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Some Observations on the American Law Institute's Model Land Development Code

(At the Association of the Bar of the City of New York, June 2, 1975)*

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FRED P. BOSSELMAN: At the annual meeting of the American Law Institute in May, 1975, the Institute gave final approval to the Model Land Development Code.[1] The process of drafting this Code began about twelve years ago and its evolution has coincided with a period in the history of American land law that is remarkable for the changes that have taken place in public attitudes and in the laws reflecting those attitudes. Drafting a model code over the last twelve years has not in any way resembled the task of codifying a stable body of law. It has been more like trying to write sonnets in a hurricane.

Given this continual state of flux it is important to note that the ALI is not proposing this Code as a uniform law; there is in fact

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1. All footnotes are references to the Proposed Official Draft of the American Law Institute's, A Model Land Development Code (April 15, 1975, submitted by the Council to the members of the A.L.I. on May 20, 21, 22, and 23, 1975).

no great value in having a uniform approach. It is not even a traditional model law; no one conceives that any state will adopt the whole Code as a package. It is more like a Sears and Roebuck Catalogue with a lot of quite separable provisions, and many of them in a variety of alternatives, so that the individual state may pick and choose the items that appeal to them.

The major credit or blame for instituting this project belongs to Richard Babcock and Paul Ylvisaker, who recognized the need for a reexamination of the traditional statutory law that governed the use of land. They formulated the basic principle for which the Code is probably best known—the idea that the state should retake some of the power to control the use of land from the local governments to which the power had been completely delegated in the twenties.

Article VII of the Code[2] embodies this principle and has been used as the basis for a wide variety of state legislation and for the proposed national land use legislation now pending in Congress. In general, this article of the Code operates on the assumption that although the great majority of land use decisions are properly made at the local level of government, a small percentage requires solution at a state or regional level in order to produce an equitable and rational result. The problem lies in defining criteria for deciding which of the land use decisions fall in the category that requires state or regional participation. We concluded that there were three factors which might put a land use decision into that category: one, the size of the proposed development; two, the type of the proposed development; and three, the nature of the area in which it is located.

I would like to describe a few aspects of the Code that have not attracted the same attention as Article VII, but that I believe contain ideas worth serious consideration.

One of the basic principles we followed in drafting the Code was that governmental development ought not to be given the immunity from regulation that is so typically found under present law. At the present time, there are many state agencies, special districts and authorities which have the power to construct highways, bridges, tunnels, sewers, public buildings and other public works without

2. This Article is designed to assist the states in finding a workable method for state and regional involvement in land development regulation. Although the increased state and federal concern with the consequences of land development is welcome, it is important to channel this concern into areas where it will be effective in dealing with important problems without unnecessarily increasing the cost of the land development process. A time-consuming and inefficient procedure requiring the approval of state or federal agencies for decisions of minor importance could have serious social consequences, especially for development in which cost is a key factor, such as housing. Commentary to Article VII at 289.

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consideration of comprehensive planning concepts of the neighborhood level concerns of the people who would be affected by the projects. On the other hand, to give a veto power to local government over development that may serve important state or regional needs could have equally adverse consequences.

The Code proposes a compromise solution. The government agency must submit its proposal to the local land regulatory agency in the same manner as any private developer; having the same rights, going through the same hearings and subject to the same type of decisions.[3] However, if the development is in fact designed to serve the needs of people in the region, Article VII's appellate procedure[4] comes into play. The state (or regional) land adjudicatory board would bring a statewide perspective to the problem, a comprehensive planning perspective as opposed to the functional perspective typically found in development agencies. Where a state land development plan has been adopted (and as used in the Code that term can include either a state plan or a regional plan) the Code goes even farther and requires the governmental development to be consistent with the state or regional plan.[5]

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3. Section 1–201. *Definitions*

(1) "Developer" means any person, including a governmental agency, undertaking any development as defined in § 1–202 of this Code and as further explained in the Notes following the Section;

1. "Developer." This term is intended to describe the actor performing the acts defined as developments in § 1–202. It expressly includes a "governmental agency" (defined in subsection (3)) in order to make clear that, contrary to tradition in some jurisdictions, development undertaken by government is subject to local ordinances regulating development unless specifically exempted.) *See* § 2–101(4).

4. Section 7–502. *Appeals*

(1) An order of a Land Development Agency may be appealed to the State Land Adjudicatory Board if it involves a substantial issue arising under Article VII.

