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## Some Model Amendments to Maine (and other States') Land Use Control Legislation

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# SOME MODEL AMENDMENTS TO MAINE (AND OTHER STATES') LAND USE CONTROL LEGISLATION

*Orlando E. Delogu, Sam Merrill, & Philip R. Saucier*

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## SOME MODEL AMENDMENTS TO MAINE (AND OTHER STATES') LAND USE CONTROL LEGISLATION\*

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### I. INTRODUCTION

This model legislation consisting of ten separate provisions is intended to clarify and/or expand existing Maine law dealing with planning and land use regulation.<sup>1</sup> It expands existing statutes by addressing a number of issues not presently covered by law. The overarching purpose of the proposed legislation is to underscore that planning and the imposition of land use regulations is not exclusively the responsibility of local governments but instead is a shared duty of the state and local governments. This is clearly stated in the text and commentary of Provision I, and is a theme that pervades all ten legislative proposals. Secondly, Provision I and those that follow make clear that it is the State with its resources and larger geographical reach that is in the best position to assure that comprehensive plans and land use regulations are consistent, fair, and applied in a manner that protects and balances the rights and interests of all Maine citizens.

A comprehensive planning process and the adoption of a comprehensive plan are not mandated under existing Maine law; they are mandated by these provisions. The authors assume throughout that comprehensive plans, and a comprehensive planning process, are essential,<sup>2</sup> that most municipalities will sooner or

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\* This research was originally undertaken by the authors as part of a study by the Muskie Institute at the University of Southern Maine to review and suggest needed changes to planning and land use control regulatory statutes in the New England states. This work was done on behalf of the New England Regional Office of the United States Environmental Protection Agency in the spring of 2003.

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1. See ME. REV. STAT. ANN. tit. 30-A, §§ 4301-4457 (West 1996 & Supp. 2003).

2. Some have been skeptical about the effectiveness of state planning requirements for local government planning, see E.R. Alexander & A. Faludi, *Planning and Plan Implementation: Notes on Evaluation Criteria*, 16 ENV'T & PLAN. B: PLAN. & DESIGN 127, 127-140 (1989), but more recent studies suggest state mandates are an important impetus for developing plans and for improving plan quality, see generally RAYMOND J. BURBY & PETER J. MAY, *MAKING GOVERNMENTS PLAN: STATE EXPERIMENTS IN MANAGING LAND USE* (1997), provided the state laws have adequate monitoring and enforcement mechanisms. See generally JOHN M. DEGROVE, *LAND GROWTH AND POLITICS* (1984).

later put these mechanisms in place, and if they do not, a statutory mandate requiring these threshold steps will be triggered.<sup>3</sup>

The ten provisions proposed here can and should be seen as an interrelated whole. The entire package may be adopted. Alternatively, each component provision of this legislative package may be addressed separately by the enactment process. Accordingly, each provision is numbered, titled, and its location within Maine's Revised Statutes is appropriately noted. There is an introductory note to each provision which briefly summarizes the intent and rationale of the proposal, and there are footnote citations to statutory language in other states addressing similar issues. Each proposed provision, though tailored to mesh with and meet the specific needs of Maine's planning and land use regulatory law, provides model language and useful clarification that could be considered, adapted and utilized to modernize land use control law in states other than Maine.

## II. MODEL AMENDMENTS

### *Provision I. Findings, Purposes, and Goals*

**Introductory Note:** This provision is offered as an amendment to ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter II, entitled Growth Management Program, specifically § 4312, the statement of findings, purposes, and goals. Many states have statutory provisions that facilitate planning and land use regulation at state, regional and local governmental levels, and that lay out a set of findings, purposes, and goals of these respective enactments.<sup>4</sup> Few of these statutory provisions, however, explicitly recognize that planning and land use regulation is a shared

