MODEL STATUTE ON LOCAL LAND USE PROCESS (3/06/07)*

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GENERAL PROVISIONS

101 Definitions

As used in this Chapter:

“Administrative Review” means a review of an application for a development permit based on documents, materials and reports, with no testimony or submission of evidence as would be allowed at a record hearing.

“Aggrieved” means that a land-use decision has caused, or is expected to cause, [special] harm or injury to a person, neighborhood planning council, neighborhood or community organization, or governmental unit, [distinct from any harm or injury caused to the public generally]; and that the asserted interests of the person, council, organization, or unit are among those the local government is required to consider when it makes the land-use decision.

Comment: The definition of “aggrieved” determines who can be party to a hearing, who can submit information in an administrative review, who has standing in an appeal, who can appeal decisions to hearing officers, and who can bring judicial appeals. The aggrievement test has two elements: harm or injury, and an interest that the local government was required to consider in making its decision. Inclusion of the bracketed language requires persons claiming standing to demonstrate that they have suffered harm distinct from the harm to the general public. Removing the bracketed language still requires a showing of harm or injury but not a demonstration that the harm is in some way special or unique.

“Appeals Board” means any officer or body designated by the legislative body or by state law to hear appeals from land-use decisions, including but not limited to the Land-Use Review Board, the local planning agency, local planning commission, a hearing examiner, or any other official or agency that makes a land-use decision on a development permit.

“Certificate of Appropriateness” means the written decision by a local historic preservation or design review board that a proposed development is in compliance with a historic preservation or design review ordinance.

“Certificate of Compliance” means the written determination by a local government that a completed development complies with the terms and conditions of a development permit and that authorizes the initial or changed occupancy and use of the building, structure, or land to which it applies. A “Certificate of compliance” may also include a temporary certificate to be issued by the local government, during the completion of development, that allows partial use or occupancy for a period not to exceed [2] years and under such conditions and restrictions that will adequately assure safety of the occupants and substantial compliance with the terms of the development permit.

“Conditional Use” means a use or category of uses authorized to be considered for approval, but not permitted as of right, by a local government’s land development regulations in designated zoning districts pursuant to Section 502.

“Comprehensive Plan” means the comprehensive plan required by [cite section of law].

“Confronting” means across a street, highway or other public right-of-way from a property on which an application for a development permit has been submitted.

“Development” means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity that alters a shore, beach, [seacoast,] river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered species habitat, aquifer or other resource area, including [coastal construction or] other activity.

“Development Permit” means any written approval or decision by a local government under its land development regulations that gives authorization to undertake some category of development. A “development permit includes but is not limited to, a building permit, zoning permit, final subdivision plat, minor subdivision, resubdivision, conditional use, variance, appeal decision, planned unit development, site plan, [and] certificate of appropriateness[.] [, and zoning map amendment(s) by the legislative body]. “Development permit” does not mean the adoption or amendment of a local comprehensive plan or any subplan, the adoption or amendment of the text of land development regulations, or a liquor license or other type of business license.

Comment: This paragraph defines the land-use approvals that are to be considered a development permit. Note that a development permit is any “written approval or decision” that authorizes development. This term includes written approvals or decisions that are made following administrative reviews, record hearings, and record appeals. A “master permit” is defined later in this Section as a development permit.

The procedures for hearings on the record apply only to development permits. The adoption and amendment of comprehensive plans is usually considered a legislative act. This definition means that plan adoption and amendment are not covered by the administrative review provisions of this Chapter. States in which a zoning map amendment is a quasi-judicial decision may want to include optional bracketed language that makes such amendments a development permit. See Section 201(5)

“Enforcement Action” means an action pursuant to [cite law].

“Hearing” means a hearing held pursuant to this Chapter.

“Issued” or “Issuance” means: (a) [3] days after a written decision on a development permit is mailed by the local government or, if not mailed, the date on which the local government provides notice that the written decision is publicly available; or (b) if the land-use decision is made by ordinance or resolution of the legislative body, the date the legislative body adopts the ordinance or resolution, or the date on which the ordinance or resolution is to become effective.

“Land Development Regulation” means any zoning, subdivision, impact fee, site plan, corridor map, affordable housing, hillside floodplain, wetland, stormwater, resource extraction or historic preservation regulation, and any other governmental regulations that affect the use, density, or intensity of land.

“Land Use” means the conduct of any activity on land, including, but not limited to, the continuation of any activity, the commencement of which is defined herein as “development.”

“Land-Use Decision” means a decision made by a local government officer or body, including the legislative body, on a development permit application, an application for a conditional use, variance, or mediation, or a formal complaint pursuant to [cite law] and includes decisions made following a record hearing or record appeal. It also means an enforcement order and/or supplemental enforcement order pursuant to [cite law], but only for purposes of judicial review pursuant to Section 601 *et seq.*. A “completeness decision,” “development permit,” and “master permit” are “land-use decisions” for purposes of this Chapter.

Comment: The definition of a “land-use decision” is based in part on the Washington State Project Review Act, Wash. Rev. Code §§36.70B.010 et seq.

“Master Permit” means the development permit issued by a local government under its land development regulations and any other applicable ordinances, rules, and statutes that incorporates all development permits together as a single permit and that allows development to commence.

Comment: The master permit is the unification of all development permits necessary for a land development. For example, in order to build a single-family home in a subdivision that has been platted, it may only be necessary to obtain a building permit (approving the plans for the residence itself) and a zoning permit (indicating that the use is allowed and the structure meets all applicable zoning requirements). Once the requirements for the two permits are met, and the two permits are granted, the master permit would automatically be issued, allowing development to commence. The master permit is authorized under Section 208, Consolidated Permit Review Process.

“Owner” means any legal or beneficial owner or owners of land, including the holder of an option or a contract to purchase, whether or not such option or contract is subject to any condition.

“Record” means the written decision on a development permit application, and any documents identified in the written decision as having been considered as the basis for the decision.

“Record Appeal” means an appeal to a local government officer or body from a record hearing on a development permit application.

“Record Hearing” means a hearing, conducted by a hearing officer or body authorized by the local government to conduct such hearings, that creates the local government’s record through testimony and submission of evidence and information, under procedures required by this Chapter. “Record hearing” also means a record hearing held in an appeal, when no record hearing was held on the development permit application.

Comment: The definitions for hearings and appeals are critical. One important reform contained in this Chapter is to clarify the types of hearings and appeals authorized for land-use decisions at the local level, and how they should be held. The Sections on the unified development permit review process specify what kinds of hearings can be held at different stages of the development permit review process.

102 Purposes

The purposes of this Chapter are to:

(1) provide for the timely consideration of development permit applications.

(2) provide a unified development permit review process for land-use decisions by local governments;

(3) authorize a consolidated development permit review process for land-use decisions by local governments;

(4) provide for the appointment of hearing examiners;

(5) provide for a Land-Use Review Board;

(6) authorize conditional uses, variances, and mediation in land development regulations; and

(7) provide a judicial review process for land-use decisions.

103 Exemptions for Corridor Maps

See Appendix of Optional Sections

201 Development Permit; Unified Development Permit Review Process; Inclusion of Amendment of Zoning Map

Comment: The following Sections provide a unified development permit review process for all decisions on development permits that, at some point, are subject to an administrative review or record hearing. These Sections also provide procedures for appeals on development permits. The unified development permit review process applies to all land-use decisions, whether by the legislative body, the planning commission, a hearing officer, or land-use review board authorized by this Chapter. The Chapter adopts the Washington reform that allows only one hearing that produces a record and one

appeal from a record hearing on a development permit. Limiting the number of hearings in this way should minimize the confusion and expense that often accompany the present system. However, as the brackets indicate, it is optional when adopting this Section to provide for more than one of each type of hearing.

In addition, a local government has the option of establishing a development permit review process in which it does not require a record hearing. This option is available because Section 204 authorizes administrative reviews on development applications without the benefit of a hearing. However, the law of a particular state may require a record hearing on some types of land-use decisions, such as variances and other land-use decisions held to be quasi-judicial.