(2) An appeal may be made by any person having standing to seek judicial review as of right under § 9–103.

(3) No appeal may be taken unless a notice of appeal is transmitted to the Land Development Agency whose order is challenged within four weeks after notice of the order has been given under § 2–306.

(4) The appellant shall furnish a copy of the notice of appeal to all parties to the proceeding before the Land Development Agency and to the local government that created the Land Development Agency.

(5) The State Land Adjudicatory Board shall establish rules designating the contents of appeals and all other matters relating to the procedures for appeal.

(6) The parties shall be entitled to make written submissions on the record and propose findings and conclusions. The State Land Adjudicatory Board may grant oral argument on any appeal.

5. Section 12–203. *Conformance with State Land Development Plans*

If a current State Land Development Plan is applicable no governmental

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I think that these provisions of the Code are consistent with one of the most promising trends that has been developing in this field—the dissatisfaction with the traditional concept of the plan as a purely advisory document having no legal effect. There is a search for stability in the process, for some standards on which to base long-range decisions. The national growth rate appears to be leveling off, which makes this a good time to give planning an importance and credibility that it has lacked, by requiring that land use decisions be consistent with any comprehensive plan.

Another interesting part of the Code is found in Part Four of Article II.[6] It provides that where a development requires multiple permits from various local and state agencies or special districts, the developer may ask for a consolidated hearing on his application. The proposed Code does not suggest any change in the substantive decision-making powers of any existing agencies, but merely requires that they participate in a common hearing, base their decisions on the common record to be made before the panel of hearing examiners, and issue their decision according to a common time schedule.

Article VI, dealing with land banking, is another interesting and potentially important part of the Code.[7] This concept which may

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agency shall undertake any development, and no person shall undertake any development with funds furnished by a governmental agency, if the development is inconsistent with that plan.

6. Section 2–402. *Joint Hearing*

(1) A developer seeking to undertake development requiring multiple permits may apply for a joint hearing on some or all of the permits by filing an application on forms to be provided by the State Land Planning Agency, accompanied by applications for each of those initial development permits listed in the permit register on which he seeks a joint hearing. The developer shall also file a copy of each application with the appropriate permit-issuing agency to which the application is directed and shall notify the agencies that an application for joint hearing has been filed. Development shall be treated as requiring multiple permits under this Part if it

(a) requires a special development permit or special amendment to a development ordinance pursuant to this Article; and

(b) requires one or more other initial development permits listed in the permit register. [, and]

[(c) is development of regional impact pursuant to § 7–301 of this Code.]

7. Selected portions of Article VI.

Section 6–101. *Land Reserve as a Public Purpose*

The acquisition of interests in land for the purpose of facilitating future planning to maintain a public land reserve, and the holding and disposition thereof in accordance with the purposes of this Code, are hereby declared to be for the public purpose of achieving the land policy and land planning ob-

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be defined as the large scale purchase of interests in land by a governmental agency for the purpose of having the land available for undetermined future uses, is widely used in a number of other countries and is being used increasingly in Canada. At the 1973 Annual Meeting of the Institute the membership expressed considerable support for land banking and directed us to prepare such an Article. We did so and the concept is now approved as part of the Code.

Article VI is somewhat different from what has been tried in places like Suffolk County and Fairfax County. Under the Code all land banking would be done by a state land reserve agency having power to acquire land anywhere in the state, hold it and resell it, as needed. It could contract with local governments to perform land banking functions for them. But local governments would not be authorized to engage in this directly without state supervision. This is primarily out of a concern that this is a technique that is possibly subject to abuse by communities that are concerned with keeping

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jectives of this State whether or not at the time of acquisition or expenditure of funds for acquisition or maintenance any particular future use, public or private, is contemplated for the land. Appropriations for, issuance of bonds for, taxation for a land reserve system, acquisition of land for a land reserve by gift, purchase or condemnation, management of land so acquired, and disposition of land so acquired, are hereby declared to be for a valid public purpose.

Section 6–102. *Organization of State Land Reserve Agency*

(1) There is hereby created a State Land Reserve Agency which is authorized to exercise the powers granted to it by this Article.

Section 6–103. *Land Reserve Policy*

(1) The State Land Reserve Agency shall adopt by rule and may amend from time to time a land reserve policy describing the general purposes for which it intends to acquire, hold and dispose of land under this Article.

