transportation Demand Management Measures**” means the specific measures used to help manage transportation demand. Transportation demand management measures include, but are not limited to:
 - 1. relocation of the worksite to a transit zone;
 - 2. provision of preferential parking or reduced parking charges, or both, for high-occupancy vehicles;
 - 3. instituting or increasing parking charges for SOVs;
 - 4. provision of commuter ride matching services to facilitate employee ridesharing for commute trips;
 - 5. provision of subsidies for transit fares, carpooling, and/or vanpooling;
 - 6. provision of vans for vanpools;
 - 7. permitting the use of the employer’s vehicles for carpooling or vanpooling;
 - 8. permitting flexible work schedules to facilitate employees’ use of transit, carpools, or vanpools;
 - 9. cooperation with transportation providers to provide additional regular or express service to the worksite;
 - 10. construction of special loading and unloading facilities for transit, carpool, and vanpool riders;
 - 11. provision of bicycle parking facilities, lockers, changing areas, and showers for employees who bike or walk to work;

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12. provision of parking incentives such as a rebate for employees who do not use the parking facilities;
 13. establishment of a program to permit employees to work part- or full-time at home or at an alternative worksite closer to their home;
 14. establishment of a program of alternative work schedules such as compressed work week schedules which reduce commuting; and
 15. implementation of other measures designed to facilitate the use of high-occupancy vehicles such as on-site day care facilities and “guaranteed ride home” programs.
- (o) “**Vanpool**” means [five] or more persons commuting on a regular basis to and from work by means of a vehicle with a seating capacity of not more than [15] persons;
- (4) The Department shall:
- (a) be responsible for providing technical assistance to [regional planning agencies] and local governments and, through liaisons in those regions and local governments, to major employers, in carrying out the functions of this Section; and
 - (b) convene a Commute Trip Reduction Task Force, with not more than [15] members, that represents a balance of state agency representatives; [regional planning agencies], local governments, transit agencies; major employers’ representatives; and the general public. The Department shall be responsible for identifying appropriate membership and providing staff support.
- (5) The Department shall adopt rules, and may adopt guidelines, for trip reduction ordinances.
- (a) The Task Force shall recommend in writing proposed rules and guidelines. The Department shall give due consideration to the recommendations of the Task Force, and shall explain, in writing, any revisions of or alterations to the recommendations of the Task Force and the legal and factual bases therefor.
 - (b) The rules and guidelines shall ensure consistency in trip reduction ordinances among regions and local governments, taking into account differences in employment and housing density, employer size, existing and anticipated levels of transit service, special employer circumstances, and other factors the Department determines are relevant.
 - (c) At a minimum, the rules shall include:

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1. methods and information requirements for determining initial year values of the proportion of SOV commute trips and the commute trip vehicle miles traveled per employee
 2. methods and information requirements for measuring compliance with, or progress toward meeting, commute trip reduction goals;
 3. criteria for establishing commute trip reduction zones;
 4. criteria for establishing transit zones;
 5. methods for assuring consistency in the treatment of employers who have worksites in more than one region or local government;
 6. methods to ensure that employers receive full credit for the results of TDM efforts and commute trip reduction programs which have been implemented by major employers and employers at major worksites prior to the initial year;
 7. an appeals process by which major employers and employers at major worksites who, as a result of special characteristics of their business or its locations, would be unable to meet the requirements of a trip reduction ordinance, may obtain a waiver or modification of those requirements and criteria for determining eligibility for waiver or modification;
 8. alternative commute trip reduction goals for employers who cannot meet the goals of this Section because of the unique nature of their business;
 9. alternative commute trip reduction goals for major employers whose worksites change and who contribute substantially to traffic congestion in trip reduction zones; and
 10. model trip reduction ordinances.
- (d) The rules shall be considered rules of the Department, and shall be subject to Section [4-103] in the same manner as rules of the [state planning agency]. Their preparation and adoption shall be governed by the [*Administrative Procedure Act*] except as otherwise provided in this Section.
- (e) The rules and guidelines shall be sent to all [*regional planning agencies*] and local governments within [30] days after their adoption.
- (f) The Task Force shall, at least once every [5] years, conduct a general review of this Section, the rules and guidelines, and of progress toward implementing trip reduction ordinances and commute trip reduction programs. The review shall

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incorporate the progress reports pursuant to paragraph (10) below. The general review shall result in a written report to the Department, the Governor and the [legislature] that contains:

1. recommendations of proposed amendments to this Section or other statutes, new legislation, and/or amendments to the rules and guidelines under this paragraph (5). These recommendations may include proposals that the [legislature], the Department, and/or other state agencies adopt and implement other types of TDM measures beyond employee commute trip reduction measures, including but not limited to parking strategies, pricing strategies (road and bridge tolls), and land development regulations to foster bicycle/pedestrian and transit use; and
2. an analysis of changes in, or alternatives to, existing statutes, rules, and guidelines that would increase their effectiveness or reduce any identified adverse impacts; and/or why such changes or alternatives are less effective or would result in more adverse effects than the existing statutes, rules, and guidelines.

The Department shall give due regard to the written report, and shall adopt or reject the report in writing, stating in that writing any revisions or alterations from the report and the reasons therefor. If the Department fails to adopt, in whole or with revisions, such a written report within five years of the adoption of the first rules pursuant to this Section or of the last adoption of a written report, the rules and guidelines shall not enjoy a presumption of reasonableness, and the Department shall bear the burden of demonstrating such reasonableness.

- (6) Every local government with a population of [150,000] or more, or containing one or more major employers or major worksites and located in a region with a population of [150,000] or more, shall adopt a trip reduction ordinance. Every other local government may adopt a trip reduction ordinance. A trip reduction ordinance:
 - (a) may be adopted only pursuant to this Section, and any purported adoption of a trip reduction ordinance contrary to this Section is void;
 - (b) shall be adopted in the manner of a land development regulation pursuant to Section [8-103] of this Act, except as otherwise provided in this Section;
 - (c) shall be prepared in cooperation with the [regional planning agency], adjacent or contiguous local governments, transit agencies, major employers, and the owners of, and employees at, major worksites;
 - (d) may not be adopted unless and until the local government has adopted a local comprehensive plan with a transportation element that includes all the applicable components required by Section [7-205];

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- (e) shall be consistent with the local comprehensive plan and the transportation element thereof, and shall not be inconsistent with the trip reduction ordinances of the:
 - 1. other local governments in the region if the local government is within the jurisdiction of a [regional planning agency]; or
 - 2. adjacent or contiguous local governments otherwise;
- (f) shall, before it may be adopted by any local government within the jurisdiction of a [regional planning agency], be submitted to that [regional planning agency] for review.
 - 1. The [regional planning agency] shall review the proposed ordinance for compliance with this Act and the rules pursuant to this Section and for consistency as provided in paragraph (6)(e) of this Section.
 - 2. The [regional planning agency] shall approve or reject the proposed trip reduction ordinance within [30] days of receipt, and shall notify the local government in writing of its decision and the legal and factual bases therefor within [10] days of its decision.
 - 3. The [regional planning agency] shall submit a copy of every proposed trip reduction ordinance, and of its decision thereon, to the Task Force within [10] days of its decision.
 - 4. A local government whose proposed trip reduction was rejected pursuant to this paragraph may appeal the decision of the [regional planning agency] to the Task Force, which shall review the proposed ordinance in the same manner as proposed ordinances submitted pursuant to subparagraph (6)(g) below.
 - 5. Any purported adoption of a trip reduction ordinance that must be submitted to a [regional planning agency] pursuant to this subparagraph (6)(f) but which was not so submitted or was submitted and rejected is void.
- (g) shall, before it may be adopted by a local government not within the jurisdiction of a [regional planning agency], be submitted to the Task Force for review.
 - 1. The Task Force shall review the proposed ordinance for compliance with this Act and the rules pursuant to this Section and for consistency as provided in paragraph (6)(e) of this Section.
 - 2. The Task Force shall approve or reject the proposed trip reduction ordinance within [30] days of receipt, and shall notify the local government

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in writing of its decision and the legal and factual bases therefor within [10] days of its decision.

3. The Task Force shall retain a copy of every proposed trip reduction ordinance and the decision thereon, whether rendered by the Task Force or by a [regional planning agency].
4. Any purported adoption of a trip reduction ordinance that must be submitted to the Task Force pursuant to this paragraph but which was not so submitted or was submitted and rejected is void.

(7) A trip reduction ordinance shall:

- (a) apply to all major employers and to all employers at major worksites, except that it shall not apply to construction worksites when the expected duration of the construction project is less than two years;

◆ Since major worksites have essentially the same vehicle use impact as a major employer (100 or more employees arriving at a building or complex of buildings during the major commuting hours), employers of any size located at major worksites are subject to this Section and to trip reduction ordinances to the same degree as major employers. Though there are obvious benefits for a small employer to locate at a major worksite, there is a possibility that if a trip reduction ordinance is perceived as onerous by small employers located at major worksites, some such employers will move to separate, non-major, worksites, thus increasing sprawl. The best preventative measure is to adopt a fair and balanced trip reduction ordinance and to monitor the land market for signs of such a movement of employers.

- (b) be designed to achieve reductions in the proportion of SOV commute trips and commute trip vehicle miles traveled per employee by employees of major public- and private-sector employers in the local government;
- (c) include at least the following minimum provisions:
 1. a means for determining initial year values of the proportion of SOV commute trips and commute trip vehicle miles traveled per employee;
 2. goals for reductions in the proportion of SOV commute trips and commute trip vehicle miles traveled per employee;
 3. a means for determining compliance with, and/or progress toward meeting, commute trip reduction goals;
 4. designation of commute trip reduction zones, if any exist;

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5. designation of transit zones, if any exist;
 6. provisions for monitoring and review of the progress toward the aforementioned goals within commute trip reduction zones;
 7. requirements for major employers and employers at major worksites to adopt and implement commute trip reduction programs, pursuant to paragraph (9) of this Section;
 8. a commute trip reduction program for employees of the local government;
 9. provisions for periodic review of the compliance of employers with their commute trip reduction programs, pursuant to paragraph (9) of this Section;
 10. provisions for enforcement pursuant to Chapter 11 of this Act for the failure of a major employer or employer at a major worksite to implement a commute trip reduction program or to modify its commute trip reduction program as may be necessary. Such provisions shall take into account the nature, seriousness, and circumstances of the violation, whether there is a pattern of noncompliance, and efforts which are being made to achieve compliance;
 11. an appeals process by which employers who, as a result of special characteristics of their business or its locations, would be unable to meet the requirements of the trip reduction ordinance, may obtain waiver or modification of those requirements; and
 12. a review of local parking policies and ordinances as they relate to employers and major worksites, and of any revisions necessary to comply with commute trip reduction guidelines.
- (8) A local government that has adopted a trip reduction ordinance that designates commute trip reduction zones and/or transit zones may:
- (a) amend its land development regulations to establish lower minimum parking-area requirements in transit zones and/or commute trip reduction zones;
 - (b) amend its land development regulations to establish maximum parking-area limits in transit zones and/or commute trip reduction zones; or
 - (c) amend other ordinances and regulations, such as on-street parking regulations, with the purpose of reducing the number of parking spaces available and/or the times of their availability within transit zones and/or commute trip reduction zones.

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- (9) Every major employer, and every employer at a major worksite, in a local government that has adopted trip reduction ordinance shall adopt and implement a trip reduction program.
- (a) A commute trip reduction program shall consist of, at a minimum:
1. designation of a transportation coordinator, whose name, location, and telephone number must be displayed prominently at each affected worksite;
 2. regular distribution of information to employees regarding alternatives to SOV commuting;
 3. annual review of employee commuting;
 4. annual reporting to the local government, consistent with the method established in the trip reduction ordinance, of compliance with the SOV reduction goals; and
 5. implementation of one or more transportation demand management measures designed to achieve the applicable commute trip reduction goals adopted by the local government.
- (b) The local government shall review the initial commute trip reduction program of each major employer and each employer at a major worksite within [90] days of receipt of the program, and shall annually review each such employer's compliance with its commute trip reduction program.
1. The local government shall notify the employer in writing of the findings of its review within [10] days of its conclusion.
 2. If the jurisdiction finds that the program is not likely to meet the applicable commute trip reduction goals, the local government shall work with the employer to modify the program as necessary.
 3. The employer shall implement the commute trip reduction program within [three] months of receiving notice of its approval of the program.
- (c) If a major employer or employer at a major worksite does not meet the applicable commute trip reduction goals, then the local government shall, after consulting with the employer, propose modifications to the commute trip reduction program and direct the employer to revise its program with [30] days to incorporate those modifications, or alternative modifications proposed by the employer that the local government determines to be appropriate.

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- (d) Failure to modify the program as provided in subparagraph (9)(c) above shall constitute a violation of land development regulations pursuant to Chapter 11 of this Act.
 - (e) Employers or owners of worksites may form or use existing transportation management associations to assist members in developing and implementing commute trip reduction programs.
- (10) Every local government that adopts a trip reduction ordinance shall submit an annual progress report to the Department, in a format established by the Department. The report shall describe progress in attaining the applicable commute trip reduction goals for each commute trip reduction zone and commute trip reduction program, and shall highlight any problems being encountered in achieving the goals. The local government shall publish the progress report and make it available to the public.
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Commentary: Historic and Architectural Design Review²⁰

Historic preservation and architectural design review have increasingly become a standard component of communities' suite of land development regulations. With the assistance of historic preservation and architectural design controls, communities can maintain and foster their unique identities, which in turn can help to make the community a desirable place to live and do business. Historic preservation ordinances²¹ seek to preserve the *existing* historic character of structures or sites that may be associated with an important historic event or person or are representative of a certain architectural type or period. Design review controls²² are concerned with the aesthetics of *proposed* residential and nonresidential development.

Historic preservation controls are typically applied to an existing area known as an "historic district" that contains buildings or structures with identifiable historic or architectural characteristics,

²⁰See generally Christopher J. Duerksen, "Historic Preservation," in Edward Ziegler, ed., *Rathkopf's Law of Zoning and Planning*, Vol. 1 (Eagan, Minn.: West Group, 1992 Supp.), Ch.15; and Gordon L. Ohlsson, "Aesthetic Zoning" in Eric Damian Kelly, gen. editor, *Zoning and Land Use Controls*, Vol. 2 (New York: Matthew Bender, 1991), Ch. 16.

²¹See generally Christopher J. Duerksen, ed., *A Handbook on Historic Preservation Law* (Washington, D.C.: Conservation Foundation, 1983); Richard J. Roddewig, *Preparing a Historic Preservation Ordinance*, Planning Advisory Service Report No. 374 (Chicago: American Planning Association, 1983); Nancy Benzinger Brown, "Historic Preservation Legislation," in *Modernizing State Planning Statutes: The Growing SmartSM Working Papers*, Vol. 3 , Planning Advisory Service Report No. ____, (Chicago: American Planning Association, forthcoming).

²²See generally Mark L. Hinshaw, *Design Review*, Planning Advisory Service Report No. 454 (Chicago: American Planning Association, February 1995); Peggy Glassford, *Appearance Codes for Small Communities*, Planning Advisory Service Report No. 379 (Chicago: American Planning Association, October 1983); Brenda Case Lightner, "Survey of Design Review Practices" *PAS Memo* (Chicago: American Planning Association, January 1993).

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or individual structures designated as “historic landmarks,” Historic districts and landmarks are often identified for protection through part of a survey process conducted by experts in history or architecture and based on specific criteria contained in a historic preservation ordinance. Frequently, locally-designated historic districts and landmarks are simultaneously listed on the U.S. Department of Interior’s National Register of Historic Places.²³ Protection is accomplished through the regulation of proposed changes to a district or landmark property, including alterations to existing structures and sites, demolition, the construction of additions and new structures, and the relocation of historic buildings to new sites.

Design review regulations, in comparison, attempt to promote or establish community character by insuring that a certain architectural style or styles are followed (e.g., “look-alike” ordinances) or, in contrast, that architectural diversity is encouraged (“anti-look-alike” ordinances).²⁴ In the former, the emphasis is on compatibility of new buildings and modifications to existing buildings. In the latter, the emphasis is on avoiding monotony.

While the objectives of the two laws differ significantly, the process involved can be similar.²⁵ A board²⁶ is assigned by ordinance the responsibility of reviewing proposed development or changes to existing buildings and issuing a permit, a “certificate of appropriateness,” when it is found that the proposal complies with criteria and standards in the ordinance. Accompanying the ordinance may be descriptive, often illustrated, guidelines to give examples of how to interpret design criteria or standards of review in the ordinance.²⁷

Historic preservation ordinances rest on firm legal ground. Virtually every state authorizes regulations for historic preservation, either as a permissible objective in zoning and other land-use

²³The most important piece of federal legislation is the National Historic Preservation Act of 1966, as amended. 16 U.S.C. §§470a-470m. The act authorizes the Secretary of the Interior to maintain a National Register of Historic Places, which includes historic areas, sites, and buildings. The act contains a review process that requires federal agencies to take into account the effect of federal “undertakings” on National Register properties. National Register designations often form the basis for local historic districts.

²⁴Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing Co., 1997), §11.22, 459.

²⁵Though a single board can be used for both historic preservation and design review, the expertise needed for each is distinct and therefore there may need to be two boards, each containing the experts needed for its respective task.

²⁶The use of a board rather than a single officer addresses due process concerns. Preservation ordinances have been upheld against due process challenges because the review board was required to have members with expertise in history or architecture. See, e.g., *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979).

²⁷These guidelines are often adopted by the historic preservation or design review board. See, e.g., *Sherman v. Dayton Board of Zoning Appeals*, 84 OhioApp.3d 223, 515 N.E.2d 937(1993) (holding that mandatory standards adopted by the city’s landmarks commission, as specific applications of more general federal guidelines for historic districts, had the force of law).

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regulations,²⁸ or as a separate statute, sometimes describing the composition and powers of a historic district commission, the process by which historic districts are created, and the manner in which proposed development in such districts and on landmarked property is to be reviewed.²⁹

Both historic preservation and design review ordinances have been challenged as improper uses of the police power, regulating “mere” aesthetics. This view has rarely been supported by the courts. These ordinances are typically adopted to address concerns beyond or in addition to aesthetics, such as economic stability, support of property values, and social development.³⁰ Furthermore, the majority view in U.S. courts is that aesthetics alone *is* a proper purpose in land use regulation.³¹ In *Berman v. Parker*, a nonzoning case involving the constitutionality of an redevelopment statute for the District of Columbia, the U.S. Supreme Court remarked in dicta that was to favorably influence consideration of aesthetic purposes in state courts:

The concept of the public welfare is broad and inclusive . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as health, spacious as well as clean, well-balanced as well as carefully patrolled.³²

²⁸N.M. Stat. Ann. §3-22-2 (1999); N.Y. Gen. Mun. Law §86-a.

²⁹See, e.g., Ariz. Rev. Stat. §9-462.01(A)(10) (1999); Ark. Stat. §§14-172-201 et seq. (1999); Rev. Conn. Gen. Stat. Tit. 7, Ch. 97a (1997); Ga. Code Ann. §§36-16-1 et seq.; Idaho Code §§67-4601 to 67-4619 (1999); Ind. Stat. Ann. §§36-7-11 et seq. (1999); Mass. Gen. Laws Ann. Ch. 40C (1999); Mich. Comp. Laws Ann. §§399.172-215 (1999); Nev. Rev. Stat. §384.005 (1999); N.H. Rev. Stat. Ann. §§674:45-674:50 (1999); N.M. Stat. Ann. Ch. 3, Art. 22 (1999); S.D. Code. Laws Ann. Ch. 1-19B (1999); Va. Code Ann. §15.2-2306 (1999); and W. Va. Code Ann. Art. 26A (1999). See generally Pamela Thurber and Robert Moyer, *State Enabling Legislation for Local Preservation Commissions* (Washington, D.C.: National Trust for Historic Preservation, Fall 1984).

³⁰See, e.g., *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, cert. denied, 350 U.S. 841 (1955); *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970); *Reid v. Architectural Board of Review*, 119 OhioApp. 67, 192 N.E.2d 74 (1963); *Village of Hudson v. Albrecht*, 9 OhioSt.3d 69, 458 N.E.2d 852 (1984), appeal dismissed, 467 U.S. 163 (1984).

³¹*Donrey Communications Co. v. City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900 (1983), cert. denied, 466 U.S. 959 (1984); *Metromedia Inc. v. City of San Diego*, 26 Cal.3d 848, 610 P.2d 407 (1980), rev'd on other grounds, 453 U.S. 490 (1981); *City of Lake Wales v. Lamar Adv. Ass'n*, 414 So.2d 1030 (Fla. 1982); *John Donnelly & Sons v. Outdoor Adv. Bd.*, 369 Mass. 206, 339 N.E.2d 709 (1975); *Asselin v. Town of Conway*, 137 N.H.368, 628 A.2d 247 (1993); *Cromwell v. Ferrier*, 19 N.Y.2d, 363, 225 N.E.2d 749; *State v. Jones*, 305 N.C. 520, 290 S.E.2d 675 (1982); *Oregon City v. Hartke*, 240 Or. 35, 400 P.2d 255 (1965); *State v. Smith*, 618 S.W.2d 474 (Tenn. 1981), *Town of Sandgate v. Colehamer*, 156 Vt. 77, 589 A.2d 1205 (1990).

³²*Berman v. Parker*, 348 U.S. 26, 33 (1954).

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In more recent years, the U.S. Supreme Court upheld New York City's landmarks preservation ordinance, which "embod[ied] a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city."³³ The Court further stated:

Because this Court has recognized in a number of settings that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city ... appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible government goal.³⁴

In a few cases, architectural review ordinances have been invalidated as an improper delegation of power or because they were unconstitutionally vague and thus it was difficult for a board to make a decision based on the standards in the ordinance.³⁵ In contrast, historic preservation ordinances have generally withstood due process challenges.³⁶

EARLIER MODEL LEGISLATION

The American Law Institute's 1976 *Model Land Development Code* contained several provisions dealing with aesthetic controls. One section authorized local governments to designate specified land or structures as landmarks (including a reasonable amount of land surrounding the landmark) and to require that no development occur unless the local government approved a special

³³ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 132 (1978).

³⁴Id. at 129. (Citations omitted). Other cases upholding historic preservation ordinances as proper uses of the police power include *A-S-P Associates v. City of Raleigh*, 258 S.E.2d 444 (N.C. 1979); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975); *Bohannon v. City of San Diego*, 30 Cal.App.3d 416 (1973); *Figarsky v. Historic District Comm.*, 368 A.2d 163 (Conn. 1976); *Rebman v. City of Springfield*, 250 N.E.2d 282 (Ill. 1969); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 389 P.2d 13 (N.M. 1964); *City of New Orleans v. Levy*, 64 So.2d 798 (1953); and *Opinion of the Justices*, 128 N.E.2d. 557 (Mass. 1955).

³⁵*City of West Palm Beach v. State*, 158 Fla. 863, 30 So.2d 491 (Fla. 1947); *Piscitelli v. Twp. Comm.*, 103 N.J. Super. 589, 248 A.2d 274 (1968) *Bd. of Supvrs. v. Rowe*, 215 Va. 128, 216 S.E.2d 199 (1975); *Waterfront Estates Dev., Inc. v. City of Palos Hills*, 232 Ill.App.3d 367, 597 N.E.2d 641 (1992); *Pacesetter Homes v. Village of Olympia Fields*, 104 Ill.App.2d 218, 244 N.E.2d 369 (1968); *Morristown Rd. Assoc. v. Mayor and Common Council*, 163 N.J. Super. 58, 394 A.2d 157 (1978). *Contra Novi v. City of Pacifica*, 169 Cal.App.3d 678, 215 Cal.Rptr. 439 (1985).