The review process for development permit applications contemplated by this Chapter is simple. Applications for development permits can be considered either in an administrative review or a record hearing. An appeal following a record hearing is on the record, while an appeal following an administrative review requires a record hearing. A decision following a record appeal is appealable to a court. A decision following an administrative review can be appealed to a court, but this is unlikely because of the exhaustion of remedies requirement for judicial review, which requires an appeal to a local officer or body before judicial review can be obtained.

This part of the Chapter does not assign substantive responsibilities to any of the boards or commissions in local governments or to the legislative body. Neither does it dictate any one inflexible form of organization for these bodies. The *Standard State Zoning Enabling Act* provided for an inflexible assignment of responsibilities to the legislative body, the planning commission and the board of adjustment. Several states, such as California, now allow the legislative body to determine how hearing responsibilities are assigned, and this part of the Chapter adopts that approach.

The local government may choose any structure it prefers. It can, for example, assign rezonings to the legislative body, conditional uses and other initial approvals to the planning commission, and appeals and variances to the Land-Use Review Board, which may also be named as the Board of Zoning Adjustment or Appeals. This is the traditional structure. The local government can then decide what kinds of hearings should be held at each decision level. For example, the Land-Use Review Board can be authorized to hear record appeals on development permits reviewed by other bodies, and record hearings on variances it has the authority to issue. An ordinance may defer a record hearing to the appeal stage. For example, the ordinance could allow the planning commission to make its decision without a record hearing, but then provide for a record hearing by the land-use review board.

(1) The legislative body of each local government shall adopt, as part of its land development regulations, an ordinance that establishes a unified development permit review process for applications for development permits. The ordinance may require or authorize a pre-application conference on a proposed development permit application,

and may specify the responsibilities of the local government and the applicant in the pre-application conference.

(2) The ordinance establishing a unified development permit review process shall contain a list of all development permits required by the local government. [Additional language for this paragraph has been moved to the Appendix.]

(3) The ordinance establishing a unified development permit review process may provide for no more than [1] record hearing for each development permit and [1] record appeal. The ordinance may also authorize the administrative review of development permit applications without a hearing, as provided by Section 204, and [1] appeal for each development permit, in the form of a record hearing. The ordinance may assign the responsibility for record hearings, record appeals and administrative reviews to the legislative body, the local planning commission, or such other officers or bodies as the legislative body shall determine.

(4) The ordinance establishing a unified development permit review process shall establish reasonable time limits on the validity of development permits. A reasonable time limit is one that provides adequate time to complete the development authorized, based upon a good faith effort towards completion.

(5) For the purposes of this Chapter, the ordinance establishing the unified development permit review process may define the amendment of the zoning map by the legislative body as a development permit.

(6) Within a local government's corporate limits, no building or structure for which a valid building permit has been issued may be denied permission, upon payment of a reasonable fee and compliance with any standards required for connection existing lines of a local government-owned utility at the permit applicant's expense.

202 Development Permit Applications

(1) As part of the ordinance establishing the unified development permit review process, the legislative body shall specify in detail the information required in every application for a development permit and the criteria it will apply to determine the completeness of any such application. The ordinance shall require the local government to notify applicants for development permits, at the time they make application, of the completeness determination, notice, and time-limit requirements required by this Chapter for the review and approval of development permits.

(2) No local government may require a waiver of the time limits on a completeness determination or a decision on a development permit as a condition of accepting or processing an application for a development permit, nor shall a local government find an application incomplete because it does not include a waiver of these time limits.

Comment: Without this provision, a local government could effectively negate the time limits of this law by routinely requiring waiver of time limits as a condition to the approval of development permits.

203 Completeness Determination

Comment: This Section provides a process under which a local government must make a completeness decision on a development application. It is based on Cal. Gov't Code §65943 et seq. and on Wash. Rev. Code §36.70B.070. The application requirements the local government includes in its ordinance will determine the basis on which the completeness decision is made. The brackets indicate that time limits for decisions can be modified by the state legislature. The legislative body may want to direct administrative bodies and officers to propose requirements for development permits to it for its approval by ordinance.

Because local governments differ in what they may require, the Section does not specify the kinds of information that applications must contain. However, the ordinance required by this Section is expected to specify in detail the information required from applicants. The Section is based on Calif. Gov't Code §65940 et seq.

The completeness determination need not be difficult or time-consuming. The period of time specified for the determination is a maximum, so that a local government can make a completeness determination in less time. A completeness determination may be possible for simple applications almost immediately, with no need to specify the submission of additional information.

This Section gives the local government an opportunity to require additional information from an applicant if it finds that an application is incomplete. A local government should be able to specify what additional information is necessary in order to make an application complete, so that one additional submission should be adequate.

Paragraph (5) provides an opportunity to the local government to request additional information when necessary after a completeness decision, but also makes it clear that an application is complete when it meets the completeness requirements of this Section. A completeness determination, or a deemed-completeness requirement under paragraph (4), starts the time limits running on when a decision on the application must be made under Section 10-210. A completeness decision is a "land use decision," which means it is an interlocutory decision that is appealable under the judicial review provisions of this Chapter.

The Section prohibits a waiver of the time limits for making a completeness determination. Without this provision, applicants for development permits may agree to a waiver in order to avoid antagonizing the local government that will make the decision on its application.

(1) Within [30] days after receiving a development permit application, the local government shall mail or provide in person a written determination to the applicant, stating either that the application is complete, or that the application is incomplete and what is necessary to make the application complete.

(2) If the local government determines that the application is incomplete, it shall identify in its determination the parts of the application which are incomplete, and shall indicate the manner in which they can be made complete, including a list and specific description of the additional information needed to complete the application. The applicant shall then submit this additional information to the local government within [30] days of the determination pursuant to paragraph (1), unless the local government agrees in writing to a longer period.

(3) The local government shall determine in writing that an application is complete within [30] days after receipt of the additional information indicated in the list and description provided to the applicant under paragraph (2).

(4) A development permit application is deemed complete under this Section if the local government does not provide a written determination to the applicant that the application is incomplete within [30] days of the receipt of an application under paragraph (1) or within [30] days of the receipt of any additional information submitted under paragraph (2).

(5) A development permit application is complete for purposes of this Section when it meets the completeness requirements of, or is deemed complete under, this Section.

(6) After a development application is complete or deemed complete, the local government may request additional information or studies if new information is required or a substantial change in the proposed development occurs. It shall make a completeness determination as required by this section for any additional information or studies submitted.

204 Administrative Review

Comment: This Section authorizes administrative reviews of development permit applications without a record hearing. There is no hearing, but paragraph (2) broadly authorizes persons, organizations and government units to submit materials concerning the application. The term "aggrieved" is defined in Section 101 above. The officer or body that makes the decision must provide a written decision and give notice. The time limits for decisions on development permits required by Section 210 apply to administrative reviews. The protections provided for record hearings through the ban on *ex parte* communications does not apply to administrative reviews. Communication with the applicant and others interested in the application is expected during an administrative review.

Land-use decisions made following an administrative review are subject to an appeal under Section 209, but a record hearing will then by held by the officer or body that conducts the appeal. Under the exhaustion of remedies doctrine, codified at Section 604 below, this means that, before any appeal may be made to a court, an appeal pursuant to Section 209 must be taken if it is not futile.

(1) **When required.** The ordinance establishing the development permit review process may authorize local government officers and bodies to conduct an administrative review of development permit applications without a record hearing. The ordinance shall designate the development permits that are subject to an administrative review.

(2) **Participation.** Documents and materials concerning a development permit application may be submitted to the officer or body that will conduct the administrative review by:

(a) The applicant;

(b) Any person or entity supporting the application; and

(c) any person, neighborhood planning council, neighborhood or community organization, or governmental unit, if it would be aggrieved by a decision on the development permit application.

(3) **Conflicts.** Any decision-making officer or member of a decision-making body having a direct or indirect financial interest in property that is the subject of an administrative review, [who is related by blood, adoption, or marriage to the owner of property that is the subject of an administrative review or to a person who has submitted documents and materials concerning an application,] or who resides or owns property within [500] feet of property that is the subject of an administrative review, shall recuse him- or herself from the matter and shall state in writing the reasons for such recusal.

