

## Model Legislation for Land Use Decisions

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PROCEEDINGS BEFORE THE PLANNING AND ZONING BOARD  
OF THE CITY OF SAN CIBOLA

Board member Greta Greenbelt Growthplanne: Well, I've only been on this board for eight months and no one has given me a copy of the rules yet. . . .

Chairperson Wilbert Wawfull: But we really don't have any rules.<sup>1</sup>

DECISION MAKING FOR LAND USE CASES is drama. Who participates in the review process, how hearings are held, and how courts review land use decisions raise fundamental problems of fairness in our legal system. These problems have become even more critical because the land use process has changed enormously. The Standard Zoning Enabling Act<sup>2</sup> published decades ago, which is the basis for most state zoning laws, did not contemplate the extensive use of discretion that occurs today. It authorized a board of adjustment with limited administrative power and elementary procedures and provided a limited statutory appeal. Some states have reformed their zoning legislation but many have not, and reform of Standard Act procedures is an important legislative priority.<sup>3</sup>

The American Planning Association (APA) recently published a *Legislative Guidebook*<sup>4</sup> in its Growing Smart project that contains new model laws for land use planning and regulation, including pro-

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1. From a fictitious hearing script prepared by the late Marlin Smith, as reproduced in DANIEL R. MANDELKER & JOHN M. PAYNE, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 425, 426 (5th ed. 2001).

2. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* (1926) [hereinafter *STANDARD ZONING ACT*].

3. With few exceptions, most efforts at reforming planning statutes have ignored reform of administrative and judicial review procedures. These procedures do not attract as much interest as other issues, such as the scope of comprehensive planning and growth management, but they are critical to the proper functioning of the land use regulation system.

4. AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE 10-3* (Stuart Meck ed. 2002) [hereinafter *GUIDEBOOK*], available at [www.planning.org](http://www.planning.org).

cedural reforms for the administrative and judicial review of land use decisions.<sup>5</sup>

Part I of this article describes the Growing Smart project. Part II reviews the administrative and judicial review process in the Standard Zoning Act, and explains why the process creates serious problems for land use decision making. Part III describes the administrative and judicial review process in Chapter 10 of the Legislative Guidebook, which is a replacement for the Standard Zoning Act.

### I. The Growing Smart Project

The Growing Smart project began because of concern in the APA about the need for new model land use legislation. An earlier attempt by the American Law Institute had limited success,<sup>6</sup> and a task force met in March 1991 at the request of APA chapters to consider a new statutory reform project. The task force meeting outlined the objectives of statutory reform and how it should be done, and the Growing Smart project began when funding became available in 1995.<sup>7</sup> APA selected staff to direct the project<sup>8</sup> and created an advisory Directorate. It included rep-

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5. This chapter implements an APA concern about land use decision making that was voiced in a 1995 task force report, on which I served:

The system of variances, conditional uses and other procedures for administrative relief is outmoded. Delay in decision making also occurs, and applicants for land use approvals can be so frustrated in attempting to obtain relief that they may conclude that their only hope is to file a taking claim. Reform is necessary to provide a decision making process in which administrative relief is routine and final decisions are required within a reasonable time. [Emphasis in original.]

DANIEL R. MANDELKER, ANN LOUISE STRONG & ERIC DAMIAN KELLY, *GOOD PLANNING, CONSISTENT REGULATION, AND FAIR DECISION-MAKING: A PRESCRIPTION FOR AVOIDING TAKINGS CHALLENGES* 14 (1995). Chapter 10 incorporates many of the recommendations contained in this report. See also Ann Louise Strong, Daniel R. Mandelker & Eric Damian Kelly, *Property Rights and Takings*, 62 J. AM. PLAN. ASS'N 5, 10 (1996) (article based on report making same recommendations).

6. AMERICAN LAW INSTITUTE, *A MODEL LAND DEVELOPMENT CODE* (1976) [hereinafter *MODEL CODE*]. A number of states adopted the Code's proposals for state regulation of areas of critical state concern, and Florida modeled its state-level land use statute on the Code, but its proposals for local planning and land use regulation attracted little following. See Daniel R. Mandelker, *Fred Bosselman's Legacy to Land Use Reform*, 17 J. LAND USE & ENVTL. L. 11 (2002) (discussing his proposal for critical area regulation in ALI Model Code as one of the Code's principal draftsmen). One problem was the insular process in which the Code was drafted. It also missed the growth management movement and did not significantly address problems of housing affordability.

7. For a full account of the project by its director, including the task force meeting, see Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 54 LAND USE L. & ZONING DIG. No. 1, at 3 (2002). I was a member of the task force and was present at its two-day meeting.

8. Stuart Meck was the Principal Investigator and John Bredin, a member of the Illinois bar, was the Research Fellow for the Growing Smart project.

representatives from national organizations including the International Municipal Lawyers Association, the National Conference of State Legislatures, planning officials, and representatives of the natural and built environments.<sup>9</sup> Though the APA project team retained editorial control of the *Guidebook's* contents, they seriously considered Directorate recommendations. It met thirteen times during the project and played an important role in the development of its legislative proposals. Chapter 10, especially, received extensive review from the Directorate and included many changes adopted in response to its recommendations. In addition, legislative drafts were widely circulated for comment to other organizations and individuals, and 330 comments were received in the final phase of the project alone. The great majority of these recommendations were accepted.

## II. Administrative and Judicial Review Under the Standard Zoning Act

Chapter 10 is probably the most innovative chapter in the *Guidebook*,<sup>10</sup> and a review of the zoning system authorized by the Standard Zoning Act provides perspective on how Chapter 10 changes land use decision making. Section 7 of the Standard Act provides the authority for the administrative and judicial review of zoning decisions.<sup>11</sup> That section authorizes (but does not require) local legislative bodies to appoint a *Board of Adjustment*. The board has three statutory powers: to hear appeals from an “administrative official,”<sup>12</sup> to grant special exceptions

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9. The natural environment representatives were from the Environmental Law Institute; James McElfish held this position during the final phases of the project. The built environment representative was Paul Barru, then chair of the Land Development Committee of the National Association of Home Builders (NAHB). John Delaney, a land use attorney associated with NAHB, was not on the Directorate but was an influential reviewer of legislative drafts. For discussion of the role of the Directorate, see GUIDEBOOK, *supra* note 4, at A-1.

10. Chapter 10 has had some influence on state legislation. Florida legislation provides for an appeal by certiorari when a local government adopts statutory procedural requirements or adopts an ordinance establishing the statutory requirements as a minimum. See FLA. STA. ANN. § 163.3215(4) (2003). The local government section of the Florida Bar is drafting a model ordinance that will comply with this statute. The concepts contained in Chapter 10 were considered in drafting the statute and the model ordinance. E-mail from Tom Pelham, to Daniel R. Mandelker (July 2, 2003). Legislation based on Chapter 10 was introduced in the Illinois House of Representatives by Rep. Ricca Slone. H.R. 3185, 92d Leg. (Ill. 2002). This bill did not pass. Chapter 10 was also considered in the drafting of model land use legislation for New England states by the New England Environmental Finance Center. E-mail from Orlando DeLogu, to Daniel R. Mandelker (July 29, 2003).

11. See GUIDEBOOK, *supra* note 4, at 10–6 to 10–12 (for additional description of Standard Zoning Act procedures).

12. *Id.* at 10–6. The authority provided is “[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an

as provided in the zoning ordinance,<sup>13</sup> and to grant variances in cases of “unnecessary hardship.”<sup>14</sup> Any “person aggrieved,” and any local “officer, department, board, or bureau” can also take an appeal to the board from an administrative decision. There is no requirement for a notice and hearing. The statute refers to “meetings” of the board, which are to be open to the public, and requires “minutes of its proceedings” and “records of its examinations,” but not findings of fact.<sup>15</sup>

Anyone “jointly or severally, aggrieved,” and any taxpayer, officer, department, board or bureau of the municipality may file a petition with a court specifying that the decision appealed “is illegal.” When it receives a petition, the court may allow a writ of certiorari<sup>16</sup> to the board to review its decision. The board must then “return” to the court such “certified or sworn” copies of “original papers” as called for in the writ. The return shall also “concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from,” which is a requirement for the creation of a record when there is an appeal.<sup>17</sup> A court may take evidence when “it shall appear to the court that testimony is necessary for the proper disposition of the matter.”

These administrative and judicial review procedures provide some statutory process for the limited powers conferred on the board of adjustment, but they are incomplete because the zoning system has changed substantially. Modern zoning ordinances grant discretionary authority not authorized by the Standard Act, such as the authority to

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administrative official in the enforcement of this act or of any ordinance adopted pursuant thereto. *Id.* The board is given a broad power to “reverse or affirm” any decision or other matter appealed to it. *Id.* at 10–42.

13. *Id.* at 10–6. The authority provided is “[t]o hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.” *Id.*

14. GUIDEBOOK, *supra* note 4, at 10–6 to 10–7. The authority provided is “[t]o authorize upon appeal in specific cases such variances from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.” *Id.* Section 6 of the Act authorized “changes” that include amendments to the zoning ordinance. *Id.* The legislative body has this authority.

15. See DANIEL R. MANDELKER, LAND USE LAW § 6.52 (5th ed. 2003) [hereinafter LAND USE LAW]. Some courts require findings of fact even though the statute does not require them. *Id.*

16. Certiorari is described in LAND USE LAW, *supra* note 15, § 8.13.

17. See *Tate v. Miles*, 503 A.2d 187 (Del. 1986); *Flick v. Gately*, 65 N.E.2d 137 (Ill. App. Ct. 1946) (may not rely on evidence not presented at hearing); *Coderre v. Zoning Bd. of Pawtucket*, 230 A.2d 247 (R.I. 1967) (disapproving use of standard form for decision); *Patterson v. Bd. of Zoning Appeals*, 22 Va. Cir. 366 (Cir. Ct. Loudon Cty. 1991) (findings not made).

approve site plans<sup>18</sup> and planned unit developments.<sup>19</sup> Agencies other than the board of adjustment, such as the planning commission, are often given the authority to carry out these discretionary reviews. The procedures provided by the Standard Act for the board of adjustment do not apply to these agencies. Judicial review of their decisions is uncertain because the judicial review procedures in the Standard Act apply only to the board.<sup>20</sup>

The limited administrative procedures the Standard Act provides for the board of adjustment are also unsatisfactory. Major difficulties are the failure to specify who has standing in board proceedings, how the issues the board must decide are identified, how hearings are conducted, and how the board should make decisions. Because of these failures, decision making under the Standard Act is often chaotic. The issues for decision are not clear, staff reports and other materials may not be available before a hearing, and parties before the board may be blindsided by unexpected witnesses and testimony. Hearings are undisciplined with no real attempt at a fair process that includes necessary procedural safeguards.

The approval process for land development projects is also complicated because they must often obtain discretionary approvals in addition to those required by the zoning ordinance. Subdivision approval is an example.<sup>21</sup> Historic preservation controls, which require owners of historic structures to obtain certificates of appropriateness for exterior changes, are another.<sup>22</sup> Different agencies are responsible for administering these regulations. Each regulation may have its own administrative procedures, and the numerous discretionary reviews a project may have to obtain from different agencies can complicate and delay the decision process. Chapter 10 remedies these problems by providing disciplined administrative and judicial review procedures.

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18. LAND USE LAW, *supra* note 15, § 6.66.

19. *Id.* § 9.24–9.30. *See also* GUIDEBOOK, *supra* note 4, at 10–8 to 10–12 (documenting additional problems with internal administrative review and abuse of authority by board of adjustment).

20. *Compare* Maher v. Town Planning & Zoning Comm'n, 226 A.2d 397 (Conn. 1967) (court heard appeal of “special case” decision from planning commission), *with* Downing v. Bd. of Zoning Appeals, 274 N.E.2d 542 (Ind. Ct. App. 1971) (preliminary review of subdivision not appealable).