³⁶See generally, George Abney, "Florida's Local Historic Preservation Ordinances: Maintaining Flexibility While Avoiding Vagueness Claims," 25 *Fla. St. U. L. Rev.* 1017 (1998), which identifies an extensive body of state and federal court decisions upholding governmental decisions under historic preservation ordinances against claims of vagueness and unlawful designation of authority.

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development permit.³⁷ Another section allowed development ordinances to designate special preservation districts of historic, archaeological, scientific, architectural, natural or scenic significance and to regulate development within them through a special permit process.³⁸ The development ordinance was to specify criteria to be used in granting the permit.

THE MODEL STATUTE

Section 9-301 below authorizes a local government to adopt historic preservation and design review ordinances as part of its land development regulations. Under the historic preservation ordinance, a local government may create historic districts and designate historic landmarks. Under the design review ordinance, a local government may create design review districts. Both types of ordinances require that a certificate of appropriateness be obtained before certain types of development in a district or on a landmark site may occur. The model describes the contents of both such ordinances in greater detail.

The designation of historic landmarks and districts and of design review districts is conditioned upon the adoption of a local comprehensive plan that also contains a historic preservation element and/or a community design element. Both elements require the kind of background studies that would allow the formulation of design criteria.

The model statute provides options as to the body that is to review applications for a certificate of appropriateness. For example, a local planning commission, hearing examiner, or another individual local official may be designated, or a new board, such as a historic preservation commission, may be created for the purpose of administering the ordinance. The certificate, which is a type of development permit, is to be granted pursuant to criteria in the ordinance.

The Section provides the option to adopting state legislatures to authorize the regulation of publicly accessible interiors as well as the exterior features of buildings. According to a survey conducted by the National Alliance of Preservation Commissions in 1998, approximately 8 percent of the jurisdictions responding have control over interior architectural features that are visible to the public such as an office building lobby, a theater, or restaurant.³⁹ Examples of states specifically authorizing the regulation of interiors include Michigan⁴⁰ and North Carolina.⁴¹

³⁷American Law Institute (ALI), *A Model Land Development Code: Complete Text and Commentary* (Philadelphia: ALI, 1976), §2-208, Landmark Sites.

³⁸Id., §2-208, Special Preservation Districts.

³⁹National Association of Preservation Commissions, *United States Preservation Commission Identification Project 1998*, <http://www.arches.uga.edu/~napc/napc3.pdf>

⁴⁰Mich. Comp. Laws §399.205 (2000).

⁴¹N.C. Gen. Stat. §160A-400.9(b) (2000) (interior regulation of private property only if landowner consents, but consent is binding on future owners of same property).

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There are concerns about the protection of historic properties while a historic preservation plan element or ordinance is pending in the local legislative process. The historic features of a property could be irrevocably damaged or destroyed in the time it takes a local government to add the property to the protected list. There is a tool in the *Guidebook* well-suited to protecting historic properties while the designation process is pending – the moratorium, as authorized and regulated by Section 8-604. To make this connection clearer, and to resolve any ambiguities in the moratorium Section, Section 9-301 below expressly authorizes planning moratoria for individual properties that have historic preservation potential, giving local governments up to 180 days free from development in which to adopt or amend the historic preservation plan element and ordinance to include the property in question.

There may be similar concerns with the effect of historic preservation on individual landowners, specifically that the regulations may create an undue hardship that must somehow be remedied. The *Guidebook* includes a general procedure for addressing claims of undue hardship – the mediated agreement pursuant to Section 10-504. With the procedure of that Section being generally available, there is no need for a separate procedure solely for historic preservation regulation (or indeed any other particular category of land development regulation).

9-301 Historic Districts and Landmarks; Design Review

- (1) The legislative body of a local government may adopt and amend in the manner for land development regulations pursuant to Section [8-103 *or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances*]:
 - (a) a historic preservation ordinance that authorizes the designation of areas by ordinance as historic preservation districts, that authorizes the designation of properties by ordinance as historic landmarks, and requires that, in accordance with standards of review specified in the ordinance, a certificate of appropriateness be obtained from a historic preservation board for development affecting the exterior [and interior] architectural features of all or specified proposed development therein, and/or
 - (b) a design review ordinance that authorizes the designation of areas by ordinance as design review districts and requires that, in accordance with standards of review specified in the ordinance, a certificate of appropriateness be obtained from a design review board for development affecting the exterior [and interior] architectural features of all or specified proposed development therein
- (2) As used in this Section:
 - (a) “**Certificate of Appropriateness**” means the written decision by a local historic preservation board or design review board that proposed development is in

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compliance with a historic preservation ordinance or design review ordinance, respectively, including the standards of review therein;

- (b) “**Contributing Structure**” means a classification applied to a site, building, structure or object within a historic district signifying that it contributes generally to the qualities which give the historic district its historical, architectural, archaeological or cultural significance, but without necessarily being itself a landmark.
- (c) “**Design Review Board**” means any officer or body designated by the legislative body to review applications for and issue a certificate of appropriateness for exterior architectural features of all or specified proposed development in a design review district;
- (d) “**Design Review District**” means a geographically definable area possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united aesthetically by development or that, in the determination of the local legislative body, has the potential to be united aesthetically by development;
- (e) “**Exterior Architectural Features**” mean the architectural character and general composition of the exterior of a structure, including, but not limited to the kind, color, and texture of the building material and the type, design, and character of all windows, doors, light fixtures, signs, and other appurtenant elements including antennas, receiving dishes, and utility structures. Exterior architectural features include:
 - 1. natural and man-made features of the site that significantly affect the character or appearance of the site; and
 - 2. archeologically or culturally significant features of the site;
- (f) “**Historic District**” means a geographically definable area possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by physical development;
- (g) “**Historic Landmark**” means an individual property of historical, architectural, archeological, or cultural interest;
- (h) “**Historic Preservation Board**” means any officer or body designated by the legislative body to review applications for and issue a certificate of appropriateness for [exterior architectural features of] all or specified proposed development in a historic district or of a historic landmark;
- [(i) “**Interior Architectural Features**” mean the architectural character and general composition of a significant landmark interior, including the room design and

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configuration, color and texture of materials, and the type, pattern, and character of all architectural details and elements, including but not limited to staircases, doors, hardware, moldings, trims, plaster work, light fixtures, and wall coverings;]

- (j) “**Significant Landmark Interior**” means the interior of a building or structure that has been designated as a historic landmark, is open to or available for use by the public, and satisfies the criteria for designation under this Section;] and
 - (k) “**Standards of Review**” mean the criteria used by a historic preservation board or design review board in deciding whether to issue a Certificate of Appropriateness.
- (3) A historic preservation ordinance and/or a design review ordinance adopted pursuant to this Section shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the ordinance;
 - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)];
 - (c) a statement of consistency with the local comprehensive plan that is based on findings made pursuant to Section [8-104];
 - (d) definitions, as appropriate for such words or terms contained in the historic preservation ordinance and/or design review ordinance. Where this Act defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
 - (e) for a historic preservation ordinance, criteria to be applied by the local government in selecting areas to be designated by ordinance as historic districts and in selecting individual properties to be designated by ordinance as historic landmarks[, including any significant landmark interiors]. Properties eligible for designation shall possess integrity of location, design, setting, materials, workmanship, feeling and association; and:
 - 1. be associated with events that have made a significant contribution to the history of the local government, this State, or the United States;
 - 2. be associated with the lives of persons significant in past events;
 - 3. embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
 - 4. yield, or be likely to yield, information important in prehistory or history;

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- ◆ These criteria are based on the "Criteria for Evaluation" for listing on the National Register of Historic Places under 36 C.F.R. § 60.4. Additional criteria reflecting the particular historic preservation objectives of a local jurisdiction may be added in the ordinance.
 - (f) for a design review ordinance, criteria to be applied by the local government in selecting areas to be designated by ordinance as design review districts;
 - (g) standards of review to be applied by the historic preservation board and/or design review board in reviewing applications for a certificate of appropriateness. These criteria shall include such matters as are consistent with the desired character of the exterior [and interior] architectural features of buildings and structures and their surroundings in a historic district, in a design review district, or on properties that have been designated as historic landmarks;

- ◆ The Secretary of the Interior's Standards for Rehabilitation, codified at 36 C.F.R. Part 67, are the prevalent standards used by local governments in the regulation of historic properties. These standards may be modified or embellished to reflect the particular historical or architectural character of the properties subject to protection within a specific locality.
 - (h) procedures for the review of applications for a certificate of appropriateness pursuant to paragraph (7) below;
 - (i) specifications for all application documents and plan drawings for a certificate of appropriateness; and
 - (j) designation of an officer or body, including but not limited to a local planning commission or hearing examiner, as the historic preservation board and/or design review board, or the creation of a new board or boards. The same officer or body may be designated as both the historic preservation board and the design review board, or separate designations may be made. If the historic preservation ordinance and/or design review ordinance creates a new board or boards, then the ordinance shall:

- ◆ Under this Section, a "board" may consist of a single local official assisted by his or her staff.
 - 1. specify the number of members who shall serve on the board, including alternate members;
 - 2. specify that at least one member of the board shall have expertise or training in history, architecture, architectural history, archaeology, or land-use planning;

- ◆ Historic preservation and design review board members should, to the greatest extent possible, have sufficient backgrounds in history, architecture, architectural history, and related

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backgrounds to preclude potential due process challenges or claims of arbitrary and capricious decision making. Where a community cannot “field” an all-professional board or boards, it should ensure that board members have the requisite expertise to the greatest extent possible, through training or other means, and have access to qualified experts when necessary.

3. provide for the appointment of board members, including alternate members, and for the organization of the board;
 4. specify the terms of members of the board, which may be staggered;
 5. specify the requirements for voting on matters heard by the board, and specify the circumstances in which alternate members may vote instead of regular members; and
 6. specify procedures for filling vacancies in unexpired terms of board members, including alternate members, and for the removal of members, including alternate members for due cause.
- (4) A local government that has adopted a historic preservation ordinance and/or a design review ordinance may adopt an advisory manual of written and graphic design guidelines to assist applicants in the preparation of an application for a certificate of appropriateness.
- (a) Design guidelines may provide examples of development and alterations to development that would meet the intent of the standards of review.
 - (b) Design guidelines shall be prepared by the historic preservation board and/or design review board and adopted by the local legislative body, and shall be consistent with the standards of review, but are not by themselves legally binding.
- (5) No local government may designate pursuant to this Section:
- (a) a historic landmark or historic district unless it has first adopted a local comprehensive plan that contains a historic preservation element pursuant to Section [7-215]; and
 - (b) a design review district unless it has first adopted a local comprehensive plan that contains a community design element pursuant to Section [7-214];
- ◆ Note that a community design element may concern broad and concrete aesthetic issues that do not require a design review (“all single-family houses shall be clad in brick” for instance). Therefore, while design review cannot occur without the community design plan element, that element can be implemented independently of this Section to the extent that discretionary design review is not needed.

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- (6) A historic district, design review district, or historic landmark shall be designated by ordinance in the manner provided for discrete and identifiable lots or parcels of land in Section [8-103].
- (a) The ordinance shall contain, as applicable, a legal description of:
1. the boundaries of the historic or design review district; and/or
 2. the property that is to be designated a historic landmark[, including any significant landmark interiors].
- (b) The ordinance may be adopted only upon receipt of recommendations from the historic preservation board or design review board, provided however, that the legislative body may enact or amend the land development regulations if it has not received a recommendation from the historic preservation board or design review board within [60] days of the date of the public hearing on the proposed ordinance or amendment. The local legislative body shall give due consideration to the recommendations of the historic preservation board or design review board.
- (c) A historic district, design review district, or historic landmark shall be shown as an overlay district or other zoning district on the zoning map of the local government pursuant to Section [8-201(3)(o)].
- (7) A certificate of appropriateness is required for all proposed development removing, destroying, adding, or altering exterior [and interior] architectural features of properties located in a historic district or design review district or of properties designated pursuant to this Section as historic landmarks, or for disturbing or excavating archaeologically or culturally significant sites within a historic district or a property designated pursuant to this Section as a historic landmark.
- (a) A certificate of appropriateness may be issued subject to such conditions which, in the opinion of the historic preservation board or design review board, are directly related to the standards of review, provided such conditions do not conflict with or waive any other applicable requirement of the land development regulations.
1. The board shall base any conditions it adopts on competent, credible evidence it shall incorporate into the record and its decision.
 2. If the historic preservation board or design review board issues the certificate with conditions pursuant to this paragraph, the plan drawings and other materials submitted with the application describing the exterior [and interior] improvements shall be revised to include such conditions before the certificate of appropriateness is issued.

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- (b) A certificate of appropriateness is a development permit, and certificates of appropriateness shall be part of the unified development permit review process established pursuant to Section [10-201]. A record hearing shall be conducted upon all applications for a certificate of appropriateness.
- (8) This Section:
 - (a) does not authorize a historic preservation board or design review board, in a decision on an application for a certificate of appropriateness, to prohibit or deny a land use that is permitted as of right in the applicable zoning use district, although it may prohibit or deny permission for development even though that development may be necessary for a permitted land use;
- ◆ Uses as of right should not lose their as-of-right nature because the building in which the use is located is subject to a design review or historic preservation ordinance. To give an example, a design review board could compel a fast-food chain to employ signage and building decor that are compatible with the design district but could not prohibit a restaurant from operating within the design-compliant building if restaurants are as-of-right in that use district. States with similar provisions include North Carolina (N.C. Gen'l Stat. §160A-400.13) and West Virginia (W.Va. Code §8-26A-7(11)). Care should be taken in the preparation of the land-use element of the comprehensive plan and the zoning ordinance to provide as-of-right uses in historic or design review districts that are compatible with the purposes and standards of the districts.
 - (b) shall not prevent the ordinary maintenance or repair of any exterior [or interior] architectural feature in a historic district, design review district, or historic landmark that does not involve a change in design, material, or appearance thereof;
 - (c) shall not prevent the construction, reconstruction, alteration, restoration, moving, or demolition of any exterior [or interior] architectural feature that the [code enforcement agency] shall certify is required by the public health or safety because of an unsafe or dangerous condition; and
 - (d) does not prevent the maintenance or, in the event of an emergency, the immediate restoration of any existing above-ground utility structure without a certificate of appropriateness.
- (9) All buildings and contributing structures in a historic district or on a historic landmark shall be maintained in a reasonable state of repair by the owner and by any other person who may have legal custody and control over the premises.
 - (a) The [code enforcement agency], at the request of the historic preservation board or design review board, may order the owner or any other person with legal custody and control over the premises to correct defects or repairs to any building or contributing structure within a historic district or on a historic landmark, so that such

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properties are preserved and protected in accordance with the purpose of the historic preservation ordinance.

- (b) Any such order shall be in writing and shall state the specific actions that must be taken to comply with this provision and the date for compliance.
- ◆ Some historic preservation ordinances specifically authorize a code enforcement agency to institute, perform, or complete the necessary remedial work to prevent deterioration or de facto demolition by neglect and impose a lien against the property for the expenses incurred. This power is included in Chapter 11 as a generally-available remedy for the local government when a landowner does not maintain or repair their property as required by land use regulations. Many communities also authorize the use of eminent domain as a means of protecting historic buildings from serious neglect, but such a grant is beyond the scope of the *Legislative Guidebook*.
- (10) A local government may adopt a moratorium, pursuant to Section [8-604], for the purpose of preparing and adopting historic preservation plans, ordinances, designations, and amendments thereto, and may apply said moratorium to individual properties with the potential or need for historic preservation under this Section.
- ◆ Such a moratorium gives the local government up to 180 days to add a property to its historic preservation plan element and ordinance, during which no development permit, including building permits, may issue for that property.
- (11) This Section, or any provision thereof, shall not invalidate any designation of a historic district, historic landmark, or design review district made, or any certificate of appropriateness issued, pursuant to any earlier statute, ordinance, or regulation, if said designation or issuance was valid at that time.

Commentary: Transfer of Development Rights⁴²

THE BASICS

⁴²See generally John J. Costonis, “The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks,” *Harvard L. Rev.* 85 (1972): 574, 578; Robert A. Johnston & Mary E. Madison, “From Landmarks to Landscapes: A Review of Current Practices in the Transfer of Development Rights,” *Journal of the American Planning Association*, Vol 63, No. 3 (Summer 1997): 365-378; Rick Pruetz, *Saved by Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights* (Burbank, Calif.: Arje Press, 1997); Frank Schnidman, “Transferable Development Rights,” Ch. 23, in Donald Hagman and Dean Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (Chicago: American Society of Planning Officials, 1978); Sarah J. Stevenson, “Banking on TDRs: The Government’s Role as a Banker of Transferable Development Rights,” *1999 Zoning and Planning Law Handbook* (St. Paul, MN: West Group, 1999), 419-478.

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What is a transfer of development rights (also called transfer of development credits, transferable development rights, or simply “TDR”)? Put most simply, it is the yielding of some or all of the right to develop or use a parcel of land in exchange for a right to develop or use another parcel of land, or another portion of the same parcel of land, more intensively. In TDR programs, a local or regional government that wishes to preserve land in an undeveloped or less-developed state may do so without payment of cash compensation⁴³ if it is willing to accept higher densities or more intensive uses elsewhere. The owner has, in theory, not suffered a taking even in the extreme case where all reasonable use of a parcel of land is effectively precluded, because he or she has not lost any rights of ownership but merely transferred one component of ownership of land -- the right to develop and use the land -- from one parcel to another.

Why would a local government wish to preserve privately-owned land in an undeveloped state or prevent future development of such property? There are typically three reasons for a TDR program. The first is to preserve open space or ecologically sensitive areas (such as wetlands). The second common use of TDR is the preservation of agricultural or forest uses. The last, and most familiar, use of TDR is in the preservation of historic landmarks.

TDR CASES -- THE U.S. SUPREME COURT

Only two cases directly concerning TDR have been before the United States Supreme Court: *Penn Central Transportation Co. v. City of New York*,⁴⁴ and *Suitum v. Tahoe Regional Planning Agency*.⁴⁵

(1) *Penn Central*. In the *Penn Central* case, the City of New York enacted a Landmarks Preservation Law. Under this ordinance, the city Landmarks Preservation Commission designates landmark buildings and districts, after hearing. The owners of properties so designated must keep the exterior features of the building in good repair, and that Commission must approve any proposal to alter the exterior architectural features of the landmark, including exterior improvements.⁴⁶ There are three grounds for approving a proposed exterior alteration: it does not affect exterior architectural features, it is appropriate to the historic nature and features of the landmark, or the owner would make an “insufficient return” on the property without it.⁴⁷ The ordinance also provided

⁴³However, the owner of the sending parcel will probably receive cash in payment from the owner of the receiving parcel for the transfer of the development right.

⁴⁴438 U.S. 104 (1978).

⁴⁵No. 96-243 (U.S. 1997).

⁴⁶438 U.S. 104, 110-112.

⁴⁷438 U.S. 104, 112.

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that unused development rights could be transferred to lots on the same block or across the street, or to nearby lots under the same ownership.⁴⁸

The Penn Central Transportation Company owned Grand Central Terminal, which was a landmark under the Landmarks Preservation Law due to it being an exemplar of Beaux Arts design. The building is an eight-story railway station, with space not used for railway purposes rented to other commercial uses. The Penn Central Transportation Company also owned several neighboring hotels and office buildings along Park Avenue, at least eight of which were eligible under the ordinance to be recipients of development rights from the Grand Central Terminal. When the Company twice applied to the Commission for permission to build an over-50-story office building atop the Terminal, it was twice denied permission on the grounds that the skyscraper was incompatible with the turn-of-the-century design of the Terminal. The Company did not seek judicial review of the Commission decisions but instead brought suit, challenging the landmark designation and the denial of permission to build as a taking.⁴⁹

The Court found that there was no taking in these circumstances. First and foremost, the “objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.”⁵⁰ Second, the Company was not denied economically viable use of the property, the Court held, since it was economically viable in its form as a railway station with leased commercial space, nor were the investment-backed expectations of the Company thwarted by denial of permission to build the office tower, because their reasonable expectation, backed by expenditure of money, was in the existing railway station.⁵¹

Though the Court did not have to address the topic of TDR, since it found that there was no taking on an independent basis, the Court said,

“...it is not literally accurate to say that they have been denied all use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. ... [T]he New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants

⁴⁸438 U.S. 104, 113-114.

⁴⁹438 U.S. 104, 115-119.

⁵⁰438 U.S. 104, 129.

⁵¹438 U.S. 104, 136.

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and, for that reason, are to be taken into account in considering the impact of regulation.”⁵²

(2) *Suitum*. The Tahoe Regional Planning Agency regulates land development for the ecologically-sensitive Lake Tahoe region on the California/Nevada border. Because the area under its jurisdiction is so delicate, the Agency strictly regulates development. Every parcel must pass the Agency’s “Individual Parcel Evaluation System” (IPES) in order for the owner to receive permission to develop the parcel. However, undeveloped parcels in areas carrying runoff water into the Lake Tahoe watershed cannot receive a development permit under the IPES. To adjust for this severe restriction of development, owners of parcels that cannot be developed under IPES may transfer the development right to other parcels eligible for construction.⁵³

The “development rights” that can be transferred by an owner with an undevelopable parcel include the general right to build a residence, called a “Residential Development Right,” the right to construct a residence in the present calendar year (which is otherwise assigned by lottery), termed a “Residential Allocation,” and the right to build or add to a residence a particular square footage of “footprint” (in the case of land that cannot be developed because of a runoff area, 1 percent of the total area of the undevelopable parcel), called “Land Coverage Rights.” Ms. Suitum was the owner of a parcel in a water runoff area and was denied the right to construct a residence on her parcel. Under the Agency’s TDR program, she, without dispute, had three Residential Development Rights, one Residential Allocation, and the right to 183 additional square feet of “footprint.” She did not attempt to exercise these rights on another parcel or by transferring them. Instead, Ms. Suitum brought suit against the Agency, claiming that it had effected a taking of her property without just compensation.⁵⁴

The Supreme Court stated that there was a dispute over whether the case before it was ripe for adjudication in the first place. According to precedents, a takings claim is not ripe for adjudication unless the owner has both received a final regulatory decision on the use of his or her property and has sought compensation through the procedure set by state law.⁵⁵ Ms. Suitum argued that she was denied all reasonable use of the parcel she owned, that the TDRs were of little or no value, and that her claim was ripe because it would be futile to try to transfer them.⁵⁶ The Agency responded that the various TDRs were of significant market value (and offered appraisals in support of that proposition), that the value of the rights was relevant to the question of whether there was a taking

⁵²438 U.S. 104, 137.

⁵³No. 96-243, pg. 3, 4.

⁵⁴No. 96-243, pg. 4.

⁵⁵No. 96-243, pg. 5.

⁵⁶No. 96-243, pg. 5.