(4) **Findings, decision, and notice.**

(a) A local government may approve or deny a development permit application, or may approve an application subject to conditions. Any approval, denial, or conditions attached to a development permit approval shall be based on and implement the land development regulations, and goals, policies, and guidelines of the local comprehensive plan.

(b) Any decision on a development permit application shall be based upon and accompanied by a written statement that:

1. states the land development regulations and goals, policies, and guidelines of the local comprehensive plan relevant to the decision;

2. states the facts relied upon in making the decision;

3. is consistent with the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement of the comprehensive plan.

4. responds to all relevant issues raised by documents and materials submitted to the administrative review; and

5. states the conditions that apply to the development permit, the conditions that must be satisfied before a certificate of compliance can issue, and the conditions that are continuing requirements and apply after a certificate of compliance is issued.

(c) A local government shall give written notice of its decision to the applicant and to all other persons, neighborhood planning councils, neighborhood or community organizations, or governmental units that submitted documents and materials [and shall publish a summary of its decision in a newspaper of general circulation and may [*or* shall] publish the decision on a computer-accessible information network].

Comment: To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process. This Section also authorizes conditions on approved applications, which often are necessary to meet problems discovered about the application during the process. This authority is intended to be flexible, as conditions can implement any of the regulations or planning policies on which the decision is based. Subparagraph (c) makes newspaper and electronic publication of a decision optional. This Section is based on Idaho Code §67-6519, N.J. Stat. Ann. §40:55D-10, and Ore. Rev. Stat. §§227.173(3) and 227.175(3).

(5) **Determination of compliance.** The officer or body that grants a development permit shall issue a determination of compliance if the completed development is in accordance with the conditions of the development permit that must be satisfied before a determination of compliance can issue. The officer or body may delegate the responsibility of issuing the determination of compliance to another officer. [Additional provisions are included in the Appendix.]

205 Notice of Record Hearing

Comment: This paragraph is based on Ore. Rev. Stat. §197.763. The hearing notice is extremely important. Many unnecessary hearing difficulties and unnecessary appeals can be avoided if the hearing notice must provide all the information that is needed to form an opinion about the application. An extension of time limits for a hearing is authorized when state agencies or other local governments must approve or review a development application, as this additional process may take longer than 30 days.

(1) **Notice required.** If a local government holds a record hearing on a development permit application, it shall provide notice of the date of the record hearing within [15] days of a completeness determination on the application under Section 203, or within [15] days from the date an application is deemed complete under Section 203(5). Notice

of the record hearing shall be mailed at least [20] days before the record hearing, and the record hearing must be held no longer than [30] days following the date that notice of the record hearing is mailed. A local government may hold a record hearing at a later date, but no more than [60] days following the date that notice of the record hearing was mailed, if state agencies or other local governments must approve or review the development application, or if the applicant for a development permit requests an extension of the time at which the record hearing will be held.

(2) **Contents of notice.** The notice of the record hearing shall:

(a) state the date, time, and location of the record hearing;

(b) explain the nature of the application and the proposed use or uses which could be authorized;

(c) list the land development regulations and any goals, policies, and guidelines of the local comprehensive plan that apply to the application;

Comment: This is a very important paragraph, because the land regulations and comprehensive plan goals, policies and guidelines listed in the notice will determine the issues on which the hearing will be held. Of course, it is open to any party to challenge this part of the notice as legally incomplete if it omits regulations or plan goals, and policies and guidelines that apply to the application.

(d) set forth the street address or other easily understood geographical reference to the subject property;

(e) state in person, or by letter or email, that a failure to raise an issue that could have been known by those parties affected by the issue at a record hearing, or the failure to provide statements or evidence sufficient to afford the local government an opportunity to respond to the issue, precludes an appeal to the appeals board based on that issue, unless the issue could not have been reasonably known by any party to the record hearing at the time of the record hearing;

(f) state that a copy of the application, all documents and evidence submitted by or on behalf of the applicant, and any applicable land development regulations or goals, policies, and guidelines of the local comprehensive plan, are available for inspection at no cost and that copies will be provided at reasonable printing, mailing and related costs;

(g) state that a copy of any staff reports on the application will be available for inspection at no cost at least [7] days prior to the record hearing, and that copies will be provided at actual printing, mailing and related costs;

(h) state that a record hearing will be held and include a general explanation of the requirements for the conduct of the record hearing; and

(i) identify, to the extent known by the local government, any other governmental units that may have jurisdiction over some aspect of the application.

206 Methods of Notice

Comment: Land-use statutes typically specify in detail how notice must be given by local governments. These statutes may either require too much notice or not enough, and often create technical compliance problems that can lead to litigation. This Section allows local governments to determine what type of notice they want to give, subject to a requirement that notice by posting and publication be given as a minimum. Inclusion of notice requirements in the development permit review ordinance required by Section 10-201 is mandated, because it is essential that the ground rules for giving notice be known. This Section is based on Wash. Rev. Code §36.70B.110.

(1) A local government shall use reasonable methods to give notice of a development permit application to the public, including [neighborhood planning councils established pursuant to law, neighborhood or community organizations recognized pursuant to law, and to] local governments or state agencies with jurisdiction. A local government shall specify the methods of public notice it will use in its development permit review ordinance, and may specify different types of notice for different categories of development permits. However, any ordinance adopted under this paragraph shall at least specify all of the following methods:

(a) conspicuous posting of the notice on the property, for site-specific development proposals;

(b) publishing the development location, description, type of permit(s) required, and location where the complete application may be reviewed, as included in the notice, in a newspaper of general circulation in the jurisdiction of the local government [and giving notice by publication on a computer-accessible information network];

(c) posting the notice on a bulletin board in a conspicuous location in the principal offices of the local government; and

(d) mailing of notice to all adjacent local governments within [1000] feet of the land on which an application for a development permit has been submitted, and to all state agencies that have jurisdiction over the development application.

(2) Other examples of reasonable methods to inform the public that a local government may include in its development permit review ordinance are:

(a) notifying public or private groups that have registered with the local government and have indicated they want to receive notification of any application for a development permit within their area of interest, as state in the registration;

(b) notifying the news media;

(c) publishing notices in appropriate regional or neighborhood newspapers or trade journals;

(d) publishing notice in local government agency newsletters or sending notice to agency mailing lists, either general lists or lists for specific proposals or subject areas; and

(e) mailing notice to abutting and confronting property owners.

207 Record Hearings

(1) **When required.** This Section applies when a local government holds a record hearing on a development permit application.

(2) **Availability of materials.** The applicant, or any person who will be a party to, or who will testify or would like to testify in any record hearing, shall submit all documents or evidence on which he or she intends to rely and testify to the local government, which shall make them available to the public at least [7] days prior to the record hearing.

(3) **Availability of staff reports.** The local government shall make any staff report it intends to use at the record hearing available to the public at least [7] days prior to the record hearing.

Comment: Paragraphs (2) and (3) require full disclosure of applicant materials and local government reports prior to a hearing. Failure to disclose these materials creates fairness problems that frustrate all parties to a hearing and that can lead to litigation. These paragraphs mean that parties to a hearing must submit materials for witnesses they intend to call, and materials must also be submitted by persons who would like to testify though they are not parties. See Section 207(6)(b).

(4) **Record hearing rules.** As part of its unified development permit review process, the legislative body of each local government shall specify rules for the conduct of record hearings. The rules, as a minimum, shall include the requirements for record hearings contained in this Section, and may supplement, but may not conflict with, these requirements.

(5) **Parties.** Any person who supports the development application, and any governmental unit that has jurisdiction over the development application, and any abutting or confronting owner or occupant, may be a party to a record hearing held under this Section. Any other person or governmental unit, including a neighborhood planning council or neighborhood or community organization, may be a party to any record hearing held under this Section, if it would be aggrieved by a land-use decision on the development permit application.

Comment: The first sentence states who may be parties as of right. All other persons and agencies must be "aggrieved" to have standing, the term "aggrieved" as defined in Section 10-101.

