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APPENDIX Statements from Members of the Growing SmartSM Directorate

A project Directorate, consisting of representatives of national organizations and representatives for the built and natural environments and local government law, plus APA, advised the Growing SmartSM project team. A list of Directorate members appears in the Foreword and Acknowledgments of the *Legislative Guidebook*; APA Research Director William R. Klein, AICP, chaired the Directorate meetings. The practical counsel of Directorate members was invaluable in guiding the project. Operating under a charter—a set of bylaws for its operation—and working by consensus with its facilitator, Dr. Joseph Whorton, the Directorate met 13 times during the course of the project (from 1995 to 2001) to review and suggest changes, including alternatives not previously considered, in drafts of Chapters of the *Legislative Guidebook* and other work products, such as the *User Manual*. Directorate members also reviewed proposals and comments on the project materials from organizations and persons not represented on the Directorate but affected by legislative reform. Membership on the Directorate, however, does not imply or mean endorsement of any aspect of the Growing SmartSM project; each member organization retains its right to act independently with respect to any proposal contained in the *Guidebook*.

The project team retained editorial control over the content of the *Guidebook*; however, more often than not, when an alternative or change was suggested, the team found a way to modify the draft statutory language or commentary to accommodate the suggestion. As in any professional research project, the project team made judgments, and there was not always consensus about the approach. Under the charter, individual Directorate members could submit individual statements regarding the *Guidebook's* range of recommendations. Two Directorate members, James McElfish, who represented the interests of the natural environment, and Paul Barru, who represented the interests of the built environment, have elected to do so. Their statements appear below.

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Statement of James M. McElfish, Jr. Directorate Member for the Natural Environment

OVERVIEW

The Growing SmartSM *Legislative Guidebook* represents a substantial investment of time and effort by the Research Staff of the American Planning Association. As a participant in the advisory group referred to as the “Directorate,” I was privileged to participate in discussions of various topics and of the model language. However, the final decisions about what to include or not to include were made by the project staff without a poll of the Directorate members or review by APA’s governing board or committees. Thus, users of the *Guidebook* should be aware that while it contains much valuable information, it represents neither a consensus statement nor a statement of APA policy. It is, simply, a research document.

As a research document, the *Guidebook* contains a great deal of information that can be found nowhere else. Its most valuable contribution to the work of state legislators, legislative staff, advocates for various interest groups, and planners is undoubtedly its detailed survey of the existing state laws on each of the hundreds of topics covered in the *Guidebook*. Even more than the model statutory language, the citations to legislation in specific states will be useful to the entire land-use profession. *The specific approaches recommended in the model language, however, will need to be evaluated carefully by Guidebook users.* In some instances the model language reflects excellent practice and well-supported approaches; in others it reflects merely a middle-the-of-road approach that is unobjectionable but far from the state of the art in statutory drafting of land-use tools; and in still others (but only a few others) it offers approaches that are risky and that defeat the objectives of sound planning.

This brief statement is intended to highlight those issues that will require particular care from users of the *Guidebook*. Before turning to these few areas, however, I want to express my appreciation to the authors of this substantial work. They have made an immense contribution to our understanding of state enabling legislation nationwide, and more often than not, have identified good practices worthy of consideration by legislators, planners, and advocates. The fact that some problems remain does not diminish their achievement.

PROBLEM AREAS: PROCEED WITH CAUTION

Section 7-202 Comprehensive Plan Elements - Major Deficiencies

The model language for comprehensive plan elements includes no required element for the protection of natural and historic resources. This is far from the best practice in state enabling legislation; indeed it is a step backward. The *Guidebook’s* model statute requires no natural resources element at all and makes it possible for a local government to “opt out” of preparing a “critical and sensitive areas element” by finding that the area potentially subject to such an element is either less than five acres or is already designated as an area of critical state concern. But it takes assessment and planning to determine what areas may be critical or sensitive; thus, the opt-out provision makes no sense. Moreover, even 5-acre areas, such as those along river banks and key

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habitat areas, can be extremely important. State-designated areas also often require special attention from local governments to assure that local activities and ordinances are compatible. The deficiency in § 7-202 is particularly significant because Chapter 9 of the *Guidebook* prohibits local governments from adopting conservation ordinances and mitigation requirements without a critical and sensitive areas plan element.

In addition, a historic preservation plan element is *entirely* optional under § 7-202. This too is poor practice. Even the newest of communities has some need to plan for historic preservation. Without such a plan, local governments will find themselves playing catch-up years later when it is far too late.

As the commentary to Chapter 7 points out, numerous state enabling laws expressly *require* comprehensive planning elements to cover natural and historic resources. In its “Growing Smarter” amendments to the state Municipalities Planning Code enacted last year, for example, Pennsylvania required all comprehensive plans to include “A plan for the protection of natural and historic resources to the extent not preempted by federal or state law. This clause includes, but is not limited to, wetlands and aquifer recharge zones, woodlands, steep slopes, prime agricultural land, flood plains, unique natural areas and historic sites.” MPC § 301(a)(6). The *Legislative Guidebook* should have done no less.

Section 9-101 Critical and Sensitive Areas, Section 9-403 Mitigation – Ordinance Limitations

Chapter 9 relies almost entirely on the device of overlay districts to protect natural resources, waterways, forest cover, habitat connections, etc. § 9-101(5). While this is an important and useful tool, it represents old-style thinking about natural resources and landscapes. Many important landscape features and elements are not simply limited to “critical and sensitive areas” but are more pervasive; and impacts on the environment are now understood to be cumulative as well as acute. Thus, many local jurisdictions have enacted stormwater management ordinances, limitations on impervious surfaces, requirements to avoid introducing non-native plants, requirements for water conserving design and xeriscaping, mitigation requirements for removal of forest cover, matching up of open space areas on adjacent cluster developments to provide for habitat corridors, and similar provisions. Many of these ordinances are not limited to overlay districts because they address a cumulative effect of development activities throughout the jurisdiction. But the *Guidebook* overlooks this. It relies on requiring overlays as the basis of conservation. § 9-101(5). And it allows mitigation ordinances only where a local government has adopted a critical and sensitive areas element and then only to mitigate for activities in such areas. § 9-403. Thus, adoption of the model language could prevent the use of modern protective tools such as Maryland’s Forest Conservation Act, mentioned on p. 9-80, which does not limit local forest conservation and mitigation ordinances only to “forest areas” of local jurisdictions but rather applies them to all development activities throughout every jurisdiction in the state (with an exception for the two most forested counties). Md. Nat. Res. Code § 5-601 et seq. Rather than relying solely on model sections § 9-101 and § 9-403, which are too constrained in comparison with modern practice, state legislatures should adopt additional enabling language (or savings language) that authorizes local governments to adopt protective and mitigative ordinances that apply beyond critical and sensitive overlay areas.

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Section 8-501 Vested Rights - Risky Experiment

The *Guidebook* has a lengthy discussion of vested rights and before offering two model alternatives notes that “it may be desirable for a state with a strong preference for a particular vesting rule other than the ones provided here to substitute that rule for the [model] alternatives...or even to adopt no vesting statute and rely on existing case law precedent.” This is good advice, because Alternative 1, if adopted, would be the most liberal vesting standard in the United States. Its approach has never been enacted by any legislature nor adopted by any court, and for good reason. It would freeze the land development regulations as of the date of any application (even an entirely incomplete application with no reliance interest whatever), and allow the cure of the incomplete application later. If anything will produce a race to file, this standard will. This is bad policy, and its adoption would hamstring local governments by vesting development rights with no showing of reliance by, or detriment to, the applicant.

