

## **FINANCING REQUIRED PLANNING**

This Chapter contains various model statutes that authorize methods of financing the planning activities authorized and required elsewhere in the *Guidebook*. Sections 13-101 through 13-103 authorize local governments to adopt and impose taxes to finance planning: a property tax, real property transfer tax, and a development excise tax. Section 13-104 is concerned with the dedicated purposes to which the special tax revenue may be put.

Section 13-201 is the Smart Growth Technical Assistance Act. It creates a state program under which grants may be made to regional planning agencies and local governments to support their “smart growth” planning activities. Smart growth is a defined term with a flexible but specified meaning that at its essence is compact and mixed-use development that increases choices in transportation and opportunities for personal interaction. Additionally, the state planning agency is directed to gather and distribute model plans and ordinances that encourage smart growth and to provide educational resources, training, and other technical assistance regarding the principles and methods of smart growth.

## CHAPTER 13

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### Chapter Outline

#### LOCAL TAX FINANCING OF PLANNING

13-101	Real Property Tax to Finance Planning
13-102	Real Property Transfer Tax to Finance Planning
13-103	Development Excise Tax to Finance Planning
13-104	Disposition of Revenue From Planning Taxes

#### TECHNICAL AND FINANCIAL ASSISTANCE FOR PLANNING

13-201	Smart Growth Technical Assistance Act
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### Cross-References for Sections in Chapter 13

Section No.	Cross-Reference to Section No.
13-102	8-103
13-103	8-103, 8-502, 10-209, 10-211, 10-601 <i>et seq.</i> , Ch. 11
13-104	7-401, 7-406, 8-104, 13-101, 13-102, 13-103
13-201	4-103

**LOCAL TAX FINANCING OF PLANNING**

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***Commentary: Local Financing of Planning Activities***

The planning activities of a local government are multifold, and are not inexpensive. Studies must be performed, data gathered, hearings held, and existing regulations reviewed. Planning agencies must employ planning professionals and clerks, provide office supplies, and purchase information resources. In the absence of a special source of funding, these activities are financed from the general fund of the local treasury. However, there may be circumstances where it is desirable for planning officials to have a separate, dedicated, revenue stream. Three means of providing such a source of funding are an assessment under the existing real property tax structure, a tax on real property transfers, and a development excise tax. The real property transfer tax is essentially a flat sum to be paid at the time of recordation of a deed or other document that transfers ownership of land within the local government. The development excise tax is rather unique, and requires a more in-depth explanation.

**DEVELOPMENT EXCISE TAXES<sup>1</sup>**

A development excise tax is different in fundamental ways from a real property tax or a real property transfer tax. It is imposed on the activity of developing land, is proportional to the density or intensity of the development, and is an obligation of the developer. This is in contrast to the real property tax, which is assessed against the value of real property and is an obligation of the property owner, or the property transfer tax, which is also paid by the land owner but in the form of a flat fee at the time he or she records the deed that grants them title.

These differences are relevant to the extent that the state constitution or statutes provide different procedural or substantive requirements for property and excise taxes. For example, uniformity clauses in state constitutions often require that all real property subject to a real property tax must constitute a single classification. For example, distinct tax rates or valuation formulas for residential and non-residential property would run afoul of such provisions.<sup>2</sup>

Development excise taxes are also distinct from impact fees. The purpose of impact fees is at least partially regulatory – to ensure that development projects pay their full cost – while the

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<sup>1</sup>An excellent discussion of development excise taxes, their advantages, and the potential pitfalls is Eric J. Strauss and Martin L. Leitner, “Development Excise Taxes: Financing Public Facilities Without the Limitations Associated with Exactions and Impact Fees,” Chapter 13 in Mark S. Dennison, ed., *1989 Zoning and Planning Law Handbook*, (New York: Clark Boardman Co., 1989), 315-328.

<sup>2</sup>*John Wanamaker of Philadelphia v. School District*, 274 A.2d 524 (Pa. 1971).

## CHAPTER 13

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purpose of a development excise tax is to raise revenue. Therefore, a development excise tax is not subject to the “rational nexus” or “rough proportionality” requirements applicable to impact fees.<sup>3</sup>

Because of these differences, state courts are concerned with the actual nature or character of particular taxes, and may consider a tax that is called one thing to actually have the characteristics of a different class of taxes. “The nature of a tax must be determined by its operation, rather than by any particular descriptive language which may have been applied to it.”<sup>4</sup>

The single biggest legal obstacle to any tax ordinance is that it may be deemed a form of taxation which the local government has no statutory authority to adopt. The adoption of a development excise tax enabling statute like the model below should inherently resolve any issues of statutory authorization, but there are other legal issues. To ensure that an excise tax on development activities is not deemed a property tax, it should be an obligation of the developer, not the owner of the premises, it should not be secured by a lien on the property developed, and the amount of the tax should not be based on the value of the property.<sup>5</sup> In order to distinguish a development excise tax from an impact fee, it should have no regulatory functions or purposes, should tax the development activity and not the property developed, should not be an obligation of the land owner, and payment of the tax should not be a condition precedent for the issuance of a development permit.<sup>6</sup>

The dedication of development excise tax revenue to financing planning might raise some concerns, since the “earmarking” or dedication of funds is a hallmark of impact fees. However, many measures clearly intended to be revenue generators only are also dedicated, so the use of development excise tax revenue to finance planning activities alone should not be a problem unless there is clear precedent to the contrary in one’s particular state.