(6) **Conduct of record hearing.**

(a) The officer presiding at a record hearing, or such person as he or she may designate, [shall or may] have the power to conduct discovery and to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant evidence, including witnesses and documents presented by the parties. The presiding officer may call any person as a witness whether or not he or she is a party.

(b) The presiding officer shall take the testimony of all witnesses relating to a development permit application under oath or affirmation, and shall permit the right of cross-examination to all parties through their attorneys, if represented, or directly, if not represented, subject to the discretion of the presiding officer and to reasonable limitations on the time and number of witnesses.

(c) Technical rules of evidence do not apply to the record hearing, but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence.

(d) If a party to the first record hearing provides additional documents or evidence, the presiding officer may [*or* shall] allow a continuance of the record hearing or leave the record open to allow other parties a reasonable opportunity to respond.

(e) The local government shall provide for the verbatim recording of the record hearing, and shall furnish a copy of the recording, on request, to any interested person at its expense.

Comment: Subparagraph (e) is based on N.J. Stat. Ann. §40:55D-10, which prescribes detailed procedures for public hearings that develop a record. See also Ore. Rev. Stat. §197.763(5). A local government may want to include provisions in their hearing rules for procedures not covered by this section. For example, the rules can provide procedures under which presiding officers can call witnesses other than witnesses called by parties. See paragraph (6)(b), above. They can also provide procedures for site visits, which are common in some jurisdictions. A site visit is acceptable if all parties are given personal notice of the visit, and if all decision makers are present at the site at the time of the visit. In addition, any information obtained during the site visit must be made part of the record and an opportunity provided for rebuttal.

This paragraph does not deal with the problem of "judicial notice," which is the reliance on materials outside the formal record. However, it is clear that decision makers can rely on materials of this kind under the doctrine of "Official Notice" if they are openly disclosed and subject to rebuttal. See Ronald M. Levin, "Scope-of-Review Doctrine Restated: An Administrative Law Section Report," 38 *Admin. L. Rev.* 239, 279-282 (1986). Nothing in this paragraph prevents decision makers from relying on their own judgment in making decisions.

(7) **Ex parte communications.**

(a) A land-use decision based on a record hearing is void if a decision-making officer, or a member of a decision-making body, engages in a substantial ex parte communication concerning issues related to the development permit application with a party to the record hearing, or a person who has a direct or indirect interest in any issue in the record hearing, unless the official or member who engages in the ex parte communication provides an opportunity to rebut the substance of any written or oral ex parte communication by promptly putting it on the record and promptly notifying all parties to the record hearing of the contents of the communication.

(b) An oral communication between local government staff and the decision-making officer or a member of a decision-making body is not a substantial ex parte communication under this paragraph.

Comment: This subparagraph deals with ex-parte communications. Exparte communications are described as "substantial", excluding unintentional, *de minimis*, contacts from the purview of this paragraph. (Also, since Section 10-615 authorizes reversal of a land-use decision only if there was prejudicial error, a court can reverse on the grounds of substantial ex-parte communication only if the communication was prejudicial.) The subparagraph allows them if they are disclosed on the record, and exempts verbal communications by staff from the ex-parte communications bar, but written staff reports must be placed on the record as required by Section 207(3). This subparagraph is based on Ore. Rev. Stat. §§215.422 and 227.180, and Wash. Rev. Code § 42.36.060. For more detailed regulation of ex-parte communications see Fla. Stat. Ann. §268.0115.

(8) **Conflicts**. Any decision-making officer or member of a decision-making body having a direct or indirect financial interest in property that is the subject of a record hearing, who is related by blood, adoption, or marriage to the owner of property that is the subject of a record hearing or to a party to the record hearing, or who resides or owns property within [500] feet of property that is the subject of a record hearing, shall recuse him- or herself from the matter before the commencement of the record hearing and shall state the reasons for such recusal.

(9) **Findings, decision, and notice.**

(a) A local government may approve or deny a development permit application, or may approve an application subject to conditions.

(b) Any decision on a development permit application shall be based upon and accompanied by a written statement that:

1. states the land development regulations and goals, policies, and guidelines of the local comprehensive plan relevant to the decision;

2. states the facts relied upon in making the decision;

3. is consistent with the land development regulations, the goals, policies, and guidelines of the local comprehensive plan (including the future land-use plan map), and the facts set forth in the written statement of the comprehensive plan as it existed at the time of the development application;

4. responds to all relevant issues raised by the parties to the record hearing;
and

5. states the conditions that apply to the development permit, the conditions that must be satisfied before a certificate of compliance can issue, and the conditions that are continuing requirements and apply after a certificate of compliance is issued.

(c) A local government may give written notice of its decision to all parties to the proceeding [and shall publish a summary of its decision in a newspaper of general circulation and may [*or* shall] publish the decision on a computer-accessible information network].

Comment: To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process. This paragraph also authorizes conditions on approved applications, which are often necessary to meet problems about the application discovered during the process. This authority is intended to be flexible; conditions can implement any of the regulations or planning policies on which the decision is based. Subparagraph (c) makes newspaper and electronic publication of a decision an option. This paragraph is based on Idaho Code §67-6519, N.J. Stat. Ann. §40:55D-10, and Ore. Rev. Stat. §§227.173(2) and 215.416(9).

(10) **Certificate of compliance.** The officer or body that grants a development permit shall issue a certificate of compliance if the completed development is in accordance with the conditions of the development permit that must be satisfied before a certificate of compliance can issue. The officer or body may delegate the responsibility of issuing the certificate of compliance to another officer. [Optional provisions are included in the Appendix.]

208 Consolidated Permit Review Process

See Appendix of Optional Sections

209 Appeals

(1) An appeal of a land-use decision may be taken to an appeals board within [30] days after the decision is issued.

(a) by the applicant for the development permit or land-use decision, by the holder of a development permit, and by any party to the record hearing, if there has been a record hearing; or

(b) if there has been an administrative review:

1. by the applicant for the development permit; or

2. by any person, including a person supporting the application; neighborhood planning council; neighborhood or community organization; or governmental unit, if he, she, or it is aggrieved by the land-use decision.

(2) (a) The party appealing must file a notice of appeal specifying the grounds for the appeal with the officer or body from whom the appeal is taken, and with the appeals board. The officer or body from whom the appeal is taken shall transmit to the appeals board the record upon which the land-use decision appealed from was taken.

(b) The appeals board may dismiss an appeal if it determines that the notice of appeal is legally insufficient on its face.

Comment: If a record hearing has been held on the development permit application, any person who could be aggrieved has had the opportunity to become a party to the hearing, so this section limits appeals to persons who became parties. If there has been an administrative review without a hearing there has been no opportunity to establish party status, so appeals may be taken by the applicant and by any person aggrieved.

(3) An appeal that is not dismissed shall stay any and all proceedings to enforce, execute, or implement the land-use decision being appealed, and any development authorized by the land-use decision. If the party appealing is not the applicant, a stay shall not be granted if the officer or body from whom the appeal is taken certifies in writing to the appeals board that a stay in the decision or development thereunder would cause immediate and irreparable harm to the appellant with no comparable immediate and irreparable harm to the applicant or imminent peril to life or property. If such a certification is filed, there shall be no stay other than by a restraining order, which may be granted by the [*name of court*] on due cause shown and with notice to the officer or body from whom the appeal is taken.

Comment: A stay of proceedings to carry out a land-use decision pending an appeal maintains the status quo while a land-use decision is appealed, but also creates delays for a permit applicant if the decision stayed is a favorable decision on the permit. This paragraph authorizes a procedure that prohibits a stay order only if it would cause harm or a peril to life or property. The officer or body must present a certification that these circumstances exist, and it is then up to a court to decide whether it should grant a stay. The assumption is that a court can consider the probability of success on the merits or the appeal when it decides whether to grant a stay, and so may refuse a stay if it believes the appeal is wholly without merit. In addition, if it has the authority, a court can also order the posting of a bond as a condition to a stay order.