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in the first place, and therefore that Ms. Suitum's claim was not ripe because she had not tried to collect or exercise her development rights.⁵⁷

The Court found that there was a final decision on the use of Ms. Suitum's property when the Agency declared under IPES that her parcel could not be developed. Also, there was no dispute as to exactly what TDRs she would receive from the Agency.⁵⁸ As to the fact that any particular sale of TDRs can be denied approval by the Agency, and thus there was no final decision by the Agency, the Court found that, "[w]hile a particular sale is subject to approval, saleability is not...."⁵⁹

On the issue of the value of the TDRs, the Court asserted that "the valuation of Suitum's TDRs is therefore simply an issue of fact about possible market prices..."⁶⁰ In other words, the Supreme Court found that the value of the TDRs was not essential to determining whether or not there had been a taking, as the Agency had claimed. The Court declared the case was ripe and remanded the case for further proceedings.

The concurrence of Justices Scalia and O'Connor is even more explicit on the issue of TDR and where in the takings equation they should be considered: TDRs are not a transfer of the right to develop the sending parcel, but a tool for compensating the owner of the sending parcel with a valuable and saleable, but different, right.⁶¹ As Justice Scalia stated, "...the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity...."⁶²

TDR CASES -- THE STATE COURTS

Because takings is an issue under state constitutions as well as the Federal Constitution, and because TDR programs exist under state and local law, the state courts have had the most experience with challenges to TDR programs.

Validity of TDR Programs

TDR ordinances have survived challenges from several legal directions. In Washington, D.C., a TDR program was upheld against claims that it violated the uniformity requirement of the zoning

⁵⁷No. 96-243, pg. 4.

⁵⁸No. 96-243, pg. 7.

⁵⁹No. 96-243, pg. 8.

⁶⁰No. 96-243, pg. 8.

⁶¹No. 96-243, pg. 11.

⁶²No. 96-243, pg. 12.

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enabling statute and that it constituted discrimination on the basis of wealth.⁶³ The New York City TDR program was upheld in the face of a claim that it constituted illegal spot zoning.⁶⁴ A TDR ordinance in Los Angeles was unsuccessfully challenged on the basis that a TDR program is inconsistent with the concept of zoning in accordance with a comprehensive plan (akin to a “spot zoning” claim).⁶⁵

In Florida, in *Glisson v. Alachua Cty.*,⁶⁶ an appellate court upheld an ordinance and regulations restricting development in an area with both ecological and historic significance on the grounds that protecting the area from further development was a legitimate public purpose, and the ordinance and regulations were a reasonable means to that end both because existing uses were permitted and because TDRs (and variances) were allowed to those who could not make reasonable use of their property.

In the case of *City of Hollywood v. Hollywood, Inc.*,⁶⁷ a landowner challenged a TDR program on the basis of substantive due process. Under the program, the developer was to receive the right to build 368 housing units on one portion of his property if he deeded over a beachfront area that could accommodate 79 units. The court found that protecting the aesthetic value of the unspoiled beach was a legitimate public purpose, and that the transfer of the right to develop housing units to another portion of the property was a reasonable means to that end even though the owner was required under the transfer to deed outright to the city several acres of property.⁶⁸

A similar substantive due process claim was made in *Gardner v. New Jersey Pinelands Comm'n.*⁶⁹ In dispute was the statute and regulations creating the New Jersey Pinelands, specifically the restriction of development on agricultural parcels in exchange for transferable rights useable elsewhere in the Pinelands area. As in *City of Hollywood*, above, the New Jersey Supreme Court found that the preservation of agricultural land from more intensive residential or commercial development was a legitimate purpose and the restriction on development combined with the TDRs was a reasonable means to that end.

However, while several states have upheld TDR programs, the state courts have not universally approved all TDR ordinances. The initial Montgomery County (Maryland) TDR ordinance was invalidated on the grounds that, under the Maryland zoning enabling statutes, the designation of

⁶³ *Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 355 A.2d 550 (D.C. App. 1976), cert den'd 429 U.S. 966 (1977).

⁶⁴ *Fur-Lex Realty v. Lindsay*, 81 N.Y.Misc. 2d 904, 367 N.Y.S.2d 388, 392 (Sup. Ct. N.Y. Cty. 1975).

⁶⁵ *Local & Regional Monitor v. City of Los Angeles*, 12 Cal.App.4th 1441, 16 Cal.Rptr.2d 358 (Cal. App. 1993).

⁶⁶ 558 So.2d 1030 (Fla. App. 1990).

⁶⁷ 432 So.2d 1332 (Fla. App. 1983).

⁶⁸ 432 So.2d 1332, 1338.

⁶⁹ 125 N.J. 193, 593 A.2d 251 (1991).

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receiving parcels and the permissible density on those parcels was a rezoning and thus a legislative act, and could not be assigned to the planning board as the ordinance provided.⁷⁰ However, the county amended the ordinance to comply with the enabling acts, and the TDR ordinance is still in place.⁷¹

Effectiveness of TDR Programs Against Takings Claims

In *Aptos Seascope Corp. v. Santa Cruz Cty.*,⁷² a California appeals court expressly stated that TDR should be considered in the analysis of whether there has been a taking and can indeed “preclude a finding that an unconstitutional taking has occurred.”⁷³ Courts in similar states have found that TDRs go directly to the question of whether there has been a denial of economically viable use of the owner’s property.⁷⁴

The Court of Appeals (highest court) of New York heard the early case of *Fred F. French Inv. Co. v. New York City*.⁷⁵ In that case, private park space in a multi-unit residential development was declared open to the public, in exchange for the right to develop at a higher density at a site in midtown Manhattan. The TDR program in question allowed certain density increases as of right but required an approval after public hearing for larger density changes. The court found that there was a taking, and that the transferred development rights were inadequate compensation because their value is speculative until attached to a particular parcel and because the large density transfers were contingent on city approval, which could be denied.⁷⁶

However, when the same court heard the *Penn Central* case approximately one year later,⁷⁷ the court found that the transferred development rights in the New York City historic preservation ordinance were reasonable compensation even though they did not equal the value of the right to develop the sending parcel. The court reasoned that almost any land regulation negatively affects

⁷⁰*West Montgomery Cty. Citizens Ass’n v. Maryland-Nat’l Capital Park & Planning Comm’n*, 309 Md. 183, 522 A.2d 1328 (1987).

⁷¹Julian C. Juergensmeyer, James C. Nicholas, and Brian D. Leebrick, “Transferable Development Rights and Alternatives After *Suitum*,” *Urban Lawyer* 30, No. 2 (Spring 1998): 441, 451 fn. 89; Daniel R. Mandelker, *Land Use Law*, 4th ed. (Charlottesville, Va.: Lexis Law Publishing Co., 1997), §12.13., 494.

⁷²138 Cal.App.3d 484, 188 Cal.Rptr. 191 (1982).

⁷³138 Cal.App.3d 484, 496, 188 Cal.Rptr. 191, 197.

⁷⁴*Gardner v. New Jersey Pinelands Comm’n*, 125 N.J. 193, 593 A.2d 251 (1991); *Fifth Avenue Corp. v. Washington Cty.*, 282 Or. 591, 581 P.2d 50 (1978); *Glisson v. Alachua Cty.*, 558 So.2d 1030 (Fla. App. 1990); *Aptos Seascope Corp. v. Santa Cruz Cty.*, 138 Cal.App.3d 484, 188 Cal.Rptr. 191 (1983).

⁷⁵39 N.Y.2d 587, 350 N.E.2d 381 (1976), appeal dismissed 429 U.S. 990 (1976).

⁷⁶39 N.Y.2d 587, 598, 350 N.E.2d 381, 388.

⁷⁷42 N.Y.2d 324, 366 N.E.2d 1271 (1977).

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the value of property, and therefore the value of the increased density on the receiving parcel did not have to equal or exceed the value of the right to develop the sending parcel. The court also found that there was more certainty of where and how the transferred development rights could be used in the *Penn Central* TDR program than in the TDR ordinance at question in the *Fred F. French Inv. Co.* case, and thus distinguished the two cases.

In the case of *Corrigan v. City of Scottsdale*,⁷⁸ an Arizona court struck down a TDR ordinance on the grounds that the Arizona Constitution requires that just compensation must be “made in money.”⁷⁹ The court had already found that the declaration of 80 percent of a 4800-acre parcel of land as undevelopable Conservation Area was an unreasonable means to protecting the aesthetic interest in open land. Therefore, in striking down the ordinance on the basis of the constitutional requirement of compensation in money, the court was effectively considering TDR as solely a compensation measure.

Even though courts have found that TDR can negate a takings claim, and must be considered in the analysis of whether there has been a taking, there can be other takings-related problems with TDR programs. For instance, courts look askance at artificially downzoning a receiving area -- zoning that area for a use or density significantly lower than the surrounding areas so that the TDRs become necessary to have any economically-viable development in the receiving area.⁸⁰

EXAMPLES OF TDR PROGRAMS

There are a number of municipalities, counties, and regions that have TDR programs in place. These vary from rural areas to the largest city in the nation. The programs protect, in various communities, historical landmarks, agricultural and forest uses, and natural areas and open space. Rick Pruetz, by reviewing planning literature and by sending a questionnaire to 3,500 communities across the nation, has found 107 TDR programs in 25 states.⁸¹

Pine Barrens, New York. The Pine Barrens is an area on the east end of Long Island designated by state statute – the Long Island Pine Barrens Protection Act.⁸² (Note that it is not the same as the

⁷⁸149 Ariz. 553, 720 P.2d 528 (App. 1985), rev'd on other grounds, 149 Ariz. 538, 720 P.2d 513 (1986).

⁷⁹Ariz. Const. Art. 2, Sec. 17.

⁸⁰*Neuzil v. Iowa City*, 451 N.W.2d 159 (Iowa 1990); *Finch v. City of Durham*, 325 N.C. 352, 384 S.E.2d 8 (1989); *Odabash v. Borough of Dumont*, 65 N.J. 115, 319 A.2d 712 (1974); *National Amusements, Inc. v. City of Boston*, 29 Mass.App. 305, 560 N.E.2d 138 (1990).

⁸¹Pruetz, 14-17, 41.

⁸²N.Y. Env'tl. Conserv. Law §§57-101 to 57-137 (1997).

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Pinelands of New Jersey, an area that also has a successful TDR program.⁸³) The purpose of the Pine Barrens Protection Act is to preserve natural areas, agricultural and fishing resources, and historic sites in the Pine Barrens-Peconic Bay area.⁸⁴

The Act designates the portion of the Pine Barrens-Peconic Bay system that constitutes the Central Pine Barrens, which is divided by the Act itself into a core preservation area and a compatible growth area.⁸⁵ Governing the Central Pine Barrens is the Central Pine Barrens Joint Planning and Policy Commission – one appointee of the governor, the executive of Suffolk County, and the executives of three named towns. The Commission prepares and adopts a comprehensive land-use plan for the Central Pine Barrens area, can alter at its discretion (after due notice to affected land owners) the border between the core preservation area and the compatible growth area by up to 300 feet, and adopts regulations and standards implementing the plan, including but not limited to incentives and bonuses to encourage the use of TDRs.⁸⁶

The Commission is required to 1) inventory all privately-owned land in the core preservation area; 2) calculate the development yield of all such parcels “in a reasonable and uniform manner” based on such measures as area, density, height limitations, and floor area ratios; 3) notify the owners of such parcels of its determination; 4) designate receiving areas, both inside and outside the Central Pine Barrens, for development rights transferred from the core preservation area, and 5) consider the fiscal impact of the TDR program it develops.⁸⁷ Under the comprehensive land-use plan, some of the goals the Commission must comply with in designating receiving areas in the compatible growth area are to:

preserve...the essential character of the existing Pine Barrens environment, ... protect the quality of surface and groundwaters, discourage piecemeal and scattered development, encourage appropriate patterns of compatible...development in order to accommodate regional growth influences in an orderly way while protecting the Pine Barrens environment from the individual and cumulative adverse impacts thereof, accommodate a portion of development redirected from the preservation area ... across municipal boundaries, and allow appropriate growth consistent with the natural resources goals of [the plan].⁸⁸

⁸³N.J. Stat. Ann. §§13:18A-1 to –29 (1997), upheld in *Matlack v. Board of Chosen Freeholders*, 191 N.J. Super. 236, 466 A.2d 83 (L. Div. 1983), aff’d 194 N.J. Super. 359, 476 A.2d 1262 (App. Div. 1984); Telephone interview, 10/12/98, with John Costonis.

⁸⁴N.Y. Env’tl. Conserv. Law §57-103.

⁸⁵N.Y. Env’tl. Conserv. Law §57-107(10) - (12).

⁸⁶N.Y. Env’tl. Conserv. Law §§57-109(2), 119.

⁸⁷N.Y. Env’tl. Conserv. Law §57-119 (7), (8).

⁸⁸N.Y. Env’tl. Conserv. Law §57-121(4).

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The Pine Barrens TDR program, in place since mid-1995, has been employed to a moderate degree – as of August 31, 1998, 228 parcels in the core preservation area were awarded transferable development credits.⁸⁹ Out of the 52,500 acres of the core preservation area (and 47,500 acres of the compatible development area), the total area of the sending parcels was nearly 199 acres.⁹⁰ Ray Corwin, the executive director of the Commission, asserts that the TDR program is a success, especially when considered as a voluntary *portion* of the entire Pine Barrens regulatory system. The prevalence of small parcels using the program is intentional: the fee structure of the TDR program is calculated to reduce the cost to small landowners of using TDRs.⁹¹

Collier County, Florida. Collier County is on the southern tip of Florida, on the Gulf Coast. With a population of more than 150,000, it includes the growing city of Naples but also includes portions of the fragile Everglades ecosystem. To preserve both coastal areas and the inland wetlands, the county enacted a zoning ordinance in 1974 that included a Special Treatment Overlay Zone. Within the Zone, covering over 80 percent of the county's area, a permit is required for all new development, and strict environmental requirements apply to the issuance of such permits. To soften the impact of the regulatory aspect of the Zone, the ordinance also authorizes TDRs – one dwelling unit for every two acres – from parcels in the Zone to parcels outside the Zone, if the sending property is at least two acres. No receiving parcel can increase its density by more than 20 percent of its zoned density. To ensure that the transferred development rights will not still be used on the sending property, the owner of the sending property may either deed it outright to the county or sign and record a guarantee that the land will not be developed and will be left in a natural state, with the permissible exception of nature trails, boardwalks, and related uses.⁹²

The Collier County TDR program has been somewhat of a success – 526 development rights, arising from 325 acres in the Zone, have been transferred since the program's inception.⁹³ However, due mainly to the fact that existing zoning provides adequate density without purchasing TDRs, the program has been very rarely employed in the last 10 years or so.⁹⁴ On the other hand, nine other

⁸⁹Information sheet from Pine Barrens Credit Clearinghouse, a division of the Central Pine Barrens Commission (n.d).

⁹⁰Pine Barrens Credit Clearinghouse information sheet; Brief of the National Trust For Historic Preservation in the United States *et al.* at 19, *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 (U.S. 1997).

⁹¹Telephone interview, 10/14/98, with Ray Corwin, executive director, Central Pine Barrens Commission.

⁹²Pruetz at 187-188.

⁹³Pruetz at 188.

⁹⁴Telephone interview, 10/6/98, with Ms. Barbara Cacchione, Planning Services Department, Collier County.

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south Florida counties facing the same need to preserve the unique coastline and wetlands environments of southern Florida have followed Collier's lead by enacting TDR ordinances.⁹⁵

Montgomery County, Maryland. Montgomery County, like many other counties throughout the nation, is a county in transition. While it contains thousands of acres of farmland, it also includes several growing suburbs of Washington, D.C., and portions of the county are served by the Washington Metro (subway) and commuter trains. Like many such counties, the County Board wanted to preserve agricultural uses in the face of expanding residential subdivisions and commercial uses, so they enacted an agriculturally-oriented TDR ordinance in 1981.

The rural area, covering almost one-third of the county, was downzoned from 1 residential unit per 5 acres to 1 unit per 25 acres, and the owners received 5 transferable rights to build a dwelling unit per each 25 acres. Note that, since the owner of the sending parcel can still build one residence per 25 acres, a grant of 5 transferable rights to build a dwelling unit per 25 acres gives the sending parcel the transferable right to build one more dwelling unit than it had under the old zoning. The areas of the county designated as receiving areas were the developing corridors along superhighways and railways into Washington, so that suburbanization, which was occurring regardless of the TDR program, would be concentrated along the transportation facilities that serve the development. For the sake of efficiency, the TDR program is administered as part of the subdivision approval: when a developer is seeking plat approval and is going to buy transferable rights as part of the development, the sale of development rights is approved as part of the plat approval.⁹⁶

The Montgomery County TDR program has been very effective: more than 38,000 acres of the approximately 91,000 rural acres have been preserved by transfers of development rights as of 1998.⁹⁷ Because of the existing development pressure and the concentrated nature of the receiving area, the market value of TDRs was high – around \$10,000 per right.⁹⁸ And, just as the Collier County, Florida, TDR program inspired other counties in Florida to enact similar ordinances, the success of the Montgomery County program in preserving farmland and concentrating development has provided impetus for six other counties in Maryland to adopt TDR programs.⁹⁹

New York City, New York. The oldest, and one of the most famous, TDR programs was instituted in New York City as part of its historic preservation program. New York City has several

⁹⁵Pruetz at 45.

⁹⁶Juergensmeyer, Nicholas, and Leebrick at 450-451.

⁹⁷Ann Louise Strong, "Transfer of Development Rights to Protect Water Resources," *Land Use Law & Zoning Dig.* Vol. 50, No. 9 (Sept. 1998): 3, 7.

⁹⁸Brief of the National Trust For Historic Preservation at 18; Juergensmeyer, Nicholas, and Leebrick at 450-451, 474.

⁹⁹Pruetz at 45.

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buildings of historic importance, especially in its high-density core areas of Midtown and downtown Manhattan. However, since many of these buildings make less-intensive use of the land they occupy than is permitted by present zoning and other land-use regulations, there is a great incentive for the owners of such properties to tear down the historic structure and replace it with a modern building that takes full advantage of the legally-permitted density.

Therefore, in 1965, the City enacted the Landmarks Preservation Law. The Law creates a Landmarks Preservation Commission, which designates landmark buildings and districts after holding a hearing at which the owner has a right to participate; the designation is subject to judicial review. The owners of properties so designated -- landmark properties -- must keep the exterior features of the building in good repair, and the commission must approve any proposal to alter the exterior architectural features of the landmark, including exterior improvements.¹⁰⁰ There are three grounds for approving a proposed exterior alteration. The first is that the proposed alteration to the landmark does not affect exterior architectural features; not surprisingly, a decision in favor of the owner results in a “certificate of no effect on protected architectural features.” The second route to approval of an alteration to a landmark is the “certificate of appropriateness”; that is, the commission finds that the proposed alterations do affect the external features of the landmark, but the alterations are appropriate to the historic nature and features of the landmark. The third basis is that the owner would make an “insufficient return” on the property unless he or she is allowed to make the alteration.¹⁰¹

With the same focus on guaranteeing that owners of landmark properties receive a “reasonable return” on their investment, the ordinance also provides for TDR. As the Law originally applied, unused development rights could be transferred to adjacent lots on the same block.¹⁰² After a 1968 amendment, owners of landmark sites could transfer unused density from a landmark parcel to property across the street or across a street intersection, subject to a restriction that the floor area of the receiving parcel may not be increased by more than 20 percent above its otherwise-zoned level.¹⁰³ There was a further amendment in 1969, allowing transfer of density “across a street and opposite to another lot or lots which except for the intervention of streets or street intersections form a series extending to the lot occupied by the landmark building[, provided that] all lots [are] in the same ownership.”¹⁰⁴ Thus, lots blocks away from the landmark property could use the development rights as long as the same owner owned the landmark lot, the receiving parcel, and the land in between except for streets (the exact situation the Penn Central Railroad was in with regards to Grand Central Terminal and the properties built on top of the tracks leading to the Terminal).

¹⁰⁰*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 110-112.

¹⁰¹438 U.S. 104, 112.

¹⁰²438 U.S. 104, 110, 113-114.

¹⁰³438 U.S. 104, 114.

¹⁰⁴438 U.S. 104, 114.

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The TDR portion of the Landmarks Preservation Law has been only mildly successful: over a dozen transfers have been made over the years since its enactment.¹⁰⁵ The main problem with the program is that there are other means under New York City zoning laws to obtain increased density (including rezoning and various density bonus programs such as for designing a building with a plaza or open area adjacent) and the process for approving TDRs under the Landmarks Preservation Law involves the approval of the Community Board for the surrounding neighborhood, the City Planning Board, and the City Council, and approval can take up to seven months.¹⁰⁶

However, very recently, New York City has established a TDR program for its Theater Subdistrict. The subdistrict has existed in the Broadway theater area since the 1970s, and within the district, there are regulations to preserve live theaters as such and to prevent their demolition and conversion to other uses such as office buildings. Just a few months ago, the City established a program whereby listed theaters (approximately 44 in number) can transfer their unused development rights to any other property in the subdistrict under a streamlined approval procedure if the owner agrees to maintain the property as an operating theater.¹⁰⁷

The Chicago Plan. “The Chicago Plan” is the common name for a TDR program for the preservation of landmarks, created by John J. Costonis, a law professor, and Jared B. Shlaes, a real-estate consultant, and proposed for adoption by the City of Chicago.¹⁰⁸ It was proposed in 1971 because Chicago had been, at that time, making little or no effort to protect historic landmarks, especially the original, pioneering “skyscrapers” of the 1880s and 1890s that were being torn down for the construction of taller, modern skyscrapers.

The Chicago Plan is based on the idea that most landmark properties do not fully employ the density allowed by the zoning and other land-use regulations for the land they rest on. In areas that are not developing intensively, this is rarely a problem because there is little or no pressure to build the property to its full density. But in heavily-developing areas, especially with a limited supply of land—such as the downtown areas of many cities—the market provides the incentive to develop to the extent of the law parcels that are not “fully” developed. This is true even if the landmark building is operating at a profit.¹⁰⁹

What the Chicago Plan proposes is that areas containing landmark properties, such as a downtown area, would be declared to be development rights transfer districts by the City Council,

¹⁰⁵Brief of the National Trust For Historic Preservation at 19; Pruetz at 225.

¹⁰⁶Telephone interview, 10/7/98, with Melanie Meyers, NYC Department of City Planning; Juergensmeyer, Nicholas, and Leebrick at 447-448, 454.

¹⁰⁷Telephone interview, 10/7/98, with Melanie Meyers, NYC Department of City Planning.

¹⁰⁸John J. Costonis, “The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks,” *Harvard L. Rev.* Vol. 85 (1972): 574, 578.

¹⁰⁹Costonis, at 575, 579-580, 582, 589.