### STATE STATUTES

**Arizona** authorizes counties to impose a \$2 real property transfer tax in addition to the recording fee.<sup>7</sup> The statute exempts several forms of transfer that do not constitute a substantive change in ownership (placing property into or out of a trust, “straw man” transactions to create a joint or common tenancy, transfers between commonly-owned corporate entities), that transfer interests other than full legal and equitable title (mortgages, liens, and security interests; easements and profits), that clear up title without changing it (partitions, deeds to clarify or confirm earlier deeds), and that are not engaged in for financial gain (deeds of gift, deeds transferring title between spouses

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<sup>3</sup>*Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*, 141 Cal.Rptr. 36 (Cal. 1977).

<sup>4</sup>*Weaver v. Prince George’s County*, 379 A.2d 399 (Md. 1977).

<sup>5</sup>See *Commissioners of Anne Arundel County v. English*, 35 A.2d 135 (Md. 1943); *Flynn v. City and County of San Francisco*, 115 P.2d 3 (Cal. 1941).

<sup>6</sup>*Newport Building Corp. v. City of Santa Ana*, 26 Cal.Rptr. 797 (Cal. 1962); *Cherry Hill Farm v. City of Cherry Hills*, 670 P.2d 779 (Colo. 1983).

<sup>7</sup>Ariz. Rev. Stat. §§11-1131 *et seq.* (1999).

## CHAPTER 13

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or between parents and children).<sup>8</sup> The tax must be paid before a transfer document will be accepted for recording,<sup>9</sup> and it is a misdemeanor for an employee of the recorder to accept a document without payment of the tax or proof of an exemption.<sup>10</sup>

**California** cities and counties may adopt a real property transfer tax.<sup>11</sup> Counties, and cities where the county has not adopted a transfer tax, may impose a rate of 55 cents per \$500 of value of the property transferred.<sup>12</sup> A city located in a county with a transfer tax may collect only half that amount under its own transfer tax, and the county must grant a credit equal to the city transfer tax so that the total transfer tax does not exceed 55 cents per \$500.<sup>13</sup> The tax is payable to the county by either the grantor or the grantee,<sup>14</sup> and applies to transfers of mobile homes.<sup>15</sup> In addition to repealing many of the exemptions from the Arizona statute,<sup>16</sup> California exempts transfers pursuant to or in implementation of a bankruptcy.<sup>17</sup> No deed or other document transferring an interest in land may be filed without proof of payment of the tax or of exemption from it.<sup>18</sup>

**Illinois**<sup>19</sup> imposes a real estate transfer tax of 50 cents per \$500 of value.<sup>20</sup> It provides a list of exemptions similar to that in the Arizona statute,<sup>21</sup> and no deed or other document transferring title may be recorded unless it bears a stamp demonstrating that the tax was paid or an affidavit is

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<sup>8</sup>Ariz. Rev. Stat. §11-1134.

<sup>9</sup>Ariz. Rev. Stat. §11-1132.

<sup>10</sup>Ariz. Rev. Stat. §11-1137.

<sup>11</sup>Cal. Rev. & Tax. Code §§11901 *et seq.* (1999).

<sup>12</sup>Cal. Rev. & Tax. Code §11911(a).

<sup>13</sup>Cal. Rev. & Tax. Code §§11911(b), 11931.

<sup>14</sup>Cal. Rev. & Tax. Code §§11912, 11931.

<sup>15</sup>Cal. Rev. & Tax. Code §11913.

<sup>16</sup>Cal. Rev. & Tax. Code §§11921-11930.

<sup>17</sup>Cal. Rev. & Tax. Code §11923.

<sup>18</sup>Cal. Rev. & Tax. Code §11933.

<sup>19</sup>35 Ill. Comp. Stat. §§200/31-1 *et seq.* (1999).

<sup>20</sup>35 Ill. Comp. Stat. §200/31-10.

<sup>21</sup>35 Ill. Comp. Stat. §200/31-45.

## CHAPTER 13

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presented proving that the transfer is exempt.<sup>22</sup> Illinois authorizes municipalities<sup>23</sup> and home-rule counties<sup>24</sup> to impose their own real estate transfer tax, but only upon approval by referendum after holding one or more public hearings. Non-home-rule counties may impose a real estate transfer tax without referendum, but are expressly required to employ the exemptions of the state real property transfer tax statute<sup>25</sup> and are limited to a tax rate of 25 cents per \$500 of property value.<sup>26</sup> Upon the request of a county with a real property transfer tax, the tax stamp required by the state transfer tax will not be issued until the county transfer tax has also been paid.<sup>27</sup>

**Maryland** has recently adopted a development excise tax enabling statute for Cecil County.<sup>28</sup> The county cannot adopt such a tax without first holding a public hearing after due notice. The tax may be imposed on the construction of residential units anywhere in the county (including within municipalities) at the time a building permit is obtained, and may not exceed \$3500 per residential unit. The revenues from the tax are to be deposited in a capital facilities improvement fund and may be spent only on capital projects that create, or increase the capacity of, public facilities or on debt service on bonds for such capital projects.