(4) The appeals board shall set the time and place at which it will consider the appeal, which shall be no more than [20, 30 *or* 40] days from the time the appeal was filed. The appeals board shall give at least [10] days notice of the appeal hearing to the officer or body from which the appeal was taken and to the parties to the appeal.

(5) (a) The appeals board shall hold a hearing on the record in a record appeal unless it decides that additional evidence is necessary to supplement the record. As part of its unified development permit review process, the legislative body shall adopt rules under which the appeals board may hear arguments on the record by the parties to the record appeal. The appeal proceeding shall be limited to the grounds raised in the notice of appeal.

Comment: This paragraph is based on R.I. Gen Laws §§45-24-64 and 45-24-66, and Wash. Rev. Code § 36.70.830.

(b) 1. An appeals board shall issue a written decision after the record hearing in which it may remand, reverse or affirm, wholly or in part, or may modify a land-use decision from which an appeal is taken, and shall have the authority in making such decision to exercise all the powers of the officer or body from which the appeal is taken, insofar as they concern the issues on appeal. A tie vote is an affirmation of the decision from which the appeal was taken.

2. The appeals board shall not make findings of fact, unless the board has taken evidence supplementing the record on appeal, in which case it shall make findings of fact based on this evidence and shall make a decision based on such findings as required by Section 207(9).

Comment: This paragraph is standard. See, e.g., Rhode Island Gen. Laws § 45-24-67.

(6) In an appeal from an administrative review, the appeals board shall hold a record hearing and make a decision as provided in Section 207.

(7) The appeals board shall mail a notice of any decision to the parties to the appeal and to the [local planning agency *or* code enforcement officer] of the local government within [30] days of the commencement of the hearing.

(8) The appeals board shall keep written minutes of its proceedings, showing the vote of each member upon each appeal or, if absent or failing to vote, indicating that fact, and shall keep records of its official actions in its office.

Comment: These provisions are standard. See R.I. Gen. Laws §45-24-61.

210 Time Limits on Land-Use Decisions

Comment: It is one of the fundamental elements of due process that a decision maker must come to a final decision within a reasonable period of time. Certainty is one of the

goals of the land-use decision making process established in this Chapter, and a failure by a local government to decide either way on a development permit application destroys certainty. Therefore, this Section establishes an overall time limit for the development permit review process, and alternatively requires local governments to fix time limits under Section 201. The applicant and the local government may mutually consent to an extension of that time limit. It should be noted that a local government cannot demand a waiver of time limits in an application for a development permit. See Section 202(4). The Section provides that the time limits do not apply when the local government identifies a specific land development regulation that prohibits the development and with which the application does not comply. This exception, which is based on N.H. Rev. Stat. §676:4, is intended to cover nondiscretionary requirements not considered in the decision making process, such as a restriction on development in floodplains. There is also an exception to the time limit for periods when the local government cannot process permit applications due to circumstances beyond its control. This is meant to cover disasters and similar events that disrupt normal operations of the local government.

The section requires the local government to refund the development permit application fee and gives the applicant a cause of action to compel the local government to make a decision on the development permit application. This is the approach taken in the Oregon land development statutes.[39] The application fee refund is an incentive to the local government to make a decision on the application without a court order. If the only consequence of not making a decision on a development permit application were a court order to make a decision, a dilatory local government would have a strong incentive to do nothing with a controversial permit application. If it held out until a writ of mandamus were issued, the applicant may give up or the local government may prevail in court. If they are eventually ordered to issue a development permit, they can plausibly deflect criticism of the permit approval by pointing to the court order compelling them to act.

(1) If a local government fails to approve, conditionally approve, or disapprove a development permit application within [*Option A:* [90, 120, *or* 180] days from the time it makes a written determination that a development permit application is complete] [*Option B:* the time period specified for that development permit under Section 201(2)(d)]; then

(a) the local government shall refund to the applicant any development permit application fee paid to the local government pursuant to Section 211; and

(b) the applicant shall have a cause of action, in the nature of mandamus, in the [*name of court*] in order to compel the local government to approve, approve with conditions, or disapprove the development permit application; unless within that period the local government has identified in writing some specific land development regulation provision with which the application does not comply, and that prohibits the development of the property.

(2) The local government, and the applicant for a development permit, may mutually agree to an extension of the time limits for a decision specified in paragraph (1).

(3) The time limits for decision specified in this Section do not run during any period:

(a) not to exceed [30] days, in which a local government requests additional studies or information concerning a development permit application; or

(b) in which the local government is unable to act upon development permit applications due to circumstances beyond the local government's control, including a reasonable period for resubmission of development permit applications and related materials destroyed, damaged, or otherwise rendered unusable.

211 Fees

A local government may charge such fees as are necessary to carry out the responsibilities imposed by Sections 201 through 210. It shall base such fees on the actual or average costs of review and processing of development permit applications and appeals from decisions on development permit applications, and may adopt different schedules of fees for different categories of development reviews and appeals.

HEARING EXAMINERS

This part is in the Appendix of Optional Sections.

LAND-USE REVIEW BOARD

Comment: Sections 10-401 *et seq.* provide for the creation and organization of a Land-Use Review Board. In most zoning enabling legislation, this board is called a Zoning Board of Adjustment or Zoning Board of Appeals. These Sections adopt a different name because a local government's land development regulations will probably contain more than zoning regulations. However, a state may use another name if it prefers.

These Sections differ from the traditional zoning enabling act because they do not mandate a fixed and inflexible structure for the Board. Smaller communities, especially, may need the flexibility to create smaller Boards, and the Section does not prohibit the creation of a Board with only one member. Communities may also need flexibility in setting the terms of office for board members. For example, some communities may prefer longer terms in order to reduce turnover and to keep Board members in office once they gain experience.

Moreover, a local government may decide not to create a Land-Use Review Board. This Chapter allows a local government to assign functions traditionally exercised by a zoning board of adjustment or appeals to another officer or body, such as the local planning commission or a hearing examiner. Sections 10-401 et seq. are based in part on R.I. Gen. Laws §45-24-56.

401 Land-Use Review Board Authorized

The legislative body of each local government [shall *or* may] adopt an ordinance, as part of its land development regulations, which provides for the creation of a Land-Use Review Board.

402 Organization and Procedures

An ordinance creating a Land-Use Review Board shall:

(1) specify the number of members who shall serve on the Board, including alternate members;

(2) provide for the appointment of Board members, including alternate members, and for the organization of the board;

(3) specify the terms of members of the Board, which may be staggered;

(4) specify the requirements for voting on matters heard by the Board, and specify the circumstances in which alternate members may vote instead of regular members; and

(5) specify procedures for filling vacancies in unexpired terms of Board members, including alternate members, and for the removal of members, including alternate members for due cause.

403 Compensation, Expenses and Assistance

The ordinance creating the Land-Use Review Board may provide for the compensation of board members and for reimbursement for expenses incurred in the performance of official duties, and may authorize the board to engage legal, technical, or clerical assistance to aid in the discharge of its duties.

404 Training

Within [6] months of assuming office for the first time, any member of the Land-Use Review Board, including alternate members, [shall *or* may] complete at least [6] hours of training in his or her duties as a member of the Board. The local planning agency shall design and provide the training.

Comment: This Section authorizes training for new board members, and a local government can make this training mandatory. It is based on N.H. Rev. Stat. Ann. §673:3-a.

405 Powers

The ordinance creating a Land-Use Review Board shall specify the powers the Board may exercise. The ordinance may provide that the Board shall serve as the local government's appeals board.

ADMINISTRATIVE ACTIONS AND REMEDIES

Comment: The model act does not include substantive provisions for variances, conditional uses and other possible administrative remedies, as authority for these remedies will vary among the states. The act does include provisions allowing the Land-Use Review Board or other designated body to authorize whatever remedies are provided by statute.

501 Authority to Approve.

Each local government's land development regulations [shall *or* may] authorize the Land-Use Review Board, the planning commission, the legislative body, or such other officer or body as the land development regulations shall designate, to approve the administrative actions, remedies, and procedures authorized by law.

502 Conditional Uses

This authority will be provided by state law.

503 Variances

This authority will be provided by state law.