21. Though subdivision control is usually limited to lot design, access, physical improvements and similar issues, the statute confers broader authority in some states. In California, for example, a local legislative body may reject a subdivision if “the site is not physically suitable for the type of development” proposed, or “the site is not physically suitable for the proposed density of development.” CAL. GOV'T CODE § 66474 (c)-(d) (2003).

22. LAND USE LAW, *supra* note 15, § 11.28.

### III. The Growing Smart Proposals for the Administrative and Judicial Review of Land Use Decisions<sup>23</sup>

#### A. Legislative Framework and Drafting Strategy<sup>24</sup>

The legislative framework and drafting strategy that guided the Growing Smart project are critical to its recommendations for administrative and judicial review. The *Legislative Guidebook* contains fifteen chapters that cover state, regional and local planning, and local land use regulation. In an important innovation, it integrates land use controls in an ordinance that contains all local “land development regulations.” These regulations include all of the usual land use controls, such as zoning, as well as any “other governmental controls that affect the use, density, or intensity of land.”<sup>25</sup> This regulatory framework is critical to the administrative and judicial review system in Chapter 10, which applies to all applications for a “development permit” under a “land development regulation.”<sup>26</sup>

Chapter 10 introduces the concept of a development permit to describe the approval a local government must give if it approves a development permit application. It defines a “development permit” as “any written approval or decision by a local government under its land development regulations that gives authorization to undertake some category of development.”<sup>27</sup> The definition gives examples of such per-

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23. I was the primary author of Chapter 10, though Stuart Meck and John Bredin both provided valuable commentary and drafting assistance. Land use attorneys Brian Blaesser, Wendie Kellington, Ed Sullivan, and Professor Ron Levin reviewed drafts of the chapter and provided valuable comments, and planners, officials, and land use attorneys throughout the country also provided helpful advice and suggestions.

24. Chapter 10, like other chapters in the *GUIDEBOOK*, contains extensive commentary on its statutory recommendations. I refer to this commentary here, but it should be consulted for additional explanation of the statutory proposals. My objective in this article is to explain the principal proposals in Chapter 10 in more detail.

25. *GUIDEBOOK*, *supra* note 4, § 3–101, at 3–6. Newer techniques include transportation demand management, affordable housing incentives, regulation of critical and sensitive areas, and transfer of development rights. Another important decision was to retain the terminology and concepts of the existing land use control system. The American Law Institute’s Model Land Development adopted new and unfamiliar terminology and concepts, and many believe this decision contributed to its lack of acceptance. *See, e.g.*, AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE art. I, pt. 2 (1976) [hereinafter MODEL CODE]. *See* *GUIDEBOOK*, *supra* note 4, at A-7 (“Guidebook sets forth a straightforward set of processes”) (Statement of James M. McElfish, Jr., Directorate Member for the Natural Environment.).

26. *GUIDEBOOK*, *supra* note 4, §10–201(1), at 10–24. Local governments must adopt “an ordinance that establishes a development review process for applications for development permits.” *Id.*

27. *GUIDEBOOK*, *supra* note 4, § 10–101, at 10–18. The land development ordinance must include a list of all the development permits required by the local government. *Id.* § 10–201(2), at 10–24. For the broad and comprehensive definition of development, *see Id.* § 3–101, at 3–5. Under existing practice the board of adjustment grants a remedy,

mits that include the usual discretionary approvals, such as conditional uses, variances, and site plans. The term “development permit” also includes site-specific zoning map amendments, but only if a local government defines a zoning map amendment as a development permit subject to the review process.<sup>28</sup> Otherwise, a zoning map amendment is a legislative decision.<sup>29</sup> Chapter 10 thus applies to all quasi-judicial decisions made under a local government’s land development regulations.

Stuart Meck, the principal investigator for the Growing Smart project, explained the three-part philosophy that guided its legislative proposals.<sup>30</sup> One was the rejection of the “one-size-fits-all” approach to legislative drafting; the *Guidebook* presents several alternatives on many issues. This decision to present opposing views was especially important in Chapter 10, which became controversial on a number of critical points. Next, the *Guidebook* has a “tight-loose” quality. It provides clear direction on important issues, such as the content of a comprehensive plan, but gives local governments autonomy to determine the administrative structure for decision making. For example, local governments can decide how they want to assign decision making responsibilities under Chapter 10 and need not assign them to a board of adjustment.<sup>31</sup> The hearing procedures required if the designated body decides to hold a hearing are clearly specified, however.<sup>32</sup> The third part of the strategy was the decision to provide a clear, disciplined, and seamless administrative and judicial review process in Chapter 10 that is structurally flexible but mandates fair procedures from beginning to end.

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such as a variance or conditional use, and does not explicitly authorize the development of land.

28. *Id.* § 10–201(5), at 10–25.

29. Most states hold a site-specific map amendment is a legislative act, but a minority of states hold a zoning map amendment is quasi-judicial even though it is made by the legislative body. *See, e.g., Bd. of County Comm’rs v. Snyder*, 627 So. 2d 469 (Fla. 1993). The definition of a development permit also excludes the adoption and amendment of comprehensive plans. *See Marin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997) (amendment to comprehensive plan held legislative). Variances and special exceptions are clearly quasi-judicial. Courts have reached different conclusions about the approval of planned unit developments. *See State ex rel. Helujon, Ltd. v. Jefferson County*, 964 S.W.2d 531 (Mo. Ct. App. 1998) (held legislative even though ordinance contained approval criteria). The *Guidebook* provides that the approval of a planned unit development is a development permit. *GUIDEBOOK, supra* note 4, § 8–303(11), at 8–82.

30. Stuart Meck, *Highlights of the American Planning Association’s Growing Smart Project: New Tools for Planning and Management of Development*, 25 *Zoning & PLAN. REP.* 49, 50–51 (2002).

31. *GUIDEBOOK, supra* note 4, § 10–204(3), at 10–24 to 10–25.

32. *Id.* § 10–207(6), at 10–35.

## B. *The Administrative Review System in Chapter 10*

### 1. A UNIFIED ADMINISTRATIVE REVIEW PROCESS

Chapter 10<sup>33</sup> requires local governments to provide a unified administrative review process<sup>34</sup> for all development permit applications. This process, which extends from the time of application to the time of final decision, is disciplined and procedurally fair. A disciplined process is critical. Too often, land use procedures do not define the issues decision makers must consider. A fair process is also critical. Too often, decision making does not occur in a process that provides a fair opportunity for all parties to participate. Some states require zoning boards to make findings of fact,<sup>35</sup> but if the process that leads up to this finding is not fair, the record on which decision makers make findings will be inadequate. Chapter 10 also standardizes and simplifies the judicial review of land use decisions by authorizing record hearings in which the issues are carefully defined, and that produce a decision based on clear findings of fact.

Following the “tight-loose” approach of the Growing Smart project, a local government can decide how it wants to consider development permit applications. It may select the agencies to hear development permit applications, take appeals, and grant administrative relief.<sup>36</sup> It does not have to require record hearings for any applications, or it may require record hearings for some type of applications but not others.<sup>37</sup> If a record hearing is held, however, it must follow required statutory procedures.<sup>38</sup> It may create a land-use review board, but this is not mandatory. It can give the planning commission the authority to approve development permits and then give the board the authority to

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33. With few exceptions, notably the Mediated Agreement and the definition of a final decision that is subject to judicial appeal, Chapter 10 is based on legislation adopted in other states, notably California, Oregon, and Washington. The *Legislative Guidebook* contains commentary that indicates the statutory origins of the model legislation in Chapter 10, though it is often less complicated than the state legislation from which it is drawn. Because this is model legislation, I believe a simpler and more easily understood model is preferable, though the legislation proposed in Chapter 10 may be more complex than some would like. I have cited legislation that was especially helpful in drafting Chapter 10 in this article, and commentary to Chapter 10 also cites statutory sources.

34. GUIDEBOOK, *supra* note 4, § 10–201(a), at 10–24. Local governments must adopt this process by ordinance in their land development regulations.

35. LAND USE LAW, *supra* note 15, § 6.52.

36. GUIDEBOOK, *supra* note 4, § 10–201(3), at 10–24 to 10–25. The ALI Model Land Development Code mandated the creation of a Land Development Agency as an administrative agency, and modified the remedies usually available under zoning ordinances, such as the variance. *Id.* at 10–13 to 10–15.

37. *See id.* § 10–201(3), at 10–24; *see also id.* at 10–21, 10–22 (commentary).

38. *Id.* § 10–207, at 10–39 to 10–40.

hear record appeals from the commission. It can also authorize administrative staff to approve development permits in an administrative review without a record hearing, with appeals in a record hearing to the planning commission. These are just two examples. To remedy the problems created when a development permit application requires multiple permits, Chapter 10 includes a consolidated permit process. It authorizes a development coordinator to issue a master permit for all development permits and any zoning map amendments a development requires.<sup>39</sup>

Chapter 10 also authorizes a hearing examiner system in which a local government can use hearing examiners to hold required hearings.<sup>40</sup> This system is based on hearing examiner legislation in other states, such as Washington.<sup>41</sup> Chapter 10 authorizes local governments to specify what cases the hearing examiner may hear and what effect his recommendations will have. Decisions on legislative matters, such as the textual amendment of a land development regulation, may only be a recommendation to the legislative body, however.<sup>42</sup> A hearing examiner system is especially useful for small local governments that do not have enough development permit applications to justify the appointment of staff.

The Growing Smart project considered the variance and special exception remedies authorized by the Standard Zoning Act,<sup>43</sup> which are controversial. Use variances, which allow a change in use not permitted by the zoning ordinance, are problematic. Many critics oppose them, and some courts prohibit use variances because they usurp the authority of the legislative body to amend the zoning ordinance.<sup>44</sup> Special exceptions are illusory if local governments require them for uses they do not want, such as manufactured homes, and the zoning board rejects any applications for one of these uses.<sup>45</sup> Chapter 10 does not reform

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39. *Id.* § 10-208, at 10-39, 10-40. This section is based on OR. REV. STAT. § 215.416 (2003) and WASH. REV. CODE § 36.70B.120 (2003).

40. GUIDEBOOK, *supra* note 4, §§ 10-301 to 10-308, at 10-45 to 10-50. A local government may authorize hearing examiners to exercise any of the powers delegated to local boards or agencies, such as the planning commission or the Land-Use Review Board. Hearing examiners can “ride circuit” and serve more than one community.

41. WASH. REV. CODE § 35A.63.170 (2003).

42. GUIDEBOOK, *supra* note 4, § 10-306(1), at 10-49.

43. STANDARD ZONING ACT, *supra* note 2, § 7. The board of adjustment was given the authority to grant these remedies. The Act provided a hardship standard for variances, and authorized local governments to provide for special exceptions in their zoning ordinances. *See* LAND USE LAW, *supra* note 15, § 6.39.

44. *E.g.*, *Josephson v. Autry*, 96 So. 2d 784 (Fla. 1957). *See also* CAL. GOV'T CODE § 65906 (2003) (prohibiting use variances).

45. Oregon's state land use legislation partly addresses this problem by providing that standards, conditions, and approval procedures for “needed” housing must be “clear and objective and may not have the effect, either in themselves or cumulatively, of

these administrative remedies, however. It keeps the authority to grant variances and special exceptions, renamed as conditional uses,<sup>46</sup> but prohibits use variances. It allows only dimensional variances from setback, yard and other requirements applied to the development of lots. It creates an optional land-use review board<sup>47</sup> rather than a zoning board of adjustment to approve these remedies under any of a local government's land development regulations including, but not limited to, zoning. In an innovative measure, Chapter 10 also authorizes a Mediated Agreement<sup>48</sup> between a landowner and a local government that can modify land development regulations that apply to the landowner's property.