(2) Before adopting any land reserve policy the Agency shall submit the proposed policy for review and comment to the State Land Planning Agency and any appropriate advisory committee created under Section 6–102.

(3) The State Land Reserve Agency shall not adopt any land reserve policy which the State Land Planning Agency had [disapproved] [determined to be inconsistent with a currently effective State Land Development Plan].

Section 6–301. *Purposes of Acquisition*

(1) The State Land Reserve Agency may acquire any land that is used or is capable of being used to carry out the Agency's land reserve policy, and which the Agency by resolution finds necessary and proper in carrying out the policy. The land may be acquired from private owners and from governmental agencies of this State and of the United States.

(2) The State Land Reserve Agency may acquire land for any lawful purposes of a local government pursuant to a contract authorized by § 6–501. Such acquisition must be consistent with the Agency's land reserve policy unless the acquisition is made solely with funds supplied by the local government.

(3) The power granted by this Article to acquire land includes the power to acquire any interest in land as defined in § 5–101.

(4) Land acquired under this Article shall be treated, for purposes of

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people out and using it in a discriminatory fashion. There has been, within the last couple of years, a growing interest in land banking, particularly in many of the western states, motivated by various interests. In some cases it's to preserve agricultural land. In others, it's largely from a recreational or open space standpoint. I think this is an aspect of the Code that is going to get a lot of attention in the next couple of years.

Another section of the Code that is particularly interesting is Section 9–111,[8] which attempts to provide a mechanism for better resolution of disputes in which a property owner alleges that his property is being taken without just compensation because a land development regulation is unduly restrictive on his use of the land. Section 9–111 suggests that a court that finds a regulation to be unduly restrictive in the constitutional sense should delay holding the regulation invalid until the governmental agency has had time to decide whether it wishes to use the land acquisition powers given by the Code to purchase or condemn some interest in the property,

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future disposition, as land acquired for planning purposes under § 5–401.

Section 6–304. *Condemnation Power*

(1) The State Land Reserve Agency shall have the power to condemn land, subject to the conditions of this Section and the [general eminent domain statute].

(2) The condemnation shall comply with the provisions of § 5–303 governing assumptions regarding development permission made in valuing the land, with the provisions of § 5–304 governing the valuation of temporary interests, and with the provisions of § 5–301 regarding compliance with local regulations if the condemnation is for the purpose of undertaking specific development.

8. Section 9–111. *Judicial Relief Available; Consolidation of Actions*

(1) Except as limited by § 9–111, the Court may, in a proceeding which does not involve the validity of an order, sustain the rule or ordinance, declare the rule or ordinance to be invalid in whole or in part, or grant such other relief as the court deems appropriate.

(2) Except as limited by § 9–111, the Court may, in a proceeding involving an order, affirm the decisions of the agency, set aside the order, remand the matter for further proceedings before the agency in accordance with directions contained in the opinion or order of the Court, or enter an order which might have been entered by the agency issuing the order and which the court could order the agency to issue.

(3) If an application for a development permit is pending at the time a proceeding seeking a declaration as to the validity of an ordinance or rule as commenced and the court is satisfied that a judicial declaration as to any order issued on the application will dispose of the issues raised in the pending proceeding, it may stay the declaratory proceeding until final action on the application for a development permit has been taken. If a proceeding to review an order granting or denying a development permit is pending, the court may consolidate or stay other proceedings in the interest of a speedy determination of the issues.

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which would have the effect of eliminating the unconstitutionality of the regulation.

I should note that the land acquisition powers granted to local governments by the Code are very extensive (short of land banking) and authorize local government to use the power of land acquisition to accomplish virtually any purpose consistent with its own planning policies.[9] I realize that at the present time there are not many local governments in a position economically to think about acquiring large amounts of land, but hopefully the Code will survive these

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9. Section 5–101. *Nature of Powers Granted*

(1) A local government and [enumerate any other governmental agencies to which power is to be granted] may acquire an interest in land for the purposes set forth in this Article subject to the terms of this Article.

(2) The grant of power under this Article to a local government and [other enumerated governmental agencies] to acquire an interest in land is in addition to any powers to acquire an interest in land under any other law.

(3) An "interest in land" includes a fee simple, leasehold interest, option, development right, right of first refusal, easement and any other interest in land less than a fee simple.