504 Referral to Planning Commission

Comment: This provision provides a procedure for referral to the planning commission for conditional uses and variances. The authority for conditional uses and variances will be provided by state law. See the Note above for § 501.

(1) If the land development regulations designate an officer or body other than the planning commission to hear an application for a conditional use or variance, such officer or body may request a recommendation from the local planning commission or local planning agency. It shall report its recommendations within [30] days of the receipt of the application by such officer or body.

(2) If the local planning commission or local planning agency makes a recommendation, the officer or body shall give it [due regard *or* substantial weight] and make it a part of the record.

Comment: A local government may appoint its planning commission to hear applications for the administrative remedies authorized by this Chapter. If it appoints another officer or body, this Section authorizes a referral to the planning commission or the land

planning agency for a recommendation. This Section is based in part on R.I. Gen. Laws §45-24-41(B).

505 Procedures

Comment: This section specifies the procedures required for all of the remedies and administrative actions authorized by this law. It integrates applications for development permits with applications for these remedies and actions: the application procedures for these remedies must be the same as the local government's development permit review process. As such, the decision on the requested remedy or action is also a final and appealable decision under this Chapter.

An application for one of these remedies and actions can be considered independently of an application for development. However, it must be included in a development application when one is made. Also, a local government must make a decision on the application for a remedy or action before it considers the development permit. For example, if application is made for a variance in the form of a decreased setback requirement, a decision on that application must be made before a zoning permit can be issued. This decision becomes part of the application for development, and the local government must consider the decision as it reviews the development permit application.

Paragraph (2)(a) requires the local government to specify which officers and bodies review applications for remedies and actions. It is possible that a request for an administrative remedy or action may not be heard by the same officer or body that hears the application for a development permit that accompanies the application for an administrative remedy. The consolidated review process authorized by Section 208 can provide for joint hearings on applications for a development permit and an administrative remedy when the same officer or body reviews both applications. Record hearings on applications for a remedy or action are mandated by paragraph (2)(b). Paragraph (2)(c) requires development permits to include any approved administrative action or remedy.

(1) (a) Each local government shall adopt an application procedure for conditional uses and variances. This procedure must incorporate the procedures of the development permit review process, and a decision on an application for a conditional use or variance is a final appealable decision under this Chapter.

(b) Applications for conditional uses and variances must be included as part of a development permit application if a development permit application is submitted. A decision on an application for a conditional use or variance must be made before a development permit may be issued, and such a decision shall become part of the application for a development permit.

(2) The application procedure required by paragraph (1) shall:

(a) specify which officers and bodies shall review applications for conditional uses and variances;

(b) require that the review of such applications be conducted by record hearing; and

(c) require any development permit for such development to incorporate any conditional use or variance that has been approved for such development.

JUDICIAL REVIEW OF LAND-USE DECISIONS

601 Purposes

The purpose of Sections [601 to 618] is to provide for the judicial review of land-use decisions by local governments by establishing uniform, expedited appeal procedures and uniform criteria for reviewing such decisions, in order to provide consistent, predictable, and timely judicial review.

Comment: This Section states the purpose of the judicial review provisions, which are based to a considerable extent on the Washington Land-use Petition Act, Wash. Rev. Code Ann. §§36.70C.010 et seq. The judicial review provisions in this Chapter replace the limited judicial review provisions in the *Standard State Zoning Enabling Act*, and apply to land-use decisions by local governments on development permit applications.

602 Method of Judicial Review Exclusive

Comment: The *Standard State Zoning Enabling Act* authorized the use of the judicial writ of certiorari to review decisions of the board of zoning adjustment. This writ is available to review decisions made on a record. The judicial review remedy provided by this Chapter replaces the writ of certiorari and is the exclusive method of judicial review for land-use decisions.

A writ of mandamus, which seeks to compel an action by a local government, and a writ of prohibition, seeking to prohibit action by a local government, are exempt from judicial review under this Chapter. For example, an applicant who believes that a local government has improperly refused to find her development application complete can bring an action in mandamus to compel the local government to accept the application, on the theory that there is a duty to accept an application that complies with the legal requirements for applications. See Sections 202, -203.

Neither does the Section prohibit an application for an injunction or declaratory judgment where the claim is that a land development regulation or comprehensive plan is invalid or unconstitutional. Section 10-602 also exempts claims for damages or compensation, which may be brought in state court under the state constitution or under the federal constitution, and claims brought in state court under Section 1983 of the Federal Civil Rights Act. While a petitioner may join these claims with a petition for judicial review under this Chapter, they do not have to do so in order to preserve the claims, and the filing of a petition for review does not bar the later filing of an action for damages or compensation. This Section is based on Wash. Rev. Code Ann. §36.70C.030.

(1) The judicial review provided by this Chapter replaces the writ of certiorari for the review of land-use decisions and is the exclusive means for the judicial review of land-use decisions.

(2) The judicial review provided by this Chapter does not replace or apply to judicial review of applications for:

(a) a writ of mandamus or prohibition;

(b) an injunction or declaratory judgment claiming that the adoption or amendment of land development regulations or local comprehensive plan is invalid or unconstitutional; and

(c) claims for monetary damages or compensation.

(3) Any person filing a petition for judicial review under this Chapter may join with that petition any claim excluded from this Chapter by paragraph (2) above and/or a claim under Section 1983 of the Federal Civil Rights Act, 42 U.S.C. §1983.

(4) The rules for civil actions in the [*name of court*] govern procedural matters under this Chapter to the extent that these rules are consistent with this Chapter.

603 Judicial Review of Final Land-Use Decisions

Comment: This section makes it clear that judicial review of land-use decisions is available by filing a land-use petition, which is equivalent to a complaint or petition in a civil action. A state may want to add a provision on joinder of parties, if this problem is not covered by court rules or another statute. See Wash. Rev. Code §36.70C.050.

The Section, in paragraph (1), requires a final land-use decision before judicial review is available. Paragraph (2) defines finality. The definition of finality is written so that an appeal of a land-use decision to a court is not necessary to make a decision final. However, under Section 604, a final decision is not appealable if administrative remedies have not been exhausted, unless seeking those remedies would be futile. Neither is an application for a zoning map amendment necessary.

(1) Any person with standing pursuant to Section 607 may obtain judicial review of a final land-use decision under this Chapter by filing a land-use petition with the [*name of court*].

(2) A land-use decision is a "final land-use decision" if:

(a) an application for a development permit is complete or deemed complete pursuant to Section 203; and

(b) the local government has approved the application, has approved the application with conditions, or has denied the application.

(3) The issuance or denial of a certificate of nonconforming use is a final land-use decision.

(4) A decision arising from an appeal pursuant to Section 209 is a final land-use decision.

604 Exhaustion of Remedies

Comment: State courts require that petitioners for judicial review must exhaust administrative remedies and appeals before judicial review is available. Courts may impose this requirement in addition to or instead of the ripeness requirement. This section codifies this requirement. It clarifies its meaning by only requiring exhaustion of administrative appeals and the conditional use and variance remedies available in this Chapter.

A land-use decision is appealable under Section 603. However, since land development regulations must include an appeal to a local officer or body under Section 209, it will be necessary to first make such an appeal, with limited exceptions. State courts have adopted a futility exception to exhaustion, and exhaustion is not required if remedies are inadequate. This section is intended to include these exceptions in paragraph (2) by making case law interpretation of terms applicable.

(1) The [*name of court*] shall have jurisdiction over a land-use petition if and when the petitioner has exhausted the appeal procedures provided under Section 209 and any other applicable remedies available by law.

(2) The terms and provisions of this Section shall be given the meanings assigned to them by [the common law *or* case law *or* precedent].

605 Federal Claims

Any person who files a land-use petition under this Chapter may include in the petition a statement reserving any federal claim arising out of the land-use decision that is the basis for the petition, and a prayer that the court should reserve these claims in its decision under Section 615.

Comment: Federal courts require persons who bring takings claims to begin their lawsuit in state courts by seeking compensation when a state compensation remedy is available. The reservation of the federal claim in state court may determine whether a petitioner can return to federal court once the state lawsuit is terminated. This Section gives the petitioner for judicial review in state court the option to reserve a federal claim.