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at the recommendation of the Landmarks Commission and the Planning Commission. The owners of buildings declared to be landmarks, within a transfer district, could transfer the development rights he or she is not employing to one or more non-landmark properties in the transfer district, whether or not owned by him or her, and have the property-tax valuation of the landmark parcel appropriately adjusted. In exchange, the landmark property would become subject to a preservation restriction, binding the owner and all future owners of the landmark parcel to maintain the property according to certain standards and to refrain from altering or demolishing the property without consent from the city. The area of receiving parcels could not be expanded by more than 15 percent, and all transfers would be subject to development restrictions in the ordinance.¹¹⁰

For the owners of landmarks who did not voluntarily convey their development rights and enter into a preservation restriction, the city could condemn the development rights under eminent domain, putting condemned rights into a development rights bank and funding condemnations with the revenues generated from the bank's sale of development rights condemned earlier.¹¹¹

The great flexibility in the Chicago Plan is the ability to transfer development rights to any non-landmark property in the district, and not just to neighboring properties or nearby properties under the same ownership, as in the New York Landmarks Preservation Law.¹¹² Another powerful tool in the Chicago Plan is the development rights bank. Instead of having to obtain revenue from the general treasury to condemn development rights, often for downtown properties worth millions of dollars, the city has a dedicated source of income to condemn development rights of landmarks: the sale of development rights it has earlier condemned.¹¹³ Properly managed, the development rights bank is a self-perpetuating system, much like a revolving loan fund.

The main benefit to the owner of the landmark comes from the tax effects of losing the development rights. Whether the transfer is voluntary or as a result of condemnation, the loss of development rights on the sending parcel greatly reduces the value of the property for the purpose of property tax assessments.¹¹⁴ Without the transfer, evidenced by recorded documents, the owner of property is assessed for the possible development value of the property, even if he or she intends never to build to the full extent of the law. With it, the owner is assessed only for the actual value of what the existing building can be used for, and not the hypothetical value of what the largest permissible building on the parcel would be worth.

Such a program was not implemented by the City of Chicago due to legal conservatism in City Hall under Mayor Richard J. Daley and in the legal community -- the more traditional zoning/police power approach to protecting landmarks had been tried and judicially approved -- and due to the fact

¹¹⁰Costonis, at 590, 592, 594-595.

¹¹¹Costonis, at 590, 593.

¹¹²Costonis, at 594-596.

¹¹³Costonis, at 597-598.

¹¹⁴Costonis, at 592-593.

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that downtown developers could build to market intensities and densities under existing zoning or by employing incentives, and did not need to purchase TDRs.¹¹⁵ However, the adoption of elements of the Chicago Plan by the Illinois Legislature as a municipal historic preservation enabling act (see below), and in the TDR enabling statutes of New York State and Tennessee (also below) must be noted, so that the Chicago Plan was a model for action by others if not by the city for which it was intended.

TDR ENABLING STATUTES

Several local governments have implemented TDR programs without express authority from a state enabling statute. In those cases, they relied on their general authority to regulate the type and density of land use.¹¹⁶ However, it is best to avoid any claim that a local TDR ordinance is *ultra vires* (that is, that the local government had no authority to enact it) by enacting a state statute that expressly authorizes TDR programs.¹¹⁷

Some states generally authorize local governments to enact TDR ordinances, but provide no standards, conditions, or other regulation of their content. Florida's "Private Property Rights Protection Act" includes TDR as one possible mitigation measure when a land owner claims, and the local government agrees, that a particular local land development regulation or decision "inordinately burdens" the owner's reasonable use of the land.¹¹⁸ Idaho simply authorizes TDRs for the preservation of historic properties.¹¹⁹ Maryland merely authorizes counties and municipalities, including Baltimore, to establish TDR programs.¹²⁰ New Hampshire¹²¹ authorizes TDR along with many other "innovative land use controls," such as timing, intensity, and use incentives, phased development, planned unit development, cluster development, flexible zoning, inclusionary zoning,

¹¹⁵Telephone interview, 10/7/98, with Jared Shlaes, Shlaes & Co., Chicago; Telephone interview, 10/12/98, with John Costonis.

¹¹⁶*Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 355 A.2d 550 (D.C. App. 1976); *Matlack v. Board of Chosen Freeholders*, 466 A.2d 83 (N.J.L. Div. 1983), aff'd 476 A.2d 1262 (N.J. App. Div. 1984).

¹¹⁷See *West Montgomery Cty. Citizens Ass'n v. Maryland-Nat'l Capital Park & Planning Comm'n*, 522 A.2d 1328 (Md. 1987) (TDR ordinance assigns power to designate receiving areas to planning board, *ultra vires* under zoning enabling act requiring rezoning to be approved by local legislature).

¹¹⁸Fla. Stat. §70.001 (1997).

¹¹⁹Idaho Code §67-4619 (1998).

¹²⁰Md. Ann. Code art. 66B, §11.01 (1998).

¹²¹N.H. Rev. Stat. Ann. §674:21 (1998).

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and impact fees. The only standards in the statute, however, are for impact fees. Rhode Island authorizes TDR programs as part of the standard zoning power of a city or town.¹²² South Dakota generally authorizes counties and municipalities to employ TDRs as part of historic preservation ordinances.¹²³ Washington takes a similar approach to New Hampshire's and states that a "comprehensive plan should provide for innovative land use management techniques, including, but not limited to, density bonuses, cluster housing, planned unit developments, and the transfer of development rights."¹²⁴

Arizona includes in its zoning enabling statute¹²⁵ a provision authorizing the use of TDR. The provision¹²⁶ requires that any TDR must be with the consent of the owners of the sending and receiving parcels and must be preceded by notice and a hearing. It also requires that any TDR be performed pursuant to a local ordinance that requires the issuance and recording of documents severing the development right from the sending parcel and transferring them to the receiving parcel, prescribes means and procedures for ensuring development in violation of the transfer does not occur on the sending parcel, and authorizes the local government to purchase and resell development rights.

Connecticut also has a more detailed statute. The general zoning enabling section includes express authority to create a TDR program and to vary density limits in the receiving areas.¹²⁷ Another provision requires that development rights cannot be transferred except upon the joint application of the transferor and the transferee (the owners of the sending and receiving parcels, respectively).¹²⁸ And another section expands the scope of TDR by allowing two or more municipalities with a TDR program to enter into an agreement authorizing and establishing procedures for the transfer of development rights from parcels in one municipality to parcels in another.¹²⁹

Georgia authorizes counties and municipalities to employ TDR to protect natural land, open space, recreational land, farm land, and "land that has unique aesthetic, architectural, or historic

¹²²R.I. Gen. Stat. §45-24-33(B)(2) (1998).

¹²³S.D. Codified Laws §1-19B-26 (1998).

¹²⁴Wash. Rev. Code §36.70A.090 (1998).

¹²⁵Ariz. Rev. Stat. §9-462.01 (1998).

¹²⁶Ariz. Rev. Stat. §9-462.01(12).

¹²⁷Conn. Gen. Stat. §8-2(a) (1997).

¹²⁸Conn. Gen. Stat. §8-2f.

¹²⁹Conn. Gen. Stat. §8-2e.

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value.”¹³⁰ As in Arizona, all transfers must be preceded by notice and a hearing and must be with the consent of the owners of both the sending parcel and the receiving parcel.¹³¹ Indeed, the required elements of a county or local TDR ordinance are exactly the same as in Arizona, except that Georgia also authorizes “persons” to purchase development rights and to either resell them or hold them for conservation purposes.¹³²

Illinois, as stated above, bases its municipal TDR enabling statute¹³³ on the Chicago Plan. The municipality is authorized to designate landmarks and to implement the designation with regulations, purchase (of the full title or of just the development rights), or the employment of TDRs.¹³⁴ The development right is the density permissible under zoning law (and the statute recommends using quantifiable measures of density), and a voluntary TDR is secured by the execution and recording, by the owner of the landmark, of a conservation easement against the landmark and in favor of the municipality.¹³⁵ When a landmark property becomes subject to a conservation easement, either by voluntary TDR or through condemnation by the municipality, the value of the landmark property for tax purposes is adjusted.¹³⁶ The municipality is also authorized to create a development rights bank, holding condemned development rights and funding further condemnations by the sale of development rights.¹³⁷ The Illinois County Historic Preservation Law¹³⁸ also grants counties the power to employ TDR when the owner of a parcel, seeking permission to alter or demolish the landmark property, can show specific evidence of economic hardship from being denied permission.¹³⁹

The **Kentucky** statute¹⁴⁰ authorizes cities, counties, and urban-county governments to enact TDR ordinances, and does not limit their use to historic preservation. A TDR ordinance must provide for the voluntary transfer of development rights from one parcel of land to another, the restriction of

¹³⁰Ga. Code. Ann. §36-66A-1 (1998).

¹³¹Ga. Code. Ann. §36-66A-2.

¹³²Ga. Code. Ann. §36-66A-2(7).

¹³³65 Ill.Comp.Stat. §§5/11-48.2-1 to -7 (1998).

¹³⁴65 Ill.Comp.Stat. §5/11-48.2-2.

¹³⁵65 Ill.Comp.Stat. §5/11-48.2-1A.

¹³⁶65 Ill.Comp.Stat. §5/11-48.2-6.

¹³⁷65 Ill.Comp.Stat. §5/11-48.2-1A.

¹³⁸55 Ill.Comp.Stat. §§5/5-30001 - 30022 (1998).

¹³⁹55 Ill.Comp.Stat. §§5/5-30011(16), -30019 to -30021.

¹⁴⁰Ky. Rev. Stat. Ann. §100.208 (1997).

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development on the transferring parcel, and the increase in density or intensity of development on the receiving parcel. Both transferring and receiving areas must be indicated on the zoning map. Cities within counties can enter into agreements with the county to provide for the transfer of development rights from parcels in the county to parcels in the city and vice versa. TDR are completely alienable and can be transferred by deed, but the local government is authorized to prescribe, by ordinance, procedures for the transfer of development rights and their enforcement.

New Jersey has created a statewide TDR bank within its Department of Agriculture.¹⁴¹ The bank is authorized to purchase development rights, and to provide matching funds up to 80 percent for the purchase of development rights by a municipality or county.¹⁴² It is also authorized to sell the TDRs it obtains. However, if it purchased or condemned development rights in cooperation with a local government, it must pay 20 percent of the proceeds to that local government unless the local government agrees to waive the payment and the TDRs are being used in “projects that satisfy a compelling public purpose.”¹⁴³

New York authorizes cities,¹⁴⁴ towns,¹⁴⁵ and villages¹⁴⁶ to enact TDR ordinances by the same procedure as is prescribed for zoning ordinances.¹⁴⁷ Such ordinances may be enacted “to protect the natural, scenic, or agricultural qualities of open land, to enhance sites and areas of special character or special historical, cultural, aesthetic, or economic interest or value....”¹⁴⁸ To ensure the TDR program is well-considered, the statutes require that a TDR ordinance can be enacted only in accordance with a local comprehensive plan, the receiving district must first be found by the local legislature to have adequate public facilities and other necessary resources to accommodate the transferred development rights, the local legislature must consider and adjust for the impact of the TDR program on low- and moderate-income housing, and the local government must also produce and keep updated a generic environmental impact statement for the receiving area.¹⁴⁹ The sending and receiving districts must be designated and mapped with specificity, and the ordinance must provide the procedure for transferring development rights. The means by which the sending parcel

¹⁴¹N.J. Stat. Ann. §4:1C-51 (1998).

¹⁴²N.J. Stat. Ann. §4:1C-52(a).

¹⁴³N.J. Stat. Ann. §4:1C-54.

¹⁴⁴N.Y. Gen. City Law §20-f (1998).

¹⁴⁵N.Y. Town Law §261-a (1998).

¹⁴⁶N.Y. Village Law §7-701 (1998).

¹⁴⁷N.Y. Gen. City Law §20-f(3); N.Y. Town Law §261-a(3); N.Y. Village Law §7-701(3).

¹⁴⁸N.Y. Gen. City Law §20-f(2); N.Y. Town Law §261-a(2); N.Y. Village Law §7-701(2).

¹⁴⁹N.Y. Gen. City Law §20-f(2)(a), (f); N.Y. Town Law §261-a(2)(a), (f); N.Y. Village Law §7-701(2)(a), (f).

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loses its development rights is a conservation easement with the local government as the beneficiary, and the development rights received by the receiving parcel must be documented by a certificate from the local government; both the conservation easement and the certificate of development right must be recorded.¹⁵⁰ The creation of development rights banks by local governments is authorized; and the assessed value of land, for property tax purposes, affected by a TDR must be adjusted for the transfer within a year of the transfer.¹⁵¹

North Carolina authorizes the use of “severable development rights” by cities and counties in connection with dedicating a corridor for a street or highway indicated on a plan as an alternative to requiring dedication of the corridor as a condition of subdivision plat approval.¹⁵² The local legislature must, through the zoning ordinance, indicate receiving districts for the SDRs, which are the only parcels where the development rights may be used, though the SDRs are vested rights and freely alienable upon their recording by the city or county. No plat or deed for property employing SDRs can be recorded until the development right of the sending parcel are extinguished in favor of the city or county and the document doing so is recorded. The city then deeds the rights back to the owner of the sending parcel (and records the deed), to be conveyed as the owner sees fit.¹⁵³

Pennsylvania authorizes local governments to enact TDR ordinances and provides that no transfer of development rights can occur in absence of such an ordinance.¹⁵⁴ Development rights must be transferred by a deed, which must be recorded but cannot be accepted for recording without the deed being first approved by the local government.¹⁵⁵ Development rights cannot be transferred across municipal lines, except when there is a joint zoning ordinance between the municipalities where the sending and receiving parcels are located.¹⁵⁶

The **Tennessee** statute¹⁵⁷ provides that only counties with a metropolitan government can have a TDR program, but TDRs can expressly be used for “historical, agricultural, or environmental” purposes. The area of the designated receiving property must be equal to or greater than the area of the sending parcel. The transfer of development rights to parcels owned by other persons must be allowed, and any TDR must be voluntary and by contract. The transfer of development rights is not subject to taxation, either property or income taxation. Conveyances of development rights

¹⁵⁰N.Y. Gen. City Law §20-f(2)(b), (c); N.Y. Town Law §261-a(2)(b), (c); N.Y. Village Law §7-701(2)(b), (c).

¹⁵¹N.Y. Gen. City Law §20-f(2)(d), (e); N.Y. Town Law §261-a(2)(d), (e); N.Y. Village Law §7-701(2)(d), (e).

¹⁵²N.C. Gen. Stat. §§136-66.10, .11 (1997).

¹⁵³N.C. Gen. Stat. §136-66.11(d), (f).

¹⁵⁴Pa. Stat. Ann. tit. 53, §10619.1(a) (1998).

¹⁵⁵Pa. Stat. Ann. tit. 53, §10619.1(b), (c).

¹⁵⁶Pa. Stat. Ann. tit. 53, §10619.1(d).

¹⁵⁷Tenn. Code Ann. §13-7-101(a)(2) (1997).

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have to be in writing and recorded with the county register of deeds, and development rights allocated to a property do not become effective until the transferred development rights are noted in an instrument so recorded.

BASIC ELEMENTS OF SUCCESSFUL TDR PROGRAMS

As indicated above, there are several essential elements in a TDR program that is constitutional, legal, and effective. There should be a clear and valid public purpose for applying a TDR program to an area: preservation of open space and scenic views, protection of natural areas, including wildlife habitats and the species therein, agricultural or forest preservation, and the protection of historic landmarks. Both the sending area and the receiving area should be designated clearly. The designation of sending and receiving areas should be consistent with the local comprehensive plan. This is an absolute necessity in states that require land development regulations to be consistent with a plan. But it is also desirable in other states, so that the selection of sending and receiving areas will be reasonable and related rationally to the other elements of the plan, and (just as important if not more so) will be seen by the public as such. The development rights which the sending parcel has transferred should be clearly recorded as a conservation easement against the sending parcel and in favor of the local government. This both gives notice to future owners of the restricted development and makes the restriction of development of the sending parcel enforceable by the local government in a civil action.

It should be noted that the transfer of development rights may occur separately from the exercise of those development rights on a receiving parcel. One does not have to purchase development rights intending to use them immediately, or even knowing where one will use them, so long as the development rights are exercised (if at all – a conservation group or concerned citizen could obtain TDRs with the intent of never using them) within a receiving area and otherwise in compliance with the Section.

There is one basic question that the *Legislative Guidebook* will not directly resolve: should TDR programs be mandatory or voluntary? This refers to whether the owners of sending parcels **may** or **must** transfer their development rights -- all TDR systems are predicated on the voluntary sale of the TDRs to receiving parcels, subject to approval in many cases. As the statutes cited above show, some states require voluntary programs, while others envision mandatory transfer of rights. The advantage of voluntary systems is, of course, that all takings challenges are effectively precluded when the transaction is contractual. On the other hand, if the local government wants all parcels in the sending area to transfer their development rights, the most straightforward means of achieving this is a mandatory system -- to obtain 100 percent participation voluntarily, the local government would probably have to offer substantial incentives, in the form of TDRs of much greater density or intensity than those lost on the sending parcel. Also, TDR as a component of a development regulation system that includes traditional exercise of the police power has been more accepted by the legal community than TDR alone.¹⁵⁸ Because local governments in the same state but facing

¹⁵⁸Telephone interview, 10/12/98, with John Costonis.

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different circumstances may see a need for one or the other system, Section 9-401 below does not specifically require voluntariness, and thus authorizes both voluntary and mandatory TDR programs.

	TDR Systems	
	<u>Voluntary</u>	<u>Mandatory</u>
Public/homeowner resistance?	Less	More
Potential for takings claims?	No	Yes
100% participation in sending district?	No*	Yes

*unless expensive incentives provided

In determining what development right is being transferred from the sending parcel, uniform standards, preferably based on quantifiable measures like density, area, floor-area-ratio, or height, should be used. The application of the development rights to receiving areas must be planned carefully. The receiving area must have adequate public facilities and services to accommodate the increased development the TDRs bring, and a TDR enabling statute should require that this criteria be applied by TDR programs. The density or intensity of development permitted in the receiving area without TDRs is also important. If a receiving area, in order to encourage the transfer of development rights to the area, has so low an allowable density without TDRs that development in the area is not economically viable without the TDRs, claims of downzoning and takings are possible.¹⁵⁹ Conversely, if the zoning of the receiving area allows development at market capacity without the TDRs, or other means of achieving density increases (such as density bonuses for buildings designed with a plaza or other open area adjacent) are readily available, there will be little demand for the TDRs and their market value will be diminished.¹⁶⁰ To restate the issue, economically-viable use of parcels in the receiving area must be possible at the base zoning without using TDRs, but development of receiving parcels to the density the market is demanding should not be possible without employing TDRs -- a balancing act, indeed.

As well as providing a mechanism for transfers of development rights from one privately-owned parcel to another, the local government may wish to have a more direct role in the development rights market. It may wish to buy and sell development rights in order to stabilize the market, or it may wish to buy up development rights in order to preserve property from development in a non-regulatory manner. Whatever the reason, the mechanism for this is the TDR bank,¹⁶¹ which buys

¹⁵⁹Mandelker, §11.34 at 491.

¹⁶⁰Telephone interview, 10/12/98, with John Costonis; Juergensmeyer, Nicholas, and Leebrick at 447-448; Joseph Stinson and Michael Murphy, *Transfer of Development Rights*, ¶ 18, <www.law.pace.edu/landuse/tdr.html>.

¹⁶¹For more on TDR banking, see Sarah J. Stevenson, "Banking on TDRs: The Government's Role as a Banker of Transferable Development Rights," *1999 Zoning and Planning Law Handbook* (St. Paul, MN: West Group, 1999): 419-478 .

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and receives donations of development rights, holds them, and may sell or convey them. The bank may be funded by tax or fee revenue, or by donations with local legislative approval, but it is also expected to use the revenue from the sale of development rights to fund future purchases. The model Section authorizes the creation of such a bank, which may be a governmental agency or a non-profit organization.

Beyond the legal factors for the effectiveness of TDR programs, there are market considerations. Specifically, not only must development be legally possible at the underlying zoning, there must be a market demand for development at a density or intensity *higher* than that available under zoning alone. In short, economic growth and development pressure must be occurring in the receiving area. Otherwise, there will be no market demand for the development rights even if the ordinance is well-drafted.

9-401 Transfer of Development Rights

- (1) A local government may adopt local land development regulations and amendments that include provisions for the transfer of development rights, in the manner prescribed in this Section.
- (2) The purposes of this Section are to:
 - (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
 - (b) conserve agriculture and forestry uses of land;
 - (c) protect lands and structures of aesthetic, architectural, and historic significance;
 - (d) [*other purposes*];
 - (e) ensure that the owners of land that is so preserved, conserved, or protected may make reasonable use of their property rights by transferring their right to develop to other properties that can make use of it;
 - (f) provide a mechanism whereby development rights may be reliably transferred;
 - (g) ensure that development rights are transferred to properties that are in areas or districts that have adequate community facilities, including transportation, to accommodate additional development; and
 - (h) authorize the local government to create a TDR Bank, whereby development rights may be purchased and conveyed by the local government, in order to stabilize the market in development rights and to regulate or control the development of property

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that the local government intends to protect under subparagraphs (a) through (d) above.

- (3) As used in this Section, and all other Sections of this Act where “transfer of development rights” is referred to:
- (a) “**Development Rights**” mean the rights of the owner of a parcel of land, under land development regulations, to place that parcel and the structures thereon to a particular use or to develop that land and the structures thereon to a particular area, density, bulk, or height;
 - (b) “**Receiving District**” means one or more districts in which the development rights of parcels in the sending district may be used;
 - (c) “**Receiving Parcel**” means a parcel of land in the receiving district that is the subject of a transfer of development rights, where the owner of the parcel is receiving development rights, directly or by intermediate transfers, from a sending parcel, and on which increased density and/or intensity is allowed by reason of the transfer of development rights;
 - (d) “**Sending District**” means one or more districts in which the development rights of parcels in the district may be designated for use in one or more receiving districts;
 - (e) “**Sending Parcel**” means a parcel of land in the sending district that is the subject of a transfer of development rights, where the owner of the parcel is conveying development rights of the parcel, and on which those rights so conveyed are extinguished and may not be used by reason of the transfer of development rights; and
 - (f) “**Transfer of Development Rights**” means the procedure prescribed by this Section whereby the owner of a parcel in the sending district may convey development rights to the owner of a parcel in the receiving district, whereby the development rights so conveyed are extinguished on the sending parcel and may be exercised on the receiving parcel in addition to the development rights already existing regarding that parcel.
- (4) The legislative body of a local government may adopt a transfer of development rights program only by ordinance, in the manner for land development regulations pursuant to Section [8-103], and an ordinance pursuant to this Section shall:
- (a) be adopted by the legislative body only after it has adopted:
 - 1. a local comprehensive plan; and

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2. for a transfer of development rights program concerning critical and sensitive areas, a critical and sensitive areas element pursuant to Section [7-209];
 3. for a transfer of development rights program concerning natural hazards, a natural hazards element pursuant to Section [7-210];
 4. for a transfer of development rights program concerning agriculture, forest, or scenic preservation, an agriculture, forest, and scenic preservation element pursuant to Section [7-212]; and/or
 5. for a transfer of development rights program concerning historic preservation, a historic preservation element pursuant to Section [7-215];
- (b) be adopted by the legislative body only after a public hearing has been held on the proposed ordinance, with notice to all owners of property in the proposed sending and receiving districts. Any purported adoption contrary to this subparagraph shall be void;
 - (c) include a citation to enabling authority to adopt and amend the transfer of development rights ordinance;
 - (d) include a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;
 - (e) include a statement of consistency with the local comprehensive plan and with the applicable elements thereof, as listed in subparagraph (4)(a) above, that is based on findings made pursuant to Section [8-104];
 - (f) describe in detail both the sending and receiving districts, and shall require the designation of both the sending and receiving districts on the zoning map of the local government;
 - (g) describe the development rights to be transferred in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
 - (h) require that the owner of a sending parcel execute, and record with the county [*recorder of deeds*], a deed or instrument creating a conservation easement, describing the released development rights in reasonable detail and preferably in quantifiable terms. The sending parcel shall be the servient estate and the local government shall be the holder of the easement, and the local government may specify one or more non-profit organizations to be additional holders of the easement. Before any such easement is recorded, the instrument shall be submitted to the [local planning agency] for its approval;

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- (i) require that, before any transfer of development rights may be completed, the [local planning agency] shall approve the transfer of development rights. The only bases for rejecting a proposed transfer of development rights is that the development rights released by the instrument vary significantly from the development rights that the sending parcel is supposed to be releasing pursuant to the transfer of development rights, or there is some other significant error in the instrument;
- ◆ Note that there may be intermediate transfers of the development rights. Each transfer, with the exception of transfer to the owner of a receiving parcel who intends to exercise the development rights, is reviewed by the local government but only to ensure that the development rights being transferred are consistent with the original conservation easement.
- (j) require that, before any development rights transferred may be exercised upon a receiving parcel, the [local planning agency] shall approve the exercise of development rights. The only bases for rejecting a proposed exercise of development rights are that:
 - 1. the proposed receiving parcel upon which the development rights are to be exercised is not in a receiving district; or
 - 2. the exercise of development rights would increase the density or intensity of development on the receiving parcel to a degree that violates one or more of the provisions of paragraph (8) below; and
- (k) require that, once an exercise of development rights is approved, the [local planning agency] issue to the owner of the receiving parcel, and record with the county [*recorder of deeds*], a certificate assigning to the receiving parcel, and all present and future owners thereof, the development rights that the receiving parcel is to receive through the transfer of development rights. Such certificate shall describe the development rights in reasonable detail and refer to the instrument creating the conservation easement, and the certificate shall have a copy of the instrument attached.
- (5) Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.
- (6) No district shall be designated as a receiving district unless the local legislative body finds, before enacting an ordinance authorized by this Section, that the district has or will have adequate community facilities and other resources to accommodate the increased development authorized by the transfer of development rights from the sending district.
- (7) No district, or portion of any district, designated as a receiving district, shall be downzoned to the degree that no reasonable use can be made of a parcel of property, either after an

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ordinance pursuant to this Section has been adopted or before such adoption in anticipation of adoption.