(4) Whenever a governmental agency is authorized by this Article to acquire an interest in land it may acquire the interest by exercising the power of eminent domain (hereinafter called condemnation) or by purchase, gift, exchange, interagency transfer, devise or other means.

(5) The grant of power by this Article to acquire an interest in land does not imply any lack of power to accomplish the same objective by regulation or any other means.

Section 5–102. *Discontinuance of Existing Land Uses*

A governmental agency authorized to acquire interests in land under this Article may acquire an interest in land as a means of securing the discontinuance of an existing use for which an order of discontinuance has been or could be issued under Article IV.

Section 5–103. *To Facilitate Development or Conservation of Specially Planned Areas*

A local government may acquire an interest in land for the purpose of facilitating development or conservation of a specially planned area designated by the local government if the acquisition is consistent with a precise plan adopted under § 2–211.

Section 5–104. *To Provide Replacement Land or Facilities*

(1) A governmental agency that is acquiring interests in land for any public or publicly-aided project may acquire such other interests in land as may be necessary or appropriate for the purpose of

(a) offering substitute sites or facilities to replace sites or facilities the usefulness of which has been impaired by the project; or

(b) making available dwelling units suitable to the reasonable requirements of persons within the jurisdiction of the agency who are displaced or are to be displaced by the project or by any common disaster or other casualty.

(2) The power of condemnation shall be used to acquire interests in land under this Section only if

(a) the acquisition of replacement property under this Section will not cause substantial uncompensated hardship, other than hardship for which compensation is available, to persons affected; and

(b) the acquisition is reasonably necessary to alleviate hardship caused

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economic conditions, at which time local government will have the economic capability to take advantage of the broad powers.

In this connection, Part (2) of Article V of the Code[10] is also quite interesting. It contains sweeping authorization for the use of the urban renewal type powers, but not limited to the traditional urban renewal areas, namely areas where there is a finding that the present conditions in the area requires improvement. The public purpose of the use of the power relates to what is being built, rather than the problem that is being remedied. In other words, the position of the Code is that large scale development is desirable in and of itself. It serves a public purpose in that it fosters improved econo-

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by a public or publicly-aided project or by a common disaster or other casualty.

Section 5–105. *To Preserve or Improve the Condition of Landmark Sites or Special Preservation Districts*

A governmental agency authorized to acquire interests in land under this Article may acquire an interest in land for the purpose of preserving or improving the condition of a landmark designated under § 2–208 or of a structure or land in a special preservation district designated under § 2–209.

Section 5–106. *To Achieve Planning Objectives*

A local government may, when reasonably necessary, acquire an interest in land to achieve the objectives of a state or local Land Development Plan or the objectives of permissible regulation under this Code including the following purposes

(1) to protect or improve environmental values including ecological balance;

(2) to preserve historical or archeological structures or sites;

(3) to minimize potential damage from floods, earthquakes, hurricanes or other natural disasters;

(4) to protect existing scenic or recreational values or to preserve open space;

(5) to facilitate the future construction of, or the continued usefulness of, needed public facilities.

Section 5–107. *Extraterritoriality*

Any power to acquire an interest in land granted to a governmental agency by this Part may be exercised outside its territorial boundaries, but the development of the land is subject to compliance with

(1) this Code;

(2) any applicable development ordinance of the local government in whose jurisdiction the land is located; and

(3) all other laws and ordinances otherwise applicable to the agency exercising the power of acquisition.

10. Section 5–201. *Public Purpose*

The assembly of land for large scale development is a public purpose for which the State Land Planning Agency may acquire land subject to the provisions of this Part. Before exercising the power of condemnation the State Land Planning Agency shall adopt a rule, identifying the categories of large scale development that should be encouraged in order to accomplish improved patterns of land development, and for which the Agency intends to acquire land pursuant to this Part.

Section 5–202. *Eligibility of Applicants*

The State Land Planning Agency may acquire an interest in land within a

mies, improved environmental considerations, and other forms of "social balance." Therefore, the condemnation power, for example, may be used to encourage new communities or other large scale development proposals, regardless of the existing conditions in the area.

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development site in accordance with this Part if such acquisition is requested by

(1) a private developer who has already acquired control by purchase, option, agreement with a governmental agency or otherwise of over [60] percent of a development site for development meeting the standards of rules adopted under § 5–201; or

(2) a developer that is a governmental agency having the authority under other law to undertake development meeting the standards of rules adopted under § 5–201.