606 Filing and Service of Land-Use Petition

(1) A land-use petition is barred, and a court may not grant review, unless the petitioner has timely filed the petition with the court and has served the petition by registered or certified mail within [21] days of filing the petition [*or* has timely served the petition by summons] on the following persons, who shall be parties to the review of the land-use petition:

(a) the local government, which for purposes of the petition is the local government's corporate entity and not an individual decision maker or officer or body;

(b) the applicant for the development permit and the owner of the property at issue, if the owner was not the applicant; and

(c) all parties to a record hearing or record appeal on the land-use decision at issue.

(2) The petition is timely filed if it is filed and served on all parties listed in paragraph (1) of this Section within [21] days of the issuance of the land-use decision by the local government.

Comment: These provisions are standard, and are based on Wash. Rev. Code Ann. §36.70C.040. See also Conn. Gen. Stat. §8-8(c). A state may wish to add provisions on how service is to be made if this requirement is not covered by the rules of court or another statute.

607 Standing and Intervention

The following persons have standing to bring a land-use petition under Section 603, and to intervene in a proceeding for judicial review brought under that Section:

[(1) the applicant or the owner of property to which the land-use decision is directed, if the applicant is not the owner;

(2) the local government to which the application for the land-use decision was made;

(3) any person owning or legally occupying property abutting or confronting a property which is the subject of the land-use decision;

(4) all other persons who participated in an administrative review by right, or who were parties to a record hearing, on a development permit application that was the subject of the land-use decision; and

(5) any other person, neighborhood planning council, neighborhood or community organization, or governmental unit, if it is aggrieved by the land-use decision, or if it would be aggrieved by a reversal or modification of the land-use decision.]

Comment: State courts require petitioners for judicial review of land-use decisions to have standing to sue, and many state land-use statutes define standing. In addition to

mandatory standing for the applicant or owner of property that is the subject of the land-use decision, parties to a hearing, and neighbors, this Section grants standing to persons and organizations aggrieved by the land-use decision. This is the usual basis for standing in state courts. The Section also extends standing to organizations, and uses the tests for standing to control intervention in judicial review proceedings. The Section is based on Wash. Rev. Code §36.70C.060, with the addition of mandatory standing for neighbors, as provided by Vt. Stat. Ann. tit. 23, §4464(b).

The Section adapts language from the Washington statute that defines when a person or organization is aggrieved. The purpose of this definition is to require that parties seeking standing to challenge a land-use decision have a sufficient interest to create an actual controversy. This requirement makes it unnecessary to place additional limitations on appeals by organizations, such as a requirement that a neighborhood or community organization show that it represents a certain percentage of residents in a neighborhood it purports to represent. It is the intention of this Section that aggrieved persons and organizations have standing without necessarily having participated in a hearing on the development permit application that was the subject of the land-use decision. This Section applies to administrative reviews on development permit applications as authorized by Section 204. A state may decide not to define when a party seeking standing is aggrieved. That decision will then be left to the courts. And because a state may have a clear standing rule from case law or statute that it wishes to use in place of the model provided, the entire substantive portion of the Section has been placed in brackets.

608 Required Elements in Land-Use Petition

A land-use petition must set forth:

(1) the name and mailing address of the petitioner;

(2) the name and mailing address of the petitioner’s attorney, if any;

(3) the names and mailing addresses of the applicant for the land-use decision, and of the owners of the property that is the subject of the decision, if the petitioner is not the applicant and sole owner of the property;

(4) the name and mailing address of the local government whose land-use decision is at issue, if the petitioner is not the local government;

(5) identification of the decision-making officer or body, together with a duplicate copy of the written decision;

(6) identification of each person whom the petitioner knows or reasonably should know is eligible to become a party under Section 606(1);

(7) facts demonstrating that the petitioner has standing to seek judicial review under Section 607;

(8) a separate and concise statement of each error alleged to have been committed in an administrative review, record hearing, or record appeal.

(9) a concise statement of facts upon which the petitioner relies to sustain the statement of error; and

(10) a request for relief, specifying the type and extent of relief requested.

Comment: This Section is based on Wash. Rev. Code §36.70C.080 and contains standard language specifying the contents of a petition.

609 Preliminary Hearing

(1) When appropriate, in the petition served on the parties identified in Section 07(1)], the petitioner shall note, according to the rules of the [*name of court*], a preliminary hearing on jurisdictional and preliminary matters, including standing. The court shall set the preliminary hearing no sooner than [35] days and no later than [50] days after the petition is served on the parties identified in Section 606(1).

(2) The parties shall settle the record and raise all motions on jurisdictional and procedural issues for resolution at the preliminary hearing, except that a motion to allow discovery may be brought sooner

(3) The defenses of lack of standing, untimely filing or service of the petition, and failure to join persons needed for just adjudication are waived if not raised by timely motion noted to be heard at the preliminary hearing, unless the court allows discovery on such issues. These defenses, as well as bias or ex parte contacts not disclosed in the hearing, and unconstitutionality, are the only matters that may be the subject of further discovery.

(4) The petitioner shall move the court for an order at the preliminary hearing that sets the date on which the record must be submitted, sets a briefing schedule, sets a discovery schedule if discovery is to be allowed, and sets a date for the hearing or trial on the merits.

(5) The parties may waive the preliminary hearing by scheduling with the court a date for the hearing or trial on the merits, and by filing a stipulated order that resolves the jurisdictional and procedural issues raised by the petition, including the issues identified in paragraphs (3) and (4) of this Section.

(6) A party need not file an answer to the petition.

(7) Unless the Court determines by order that the complexity of the case, resolution of discovery issues, or other reason in the interests of justice is present, the review proceeding shall be concluded within 150 days of the settlement of the record.

Comment: This Section is based on Wash. Rev. Code §36.70C.080. It authorizes a preliminary hearing at which the court can deal with motions preliminary to trial that raise standing and other jurisdictional matters. Because the petitioner may not know at the time of filing the petition whether a preliminary hearing is necessary, the Section authorizes a motion for preliminary hearing only where appropriate. A state need not adopt this Section if a preliminary hearing is authorized by court rules or another statute.

610 Expedited Judicial Review

The [*name of court*] shall provide expedited review of petitions filed under this Chapter, and must set the petition for hearing within [60] days after the date set for submitting the local government's record. The court may set a later date if it finds good cause based on a showing by a party or parties, or if all the parties stipulate to a later date.

Comment: Expedited judicial review is essential for land-use decisions because delay is costly for all parties, and can disrupt local government planning and land development regulation efforts while an appeal is pending. This Section is based on Wash. Rev. Code §36.70C.090.

611 Stay of Action Pending Judicial Review

(1) A petitioner or other party may move the court to stay or suspend an action by the local government or another party to implement the decision under review. The motion must set forth a statement of grounds for the stay and the factual basis for the motion. The court may grant the motion for a stay upon such terms and conditions, including the filing of security, as it determines are necessary to prevent the stay from causing harm to other parties.

(2) When a local government has approved a development in a land-use decision, or has approved a development with conditions, and a petition has been brought for judicial review of the land-use decision, the owner of the land that is the subject of the petition may move the court to order the petitioner to post security as a condition to continuing the proceedings before the court. The question whether or not such motion should be granted and the amount of the security are within the sound discretion of the court.

Comment: Whether, and under what circumstances, a court should stay an action by a local government or another party is an important question. For example, if a development that is permitted by a landuse decision is not stayed, a developer can moot the case by completing the development pending the appeal.

This Section authorizes a stay, and is based on Wash. Rev. Code §36.70C.100. Unlike the Washington law, this Section does not provide for an evidentiary hearing on the stay

order to determine whether the party requesting the stay is likely to prevail on the merits, whether the stay is necessary to prevent irreparable injury, and whether will not substantially harm other parties and is timely. An evidentiary hearing on the need for a stay order is a mini-trial on the merits of the petition, and can create unnecessary delays before the case goes to trial. It is the intention of this Section, however, that a court should have the discretion to consider the merits of the case and the other factors noted above when setting the amount of the bond. See Jan Krasnowiecki and L.B. Kregenow, "Zoning and Planning Litigation Procedures Under the Revised Pennsylvania Municipalities Planning Code," 39 Vill. L. Rev. 904-06 (1994).