Section 10-210 Time Limits on Land-Use Decisions – Undermining the Comprehensive Plan

The *Guidebook* offers model language to promote timely decisionmaking by local governments. The first alternative it offers, however, badly undermines the comprehensive plan. It provides that if a local government does not render a decision on a development application (ANY development application) within the number of days prescribed by the state legislature or established by local ordinance, the development is “deemed approved.” This means that the adverse outcome of this missed deadline falls entirely on the public, and it means that comprehensive plans may be overturned by a missed deadline – without regard to whether the applicant suffered any harm thereby and without regard to whether the approval contained elements that should be and still could be ameliorated. This is bad policy and bad law, and it does not represent best practice among the states. While a footnote in the commentary lists states that have “deemed approved” provisions, examination of these laws show that most of these apply them only to subdivisions. This may make some sense, as recording a subdivision is a straightforward process largely circumscribed by subdivision regulations. But requiring “deemed approval” for all development decisions – including new towns, PUDs, and numerous other actions – is far from smart growth. And the model provision that only one extension of [90] days can be had by agreement badly constrains the whole process. Large-scale developments, and even many PUDs require far more time.

The “deemed approved” alternative purports to be based on Cal. Govt. Code § 65950. But this California statute is extraordinarily inapplicable as a basis for this *Guidebook* alternative. That California law does grant “deemed approval” for development applications, but the time period does not even commence running until *after* the *completion* of the entire California Environmental Quality Act (CEQA) process – a process that requires at least six months (and often a year or more) of public notice and comment and environmental studies. And the period for deemed approval, which runs from the date of certification of the final environmental impact report (EIR) is *180 days*. (Shorter periods are allowed only for EIRs for low income housing, publicly financed works, and categorically excluded and negative declaration projects - typically very small routine projects). In reality, California’s statute is not a model for Alternative 1.

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Alternative 1 creates a “deemed approved” provision that is far more sweeping in scope than anything now found in state planning laws. In doing so, it creates a grave potential for litigation, creates incentives for local governments to find technical reasons to deny applications rather than face the time limits, and thwarts the reasoned interchange and give-and-take that characterizes good development review. Timely decisionmaking is important, indeed critical, for land-use planning and development. But the solution should promote better decisions, not subversion of the comprehensive plan. The second alternative offers at least one way to assure timely review without these ill effects.

Section 9-301 Historic Preservation and Design Review – An Awkward Alliance

Historic preservation and design review are both important local government functions that affect community values. The *Guidebook*, however, places these two functions in an awkward alliance with one another in a single model provision that is not based on existing law. Indeed, the Commentary to this Section notes that “the objectives of the two laws differ significantly” (p. 9-26) and then proceeds to join them together. The Section in general works better for design review than it does for historic preservation. Legislatures may well want to adopt it for design review only and to adopt a separate provision for historic preservation.

Section 9-301 excludes a number of tools recommended by the experts in this field, the National Trust for Historic Preservation (www.nthp.org). For historic preservation it does not provide suitable temporary protection for threatened structures (except through a development moratorium). The National Trust strongly recommends that interim protection provisions be included in historic preservation ordinances in order to protect properties that might otherwise be demolished during the historic property designation review process. The moratorium option offered in the *Guidebook* would not suffice in these situations. Under the proposed moratorium option, protection of historic properties would not be triggered until after broad public hearings, findings, and processes not tailored to provide certainty for all interested parties. The *Guidebook* also fails to include an economic hardship provision that could help accommodate protections to take into account effects on landowners. The National Trust strongly recommends that all local historic preservation ordinances include provisions for economic hardship rather than reliance on the “mediation process” recommended in the *Guidebook*. Economic hardship provisions have been essential components of modern preservation ordinances for at least 15 years; they provide important standards and processes to ensure fairness for property owners and protection for historic resources. When a state legislature wants to adopt historic preservation enabling legislation, it should consult with the Trust before relying on this portion of the *Guidebook*.

SOME HONORABLE MENTIONS

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Despite the concerns and problem provisions noted above, the *Guidebook* does offer some substantial opportunities in its model language. I want to highlight just a few areas as worthy of particular attention:

State Planning Goals

The *Guidebook's* emphasis on State Planning Goals and integration of local land-use planning with state goals is quite important because a century of land-use regulation has demonstrated that the township, city, or even county scale is too limited for many purposes – including habitat, economic development, transportation, and housing. Legislatures should find much of value in Chapter 4.

State Biodiversity Conservation Plans

The *Guidebook's* provision for State Biodiversity Conservation Plans provides a framework for the kind of activity that is now being pursued in nearly two dozen states without such clear authorization. § 4-204.1. Both the commentary and the model language contain comprehensive guidance on studies necessary to support the plan; goals, mapping, and implementation activities that should be developed in the plan; and procedural issues related to development of the plan. It is particularly appropriate that the *Guidebook* contains language that the governor's office may review the State Land Development Plan and the state functional plans (for transportation, economic development, telecommunications) for consistency with the biodiversity conservation plan. In addition, the "Procedures Related to State Plan Making, Adoption, and Implementation," which apply to the State Biodiversity Conservation Plan, ensure two important outcomes: 1) the Plan will be developed in an open process that includes public input, and 2) the activities of multiple state agencies will be reviewed for their consistency with the Plan. States that adopt a biodiversity conservation plan will avoid the all-too-common situation of investing in biodiversity conservation through land acquisition and state agency activities while simultaneously supporting activities that would undermine those efforts.

Standing to Participate

The *Legislative Guidebook* adopts a reasonable middle ground on standing to participate in review of land-use decisions. § 10-607. It is important that the public, and those affected by land-use decisions, be able to participate in the planning process, the adoption of ordinances, and the review of applications. While broader standing might have been desirable, the *Guidebook* properly resisted attempts to exclude the public and local property owners from decisions that affect their communities.

Regulatory Takings

The *Guidebook* largely avoids integration of "regulatory takings" provisions into the many places where some sought language that would create new rights and expose state and local governments to demands for payment and to litigation. The *Guidebook* sets forth a straightforward

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set of processes and does not fall into the trap of introducing new uncertainties and untested remedies.

Tax-Base Sharing

I am pleased that the *Guidebook* was able to include, at least in a modest form, some attention to local taxing provisions as Professor Norman Williams recommended at the outset of this project so many years ago. While there is much to be done in this area, the provisions for tax-base sharing in chapter 14 (§§ 14-101 to -114, -201) do emphasize the importance of cooperation among jurisdictions to assure that new development does not become a zero-sum game of winners and losers to the detriment of both the natural environment and the vitality of older communities.

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Washington, D.C.
November 9, 2001

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Statement of Paul S. Barru Directorate Member for the Built Environment

Note: Comments are based on final draft *Guidebook* language posted on Internet and dated October 26, 2001

PREFACE

As the member of the Growing SmartSM Directorate representing the “built environment”, I speak for the citizens who own land and who, in any proposed use of such land, would be subject to the rules and processes proposed in the *Guidebook* if adopted by states, regions, counties, or municipalities. I submit this on behalf of the home builders, office and industrial developers, real estate agents, general contractors, road builders, engineers, architects, and others who are generally classed as the built environment.

Clearly, I will not presume to comment on the whole of this monumental work, but only briefly on three things: 1) assumptions that either do or should underlay the process; 2) a major disappointment in the *Guidebook*; and 3) a selected group of specific issues of such major import to the whole enterprise of Smart Growth and its twin, Smart Process, that if not implemented and managed properly, have the potential to undermine much of the value that has been achieved.