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3. Such statutory enactments should conform to existing definitions of "state-sponsored" growth management programs. According to planner and academic Dennis Gale, these programs include the following characteristics, among others: (1) they are provided for under state legislative enactment; (2) they mandate or encourage local governments to prepare plans; (3) they mandate or encourage plan submittal to the state and/or a substate body for review and comment, approval, or negotiation; and (4) they maintain a system of incentives and/or disincentives to encourage compliance or cooperation. Dennis E. Gale, *Eight State Sponsored Growth Management Programs: A Comparative Analysis*, 59 J. AM. PLAN. A. 425, 425-26 (1992). The existing framework of planning regulation in Maine has some of these characteristics, but we argue that each of the program characteristics, especially the final one, should be considerably strengthened in every state's land use law along the lines proposed in this legislative package.

4. See, e.g., CONN. GEN. STAT. ANN. §§ 8-18 to 8-30a (West 2001 & Supp. 2003) (relating to municipal planning), and CONN. GEN. STAT. ANN. §§ 8-31 to 8-37b (West 2001 & Supp. 2003) (relating to regional planning); MASS. GEN. LAWS ANN. ch. 40B §§ 1-8 (West 1994) (dealing with regional planning), and MASS. GEN. LAWS ANN. ch. 41, § 81A-81J (West 1994 & Supp. 2003) (dealing with municipal planning); N.H. REV. STAT. ANN. §§ 4-C:1 to 4-C:23 (2003 & Supp. 2003) (relating to state planning) and N.H. REV. STAT. ANN. tit. 64 (relating to municipal planning); R.I. GEN. LAWS §§ 45-22.2-1 to 45-22.2-14 (1999 & Supp. 2003) (relating to state planning), R.I. GEN. LAWS §§ 45-22.1 to 45-22.9 (1999) (municipal planning), R.I. GEN. LAWS § 45-23-29 (1999) (laying out legislative findings and intent with respect to subdivision control), and R.I. GEN. LAWS § 45-24-29 to 45-24-30 (1999) (laying out legislative findings, intent, and purposes of zoning ordinances); and VT. STAT. ANN. tit. 24, §§ 4301-4496 (1999 & Supp. 2003) (dealing with municipal and regional planning), and VT. STAT. ANN. tit. 10, §§ 6001-6108 (1997 & Supp. 2003) (dealing with state land use and development planning).

responsibility of state and local government.<sup>5</sup> Fewer still explicitly require that local land use controls be exercised within the framework of state guidelines and limitations that assure that local regulatory powers are exercised in a manner that achieves statewide consistency, fairness, and equal treatment of property owners and developers subject to these controls.<sup>6</sup> That is the main thrust of this expanded "findings, purposes, and goals" provision. It is not so much a shifting of planning and land use regulatory powers from the local level of government to the state, as it is recognition that both levels of government have historically been involved in these issues. Moreover, both levels of government have critical roles to play, and must coordinate their roles more effectively if the benefits of planning and land use regulatory measures are to be realized as we move into an ever more congested twenty-first century.

**This proposed statutory language amends  
Me. Rev. Stat. Ann. tit. 30-A, by adding a new subsection 5.**

**§ 4312. Statement of findings, purposes, and goals**

**5. Additional purposes and goals.**

Beyond the purposes and goals outlined in subsections 2 and 3 of this section, the Legislature finds and declares that land use planning and regulation is a shared responsibility of both the state level of government and municipal governments. While initial and primary responsibility for land use decision making (including enforcement) remains at the municipal level of government, increasing population in many regions of the State, environmental considerations that often reach across municipal boundaries, the complexity and regional impact of many modern developments, the need to combat sprawl both within and beyond individual municipalities, and the need to foster fair and even-handed statewide approaches to land use planning and regulation requires that the State's role in land use planning and regulation be more fully defined by statute.