**Massachusetts**<sup>29</sup> has a tax on real property transfers, at a rate of \$2 for a transfer of interest in land valued between \$100 and \$500 and \$2 for every \$500 thereafter (except in Barnstable county, where the excise tax is \$1.50 per additional \$500).<sup>30</sup> 42.5% of the revenue goes into the Deed Transfer Fund of the county where the land is located,<sup>31</sup> and is disbursed from there to the Corrections Fund (75%), the county general fund (15%), and for the modernization and automation

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<sup>22</sup>35 Ill. Comp. Stat. §§200/31-15, -20.

<sup>23</sup>65 Ill. Comp. Stat. §5/8-3-19.

<sup>24</sup>55 Ill. Comp. Stat. §5/5-1031.1

<sup>25</sup>35 Ill. Comp. Stat. §200/31-45.

<sup>26</sup>55 Ill. Comp. Stat. §5/5-1031.

<sup>27</sup>35 Ill. Comp. Stat. §200/31-15.

<sup>28</sup>2000 Md. Laws Ch. 163, effective July 1, 2000.

<sup>29</sup>Mass. Gen'l Laws ch. 64D, §1 *et seq.* (1999).

<sup>30</sup>Mass. Gen'l Laws ch. 64D, §1.

<sup>31</sup>Mass. Gen'l Laws ch. 64D, §11.

## CHAPTER 13

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of land transfer records (10%).<sup>32</sup> Transfers to or from the Federal government, the Commonwealth, or to a city or town are exempt,<sup>33</sup> and the tax is payable by either the grantor or the grantee.<sup>34</sup>

**Ohio** counties, townships, and municipalities may assess a property tax in excess of the statutory 10-mill limit for the purpose of funding regional planning, if approved by two-thirds of the legislative body and by a referendum.<sup>35</sup> Ohio law<sup>36</sup> also authorizes counties to collect a real property transfer tax, not to exceed 30 cents per \$100 of value of the property being transferred.<sup>37</sup> The statute includes a series of exemptions<sup>38</sup> which is very similar to the exemptions in the Arizona transfer tax statute. The county real property transfer tax may be accompanied by a tax on the transfer of manufactured housing, payable by the grantor, at the same tax rate as the real property transfer tax.<sup>39</sup> A reduction in the tax rate may be granted to property, either real property or manufactured housing, that has received a tax reduction certificate for its homestead status.<sup>40</sup>

### DEVELOPMENT EXCISE TAX ORDINANCES

**Boulder, Colorado.** The development excise tax ordinance in Boulder<sup>41</sup> applies equally to new development and to existing development in territory being annexed to the city,<sup>42</sup> and also applies to the addition of residential units or non-residential floor area to existing development.<sup>43</sup> Non-residential units pay a rate of \$1.97 per square foot, while attached residential units and mobile homes pay \$2,871.40 per unit and detached residential units pay \$4,460.99 each.<sup>44</sup> The tax revenue

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<sup>32</sup>Mass. Gen'l Laws ch. 64D, §12.

<sup>33</sup>Mass. Gen'l Laws ch. 64D, §1.

<sup>34</sup>Mass. Gen'l Laws ch. 64D, §2.

<sup>35</sup>Ohio Rev. Code §5705.19 (1999).

<sup>36</sup>Ohio Rev. Code §§322.01 *et seq.*.

<sup>37</sup>Ohio Rev. Code §322.01.

<sup>38</sup>Ohio Rev. Code §319.54(F)(3).

<sup>39</sup>Ohio Rev. Code §322.06.

<sup>40</sup>Ohio Rev. Code §§322.07, 323.154.

<sup>41</sup>Boulder (CO) Rev. Code §§3-8-1 *et seq.* (2000).

<sup>42</sup>Boulder Rev. Code §3-8-1.

<sup>43</sup>Boulder Rev. Code §3-8-4.

<sup>44</sup>Boulder Rev. Code §3-8-3.