ASSUMPTIONS

Smart Growth means planning for growth, not slowing growth or no growth. The *Guidebook* is successful in reaching its objective of Smart Growth and its twin, Smart Process, in some specific areas. However, on the whole, it falls far short of what might have been achieved. This is hardly a surprise when you consider the current state of growth management and the constant battleground it has become. I feel the process began to come undone as it moved ahead with a broad vision of Smart Growth, because working assumptions and definitions were not constantly revisited to see if they had continuing validity. In the end, the process sought to satisfy two or more visions, often imposed from outside of the staff and Directorate, by presenting alternatives rather than doing the harder job of reaching consensus on a common vision. Alternative choices for managing growth—within a common vision of Smart Growth that means planning for growth as needed, not stopping it—are what is needed to meet the needs of divergent communities.

Any approach to Smart Growth must be comprehensive. This means that it must include concerns for the environment, the economy, and social equity or justice. **These three elements must be balanced.** Like a three-legged stool, if the legs are not the same length, it will not provide a solid base to stand on; and if one leg is too long, the stool will tip over.

The natural environment needs strong protection, but protection comes in many forms. Some lands need to be preserved in public ownership, while others are best protected by environmentally sensitive development. Still other lands are suitable for intense development to allow a community to accommodate its projected development needs. The *Guidebook* falls short in identifying various types of land that require protection and criteria to judge the best protection techniques. While

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limited in scope, the *Guidebook* focuses on limiting development in “sensitive areas” with little guidance on defining what they are and the best ways to protect them.

The absence of an economist on the Directorate or of any significant economic or tax studies is an indication that the economics of Smart Growth were only peripherally addressed. When essential economic issues began to emerge, there was little willingness to indicate at the very least that they were important and needed to be considered, even if they were not included in any depth within the *Guidebook*. To deal with the economy seriously, beyond the *Guidebook*'s modest efforts, you must include a consideration of economic development and job generation, especially how they interact in creating land-use demand. Other related topics that need to be understood include how taxation policy drives land-use decisions, favoring job generation without always addressing the provision of adequate housing to match those jobs; how housing, commercial, and retail markets interact in creating growth pressure; how you plan for, build, and finance infrastructure in a timely and cost-effective manner; among many other items that affect the economy.

In the simplest terms, social equity is concerned with how well people can live in a community on the wages they are able to earn in jobs created by economic development and the degree to which growth benefits all segments of society. The *Guidebook* gives considerable protection from the adverse consequences of growth but does not adequately address the equity issues inherent in a community's failure to ensure that affordable housing for all income segments is available. The inclusions in the *Guidebook* are not sufficient.

To judge APA adversely for not having predicted that “comprehensive planning” for Smart Growth included such a broad array of issues is unfair. This is an area of inquiry that grows as the interrelatedness of many issues and their importance to the whole emerges. While it might have been impossible to include all of these within the scope of the original enterprise, the work suffers by not indicating that these gaps exist. I hope that if the *Guidebook* undergoes revisions in future years, the APA will consider analyzing some of these areas and that broad advisory input from affected interest groups will be incorporated in such revisions. In the meantime, the absence of these issues in this *Guidebook* compromises its goal of providing pathways for Growing SmartSM.

Growing SmartSM requires a blueprint or comprehensive plan that, when adopted, becomes public policy. The process for developing any effective public policy must be inclusive, deliberate, and, to the greatest degree possible, achieved by consensus. It cannot be a top-down process, with public officials and staff driving and controlling the process. Rather, they need to enable the broadest possible community of voices and viewpoints to be heard and to participate. This should also include private sector business people, who are often excluded from the public debates. After all, they are the ones who take many of the risks involved in implementing the growth plan. The goal is to achieve a community vision that balances as many needs and desires of the community as possible. This vision takes tangible form as public policy known as an adopted comprehensive plan. Elected officials then need to legislate the most effective structure for the efficient, timely, and cost-effective implementation of this public policy.

Smart growth requires a smart process to fully implement what the community seeks from its smart growth public policy. When a landowner or any other citizen seeks to use their land or any other outcome in strict conformity to the provisions of the master plan/public policy, they have

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a right to expect a process that allows only directly and significantly affected parties to participate. Unforeseen and unexpected negative consequences of the proposed implementation need to be dealt with equitably. The benefits to the community and the applicant will be fidelity to the community's growth vision, the elimination of unnecessary risk and time, and significant cost savings to all parties, not the least being for taxpayers/consumers.

A basic philosophical premise of smart growth should be that comprehensive plans be implemented, not nullified in piecemeal fashion through the development review process. Issues settled during the comprehensive plan debate should not be reopened for a period of time following adoption if the plan and the process are to be meaningful.

MAJOR DISAPPOINTMENT

At best, this is a complex document that requires a good deal of knowledge to even begin to use. A solid index is only a partial and incomplete solution. The cross-referencing list now included at the beginning of each chapter is a good start, but to make this work truly useful requires extensive cross-referencing within the text itself, section-by-section, subsection-by-subsection. This is a major but absolutely essential task for effective and complete use.

SPECIFIC ISSUES IN THE *GUIDEBOOK*

My objections and recommendations relate to the eight most critical areas of concern: standing and reopening of settled issues, supplementation of the record, sanctions on local government for failure to update plans, exhaustion of remedies, moratoria, vested rights, third-party initiated zoning petitions, and designation of critical and sensitive areas.

Standing and Reopening of Settled Issues

After embracing the traditional standard of "aggrievement" as the basis for standing to petition for judicial review of a land-use decision (September 2001 Draft of the *Guidebook*, hereinafter "September 2001 Draft"), the most recent draft (hereinafter, the "October 2001 Draft") inexplicably dilutes the definition of "aggrieved" and adds other options that effectively allow any person with any ax to grind to pursue a court challenge, whether or not he or she will actually suffer any special harm or injury, has appeared at or offered evidence during a public hearing, or even lives in the impacted community. This expansive approach to standing fundamentally alters the system now in place across the nation, which requires a party challenging a land-use decision to take part in the approval process and offer comments, to actually live in the community in question, and to demonstrate that the proposed use will cause special injury or harm to them over and above its impact upon the public generally. These liberal standing provisions will increase the amount of litigation that communities will face and it is more likely the government will be sued rather than a developer.

The objectionable provisions of the *Guidebook* with respect to issues of standing seem to be motivated by a desire to be inclusive, that is, to apply a liberal standard that is easily met. Section 10-607(4) no longer includes an aggrievement test when determining who can petition the courts on a land-use matter, and Section 10-607(5) is acknowledged in the commentary to afford standing

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to persons who haven't even participated in the agency's hearings. **Perhaps this approach follows from the current trend of greater public participation in planning. I wholeheartedly support the idea of extensive public participation in *planning*. However, it does not follow from this that broad public participation in development review or in judicial review of site-specific development proposals is a good thing. On the contrary, such participation would be detrimental and open the door to undermining the work of the greater citizenry that helped to produce and articulate the broad public policy themes of the comprehensive plan. Liberal standards of public involvement are appropriate at the level of planning, policy, and broad regulatory enactments such as comprehensive zoning and zoning ordinance text amendments. But the standards should become stricter as we move down to levels of post-zoning implementation, such as site-specific project review, and judicial review.**

The public generally shares this view as evidenced by the overwhelming rejection of Amendment 24 in Colorado and of Proposition 202 in Arizona in the November 2000 elections. **A specific development proposal that is consistent with the comprehensive plan and development regulations is also consistent with the greater public's "vision" for the future.** It does violence to this vision when we open the appeal process liberally to active special interests, no matter how well intentioned, and permit them to derail worthy projects that do not comport with their particular vision. A community cannot achieve its vision of "smart growth" without a smart process that preserves and protects its adopted vision from naysayers in the community.

Major issues decided at the comprehensive planning and zoning stage, such as use, density or intensity, should *not* be revisited in the post-zoning site-specific proceeding *unless* the application does not comply with these decisions. It is critical that this principle be recognized in the *Guidebook*. Otherwise, there will be no protection or political cover for decision-makers from the onslaught of entrenched growth opponents who reside in areas planned for growth. They could stop the proposed growth allowed in the Master Plan, oppose adopted public policy and create costly delays.