Specifically, these statutory provisions will in some instances require certain municipal actions relative to planning and land use control, *e.g.*, that a comprehen-

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5. One notable exception is found in Oregon, which has passed and implemented a Comprehensive State Planning Coordination Act that recognizes the importance of the planning process at both a state and local level and the need for effective coordination. OR. REV. STAT. §§ 197.005-197.860 (2001). The system is administered by a state agency, the Department of Land Conservation and Development, and an appointed board, the Land Conservation and Development Commission. OR. REV. STAT. § 197.040 (2001). As envisioned in the Act, the State has adopted 19 statewide planning goals, and subsequent relevant regulations, and then local municipalities must adopt comprehensive plans and implementing strategies that satisfy both planning goals and administrative rules. OR. REV. STAT. §§ 197.175, 197.225 (2001). The state will then review each proposed municipal plan to determine whether it properly implements these goals. OR. REV. STAT. § 197.180 (2001). For an interesting discussion on the interaction between the State of Oregon and City of Portland's zoning laws in light of these statutes, see Byron Shibata, *Land Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, 10 WASH. U. J.L. & POL'Y 161, 214-224 (2002).

6. This problem is further exacerbated by the proliferation in recent decades of states' adoption, in piecemeal fashion, of a range of single-purpose state land use control measures, including power plant siting, wetlands preservation, coastal zone protection, and wild rivers preservation, among many others. The diversity and abundance of such measures tends to slow emergence of coherent frameworks for shared land use responsibilities between local governments and the state.

sive plan be adopted prior to the enactment of any land use control ordinance or code; that “need” be demonstrated before a growth control ordinance is adopted; that sites be found for cluster, planned unit, high density, and in-fill development, low- and moderate-income housing, and locally unwanted (but necessary) land uses. In some instances municipal land use regulations are only permitted (as is presently the case with the use of moratoria and impact fees) when they are in compliance with state guidelines and limitations designed to achieve overall fairness and equal treatment under the law. Finally, by providing mechanisms for state-level appeal, these statutory provisions are intended to ensure that land use control powers and responsibilities will not be abused on one hand or ignored on the other. Modern planning and land use control tools are intended to be utilized. In all Maine municipalities sites for all of the development types noted above must be identified and actually made available to potential developers.

Commentary: The intent of this expanded “findings, purposes, and goals” provision within, and at the very beginning of, the State’s statutory framework regarding planning and land use control law is to make clear that the State’s role in this area of law is necessary, increasing, long standing, and cannot be abdicated in the name of “home rule” or “local control” to the almost exclusive province of local (municipal) governmental entities. As explicitly stated, these areas of law are “shared responsibilities” of both the state government and local governments. One might argue that this represents a significant shift of power from local governments to the state level of government—not so. In truth, planning and land use control law has never been the exclusive province of local governments. To be sure, a leading role in these areas of law has historically been played by local governments, and both the State Legislature and the courts have been appropriately deferential to the views, inputs, decisions, and aspirations of local governments in these areas of law.<sup>7</sup> Nevertheless, the State’s role in authorizing the use of police powers and in defining the scope of police power controls has always been paramount. Municipal governments have no inherent powers to plan and control land uses. It was the State Legislature that initially provided planning and land use control enabling legislation authorizing municipalities to act in these areas of law.<sup>8</sup> Provisions such as the Site Law,<sup>9</sup> the Mandatory Shoreland Zoning Act,<sup>10</sup> the LURC Law,<sup>11</sup> and enactments requiring that sites be found in all Maine

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7. See, e.g., ME. CONST. art. VIII, pt. 2, § 1; *Schwabe v. Town of Swan’s Island*, 2002 WL 32068244, at \*2 (Me. Super., Nov. 12, 2002) (Jabar, J.) (“Courts defer to a municipality’s interpretation of an ordinance it administers, and uphold interpretations unless the statute or ordinance clearly compels a contrary result.”). See also *Rockland Plaza Realty Corp. v. City of Rockland*, 2001 ME 81, ¶ 18, 772 A.2d 256, 262.

8. ME. REV. STAT. ANN. tit. 30-A, § 4312 (West 2001 & Supp. 2003).

9. Maine Site Location of Development Law, ME. REV. STAT. ANN. tit. 30-A, §§ 481-490 (West 2001) (stating that the purpose of the law is to allow the State to exercise its police power to “control the location of those developments substantially affecting local environment in order to insure that such developments will be located in a manner which will have a minimal adverse impact . . . and protect the health, safety and general welfare of the people.”) § 481.