- ◆ This paragraph is intended to prevent the takings problem discussed above, whereby, to encourage the use of TDRs in a receiving district, the local government downzones the district to the degree that owners cannot make a reasonable use of their property in the district unless they purchase TDRs.

- (8) Any other provision of local land development regulations to the contrary, the density or intensity of development of a receiving parcel may be increased by the transfer of development rights so long as the increase in density or intensity:
 - (a) is consistent with the local comprehensive plan; [and]
 - (b) is not incompatible with the land uses on neighboring lots or parcels; [and]
 - [(c) is not more than [20] percent greater than the development rights of the receiving parcel without the transfer of development rights.]

- ◆ No increase in density or intensity may contravene the plan or be inconsistent with surrounding land uses. However, some states may prefer a clear, numerical, limitation on the increase, and therefore subparagraph (c) is provided as an option. Note that the 20 percent figure can be altered at the state's preference.

- (9) The local government shall notify the county [*property tax assessor*] of a transfer of development rights within [30] days of:
 - (a) the approval of a transfer of development rights pursuant to subparagraph (4)(i) above;
 - (b) the issuance of a certificate pursuant to subparagraph (4)(k) above;
 - (c) the condemnation or purchase of development rights by the local legislative body or the TDR Bank, pursuant to subparagraphs (10)(a) or (b) below;
 - (d) the receipt by the TDR Bank of a donation of development rights pursuant to subparagraph (10)(e) below; or
 - (e) the sale or conveyance of development rights by the TDR Bank pursuant to subparagraph (10)(c) below;

and the [*assessor*] shall adjust the valuations for purposes of the real property tax of the sending parcel and of the receiving parcel or parcels, if any, appropriately for the development rights extinguished or received.

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- (10) The local government may, by ordinance, establish a transfer of development rights bank, otherwise referred to as the “TDR Bank.” The TDR Bank may be operated by the [local planning agency] or by any other existing or new entity designated by the ordinance, including an agency of the local government, the [regional planning agency] or [state planning agency], or a non-profit organization.
- (a) The TDR Bank shall have the power to purchase development rights[, subject to the approval of the local legislative body].
 - (b) The TDR Bank shall have the power to recommend to the local legislative body properties where the local government should acquire development rights by condemnation.
- ◆ If the local government itself does not have the power under the state eminent domain enabling statute to condemn development rights or a conservation easement (which is the same thing), that statute **must** be amended to give the local government that power, so that it can then be delegated pursuant to this paragraph.
- (c) The TDR Bank shall have the power to sell or convey any development rights it may possess[, subject to the approval of the local legislative body].
 - (d) The TDR Bank may, for conservation or other purposes, hold indefinitely any development rights it possesses.
 - (e) The TDR Bank may receive donations of development rights from any person or organization, public or private[, subject to the approval of the local legislative body].
 - (f) The TDR Bank may be funded from:
 - 1. the [general *or other*] fund of the local government treasury;
 - 2. the proceeds of the sale of development rights by the TDR Bank; or
 - 3. grants or donations from any source.
- A separate account in the local government treasury shall be established, into which the aforementioned funding shall be paid and from which the TDR Bank may purchase or condemn development rights and pay its reasonable expenses.
- (11) Two or more local governments may enter into an implementation agreement, pursuant to Section [7-503], whereby transfer of development rights may occur between a sending parcel in one local government and a receiving parcel or parcels in another local government. All relevant provisions and terms in ordinances pursuant to this Section in all local governments that are parties to the agreement shall be substantially identical, and this may be provided by

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including with the agreement a common ordinance to be adopted by all parties to the agreement.

- (12) This Section, or any provision thereof, shall not invalidate any completed transfer of development rights pursuant to any earlier statute, ordinance, or regulation, if said transfer was valid at that time.

- ◆ Paragraph (12) is a “savings clause,” preserving the validity of earlier transfers of development rights, even if performed contrary to the requirements of this Section, as long as they were legally proper at the time.

Commentary: Conservation Easements; Purchase of Development Rights¹⁶²

A local government may prevent certain types or categories of development on private property through regulation. However, the Fifth and Fourteenth Amendments to the U.S. Constitution, and similar provisions in state constitutions, limit governments’ ability to preclude all development of property; with certain exceptions, the general rule is that government may not prohibit all reasonable use of one’s property unless it pays “just compensation.”¹⁶³ More commonly, local political conditions may be adverse to a regulatory solution even where the proposed regulation would not prohibit all reasonable uses of the land and is clearly not a taking. In these cases, with political or legal roadblocks to a regulatory approach, local governments with the resources to do so may prefer to “buy out” certain development rather than prohibit it.

The local government could purchase or condemn the parcel on which it wishes to bar development. But this results in the local government paying the full value of the parcel and owning it outright. As such, purchasing the property may not be appropriate when the government wants to prevent some or all further development yet wishes the property to continue in private ownership, as with historic and agricultural preservation. Enter purchase of development rights, or “PDR.” Purchasing just the development rights that the local government wants to prevent being used is a more narrowly focused instrument, and tends to be less expensive than purchasing the full (fee simple) title to the property.

¹⁶²See generally E. Thompson, Jr., “‘Hybrid’ Farmland Protection Programs: A New Paradigm for Growth Management?” *William & Mary Env’t L. & Pol. Review*, Vol. 23 (Fall 1999): 831; Thomas S. Barrett & Stefan Nagel, *Model Conservation Easement and Historic Preservation Easement, 1996* (Washington D.C.: Land Trust Alliance, 1996); Janet Diehl & Thomas S. Barrett, *The Conservation Easement Handbook: Managing Land Conservation and Historic Preservation Easement Programs* (Washington D.C.: Land Trust Alliance, 1988); Marilyn Meder-Montgomery, *Preservation Easements: A Legal Mechanism for Protecting Cultural Resources* (Denver: Colorado Historical Society, 1984).

¹⁶³U.S. Constitution, Amendment V; *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (1992).

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Purchasing development rights is not a general substitute for regulation. Though cheaper than outright purchase of land, it is still relatively expensive. And regulatory measures rarely run afoul of the takings clause. Instead, PDR is a supplement to regulation, a method of making local government regulation more palatable to the affected landowners when their reaction is a serious political consideration. Indeed, the purchase of development rights can be a needed cash inflow allowing landowners such as farmers and ranchers to maintain or even expand that use, therefore contributing to the maintenance of a viable agricultural economy in the area. As such, PDR has become another useful tool for controlling the uses of land. For example, as of March 2000, 19 states and 34 localities in those states were protecting nearly 820,000 acres of farmland with PDR.¹⁶⁴

PDR AND TAXES

The use of PDR provides tax benefits to the landowner who has conveyed away their development rights. These benefits come under both real property taxes and income and estate taxes.

Land is typically assessed according to the value it could receive on the open market, which includes the uses to which it can be put as well as the present use or uses. Therefore, farmland, historic property, or open space that may legally be developed is valued and taxed commensurate with the most intense legal development. Since the landowner is not engaging in this more intense use, and therefore does not have the revenue from it, but pays a real property tax as if he or she were, there is a strong incentive for the unprofitable or marginally profitable owner to develop the property or sell it to developers. PDR constitutes a concrete legal limitation on the use of the property that is grounds for reducing the assessed value of the property and thereby its property taxes.

Since a conservation easement decreases the monetary value of the land it affects, the capital gain that would otherwise incur tax liability upon the sale of the property can be reduced or even become a capital loss. The same reduction in valuation affects the estate tax where applicable. Furthermore, the donation of a conservation easement to local governments and certain non-profit organizations is deductible for federal income tax¹⁶⁵ and estate tax¹⁶⁶ purposes, the latter up to 40 percent of the value of the land with a maximum of \$500,000. Nine states expressly provide for income tax credits for donated conservation easements.¹⁶⁷

Altogether, the tax benefits may be significant enough for an owner who wishes to continue using the property in its present state to give a conservation easement, rather than sell one, solely

¹⁶⁴American Farmland Trust, <http://www.farmlandinfo.org/fic/tas/tafs-pacestate.html>

¹⁶⁵26 U.S.C. §170(h).

¹⁶⁶26 U.S.C. §2031(c).

¹⁶⁷Arizona: Ariz. Rev. Stat. §§ 43-1021, 43-1081.02, 43-1121, & 43-1180; California: Cal. Pub. Res. Code §§37000 *et seq.*, Cal. Rev. & Tax Code §§ 17039.1, 17053.30, 23036.1, & 23630; Colorado: Colo. Rev. Stat. §39-22-522; Connecticut: Conn. Gen'l Stat. §12-217dd; Delaware: Del. Code §§30-1801 *et seq.*; Maryland: Md. Tax Code §§10-218 & 10-722; North Carolina: N.C. Gen'l Stat. §§105-130.34 & 105-151.12; South Carolina: S.C. Code §§12-6-3515, 50-3-1110 *et seq.*, & 62-3-715; Virginia: Va. Code §§58.1-510 *et seq.*.

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in order to take advantage of the lower property taxes and income tax deduction. Or a marginally profitable landowner who is not averse to developing his or her property may find that the tax breaks exceed the gain from developing the land or holding it for development.

STATE STATUTES ON PDR

Several states have statutes expressly authorizing the purchase of development rights for purposes of preservation. The purposes for which states authorize PDR include the protection of open space and scenic views,¹⁶⁸ agricultural and forest preservation,¹⁶⁹ the protection of historic or cultural sites, or some combination of these.¹⁷⁰ Most of these statutes are bare authorizations to engage in the purchase of development rights for particular stated purposes, any detailed provisions in the statute being concerned with the funding and financial issues of PDR programs.

THE LEGAL BASICS OF EASEMENTS¹⁷¹

The legal tool by which a local government (and others) can purchase just the development rights it wishes, while leaving title in the owner's private hands, is the **conservation easement**. An easement is a non-possessory right of a person or entity over the real property of another. It is non-possessory because, unlike a lease, it does not allow the person or entity to occupy the premises. Instead, it allows the person or entity to perform some specific action on the property which it otherwise would not be able to do (positive easements) or requires the owner of the property to refrain from some activity that he or she would otherwise be able to do (negative easements). Examples of positive easements include rights-of-way – the right to cross another's premises – and mineral rights, while negative easements include solar easements – prohibiting an owner from building a structure that would block sunlight from the neighboring property.

Though some easements may be created by law without the consent of the owner – for example, a lot or parcel with no direct access to a public thoroughfare will have a right of way across its neighbor by necessity – most easements are created by agreement. Easements can be structured so

¹⁶⁸Arizona: Ariz. Rev. Stat. §§9-464 *et seq.*; Colorado: Colo. Rev. Stat. §§31-25-201, 31-25-301 (authorizing PDR to preserve both open space and “vistas of scientific, historic, aesthetic, or other public interest”); Connecticut: Conn. Gen'l Stat. §7-131d; Iowa: Iowa Code §§457A.1 *et seq.*; Massachusetts: 1998 Mass. Acts ch. 293 (Cape Cod Open Space Land Acquisition Program); Missouri: Mo. Rev. Stat. §67.880; New Hampshire: N.H. Rev. Stat. §§79-C:1 *et seq.*; New Jersey: N.J. Stat. §§13:8A-1 *et seq.* (New Jersey Green Acres Land Acquisition); New York: N.Y. Envtl. Conserv. Law §§54-0301 *et seq.*; Pennsylvania: 32 Penn. Stat. §§5001 *et seq.*; Virginia: Va. Code §15.2-2403.

¹⁶⁹California: Cal. Gov't Code §§10230 *et seq.*; Michigan: Mich. Comp. Laws §§125.231 *et seq.*, 125.301 *et seq.*, and 125.593 *et seq.*; Rhode Island: R.I. Gen'l Laws §§42-85-5 *et seq.*; Wisconsin: Wis. Stat. §§91.01 *et seq.*

¹⁷⁰Indiana: Ind. Code §§14-12-2-1 *et seq.* (Indiana Heritage Trust Program); Ohio: Ohio Rev. Code §§5301.67 *et seq.* (agricultural and open space preservation).

¹⁷¹See generally Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* (Colorado Springs, CO: Shepard's/McGraw-Hill, Inc., 1990).

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that the duty is owed to a particular person or entity personally (easements in gross) or to whomever owns a particular property (an easement appurtenant). The property subject to these duties is referred to as the “burdened” or “servient” estate, while the party or property to which the duty is owed is the “benefitted” or “dominant” estate or party.

What differentiates an easement from an ordinary contract is that the easement binds future owners of the servient estate, even though they were not parties to the original agreement, so long as the document creating the easement is properly recorded or the owner is otherwise given notice of the existence of the easement. Similarly, the benefit of an easement appurtenant runs automatically to future owners of the dominant property.

CONSERVATION EASEMENTS

A conservation easement is an example of a negative easement, whereby the owner of the burdened estate is bound not to engage in development activities that he or she would otherwise have a right to perform. A conservation easement can prohibit all future development, or it can specify particular development activities that are prohibited. For example, a scenic easement may prohibit the construction of buildings and structures in certain locations or above a particular height that would obstruct the view protected by the easement. It should be noted that a conservation easement may include positive duties – maintaining a building in good repair, or clearing tree stumps from a field, for example – as well as negative ones.

Since easements are a creation of the common law (actually, equity), conservation easements do not, strictly speaking, require an enabling statute. However, there are several characteristics of common-law easements that are adverse to useful and effective conservation easements. Traditionally, easements are not created or enforceable unless there is “privity of contract” and “privity of estate” between the parties.¹⁷² For an easement to exist, the obligations or restrictions thereunder must be considered to “touch and concern the land,” which means “there must be some fundamental link between the promise and the burdened and benefitted land.”¹⁷³ Beyond the general vagueness of “touch and concern,” another complication is that, for an easement appurtenant, “touch and concern” must be satisfied for both the servient and the dominant estate. Many courts look suspiciously at easements that require the owner of the servient estate to actively perform some duty or activity, especially where the easement is in gross. In many states, easements in gross terminate with the original beneficiary of the easement and cannot be assigned to another.¹⁷⁴ Depending on

¹⁷²It is not necessary to explain privity of estate or contract in detail, except to state that they make enforcement of easements in gross by or against successors to the original parties difficult and uncertain, and are considered by many attorneys and lawmakers to be archaic requirements.

¹⁷³Korngold §9.10, p. 307-309.

¹⁷⁴Korngold, §5.08, p. 198.

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how the easement is created, in some states it may be enforceable only by injunction or with monetary damages but not both.¹⁷⁵

Though the courts have modified or abolished these rules in many states, others have not, and thus there is uncertainty about the formation, enforceability, and assignability of conservation easements. To remove this uncertainty and subject conservation easements to only those reasonable requirements that are necessary to protect the parties and the public, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Conservation Easement Act.¹⁷⁶ Several states¹⁷⁷ have adopted conservation easement acts based on the Uniform Act. Under the Uniform Act and the state statutes adopting it, conservation easements are perpetual unless expressly stated otherwise. Conservation easements may be created without privity of contract or estate, where the agreement does not “touch and concern” the land, and where an easement in gross imposes a positive duty. The assignment of the benefit under a conservation easement is permitted even where it is an easement in gross. Conservation easements may be enforced in either law or equity, and both monetary damages and injunctive relief are available. In short, these statutes greatly reduce the potential that a conservation easement may be rendered unenforceable not because it was not the product of reasonable, voluntary agreement but because of archaic case law not related to the protection of the parties or the public.

Many of the state conservation easement acts (though not the Uniform Act) also expressly state that valuation of the servient estate for real property tax purposes must be adjusted to account for the development rights that have been extinguished by the conservation easement. Also, the Uniform Act and the adopting statutes authorize all “governmental units” to enter into conservation easements for purposes of preserving open space, natural areas, wildlife and plant habitat, agricultural and forest lands, and properties of historic, archeological, cultural, or aesthetic significance. Therefore, they are effectively general authorization for local governments to create and operate PDR programs for all the typical purposes of such programs.

THE MODEL STATUTES

¹⁷⁵Korngold, §8.01, p. 249-250.

¹⁷⁶National Conference of Commissioners on Uniform State Laws, “Uniform Conservation Easement Act,” in *Land Saving Action: A Written Symposium by 29 Experts on Private Land Conservation in the 1980s*, Russell L. Brenneman and Sarah M. Bates, eds., pp. 111-116 (Covelo, CA: Island Press, 1984).

¹⁷⁷Arkansas: Ark. Code §§15-20-401 *et seq.*; Delaware: Del. Code §§11-6901 *et seq.*; Florida: Fla. Stat. §704.06; Georgia: Ga. Code §§44-10-1 *et seq.*; Hawaii: Haw. Rev. Stat. §§ 198-1 *et seq.*; Idaho: Idaho Code §§55-2101 *et seq.*; Illinois: 765 Ill. Comp. Stat. §§120/0.01 *et seq.*; Kansas: Kan. Stat. §§58-3810 *et seq.*; Maine: 33 Me. Rev. Stat. §§476 *et seq.*; Minnesota: Minn. Stat. §§84C.01 *et seq.*; Mississippi: Miss. Code §§89-19-1 *et seq.*; Nebraska: Neb. Rev. Stat. §§76-2,111 *et seq.*; Nevada: Nev. Rev. Stat. §§111.390 *et seq.*; North Carolina: N.C. Gen'l Stat. §§121-34 *et seq.*; Oregon: Or. Rev. Stat. §§271.710 *et seq.*; South Carolina: S.C. Code §§27-8-10 *et seq.*; South Dakota: S.D. Codified Laws §§1-19B-56 *et seq.*; Texas: Tex. Nat. Res. Code §§183.001 *et seq.*; Utah: Utah Code §§57-18-1 *et seq.*; Vermont: 10 Vt. Stat. §§821 *et seq.*; Washington: Wash. Rev. Code §§64.04.130 and 84.34.200 *et seq.*

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Before local governments can be authorized to purchase development rights through conservation easements, there must be legal authorization for conservation easements themselves. Therefore, included as Section 9-402.1 is a model conservation easements Section modeled upon the Uniform Conservation Easement Act. Since this Section deals with conservation easements by both governmental and private entities, it is appropriately placed in any codification with other statutes related to real property in general and easements specifically. Where a state has adopted the Uniform Conservation Easement Act or a similar statute, there is no need to adopt Section 9-402.1.

The model statute authorizing purchase of development rights by local governments, Section 9-402, is based on Section 9-401, which authorizes transfer of development rights (TDR). This is because PDR and TDR serve similar purposes of preserving desirable land or preventing undesirable development without resorting to regulation. Both provisions require that the local government have a local comprehensive plan and appropriate plan elements (critical and sensitive areas, natural hazards, agricultural and forest preservation, and/or historic preservation) in place before adopting a PDR or TDR program, and that the program be consistent with that plan and elements. Both require the owner of the parcel where development rights are to be extinguished to execute a conservation easement, that the easement must be submitted to the local government for approval, and that such approval can be denied only on limited and specified bases. Both prohibit the recording of an unapproved conservation easement. And both Sections have savings clauses for any TDR and PDR that occurred under previous statutes or ordinances.

The PDR statute also authorizes the local government to accept voluntary donations of development rights. Except that no price is paid for the development rights, such transactions are structured identically to purchases of development rights, with a conservation easement executed, approved by the local government, and recorded. As stated above, voluntary donations of development rights may occur when the landowner does not intend to exercise the development rights for some reason of personal preference and conveys the development rights in order to receive the property tax benefits of a lower land valuation, or when it is more profitable for a land owner to receive the tax benefits than to exercise or hold the development rights.