Section 5–203. *Application and Hearing Procedure*

(1) The State Land Planning Agency shall by rule specify the form and contents of an application requesting that it acquire land under this Part for large scale development. Each application shall contain a description of the development site of the proposed large scale development which is adequate to identify it.

(2) Before issuing an order concerning the application the State Land Planning Agency shall hold a hearing under [insert appropriate section of State Administrative Procedure Act] in the jurisdiction of the local government within which the land is located. In addition to any other requirements for notice of a hearing on orders, notice of a hearing on an application under this Part shall be published in a newspaper of general circulation in the community of the development site and shall be given individually to

(a) the applicant;

(b) the local government within whose jurisdiction the development is to be located; and

(c) the owner of each parcel of land within the site of the proposed development.

(3) The State Land Planning Agency shall publish notices of all applications filed under this Part in the weekly land development notice issued pursuant to § 8–208.

Section 5–204. *Order Directing Land Acquisition*

(1) The State Land Planning Agency shall issue an order directing the acquisition of land under this Part only if it finds that

(a) the proposed development will be large scale development meeting the standards of rules adopted under § 5–201;

(b) the developer is an eligible developer under § 5–202 and there is reasonable assurance that he is capable of completing the project according to his plan;

(c) the development is not inconsistent with any state or local Land Development Plan;

(d) the development will contribute to better patterns of growth for the area than would be likely to result in the absence of the development;

(e) there is reasonable assurance that the public facilities necessary to serve the development will be constructed at the appropriate time.

(2) An order authorizing the acquisition of land under this Part shall contain

(a) a description of the development site;

(b) the name and address of the developer for whom the acquisition is being made;

(c) the findings required by this Section; and

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Another rather technical but quite important section of the Code dealing with land acquisition is Section 5–303,[11] which attempts to resolve the problem of how land development regulations are to be treated in valuing property being acquired in eminent domain proceedings. At the present time the landowner is entitled to inflate his land values by presenting evidence, in the condemnation proceeding, of the prospect of changing the existing regulations in order to allow virtually any type of land development. The only limitation on the owner is that he present a witness willing to testify that he would be interested in building on the land. Realistically this has presented a small hurdle, seriously hampering the land acquisition programs of many agencies, as well as weakening the land regulatory system. The proposed Code would eliminate this practice by restricting the landowner to the value of the property under the regulations currently effective at the date of the award. However, if these regulations are found by the Court to be so restrictive as to constitute an unconstitutional taking of the property, the court is restricted to value the property at its value for the minimum development necessary to eliminate the unconstitutional taking. These

(d) any reasonable conditions or restrictions relating to the use of the acquired land as are necessary to assure better patterns of growth for the area.

(3) A copy of the order shall be recorded with the appropriate filing officer under § 11–102.

Section 5–205. *Valuation of Land for Large Scale Development*

In valuing real property acquired under this Part no court shall exclude evidence of value on the ground that the value was generated by acts of the condemnor or of the developer who applied for the land acquisition.

11. Section 5–303. *Assumptions Regarding Development Permission*

If any interest in land is condemned under this Article the court shall assume for purpose of valuation that development would have been permitted on the land only in accordance with such combination of the following assumptions as shall produce the highest market value

(1) any development for which the landowner can obtain a general development permit under the terms of the development ordinance then applicable to the land; or

(2) any development for which the landowner can obtain a special development permit under the terms of the development ordinance then applicable to the land, except to the extent that the Land Development Agency prior to the date of the award has limited its willingness to issue a special development permit for the land by the issuance of a declaratory order under § 2–308; or

(3) any development for which the landowner can obtain a general or special development permit under an amendment to the ordinance adopted after the valuation date but prior to the date of the award; or

(4) any development permit previously granted which has not by its terms expired; or

(5) if the assumptions in the previous subsections would result in an unconstitutional taking of property, the minimum development necessary to eliminate the unconstitutional taking.

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provisions are not likely to be popular with landowners, but we believe they provide substantial savings to governmental agencies acquiring land for public projects and eliminate some of the windfalls that now are provided to lucky owners.