10. Maine Mandatory Shoreland Zoning Law, ME. REV. STAT. ANN. tit. 38, §§ 435-449 (West 2001). The law purports “[t]o aid in the fulfillment of the State’s role as trustee of its waters and to promote public health, safety and the general welfare” and thus declares that it is in “the public interest that shoreland areas be subject to zoning and land use controls.” § 435.

11. Maine Land Use Regulation Commission Law, ME. REV. STAT. ANN. tit. 12, §§ 681-689 (West 1994 & Supp. 2003). The “LURC Law” extends state planning control over the unorganized and deorganized townships of the State through the Land Use Regulation Commission, in order to “prevent inappropriate residential, recreational, commercial and industrial uses . . . ; the

towns for group homes and manufactured housing,<sup>12</sup> all evidence the historic existence of, as well as the growing need for, a more vigorous state role (and statutes) addressing various aspects of planning and land use control law. Today, as our population increases and our society becomes more diverse and complex, this state role must expand still further—not to the exclusion of municipal involvement in these areas of law, but in a way that recognizes that the laws of the State speak to the needs of all our citizens. These laws alone are capable of transcending municipal boundaries and creating approaches to planning and land use law that are at once fair and comprehensive. This is the larger purpose of this legislative package, and is sought to be stated clearly in this expanded “findings, purposes, and goals” provision.

### *Provision II. Definitions*

**Introductory Note:** This provision is offered as an amendment to ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter I, entitled General Provisions, to clarify and expand the definitions of terms of art, tools, and mechanisms widely utilized in the fields of planning and land use regulation. All states have as part of their statutory provisions dealing with planning and land use regulation more or less extensive definitions sections. Most of these sections, like Maine’s,<sup>13</sup> are scattered throughout the state’s larger framework of planning and land use regulation law; it is all quite random—many modern planning tools, mechanisms, and terms of art are defined by one state, but not defined by others.<sup>14</sup> A more comprehensive

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intermixing of incompatible industrial, commercial, residential and recreational activities; . . . substandard structures or structures located unduly proximate to waters or roads; . . . the despoliation, pollution and inappropriate use of the water in these areas; and to preserve ecological and natural values.” § 681.

12. Maine Manufactured Housing Act, ME. REV. STAT. ANN. tit. 30-A, § 4358 (West 1996 & Supp. 2003) (requiring municipalities to allow “manufactured housing to be placed or erected on individual house lots in a number of locations on undeveloped lots where single-family dwellings are allowed . . .”). This statute was enacted in a response to widespread municipal discrimination against allowing manufactured housing. See ORLANDO E. DELOGU, MAINE LAND USE CONTROL LAW: CASES, NOTES, COMMENTS 707 (2nd ed. 1997). For an excellent review of the statute’s legislative history, see *Bangs v. Town of Wells*, 2000 ME 186, ¶¶ 9-15, 760 A.2d 632, 635-37.

13. See, e.g., ME. REV. STAT. ANN. tit. 30-A, § 4301 (definitions relating to general planning and land use regulation), § 4358 (definition of “manufactured housing”), § 4357-A (definition of “community living arrangement”), and § 4401 (definitions relating to subdivisions) (West 1996 & Supp. 2003).