9-402 Purchase of Development Rights

- (1) A local government may adopt local land development regulations and amendments that include provisions for the purchase of development rights, in the manner prescribed in this Section.
- (2) The purposes of this Section are to:
 - (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
 - (b) conserve agriculture and forestry uses of land;

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- (c) protect lands and structures of aesthetic, architectural, and historic significance;
 - (d) [*other purposes*];
 - (e) ensure that the owners of land that is so preserved, conserved, or protected may be reasonably compensated for restrictions on otherwise permissible uses of their property rights while retaining ownership of the land and the right to commence and continue uses not so restricted; and
 - (f) provide a procedure for local governments to engage in such preservation, conservation, and/or protection through conservation easements.
- (3) For the purposes of this Section, “**Purchase of Development Rights**” means:
- (a) the purchase of development rights from an owner of land by a local government; and/or
 - (b) the voluntary donation of development rights by an owner of land to a local government.
- (4) The legislative body of a local government may adopt a purchase of development rights program only by ordinance, in the manner for land development regulations pursuant to Section [8-103], and an ordinance pursuant to this Section shall:
- (a) be adopted by the legislative body only after it has adopted:
 - 1. a local comprehensive plan; and
 - 2. for a purchase of development rights program concerning critical and sensitive areas, a critical and sensitive areas element pursuant to Section [7-209];
 - 3. for a purchase of development rights program concerning natural hazards, a natural hazards element pursuant to Section [7-210];
 - 4. for a purchase of development rights program concerning agriculture, forest, or scenic preservation, an agriculture, forest, and scenic preservation element pursuant to Section [7-212]; and/or
 - 5. for a purchase of development rights program concerning historic preservation, a historic preservation element pursuant to Section [7-215];
 - (b) include a citation to enabling authority to adopt and amend the purchase of development rights ordinance;

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- (c) include a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;
 - (d) include a statement of consistency with the local comprehensive plan and with the applicable elements thereof, as listed in subparagraph (4)(a) above, that is based on findings made pursuant to Section [8-104];
 - (e) describe the development rights that may be purchased in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
 - (f) require the local government to conduct an appraisal of the value of the parcel from which the local government is to purchase development rights and of the value of the development rights to be purchased; and
 - (g) require that the local government and any owner of a parcel from which the local government is to purchase development rights enter into a written purchase of development rights agreement in compliance with paragraphs (5) and (6) below.
- (5) A purchase of development rights agreement shall, at a minimum:
- (a) state the address and legal description of the premises;
 - (b) state the name of all record owners of the premises;
 - (c) describe the development rights to be purchased in reasonable detail, preferably in quantifiable terms such as area, building coverage ratio, density, floor area ratio, height, or other forms of measurement;
 - (d) state the price that the local government shall pay in consideration of the purchase of development rights, including any agreed terms under which payment is to be made, unless the development rights are being voluntarily donated by the owners of the parcel;
 - (e) require that the owners of the parcel execute a deed or instrument creating a conservation easement, releasing development rights as agreed and describing the released development rights in reasonable detail, preferably in quantifiable terms, with the parcel from which development rights are being purchased as the servient estate and the local government as the holder of the easement;
 - (f) provide that the owner of the parcel shall submit the conservation easement to the [local planning agency] for its approval before the local government is obligated to pay the stated price;

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- (g) require that the local government approve the conservation easement, indicate its approval on the instrument creating the easement, and pay the agreed price within [28] days of submission of the instrument unless the development rights released by the conservation easement vary significantly from the development rights that the owner of the servient estate agreed to release pursuant to the purchase of development rights or there is some other significant error in the instrument; and
 - (h) require the owners of the servient estate to record any approved conservation easement with the county [*recorder of deeds*] within [28] days of payment, or of approval if the development rights are being voluntarily donated.
- (6) A purchase of development rights agreement may require that the conservation easement pursuant to paragraph (5)(e) above name one or more non-profit organizations as additional holders of the easement.
- ◆ There are non-profit organizations, such as land trusts, that have as their primary mission the protection of land and the preservation of the important resources thereon. The inclusion of such organizations as easement holders can be a valuable addition to a PDR program.
- (7) Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.
 - (8) This Section, or any provision thereof, shall not invalidate any completed purchase or gift of development rights pursuant to any earlier statute, ordinance, or regulation, if said transfer was valid at that time.

9-402.1 Conservation Easements

- (1) Conservation easements may be created and enforced according to the provisions of this Section.
- (2) The purposes of this Section and of a conservation easement are to:
 - (a) preserve open space, scenic views, critical and sensitive areas, and natural hazard areas;
 - (b) conserve agriculture and forestry uses of land;
 - (c) protect lands and structures of aesthetic, architectural, and historic significance;
 - (d) preserve affordable housing; and

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- ◆ A conservation easement may be used to preserve affordable housing by prohibiting the conversion of affordable housing to market-rate housing or to another land use entirely.
 - (e) ensure that the owners of land that is so preserved, conserved, or protected may retain ownership of the land and the right to commence and continue uses not so restricted.
- (3) As used in this Section, and elsewhere in this Act where “conservation easements” are referred to:
 - (a) “**Conservation Easement**” means a non-possessory interest of a holder in real property imposing limitations or affirmative obligations upon the owners of that property for the purposes enumerated in paragraph (2) of this Section. Such limitations or obligations may include, but are not limited to, one or more of the following prohibitions:
 1. constructing or placing buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground;
 2. dumping or placing soil or other substance or material as landfill or dumping or placing trash, waste, or unsightly or offensive materials;
 3. removing or destroying trees, shrubs, or other vegetation;
 4. excavating, dredging, or removing loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface;
 5. surface use except for purposes that permit the land or water area to remain predominantly in its natural condition;
 6. activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation;
 7. acts or uses detrimental to such retention of land or water areas; and
 8. acts or uses detrimental to the preservation of sites or properties of historical, architectural, archaeological, or cultural significance.
 - (b) “**Entities Eligible to Be a Holder**” means:
 1. any governmental unit authorized to own real property and/or interests therein;
 2. any governmental unit participating in a transfer of development rights program under Section [9-401], a purchase of development rights program

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under Section [9-402], and/or a mitigation banking program under Section [9-403];

- ◆ Sections 9-401(12) and 9-402(8) are savings clauses for existing valid transfers, purchases, and gifts of development rights. Therefore, existing TDRs and PDRs are effectively “under” the above Sections.

3. any charitable or not-for-profit organization, corporation, or trust whose purposes include or encompass protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving sites or properties of historical, architectural, archaeological, or cultural significance; and
 4. any person or entity participating in a mitigation banking program pursuant to Section [9-403].
- (c) “**Holder**” means any entity, eligible to be a holder, that is:
1. a party to a conservation easement other than an owner of the servient estate or an entity having a third-party right of enforcement;
 2. a successor in interest, by assignment, to such a party; or
 3. an owner of a dominant estate, if any, under a conservation easement.
- (d) “**Third-Party Right of Enforcement**” means a right provided in a conservation easement to enforce any of its terms granted to an entity that is eligible to be a holder but is not a holder of the conservation easement.
- (e) “**Servient Estate**” means the property subject to limitations or obligations pursuant to a conservation easement.
- (4) (a) Except as otherwise provided herein, a conservation easement may be created, conveyed, recorded, or assigned in the same manner as other easements.
- (b) A conservation easement may be modified, released, or terminated only by order of the [*name of court*] upon findings, supported by evidence, that:
1. a change or changes in circumstance since the creation of the conservation easement has rendered the particular purpose or purposes of the conservation easement impracticable; and
 2. the modification, release, or termination is consistent with a specific goal, policy, or provision in the local comprehensive plan.

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A mere change in value of the servient estate shall not suffice as grounds for a modification, release, or termination. The court shall give preference to modification, adhering to the doctrine of “cy pres,” and shall approve release or termination only if the conservation easement can no longer be used to accomplish any conservation purpose. The court may require the payment of appropriate damages and/or restitution for a release or termination.

- ◆ This standard (with the exception of comprehensive plan consistency) is adapted from the American Law Institute’s *Restatement of the Law 3rd, Property (Servitudes)*, Section 7.11 (2000). The Restatements are summaries of the existing case law on various legal topics produced by a nationwide committee of attorneys and legal scholars. “Cy pres” is French for “as close as possible” and is the guiding principle when legal documents must be amended by the courts because the parties’ original intention can no longer be implemented through the document as originally written.
 - (c) The provisions of this Section shall not be construed to imply that any restriction, easement, covenant, or condition that does not have the benefit of this Section shall, on account of any provision hereof, be void, invalid, or unenforceable.
- ◆ These provisions clarify that the existing case law on easements has not been eliminated by this Section. Easements that do not qualify for this Section are not rendered void by that fact, but are valid or invalid based on their status under existing law.
 - (5) Conservation easements:
 - (a) may be created or stated in the form of a restriction, easement, covenant, or condition in any deed, will, or other instrument executed by or on behalf of the owner of the servient estate;
 - (b) may [not] be created by condemnation or by other exercise of the power of eminent domain;
- ◆ The purpose of this paragraph is to encourage adopting legislatures to squarely address the issue of conservation easements by eminent domain. If an adopting state legislature desires that conservation easements be created solely through voluntary transactions, then the “not” in the above paragraph should be included. If a legislature instead wishes to provide expressly that conservation easements may be obtained by eminent domain, the “not” should be deleted.
 - (c) shall run with the land, shall be of unlimited duration unless otherwise provided in the conservation easement, and shall be binding on all subsequent owners of the servient estate;
- ◆ This is the basic distinction between an easement and any other contractual arrangement.

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- (d) shall not be void, invalid, or unenforceable on account of:
 - 1. lack of privity of estate or contract;
 - 2. lack of a dominant estate or of benefit to particular land;
 - 3. the benefit being assignable;
 - 4. the imposition of any affirmative obligations or negative burdens on a holder, the servient estate, or any owner of the servient estate;
 - 5. being of a character or containing any provisions not recognized traditionally in covenants or easements, either at common law or in equity; or
 - 6. the benefit not touching or concerning real property.
- (e) shall be assignable to entities eligible to be a holder regardless of the lack of benefit to a dominant estate, unless otherwise provided in the conservation easement; and
- (f) may be released by the holder of the easement to the owner of the servient estate even though the owner of the servient estate may not be eligible to be a holder.
- (6) All conservation easements shall be recorded with the county [*recorder of deeds*] in the same manner as any other instrument affecting title to real property, with the exception of conservation easements, or instruments purporting to be conservation easements, that are required by Sections [9-401], [9-402], or [9-403] to be marked with the approval of the local government but are not so marked.
- (7) The owner of the servient estate shall submit a copy of a recorded conservation easement to the county [*property tax assessor*] within [30] days of the recordation, and the [*assessor*] shall adjust the valuations for purposes of the real property tax of the servient estate appropriately for the development rights extinguished by the conservation easement.
- (8) A conservation easement may be enforced by a civil action:
 - (a) commenced by any holder of the easement or entity having a third-party right of enforcement; and
 - (b) based in equity, law, or both, with any appropriate remedies in law and equity available, including both injunctive relief and monetary damages.

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- (9) A civil action affecting a conservation easement may be commenced by an owner of an interest in the servient estate, a holder of the conservation easement, an entity having a third-party right of enforcement, or a person so authorized by another law.
 - (10) A holder of a conservation easement may enter upon the servient estate in a reasonable manner and at reasonable times to assure compliance with the conservation easement.
 - (11) The ownership or attempted enforcement of rights held by the holder of a conservation easement does not by itself subject the holder to any liability for any damage or injury that may be suffered by any person on the servient estate or as a result of the condition of the servient estate.
- ◆ This provision insulates holders of conservation easements from being named in civil actions arising from the premises of the servient estate solely because of their non-possessory interest in that estate as an easement holder.

Commentary: Mitigation¹⁷⁸

When a developer proposes to develop property that includes critical and sensitive areas, such as wetlands, there are basically two possible methods. The first is to refrain from developing the portions of the property that constitute critical and sensitive areas. The second, which is the focus of this Section, is mitigation. As used in this context, mitigation is substitution, where the critical and sensitive areas to be developed are replaced or compensated for by the creation of new critical and sensitive areas. Mitigation can involve either creating critical and sensitive areas from land that was never critical and sensitive, or restoring land that was once a critical and sensitive area to that former condition. Also, mitigation can involve the developer creating or restoring such areas on his or her own land or, alternatively, obtaining land (or rights to land) that has been converted to a critical and sensitive area by another person or organization.

¹⁷⁸See generally Mark S. Dennison, *Wetland Mitigation: Mitigation Banking and Other Strategies for Development and Compliance* (Rockville, MD: Government Institutes, Inc., 1997); Megan Lewis, "Swamps for Sale: Wetlands Mitigation Banking," *Environment and Development*, Mar./Apr. 1996 (Chicago: APA Press); "Banking on Wetlands," *Environmental Manager*, February 1996 (John Wiley & Sons); Brian Blaesser, "New Federal Wetlands Policy: The Landowner's Perspective," *Land Use Law & Zoning Digest* Vol. 46, No. 1: 3,6-8 (January 1994); Robert D. Sokolove & Pamela D. Huang, "Privatization of Wetland Mitigation Banking," *Natural Resources & Environment*, Vol. 7, No. 1: 36-38, 68-69 (Summer 1992) (Chicago: American Bar Association, Section of Natural Resources, Energy, and Environmental Law); Jon A. Kusler & Mary E. Kentula, eds., *Wetland Creation and Restoration: The Status of the Science* (Washington D.C.: Island Press, 1990).

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The key issue in mitigation is equivalency: whether the created critical and sensitive area is roughly equal in size and quality to the area that is to be developed. The goal of mitigation is the preservation of critical and sensitive areas; if a developer could legally build on 100 acres of high-quality wetland by creating 100 acres of lower-quality wetland, then there would be a net loss in wetland habitat. Since such areas must be defined in the first place, these definitions are the clear starting place for creating standards for comparing created and destroyed critical and sensitive areas. But merely providing substitute land that meets the definition of a critical and sensitive area is not enough: 100 acres of low-quality wetland is still wetland according to the legal definition, but is not equivalent to 100 acres of high-quality wetland. Therefore, more detailed standards and criteria for comparing one critical and sensitive area to another are necessary.

FEDERAL WETLANDS MITIGATION LAW

The development and mitigation of wetlands is already regulated by federal statutes and regulations. The primary law regulating wetlands and their development is the federal Clean Water Act.¹⁷⁹ Any dredging or filling of wetlands, with specific exceptions, requires a permit pursuant to Section 404 of the Act.¹⁸⁰ This permit is issued by the U.S. Army Corps of Engineers (the “Corps”) under its own procedures¹⁸¹ but pursuant to substantive regulations from the U.S. Environmental Protection Agency (“EPA”)¹⁸² and to EPA veto. In reviewing permit applications, the Corps must also solicit and consider, but is not generally bound by, recommendations from the U.S. Fish and Wildlife Service, the National Marine Fishery Service, and similar state and local agencies.¹⁸³

Under this federal permitting process, an applicant seeking to engage in mitigation must first demonstrate that there is no “practicable alternative” to granting the permit “which would have less adverse impact.”¹⁸⁴ If this can be shown, then the applicant must prove that all potential negative impacts to the wetlands from the proposed permit have been minimized as much as possible.¹⁸⁵ Only if this is also shown can the applicant then engage in development of the wetlands and receive credit for created wetlands. There is a requirement that the created wetlands be in the same watershed as

¹⁷⁹Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* (1998).

¹⁸⁰33 U.S.C. §1344.

¹⁸¹33 C.F.R. Parts 320, 323, 325.

¹⁸²Clean Water Act Section 404(b)(1) Guidelines, 40 C.F.R. Part 230 (1998).

¹⁸³33 C.F.R. §§320.4, 325.

¹⁸⁴40 C.F.R. §230.10(a).

¹⁸⁵40 C.F.R. §230.70.

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the wetlands to be developed and a strong preference for locating replacement wetlands on the same site as the wetlands they are replacing.¹⁸⁶

STATE MITIGATION LAW

Nearly half the states have their own statutes requiring a permit for development in wetlands areas. Of these, three states, **Michigan**, **New Jersey**, and **Oregon** have been officially or effectively delegated the responsibility of issuing permits under Clean Water Act Section 404, and therefore, in these states, there is no need to obtain separate federal and state wetlands development permits.¹⁸⁷

Eight states have wetlands statutes expressly authorizing mitigation banking. **California**¹⁸⁸ authorizes mitigation banks for wetlands in the Sacramento-San Joaquin Valley Region, requiring the state Department of Fish and Game to enter into a memorandum of understanding with the relevant federal agencies on wetlands mitigation (the Corps, EPA, Fish and Wildlife, Marine Fisheries, etc.) and adopt mitigation regulations in cooperation with those agencies.

The **Florida** wetlands statute¹⁸⁹ regulates mitigation as a condition of wetlands permit approval for both private and public projects. It requires the submission of a mitigation plan to the state Department of Environmental Protection and the relevant water management district, and the criteria for evaluating such a plan are similar to the federal standards for wetlands mitigation. Florida statute also expressly provides funding and a review procedure for mitigation of wetlands destroyed in the construction of the Central Florida Beltway, a state project connecting several highways into a continuous system.¹⁹⁰

Louisiana¹⁹¹ requires mitigation as a condition for all permits to develop coastal wetlands.¹⁹² The Department of Natural Resources is generally authorized to adopt regulations establishing mitigation criteria, including criteria for granting credits and geographical limitations on where credits may be used. However, the statute also prohibits the Department from requiring mitigation

¹⁸⁶Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605, 58611 (Nov. 28, 1995); Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

¹⁸⁷Dennison at 91-92. Oregon has not officially been delegated to enforce Section 404 and regulations, but since the Corps granted a five-year permit to the state for wetland restoration and enhancement, the Corps has effectively yielded the wetlands permitting field in Oregon to the state.

¹⁸⁸Cal. Fish & Game Code §§1775 *et seq.* (1998).

¹⁸⁹Fla. Stat. §§373.403 *et seq.* (1998).

¹⁹⁰Fla. Stat. §338.250.

¹⁹¹La. Rev. Stat. §§49:214.21 *et seq.* (1998).

¹⁹²La. Rev. Stat. §49:213.41.

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from projects “which the secretary [of the Department] determines is primarily designed...to provide a net gain in ecological values” and authorizes the secretary to require either on-site or off-site mitigation despite any contrary provisions in department regulations if he or she “determines that the proposed mitigation is acceptable and sufficient.”

Louisiana also creates a wetlands conservation and restoration program,¹⁹³ under which a wetlands conservation and restoration plan¹⁹⁴ is prepared and implemented by a Wetlands Conservation and Restoration Task Force consisting of the secretaries of the Departments of Natural Resources, Wildlife & Fisheries, Environmental Quality, and Transportation & Development.¹⁹⁵ The program is financed by the state Wetlands Conservation and Restoration Fund, which receives a set portion of the state’s mineral revenues.¹⁹⁶

Maryland¹⁹⁷ requires that there be “no practicable alternative” to developing a wetland before granting a wetlands permit and that “all necessary steps [shall be taken] to first avoid significant impairment and then minimize losses.”¹⁹⁸ After that point is reached, mitigation is required, under standards and procedures adopted and implemented by the state Department of the Environment.¹⁹⁹ The Department also creates and operates mitigation sites financed, through the Nontidal Wetland Compensation Fund, from mitigation fees paid by wetland owners for whom wetland creation or restoration were “not feasible alternatives.”²⁰⁰ Agricultural activities (except for certain specified agricultural activities not required to obtain a wetlands permit) are expressly required to formulate a plan for mitigating any approved wetland development within three years, with deferral of mitigation if the state Department of Agriculture determines in writing that the farmer will otherwise undergo economic hardship.²⁰¹

Maryland also has a Forest Conservation Act²⁰² that requires mitigation of developments in forest areas. Local governments must adopt a forest conservation program, and every proposed

¹⁹³La. Rev. Stat. §§49:213.1 *et seq.*

¹⁹⁴La. Rev. Stat. §49:213.6.

¹⁹⁵La. Rev. Stat. §49:213.5.

¹⁹⁶La. Rev. Stat. §49:213.7.

¹⁹⁷Md. Envir. Code §§5-901 *et seq.* (1999).

¹⁹⁸Md. Envir. Code §§5-907(b), -909(a).

¹⁹⁹Md. Envir. Code §§5-909(b), -910.

²⁰⁰Md. Envir. Code §5-909(c).

²⁰¹Md. Envir. Code §5-905.

²⁰²Md. Nat. Res. Code §§5-1601 *et seq.* (1999).

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subdivision above a specified area is subject to that program. The developer of the subdivision must submit an acceptable forest conservation plan for the property before any subdivision plat approval. The Act provides specific criteria for quantity and quality acceptable reforestation to offset deforestation due to development. Offsite forest mitigation banking is authorized, and if mitigation cannot be accomplished either onsite or offsite, the developer must contribute to a Forest Conservation Fund in proportion to the acreage of required replacement forest. The developer must post a performance bond to ensure adherence to the forest conservation plan, and the owner of the premises must grant a conservation easement to the local government to guarantee the continued existence of the created forest.

Minnesota²⁰³ creates a wetlands regulatory permitting program that “may not be more restrictive than the program under Section 404.”²⁰⁴ Wetlands cannot be drained or filled unless an equal amount of wetlands “of at least equal public value”²⁰⁵ are created to replace them pursuant to a wetland value replacement plan approved by the local government under rules created by the state Board of Water and Soil Resources.²⁰⁶

New Jersey²⁰⁷ requires mitigation as a condition to the approval of any freshwater wetlands permit.²⁰⁸ If wetlands “of equal ecological value to those which are being lost” cannot be created on-site, mitigation credits may be purchased from the state’s Wetlands Mitigation Bank. The bank is operated by a Wetlands Mitigation Council consisting of the Commissioner of Environmental Protection and six members appointed by the governor with the consent of the state Senate.²⁰⁹

Oregon²¹⁰ expressly adopts in its statute two basic principles from the federal wetland mitigation regulations. First, mitigation banking off-site is permissible only when “all on-site mitigation methods have been examined and found to be impracticable or off-site mitigation is found to be environmentally preferable,” and, second, the created wetlands have to be in the same basin or subbasin for freshwater wetlands or “estuarine ecological system” for estuarine (saltwater) wetlands as the wetlands to be developed.²¹¹ It also creates a Wetlands Mitigation Bank Revolving Fund

²⁰³Minn. Stat. §§103G.001 *et seq.* (1998).

²⁰⁴Minn. Stat. §103G.127.

²⁰⁵Minn. Stat. §103G.222(a).

²⁰⁶Minn. Stat. §103G.2242.

²⁰⁷N.J. Stat. Ann. §13:9B-3 *et seq.* (1998).

²⁰⁸N.J. Stat. Ann. §13:9B-13.

²⁰⁹N.J. Stat. Ann. §§13:9B-14 and -15.

²¹⁰Or. Rev. Stat. §§196.600 *et seq.* (1998).

²¹¹Or. Rev. Stat. §196.620.

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Account, which is to finance the acquisition and operation of state wetland mitigation banks and is to be financed by the sale of credits from those banks as well as from general state revenue.²¹²

The **Wyoming Wetlands Act**²¹³ authorizes the adoption of wetlands mitigation criteria and regulations of wetlands mitigation banking. Like the federal wetlands permitting process, the Wyoming system involves several agencies: the Department of Environmental Quality adopts the guidelines and regulations in cooperation with the state engineer, the water development commission, and the state Departments of Agriculture, Fish and Game, and Transportation.²¹⁴

PROVISIONS OF THE MODEL STATUTE

Section 9-403 below authorizes local governments to enact ordinances creating mitigation programs. Since the critical and sensitive areas element of the local comprehensive plan governs such areas, a local comprehensive plan with a critical and sensitive areas element must be in place before a mitigation ordinance may be adopted, and the ordinance must be consistent with that plan and element. When a development may or must provide mitigation measures pursuant to ordinance, then the provision of at least equivalent mitigation measures must either be a prerequisite to the issuance of a development permit or be included as a condition to the development permit. Mitigation measures may be prepared by the developer directly, the developer may purchase land that consists of created critical and sensitive areas, or the developer may receive credit for such created land while it remains in the ownership or responsibility of another. This last option may be exercised by the developer obtaining a conservation easement over the created area, so that it cannot be developed, if the easement is enforceable by the local government and the owner of the created land is able to maintain it as such.