## CHAPTER 13

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is to be paid into three special, dedicated funds: the Capital Development Fund, Transportation Development Fund, and Permanent Park and Recreation Fund.<sup>45</sup> The City Council is empowered to grant credits to developers who provide capital improvements, development improvements, or park and recreation improvements equivalent to the tax, or who provide affordable housing or engage in development in urban renewal areas.<sup>46</sup> The development excise tax constitutes a lien on the property, and unpaid development excise tax can be collected by the county treasurer if the city manager certifies the unpaid taxes to the treasurer.<sup>47</sup>

**Napa, California.**<sup>48</sup> All new residential, commercial, and industrial development in Napa must pay a development excise tax.<sup>49</sup> Each new residential unit pays \$125, while commercial development is taxed one cent per square foot and industrial development pays one-half cent per square foot (in both cases gross floor area including parking),<sup>50</sup> and the tax revenue may be spent only on the construction and expansion of “city fire stations, municipal buildings, and community parks.”<sup>51</sup> Development that replaces destroyed development is excluded from the tax so long as construction begins within six months of the destruction,<sup>52</sup> and the tax exempts development by governments, charitable, religious, and educational institutions, insurance companies, and banks.<sup>53</sup> The tax is payable by “the person by or on behalf of whom a residential, commercial or industrial unit or building or mobile home park is constructed whether such person is the owner or a lessee of the land,”<sup>54</sup> and is due before a building permit may be issued.<sup>55</sup> No construction may occur, and no constructed building may be occupied, until the tax is paid,<sup>56</sup> and the city is empowered to collect

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<sup>45</sup>Boulder Rev. Code §3-8-6.

<sup>46</sup>Boulder Rev. Code §3-8-7.

<sup>47</sup>Boulder Rev. Code §3-8-8.

<sup>48</sup>Napa (CA) Mun. Code §§3.24.010 *et seq.* (1999).

<sup>49</sup>Napa Mun. Code §3.24.020.

<sup>50</sup>Napa Mun. Code §3.24.030.

<sup>51</sup>Napa Mun. Code §3.24.120.

<sup>52</sup>Napa Mun. Code §3.24.090.

<sup>53</sup>Napa Mun. Code §3.24.100.

<sup>54</sup>Napa Mun. Code §3.24.040.

<sup>55</sup>Napa Mun. Code §3.24.070.

<sup>56</sup>Napa Mun. Code §§3.24.050, 3.24.060.

## CHAPTER 13

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unpaid tax through a civil action in court.<sup>57</sup> A refund is due if the developer proves to the satisfaction of the finance director that the development on which the tax was paid did not occur.<sup>58</sup>

**Overland Park, Kansas.** This large Kansas City suburb has a development excise tax that is levied against the act of subdividing or platting real property.<sup>59</sup> The tax is assessed at a rate of 14.5 cents per square foot of land as indicated on the plat, and must be paid before, and as a condition precedent of, recordation of the final plat. The tax revenue is paid into the general fund of the city treasury. Exemptions are available under the excise tax ordinance for land platted by the city itself, for land zoned agricultural where all parcels are five acres or greater, detached accessory buildings that are incidental to a main building, additions to single-family houses that will not change the primary use, and minor additions that will not change the character, extent, or intensity of the existing development and do not constitute more than 10 percent of the pre-existing floor area. There is also provision for a rebate of the excise tax where development was subject to both the excise tax and to the old exaction for thoroughfare improvements which it replaced. The Overland Park ordinance was sustained by the Kansas Court of Appeals, which held, *inter alia*, that the ordinance was not a tax upon the use of real property or upon the rendering of a service, but was nevertheless a revenue measure rather than a regulatory one.<sup>60</sup>

### PROVISIONS OF THE MODEL SECTIONS

Section 13-101 authorizes a real property tax assessment dedicated to finance planning. The Section includes a provision whereby an adopting state can set an upper limit on the tax rate, based on the particular features and circumstances of their state's real property tax system. The details of assessment, collection, distribution, and appeal or review of the tax are not addressed in the Section, as they are best handled under the state's existing statutes on real property taxes.

A tax on real property transfers is authorized by Section 13-102. The tax is collected by the county recorder of deeds at the time the document effecting a transfer is recorded, and payment is a condition precedent for recordation. The Section excludes certain transactions which theoretically constitute a transfer of an interest in land but in reality do not have the effect of changing ownership. It also exempts transfers to governmental units and donations of real property to tax-exempt not-for-profit entities.

A development excise tax is authorized by Section 13-103. The local government must expressly provide a formula for assessing the tax, a procedure for collection of the tax, a procedure for appealing assessments, and a procedure for refunding the tax when the development activity upon which the tax was paid did not actually occur. The development excise tax does not apply to

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<sup>57</sup>Napa Mun. Code §3.24.040.

<sup>58</sup>Napa Mun. Code §3.24.110.

<sup>59</sup>City of Overland Park, Kan., Ordinances No. EX-2154 and REB-2155 (1999).

<sup>60</sup>*Home Builders Association of Greater Kansas City v. City of Overland Park*, 22 Kan. App. 2d 649, 921 P.2d 234 (1996).

## CHAPTER 13

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development by governmental units or by tax-exempt not-for-profits engaging in development activities within the limits of that exemption. Local governments are also authorized to exempt certain socially-beneficial types of development, such as affordable housing, when a clear policy in the local comprehensive plan calls for it. Otherwise, the tax is intended to apply to all land uses and all types of development: a local government cannot adopt a development excise tax applicable only to residential property, for instance.