GEORGE M. RAYMOND: First, and of greatest import, is the Code's suggestion that the primary responsibility for all important land use decisions belongs to the state notwithstanding lip service to the idea that local governments should remain "the primary authorities for planning and regulating development."[12] This conclusion is based on an evaluation of the areas which the Code would specifically place under state control. "Areas of critical state concern," as defined in the Code, could cover a very substantial proportion of the state's entire land area. They could include environmentally significant areas, which are considerable; all agricultural lands; all inland wetlands; and, beyond these, any topographically varied terrain and any open spaces "environmentally critical" to the proper shaping of urban development or which local interests can convince regional or county planners to declare as of more than local interest.[13]

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12. Section 1–101. *Purposes*

(1) the designation of the local governments of this State as the primary authorities for planning and regulating development in this State according to a system of uniform statewide procedural standards.

13. Section 7–201. *Designation of Areas of Critical State Concern*

(1) The State Land Planning Agency may by rule designate specific geographical areas of the state as Areas of Critical State Concern and specify the boundaries thereof. In the rule designating an Area of Critical State Concern the State Land Planning Agency shall set forth

(a) the reasons why the particular area designated is of critical concern to the state or region;

(b) the dangers that might result from uncontrolled or inadequate development of the area;

(c) the advantages that might be achieved from the development of the area in a coordinated manner;

(d) general principles for guiding the development of the area; and

(e) the type of development, if any, that shall be permitted pending the adoption of regulations under §§ 7–203 or 7–204.

(2) Prior to adopting any rule under this Section, in addition to any notice and hearing otherwise required under § 8–201, the Agency shall hold a hearing under § 2–305 in a location or locations within an area proposed to be designated under the rule, or, if such location is not feasible, at a location convenient to people affected by the proposed rule. The Agency shall give notice to all local governments that include within their boundaries any part of any Area of Critical State Concern proposed to be designated by the rule, and shall publish notice of the proposed rule and the time and place of the hearing thereon in the weekly land development notice issued pursuant to § 8–208. The Agency shall either adopt, with or without modifications, or reject the proposed rule within [3 months] after notice is initially published.

(3) An Area of Critical State Concern may be designated only for

(a) an area significantly affected by, or having a significant effect upon,

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The Code also proposes to give the state jurisdiction over all areas affected by, or significantly affecting, "existing or proposed major public facilities or other area(s) of major public investment." This could give the state a say in the use of all lands located adjacent to, or affected by, all interchanges between limited access and land service highways (most authorities suggest, as a minimum, that all lands within a one-mile radius be included); county or area-wide sewer or water supply systems; any major public facilities (such as hospitals, colleges, or universities); any regional, county, or State recreational area; and any airport, railroad station, or multi-model transportation center.

In addition to the lands which all of this would cover, the state's jurisdiction would also embrace all developments defined as of *regional impact.*[14] These could include a broad range of developments, and, what is more, the definition could vary, area by area. Thus, for instance, to be "of regional impact" in New York City a housing development might have to contain 500 units or more, whereas near Waddington, along the St. Lawrence River, a development with as few as 25 units might be deemed to exert a "regional impact."

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an existing or proposed major public facility or other area of major public investment;

(b) an area containing or having a significant impact upon historical, natural or environmental resources of regional or statewide importance;

(c) a proposed site of a new community designated in a State Land Development Plan, together with a reasonable amount of surrounding land; or

(d) any land within the jurisdiction of a local government that, at any time more than [3 years] after the effective date of this Code, has no development ordinance in effect.

(4) A "major public facility" means any publicly-owned facility of regional significance but does not include

(a) any public facility operated by a local government, or any agency created by it, primarily for the benefit of the residents of that local government;

(b) any street or highway except an interchange between a limited access highway and a frontage access street or highway;

(c) any airport that is not to be used for instrument landings; or

(d) any educational institution serving primarily the residents of a local community.

14. Section 7-301. *Development of Regional Impact*

(1) The State Land Planning Agency shall by rule define categories of development which, because of the nature or magnitude of the development or the nature or magnitude of its effect on the surrounding environment, is likely in the judgment of the Agency to present issues of state or regional significance.

(2) In adopting rules under this Section the State Land Planning Agency shall include in its consideration:

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Finally, the Code would give the State control over the location of all developments defined as *of regional benefit*.[15] These would include all public projects other than those sponsored by the locality itself; all charitable institutions and utilities serving a broad area; and all publicly-assisted housing.