As noted, the key issue in mitigation is evaluating the quality of the existing critical and sensitive area that is to be developed and of the area to be created. Consequently, mitigation standards are necessary. They must be consistent with the existing federal and state statutes and regulations of critical and sensitive areas, since these provisions govern in any conflict. In the area of wetlands, the federal role is so prominent that the model provides that applicable federal regulations on mitigation banking govern directly. For other critical and sensitive areas, the model provides two alternatives as to the responsibility for preparing and adopting the mitigation standards. The first involves the joint preparation of the standards by the state planning agency and environmental protection agency, after public hearing and comments from the local governments. This alternative includes the standard Growing SmartSM provision requiring review of the standards at least every five years. The other alternative requires the local government to include mitigation standards in any mitigation ordinance.

²¹²Or. Rev. Stat. §§196.640-.655.

²¹³Wyo. Stat. §§35-11-308 *et seq.* (1998).

²¹⁴Wyo. Stat. §35-11-311.

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It must be noted that, while there are detailed criteria and procedure for reviewing wetlands mitigation banking proposals under federal law, this does not supplant, or preclude the need to develop, such procedures and criteria at the state and local government levels, since there are critical and sensitive areas other than wetlands that can equally benefit from mitigation.

9-403 Mitigation

- (1) A local government may adopt and amend a mitigation ordinance, in the manner for land development regulations pursuant to Section [8-103 *or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances*].
- (2) The purposes of this Section are to:
 - (a) preserve critical and sensitive areas;
 - (b) ensure that the owners of land that includes critical and sensitive areas may make reasonable use of their property by creating equivalent areas elsewhere to substitute or compensate for development upon critical and sensitive areas; and
 - (c) provide standards and procedures whereby the equivalency, in quantity and quality, of created critical and sensitive areas with critical and sensitive areas that are to be developed may be reliably determined.
- (3) As used in this Section:
 - (a) “**Creation**,” “**Created**,” and “**Creating**” include both the creation of critical and sensitive areas from land that was not previously critical and sensitive and the restoration as critical and sensitive areas of land that was previously but is not presently critical and sensitive.
 - (b) “**Federal Wetlands Mitigation Provisions**” mean the following, as amended:
 1. 33 U.S.C. §§1251 *et seq.*;
 2. 33 C.F.R. Parts 320-330;
 3. 40 C.F.R. Part 230;
 4. Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605 (Nov. 28, 1995);

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5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990);
6. Fish and Wildlife Service Mitigation Policy, 46 Fed. Reg. 7644 (Jan 23, 1981);
7. National Marine Fisheries Service Habitat Conservation Policy, 48 Fed. Reg. 53142 (1983);

and all other federal statutes, regulations, policies, and memoranda of agreement, as applicable, regarding mitigation as it relates to wetlands.

- (c) “**Mitigation**” means the substitution of critical and sensitive areas created from land that did not constitute critical and sensitive areas for critical and sensitive areas that are proposed to be subject to development and that, as a result of the development, will not constitute critical and sensitive areas.
 - (d) “**Mitigation Program**” means a requirement or authorization by a local government that the owner of a proposed development that includes or encompasses critical and sensitive areas engage in mitigation.
 - (e) “**Mitigation Measures**” mean the act of creating critical and sensitive areas, of purchasing or obtaining such land that has been created by another, or of reserving such land that has been created by another.
 - (f) “**Mitigation Standards**” mean the criteria by which the equivalence of created critical and sensitive areas with existing critical and sensitive areas is measured or determined. “Mitigation standards” include, but are not limited to, the definitions or criteria by which land is designated as a critical and sensitive area.
 - (g) “**Reserving**” means the procedure by which an owner who is to provide mitigation measures pursuant to a mitigation ordinance does so by obtaining a conservation easement over, but not title to, a critical and sensitive area created by another.
- (4) A mitigation program may be adopted by a local government only by a mitigation ordinance. A mitigation ordinance is a land development regulation, and shall be adopted by the legislative body only after it has adopted a local comprehensive plan that includes a critical and sensitive areas element pursuant to Section [7-209].
 - (5) When a local government has adopted a mitigation ordinance, all proposed development that includes or encompasses critical and sensitive areas, where the owner proposes to develop such areas, shall either:

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- ◆ This subparagraph makes it clear that mitigation is not required when critical and sensitive areas are not going to be developed; i.e., when the property will be developed but critical and sensitive areas will be left untouched. Therefore, this Section preserves the incentive to refrain from developing critical and sensitive areas in the first place rather than engage in the relatively expensive and risky mitigation process.
 - (a) be subject to a condition precedent to the issuance of any development permit that the owner must provide mitigation measures that are at least equivalent, in quality and quantity, to any critical and sensitive areas that are proposed to be developed. Any purported development permit issued when said condition precedent has not been satisfied is void, any provision of Section [8-501] to the contrary notwithstanding, or
 - (b) include as a condition to any development permit that the owner must provide mitigation measures that are at least equivalent, in quality and quantity, to any critical and sensitive areas that are proposed to be developed. Such a condition shall include a requirement that the owner provide a bond or other surety for the completion of such equivalent mitigation measures.
- (6) *Alternative A – State adoption of mitigation standards:*

The [state environmental protection agency] shall prepare and adopt mitigation standards.

 - (a) Mitigation standards shall be consistent with all applicable federal and state statutes and regulations regarding the critical and sensitive areas that are the subject of the mitigation standards, including, where applicable, federal wetlands mitigation provisions.
 - (b) Mitigation standards and amendments thereto shall be prepared in consultation with the [state planning agency], and the mitigation standards shall be void unless adopted by both the [state EPA] and the [state planning agency].
 - (c) Before adopting mitigation standards or amendments thereto, the [state EPA] shall send copies of the proposed standards or amendment to all relevant state agencies[, regional planning agencies] and local governments, which shall submit written comments thereon within [30] days of receiving the proposed standards or amendment.
 - (d) Before adopting mitigation standards or amendments thereto, the [state EPA] shall hold a public hearing thereon. The [state EPA] shall give notice by publication in newspapers having general circulation within the state [and may also give notice by publication on a computer-accessible information network or by other appropriate means, such notice being accompanied by a computer-accessible copy of the proposed standards or amendment,] at least [30] days before the public hearing. The form of the notice of the public hearing shall include:

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1. the date, time, and place of the hearing;
 2. a description of the substance of the proposed standards or amendment;
 3. the officer(s) or employee(s) of the [state EPA] from whom additional information may be obtained;
 4. the time and place where the proposed standards or amendment may be inspected by any interested person prior to the hearing; and
 5. the location where copies of the proposed standards or amendment may be obtained or purchased.
- (e) At the public hearing, the [state EPA] shall permit interested persons to present their views orally or in writing on the proposed mitigation standards or amendment, and the hearing may be continued from time to time.
- (f) After the public hearing and the receipt of all written comments, the [state EPA] may revise the proposed standards or amendment, giving appropriate consideration to all written and oral comments received.
- (g) Mitigation standards and amendments thereto shall be considered rules of the [state EPA] and [state planning agency] for purposes of Section [4-103] of this Act, and their preparation and adoption shall be governed by the [Administrative Procedure Act] except as otherwise provided in this Section.
- (h) Mitigation standards and amendments thereto shall be sent to all [regional planning agencies] and local governments within [30] days after adoption.
- (i) If a local government adopts mitigation standards that are inconsistent with those adopted by the [state EPA], then any purported mitigation ordinance of that local government is void.
- (j) The [state EPA] shall, at least once every [5] years, conduct a general review of the mitigation standards. The general review shall result in a written report that contains:
1. an analysis of changes in, or alternatives to, existing mitigation standards that would increase their effectiveness or reduce any identified adverse impacts; and/or
 2. an analysis of why such changes or alternatives are less effective or would result in more adverse effects than the existing mitigation standards.

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If the [state EPA] fails to adopt, in whole or with revisions, such a written report within five years of the adoption of the first mitigation standards pursuant to this Act or of the last adoption of a written report, the mitigation standards shall not enjoy a presumption of reasonableness, and the [state EPA] shall bear the burden of demonstrating such reasonableness.

Alternative B – Local government adoption of mitigation standards:

Local governments shall include mitigation standards in the mitigation ordinance.

- (a) Mitigation standards shall be consistent with all federal and state statutes and regulations regarding critical and sensitive areas, including, where applicable, federal wetlands mitigation provisions.
 - (b) Mitigation standards shall be prepared by the [local planning agency] in consultation with qualified environmental scientists or engineers, or from documents or model standards that were prepared in consultation with qualified environmental scientists or engineers.
- (7) A mitigation ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the mitigation ordinance;
 - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with paragraph (2) above;
 - (c) a statement of consistency with the local comprehensive plan and the critical and sensitive areas element thereof that is based on findings made pursuant to Section [8-104];
 - (d) a statement of consistency with any critical and sensitive areas ordinance adopted pursuant to Section [9-101];
 - (e) definitions, as appropriate, for such words or terms contained in the mitigation ordinance. Where this Act defines words or terms, the mitigation ordinance shall incorporate those definitions, either directly or by reference;
 - (f) a provision implementing the requirements of paragraph (5) above;
 - (g) a recitation of or citation to the mitigation standards;
 - (h) provisions and procedures implementing paragraph (8) below
 - (i) procedures for the review of proposed mitigation measures for compliance with the mitigation standards, such review constituting part of the unified development

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- permit review process pursuant to Section [10-201] *et seq.* of this Act and being consistent with paragraph (10) with regards to the mitigation of wetlands; and
- (j) procedures for the inspection and evaluation of mitigation measures for compliance with proposed mitigation measures approved upon review.
- (8) An owner may provide mitigation measures by reserving created critical and sensitive areas, where another person or entity retains ownership of such areas, if:
- (a) the owner of the proposed development obtains a conservation easement over the created areas;
 - (b) the conservation easement grants the local government the right to enforce the easement;
 - (c) the conservation easement is submitted to the local government for review;
 - (d) the local government finds that the owner of the created areas is:
 - 1. required pursuant to the conservation easement; and
 - 2. financially and otherwise capable,to maintain the created areas in a state at least equivalent to the critical and sensitive areas proposed to be developed;
 - (e) the created areas are at least equivalent to the areas proposed to be developed, and all other requirements of this Section and the mitigation ordinance are complied with;
 - (f) the local government approves the conservation easement per the above provisions and indicates its approval on the instrument creating the easement; and
 - (g) the conservation easement is recorded with the county [*recorder of deeds*] within [30] days of such approval.
- (9) Any instrument purporting to convey a conservation easement pursuant to this Section but that the local government has not indicated its approval on the instrument is void, and shall not be recorded or accepted by the county [*recorder of deeds*] for recording.
- (10) With regards to mitigation of wetlands, the [state planning agency and state EPA] shall make all reasonable efforts to enter into a memorandum of understanding with the United States Environmental Protection Agency, Army Corps of Engineers, Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration regarding mitigation review pursuant to federal wetlands mitigation provisions and the participation therein of local governments

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that have adopted mitigation ordinances regarding wetlands. To the extent feasible, the procedure pursuant to subparagraph (7)(i) of this Section shall be integrated with the review procedure pursuant to federal wetlands mitigation provisions.

Commentary: Land-Use Incentives²¹⁵

The rapid growth that many communities experienced throughout the 1990s has spawned interest in finding innovative planning, regulatory, and development approaches and techniques to managing growth and to meet community objectives such as providing affordable housing. Many new plans and land development regulations now subscribe to the principles of smart growth, which include using land resources more efficiently through compact building forms and infill development; mixing land uses, promoting a variety of housing choices, supporting walking, cycling, and transit as attractive alternatives to driving, improving the development review process and development standards so that developers are encouraged to apply the smart growth principles, and connecting infrastructure planning to development decisions to maximize use of existing facilities and ensure that infrastructure is in place to serve new development. Smart growth, in effecting a more rational use of existing developed land and buildings, effects the preservation of natural, scenic, and historic resources.

Incentive zoning is a technique that has received renewed attention as communities aim to inculcate smart growth principles into planning and development processes. Incentive zoning is a system by which specific incentives or bonuses are granted to a developer on condition that certain physical, social, or cultural benefits or amenities will be provided to the community. A bonus is typically provided in the form of added permissible density to a development project. This is done by increasing the allowable floor area of a project above what is permitted in the zoning ordinance or increasing the allowable number of dwelling units in a residential development. Additionally, setback, height, and bulk standards are often allowed to be modified to accommodate the added density or, in the case of affordable housing, to reduce development costs. Waivers of specific regulatory requirements or fees--such as parking standards or impact fees--are also used as an incentive for a developer to provide various amenities.

The common types of community benefits or amenities for which state and local governments have devised incentive programs are urban design, human services (which includes affordable housing), and transit access. Some programs--particularly those that include affordable housing as a bonusable amenity--allow developers may pay cash in lieu of building or supplying the amenity for which the incentive is being provided. Some states group all types of incentives--for urban design, affordable housing, transit--into an umbrella statute that authorizes local governments to use

²¹⁵This commentary is based on "Zoning Bonuses and Incentives" by Marya Morris, AICP, in *Modernizing State Planning Statutes: The Growing SmartSM Working Papers, Vol. 3*, Planning Advisory Service Report No. ____ (Chicago: American Planning Association, forthcoming, 2001).

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innovative land-use regulations. In several states--namely, California, New Jersey, Oregon, and Florida--the zoning and regulatory incentive statutes for affordable housing are part of a broader statewide housing program and thus are enacted separately.

HISTORICAL DEVELOPMENT OF ZONING BONUS SYSTEMS

Zoning incentive systems came into use in the late 1950s and 1960s. Cities were looking for ways to enjoin private developers in improving the appearance of the cities without spending public money. Planners were also looking for ways to lessen the rigidity of Euclidean zoning which, in its preoccupation with separating land uses, was resulting in sterile, often less than functional, central business districts and neighborhoods and creating difficulties in meeting social objectives such as affordable housing and day care. What began as an experimental technique to use zoning to improve community design, has mushroomed into a fairly common tool for meeting a range of planning objectives.

In 1957, as part of a comprehensive revision of its zoning ordinance, Chicago became the first city to enact a zoning bonus system. That system encourages developers of downtown office buildings to provide public plazas and arcades in exchange for additional density. Unlike other cities that instituted bonus programs to exact public benefits from developers, the impetus for the Chicago bonus system was to stimulate development of high-rise office buildings, too many of which, in the view of the late mayor Richard J. Daley, were being built in New York rather than Chicago. The City of Chicago's enthusiasm for offering bonuses created what is now thought of as an overly permissive system that has resulted in very large buildings with minimal public benefit at the street level.²¹⁶

Developers in downtown Chicago may increase the floor area ratio from a base of 16 to 30 if they provide plazas and arcades. A 15 percent as-of-right increase in floor area is provided for buildings that adjoin a public open space, which in Chicago includes parks, the Chicago River, and even Lake Michigan.²¹⁷ The City of Chicago planning staff undertook two comprehensive examinations of the program in 1987 and again in 1998 in attempt to persuade the city council to substantially revise the program to make it more effective in securing public amenities. Neither of those attempts were successful, but the report and staff recommendations provide an excellent cautionary tale of bonus programs for central cities in general. Some of the findings are presented below.

New York City began its zoning incentive program in 1961 and now has the most extensive system of any city. The city uses bonuses in two ways: first, they are used to provide street-level amenities in high-density residential and commercial districts, including plazas, arcades, and

²¹⁶Telephone interview with Tom Smith, Assistant Commissioner, Chicago Department of Planning and Development, September 16, 1999. Interview conducted by Marya Morris, AICP, Senior Research Associate, American Planning Association Research Department.

²¹⁷Judith Getzels and Martin Jaffe., *Zoning Bonuses in Central Cities*, Planning Advisory Service Report No. 401 (Chicago: American Planning Association, 1988), 5.

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shopping galleries. Second, bonuses are used to protect the neighborhood character of certain districts.

In residential and commercial districts developers receive either floor area bonuses or are allowed to reduce lot sizes in exchange for a plaza or arcade.²¹⁸ In lower-density residential districts, floor area bonuses are available in exchange for deep front and wide side yards. In most cases the bonuses are available as of right. Bonuses for buildings that contain community facilities (e.g., libraries and museums) and large residential developments are subject to a special permitting procedures--similar to a planned unit development review process--through which the developer and the city negotiate the amenities and bonuses to be provided. All residential projects that incorporate bonuses are subject to mandatory streetscape urban design guidelines.²¹⁹ Arcades, for example, must run the length of a block and cannot be terminated by a blank wall, although they can be interrupted by a pedestrian plaza.

Incentive zoning regulations are also applied in special districts in New York City, to help achieve certain planning objectives. These districts are areas deemed to have special character or specific development issues, such as theater districts, tourist areas, and mixed use shopping and residential districts. Additional regulations--including the zoning bonuses--are applied as overlay regulations over underlying zoning in these districts. The purpose of the Special Midtown District, for example, which was enacted in 1980 is to encourage intensives development in some subdistricts such as Times Square, to protect and preserve various Broadway theaters (many of which were being demolished and replaced with office towers), and to protect the overall character of the theater district. The same basic types of amenities are provided in special districts exchange for increased floor area, but the exact requirements and design guidelines are specific to each special districts and even further refined within subdistricts. Moreover, some of the special district also apply transfer of development rights to shift development and density from one part of the district to another.

STATE INCENTIVE ZONING STATUTES

The authority of local governments to institute an incentive and bonus program comes from state enabling legislation.²²⁰ At least 10 states have enacted legislation expressly enabling local governments to offer zoning bonuses and other incentives in exchange for certain public benefits. None of the statutes reviewed prescribe directly what types of amenities local governments may require or what types of bonuses they may offer.

Some state incentive statutes, including that of California, aim to achieve one specific public purpose, such as affordable housing. Many state statutes, including those of Florida, Maryland, and

²¹⁸New York City Zoning Resolution, §23-16 to -18 (1999).

²¹⁹Alan Weinstein, "Incentive Zoning," Chapter 8 in *Zoning and Land Use Controls*, Vol. 2, Eric Damian Kelly, gen. ed. (New York: Matthew Bender, 19094), §26-041, 8-30.

²²⁰Cal. Govt. Code §65915 (1999); Conn. Gen'l Stat. §8-2g(a) (1999); Fla. Stat. §163.3202(3) (1999); Md. Gen'l. Mun. Law §10603 (1999).

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Rhode Island include incentive zoning on a list of innovative techniques that local governments are enabled to include in their zoning ordinance. Other techniques include transfer of development rights, design review, and density controls. The New York statute has unique provisions that require local governments that implement incentive zoning to evaluate whether existing public facilities that will serve the additional density can adequately accommodate additional development and to also prepare an environmental impact assessment on the proposed amenities.

Citing a shortage of housing for low- and moderate-income families and ever-increasing housing costs brought on in part by local government permitting processes and land-use regulations, **California** enacted legislation in 1979²²¹ requiring local governments to provide density bonuses and other incentives and concessions to developers of affordable housing. Local governments are required to enact an implementing ordinance to facilitate the incentive process. The law also requires local governments to establish procedures to waive or modify “development and zoning standards which would otherwise inhibit the utilization of the density bonus on specific sites. These procedures shall include, but not be limited to, such items as minimum lot size, side yard setbacks, and placement of public works improvements.” The state department of housing and community development publishes a model density bonus ordinance that cities and counties in the state may adopt to carry out the requirements of the statute.²²²

The other incentives and concessions that local governments may provide include a reduction in setback and square footage requirements, a reduction in parking requirements, approval of mixed use zoning, and other regulatory incentives or concessions that a developer or the city may propose for which “identifiable cost reductions” can be shown. The bonuses are used less often for residential developments that will be sold because the statute requires that they remain affordable for 10 to 30 years. Such a requirement provides no opportunity for equity recapture on the part of first-time home buyers. Thus, says Linda Wheaton, a housing policy specialist with the State of California Department of Housing and Community Development, the need for housing developments that receive bonuses to remain affordable is not reconciled with overarching goals helping families build equity and financial stability through home ownership. In terms of concessions, Wheaton says the most common waiver offered by local governments and sought out by developers is the reduction in parking requirements.²²³

To implement the density bonuses, the statute enables local governments to require developers to enter into a development agreement. Such an agreement would stipulate the exact terms of the

²²¹Cal. Govt. Code §65915. For an evaluation of the California statute, see Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan, “Selling Zoning: Do Density Bonuses for Moderate-Cost Housing Work?” *Land Use Law & Zoning Digest* 42, no. 8 (August 1990): 3-9.

²²²*Model Density Bonus Ordinance* (Sacramento, Calif.: Department of Housing and Community Development, Division of Housing Policy Development, August 6, 1996).

²²³Telephone interview with Linda Wheaton, Housing Specialist, California. Department. of Housing and Community Development, October 12, 1999. Interview conducted by Marya Morris, AICP, Senior Research Associate, APA Research Department.

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bonuses the developer would receive and the incentives and concession made by the local government. Finally, the law directs courts to uphold the decision of a city or county to grant the density bonus if it finds that there evidence that the bonus will assist the local government in meeting its share of the regional housing needs or to implement its congestion management plan. For example the law enables local governments participating in a demonstration program to grant a density bonus of at least 25 percent of the maximum permitted residential density to developers of housing within one-half mile of a mass transit station.²²⁴ According to Linda Wheaton the latter provision is rarely used, most likely because of the lack of an associated funding source to build housing in these areas.

In addition to the inclusionary housing requirements described in the next section, California has transit-oriented development legislation that authorizes the use of density bonuses to increase development density near transit stations with the goals of creating mixed use neighborhoods with a range of housing and transportation choices and reducing both vehicle miles traveled and auto emissions. The Transit Village Development Planning Act of 1994 was linked to a demonstration program of the Department of Transportation²²⁵ to test the effectiveness of increasing densities of residential development in close proximity to mass transit to increase the benefit from public investment in mass transit.

The transit village act enables cities and counties to prepare a transit village plan that addresses the following characteristics:

- (a) A neighborhood centered around a transit station that is planned and designed so that residents, workers, shoppers, and others find it convenient and attractive to patronize transit.
- (b) A mix of housing types, including apartments, within not more than a quarter mile of the exterior boundary of the parcel on which the transit station is located.
- (c) Other land uses, including a retail district oriented to the transit station and civic uses, including day care centers and libraries.
- (d) Pedestrian and bicycle access to the transit station, with attractively designed and landscaped pathways.
- (e) A rail transit system that should encourage and facilitate intermodal service, and access by modes other than single occupant vehicles.
- (f) Demonstrable public benefits beyond the increase in transit usage, including all of the following:

²²⁴Cal. Govt. Code §65913.5(a)(b), citing Cal. Govt. Code §14045.

²²⁵Cal. Govt. Code §14045(a). The demonstration program legislation indicates that local governments that participate must have an adopted land use plan and zoning ordinance that encourages development of high-density residential development near mass transit guideway stations and that are implementing state legislation regarding the following: development agreements Cal. Govt. Code § 65864; redevelopment plans pursuant to Art. 4, §33330 of the state Health and Safety Code; and congestion management plan adopted pursuant to Cal. Govt. Code §65099.