Section 13-104 provides that the revenue from all three taxes referred to above is to be placed in a special account, separate from the general fund of the local treasury, and spent only on planning activities, as defined in the Section. It also clarifies that the special planning taxes are not intended to be exclusive; general appropriations to finance planning activities may be made in addition to the dedicated revenue.

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### 13-101 Real Property Tax to Finance Planning

- (1) The legislative body of a local government may impose a local planning property tax in the manner provided by this Section.
- (2) The purpose of a local planning property tax is to raise revenue to finance the planning activities of the local government.
- (3) For the purposes of this Section, and any other Section where a local planning property tax is referred to, a “**local planning property tax**” is an tax levied against the value of real property in the local government pursuant to the [*cite real property tax law*] in order to finance the planning activities of the local government.
- (4) A local planning property tax:
  - (a) shall not exceed a rate of [X] mills, or [X] dollars per thousand dollars of assessed value; and
  - (b) shall be governed in all matters by the provisions of the [*cite real property tax law*], including in the manner of adoption, amendment, assessment, collection, enforcement, and review.

### 13-102 Real Property Transfer Tax to Finance Planning

- (1) The legislative body of a local government may adopt and amend a real property transfer tax to finance planning according to the procedure for the adoption and amendment of land development regulations pursuant to Section [8-103, *or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances.*]
- (2) The purpose of a real property transfer tax pursuant to this Section is to raise revenue to finance the planning activities of the local government.

## CHAPTER 13

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- (3) For the purposes of this Section,
- (a) **“Real Property Transfer”** means a transaction whereby there is a transfer of title or an ownership interest in real property located within the local government. A real property transfer does not include any transfer of title or ownership interest to a governmental unit by whatever method achieved, nor does it include:
1. a transfer of title into a trust when at least one of the grantors is a trustee of the grantee trust;
  2. a transfer of title out of a trust when at least one of the grantees is a beneficiary of the grantor trust;
  3. a transfer of title or ownership, directly or through an intermediary, whereby the initial grantors and the ultimate grantees are the same persons or entities, for the purpose of creating a joint tenancy, [tenancy by the entirety,] community property estate with right of survivorship, or some similar form of ownership;
  4. a transfer of title or ownership pursuant to a merger of two or more corporations or by a subsidiary corporation to its parent corporation for no consideration, nominal consideration, or in sole consideration for canceling or surrendering the subsidiary's stock;
  5. the creation, modification, or release of a mortgage, lien, or security interest;
  6. the creation, modification, or release of an easement, servitude, or profit;
  7. a partition, pursuant to [*cite partition statute*], of property held in joint tenancy, common tenancy, [tenancy by the entirety,] community property estate with right of survivorship, or some similar form of ownership;
  8. a quitclaim deed issued solely for the purpose of quieting title;
  9. a deed or other document that solely confirms or corrects a deed or document previously recorded; or
  10. a donation, directly or through a trust, of real property to a charitable, educational, eleemosynary, or religious institution, to the extent that the donation is deductible by the donor under [*cite income tax statute re. deductible donations*];
- (b) **“Real Property Transfer Document”** means any document, such as a deed, that effects or executes a real property transfer.

## CHAPTER 13

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- (4) A real property transfer tax to finance planning may be adopted and amended only through a property transfer tax ordinance pursuant to this Section. A property transfer tax ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the property transfer tax ordinance;
  - (b) a statement of purpose consistent with the purposes of paragraph (2) above;
  - (c) definitions, as appropriate, for such words or terms contained in the property transfer tax ordinance. Where this Act defines words or terms, the property transfer tax ordinance shall incorporate those definitions, either directly or by reference;
  - (d) the actual amount of real property transfer tax that is to be assessed against each real property transfer, such amount to be the same for every real property transfer and not in any case to exceed \$[X] per real property transfer document;
  - (e) the amount of the administrative fee that is to be collected and retained by the county [recorder of deeds *or equivalent official*] to cover the cost of assessing and collecting the real property transfer tax on behalf of the local government. Such fee shall be based on the actual cost of performing the duties of the [recorder of deeds] pursuant to this Section, and shall not in any case exceed [5] percent of the amount of the real property transfer tax; and
  - (f) a procedure for the review of assessments of the real property transfer tax and administrative fee, which shall conform to the provisions of Chapter 10 for review of land-use decisions and with paragraphs (7) and (8) below.
- (5) Before adopting a property transfer tax ordinance, the local government shall request in writing from the county [recorder of deeds *or equivalent official*] a reasonable estimate of the cost of performing the duties of the [recorder of deeds] pursuant to this Section.
- (a) The [recorder of deeds] shall provide such an estimate in writing within [30] days of receipt of the request, which shall be based on the actual costs and expenses of the [recorder of deeds].
  - (b) The local government shall give the estimate provided due consideration in the drafting of the property tax transfer ordinance.
- (6) Within [30] days of adopting or amending a property transfer tax ordinance, the local government shall inform the county [recorder of deeds *or equivalent official*] in writing of the effective date of the ordinance and the amount of the real property transfer tax.
- (a) So long as the property transfer tax ordinance is effective, the county [recorder of deeds] shall collect the real property transfer tax and administrative fee from each

## CHAPTER 13

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real property transfer at the time the real property transfer document is delivered to the [recorder of deeds] for recordation.