LEGAL ANALYSIS OF THE *GUIDEBOOK'S* APPROACH TO STANDING

- **After previously acknowledging that "aggrieved" status (with the twin elements of special harm or injury distinct from any harm or injury caused to the public generally) should be the primary criterion in determining one's standing to petition for judicial review of a land-use decision, the final draft *Guidebook* guts any such requirement. First, the definition of "aggrieved" in Section 10-101 has been revised to make both "special" and "distinct from any harm or injury caused to the public generally" optional. The principal definition now requires merely an undefined generalized showing of "harm or injury" in order for one to have standing.** (This is similar to the discredited "may be prejudiced" test advanced in prior drafts, and is also contrary to the understandings reached at the Directorate's final meetings on September 23-24, 2001.)

- **Second, Section 10-607(4) now broadly allows "all other persons" who participated by right in an administrative review or who were "parties to a record" to seek judicial review without *any* showing of aggrieved status.** This appears to be based upon comments by the Staff

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in an October 12, 2001, Memorandum to Directorate members suggesting that a showing of aggrievement on judicial review is unnecessary in a record appeal when the challenger has already been deemed to be aggrieved by the local government agency (October 12, 2001, Memorandum, p. 5). This view is contrary to established legal precedent, since it is within the purview of the court – not the administrative agency whose decision is under review – to determine whether or not the challenger is aggrieved. The court’s authority cannot be usurped by an agency determination regarding aggrieved status. See, e.g., *Sugarloaf Citizens Assn. v. Department of Environment*, 686 A.2d 605 (Md. 1996), discussing the difference between administrative standing before an agency and the requirement for standing to challenge the agency’s decision in court. While the former rule is not very strict, “judicial review standing” requires that one be both a party before the agency and “aggrieved” by the agency’s final decision (*i.e.*, specifically affected in a way different from the public at large). Determination of judicial review standing is exclusively a judicial function and the court need give no deference to the agency’s finding in this regard. *Id.* Section 10-607(4) is a legally flawed criterion, which effectively allows the administrative agency whose decision is under review to determine who shall be “aggrieved.”

- **Third, Section 10-607(5) allows “any other person,” including persons who have skipped the agency proceedings altogether, to seek judicial review merely upon a showing that they are “aggrieved” under the expansive new definition of that term in Section 10-101.**

- **Treatise writers favor the traditional aggrievement standard.** As can be seen from the following examples, the views expressed herein regarding Sections 10-101 and 10-607(4) and (5) are shared almost universally by treatise writers and courts.

- “Almost all state statutes contain the ‘person aggrieved’ provision but only a minority extend standing to taxpayers . . .

Under the usual formulation of the rule, third-party standing requires ‘special’ damage to an interest or property right that is different from the damage the general public suffers from a zoning restriction. Competitive injury, for example, is not enough. This rule reflects the nuisance basis of zoning, which protects property owners only from damage caused by adjacent incompatible uses. Although the special damage rule is well entrenched in zoning law, a few courts have modified it. New Jersey has adopted a liberal third-party standing rule that requires only a showing of “a sufficient stake and real adverseness.” Daniel M. Mandelker, *Land Use Law* § 8.02 at 337 (4th ed. 1997) (emphasis added) (citations omitted).

- The requirement that a person must be ‘aggrieved’ in order to appeal from the board of adjustment to a court of record was originally included in the Standard State Zoning Enabling Act and has been adopted by most of the states. See Kenneth H. Young, *Anderson’s American Law of Zoning* § 27.09 (4th ed. 1997).

- “To be a person aggrieved by administrative conduct, it is necessary to have a more specific and pecuniary interest in the decision of which review is sought. A Connecticut court said that in order to appeal, *plaintiffs are required to establish that they were aggrieved by*

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showing that they had a specific, personal and legal interest in the subject matter of the decision as distinguished from a general interest such as is the concern of all members of the community and that they were specially and injuriously affected in their property or other legal rights.” *Id.*, § 27.10 at 523-24 (Citations omitted.) (Emphasis added.)

- **Case law in many jurisdictions is in accord with the special injury rule.** See, e.g., *Hall v. Planning Comm’n of Ledyard*, 435 A.2d 975 (Conn. 1980); *DeKalb v. Wapensky*, 315 S.E.2d 873 (Ga. 1984); *East Diamond Head Ass’n v. Zoning Bd. Of Appeals of City and County of Honolulu*, 479 P.2d 796 (Haw. 1971); *Sugarloaf Citizens Ass’n v. Department of Env’t*, 686 A.2d 605 (Md. 1996); *Bell v. Zoning Appeals of Gloucester*, 709 N.E.2d 815 (Mass. 1999); and *Copple v. City of Lincoln*, 315 N.W.2d 628 (Neb. 1982).

- **In view of these and other long-established precedents for establishing aggrievement as the standard for participating in the proceedings of local government agencies and thereafter, for challenging their decisions in court, it is disappointing that gaping loopholes have been inserted in the *Guidebook* that (a) allow persons who are not aggrieved to gain standing before agencies and thereafter in court to contest an agency decision (§ 10-607(4)), and (b) allow other persons, including adjacent residents – thus *prima facie* aggrieved – to bypass the agency proceeding altogether and hold their challenge for court (§ 10-607(5)).**

RECOMMENDED SOLUTION:

AVOIDING REOPENING OF SETTLED ISSUES

To avoid reopening issues settled in the adoption of a comprehensive plan, a ninth item should be added to Section 10-207 (Record Hearings) to state that when any site specific development application is submitted for review under this section within six years of the adoption or amendment of the plan, major issues such as land use, density or intensity *shall not be reargued or reconsidered*. The only limited exceptions to this prohibition should be if the proposed use of the site is not in accordance with the plan, or if the density or intensity proposed for the site exceeds that in the plan and applicable zone.

This is based on the sound premise that the site-specific proceeding should not become a forum to reopen debate on the community’s already decided broad land-use and growth policies. See J. Tryniecki, *Land Use Regulation: A Legal Analysis and Practical Application of Land Use Law* 323 (American Bar Assn. 1998).

STANDING TO SEEK JUDICIAL REVIEW

Items (4) and (5) of Section 10-607 (Standing and Intervention) should be deleted and new Sections 10-607 (4) and (5) should be added to provide that only those persons who both participated in the record hearing and are aggrieved (i.e., will suffer special harm or injury distinct from that caused to the public generally) by the land-use decision has standing to intervene in the land-use decision.

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Supplementation of the Record

In a proposal that closely mirrors expanded standing, an optional provision in the *Guidebook* would allow for expansion of the record by the court that hears a land-use challenge. Parties would be able to introduce new studies, new testimony and new exhibits that were never made available to the local jurisdiction that issued the land-use decision in the first place. Neither would the applicant have had an opportunity to challenge, verify, or modify them in a deliberative process. Such a proposal would turn courts into planning and zoning appeals boards, allowing them not only to second guess a local decision, but to make a decision entirely on their own with no deference to local concerns.

In the final meeting of the Directorate, it was my understanding that the commentary would be modified to include a statement that remand is preferable to supplementation where the evidentiary record is inadequate. The statement added to the October 2001 Draft of the *Guidebook* leaves the issue ambiguous and open to interpretation that is destructively broad.