## 2. THE PERMIT APPLICATION AND COMPLETENESS DETERMINATION

The administrative review process begins with the filing of a development permit application.<sup>49</sup> Chapter 10 requires local governments to determine that an application is complete,<sup>50</sup> a requirement often contained in state legislation and local ordinances.<sup>51</sup> A completeness determination is an essential first step. It clearly defines the details of the development the local government will consider in a record hearing or an administrative review.<sup>52</sup> Administrative reviews and hearings cannot

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discouraging needed housing through unreasonable cost or delay." OR. REV. STAT. § 197.307(6) (2003). Needed housing includes multifamily and manufactured housing. See *Rogue Valley Ass'n of Realtors v. City of Ashland*, 970 P.2d 685 (Or. Ct. App. 1999) (applying provision); *Homebuilder's Ass'n of Lane County v. City of Eugene*, 41 Or. LUBA 370 (Land Use Bd. of App. 2002) (discussing amendments to statute following Rogue Valley decision). See also GUIDEBOOK, *supra* note 4, § 8-102(5), at 8-29 (land development regulations must "contain approval standards that are clear and objective"). The *Guidebook* contains legislation authorizing affordable housing elements in comprehensive plans as one method of meeting this social obligation. *Id.* § 7-207, at 7-123 to 7-127.

46. GUIDEBOOK, *supra* note 4, §§ 10-502, 10-503, at 10-52 to 10-54. The terminology for this remedy is unsettled. Many zoning ordinances use the term "conditional use" rather than "special exception."

47. *Id.* §§ 10-401 to 10-405, at 10-50 to 10-51.

48. *Id.* § 10-504, at 10-56 to 10-57.

49. *Id.* § 10-201(2), at 10-24. The ordinance establishing the unified development permit review process must list all of the development permits required by the local government. *Id.* The ordinance must also specify "in detail" the information required in an application. The purpose of these provisions is to require local governments to define the basis for review at the time the review process begins.

50. *Id.* § 10-203, at 10-27 to 10-28.

51. See CAL. GOV'T CODE § 65943 (2003) (providing one of the statutory models for the completeness provision in Chapter 10). See also OR. REV. STAT. § 227.178 (2003).

52. A complete application is also essential in the determination of vested rights, because one statutory proposal provides that vesting occurs when a "complete" application is filed as provided in Chapter 10. GUIDEBOOK, *supra* note 4, § 8-501, (Alternative 1), at 10-108 to 10-109. Time limits for decisions also run from the time an application is complete. *Id.* § 10-210(1), 10-44.

be fair unless the application completely describes the development in a manner that binds the decision making process.

If a local government finds an application is incomplete, it must provide a “specific description of the additional information needed to complete the application.”<sup>53</sup> The application is complete when the applicant submits the required additional information.<sup>54</sup> This process is straightforward and limited in time. It avoids protracted negotiation by allowing only one review by the local government, and by requiring explicit direction on what additional information is necessary to complete an application. The completeness determination is judicially appealable.<sup>55</sup> This option provides an opportunity to obtain a judicial ruling on completeness when the decision is made, and avoids the cost and delay that would occur if a board or a court ruled an application incomplete at the end of the decision making process.

A potential problem with the completeness requirement is that additional information not included in an application may be necessary at a later date if a project changes, or if new issues appear that were not evident at the time of application. Chapter 10 covers this problem by authorizing the local government to request additional information or studies “if new information is required or substantial changes in the project occur.”<sup>56</sup>

A local government can always frustrate the application of a completeness requirement by threatening an applicant with disapproval if she insists on a completeness determination that will start the review process. This possibility exists, and one option for remedying this prob-

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53. *Id.* § 10–203(2), at 10–28. The intention is that the burden is on the applicant to provide the additional information. *See* H. Bernard Waugh, representing National League of Cities, Comments on Chapter 10, May 27, 1999, at 5 (suggesting change of language from “thorough” to make this clear).

54. *GUIDEBOOK, supra* note 4, § 10–203(3), at 10–28. This provision states the local government shall “determine” that the application is complete when the applicant submits the required information. The inference is that the local government does not have to find the application complete if the applicant has not met this requirement.

55. *Id.* § 10–101, at 10–19.

56. *Id.* § 10–203(5), at 10–28. However, an application is complete once it satisfies the statutory completeness requirements. *Id.* at 10–27 (Commentary on Completeness). The local government may request this information at the time it determines the application is complete, or later, and does not have to justify this request. Land use attorney Brian Blaesser argued this provision gives a local government the opportunity to prolong the application process even though an application is complete. Memorandum from Daniel R. Mandelker to Stuart Meck (Jan. 6, 1999). A statute can remedy this problem by requiring a local government to justify a request for additional information. I omitted this requirement because I believe the additional protection it provides is outweighed by the cost and delay that can occur if an applicant does not believe additional information is necessary and challenges the justification for the request in court.

lem is a statutory provision authorizing the applicant to bring a writ of mandamus to compel a completeness determination if the local government refuses to make one.<sup>57</sup> Even without a statute, a permit applicant should be able to obtain mandamus relief because the completeness determination is ministerial once the applicant supplies the information requested.

### 3. THE RECORD HEARING AND DECISION

Chapter 10 authorizes, but does not require, a record hearing on development permit applications.<sup>58</sup> It allows only one record hearing if hearings are required,<sup>59</sup> an important limitation borrowed from Washington State's reform legislation.<sup>60</sup> Though multiple hearings may occur when more than one development permit is necessary (unless a permit review is consolidated), allowing only one record hearing on each permit modifies present practice in which two or more hearings often occur. Hearings before the planning commission and the legislative body usually occur on map amendments to the zoning ordinance, for example. The two-hearing procedure is wasteful and unnecessary.<sup>61</sup>

The statutory provisions for record hearings require standard notice and hearing procedures, the adoption of hearing rules, and a decision and findings of fact by the decision maker.<sup>62</sup> The hearing notice must contain the land development regulations and planning policies that will be considered at the hearing.<sup>63</sup> This provision requires a local govern-

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57. OR. REV. STAT. § 227.179 (2003).

58. GUIDEBOOK, *supra* note 4, § 10-207(5), at 10-34 (record hearing section applies "when government holds a record hearing on a development permit application.").

59. *Id.* § 10-201(3), at 10-24. The limitation to one hearing is optional because the number [1] is bracketed. A state can allow more record hearings. This section also allows only one record appeal. Chapter 10 also authorizes the administrative review of a development application. *Id.* § 10-204, at 10-29 to 10-31. There is no record hearing, but the applicant and participants in the administrative review may submit "documents and materials." *Id.* The purpose of the administrative review procedure is to provide a simpler review process, without a record hearing, for applications that do not raise major issues. An example is an application for a minor amendment to a planned unit development plan. However, the Land-Use Review Board (or the agency designated to hear appeals) must hold a record hearing if an appeal is taken from a decision in that process. *Id.* § 10-209(6), at 10-42.

60. WASH. REV. CODE § 36.70B.060(3) (2003). The procedures required by this law were a model for the administrative review procedures required in Chapter 10.

61. The one-hearing limitation also affects the option in the model law that allows a local government to select the body or official that will conduct the administrative review process and hold hearings. *See* GUIDEBOOK, *supra* note 4, § 10-201(3), at 10-24. If only one hearing is allowed, the agency selected to review the development permit application will usually hold the hearing on the application. *Id.*

62. *Id.* § 10-207, at 10-34 to 10-39.

63. *Id.* § 10-205(2)(c), at 10-32 ("list the land development regulations and any goals, policies, and guidelines of the local comprehensive plan that apply to the application").

ment to state the basis for its review of a development application so that the issues considered at the hearing will be clear. Staff reports and materials prepared by parties or persons who will testify at the hearing must be available prior to the hearing.<sup>64</sup> This provision gives the applicant and other parties to the hearing a reasonable time to study relevant reports and other materials before the hearing is held.

Verbal *ex parte* communications are regulated.<sup>65</sup> Contacts between decision makers and parties outside the hearing nullify procedural fairness because the content of these communications is off the record and not subject to examination. Chapter 10 provides two alternatives for *ex parte* communications. One voids a decision if a decision maker engages in a “substantial” *ex parte* communication on issues related to the development application. The other voids the decision unless the *ex parte* decision is placed on the record and there is an opportunity to rebut.<sup>66</sup>

There must be a decision following the record hearing that includes a written statement of the facts, the basis for the decision, and how it is “based on” the development regulations and the policies and other elements of the comprehensive plan.<sup>67</sup> In order to provide an adequate record on appeal and avoid a remand, the decision must also “respond[] to all relevant issues raised by the parties at the record hearing.”<sup>68</sup>

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64. *Id.* § 10–207(2)(3), at 10–34. Chapter 10 suggests they should be available seven days before the hearing, but a longer period can be provided.

65. *Id.* § 10–207(7), at 10–36. Judicial response to *ex parte* communications in zoning hearings is mixed. The cases require a showing of prejudice before they will hold an *ex parte* communication voids a decision, and hold there is no prejudice if the *ex parte* communication is disclosed or rebutted. LAND USE LAW, *supra* note 15, at 6.71. I rejected a harsh and prohibitory provision on *ex parte* communications that was included in the ALI Model Code because it did not reflect land use practice. E-mail from Daniel R. Mandelker to Stuart Meck (Oct. 20, 1998). See MODEL CODE, *supra* note 25, § 2–304. This provision in Chapter 10, like others, is an attempt to codify case law. A court may hold the statutory protection does not satisfy requirements for fair procedures.

66. There must be notice of the *ex parte* communication to “all parties to the record hearing.” GUIDEBOOK, *supra* note 4, § 10–207(2)(a) (Alternative 2), at 10–36. For a similar provision, see OR. REV. STAT. § 215.422(3) (2003). The original draft of this section did not contain the second alternative. There was also some interest in a provision that would authorize site visits. Bernard Waugh, Representative for the National League of Cities, Notes of the Growing Smart Directorate Meeting (June 20–21, 1999). A statute can add this authorization. See FLA. STAT. ANN. § 268.0115(C)(3) (2003). Case law has also handled this problem. See *Grimes v. Conservation Comm’n*, 703 A.2d 101 (Conn. 1997) (approving investigative site visits).

67. GUIDEBOOK, *supra* note 4, § 10–207(9)(b), at 10–37. This requirement reinforces the identical requirement in the notice provision that requires the notice to state the development regulations and plan policies and elements the hearing will consider. *Id.* § 10–205(2)(c), at 10–32.

68. *Id.* § 10–207(9)(b)(4), at 10–37. See Notes of the Growing Smart Directorate Meeting, *supra* note 66, at 8. See also Memorandum from Stuart Meck to Directorate Members and Others (Oct. 8, 1999). Compare *Gary Bd. of Zoning Appeals v. Eldridge*,

An important issue that affects the scope and purpose of a record hearing is whether objectors may attack a development permit by attacking policies in a comprehensive plan that support the approval of the development permit. An example is a residential density policy in a comprehensive plan that supports an application for residential development. The National Association of Home Builders (NAHB) argue in a guide on the Growing Smart legislation that major issues decided in a comprehensive plan and a zoning ordinance amendment to comply with the plan, such as density, “should not be revisited in the post-zoning site-specific proceeding unless the application does not comply with those decisions.”<sup>69</sup> The guide recommends statutory language that would bar “major issues” decided in a plan from being reargued within six years of a plan’s adoption, if the zoning map has been amended in accordance with the plan.<sup>70</sup> “Major issues” would include land use, density, or intensity. NAHB argues this limitation is needed to prevent project opponents at a site-specific hearing from blocking new development by reopening policy issues decided in the comprehensive plan.