(b) The [recorder of deeds] shall not record any real property transfer document that is subject to a property transfer tax ordinance without first collecting the real property transfer tax and administrative fee.

(c) The [recorder of deeds] shall, within [5] days after the end of each calendar month, remit to the local government the real property transfer tax collected on behalf of the local government during the calendar month.

(7) The payment of a real property transfer tax and administrative fee pursuant to this Section is the obligation of the grantee, and is a joint obligation of all grantees if there is more than one grantee.

◆ This provision is not likely to come into play in most circumstances, as the tax is to be paid before the document may be recorded. However, it is still a good idea to state clearly who has the legal obligation to pay.

(8) A grantee against whom a real property transfer tax and administrative fee have been assessed may pay the tax and fee and preserve the right to review the assessment by:

(a) paying the development excise tax and administrative fee in full as assessed; and

(b) submitting with payment a written statement that payment is made “under protest” or that includes other language that would notify a reasonable person that the grantee intends to preserve the right of review.

◆ Without such a provision, the requirement of payment before a real property transfer document may be recorded could effectively require a grantee to waive their right to challenge the tax in order to get their deed recorded.

### **13-103 Development Excise Tax to Finance Planning**

(1) The legislative body of a local government may adopt and amend a development excise tax according to the procedure for the adoption and amendment of land development regulations pursuant to Section [8-103, *or cite to some other provisions, such as a municipal charter or state statute governing the adoption of ordinances.*]

(2) The purpose of a development excise tax is to raise revenue to finance the planning activities of the local government. It is not the purpose of a development excise tax to regulate or curtail development.

(3) As used in this Section, and in any other Section where development excise taxes are referred to:

## CHAPTER 13

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- (a) “**Developer**” means a person or entity that initiates, arranges and manages the financing of, and controls development activity, whether or not the person or entity is an owner of the real property on which the development activity occurs;
- (b) “**Development Activity**” means development that creates or increases the inhabitable or useable floor area of buildings or structures or increases the density or intensity of the use of the land on which the development occurs. Development activity does not include:
  - 1. development by any governmental unit, including, but not limited to, the Federal and state governments and any agency thereof;
  - 2. development by any charitable, educational, eleemosynary, or religious institution that is exempt from taxation pursuant to [*cite income tax statute re. tax-exempt entities*], to the extent that the development activity is consistent with the tax-exempt purposes or functions of the institution pursuant to that statute;
  - 3. to the extent that it is not prohibited by Section [8-502], the restoration or reconstruction of buildings or structures that were, in whole or in part, rendered uninhabitable or unusable; or
- ◆ Under Section 8-502, on the protection of nonconformities, a nonconforming building or structure that is destroyed may be rebuilt so long as less than half of its useable area was destroyed. Needless to say, if a building that is in compliance with all present land development regulations is destroyed, it may be rebuilt in compliance with those regulations regardless of the percentage of its area that was destroyed.
  - 4. maintenance or repairs that are required by the [*property management code, housing code, or similar ordinance*] or that are reasonably necessary or commonly engaged in to maintain property in a reasonably habitable or useable condition;
- (c) “**Development Completion Date**” means either:
  - 1. the date upon which the development permit authorizing development activity expires;
  - 2. if more than one development permit authorizes development activity, the latest date upon which a development permit authorizing the development activity expires; or
  - 3. where the development activity does not require any development permit, a date fixed by the local government and provided in writing to the developer upon payment of the development excise tax. Such date shall

## CHAPTER 13

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allow a reasonable time period from the date of payment of the development excise tax for the completion of the development activity.

- (d) “**Development Excise Tax**” means a tax assessed against development activity, which is payable by, and an obligation of, the developer or developers.
- (4) A development excise tax may be adopted and amended only through a development excise tax ordinance pursuant to this Section. A development excise tax ordinance shall include the following minimum provisions:
- (a) a citation to enabling authority to adopt and amend the development excise tax ordinance;
  - (b) a statement of purpose consistent with the purposes of paragraph (2) above;
  - (c) definitions, as appropriate, for such words or terms contained in the development excise tax ordinance. Where this Act defines words or terms, the development excise tax ordinance shall incorporate those definitions, either directly or by reference;
  - (d) a statement of the formula for assessing the development excise tax, which shall:
    - 1. be expressed in proportion to a quantifiable measure of development activity, such as useable floor area, floor area ratio, building coverage ratio, or density or intensity; and
    - 2. except as expressly provided in this Section, apply [at a single, uniform tax rate] to all land uses and all types of development activity;
  - (e) the procedure by which the development excise tax is to be assessed and collected, including the provision of a reasonable period within which the development excise tax is to be paid;
  - (f) provision for the enforcement of the ordinance against developers subject to and obligated to pay the development excise tax who fail to pay the tax within the time permitted pursuant to subparagraph (e) above. The local government may enforce the development excise tax ordinance pursuant to Chapter 11 in the same manner as a land development regulation;
- ◆ Under the provisions of Chapter 11, the local government may employ an administrative enforcement procedure or may resort immediately to a civil action in the courts. Criminal proceedings for intentional violations are also authorized.
- (g) the procedure, pursuant to paragraph (6) below, for review of assessments of the development excise tax and for the payment of the development excise tax under protest; and