14. See generally Title 8 of the Connecticut General Statutes for a sampling of this state’s scattered approach to defining terms, e.g., CONN. GEN. STAT. ANN. §§ 8-1aa (definition of “ridgeline”), § 8-18 (definitions relating to municipal planning commissions), and § 8-30g (definitions relating to affordable housing) (West 2001); MASS. GEN. LAWS ch. 40A, § 1A (defining zoning terms), and ch. 41, § 81L (defining terms used in subdivision control) (West 1994); N.H. REV. STAT. ANN. §§ 672:2 to 672:14 (2003) (general definitions relating to planning and zoning) § 674:24 (definitions pertaining to local land use planning and regulatory power), and § 674:31 (definition of manufactured housing) (1996 & Supp. 2003); R.I. GEN. LAWS § 45-22.2-4 (containing a set of planning definitions), § 45-23-32 (defining a range of subdivision terms), § 45-24-31 (zoning definitions) (1999 & Supp. 2003); and VT. STAT. ANN. tit. 24, § 4303 (1992 & Supp. 2003) and VT. STAT. ANN. tit. 10, § 6001 (1997 & Supp. 2003) (containing separated but rather thorough definition sections pertaining to state and local land use and planning).

approach to defining critical terms used by professional planners, those administering these laws, and the courts appears useful.

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A, § 4301.**

**§ 4301. Definitions**

**4. Conditional zoning and 5. Contract zoning** [These two subsections are deleted and a new definition of the term “contract zone” is fashioned]. “Contract zone” means [is] an authorized rezoning of a defined property where, for reasons such as the unsuitability of preexisting zoning, the vacant and/or unique character of the property, and/or the nature of a proposed development, the governmental body finds it necessary to impose conditions and/or to modify preexisting development regulations applicable to the property in order to facilitate the beneficial redevelopment of the defined property. A contract zone must be in compliance with the municipality’s comprehensive plan and must meet the health and safety standards of the municipality. A “contract” rezoning (sometimes referred to as a “conditional” rezoning), and/or specific conditions or restrictions to a “contract” or “conditional” rezoning amendment, adopted by a municipal legislative body, agreed to by the property owner(s), and applicable to a specifically defined property shall not be subject to challenge by citizen initiative.<sup>15</sup>

**6-A. Impact fee** [clarification by adding underlined language]. “Impact fee” means a charge or assessment imposed by a municipality against a new development to fund or recoup a portion of the cost of new, expanded or replacement infrastructure facilities necessitated by and attributable at least in part to the new development.

**7. Implementation program** [clarification by adding underlined language]. “Implementation program” means that component of a local growth management program that begins after the adoption of a comprehensive plan and that includes the full range of municipal policy making powers, including its spending and borrowing powers, as well as its powers to adopt or implement ordinances, codes, rules, or other land use regulations, tools and/or mechanisms, and that carry out the purposes and general policy statements and strategies of the comprehensive plan in a manner consistent with the goals and guidelines of subchapter II.

**11. Moratorium** [clarification by adding underlined language]. “Moratorium” means a land use ordinance or other regulation approved by a municipal legislative body that, if necessary, may be adopted at a first reading and/or on an emergency basis and given immediate effect, and that temporarily defers all development, or a type of development, by withholding any permits, authorization, or approvals necessary for the specified type(s) of development.

**13-A. Rate of growth (or “cap”) ordinance** [clarification by adding underlined language]. “Rate of growth (or ‘cap’) ordinance” means a land use ordinance or other rule that, upon a showing of need, temporarily limits the number of build-

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15. See *infra* Provision X, § 4452-A, subsection 4, Limitations on the use of initiative mechanisms to challenge municipal land use ordinances and/or administrative actions taken pursuant to such ordinances.



ing or development permits a municipality or other jurisdiction may issue over a designated time frame (usually one year). Such ordinances and/or rules must comply with § 4360 of the statutes.

**16. Capital budgeting** [new].<sup>16</sup> “Capital budgeting” means the establishment of priorities among, and budgeting for, needed capital improvements within a municipality. It will usually be presented in a “capital improvements” or “capital budgeting” plan that identifies anticipated improvements for each fiscal year over an ensuing five-, ten-, or fifteen-year period. Whether prepared by those charged with fiscal management in the municipality or the municipal planning authority, a capital budgeting plan should grow out of, and be consistent with, an adopted comprehensive plan and should be reviewed by the planning authority prior to presentation to the governing body of the municipality for adoption. Once in place, the capital budgeting plan should be updated no less frequently than at five-year intervals, and should show clearly the impact that each improvement will have on the municipality’s current (fiscal year) operating budget.