Section 10-613 and the commentary preceding it address the pros and cons of courts supplementing the record. The commentary mentions such factors as time, fairness, cost, experience, etc. that should be weighed but neglects one very important consideration that I believe may override the others. That is the importance of maintaining a separation of power between the legislature and the judiciary. It is acknowledged that local legislative bodies may be subject to political pressure, but that is the essence of representative democracy. In our system of government, it is the job of legislative bodies to debate public policy and in the end to make decisions that reflect the dominant view. In contrast, the job of the judiciary in record appeals from decisions of local government legislative and administrative bodies is to review the decision-making process to ensure fairness, to see that the decision is in accordance with the law, and to review the record based upon a reasonableness standard (i.e. substantial evidence/nor clearly erroneous), **but not to substitute its judgment for that of the local government decisionmaker.**

I believe subsections 10-613(1)(d) and 10-613(2) blur the distinction between the acts of local government legislatures and administrative bodies on the one hand and the judiciary on the other and permit the judiciary to usurp the proper role and powers of these bodies. Land-use decisions are by nature political decisions, thus the proper places for the resolution of competing views are the local legislature, planning board, or board of appeals, not the courtroom. **If, upon review of the record, it is found that the decisionmaker did not consider essential information, the judge should remand the case back to it with instructions to consider the missing information and then make the decision.** In our view judges should strongly resist the urge to rule on the substantive merits of a land-use controversy. Unlike other cases that come before a judge, there may be no “right” or “wrong” in land use. Instead, the question is likely to be, “what decision provides the greatest good for the greatest number?” and that is the business of the local legislative body.

LEGAL ANALYSIS OF SUPPLEMENTATION ISSUES

- **Courts conducting “record reviews” of land-use decisions should exercise judicial restraint, particularly with respect to agency findings of fact on evidentiary matters, and should not allow the record to be supplemented with additional substantive evidence on**

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appeal, or take other actions that would usurp the traditional authority of local government in the land-use approval process. The *Guidebook* would broadly allow supplementation of the record by reviewing courts, a dangerous precedent as it would make the court – not the local government – the final decisionmaker in land-use cases.

- The most objectionable provision is Optional Section 10-613(1)(d), which states that a reviewing court “may supplement the record with additional evidence” if it relates to “matters indispensable to the equitable disposition of the appeal.” **This is an open-ended invitation to abuse.**

- **Treatise writers and court decisions have narrowly construed the role of courts on judicial review.**

- **“The local government, not the court, should be the final decision-maker in land use cases.** Generally, the judge’s role in land use litigation is “to provide a forum for serious and disinterested review of the issues, sharply limited in scope but independent of the immediate pressures which often play upon the legislative and administrative decision-making processes.” Williams, *American Land Planning Law* § 4.05 at 100 (1988 Revision) (emphasis added).

- Historically, reviewing courts have emulated the Uniform Administrative Procedure Act by limiting their review of an agency action to the question of whether that action was arbitrary, capricious, unreasonable or illegal. Where the agency record is inadequate to support its action, the proper practice is to remand the matter to the agency for rehearing and redetermination. *Carbone v. Weehawken Township Planning Bd.*, 421 A.2d 144 (N.J. Super. 1980). *See also, Yokely’s Law of Subdivisions* § 69(c) (2d ed. 1981). *See also, Kenneth H. Young, Anderson’s American Law of Zoning* §27.29 at 605 (4th ed. 1997): (“Reviewing courts say they are not superzoning boards and that they will not weigh the evidence.”)

- **These authorities and numerous other reported cases reflect the overwhelming consensus that an appellate court or a trial court should not be second-guessing an administrative finding.**

- Federal Circuit

SFK USA INC. v. United States, No. 00-1305, 2001 WL 567509 (Fed. Cir. May 25, 2001) (Where an administrative agency defends its decision before reviewing court on the grounds it previously articulated, the court’s obligation is clear: it reviews the agency’s decision under Administrative Procedure Act (APA) and any other applicable law, and based on its decision on the merits, it affirms or reverses, with or without a remand. 5 U.S.C.A. § 551 et seq.);

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➤ State Courts

Numerous state courts, including courts in California, Connecticut, Maryland and Pennsylvania, hold that the scope of judicial review is narrow; that remand is the appropriate remedy when an agency has applied the wrong legal standard; and that the court should not substitute its judgment for that of the agency.

RECOMMENDED SOLUTION: Delete optional § 10-613(1)(d) and § 10-613(2) as authority for a court to supplement the record.

Sanctions for Inconsistency and Lack of Periodic Review

The desire for some “stick” to compel local governments to comply with state statutes regarding consistency of regulations with plans and for periodic reviews of plans and regulations is understandable. However, I have made known my opinion on several occasions that the sticks proposed—voiding and loss of the presumption of reasonableness of local land development regulations—are poor ones. **This approach unfairly jeopardizes the status of development approvals already issued or under review, threatens the stability of the land development process, and introduces unacceptable risk into development financing.**

LEGAL ANALYSIS OF SANCTION PROVISIONS

- **Unwise sanctions are imposed for failure of local governments to timely meet statutory milestones, *i.e.*, failure to:**

- **adopt regulations consistent with the comprehensive plan (§ 8-104);**
- **review development regulations (§ 8-107);**
- **update development standards (§ 8-401); and**
- **record the comprehensive plan and regulations in the GIS Index (§ 15-202).**

- **Missing these milestones has the effect of making local government regulations or comprehensive plans “void,” “voidable,” “not effective;” or subject to losing their “presumption of reasonableness.”** These are strong terms with serious legal implications that can **place the regulatory framework in legal limbo and undermine the process by which land development is reviewed and financed.** The following statements illustrate why.

- “We recognize the uncertainty and possible chaos that might accompany invalidation of the County’s existing zoning scheme.” *Pennington County v. Moore*, 525 N.W.2d 257, 260, n.3 (S.D. 1994).

- Void conditions are subject to collateral attack at any time. *Elkhart County Bd. of Zoning Appeals v. Earthmovers, Inc.*, 631 N.E.2d 927, 931 (Ind. Ct. App. 1994); *Sitkowski*

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v. Zoning Bd. of Adjustment of Borough of Lavalette, 569 A.2d 837 (N.J. Super. Ct. App. Div. 1990).

- Avoidable provision is “valid until annulled and is “capable of being affirmed or rejected at the option of one of the parties.” Black’s Law Dictionary 1569 (1979).
- “The importance of the presumption [of validity] is that it formally fixes the responsibility for planning policy in the legislature, and prompts a reviewing court to exercise restraint. 1 *Anderson’s American Law of Zoning* § 3.13 at 117 (4th ed. 1996).
- *Ching v. San Francisco Bd. of Permit Appeals (Harsch Inv. Corp.)*, 60 Cal. App. 4th 888 (Cal. Ct. App. 1998) (statute imposed 90-day limitations period for attacking a local zoning decision).

“The clear legislative intent of this statute is to establish a short limitations period in order to **give governmental zoning decisions certainty, permitting them to take effect quickly and giving property owners the necessary confidence to proceed with approved projects.**” *Id.* at 893. (Emphasis added.)

- The October 2001 Draft has addressed these concerns with respect to Section 8-107. **However, the same defects in Sections 8-104, 8-401, and 15-202 remain unaddressed.**

RECOMMENDED SOLUTION:

The section entitled Consistency of Land Development Regulations with Local Comprehensive Plan states that actions not consistent with the comprehensive plan shall be voidable. This section *should not provide* that a failure to comply with timeframes for updating comprehensive plans will affect the validity of any land development regulation or land-use action of the local government. The Section on Uniform Development Standards should not provide that the failure of state planning agencies to conduct a timely general review and report of uniform development standards will result in the standards losing their presumption reasonableness. This section should state that failure to file a timely report as required by this section *shall not* affect the validity or presumption of reasonableness of existing uniform development standards, nor of permits issued pursuant to such standards.

Section 15-202 (Recordation Requirements) should not suggest that the failure to comply with recording requirements will render comprehensive plan, subplans, and land development regulations “not effective.” Instead, this section should state that the failure to comply with the recording requirements of this Chapter shall not affect the validity, effectiveness, or presumption of correctness of any plan or land development regulation.