This recommendation addresses a potentially difficult problem, but it is unnecessary. The comprehensive plan controls the decision if there is a requirement that zoning must be consistent with the comprehensive plan, and the hearing body should exclude evidence that attacks planning policies. Chapter 10 provides that a decision on a development permit must explain how it is based on “the goals, policies, and guidelines of the comprehensive plan,”<sup>71</sup> and if the decision on the development permit is not consistent with the plan, the applicant can appeal and seek reversal. The comprehensive plan is only advisory in states where zoning does not have to be consistent with the comprehensive plan, and it does not bind a decision on a development permit. Argument on planning policies is relevant in deciding whether, and how, the plan should apply.<sup>72</sup>

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774 N.E.2d 579 (Ind. Ct. App. 2002) (remand is proper remedy in absence of factual findings), *with* *Mohican Valley Concrete Corp. v. Zoning Bd. of Appeals*, 815 A.2d 145 (Conn. App. Ct. 2003) (court should search record for evidence to support board and not remand if board did not state reasons for decision).

69. NATIONAL ASS’N OF HOME BUILDERS, *THE BUILDER’S GUIDE TO THE APA GROWING SMART LEGISLATIVE GUIDEBOOK* 10-6 (2002) [hereinafter *BUILDER’S GUIDE*]. This recommendation may not accomplish its purpose because a plan always requires interpretation, and a local government should be entitled to hear evidence that will help interpret its plan. *See* FLA. STAT. ANN. § 164.3215(4)(h) (2003) (governing body may make “reasonable interpretation” of its comprehensive plan).

70. *BUILDER’S GUIDE*, *supra* note 69, at 10-9.

71. *GUIDEBOOK*, *supra* note 4, § 10-207(9)(b)(3), at 10-37.

72. States that do not have a consistency requirement may wish to modify the language in the *Guidebook*, *see* text accompanying note 71, *supra*, to make it clear that planning policies are only advisory.

#### 4. TIME LIMITS AND “DEEMED APPROVAL”

Delay can be a serious problem in land use decision making. Delay is time-consuming and costly, and a developer may abandon a project if the delay is unreasonable.<sup>73</sup> This problem can be fixed, and a statute can require accountability from decision makers by imposing time limits for their decisions. The Standard City Planning Act proposed in 1928 by the U.S. Department of Commerce contained time limits for decisions on subdivision applications and provided an application was “deemed approved” if there was no decision during the time limit period.<sup>74</sup> Many state land use statutes have time limits and deemed approval provisions, and some apply to other land use decisions besides subdivision approval.<sup>75</sup> Chapter 10 requires time limits on decision making that run from the time a local government decides a development permit application is complete or from the time it is deemed complete. Like all legislative proposals in the *Guidebook*, Chapter 10 only recommends and does not mandate a specific time limit, so that a legislature can set any time period it considers acceptable. This option provides an opportunity to set longer time limits that allow more time for decision making. Moreover, because time limits run from the time an application is complete, they do not begin until the local government is satisfied an application contains all the information it needs. Finally, Chapter 10 allows a mutually agreed extension of the time limit period.<sup>76</sup>

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73. Though consolidation in the development industry has strengthened its financial capacity, many developers are lightly capitalized and highly leveraged and cannot afford the unreasonable delay caused by a failure to make a timely decision. In addition, because developers often acquire land on options subject to necessary land use approvals, they may find it cost-effective to abandon a project that is held up by delay and go elsewhere.

74. ADVISORY COMM. ON CITY PLANNING AND ZONING, U.S. DEP’T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT § 15 (1928).

75. See GUIDEBOOK, *supra* note 4, at 10–43 (collection of statutes). See Jay M. Zitter, Annotation, *Standing of Civic or Property Owner’s Association to Challenge Zoning Board Decision (as Aggrieved Party)*, 8 A.L.R. 4th 1087 (1981) (review of cases decided under time limits statutes).

76. GUIDEBOOK, *supra* note 4, § 10–219(2), at 10–44. Some observers report that local governments threaten an applicant with denial unless he agrees to a time limit extension. Jan Z. Krasnowiecki & L.B. Kregenow, *Zoning and Planning Procedures Under the Revised Pennsylvania Municipalities Planning Code*, 39 VILL. L. REV. 879, 908–09 (1994). However, the authors noted these abuses occurred under subdivision control regulations, where decision making was not judicialized. They added that “nothing would guard against or prevent arbitrary actions on the local level better than requiring that all evidence and decisions be placed on a permanent, accessible record.” *Id.* at 909. Applications for subdivision approval are development permits subject to Chapter 10 procedures. GUIDEBOOK, *supra* note 4, § 10–101, at 10–18. Chapter 10 expressly prohibits local governments from demanding a waiver of the time limits provision. *Id.* § 10–202, at 10–26.

There is an optional requirement that applications not decided within the time limit are deemed approved.<sup>77</sup>

Despite long and well-established precedent for time limits in land use legislation,<sup>78</sup> this requirement met considerable resistance from members of the advisory Directorate and from municipal and related groups. They objected primarily to the optional requirement that a development permit application is “deemed approved” if a decision is not made within the specified time,<sup>79</sup> but they also objected to the inclusion of any time limit requirement at all. As one Directorate member argued, a time limit can “overthrow” a comprehensive plan if a deadline is missed, has “grave potential for litigation, creates incentives for local governments to find technical reasons to avoid time limit problems by denying applications, and thwarts the reasoned interchange and give-and-take that characterizes good development review.”<sup>80</sup> There also were objections that complex development permit applications raise

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77. GUIDEBOOK, *supra* note 4, § 10–210, at 10–44 to 10–45. For a table with suggested time limits for development permits and appeals, *see id.*, Table 10–3 at 10–28.

78. *See* Letter from Stuart Meck and John Bredin, to Meg McGuire, President, Scenic America, at 4 (Sept. 14, 2000) (time limits and deemed approval not new or radical; sitting on a permit requires no “sunlight” on a local government’s decision). *See also* Orlando Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 ME. L. REV. 29, 66 (1980) (recommending deemed approval provisions).

Delay in decision making may possibly be actionable as a violation of substantive due process. *See* *Norco Constr. Co. v. King County*, 649 P.2d 103 (Wash. 1982), but that remedy is problematic. Neither do courts usually find that a delay in decision making is a taking of property. *See* Kimberly Horsley, Comment, *The Abnormalcy of Normal Delay*, 28 PEPP. L. REV. 415 (2001).

79. An early article argued a deemed approval provision may deny procedural due process to neighbors because it results in the approval of an application without a hearing. Carolyn W. Poulin, Comment, *Land Use Applications Not Acted Upon Shall be Deemed Approved: A Weighing of Interests*, 57 UMKC L. REV. 607, 623–29 (1980). This may be the view in California. *See* *Horn v. County of Ventura*, 596 P.2d 1134 (Cal. 1979). It is not the majority view today if the decision maker has any discretion in making the decision. *See* *Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002). *See also* Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U.J.L. POL’Y 61 (2000) (discussing this issue as it arises in substantive due process litigation). If the procedural due process problem is considered serious, a statute can make time limits run from the conclusion of the hearing. This is an option in Chapter 10, which allows local governments to set their own time limits by ordinance. GUIDEBOOK, *supra* note 4, § 10–201(1), at 10–43.

80. Statement of James M. McElfish, *supra* note 25, at A-4. *See also* Letter from Directorate Member Henry W. Underhill, Jr., International Municipal Lawyers Association, to Stuart Meck, at 1 (Sept. 20, 2001); Memorandum from Clarion Associates, to Growing Smart Legislative Guidebook Review Coalition, at 4 (Aug. 23, 2000). The Coalition included the Congress for New Urbanism, Defenders of Wildlife, the National Trust for Historic Preservation, the National Wildlife Federation, Scenic America, and the Surface Transportation Policy Project. It asked Clarion to review the entire *Legislative Guidebook*.

environmental and other concerns that cannot be resolved during a short time limit period.<sup>81</sup>

The time limit provision finally approved contains substantial changes that were made to remedy objections to the initial draft. One important change allows a local government to set its own time limits by ordinance as an alternative to a fixed statutory period.<sup>82</sup> For example, a local government can provide different time limits for different categories of development or can exempt some developments from time limits completely.<sup>83</sup> Another option responds to objections that time limits can cause hurried and unsatisfactory decisions on complex development permits. This change provides for an additional period of time, optionally suggested as thirty days, during which a local government can request additional studies.<sup>84</sup> Another change provides that time limits do not run if the local government identifies “in writing some specific land development regulation provision with which the application does not comply, and that prohibits the development of the property.”<sup>85</sup> A prohibitory floodplain regulation is an example of such a regulation. Another change provides that time limits do not run during any period in which a local government is unable to act because of problems beyond its control.<sup>86</sup>

Finally, another change added an alternative to the deemed approval requirement that some state legislation contains.<sup>87</sup> Under this alternative, if a decision is not made within the required time, the local government must refund the application fee and the applicant can bring an

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81. Memorandum from Glenn P. Sugameli, Counsel, National Wildlife Federation, to William R. Klein and Others, at 9–10 (Oct. 12, 2000).

82. See E-mail from Stuart Meck, to Daniel R. Mandelker (Sept. 2, 2001) (noting addition of this requirement in response to suggestion by James McElfish).

83. Another option would have been a provision allowing a local government to extend time limits for good cause. See WASH. REV. CODE § 36.70B.090 (1998) (expired June 30, 2000) (authorizing local government to notify applicant that it cannot make decision within time limits, and stating reasons why time limits have not been met and an estimated time when it will make decision). I did not include this option because I believed this provision would provoke litigation to determine whether there was good cause for the extension, and that there were other ways of handling the need for extensions, as noted in the text. The statute now authorizes local governments to make “written findings that a specified amount of additional time” is needed for processing complete project permit applications. WASH. REV. CODE § 36.70B.080(1) (2003).

84. GUIDEBOOK, *supra* note 4, § 10–201(4), at 10–44. This is a companion provision to a comparable provision in the completeness section, which provides that a completeness determination does not prevent a local government from asking for additional information. *Id.* § 10–203(5), at 10–28.

85. *Id.* § 10–201(1), at 10–43.

86. *Id.* § 10–201(5), at 10–44.

87. See N.H. REV. STAT. ANN. § 676:4 (2003); OR. REV. STAT. § 215.429 (2003). See e-mail from Ed Sullivan, to Daniel R. Mandelker (June 23, 2003) (Oregon approach “a good compromise”).

action in mandamus to compel a decision.<sup>88</sup> This remedy provides a method to enforce time limits without compelling a deemed approval decision that may be unsatisfactory.

#### 5. REMEDIAL MEASURES AND MEDIATION

Zoning legislation has always provided remedial relief from zoning restrictions. The Standard Zoning Enabling Act authorized a hardship variance, which may be available for a change in use;<sup>89</sup> a change in dimensional restrictions, such as setbacks; or both.<sup>90</sup> However, because the variance remedy is restricted to hardship cases, landowners who believe a land use regulation unfairly restricts the use of their property must seek legal relief if the local government refuses to make a change, often by making a takings claim. Concern about the uncertainties and costs of land use litigation led to the creation of a task force by APA that examined the takings issue, noted the existing system for administrative relief was outmoded, and recommended reform in which “administrative relief is routine.”<sup>91</sup> An APA policy also endorses administrative relief that allows “the possibility of some legitimate economically beneficial use of the property in situations where regulations may have an extreme result.”<sup>92</sup>

Complying with this mandate was an important objective in the Growing Smart project because Chapter 10 does not authorize a use variance. It authorizes only a carefully restricted area, or dimensional, variance.<sup>93</sup> This type of variance authorizes modifications in the zoning

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88. GUIDEBOOK, *supra* note 4, § 10–210(1) (Alternative 2), at 10–44. *See* Memorandum from John Bredin and Stuart Meck, to Directorate Members and Others, at 11 (May 25, 2001) (noting change). Because compliance with time limits is a mandatory duty, a court could issue a writ of mandamus to compel compliance with the statute even in the absence of a statutory provision authorizing this remedy. *See* Zitter, *supra* note 75, § 51.