**17. Cluster development** [new]. “Cluster development” means the grouping of a type of development (usually housing, but possibly including commercial or office uses) in one area of a parcel of land at density levels higher than those normally permitted in the particular zone in order to permanently preserve another portion of the parcel as park and/or open space, and to achieve those infrastructure cost savings that higher density development permits. Departures from

16. A good example of a state that mandates capital budgeting and planning is Florida. As a part of its overall growth management strategy, Florida’s “Local Government Comprehensive Planning and Land Development Regulation Act” requires all of Florida’s 67 counties and 476 municipalities to adopt Local Government Comprehensive Plans that guide future growth and development. FLA. STAT. ANN. § 163.3177 (West 2003). Each Plan must include at least 9 chapters or “elements” that address future land use, housing, transportation, infrastructure, coastal management, conservation, recreation and open space, intergovernmental coordination, and capital improvements. *Id.* In particular, the Capital Improvements element requires municipalities to plan and budget for public facilities that are anticipated in the future. The subsection is worth reproducing in its entirety:

(3)(a) The comprehensive plan shall contain a capital improvements element designed to consider the need for and the location of public facilities in order to encourage the efficient utilization of such facilities and set forth:

1. A component which outlines principles for construction, extension, or increase in capacity of public facilities, as well as a component which outlines principles for correcting existing public facility deficiencies, which are necessary to implement the comprehensive plan. The components shall cover at least a 5-year period.

2. Estimated public facility costs, including a delineation of when facilities will be needed, the general location of the facilities, and projected revenue sources to fund the facilities.

3. Standards to ensure the availability of public facilities and the adequacy of those facilities including acceptable levels of service.

4. Standards for the management of debt.

(b) The capital improvements element shall be reviewed on an annual basis and modified as necessary in accordance with s. 163.3187 or s. 163.3189, except that corrections, updates, and modifications concerning costs; revenue sources; acceptance of facilities pursuant to dedications which are consistent with the plan; or the date of construction of any facility enumerated in the capital improvements element may be accomplished by ordinance and shall not be deemed to be amendments to the local comprehensive plan. All public facilities shall be consistent with the capital improvements element.

*Id.*

otherwise applicable spatial standards and development requirements that the underlying (or more traditional) zoning would impose are permissible.

**18. Floating or unmapped zone [new].** “Floating or unmapped zone” means [is] a zone (a zoning district) that fully describes a range of uses (activities) and the conditions that attach to the exercise of those uses, but which does not relegate these uses or the zoning district to a precise geographical area within the municipality at the time the “floating” or “unmapped zone” is created. Unmapped zones are appropriate in municipalities where the future shape of development is uncertain and the traditional fixing of zoning district boundary lines is premature. They may also be appropriate where the location of a large-scale development activity such as, but not limited to, an airport, a shopping center, an apartment house complex, etc., is presently undecided but capable of being positioned in any of several suitable locations within the municipality. The unmapped zone may be geographically fixed by appropriate action of the planning authority and/or the governing body of the municipality when an actual development proposal that conforms to the conditions and/or use requirements of the zone is presented.

**19. High density development [new].** “High density development” means development that departs from more usual one-half-acre, one-acre, two-acre, (or larger) per unit minimum lot size requirements, and instead, in core or other designated areas of a municipality, authorizes density levels that approximate historic density patterns in more built-up areas of the municipality. Such development may be for sale or lease; it may consist of individual units on individual (much smaller) parcels, or may utilize multi-story, townhouse, or condominium types of development; it may consist exclusively of new housing and/or may involve a range of mixed (residential, commercial, office, and/or industrial) uses. Departures from otherwise applicable spatial standards and development requirements that the underlying (or more traditional) zoning would impose are permissible.