When a development is approved by a local government in a land-use decision, an opponent of the development may file a petition for judicial review. Because the filing of petition may delay the development for a substantial period of time, even if the petitioner does not obtain a stay order, this Section also authorizes the owner of the land that has been approved for development to request an order requiring the petition to file security. The intent again is to give the court the discretion to take the merits of the opponent's case and other factors concerning the effect of a delay on the development into account when deciding whether to require security. See Krasnowiecki & Kregenow, supra. Section 602(4) makes the rules for civil actions applicable to appeals under this chapter, and the rules can provide additional guidance on stay orders, including guidance on the escrow and disposition of security.

612 Submittal of Record for Judicial Review

(1) Within [21] days after the filing of the petition for review, or within such further time as the court allows or as the parties agree, the local government shall submit to the court a certified copy of the record of the land-use decision for judicial review, except that the petitioner may prepare at the petitioner's expense and submit a verbatim transcript of any hearings held on the matter. In the absence of a transcript, the minutes of the proceedings may be used and, in any event, a audiotape or videotape of the proceedings shall be made part of the record.

(2) If the parties voluntarily agree, or upon order of the court, the record shall be shortened or summarized to avoid reproduction and transcription of portions of the record that are duplicative or not relevant to the issues to be reviewed by the court.

(3) The petitioner shall pay the local government the cost of preparing the record before the local government submits the record to the court. Failure by the petitioner to timely pay the local government relieves the local jurisdiction of responsibility to submit the record and is grounds for dismissal of the petition.

(4) If the relief sought by the petitioner is granted in whole or in part, the court shall equitably assess the cost of preparing the record among the parties. In assessing costs, the court shall take into account the extent to which each party prevailed and the reasonableness of the parties' conduct in agreeing or not agreeing to shorten or summarize the record, as authorized by paragraph (2) of this Section.

Comment: This Section authorizes the transmittal of the record of the land-use decision to the court. It is based on Wash. Rev. Code §36.70C.110. There is no direct sanction to compel agreement on shortening or summarizing the record, but there is an indirect sanction in the court's authority to make allocation of record preparation costs depend on the willingness of a party to make such an agreement.

613 Review and Supplementation of Record

(1) When the [*name of court*] is reviewing a land-use decision by an officer or body that made findings of fact in a record to support its decision, the court shall base its review on the record. The record shall include any evidence proffered by any party below, whether or not accepted as part of the record. The [*name of court*] may remand the land-use decision for further proceedings only if that additional evidence relates to:

(a) grounds for standing, or for disqualification of a member of the body or the officer that made the land-use decision, when such grounds were unknown by the petitioner at the time the record was created;

(b) matters that were improperly excluded from the record after being offered by a party to record hearing; or

(c) correction of ministerial errors or omissions in the preparation of the record.

Comment: This Section makes it clear that judicial review of factual issues is based on the record made before the body or official that made the decision. It provides limited opportunity to introduce evidence to supplement the record. It is typical of authority found in other statutes allowing the review of land-use decisions. See Utah Code Ann. §10-9-708(5)(a)(i). This narrow authority to allow supplementary evidence is intended to allow additional evidence only when exclusion of the evidence would be patently unfair. Except in such limited circumstances, the remedy for an inadequate record should be a remand to the local government for further proceedings. The section reflects the belief that the taking of evidence should occur at the local government level in the local hearing process, where it can form the basis for the local government's decision. Parties would not be allowed, under this view, to retry a case on the facts once it gets into court.

614 Standards for Granting Relief

(1) The court shall reverse or remand the land-use decision under review if the court finds the local government:

(a) Exceeded its jurisdiction;

(b) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

(c) Made a land-use decision based on findings of fact, or an application of law to facts, that is not supported by substantial evidence in the whole record;

(d) Improperly applied the land development regulations or other applicable laws; or

(e) Made an unconstitutional decision;

[(f) Made a land-use decision that is not consistent with the local comprehensive plan as it existed at the time of the development application; or

(g) Made a decision that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.]

(2) If a petitioner has reserved a federal claim in a petition filed under Section 605, the court shall note in its decision that these claims are reserved.

Comment: Standards for judicial review must be carefully specified. This section is an adaptation of Ore. Rev. Stat. §197.835(9)(a), with the addition of a requirement for consistency with the comprehensive plan as an optional provision and an arbitrary and capricious standard of review as an optional provision.

615 Decision of the Court

(1) The court may dismiss the action for judicial review, in whole or in part, or it may do one or a combination of the following: affirm, modify, or reverse the land-use decision under review or remand it for modification or further proceedings.

(2) If the court remands a land-use decision to the officer or body that made the decision, it may require the officer or body to consider additional plans and materials to be submitted by the applicant for the development permit, and the adoption of alternative regulations or conditions, as the court's order on remand shall prescribe.

(3) If the court remands the land-use decision for modification or further proceedings, the court may make such an order as it finds necessary to preserve the interests of the parties and the public, pending further proceedings or action by the local government.

Comment: Paragraph (1) is standard language governing the availability of judicial relief. It is based on Wash. Rev. Code §36.70C.140. See also Idaho Rev. Code §67-5279. Paragraph (2) is based on Pa. Stat. Ann. tit. 53, §11006-A, and authorizes the court to require the local government to consider alternative requirements and conditions on remand. Paragraph (3) is intended to give a court broad discretion in attaching conditions to a remand. For example, a court could condition a remand with an extension or stay of compliance or enforcement proceedings. This type of order is recommended by the American Bar Association. See the guidelines on judicial relief in House of Delegates, Amer. Bar Ass'n, Resolution No. 107B (Aug. 1997). The Resolution provides guidelines for decisions when stays should be granted, and recommends against granting stays in

most cases. Although these guidelines are not an interpretation binding on the model law, they can be consulted for guidance on stay orders.

In some states small tract amendments to comprehensive plans are considered quasi-judicial, rather than legislative, in nature. In these states, decisions on comprehensive plan amendments can be combined with decisions on development permits. They may not be combined in states that consider small tract amendments to be legislative.

616 Definitive Relief

If the court reverses a land-use decision that is based on a record or record appeal, and if the land-use decision denied the petitioner a development permit, or approved a development permit with conditions, the court may grant the petitioner such definitive relief as it considers appropriate.

Comment: Definitive relief is essential, in appropriate cases, to allow a petitioner to proceed with her development without going back to the local government for additional proceedings. Some courts, if they reverse a land-use decision, will order the issuance of a development permit to the petitioner rather than remand if issuance of the permit is justified on the record. A typical case is the denial of a zoning variance. This paragraph codifies this authority, but the decision on whether to issue a development permit is in the court's discretion. Note that the court must find that definitive relief is "appropriate," and it is the intent that this determination should be based on the court's decision reversing the denial or conditional approval. Presumably, a court would not order definitive relief by compelling the issuance of a development permit unless it found, in its decision, that the applicant had complied with all the requirements on which the issuance of a development permit would be based, whether or not they were considered in the court hearing. It is intended that the court would call for a hearing on definitive relief, in which it would consider arguments on whether definitive relief is appropriate under the circumstances. For example, there may be issues not considered in the court hearing which would require consideration after a remand. See Section 10-616. This Section is based on 53 Pa. Stat. §11006-A(c)(e).

617 Compensation and Damages Disclaimer

A grant or denial of definitive or other relief under this Chapter is admissible in later litigation seeking compensation or monetary damages. However, it a grant of definitive or other relief does not, by itself, establish liability for compensation or monetary damages, nor does a denial of definitive or other relief under this Chapter establish a presumption against liability for compensation or other monetary damages.

*The model statute and commentary are based on Chapter 10 of the American Planning Association, Growing Smart Legislative Guidebook: Model Statutes for Planning and Management of Change (S. Meck ed. 2002).

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