89. STANDARD ZONING ACT, *supra* note 2, at 7. For a case illustrating the limitations of the use variance, *see* Paragon Props. Co. v. City of Novi, 550 N.W.2d 772 (Mich. 1992).

90. LAND USE LAW, *supra* note 15, §§ 6.39–6.59.

91. *See* MANDELKER ET AL., *supra* note 5, at 4. *See also* STRONG ET AL., *supra* note 5, at 10 (article based on report making same recommendations).

92. AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON TAKINGS (1995), available at <http://www.planning.org/policyguides/takings.html> (adopted by the Chapter Delegate Assembly and ratified by the Board of Directors, April 1995). The policy also recommends the development of model statutes with “innovative administrative mechanisms for providing landowners relief from land use regulations.” *Id.*

93. GUIDEBOOK, *supra* note 4, § 10–503, at 10–53. Many zoning statutes do not authorize a dimensional variance. Zoning ordinances may provide for them, but the *Guidebook* provision is more tightly drawn than the dimensional variance provisions in most ordinances or statutes. A dimensional variance is available only for specified physically different circumstances. The *Guidebook* does not authorize a dimensional variance for use, density, or intensity. This limitation excludes the granting of a variance from a lot size restriction. The variance provision also requires a “showing that there

restrictions that apply to the development of a property, such as setback and height restrictions. As an alternative to the use variance, and in response to the APA policy, Chapter 10 initially included a Remedial Measure that provided limited relief from restrictions in land development regulations.<sup>94</sup> This remedy was an experiment that has no equivalent in existing legislation.<sup>95</sup>

The intent in proposing the Remedial Measure was to provide relief from excessive restrictions in land development regulations without undermining the comprehensive plan or land development requirements. Implementing this objective required attention to several conceptual issues, and the proposal went through several drafts in an effort to resolve these issues.<sup>96</sup> Two of the most important concerns were the relief a Remedial Measure should provide, and the standards the statute should include as the basis for approval. Initially, the statute contained a list of land development regulations and remedies that could qualify as Remedial Measures, but this approach was abandoned because Chapter 10 and other chapters make these options available elsewhere. Instead, the statute was revised to define the Remedial Measures that could be approved functionally.<sup>97</sup> The list included “increases in density or intensity” as the primary form of relief,<sup>98</sup> as well as other more limited remedial opportunities.<sup>99</sup> Density or intensity restrictions are

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are no other reasonable alternatives to enjoy a legally permitted beneficial use of the property if the variance is not granted.” *Id.* § 10-503(4), at 10-53.

94. Daniel R. Mandelker, Chapter 10 Draft, § 10-504, 10-53 to 10-56 (Sept. 27, 2000) [hereinafter 2000 Draft]. This Draft contained the Remedial Measures proposal in its final form before it was omitted from Chapter 10. The Draft included an important caveat noting that the remedial measure option required a “fair degree” of expertise to implement, and that it could be subject to abuse and perceived as a “brokered back room deal.” *Id.* at 10-53 to 10-54. These are harsh words that might discourage even the bravest legislator, and were included to caution against the adoption of a remedy that could be useful but was experimental.

95. However, some of the remedies selected for inclusion as a remedial measure “are authorized by Fla. Stat. Ann. § 70.001(4)(c) as the basis for settling an action seeking compensation for a land development regulation.” 2000 Draft, *supra* note 94, at 10-56. Land use attorney John Delaney proposed legislation that could provide this type of relief. John J. Delaney, *Avoiding Regulatory Wipe-Outs: Proposed Model Legislation for a Local Mechanism*, 50 LAND USE & ZONING DIG. No. 7, at 3 (1998). The proposal for Remedial Measures in Chapter 10 relied heavily on Mr. Delaney’s recommendations.

96. One issue, which was not difficult to resolve, was to decide which agency should have the authority to grant Remedial Measures. Following the tight-loose philosophy of the Growing Smart legislation, local governments were allowed to make this decision. 2000 Draft, *supra* note 94, § 10-504(1), at 10-54. Mr. Delaney suggested the local planning board as the “obvious” candidate. Delaney, *supra* note 92, at 5.

97. Memorandum from Stuart Meck, John Bredin & Daniel Mandelker, to Directorate Members and Others, at 9-10 (Oct. 14, 1999) (responding to comments by Bernard Waugh).

98. 2000 Draft, *supra* note 94, § 10-504(2)(a), at 10-54.

99. These were: “(b) modifications to or credits against exactions owed by the owner

often the key factors in the success of a development project. The authority to approve use changes was omitted because use variances have been abused.

The most difficult task in drafting this proposal was to develop criteria for Remedial Measures that could make a development project viable without endangering local planning policies and land development regulations.<sup>100</sup> One part of the solution was to provide a set of protective safeguards. They provided that a Remedial Measure must be consistent with the local comprehensive plan; that it must “not alter the character of an adjacent or surrounding neighborhood,” a limitation common in most variance statutes; and that it was “a more appropriate remedy than a conditional use, variance, or map or text amendment to the zoning ordinance.”<sup>101</sup> A final provision required a finding that a Remedial Measure was “necessary,” and the proposed statute contained two alternatives for making this determination. One required a finding that “the local government’s land development regulations did not allow a reasonable economic use of the property.”<sup>102</sup> This finding had to be supported by “competent financial evidence.” An alternate standard was added because Directorate members and others objected to the “reasonable economic use” test.<sup>103</sup> They argued this test was more lenient than the takings tests adopted by the Supreme Court, and that it

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of the land on which the development would occur, under an exactions program adopted by the local government; (c) an increase in the number of development rights authorized for transfer under a transfer of development rights program adopted by the local government; (d) payments by the applicant in lieu of on-site mitigation; or (e) a recommendation to the local legislative body or other appropriate local government agency that it purchase the property, or an interest in the property.” *Id.* §§ 10-504(2) (b)-(d).

A decision to grant a change in density or intensity would have been a development permit that would have allowed a development to proceed. Any other remedial measure would have been included in a development permit if a local government decided to issue one. *Id.* § 10-504(6), at 10-36. The application for the development permit would reference the remedial measure approval.

100. John Delaney suggested an “inordinate burden” standard based on existing case law. Delaney, *supra* note 92, at 4, 8. I did not recommend this standard because I considered it too vague.

101. 2000 Draft, *supra* note 94, at § 10-504(4)(a)-(c).

102. *Id.* § 10-504(4)(d), at 10-55. This test was based in part on N.Y. GEN. CITY LAW § 81(b)(3)(B)(i) (2003), and comparable legislation for other New York local governments. 2000 Draft, *supra* note 94, at 10-53. The relevant statutory language is “the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence.” *Id.*

103. Memorandum from John Bredin and Stuart Meck, to Directorate Members and Others, at 11 (Oct. 2, 2000) (summarizing objection by Directorate Member Henry Underhill that a reasonable return standard is a recipe for mischief). Directorate Member James McElfish expressed considerable concern on this issue. E-mail to Daniel R. Mandelker (Feb. 9, 1999). See also Stuart Meck, *Present at the Creation: A Personal Account of the APA Growing Smart Project*, 54 LAND USE & ZONING DIG. NO. 3., at 3, 11 n.25 (2002) (expressing concern about economic hardship provisions).

would be too easy for applicants to meet and too difficult for opponents to oppose. The second alternative required a showing that none of the uses authorized by the land development regulations allowed a “reasonable use” of the property, and that “the property cannot realize a reasonable return if the remedial measure is not approved, and the inability to realize a reasonable return is substantial as demonstrated by competent financial evidence.”<sup>104</sup> Commentary to the proposal pointed out, however, that the two tests were much the same.<sup>105</sup>

As the objectors noted, the connection between criteria for approving Remedial Measures and the judicial test for takings is difficult to resolve.<sup>106</sup> The Remedial Measures proposal assumed that adjustments in land development regulations should be available even when the takings tests are not met. The problem was to find a standard to express this concept that would preclude a landowner and a municipality from bargaining away appropriate land development regulations.<sup>107</sup>

The Remedial Measures option was eventually omitted, partly because of concern about approval standards,<sup>108</sup> and replaced with a provision for mediated agreements.<sup>109</sup> As the commentary points out, mediation is a nonbinding process that is a preferred alternative to allowing an administrative body to make policy decisions through remedial relief.<sup>110</sup> A mediated agreement is available when a local government denies a complete development application or approves it subject to conditions.<sup>111</sup> The petitioner for mediation must show that a land development regulation, or land development regulations “cumulatively,” impose an “undue hardship” on the use or development of the land.<sup>112</sup>

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104. 2000 Draft, *supra* note 94, § 504(4)(d) (Alternative B), at 10–55.

105. *Id.* at 10–55 (citing *Village Bd. v. Jarrold*, 423 N.E.2d 385 (N.Y. 1981)).

106. See E-mail from Daniel R. Mandelker, to Stuart Meck (Sept. 25, 2000) (noting it is almost impossible for landowners to meet the takings test in a typical zoning case). This problem also arises under variance provisions. See *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 734 A.2d 227 (Md. 1999) (holding “reasonable return” and “reasonable use” tests are less restrictive than takings tests because otherwise variance standard would be superfluous).

107. See Memorandum from Stuart Meck and John Bredin, to Directorate Members and Others, at 2 (Feb. 26, 1999) (reporting division of opinion at Directorate meeting on whether Remedial Measures were a good idea, how tightly mitigation should be controlled, the relationship of proposed mitigation to the comprehensive plan, and whether “reasonable return” was the appropriate standard). See also Notes of the Growing Smart Directorate Meeting, at 13–14 (Oct. 15–16, 2000) (discussion voicing objections to this proposal).

108. Memorandum of May 25, 2001, *supra* note 88, at 11.

109. Some states have adopted legislation providing for mediation in land use disputes. *E.g.*, CONN. GEN. STAT. § 8–8a (2003); ME. REV. STAT. Ann. tit. 5, § 3341 (2003).

110. GUIDEBOOK, *supra* note 4, at 10–54 to 10–55.

111. *Id.* § 10–504(1), at 10–56.

112. *Id.* § 10–504(1)(b), at 10–56.

Mediation is voluntary with the local government, which must notify the petitioner in writing whether it agrees to mediate.<sup>113</sup> It must focus on the negotiation of a development agreement to “remedy or ameliorate undue hardship and to resolve potential takings claims, but all appropriate remedies, measures, and responses may be considered.”<sup>114</sup> The details of this compromise have not satisfied everyone, however.<sup>115</sup>

Mediation is a possible, but not the only, remedy that can avoid litigation on takings and other claims against land development regulations. The Remedial Measures proposal was an alternative, and the protective provisions and criteria for relief it included should have been sufficient to guard against abuse.

### C. *Judicial Review of Land Use Decisions*

#### 1. THE JUDICIAL REVIEW SYSTEM<sup>116</sup>

The Standard Zoning Act authorized judicial review through certiorari for board of adjustment decisions, and Chapter 10 could have authorized certiorari review for decisions on development permits following a record hearing. However, certiorari is a method for judicial review derived from the ancient extraordinary writs that are available to review government actions,<sup>117</sup> and its use and status vary from state to state.<sup>118</sup> Some states have adopted specialized statutes authorizing the judicial review of land use decisions, but they often are incomplete and limited to selected boards or agencies.<sup>119</sup> The variety of judicial review pro-

113. *Id.* § 10-504(3), at 10-56.

114. *Id.* § 10-504(6), at 10-57. Development agreements are authorized by GUIDEBOOK, *supra* note 4, § 8-701, at 8-197 to 8-200.