The possibility of enactment of legislation reflecting only selected parts of the ALI Code raises some difficult problems. For instance, among the states which have enacted statutes inspired by, if not entirely modeled upon, the ALI Code, none has accepted the concept of state jurisdiction over the regional distribution of assisted housing. The Code shied away from conditioning state control over "critical areas" upon the prior enactment of a state land development plan. Enactment of only the environmental protection features of the Code would make the task of those concerned with equitable housing distribution more, rather than less, difficult. For this reason a serious question can be raised as to whether support of "critical area" legislation is justifiable in the absence of a simultaneous statutory guarantee that regional housing responsibilities will be fairly

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(a) The extent to which the development would create or alleviate environmental problems such as air or water pollution or noise;

(b) The amount of pedestrian or vehicular traffic likely to be generated;

(c) The number of persons likely to be residents, employees, or otherwise present;

(d) The size of the site to be occupied;

(e) The likelihood that additional or subsidiary development will be generated; and

(f) The unique qualities of particular areas of the state.

(3) Rules adopted under this Section may vary in different areas of the state to respond to differing conditions in these areas.

(4) Any development of regional benefit, as defined in this subsection, which is not otherwise included within the category of development of regional impact in the rule adopted under this subsection (1), shall nevertheless be treated as development of regional impact if the developer notifies the Land Development Agency at the time of his application for a development permit that he elects to proceed under this Part. "Development of regional benefit" means:

(a) development by a governmental agency other than the local government that created the Land Development Agency or another agency created solely by that local government;

(b) development which will be used for charitable purposes, including religious or educational facilities, and which serves or is intended to serve a substantial number of persons who do not reside within the boundaries of the local government creating the Land Development Agency;

(c) development by a public utility which is or will be employed to a substantial degree to provide services in an area beyond the territorial jurisdiction of the local government creating the Land Development Agency; and

(d) development of housing for persons of low and moderate income.

15. *Id.*, Section 7-301(4).

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assumed by all local governments in the region. In this "post-Mt. Laurel"[16] age which is now just beginning, it may in fact be entirely justifiable to ask that, just as the Code mandates state identification of environmentally critical areas and the assumption by the state of responsibility for their protection, it should also mandate the preparation, as part of a required state land development plan, of a housing allocation system.

A similar type of problem arises with respect to the probable effectiveness of state control in areas impacted by major public facilities. We are gradually learning that a purely environmental approach to the distribution of major employment centers tends to scatter them all over the landscape in order to avoid polluting the air beyond acceptable federally-imposed, secondary standards. Under the Code, in an area defined as "critical" by reason of its being affected by a major public facility, the state could theoretically establish an acceptable land use intensity "floor" as well as "ceiling." Such a "floor" could vary on a case-by-case basis to capitalize on site-specific development opportunities. The thrust of the Code's commentary, however, and certainly the statutory precedents to which it has already given birth, suggest that this is not likely to happen.

The Code recognizes that purely advisory, appointed, regional planning agencies are totally ineffective, irrespective of the possible membership thereon of elected officials from all or some of their constituent local jurisdictions. Its recommendation is that the regional planning function be discharged by the state through the intermediary of Regional Planning Divisions established by it and to which it would delegate all or some of its own powers.[17] This is a welcome recognition of the futility of expecting results, of greater than marginal success, from regional agencies, which, although lacking any constituency, are nevertheless expected to perform in a highly controversial area in conflict with the still highly venerated doctrine of "home rule."

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16. Township of Mt. Laurel v. So. Burlington Co. NAACP, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, ___U.S.___, 96 S. Ct. 18 (1975).

17. Section 8–102. *Regional Planning Divisions*

(1) The State Land Planning Agency by rule may create one or more Regional Planning Divisions, designate the boundaries of the region in which each Division is to operate, and assign to a Division any of the functions granted to the State Land Planning Agency under this Code with regard to its region, subject to such review by the Agency as it deems appropriate. In addition to the requirements for adoption of rules under § 8–201, the State Land Planning Agency shall give notice to every local government having

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Unfortunately, the Code would continue the traditional practice of granting local authorities the power to regulate land use even if they refuse to base such regulations on a land development plan. The inducements which the Code offers localities to develop such plans are not very enticing. The principal ones are: (1) the power to authorize planned unit development;[18] (2) the power to develop "precise plans;"[19] and (3) the power to acquire land for the imple-

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jurisdiction over some portion of the territory in the proposed region and to every local government having jurisdiction over land adjacent to the territory in the proposed region, and it shall hold at least one hearing at a convenient place within the region. The Agency by rule may revoke any assignment of functions or revise the boundaries of any region.