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- (1) Relief of traffic congestion.
 - (2) Improved air quality.
 - (3) Increased transit revenue yields.
 - (4) Increased stock of affordable housing.
 - (5) Redevelopment of depressed and marginal inner-city neighborhoods.
 - (6) Live-travel options for transit-needy groups.
 - (7) Promotion of infill development and preservation of natural resources.
 - (8) Promotion of a safe, attractive, pedestrian-friendly environment around transit stations.
 - (9) Reduction of the need for additional travel by providing for the sale of goods and services at transit stations.
 - (10) Promotion of job opportunities.
 - (11) Improved cost-effectiveness through the use of the existing infrastructure.
 - (12) Increased sales and property tax revenue.
 - (13) Reduction in energy consumption.
- (g) Sites where a density bonus of at least 25 percent may be granted pursuant to specified performance standards.²²⁶

Connecticut's inclusionary zoning legislation allows local governments to provide developers with a special exemption from zoning density limits in districts that permit multifamily housing.²²⁷ The exemption is applicable where the developer agrees to build a certain number of units of affordable housing. A local housing agency is charged with administering the program and setting thresholds to determine what sales and rent prices are to be considered affordable and the income groups that would be eligible to live in such housing. Developers must enter into a development agreement with the municipality that stipulates the number of affordable housing units being provided, the sales price or rents to be charged for the units, and deeds conveying covenants that indicate that the units will remain as affordable housing for 30 years.

Local governments in **Florida** are required by the state's growth management law to prepare a comprehensive plan including a housing element²²⁸ and enact land development regulations to implement the plan. The enabling legislation for the regulations encourages the use of innovative land development regulations including incentive and inclusionary zoning, as well as provisions for transfer of development rights, planned unit developments, and impact fees.²²⁹

²²⁶Cal. Gov't Code §65460.2.

²²⁷Conn. Gen'l Stat. Sec. 8-2g(a).

²²⁸Fla. Stat. §163.3177(6)(f).

²²⁹Fla. Stat. §163.3202(3).

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Maryland has broadly worded language in its zoning enabling legislation that permits local governments to “encourage innovation and to promote flexibility, economy, and ingenuity in development” as well as provisions authorizing increases in the permissible density or intensity of a particular use.²³⁰ Maryland also expressly enables counties and cities to enact ordinances that “impose inclusionary zoning and award density bonuses to create affordable housing units” and “impose restrictions on the use, cost, and resale of housing . . .”²³¹

Minnesota’s Community-Based Planning Act of 1997 contains 11 goals for local governments to address in preparing comprehensive plans, most of which are centered on smart growth principles, such as encouraging mixing of land uses, compact development, increasing affordable housing and promoting public transit.²³² The act also created a livable communities advisory council and directed it to, among other things, develop criteria and guidelines to promote “livable” communities in the state. The council must also recommend incentives to local governments to develop community-based plans, including for example, assistance with computerized geographic information systems, builders’ remedies and density bonuses, and revised permitting processes. The act lists several tools and strategies that local governments would be able to use to achieve the livable community goals, including “densities, urban growth areas, purchase or transfer of development rights programs, public investment surcharges, transit and transit-oriented development, and zoning and other official controls.”

New Hampshire has a catch-all statute for innovative land-use controls that permits local planning boards or person who administers a zoning ordinance to enact 14 different types of standards, including intensity and use incentive(s), impact fees, planned unit development, cluster development, performance standards, and inclusionary zoning.²³³ The statute provides no criteria or guidelines on the type or magnitude of incentive that may be provided, nor any guidance on the other innovative provisions it enables local governments to use, with the exception of impact fees.

New York has an umbrella incentive zoning statute that is intended to “advance the city’s specific physical, cultural and social policies in accordance with the city’s comprehensive plan and in coordination with other community planning mechanisms or land use techniques.”²³⁴ The law permits municipalities to amend the zoning ordinance to include bonus provisions and to evaluate the effects of any potential incentives to ensure that the district in which any additional density will be built contains “adequate resources, environmental quality and public facilities, including adequate transportation, water supply, waste disposal and fire protection.” Local governments are also required to prepare a “generic environmental impact statement” (paid for in part by the developer)

²³⁰Md. Gen’l. Muni. Law §10603 (1999).

²³¹Md. Code Ann. Art. 66B, §12.01.

²³²Minn. Stat., Ch. 202, Art. 4, §4A.08 (1997).

²³³N.H. Rev. Stat. Ann, Tit. 64, Ch. 674 §674.21.

²³⁴N.Y. Gen’l City Law § 81-d.

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to determine if the granting of incentives or bonuses will have a significant effect on the environment.²³⁵ In addition to the environmental review, the statute also requires local governments “to evaluate the impact of the bonus provisions upon the potential development of affordable housing gained by the provision of such incentives or bonus afforded to an applicant or lost in the provision by an applicant of any community amenity to the city.”²³⁶

The New York statute includes procedures that must be followed by local governments in providing the incentives, including descriptions of the incentives, and bonuses to be provided; the community benefits and amenities that may be accepted from developers; procedures for obtaining bonuses; and provisions for a public hearing on the proposed project (but only if it would otherwise be subject to a zoning hearing). The law contains separate, although virtually identical provisions for towns and villages in New York to use incentives.²³⁷

Oregon’s statutes implementing urban growth boundaries enable local governments to undertake “actions or measures to ensure that adequate levels of residential development are achieved within urban growth boundaries.”²³⁸ The actions and measures include “enacting provisions permitting additional density beyond that generally allowed in the zoning district in exchange for amenities and features provided by the developer.” Other actions include increasing zoned residential densities overall, providing financial incentives, redevelopment and infill strategies. The statute also permits the “removal or easing of approval standards or procedures” in order to achieve higher densities.

Rhode Island has an all inclusive statute similar to New York that authorizes local governments to use development incentives for several purposes. The incentives provide increases in the permitted use or dimension as a condition for, but not limited to:

- (1) Increased open space
- (2) Increased housing choice
- (3) Traffic and pedestrian improvements
- (4) Public and/or private facilities
- (5) Other amenities as desired by the city or town and consistent with its comprehensive plan.²³⁹

THE MODEL STATUTE

The model statute in Section 9-501 below is an adaptation and refinement of the well-drafted California statute which requires local governments to grant density bonuses of at least 25 percent, plus an additional incentive(s) or equivalent financial incentives to developers of affordable housing. In contrast to the California statute, which distinguishes between the types or categories of

²³⁵N.Y. Gen’l. City Law § 81-d(3)(d).

²³⁶N.Y. Gen’l. City Law § 81-d(3)(g).

²³⁷N.Y. Town Law Sec. 261-b; N.Y. Village Law Sec. 7-703.

²³⁸Ore. Rev. Stat. 197.296(7) (1998).

²³⁹R.I. Gen. Laws Sec. 45-24-33 (B)(1) (1999).

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affordable housing (i.e., between low-income, very-low-income, and senior citizens housing), the model below makes no such differentiation, giving that discretion to local governments. The developer is required to enter into a development agreement with the local government that will formalize the manner in which the affordable housing is to be kept affordable and other administrative details relating to the project. The model statute also authorizes development incentives for increased nonresidential floor area for provision of “public benefit amenities” such as plazas, parks, and open space, access to transit stations, and overhead weather protection and street arcades. A public benefit amenity may also include provision of affordable housing as part of a nonresidential development, for which a density bonus may be granted. A local government may also adopt a “uniform incentives ordinance” that addresses both provision of affordable housing and dedication of open space and/or provision of community design amenities.

APA’s evaluation of the California statute has determined that, if such program is to be successful at the local level, it is necessary to have a long-term commitment to the program by the local government as well as a dedicated source of funds. Monies such as revenues from tax increment financing initiatives and federal community development block grant (CDBG) programs are essential sources to provide subsidies for affordable housing. For example, Petaluma, California, near San Francisco, financed 100 affordable units per year between 1990 and 1999. To do that, the city has a housing trust fund that is financed by tax increment revenues in designated redevelopment areas, CDBG monies, and developer contributions in lieu of building affordable housing. The fund is used to leverage private and nonprofit investments in affordable housing. It also is used to pay for impact fees for affordable housing units in developments where 10 to 15 percent of the units have been set aside for low or very low income households. As such, affordable housing projects are not necessarily excused from all fees, but, rather than coming out of the developer’s pocket or being passed on to the home buyer, there is a transfer of city funds from one account to another.²⁴⁰

In San Jose, California, the city’s success with regard to affordable housing is attributable to outright land acquisition, leveraged private investment using revenue generated through property tax increments in the city’s redevelopment planning areas, and a flexible approach to accommodating housing development wherever possible. San Jose generates approximately \$20 million per year for affordable housing through the tax increment mechanism. The city’s housing agency uses that money to leverage approximately seven times that amount in private investment.

The San Jose 2020 General Plan has several mechanisms built in to encourage housing development. Adopted in 1994, it is the city’s first modern plan that meets the various requirements of state law, if not the exact letter of the law. To start, the plan designates a substantial amount of land for housing development. Further it contains “Discretionary Alternate Use Policies” which allow various commercial or industrial sites to be redeveloped as housing at the discretion of the city council. For example, sites along major commercial streets and around future light rail stations may

²⁴⁰Telephone interview with Bonnie Gaebler, Housing Administrator, City of Petaluma, California, January 11, 2000. Interview conducted by Marya Morris, AICP, Senior Research Associate, APA Research Department.

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be redeveloped as high-density housing if a proposal meets the goals and policies of the General Plan. Most development in San Jose takes place through planned residential district zoning, which provides the city and developers with a lot of flexibility as to where housing may be built, but gives the city council substantial control in implementing housing goals overall. Finally, the city does provide density bonuses. Zoned densities of 12 to 25 dwelling units/acre may be increased to 25-40 dwelling units/acre if 100 percent of the units in the project are affordable. Similar bonuses are available for projects that contain all rental units.²⁴¹

9-501 Land-Use Incentives for Affordable Housing, Community Design, and Open Space Dedication; Unified Incentives Ordinance

- (1) The legislative body of a local government, in the manner for the adoption and amendment of land development regulations pursuant to Section [8-103 *or cite to some other provision, such as a municipal charter or state statute governing the adoption of ordinances*]:
 - (a) shall adopt and amend an ordinance that authorizes incentives for the provision of affordable housing; and
 - (b) may adopt and amend an ordinance that authorizes incentives for open space dedication and provision of public benefit amenities.
- (2) The purpose of this Section is to authorize the adoption and amendment of:
 - (a) an affordable housing incentives ordinance in order to respond to and accommodate present and future needs for affordable housing;
 - (b) a community design and open space incentives ordinance to provide additional amenities for public use or benefit in new development that carry out goals and policies of a local government identified in its local comprehensive plan; and
 - (c) a unified incentives ordinance that incorporates subparagraphs (a) and (b) above.
- (3) As used in this Section:
 - (a) **“Affordable Housing”** means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate- or low-income housing. In the case of dwelling units for sale, housing that is affordable means housing in which annual housing costs constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the

²⁴¹Telephone interview with Kent Edens, Deputy Director of Planning, San Jose, California, January 14, 2000. Interview conducted by Marya Morris, AICP, Senior Research Associate, APA Research Department.

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unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the affordable rent is no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

- (b) **“Affordable Housing Development”** means any housing development that is subsidized by the federal, state, or local government, or any housing development in which at least [20] percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices that preserve them as affordable housing pursuant to this Section.
- (c) **“Affordable Housing Incentives”** mean a density bonus and other development incentives granted under an affordable housing incentive ordinance pursuant to this Section.
- (d) **“Affordable Rent”** means monthly housing expenses, including a reasonable allowance for utilities, for affordable housing units that are for rent to low- or moderate-income households.
- (e) **“Affordable Sales Price”** means a sales price at which low- or moderate-income households can qualify for the purchase of affordable housing, calculated on the basis of underwriting standards of mortgage financing available for the housing development.
- (f) **“Bonusable Area”** means space that is occupied by a public benefit amenity and that is determined by the local government to satisfy requirements under its land development regulations for additional gross floor area or dwelling units.
- (g) **“Bonus Ratio”** means the ratio of additional square feet of nonresidential floor area granted per square foot of bonusable area.
- (h) **“Density Bonus”** means the percentage of density increase granted over the otherwise maximum allowable net density under the applicable zoning ordinance as of the date of the application to the local government for incentives by a developer. The density bonus applicable to affordable housing shall be at least a 25 percent increase, and shall apply to the site of the affordable housing development.²⁴²
- (i) **“Development Agreement”** means a development agreement authorized by Section [8-701].

²⁴²California communities offer density bonuses well in excess of 25 percent., in some cases as high as 150-175 percent. See Robert A. Johnston, Seymour I. Schwartz, Geoffrey A. Wandesforde-Smith, and Michael Caplan, “Selling Zoning: Do Density Bonuses for Moderate-Cost Housing Work?” *Land Use Law & Zoning Digest* 42, no. 8 (August 1990): 3-9, at 8 (discussion of Santa Rosa, California, incentives program).

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- (j) **“Development Incentives”** mean any of the following:
1. reductions in building setback requirements;
 2. reductions or waivers of impact fees, application fees for development permits, utility tap-in fees, or other dedications or exactions;
 3. reductions in minimum lot area, width, or depth;
 4. reductions in required parking spaces per dwelling unit or per square foot of floor area;
 5. increased maximum lot coverage;
 6. increased maximum building height and/or stories;
 7. reductions in minimum building separation requirements, provided that such reductions do not conflict with building code requirements of the state or the local government, as applicable;
 8. reductions or waivers of public or nonpublic improvements;
 9. approval by the legislative body of a local government of mixed use zoning in conjunction with the housing project if commercial, office, industrial or other land uses will contribute significantly to the economic feasibility of the housing development and if the mixed use zoning is consistent with the local comprehensive plan;
 10. authorization for the affordable housing development to include nonresidential uses, provided such uses or such authorization is consistent with the local comprehensive plan;
 12. authorization for the affordable housing to be located in a nonresidential zoning district, provided such authorization is consistent with the local comprehensive plan; or
 13. other incentives proposed by the developer of an affordable housing project or by the local government that result in identifiable cost reductions for affordable housing, including direct financial aid by the local government in the form of a loan or grant to subsidize or provide low interest financing for on- or off-site improvements, land, or construction costs.
- (k) **“Floor Area Ratio”** means the ratio of the maximum gross floor area on a lot or parcel to the area of the lot or parcel that is permitted pursuant to the land development regulations of a local government.

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- (l) **“Housing Costs”** mean the sum of actual or projected monthly payments for any of the following associated with for-sale affordable housing units: principal and interest on a mortgage loan, including any loan insurance fees; property taxes and assessments; fire and casualty insurance; property maintenance and repairs; homeowner association fees; and a reasonable allowance for utilities.
- (m) **“Housing Development”** means construction, including rehabilitation, projects consisting of five or more residential units, including single-family, two-family, and multiple-family residences for sale or rent.
- (n) **“Incentives”** mean one or more of the following:
1. affordable housing incentives;
 2. bonus ratio; and
 3. density bonus.
- (o) **“Low-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (p) **“Moderate-Income Housing”** means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the housing region in which the housing is located.
- (q) **“Public Benefit Amenity”** means one or more features for public use or benefit within or in the vicinity of a development that will entitle the development to a bonus ratio or a density bonus, as applicable, including, but not limited to:
1. shopping atriums;
 2. plazas, parks, and other open spaces;
 3. overhead weather protection and street arcades;
 4. bicycle parking and storage facilities;
 5. performing arts theaters;

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6. museums;
 7. access to transit stations and transit easements;
 8. provision of child day-care centers;
 9. provision of affordable housing as part of a nonresidential development; and
 10. [other].
- (r) **“Unified Incentives Ordinance”** means an ordinance that provides incentives for both:
1. provision of affordable housing; and
 2. dedication of open space and/or provision of community design amenities;
- and that complies with all requirements of this Section for both an affordable housing incentives ordinance and a community design and open space incentives ordinance.
- (4) The legislative body of a local government may adopt and amend an affordable housing incentives ordinance only after it has adopted a local comprehensive plan that contains:
- (a) a housing element pursuant to Section [7-207]; and
 - (b) a policy in written and/or mapped form that encourages affordable housing incentives.
- (5) The legislative body of a local government may adopt and amend a community design and open space incentives ordinance only after it has adopted a local comprehensive plan that contains:
- (a) if a density bonus for residential development for the public benefit amenity of a plaza, park, or other open spaces is authorized, a housing element pursuant to Section [7-207]; and
 - (b) if any other type of bonus ratio is authorized, a community design element pursuant to Section [7-214]; and
 - (c) a policy in written and/or mapped form that describes the relationship between the applicable public benefit amenities and the density bonus or bonus ratio and supports the granting of such density bonus or bonus ratio.

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- (6) An affordable housing incentive ordinance, a community design and open space incentives ordinance, or a unified incentives ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the ordinance;
 - (b) a statement of purpose consistent with the purposes of land development regulations pursuant to Section [8-102(2)] and with the purposes of this Section;
 - (c) a statement of consistency with the local comprehensive plan that is based on findings made pursuant to Section [8-104];
 - (d) definitions, as appropriate for such words or terms contained in the affordable housing incentive ordinance. Where this Chapter or Section defines words or terms, the ordinance shall incorporate those definitions, either directly or by reference;
 - (e) procedures for the review of applications for incentives;
 - (f) a requirement that every developer that is to receive incentives shall enter into a development agreement with the local government;
 - (g) designation of an officer or body to review and approve applications for incentives; and
 - (h) provisions for enforcement, including the issuance of certificates of compliance.
- (7) An affordable housing incentives ordinance or a unified incentives ordinance shall also include the following minimum provisions:
- (a) a requirement that, where a developer proposes a housing development within the jurisdiction of the local government, the local government shall provide the developer with affordable housing incentives for the production of affordable housing within the development if the developer meets the requirements set forth in paragraphs (11) and (12) below; and
 - (b) provisions to ensure that once affordable housing is built through subsidies or other means as part of a housing development, its availability will be maintained through measures that establish income qualifications for affordable housing renters or purchasers, promote affirmative marketing measures, and regulate the price and rent, including resale price, of affordable housing units.
- (8) A community design and open space incentives ordinance or a unified incentives ordinance shall also include the following minimum provisions:
- (a) a statement of the types or categories or public benefit amenities for which a bonus ratio or density bonus shall be authorized, the amount of the respective bonus ratio

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- or density bonus, and the zoning use district or overlay district to which public benefit amenity and the respective bonus ratio or density bonus apply;
- (b) locational and other development standards for the public benefit amenities, including a statement of the minimum bonusable area that a public benefit amenity must contain in order to be eligible for a bonus ratio or a density bonus; and
 - (c) requirements for permanent public access to the public benefit amenity, including signage indicating the nature of the public access, secured by either:
 - 1. a conveyance of the plaza, park, or other open space, or access to transit stations or transit easements, to the local government or appropriate governmental unit as a public use as a condition of approval of the development permit, provided that the conveyance is in a form approved by the attorney of the local government or governmental unit; or
 - 2. where the public benefit amenity will not be owned by the local government or another governmental unit, provisions in the development agreement requiring permanent maintenance by the property owner, except that permanent public access may be limited to normal business hours.
- (9) An affordable housing incentives ordinance or a unified incentives ordinance may require that any new housing development within the jurisdiction of the local government contain at least [15] percent affordable housing if such a requirement is consistent with a policy contained in the local comprehensive plan. The incentives offered to the developer, whether density bonuses, development incentives, or both, shall be of at least equivalent financial value to the cost of making the affordable housing units affordable.
- (10) A community design and open space incentives ordinance or a unified incentives ordinance may:
- (a) include a manual of graphic and written design guidelines to assist developers in the preparation of applications for community design and open space incentives, but such guidelines shall be advisory only;
 - (b) include a statement of the maximum bonusable area that a public benefit amenity may contain in order to be eligible for a bonus ratio or a density bonus;
 - (c) include a provision that allows the developer to provide the public benefit amenity offsite as a condition of receiving a bonus ratio or density bonus, including standards of proximity of the development to the offsite public benefit amenity; and
 - (d) be adopted as an overlay district to all or portions of existing zoning use districts. The boundaries of the overlay district shall be shown on the zoning map pursuant to Section [8-201(3)(o)].

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- (11) Where a developer proposes a housing development that is to be an affordable housing development, the local government shall either:
- (a) grant a density bonus and at least one development incentive, unless the local government makes a written finding that the development incentive is not necessary to reduce the price or rent of the dwelling units in order to ensure that they are affordable housing; or
 - (b) provide, in lieu of subparagraph (a) above, development incentives of equivalent financial value based upon the land cost per dwelling unit. The value of such equivalent development incentives shall at least equal the land cost per dwelling unit that would result from a density bonus and shall contribute significantly to the economic feasibility of providing the affordable housing units.
- (12) The development agreement entered into between the developer of a housing development that is to be an affordable housing development and the local government shall include provisions to ensure the availability of affordable housing for sale or rent.
- (a) The development agreement shall provide for a period of availability for affordable housing as follows:
 - 1. Newly constructed low- and moderate-income sales and rental dwelling units shall be subject to affordability controls for a period of not less than [15] years, which period may be renewed pursuant to the development agreement;
 - 2. Rehabilitated owner-occupied single-family dwelling units that are improved to code standard shall be subject to affordability controls for at least [5] years.
 - 3. Rehabilitated renter-occupied dwelling units that are improved to code standard shall be subject to affordability controls on re-rental for at least [10] years.
 - 4. Any dwelling unit created through the conversion of a nonresidential structure shall be considered a new dwelling unit and shall be subject to affordability controls as delineated in subparagraph (a) 1 above.
 - 5. Affordability controls on owner- or renter-occupied accessory apartments shall be applicable for a period of at least [5] years.
 - 6. Alternatives not otherwise described in this subparagraph shall be controlled in a manner deemed suitable to the local government and shall provide assurances that such arrangements will house low- and moderate-income households for at least [10] years.

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- (b) In the case of for-sale housing developments, the development agreement shall include the following affordability controls governing the initial sale and use and any resale:
 - 1. All conveyances of newly constructed affordable housing dwelling units subject to the affordable housing incentives ordinance that are for sale shall contain a deed restriction and mortgage lien, which shall be recorded with the county [recorder of deeds *or equivalent official*]. Any restrictions on future resale shall be included in the deed restriction as a condition of approval enforceable through legal and equitable remedies.
 - 2. Affordable housing units shall, upon initial sale, and resale in the period covered by the development agreement, be sold to eligible low- or moderate-income households at an affordable sales price and housing cost.
 - 3. Affordable housing units shall be occupied by eligible low- or moderate-income households during the period covered by the development agreement.
 - (c) In the case of rental housing developments, the development agreement shall include the following affordability controls governing the use of affordable housing units during the use restriction period:
 - 1. rules and procedures for qualifying tenants, establishing affordable rent, filling vacancies, and maintaining affordable housing rental units for qualified tenants;
 - 2. requirements that owners verify tenant incomes and maintain books and records to demonstrate compliance with the agreement and with the ordinance;
 - 3. requirements that owners submit an annual report to the local government demonstrating compliance with the agreement and with the ordinance.
 - (d) The development agreement shall include a schedule that provides for the affordable housing units to be built or rehabilitated concurrently with the units that are not subject to affordability controls.
- (13) The approval of incentives shall constitute a development permit. The incentives shall be part of the unified development permit review process established pursuant to Section [10-201].
- (14) This Section does not limit or require the provision of direct financial aid by the local government, the provision of publicly-owned land, or the waiver or reduction of fees,

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including impact fees pursuant to Section [8-602], or of dedication or exaction requirements pursuant to Section [8-601].

- (15) The [state planning agency *or* state department of development] shall by [date] prepare and distribute a model affordable housing incentives ordinance and related guidelines to assist local governments in complying with this Section.