115. The National Association of Home Builders believes the mediation provision is too limited, but their conclusion that only a development agreement can be the outcome of mediation is incorrect. BUILDER'S GUIDE, *supra* note 69, at 10-10 to 10-14. See Memorandum from Stuart Meek & John Bredin, to Directorate Members and Others, at 4 (Oct. 12, 2001) (section changed to make it “clear that a development agreement is not the only solution that may arise from the mediation”). The NAHB Guide also objects to mandating an outside mediator, which is also required. See GUIDEBOOK, *supra* note 4, § 10-504(4), at 10-57. See also *Present at the Creation*, *supra* note 103, at 10 (2002) (noting objections from environmentalists that takings-related test was not included).

116. Daniel R. Mandelker, *Judicial Review of Land-Use Decisions*, in MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS, Vol. I, at 163 (1996) (containing portions of the commentary to the judicial review section). See also Daniel R. Mandelker, *Judicial Review of Land Development Controls Under the ALI Model Code*, 1971 LAND-USE CONTROLS ANNUAL 101.

117. See DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM ch. 12 (5th ed. 2003 Reprint) (for a discussion of the extraordinary writs).

118. See, e.g., FLA. STAT. ANN. § 163.3215 (2003) (authorizing “appeal filed by petition for writ of certiorari” from local government decisions if ordinance adopts minimum procedural requirements in statute).

119. E.g., NEB. REV. STAT. § 15-1201 (2003) (authorizing appeal from “any final

cedures available in many states to review zoning decisions can also create confusion about the proper remedy to use. Attorneys risk being thrown out of court if they choose the incorrect judicial procedure.<sup>120</sup>

Chapter 10<sup>121</sup> resolves the judicial review problem by providing a procedure for the judicial review of “land use decisions,”<sup>122</sup> which include decisions made on a hearing record. The judicial review process is modeled on the Washington Land-Use Petition Act<sup>123</sup> and is the exclusive method for the judicial review of land use decisions.<sup>124</sup> Chapter 10 includes the conventional standards for judicial review, adding a provision authorizing judicial relief if the land use decision is not consistent with a comprehensive plan when consistency is required, or if the decision does not comply with local land development regulations.<sup>125</sup> The statute also authorizes a court to grant “such definitive relief as it considers appropriate.”<sup>126</sup> Definitive relief is essential to avoid a remand when a court believes an application meets all the requirements that

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administrative or judicial order or decision of the board of zoning appeals, the board of equalization, the city council, or any officer or department or board of a city of the primary class”), held in *Copple v. City of Lincoln*, 315 N.W.2d 628 (Neb. 1982), to apply only to quasi-judicial decisions. *See also* CONN. GEN. STAT. § 8–8 (2003). Multiple appeals are necessary when a statute provides for judicial review from designated boards or officers if a development proposal requires permission from more than one approving authority.

120. *See, e.g.*, *State ex rel. Freeway Media, L.L.C. v. City of Kansas City*, 14 S.W.3d 169 (Mo. Ct. App. 2000) (declaratory judgment not available because writ of certiorari should have been used).

121. GUIDEBOOK, *supra* note 4, §§ 10–601 to 10–618, at 10–68 to 10–64.

122. Chapter 10 defines this term to include “a decision by a local government officer or body, including the legislative body, on a development permit application” and on additional specified applications, such as an application for a conditional use. It specifically includes “decisions made following a record hearing or record appeal.” GUIDEBOOK, *supra* note 4, § 10–101, at 10–19. There is a provision for expedited judicial review. *Id.* § 10–609, at 10–76.

Chapter 10 revises and expands the statutory basis for the judicial review of land use decisions by revising and expanding the statutory basis for land use decisions to provide a state remedy similar to § 1983 of the federal civil rights act, 42 U.S.C. § 1983. That remedy is available for violations of the federal constitution and federal statutes. GUIDEBOOK, *supra* note 4, at 10–61, 10–62. The ALI Model Code proposed an unworkable system of judicial review that attempted to transfer procedures for the review of state agency decisions to the local level. *Id.* at 10–65.

123. WASH. REV. CODE § 36.70C (1995).

124. GUIDEBOOK, *supra* note 4, § 10–602(1), at 10–69. This method of judicial review does not replace or apply to actions for injunctions or declaratory judgments or for writs of mandamus or prohibition. Nor does it apply to a claim for monetary damages or compensation. A landowner may bring a suit based on the statutory procedures available for the inverse condemnation remedy.

125. *Id.* § 10–615, at 10–81, 10–82. The other standards are: unlawful procedure or process if substantial harm done, erroneous interpretation of law, decision not supported by substantial evidence, clearly erroneous application of law to the facts, lack of authority, and violation of constitutional rights.

126. *Id.* § 10–619, at 10–83. This section is based on PA. STAT. ANN. tit. 53, § 11006-A(c)(e) (2003).

apply and should have been approved.<sup>127</sup> The following sections discuss problems of standing, finality and supplementation of the record, topics that were controversial in the drafting of Chapter 10.

## 2. STANDING

Deciding who has standing to appeal is a critical issue in any system of judicial review. Standing to appeal is closely tied to the question of who may be parties in record hearings.<sup>128</sup> A decision is necessary on which parties to a record hearing have standing to appeal from a decision based on the hearing, and whether persons who were not parties to the hearing can also appeal. Environmental and related organizations argued for a broad definition of standing that included public interest groups.<sup>129</sup> The National Association of Home Builders argued for a narrower definition that would require a showing of special injury. It believed public interest groups and members of the general public should not be allowed to participate in site-specific adjudicatory hearings.<sup>130</sup> The association argued that a broad standing rule was not required for these hearings because members of the public can participate earlier in the adoption of comprehensive plans and land development regulations, and that this participation is enough.<sup>131</sup>

Chapter 10 resolves the standing problem at two points. It defines the parties who have standing in record hearings as any governmental unit that has jurisdiction over the development application and “any abutting or confronting owner or occupant.”<sup>132</sup> In addition, “any other person or governmental unit,” including neighborhood and community organizations, may be a party in a record hearing if they would be “aggrieved” by a decision on the application.<sup>133</sup> The statute then defines the persons entitled to bring a judicial appeal.<sup>134</sup> Standing is granted without a showing of aggrievement to the applicant or owner of the

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127. *Id.* at 10–83 (commentary on Definitive Relief).

128. When there is an administrative review there is no hearing, but the statute authorizes the applicant, persons, organizations, and governmental units to submit materials concerning the application. GUIDEBOOK, *supra* note 4, § 10–204(2), at 10–29. Participants in an administrative review have standing to bring a judicial appeal “by right.” *Id.* § 10–607(4), at 10–74.

129. *E.g.*, Memorandum from Clarion Associates, *supra* note 80, at 5.

130. BUILDER’S GUIDE, *supra* note 69, at 10–19 to 10–24 (2002).

131. *Id.* at 10–22. *See also* Letter from John J. Delaney, to Debra L. Bassert, National Ass’n of Home Builders, at 2–4 (June 19, 1999).

132. GUIDEBOOK, *supra* note 4, § 10–207(5), at 10–34.

133. No additional limitations on organizational standing were considered necessary because the aggrievement requirement should be sufficient. *Id.* at 10–74 (commentary on Standing and Intervention). Courts usually grant standing to appeal to adjacent landowners. LAND USE LAW, *supra* note 15, § 8.04.

134. GUIDEBOOK, *supra* note 4, § 10–607, at 10–74. *See also* Federal Administrative Procedure Act, 5 U.S.C. § 702 (2003) (“person . . . adversely affected or aggrieved”).

property, the local government to which the application was made, abutting or confronting property owners, and parties to the record hearing on the development permit.<sup>135</sup> All other persons or organizations have standing to appeal if they are aggrieved.<sup>136</sup>

The term “aggrieved” is thus a critical statutory term that plays an important role in deciding who may be a party to a record hearing, and who may appeal a decision following a record hearing. The use of aggrievement as the basis for standing is consistent with established practice.<sup>137</sup> The Standard Zoning Act uses the term “aggrieved” to determine who can appeal to the Board of Adjustment and to a court,<sup>138</sup> as do many state statutes.<sup>139</sup>

Chapter 10 defines “aggrieved” as “[special] harm or injury [distinct from any harm or injury caused to the public generally].” The definition also requires that the “asserted interests” of the person claiming standing must be among those the “local government is required to consider when it makes the land-use decision.”<sup>140</sup> The bracketed words are op-

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135. *Id.* The National Association of Home Builders object to this provision because they believe an administrative agency cannot bind a court by its decision on who is a party aggrieved. BUILDER’S GUIDE, *supra* note 69, at 10–21 (citing Sugarloaf Citizens Ass’n v. Department of Env’t., 686 A.2d 605 (Md. 1996)). This comment is correct, though it applies to any attempt to codify judicially imposed procedural requirements. However, Sugarloaf may not apply to Chapter 10 because aggrievement is not required for participation in a hearing in Maryland, as the case points out. Chapter 10 requires aggrievement for party status in a hearing for some parties, GUIDEBOOK, *supra* note 4, § 10–207(5), at 10–34, though it is possible that aggrievement for participation in a hearing may not establish aggrievement for purposes of judicial review.

136. For example, a neighborhood organization would have standing to bring a judicial appeal if it was a party to the hearing. If it was not a party to the hearing, it would have to show aggrievement in order to bring a judicial appeal.

137. Chapter 10 initially contained a definition of the terms “aggrieved” and “adversely affects” to indicate a broad and narrower definition of standing, but project staff rejected this approach at the suggestion of Professor Ronald Levin, who argued that the proposed definitions would have entailed no significant difference between the two terms. E-mail from John Bredin, to Daniel R. Mandelker (Oct. 10, 2001). The “special harm or injury” requirement that defined who was “adversely affected” was added as a more stringent standing test for aggrievement.

138. Standard Zoning Act, *supra* note 2, § 7.

139. A staff report reviewed standing legislation in several states and concluded that statutes used the term “aggrievement” to define standing or specifically granted standing to groups similar to those granted standing in Chapter 10. Memorandum from John Bredin, to Directorate Members and Others, at 1–7 (Dec. 3, 1999) (citing COLO. REV. STAT. § 30–28–118 (2003); 65 ILL. COMP. STAT. § 5/11–13–12 (2003); MD. ANN. CODE, art. 66B, §§ 2.09(a), 4.08(a) (2003); MASS. GEN. LAWS ch. 40A, § 8 (2003); OHIO REV. CODE § 303.15 (2003); OR. REV. STAT. §§ 215.422(1)(a), 227.180(1)(a) (2003); R.I. GEN. LAWS § 45–24–71(A) (2003); WASH. REV. CODE § 36.70C.60 (2003). Compare UTAH CODE ANN. § 10–9–704(1)(a)(i) (2003) (“adversely affected”). See also Jefferson Landfill Comm’n v. Marion County, 686 P.2d 310 (Or. 1984) (discussing meaning of “aggrieved” and “adversely affected”).

140. GUIDEBOOK, *supra* note 4, § 10–101, at 10–18, 10–19. This provision is similar to the prudential rule in federal standing law that requires the interest asserted by a party to be within the zone of interests of the statute under review.

tional. They narrow the definition of aggrievement in response to objections that Chapter 10 defined aggrievement incorrectly because courts require a showing of special injury to show aggrievement.<sup>141</sup> Objectors apparently wanted this optional language made mandatory, a request that is inconsistent with the decision to provide statutory alternatives in the *Legislative Guidebook*. As one Directorate member noted, the compromise on standing in Chapter 10 “is a reasonable middle ground.”<sup>142</sup> The entire standing section is also optional should a state decide not to define standing by statute and to leave this issue to the courts.<sup>143</sup>

### 3. EXHAUSTION OF REMEDIES, FINALITY, AND THE REQUEST FOR CLARIFICATION

Timing is another critical issue in the judicial review of land use decisions. Courts have always applied well-established exhaustion of remedy rules to require litigants to seek all available administrative remedies before taking an appeal.<sup>144</sup> Chapter 10 codifies the exhaustion rules courts usually apply.<sup>145</sup> It also has an optional provision providing that exhaustion is not required when it would be futile, when an ad-

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141. BUILDERS GUIDE, *supra* note 69, at 10–20, 10–21. *See also* Letter from John J. Delaney, to Debra L. Bassert, National Ass’n of Home Builders, at 20–21 (Feb. 11, 1999) (making similar argument); Memorandum, *supra* note 97, at 4 (Oct. 14, 1999) (noting the optional language was inserted in response to comments by Mr. Delaney). The Maryland courts take this view. *Superior Outdoor Signs, Inc. v. Eller Media Co.*, 822 A.2d 478 (Md. Ct. Spec. App. 2003). A court can also interpret the “aggrieved” requirement to include special injury if it believes special injury is necessary. *See Copple v. City of Lincoln*, 274 N.W.2d 520 (Neb. 1979).