(2) Upon the written petition of at least [2] local governments, or of at least [—] residents of the State requesting the creation of a Regional Planning Division or requesting a change of the boundary of an existing Division, the State Land Planning Agency shall consider the desirability of issuing the requested rule and shall prepare and issue a written statement of its conclusions and grant or deny the request within 120 days after its receipt. No request for a boundary change shall be acted upon until [6] months has expired since the last designation of that boundary was adopted.

18. Section 2–210. *Planned Unit Development*

(1) A development ordinance may authorize the Land Development Agency to grant special development permission for planned unit development by specifying the types or characteristics of development that may be permitted, which may differ from one part of the community to another.

(2) Special development permits may be granted for planned unit development, including combinations of land uses within the project area, and may be based on site planning criteria relating to the project as a whole rather than to individual parcels, if the Land Development Agency finds that the development:

(a) will be consistent with a currently effective Land Development Plan; and

(b) is likely to be compatible with development permitted under the general development provisions of the ordinance on substantially all land in the vicinity of the proposed development; and

(c) will not significantly interfere with the enjoyment of other land in the vicinity.

19. Section 3–101. *Local Land Development Plan*

(1) Using the procedures of § 3–106 a local government may adopt a Local Land Development Plan which shall be a statement (in words, maps, illustrations or other media of communication) setting forth its objectives, policies and standards to guide public and private development of land within its planning jurisdiction and including a short-term program of public actions as defined in § 3–105.

(2) Whenever any power exercised under this Code is required to bear some relationship to a Local Land Development Plan, a "Local Land Development Plan" means a statement adopted under § 3–106 appropriate for the objective, policy, or standard which the local government indicates will be achieved by the particular governmental action involved.

(3) Sections 3–102 through 3–104 are only guidelines concerning the purposes and contents of Local Land Development Plans and a Local Land Development Plan may not be reviewed by any court as to compliance with this Code on the ground that the contents or purposes are not consistent with this Code. Nothing in this subsection is intended to prevent a court in its

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mentation of such "precise plans."[20] In contrast to these advantages, the disadvantages of adopting a plan under the Code are enormous. Such adoption would make all land use policies of the local government subject to *a priori* state review. By contrast, in the absence of a plan, the state's jurisdiction would be limited only to "critical areas" and to developments of more than local significance.

RICHARD A. PERSICO: Let me begin by pointing out in rapid succession what I think are probably the major improvements the Code provides over current enabling land use regulation. First of all, it is a credit to the Code and to the drafters to have brought such a degree of precision into the definition of terms used in land use planning. The definitions of variances, the special permit and the variety of nonconforming uses will all be highly beneficial. Secondly, I think that the broad grant of power given to local governments, in place of the traditional specific regulatory powers we are all familiar with, will provide flexibility that will encourage and facilitate land use regulation at the local level.

My most serious concerns are about the implementation of Article VII, which is the state land development system established in the Code. As I understand it, its thrust even where the state has established a state land development system, and you're dealing with uses which are of state or regional concern, is to leave the initial stages of enforcement and administration of that system to the localities. My reservations are based upon practical experience in a rural area in the State of New York.

The justification given in the commentary to the Code for the establishment of this system of local reliance is mainly the burden of time, cost and inconvenience to the state and to the developer. As to cost, experience in the Adirondacks shows that if you are going to give the ball to the local governments to do the initial enforcement, to conduct the first formal hearings, they are going to be completely without fiscal resources to do it, even where they operate with the best of intentions. We see this surfacing now. After two years we have gotten over half the communities in the Adirondacks involved in various stages of planning programs. With several now

consideration of any governmental action concerning development from considering the reasonableness of the Plan or its appropriateness and completeness in relation to the governmental action under consideration.

(4) A local government may designate any agency, committee, commission, department, or person to prepare the Local Land Development Plan.

20. Note 8, *supra*, Section 5-106.

about to adopt these they are awakening to the reality that they don't have the ways and means, particularly financially and expertise-wise, to administer the programs effectively.

In addition, based upon our experience, there is little willingness on the part of local governments to assume the cost, responsibilities and political headaches that go along with the enforcement of state mandates, except perhaps in the more sophisticated urban areas.

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