## CHAPTER 13

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- (h) the procedure, pursuant to paragraph (7) below, whereby development excise tax paid in advance of development may be refunded when and to the extent that the development has not occurred.
- (5) A development excise tax ordinance may include provisions:
- (a) requiring the payment of the development excise tax at the time development permit fees pursuant to Section [10-211] are paid, but payment of the development excise tax shall not be a condition precedent for the issuance of any development permit;
  - (b) authorizing the payment of the development excise tax in installments; and
  - [(c) exempting certain types or classes of development activity, including, but not limited to, affordable housing, development pursuant to a transit-oriented development plan, and development in a redevelopment area, from the assessment and collection of the development excise tax.
    - 1. No such exemption may be created unless there is a policy supporting the exemption expressly stated in the local comprehensive plan.
    - 2. Such an exemption provision shall state the policy underlying the exemption and shall provide the procedure for granting exemptions to particular development activities.]
- (6) Any developer against whom a development excise tax has been assessed may seek a review of the assessment. The procedure for such a review shall conform to the provisions of Chapter 10 for review of land-use decisions except where the provisions of this paragraph are to the contrary.
- (a) There shall be a record hearing on all reviews of a development excise tax assessment.
  - (b) A developer against which a development excise tax has been assessed may pay the tax and preserve the right to review the assessment by:
    - 1. paying the development excise tax in full as assessed, and
    - 2. submitting with payment a written statement that payment is made “under protest” or that includes other language that would notify a reasonable person that the developer intends to preserve the right of review.
- (7) When a developer pays development excise tax in anticipation or advance of development activity, and that development activity does not occur by the development completion date, the local government shall refund to the developer the portion of the development excise tax representing the development activity that did not occur and the interest thereon.

## CHAPTER 13

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- (a) The developer must apply for or request the refund according to the procedure provided in the development excise tax ordinance.
- ◆ The developer is in the best position to know how much of the projected development activity actually occurred. Also, requiring the developer to actively seek the refund will reduce the occurrence of inefficient cases where *de minimis* refunds must be processed and may be disputed.
  - (b) The local government may demand reasonable proof that the development has not occurred by the development completion date before it pays a refund pursuant to this Section.
  - (c) Refunds shall be paid in full within [60] days of an application for refund. If the local government does not pay a refund in full within that period, the developer may appeal. The procedure for appeal shall conform to the provisions of Chapter 10 for review of land-use decisions, and a record hearing shall be provided for such appeals.

### 13-104 Disposition of Revenue from Planning Taxes

- (1) All revenues generated by one or more of the following:
  - (a) a local planning property tax pursuant to Section [13-101];
  - (b) a real property transfer tax pursuant to Section [13-102]; or
  - (c) a development excise tax pursuant to Section [13-103];shall be deposited in a special interest-bearing account of the local government treasury within [5] days of their receipt by the local government.
- (2) The funds deposited into the special account, and the interest earned thereon, shall be expended only upon:
  - (a) the preparation, adoption, amendment, and review of the local comprehensive plan and any subplan required or authorized by Chapter 7 of this Act, including, but not limited to:
    - 1. research, data collection, mapping, and analysis;
    - 2. conduct of public hearings and other public participation procedures pursuant to Section [7-401];
    - 3. periodic review of the local comprehensive plan pursuant to Section [7-406]; and

## CHAPTER 13

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4. review of land development regulations and land-use actions pursuant to Sections [7-406] and [8-104];
  - (b) other expenses of the [local planning agency] incurred in the performance of any of its powers and duties pursuant to this Act; and
  - (c) other expenses of the [local planning commission], if one exists, incurred in the performance of any of its powers and duties pursuant to this Act.
- (3) Paragraph (2) above notwithstanding, any:
  - (a) refund of a development excise tax pursuant to Section [13-103(7)]; or
  - (b) repayment, pursuant to a review or appeal, of a portion or all of a local planning property tax, real property transfer tax to finance planning, or development excise tax;

shall be paid from the special account if the funds in question were deposited into the special account.
- (4) Nothing in this Section prohibits a local government that has imposed a local planning property tax, a real property transfer tax to finance planning, or a development excise tax from appropriating funds from other sources, including the general fund of the local government treasury, for the purposes and functions enumerated in paragraph (2) above.