Exhaustion of Remedies

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An essential element of smart process is a means of establishing when the approval process has run its full course and a land development decision is final. If the decision process is open-ended and lacks closure, then it is also unpredictable. Unpredictability adds delay and risk, and the costs associated with risk and delay are ultimately paid by consumers as well as by taxpayers.

I applaud the authors of the *Guidebook* for the needed and progressive reform proposed in Section 10-603 on the finality of land-use decisions. Unfortunately, this important reform is contradicted and negated by the provisions of Section 10-604, Exhaustion of Remedies. To support the provisions on finality the *Guidebook* should have provided here for streamlined qualification for appeals and made clear that in normal circumstances an applicant need only apply for remedies that are actually available. The *Guidebook* also fails to consider and include among its criteria for finality important guidelines from the Supreme Court's recent decision in *Palazzolo v. Rhode Island*.

LEGAL ANALYSIS OF ADMINISTRATIVE EXHAUSTION

• **The well-conceived ripeness reforms (§§ 10-201, 10-202, 10-203, 10-210, and 10-603) may have been undone by overly complex requirements for exhaustion of remedies.** The Model requires an applicant to exhaust *three* additional remedies *after* the initial agency decision before seeking judicial review (§ 10-604). (This has always been a “ripe” area for abuse of process.)

- Unless the administrative remedy is futile or inadequate, applicants must:
 - appeal for administrative review (§ 10-209);
 - apply for a conditional use (§ 10-502); and
 - seek a variance (§ 10-503).

- **Exhaustion of these “remedies” could add years to the review process and effectively gut the ripeness reforms.** This, on top of a growing trend in state courts to apply the draconian ripeness standards used in federal courts. *See* Daniel R. Mandelker, *Land Use Law* § 8.08.10 (4th ed. & Supp. 2000).

Professor Daniel Mandelker, although a self-described “regulatory hawk”, has long been a critic of abusive practices in agencies and courts regarding the finality doctrine as espoused in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). *See* Testimony of Daniel R. Mandelker regarding HR 1534 before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, September 25, 1997. *See also* Amicus Brief of the American Planning Association in *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). This portion of APA's brief was later “repudiated” by APA in its testimony to Congress opposing HR 1534. *See* letter of September 16, 1997, from APA President, Eric Damian Kelly, to the Honorable Henry J. Hyde, Chair, House Judiciary Committee. These practices have made it virtually impossible for Fifth Amendment Takings claimants to gain access to federal courts. *See* J. Delaney and D. Desiderio, *Who Will Clean Up The Ripeness Mess? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 13 Urb. Law. 195 (1999).

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➤ **Public agency abuse of the land-use review process has long been a concern.**

An excellent discussion and compilation of some of the numerous commentaries on this serious problem may be found in the June 2001 issue of ZONING AND PLANNING LAW REPORT. See Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, ZONING AND PLANNING LAW REPORT, Vol. 24, No. 6.

- **Palazzolo: The Supreme Court’s Latest Statement on Ripeness.** In *Palazzolo v. Rhode Island*, 121 S.Ct. 2448 (2001), which is not mentioned in the October 2001 Draft’s commentary on Section 10-604, six members of the United States Supreme Court provided important direction on the issue of ripeness. The Court stated:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.

RECOMMENDED SOLUTION: At the final meeting of the Directorate, I understood that the final draft would be amended to add that an applicant should not have to seek approval of a conditional use when such a use would not be practical for the applicant. Instead, Section 10-604(1) uses the more ambiguous term “applicable” regarding both conditional uses and variances. The explanatory language states that “if there is no conditional use provision applicable to the property” as zoned, the applicant does not have to seek a conditional use before commencing judicial review. This is not the problem I was concerned about. For example, an applicant seeking approval of a 10-lot residential subdivision would not be interested in having to file for a group home or medical clinic—even if available in the zoning ordinance. To avoid abuse and unnecessary filing of applications, as discussed in *Palazzolo*, Section 10-604(1) should be revised to delete the requirement to seek approval of a conditional use (as provided in § 10-502) and to limit the exhaustion requirement to a *practical* remedy, which *might be* either an appeal for administrative review (§ 10-209) or filing for a variance (§ 10-503).

Moratoria

Moratoria are indicators of planning failure. Clearly, absent some catastrophe or unforeseeable event, a reasonable planning process should not lead to a pass where growth is brought to a stop by fiat. But, catastrophes and unforeseen events do occur from time to time, and the law in most states allows for temporary moratoria to protect public health and safety. However, when the difficulty arises because of a failure to plan or inadequate planning, those responsible should not escape the consequences of their failure. Nor should the building industry and housing consumers suffer from the failure of others to do their jobs properly.

It is recognized that local communities are often challenged by the impacts of growth, particularly impacts on infrastructure. That is why it is so important to plan for infrastructure

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at the same time the community is planning for the expansion of population, jobs, and housing. While it is one thing to create a plan for the provision of public facilities, it is another thing to finance and implement that plan. Not every community does a good job getting infrastructure built. Other spending priorities and pressure to keep taxes low make it difficult to keep up with infrastructure demands. Nonetheless, getting infrastructure built is a public sector responsibility. It is too easy to use moratoria to escape this responsibility.

The October 2001 draft deletes the provisions in the *Guidebook* that would have permitted moratoria to be imposed on the grounds of “any significant threat to the... environment,” and in lieu thereof inserts protection of the “general welfare” as an additional ground for imposing moratoria. While “general welfare” is an improvement over singling out “the environment” as one element of public policy that should be allowed to trump other pressing public needs, such as affordable housing and jobs, it is a broad standard that can be used to allow moratoria to be imposed for virtually any reason. At the final Directorate meeting, it was agreed that the “or the environment” standard would be excised wherever it appeared in the *Guidebook*. This has apparently not been done. *See, e.g.*, optional §8-604(4), which was the section under discussion, let alone other possible sections in the *Guidebook*.¹

The *Guidebook* also permits moratoria while the government prepares, adopts or amends comprehensive plans, historic preservation plans or land development regulations, absent any looming threat to public health or safety (Section 8-604 (3)(b) and (c)). The provisions for potentially indefinite, open-ended moratoria (see for e.g., Sections 8-604(3)(b) under Alternative 2, 8-604(8) and 8-604(10)) are inappropriate. Moratoria should be for a definite, fixed period, in no case to exceed one year.

Moratoria are serious, last-resort measures that should be judiciously applied. When the legal criteria for moratoria are difficult to satisfy, an incentive is created to plan more carefully. The whole point of the Growing Smart exercise is to change and improve the level of planning, and incentives have a role in bringing that about.

Accordingly, a strict standard of “danger to public health and safety” that must be established before a moratorium may be declared would be fitting. This standard, observed by several states, reflects a public policy that moratoria are serious matters not to be used as a convenience, but as a last resort. While a moratorium may stop the issuance of development permits, it has no effect on housing demand. Its effect may thus be to direct growth outside the boundaries of the government that declared the moratorium and thereby contribute to sprawl. For this reason, states may wish to limit local governments’ power to use this tool by adopting a strict standard. In addition, states may wish to adopt a strict standard to ensure that local governments take seriously their responsibility to plan for and build infrastructure. If the standards for use of moratoria are set too low, then there is less incentive to do a good job of planning. With

¹**General Editor’s Note:** As was pointed out to Mr. Barru in a detailed critique of the accuracy of an earlier draft of his statement, this change indeed was made in the final published draft of the *Legislative Guidebook*. Memo to Paul Barru from Stuart Meck, FAICP, Principal Investigator, November 11, 2001. Nonetheless, Mr. Barru insisted on retaining this statement, even after the language had been corrected.