142. Statement of James M. McElfish, Jr., Directorate Member for the Natural Environment, GUIDEBOOK, *supra* note 4, at A-6 (and noting that “Guidebook properly resisted attempts to exclude the public and local property owners from decisions that affect their communities”).

143. GUIDEBOOK, *supra* note 4, at 10–74 (commentary on Standing and Intervention).

144. *See* LAND USE LAW, *supra* note 15, §§ 8.08–8.11 (discussing exhaustion of remedies).

145. GUIDEBOOK, *supra* note 4, § 10–604, at 10–72. The *Guidebook* notes a state may decide not to codify the exhaustion of remedies rule. *Id.* at 10–72 (commentary on Exhaustion of Remedies). States can decide not to codify if they believe standing questions are adequately handled by case law or an existing statute. *See, e.g.*, UTAH CODE ANN. § 10–9–1001 (2003) (no person may challenge municipal land decision in court “until that person has exhausted his administrative remedies”). This section attracted objections. *See, e.g.*, BUILDER’S GUIDE, *supra* note 15, at 10–15 to 10–18 (2002) (recommending deletion of conditional use as remedy that requires exhaustion); Memorandum from Directorate Member Henry Underhill, to Bill Klein, at 5 (June 22, 2000) (noting that exhaustion provision may lead to increase and complicate litigation against municipalities); Notes of the Growing Smart Directorate Meeting, at 12–13 (Oct. 15–16, 2000) (discussing claimed vagueness in language of section). *But see* Notes of the Growing Smart Directorate Meeting, at 9 (June 25–26, 1999) (noting objections but explaining purpose of provision).

ministrative remedy is inadequate, or when a plaintiff makes a facial claim of invalidity.<sup>146</sup>

Finality is another timing issue in land use litigation. Finality had not been an issue until the Supreme Court adopted a final decision rule for as-applied takings cases brought in federal court.<sup>147</sup> Landowners cannot sue in federal court in these cases until the local decision body makes a final decision on a land use application.<sup>148</sup> This finality rule is difficult to satisfy because a later Supreme Court case held an applicant must make more than one application to make her case final.<sup>149</sup> As a result, landowners must often make several applications to the local decision making body before a court will find the local government has made a final decision.<sup>150</sup>

Though state courts did not initially have a finality rule for land use litigation, they have been influenced by the Supreme Courts ripeness decisions and are applying them in state takings and other cases.<sup>151</sup> Chapter 10 provides a final decision rule to codify and make certain the rule state courts should apply in judicial appeals.<sup>152</sup> The statutory definition of finality in Chapter 10 may also be of assistance in federal litigation. A state statute cannot bind a federal court in its interpretation of federal ripeness rules, but a federal court may give some deference to state requirements on finality. Chapter 10 also contains an optional provision authorizing the reservation of federal claims in state courts.<sup>153</sup>

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146. *Id.* § 10-604(2), at 10-72. The intent is that exemption from the exhaustion requirement applies only to the facial claim if that claim is joined with an as-applied claim. Memorandum to Directorate, *supra* note 115, at 5.

147. For recent discussions of the ripeness rules see Michael M. Berger, *Supreme Bait and Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99 (2000); John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the Ripeness Mess? A Call for Reforms so Takings Plaintiffs Can Enter the Federal Courthouse*, 13 URB. LAW. 195 (1999). The ripeness rules do not apply to facial takings claims. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

148. The leading decision is *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). The court also required takings plaintiffs to sue in state court first if the state has an adequate compensation remedy.

149. *McDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

150. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496 (9th Cir. 1990) (several applications necessary). There was a later Supreme Court decision on the takings issue in this case. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

151. LAND USE LAW, *supra* note 15, § 8.09. This may seem curious because state constitutions do not usually have the "case and controversy" clause that requires the federal ripeness rules, though state courts may prudentially refuse jurisdiction if a case does not present a real controversy. See *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983).

152. GUIDEBOOK, *supra* note 4, § 10-603, at 10-70, 10-71. As always, of course, a state or federal court can decide the statutory definition does not meet judicially imposed tests for finality.

153. *Id.* § 10-605, at 10-73. A plaintiff may join a petition for review under Chapter 10 with a claim excluded from Chapter 10, such as an as-applied takings claim brought in an inverse condemnation action. *Id.* § 10-602(3), at 10-69. Note also that a defendant may remove to federal court an appeal from a local government land use decision in

A failure to reserve these claims could make it impossible to return to federal court once the state court decided the state claims.<sup>154</sup>

Precedent was available for statutory treatment of these issues in congressional legislation that reformed the Supreme Court's ripeness rules, and which passed the House (but not the Senate) in 1999.<sup>155</sup> This bill contained a complex definition of finality with two options. Under one option a decision would be final if "one meaningful application, as defined by the locality" had been disapproved, and there was one attempt to obtain an "appeal or waiver" if this opportunity was available.<sup>156</sup> The second option was similar, except that it also required "disapproval" of an application to "explain[ ] in writing the use, density, or intensity of the development of the property that would be approved, with any conditions therefor."<sup>157</sup> This last requirement was controversial because it modified the usual assumption, that the landowner has the responsibility to specify the type of project he wants the local government to approve.

Chapter 10 provides a land use decision is final if a local government has approved one development permit application that is complete or deemed complete, has approved the application with conditions, or has denied it.<sup>158</sup> This requirement provoked considerable controversy; objectors called it an unacceptable "one-strike" rule.<sup>159</sup> They believed a statutory finality provision would hasten litigation by allowing developers to require final decisions on extreme development proposals.<sup>160</sup>

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an administrative hearing. *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

154. The cases are divided on this question. *See Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003).

155. H.R. 1534, 105th Cong. (1997). I testified on behalf of this legislation. *See Testimony of Daniel R. Mandelker on H.R. 1534 Before the House Judiciary Committee*, 31 URB. LAW. 323 (1999). For discussion of the bill, *see* Max Kidalov & Richard H. Seamon, *The Missing Pieces of the Debate over Federal Property Rights Legislation*, 27 HASTINGS CONST. L.Q. 1 (1999). A takings retreat organized by the State and Local Government Law Section of the American Bar Association and the Rocky Mountain Land Use Institute made similar recommendations. Report of Retreat on Takings Jurisprudence, at 9-11 (1999). The Section did not adopt this Report.

156. *Id.* § 2(e)(2)(A)(ii)(I). This was essentially a codification of the exhaustion of remedies rule.

157. *Id.* § 2(e)(2)(A)(ii)(II). The bill also had a futility exception. *Id.* § 2(e)(2)(B).

158. *Id.* § 10-603(2)(a)(b), at 10-70. An application is also final if it is deemed approved. *Id.* § 10-603(2)(c). *See also* OR. REV. STAT. § 197.015(10) (authorizing review of final decisions).

159. Memorandum from Clarion Associates, to Growing Smart *Legislative Guidebook* Review Coalition, at 5 (Aug. 23, 2000).

160. *E.g.*, Memorandum from John Bredin and Stuart Meck, to Directorate Members and Others, at 8-9 (Oct. 2, 2000) (reporting objections by Clarion Associates and Directorate Member Henry Underhill). *See also* H. Bernard Waugh, representing National League of Cities, Comments on Chapter 10, at 11-12 (May 27, 1999)(objecting to any finality provision). The Home Builders believe the finality and related exhaustion

Despite these objections, the inclusion of a finality provision is essential to avoid the chaos in state courts that has been created by the federal ripeness rules.<sup>161</sup> APA policy favors the adoption of statutory requirements for “certain” decisions,<sup>162</sup> and the finality provision implements this policy. Changes made in the initial statutory draft removed the possibility that local governments could be forced to make decisions on incomplete applications by requiring a complete application as the basis for a final decision.<sup>163</sup> A local government can refuse to make a completeness determination until an applicant has submitted all the information it requires.<sup>164</sup>

Chapter 10 initially included another provision, modeled on the federal ripeness legislation, that authorized a development permit applicant to request a “ ‘final decision’ if her application is denied or conditionally approved.”<sup>165</sup> Objectors who did not like this requirement argued it would place an “enormous” burden on local governments, which may have limited information on the development, and that an applicant could use information received in response to their request as the basis for a takings or vested rights claim.<sup>166</sup> They also argued the applicant is responsible for providing the details of her project, not the local

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of remedies provisions place too many barriers on judicial review. BUILDER’S GUIDE, *supra* note 69, at 10–15 to 10–18. This objection is misplaced. Case law already includes a final decision and exhaustion requirement. Chapter 10 simply codifies these requirements.

161. See Letter from John J. Delaney, *supra* note 131, at 27–28 (definition of finality in state statute appropriate and helpful).

162. Policy Implementation Principles: The Appropriate State Role, as Actor and Enabler, in Planning and Managing Change, adopted by the Chapter Delegate Assembly and ratified by the Board of Directors, at 9 (Oct. 1993) (“new laws should . . . add requirements for reasonably prompt and certain decisions, and . . . offer realistic and acceptable relief in cases of unreasonable delay or incomplete or unclear decisions”). See also MANDELKER ET AL., *supra* note 5 (recommending finality rule); STRONG ET AL., *supra* note 5 (article based on report making same recommendation).

163. Memorandum from John Bredin, to Directorate Members and Others, at 11 (May 25, 2001) (reporting adoption of changes recommended by Directorate Member James McElfish, including use of term “complete” application because this term is defined in Chapter 10). See also Notes of the Growing Smart Directorate Meeting, at 11–12 (Oct. 15–16, 2000) (discussion of changes).

164. GUIDEBOOK, *supra* note 4, § 10–203, at 10–27, 10–28.

165. Chapter 10 Draft, § 10–207(10), at 10–36, 10–37 (June 12, 2001). A final decision provided by the local government under this paragraph would have been a final decision for purposes of judicial appeal. *Id.* § 10–207(10)(b), at 10–37. This provision was modeled in part on FLA. STAT. ANN. § 70.001(5)(a) (2003) (final decision mandatory when landowner files claim for compensation against local government). It also implements APA policy. See *supra* note 162.

166. Letter from Directorate Member Henry W. Underhill, Jr., International Municipal Lawyers Association, to Stuart Meck, at 1 (Sept. 20, 2001). A vested rights claim would not be successful in the majority of jurisdictions that require a building permit as the basis for such a claim. LAND USE LAW, *supra* note 15, § 6.15.

government, which should not have the burden of advising an applicant on what it would approve.

One answer to these objections is that a development permit application should contain all information needed for a local government to provide guidance, because it does not have to consider an application until it is complete. In addition, the finality rule is not meaningful if a local government does not have to provide a final decision because it is then able to delay an application endlessly through repeated denials.<sup>167</sup> This proposal, however, was modified after a Directorate meeting at which the initial draft drew objections.<sup>168</sup> Chapter 10 now authorizes a “request for clarification of findings and decisions” that requires a local government to “issue a written clarification concerning those findings and decisions.”<sup>169</sup> This requirement is not an optimal solution of this problem, which will continue to require attention.<sup>170</sup> The initial provision, perhaps modified to specify the detail required from local governments, is preferable.