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## CHAPTER 13

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### FINANCIAL AND TECHNICAL ASSISTANCE FOR PLANNING

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#### *Commentary: Smart Growth Technical Assistance Act*

The following model is a “Smart Growth Technical Assistance Act,” based upon a bill that was introduced in the Illinois Senate in 1999.<sup>61</sup> It is intended to encourage innovation in the preparation of local comprehensive plans and land development regulations through an incentive grant program that is based on the principles of “smart growth,” a phrase that draws its definition from a 1998 Planning Advisory Service Report by APA.<sup>62</sup> Under this model, the state planning agency is charged with administering the grant program, including the adoption of rules. In addition, the model statute directs the agency to make available to regional planning agencies and local governments a variety of technical assistance materials and training. Finally, it requires the completion of an annual report to the governor and state legislature regarding activities undertaken pursuant to the Section.

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#### **13-201 Smart Growth Technical Assistance Act**

- (1) This Section shall be known as the Smart Growth Technical Assistance Act.
- (2) The purposes of this Section are to:
  - (a) define and disseminate the principles of smart growth, as described in paragraph (3) below;
  - (b) encourage [regional planning agencies] and local governments in this state to engage in innovative planning, regulatory, and development practices and techniques that conform to the principles of smart growth;
  - (c) provide demonstration grants to [regional planning agencies] and local governments to prepare and implement regional and local comprehensive plans, zoning ordinances, subdivision ordinances, and other land development regulations, including development incentives, that conform to the principles of smart growth;

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<sup>61</sup>Amendment to S.B. 907, Illinois Senate (1999).

<sup>62</sup>*The Principles of Smart Development*, Planning Advisory Service Report No. 479 (Chicago: American Planning Association, September 1998), ch. 1.

## CHAPTER 13

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- (d) prepare and distribute model ordinances, manuals, and other technical publications that are founded upon and promote the principles of smart growth; and
  - (e) research and report upon the results and impact of activities funded by this Section.
- (3) As used in this Section, “**Smart Growth**” means planning, regulatory, and development practices and techniques founded upon and promoting the following principles:
- (a) using land resources more efficiently through compact building forms, infill development, and moderation in street and parking standards in order to lessen land consumption and preserve historic, scenic, and natural resources;
  - (b) supporting the location of stores, offices, residences, schools, recreational spaces, and other public facilities within walking distance of each other in compact neighborhoods that are designed to provide alternate opportunities for easier movement and interaction;
  - (c) providing a variety of housing choices, so that the young and old, single persons and families, and those of varying economic ability may find places to live;
  - (d) supporting walking, cycling, and transit as attractive alternatives to driving and lowering traffic speeds in neighborhoods;
  - (e) connecting infrastructure and development decisions to minimize future costs by creating neighborhoods where more people use existing services and facilities, and by integrating development and land use with transit routes and stations; and
  - (f) improving the development review process and development standards so that developers are encouraged to apply the principles stated above.
- (4) The [state planning agency] is hereby authorized to make grants to [regional planning agencies] and local governments to develop, update, administer, and implement comprehensive plans and land development regulations, including development incentives, that conform to the principles of smart growth.
- (a) The [agency] shall, pursuant to Section [4-103], adopt rules establishing standards and procedures for determining eligibility for such grants, regulating the use of funds under such grants, and requiring periodic reporting of the results and impact of activities funded by such grants.
  - (b) No individual grant under this Section shall have a duration of more than [24] months.
- (5) The [state planning agency]:

## CHAPTER 13

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- (a) may prepare model ordinances, manuals, and other technical publications that are founded upon and promote the principles of smart growth; and
  - (b) shall distribute any model ordinances, manuals, and other technical publications that it prepares pursuant to this Section to all local governments, [regional planning agencies], the state library, all local public libraries, and to other organizations and libraries at its discretion.
  - (c) may provide educational and training programs in planning, regulatory, and development practices and techniques founded upon and promoting the principles of smart growth, including, but not limited to, the use and application of any model ordinances, manuals, and other technical publications that it prepares.
- (6) The [state planning agency] may employ or retain private for-profit and not-for-profit organizations, [regional planning agencies], and universities to provide consultation, technical assistance, and training regarding any activity that it undertakes pursuant to paragraph (4) above.
- (7) The [state planning agency] shall, at least annually but more often at its discretion, report in writing to the governor and [state legislature] on:
- (a) the results and impacts of the activities of [regional planning agencies] and local governments funded by the grants authorized by this Section, with a focus upon those innovative planning, regulatory, and development practices and techniques that have successfully implemented the principles of smart growth;
  - (b) the distribution of such grants;
  - (c) model ordinances, manuals, and other technical publications that it has prepared; and
  - (d) educational and training programs it has provided.

The report shall also be provided to all local governments, [regional planning agencies], the state library, all local public libraries, and to other organizations and libraries at the [state planning agency]'s discretion.

- (8) The [state planning agency] shall use monies appropriated to the Smart Growth Technical Assistance Fund, a special fund created in the state treasury, to implement and administer the purposes of this Section.