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proper planning, most conditions that might give rise to use of moratoria should be avoidable. In rare cases, where even good planning cannot prevent an unforeseen danger to public health and safety, the statutory language in this alternative would permit limited use of a moratorium.

LEGAL ANALYSIS OF MORATORIA PROVISIONS

The *Guidebook* authorizes moratoria on a virtual open-ended basis (up to 1.5 years or more), and “planning moratoria” (up to 2 years or more) are also authorized (§ 8-604). In addition, no meaningful restrictions on moratoria are provided in designated growth areas.

- In designated Smart Growth areas, moratoria should be:
 - limited to circumstances in which a serious threat to public health or safety exists;
 - limited as to duration; and
 - the government entity imposing the moratorium should be required to immediately address and resolve the problems giving rise to the moratorium. *See Westwood Forest Estates v. Village of S. Nyack*, 244 N.E.2d 700 (N.Y. 1969).

- Moratoria are not part of the planning and zoning process. Rather, they are often the result of a failure to properly plan.
 - **“Planning moratoria” should generally be prohibited or severely limited.**

“Even construing the provisions of the [enabling act] liberally, we find that the power to enact a zoning ordinance, for whatever purpose, does not necessarily include the power to suspend a valid zoning ordinance to the prejudice of a land owner... *More significantly, the power to suspend land development has historically been viewed in this Commonwealth as a power distinct from and not incidental to any power to regulate land development.* Accordingly, as the [enabling act] is silent regarding land planning through the temporary suspension of development, we decline to condone a municipality’s exercise of such power.” *Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001) (emphasis added).

- Moratoria raise takings issues as well. *See* D.R. Mandelker and J.M. Payne, *Planning and Control of Development, Cases and Materials* 642 (5th ed. 2001).
 - Significantly, on June 28, 2001, the United States Supreme Court granted certiorari in the case of *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 228 F.3d 998 (9th Cir. 2000), *cert. granted*, 121 S.Ct. 2859, 150 L. Ed. 2d 749 (U.S. June 28, 2001). Certiorari was granted on the question “[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the takings clause of the United States Constitution.”

RECOMMENDED SOLUTION: Delete Alternative 1 in § 8-604(3), as it would authorize moratoria to be imposed for virtually any reason.

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Delete Alternative 2 in § 8-604(3), particularly §§ 8-604(3)(b) and (c), allowing planning moratoria of 2 years (or more). Planning moratoria should not be allowed, and if allowed, should *never* exceed six months.

Revise § 8-604(8) to limit extensions of moratoria – other than planning moratoria, which should not be extended – to not more than one six-month period, and only upon a finding of “compelling need” as defined in § 8-604 Alternatives (2)(d) and (3)(b).

Delete § 8-604(10)(a) and (b) which allow state or local governments to impose additional “temporary moratoria” upon already issued permits or to adopt “temporary policies” against approving zoning map amendments. Alternatively, these additional restrictions should only be imposed upon a finding of “compelling need” as defined in §§ 8-604(2)(d) and (3)(b).

Vested Right to Develop

Traditional late vesting rules in effect in most states are out of date and unfair. These require issuance of a building permit and commencement of construction (or other acts of reliance) in order for rights to vest. Late vesting rules do not recognize the complexity of the modern regulatory environment, or the difference between a single building project on the one hand, and long-term land development or multi-building projects on the other. Statutory reform is urgently needed in this area and the *Guidebook* has taken steps to provide it. Vesting of development rights should be recognized earlier in the process, such as at the time of subdivision or site plan approval, or at the time of filing of a complete application for subdivision/site plan approval.

A legally vested right to develop land is essential to the stability of development processes and real estate markets. The *Guidebook*, in Section 8-501, provides two alternatives. The first alternative is a vesting model that establishes a vested right to develop (which includes design, planning and preparation of the land for development, as well as construction) as soon as a complete development application is filed. The second alternative has been modified from the previous second alternative that required the issuance of a permit *and* “substantial and visible construction” to one that allows vesting based upon “significant and ascertainable development” pursuant to a development permit. This is much more equitable than the original second alternative since it appears to recognize expenditures (and other acts of reliance) based on the *development of the property*, rather than merely on construction of one or more buildings. The development process, from design to approval to construction, is significantly more complex today than it was fifty years ago.

Although the proposed first alternative allowing vesting to occur upon submission of a complete application is laudable and is recognized in some states, it may be more reform than some other states are willing to undertake. Thus, the second alternative proposed in the October 2001 Draft is also appropriate *if* it is interpreted as recognizing vested rights based upon *development* work pursuant to appropriate approvals, rather than upon construction of a building or buildings pursuant to a building permit. (See Legal Analysis.)

LEGAL ANALYSIS OF VESTING PROVISIONS

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- In today’s world, the land-use regulatory process has become increasingly elongated and complex, with environmental permitting often overlaying the traditional review process, regulations proliferating, more reviewing agencies in the mix, and more public hearings. All of these factors, and the increasing uncertainty that accompanies them, have led to a serious problem, particularly for long-term, multi-building projects, which must receive many development approvals before the first building permit is obtained. The design and approval phases of any development, particularly one which involves multiple buildings, is time consuming and expensive. Before a single footing is poured, architects and experts must be hired, attorneys retained, engineering started, a series of regulatory systems navigated, equipment leased, materials ordered, financing arranged and site development work commenced. Thus, it is appropriate that “development” activity pursuant to government approvals, and not merely “construction” of a building or buildings pursuant to a building permit, be the criterion for recognizing vested rights.
- However, it must be noted that the *Guidebook’s* definition of “development permit” lists a number of approvals, *including* a “building permit” (§ 10-101), could be interpreted to apply solely to a building permit. If this were to be the interpretation, the language would have the exact opposite effect of what was intended, which was to suggest an early vesting rule that recognizes the huge expense and commitments required to prepare a development plan and proposal. Thus, the revised second alternative in Section 8-501, if it were to be interpreted to be applicable only to a building permit, could also be construed as authorizing a late vesting rule – similar to the common law vesting rule in effect in approximately 30 states – that would not confer vested status on a project until after a *building permit* has been issued and significant and ascertainable construction thereunder has occurred. This would be a draconian imposition of the rule in today’s multi-layered regulatory environment because it ignores the often numerous development approvals that a project may have previously received and implemented. If applied in this manner, the revised section relating vested status to significant and ascertainable development pursuant to a development permit would not affect meaningful reform and instead would only embalm the status quo. (Unfortunately, the *Guidebook’s* definition of “development permit” does not include preliminary subdivision plans.)
- Approximately 12 states have enacted vesting laws, several of which recognize one’s right to proceed with development under the law in effect at the time of approval of a site-specific application, such as a preliminary subdivision plan. Other states’ laws (*e.g.*, Connecticut) allow vesting even earlier, such as at the time of submission of the initial development application. Both of these approaches are reasonable.
- Maryland is cited in the *Guidebook* as a primary source of the late vesting rule, which is as it should be, since Maryland’s “very late” vesting rule is among the most inflexible in the country. Indeed, Maryland courts have not recognized vested rights under this rule *even in circumstances where the landowner’s failure to acquire the requisite building permit and commence construction is the result of previously adjudicated or acknowledged unlawful conduct of the government*. See, *e.g.*, *Sycamore Realty Co. Inc. v. People’s Counsel of Baltimore County*, 684 A.2d 1331 (Md. 1996); *Rockville Fuel & Feed Co. v. Board of Appeals*, 291 A.2d 672 (Md. 1972).

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RECOMMENDED SOLUTION: Retain Alternative 1 and revise Alternative 2 to clarify that vesting upon commencement of ascertainable development does not require that the project must have received a building permit. Amend the definition of “development permit” in Section 10-101 to include preliminary subdivision plans or plats. Commonly, most of the detailed (and expensive) engineering design work must be accomplished in preparation at the preliminary plat stage.