#### 4. SUPPLEMENTATION OF THE RECORD

Whether parties to a judicial appeal may introduce evidence to supplement an administrative record has produced widely different answers. The issue is whether courts may modify the factual basis for a record decision by taking supplementary evidence. Arguments for such evidence are that a court should resolve any issues before it in order to avoid a costly remand, and that it is a neutral forum that can remedy any impaired fact-finding by the local decision maker. Moreover, an obstinate local body can simply adjust its findings on remand and reach the same decision it did before, so that an additional appeal is necessary. A ban on supplemental evidence also has important strategic consequences because it shifts the obligation to find facts to the local level. An applicant must make a complete and adequate record at the local hearing because she will be prevented from supplementing that record on appeal. Arguments against supplemental evidence are that it de-

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167. *See* *Richmond Co., Inc. v. City of Concord*, 821 A.2d 1059 (N.H. 2002) (noting duty of municipalities to provide assistance to citizens seeking approval under zoning ordinances).

168. Memorandum from Stuart Meck and John Bredin, to Directorate Members and Others, at 4 (Oct. 12, 2001).

169. *GUIDEBOOK*, *supra* note 4, § 10-207(10), at 10-38 (record hearing); *Id.* § 10-204(5) (administrative review).

170. The discussion at the Directorate meeting that reviewed the revised provision revealed some confusion about its intent and how local governments might implement it. Presumably, a “clarification” is a more detailed and understandable explanation of the decision the local government made. Notes were not taken for this Directorate meeting.

prives local governments of their autonomy to make decisions based on local policy and experience, and that such evidence allows a court to reverse a decision on facts or arguments not addressed in the local hearing. In this case, remand is preferable because it allows the local body to take additional evidence and reconsider.<sup>171</sup>

Statutory direction on supplemental evidence is conflicting. The Standard Zoning Enabling Act broadly authorizes a court to take evidence in an appeal from the board of zoning adjustment when “it shall appear to the court that testimony is necessary for the proper disposition of the matter.”<sup>172</sup> The 1961 Model State Administrative Procedure Act takes a contrary approach, and only authorizes a remand if there are good reasons why material evidence was not presented to the agency.<sup>173</sup> State land use legislation on supplementation varies,<sup>174</sup> and some courts do not allow supplementation in a certiorari appeal based on an administrative record.<sup>175</sup>

Chapter 10 authorizes a narrow supplementing of the administrative record on issues relating to standing, disqualification of a decision maker, and matters that were improperly excluded after being offered by a party at a record hearing.<sup>176</sup> This provision allows supplemental evidence when issues arise on appeal that relate to fundamental issues that affect the fairness of the hearing and the right to participate. A

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171. GUIDEBOOK, *supra* note 4, § 10–78 to 10–79 (commentary on Review and Supplementation of the Record).

172. Standard Zoning Act, *supra* note 2, § 7.

173. 1961 Model State Administrative Procedure Act § 15(e), 15A UNIFORM LAWS ANN. 12 (2000) (if additional evidence material and good reason for failure to present it before agency at hearing, court may order the additional evidence taken by agency upon conditions determined by court). The model act follows federal procedure. *See* United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963). The 1981 Model Act, which has been much less widely adopted, takes an even more restrictive approach to judicial supplementation of the record. 1981 Model State Administrative Procedure Act § 5–114(a), 15A UNIFORM LAWS ANN. 141 (2000).

174. *E.g.*, N.D. CENT. CODE § 28–34–01 (2003) (remand to governing body if “additional evidence is material and that there are reasonable grounds for the failure to adduce such evidence in the hearing,” or if evidence excluded by governing body); UTAH. CODE ANN. § 10–9–708 (2003) (“may not accept or consider any evidence outside the board of adjustment’s record unless that evidence was offered to the board of adjustment and the court determines that it was improperly excluded by the board of adjustment”); WASH. REV. CODE § 36C.70.120 (2003) (similar to Chapter 10 provisions except for optional provision).

175. *E.g.*, *City of Miami Beach v. East Coastline Dev. Ltd.*, 819 So. 2d 898 (Fla. Ct. App. 2002).

176. GUIDEBOOK, *supra* note 4, § 10–613(1)(a)–(c), at 10–79, 10–80. It also allows supplementation to correct “ministerial errors or omissions in the preparation of a record.” This provision was recommended by John Delaney. *See* Letter from John J. Delaney, *supra* note 131, at 31–34. *See also* GUIDEBOOK, *supra* note 4, § 10–614, at 10–80, 10–81 (authorizing discovery to obtain supplementary evidence). For a similar provision, *see* OR. REV. STAT. § 197.835(2) (2003).

broader provision is optional and allows the introduction of additional evidence relating to “matters indispensable to the equitable disposition of the appeal.”<sup>177</sup> It is included so states can authorize more extensive supplemental evidence if they believe additional fact-finding by a court is necessary.<sup>178</sup> Despite strong objection from the National Association of Home Builders, which believes supplemental evidence usurps local government’s authority to decide land use cases,<sup>179</sup> Chapter 10 provides reasonable alternatives for a broad or a narrow statutory solution of this issue.<sup>180</sup>

#### IV. Conclusion

The administrative and judicial review of land use decisions is, indeed, drama. Fair and disciplined procedures are necessary so that an application for a development permit is adequately detailed and accepted by the local government, so that all interested parties can participate in a defined hearing process, and so that decisions are based on findings of fact and clearly stated. A statutory judicial review process with clear procedures is essential to provide the necessary judicial review of decisions after a record hearing. Chapter 10 meets these needs.

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177. GUIDEBOOK, *supra* note 4, § 10–613(1)(d), at 10–80. This provision is modeled on CONN. GEN. STAT. § 8–8(k) (2003).

178. GUIDEBOOK, *supra* note 4, at 10–80.

179. BUILDER’S GUIDE, *supra* note 69, at 10–25 to 10–30. They also argue that a court in a record appeal should not “become an independent trier of fact.” *Id.* at 10–30. *See also* Letter from John J. Delaney, *supra* note 141, at 33–34 (and suggesting parties to record hearing could withhold information and then attempt to present it on appeal); Memorandum from John Bredin and Stuart Meck, to Directorate Members and Others, at 17 (Oct. 3, 2000) (responding to Mr. Delaney by noting “all grounds included [for supplementation] are specific and limited, and are necessary to provide due process in the face of clear errors”).

180. *See* Meck, *supra* note 7, at 3, 10 (stating that dispute over supplementation is a non-issue, and that *Guidebook* presents reasonable alternatives). For discussion at the Directorate meeting approving the provision on supplementation, *see* Notes of the Growing Smart Directorate Meeting, at 4–5 (Dec. 4–5, 1999).

## Appendix:

## Proposal for Remedial Measures

**Remedial Measures**

- (1) The officer or body designated under Section [10–501] may, as provided in this Section, approve measures that remedy the impact of a land development regulation on a proposed development.
- (2) An officer or body may approve any or a combination of the following as a remedial measure:
  - (a) increases in density or intensity;
  - (b) modifications to or credits against exactions owed by the owner of the land on which the development would occur, under an exactions program adopted by the local government;
  - (c) an increase in the number of development rights authorized for transfer under a transfer of development rights program adopted by the local government;
  - (d) payments by the applicant in lieu of on-site mitigation; or
  - (e) a recommendation to the local legislative body or other appropriate local government agency that it purchase the property, or an interest in the property.
- (3) An officer or body may not approve a change in the permitted land use or uses from those authorized by the land development regulations.
- (4) An officer or body shall approve a remedial measure if the applicant for the remedial measure satisfies all of the following criteria:
  - (a) the remedial measure is consistent with the local comprehensive plan as determined pursuant to Section [8–104];
  - (b) the remedial measure will not alter the character of an adjacent or surrounding neighborhood;
  - (c) the remedial measure is a more appropriate remedy than a conditional use, variance, or map or text amendment to the zoning ordinance; and
  - (d) the remedial measure is necessary because

[Alternative A] the local government’s land development regulations do not allow a reasonable economic use of the property. The claim must be supported by competent financial evidence.

[**Alternative B**] either:

- (1) none of the uses presently authorized by the local government's land development regulations allow a reasonable use of the property; or
- (2) the property cannot realize a reasonable return if the remedial measure is not approved, and the inability to realize a reasonable return is substantial as demonstrated by competent financial evidence.

The "reasonable return" test has a specific legal meaning arising from court cases, especially in the area of variances.<sup>181</sup> It has been held to be "much the same"<sup>182</sup> as the "no reasonable use" test, and it is not satisfied merely by showing that the relief sought would result in higher profit.<sup>183</sup> Nevertheless, alternatives have been provided because some adopting legislatures may be more comfortable with a particular phrasing of the test that they feel avoids the potential for misperception.

- (5) In addition to the conditions authorized by Section [10-506], an officer or body may approve a remedial measure with conditions that address the concerns that gave rise to the land development regulations that restrict the development of the property.
- (6) A remedial measure is not a development permit except for remedial measures approved under subparagraph (2)(a) above.

This Section authorizes remedial measures. Paragraph (2) states the remedial measures that a local government can approve. Some of these measures are authorized by FLA. STAT. ANN. § 70.001(4)(c) as the basis for settling an action seeking compensation for a land development regulation. These measures can remedy problems arising from restrictions on the development of property. As paragraph (3) clarifies, they do not include changes in use, only in the density or intensity of development.

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181. *Olszak v. Town of New Hampton*, 661 A.2d 768 (N.H. 1995); *Baker v. Connell*, 488 A.2d 1303 (Del 1985); *Deardorf v. Board of Adjustment*, 118 N.W.2d 78 (Iowa 1962); *Otto v. Steinhilber*, 24 N.E.2d 851 (N.Y. 1939).

182. *Village Bd. v. Jarrold*, 423 N.E.2d 385 (N.Y. 1981).

183. *Graziano v. Board of Adjustment*, 323 N.W.2d 233 (Iowa 1982)(no variance for duplex in single family zone despite "current economic situation" causing demand for duplexes); *Carbonneau v. Town of Exeter*, 401 A.2d 675 (Mass. 1979)(no variance for beauty parlor in barn in residential zone despite its greater profitability); *City of Waltham v. Vinciullo*, 307 N.E.2d 316 (Mass. 1974)(declining profits from small apartment building not sufficient to obtain variance for larger apartment building); *Lovely v. Zoning Bd. of Appeals*, 259 A.2d 666 (Me. 1969)(no variance for grocery store in agricultural zone where grocery had been a nonconforming use but lost the protection of the ordinance); *MacLean v. Zoning Bd. of Adjustment*, 185 A.2d 533 (Pa. 1962)(no variance to build gas station in residential zone just because it would be more profitable, so long as residential use was viable).

Paragraph (4) provides the criteria to be used in approving remedial measures. The first two criteria require compliance with the local comprehensive plan and a finding of no adverse effect on the surrounding neighborhood. The third criterion requires that the remedial measure must be a better remedy than the alternatives: conditional uses, variances, and zoning amendments. The fourth criterion requires a showing that (if Alternative A is accepted by the adopting legislature) no reasonable economic use of the land is authorized by the land development regulations or (if Alternative B is chosen) either no reasonable use can be made of the land or a reasonable rate of return cannot be made from the property without a remedial measure.

Paragraph (5) authorizes conditions that take into account the reasons for the development restrictions the remedial measure is intended to remedy. These conditions can minimize changes in these development restrictions that can occur through the approval of a remedial measure. And paragraph (6) provides that remedial measures are not development permits except for increases in density or intensity, which are analogous to traditional variances.

GUIDEBOOK, Chapter 10 Draft, § 10-504, at 10-53 to 10-56 (Sept. 27, 2000).