Third-party Initiated Zoning Petitions

I strongly object to subsections 8-103(1)(d) and (e), which allow new land development regulations (and zoning changes) to be initiated either by petition of owners of record lots constituting “51% of the area that is to be the subject of the proposed ordinance,” or by petition of a stated minimum number of “bona fide adult residents of the local government [sic].” At the final Directorate meeting, it was indicated that the text would include a statement that petitions of this nature should be disfavored. The language that has been added does not adequately convey that the initiative process is extremely destabilizing to orderly planning and social equity and undermines settled planning and zoning decisions. It is all the more so when it can be accomplished by a mere plebiscite of a neighborhood. Neighborhood plebiscites to effect zoning changes are unlawful in many states. See, for example, *Benner v. Tribbit*, 57 A.2d 346 (Md. 1948). There is an excellent discussion of this problem in the case of *Township of Sparta v. Spillane*, 312 A.2d 154 (N.J. Super. 1973). The fact that a minority of states authorizes the initiative process through their constitutions or state enabling laws by no means establishes the wisdom of this process, or its value in achieving the goals of Smart Growth. It is helpful that the final draft has been amended to recognize this point.

LEGAL ANALYSIS OF THIRD PARTY ZONING PETITIONS

- The *Guidebook* acknowledges that some states authorize land development regulations to be initiated:
 - By 51% or more of record lot owners “in the area that is to be the subject of the proposed ordinance” (§ 8-103(1)(d)), or
 - By “petition of a minimum percentage of bona fide adult residents” of the jurisdiction (§ 8-103(1)(e)).

- **Allowing local land-use regulations to be enacted via voter initiative or by a neighborhood plebiscite can completely destabilize the land-use regulatory process and promote exclusionary zoning.** The fact that the local legislative body would make the final decision regarding enactment of the proposed legislation does not ameliorate the mob hysteria that often accompanies such initiatives. See, e.g., *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert den.*, 422 U.S. 1042 (1975). Neighborhood plebiscites are often used to affect the civil rights or property rights of others.

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- Of course, initiatives that are authorized by State Constitutions are likely beyond the reach of remedial legislation. **However, the *Model* should not encourage the use of initiatives as they have been almost universally criticized as antithetical to good governance and good planning.** See, e.g., David Broder, *Democracy Derailed – Initiative Campaigns and the Power of Money* (Harcourt) (author is a senior columnist for the *Washington Post*).

- **Criticism of the initiative as a tool for planning and zoning has been particularly harsh and widespread.** See, e.g., Nicholas M. Kublicki, *Land Use by, for, and of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 Pepp. L. Rev. 99, at 104, 105, 155, 157-158 (1991).

- **Courts have been equally suspicious of the initiative and referendum.** See, for example: *Township of Sparta v. Spillane*, 321 A.2d 154, 157 (N.J. Super. 1973) (“Among other things, the social, economic, and physical characteristics of the community should be considered. The achievement of these goals might well be jeopardized by piecemeal attacks on the zoning ordinances if referenda were permissible for review of any amendment. Sporadic attacks on a municipality’s comprehensive plan would tend to fragment zoning without any overriding concept.”). To the same effect are: *Benner v. Tribbit*, 57 A.2d 346, 353 (Md. 1948); *Leonard v. City of Bothell*, 557 P.2d 1306, 1309-10 (Wash. 1976); *City of Scottsdale v. Superior Court*, 439 P.2d 290, 293 (Ariz. 1968).

RECOMMENDED SOLUTION: Delete § 8-103(1)(d) authorizing ordinance text and map amendments to be “initiated” by 51 percent of the owners of lots of record in “the area” that is to be the subject of the proposed ordinance, and replace it with a new § 8-103(1)(d), which would allow owners of lots of record to *apply* to the local government legislature for regulatory relief in situations affecting their property or the general community. The local government would retain the discretion whether to accept or consider the amendment application.

Of course, a landowner’s right to seek redress of a site-specific problem through legislation (such as a zoning text amendment) would not absolve the local government from evaluating the proposed amendment on the basis of whether it would promote the health, safety, and welfare of the general public.

Similarly, optional Section 8-103(1)(e), authorizing a specified percentage of adult residents of the local government to petition for ordinance amendments, should be deleted. If a single category, or a group of citizens, have a meritorious case for amending an ordinance, they can pursue it under §§ 8-103(1)(a), (b) and (c) by convincing their legislative body or planning agency of the merits of their proposal. If they are dissatisfied with the outcome, they can voice their displeasure in the next election.

Designation of Critical and Sensitive Areas

The *Guidebook* defines “critical and sensitive areas” as those areas that contain or constitute natural resources sensitive to excessive or inappropriate development. (Section 9-101(3)(c)). This definition is extremely broad. All areas can contain or constitute some natural resource. Certainly, any undeveloped property could easily be categorized as containing or

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constituting a “natural resource.” In fact, no definition of “natural resource is provided within the text. Furthermore, the *Guidebook* definition refers to “excessive or inappropriate development” but does not attempt to define what these terms mean. Without a clear, concise definition, any development could be identified as “excessive or inappropriate.” *Such lack of clarity or of any definition altogether could easily allow a local government to restrict any type of development in any area.*

The *Guidebook* language provides that local governments can opt out of adopting regulations for critical/sensitive areas if all critical/sensitive areas in their jurisdiction are designated as areas of “state” critical concern (Section 9-101(1)). However, just as importantly, the local government should be able to avoid adopting regulations for critical/ sensitive areas that have been designated as “critical” by the Federal government. For example, the U.S. Endangered Species Act of 1973 (ESA) requires the Federal government to designate “critical habitat” for endangered or threatened species. The ESA provides extensive protection of “critical habitat.” The ESA requires an applicant to apply for a permit from the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) if their action will likely impact an endangered or threatened species (which would likely occur in an area designated as critical habitat). The Act also requires projects within critical habitat, needing a Federal permit, approval or funding to go through a consultation process with FWS or NMFS. If the outcome of the consultation determines that the activity will likely adversely affect the survival and recovery of the species, the applicant will be required to minimize or mitigate the impacts of the activity.

RECOMMENDED SOLUTION: Provide a definition for “natural resources” similar to the following: natural resources are plants, animals, or useful minerals indigenous to a specific site that provide benefits not only to the owner of the site but to the public generally and that the exploitation of which would have a detrimental effect on the public welfare.

Amend the definition of “critical and sensitive areas” to include: lands and/or water bodies containing natural resources and/or which are themselves natural resources the exploitation of which would cause a threat to the public health, safety, or welfare.

Provide a definition for “excessive or inappropriate development” similar to the following: excessive or inappropriate development is grading, construction, or site disturbance that is unlawful or not in compliance with duly adopted regulations or not in compliance with duly issued permits.

Provide in Section 9-101(1) and/or in Section 7-202 (5) an opt-out provision for lands designated as “critical” by the federal government.

CONCLUSION

While many of my comments have been frankly critical, hopefully they will be perceived as constructive in their intent. Stuart Meck, his able staff, and important outside consultants have produced an impressive and very useful piece of work. The thoughtful and diligent work of a dedicated Directorate who read and commented extensively and constructively on literally thousands

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of pages of text is not to be overlooked. That the *Guidebook* can and should be made better is not a detraction of the work as it stands, but rather on the broad scope and great complexity of the undertaking. I consider it a privilege and a great learning opportunity to have been allowed to work on the Growing SmartSM Directorate.

Paul S. Barru

The following associations representing constituencies of the “built environment” hereby join in this report: National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Realtors; International Council of Shopping Centers; Self Storage Association; National Multi Housing Council/National Apartment Association; American Road and Transportation Builders Association.