**20. In-fill development [new].** “In-fill” development means development that is placed on unused, passed over, remnant, irregularly sized, often small parcels of land and/or lots of record in (or proximate to) core areas of a municipality. Such development may be for sale or lease; it may consist of housing or other permitted uses, or a combination thereof; it may involve a single unit or be multi-unit, and may be multi-story, townhouse, or condominium in character; and it should be in scale with the surrounding neighborhood. Departures from otherwise applicable spatial standards and development requirements that the underlying (or more traditional) zoning would impose are permissible.

**21. Locally unwanted land use [new].** “Locally unwanted land use” (LULU) means or makes reference to an otherwise legal activity or use of land that is often necessary and/or economically beneficial, but which is usually not permitted in any geographical area (zone) of the municipality; or, if permitted, is usually denied application approval (often on irrational grounds) rather than being granted approval with necessary (even stringent) conditions.

**22. Not in my back yard [new].** “Not in my back yard” (NIMBY) means or reflects a public attitude that would deny locational opportunity and/or application approval to a legal undertaking or use of land on grounds that are not based on planning or technical data or criteria. The basis for these denials is often some combination of anecdotal negative testimony, misinformation, fears, prejudice, and/or biases.

**23. Overlay zoning [new].** "Overlay zoning" means a zone (zoning district) that allows departures from otherwise applicable density, spatial standards, and/or development requirements that the underlying (more traditional) zoning would impose. These overlays may impose more rigorous regulations as is often the case in fragile land areas, waterfront and historic districts. They may also relax an existing regulatory framework in order to encourage small parcel development, in-fill housing, cluster or planned unit development, high density development, the transfer of development rights, or redevelopment in older neighborhoods.

**24. Planned unit (mixed use) development [new].** "Planned unit (mixed use) development" means the grouping of several types of development (residential, commercial, office, or industrial) in an integrated scheme that is aesthetically pleasing, is in compliance with the comprehensive plan, and meets all health, safety, and general welfare standards of the municipality, but is not generally permitted by the underlying zoning. It may be permitted by the use of contract zoning, by the use of floating (unmapped) zones, or by the use of overlay zoning, and it may involve the clustering of development activities. Departures from otherwise applicable spatial standards and development requirements that the underlying (or more traditional) zoning would impose are permissible.

**25. Transfer of development rights [new].** "Transfer of development rights" means and allows development, in whole or in part, to be steered away from one area (often referred to as a "no-build" zone) within the municipality, and towards other areas (so-called "build" zones) within the municipality that presumably can safely absorb an increased level of development beyond that which would be allowed by the underlying zoning. Assuming permits to build in designated "build" zone(s) are actually and readily available, landowners or developers in a "no-build" zone suffer no economic loss from such a transfer. Their economic benefits (though not derived in the usual manner, *i.e.*, by the development of their property in a "no-build" zone) will be realized either by developing on property they own or acquire in the transferred location(s), *i.e.*, in so-called "build zones," or by selling their transferable development rights to someone who already owns property in a "build" zone.

Commentary: These clarified definitions, and the addition of new definitions of terms of art and widely used tools and mechanisms of the planning profession, facilitate not only a better understanding of these concepts by elected officials and courts, but will also serve to encourage professional planners in Maine and those charged with administering comprehensive planning and land use regulations to use the widest array of these modern, useful, and judicially sustainable techniques. It is worth noting that "Growing Smart,"<sup>17</sup> the American Planning Association's recently published two-volume legislative guidebook containing model statutes for planning and growth management, defines a similar array of terms to facilitate these processes at state, regional, and local levels of government.<sup>18</sup> Finally, it would seem useful to pull all of the planning related statutory definitions scattered in various sections of chapter 187 of title 30-A of the Maine Revised Statutes, including more recently enacted pocket-part definitions,<sup>19</sup> and these newly pro-

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17. GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., 2002).

18. *Id.* at 4-208.3, 4-301, 5-102, 5-302, 7-101, 8-101, 10-101, 14-102.

19. *See supra* text accompanying note 13.

posed clarifications and additions, into a single comprehensive, alphabetized, and renumbered definitions section, which should probably appear at the beginning of chapter 187 as a reconfigured § 4301.

### *Provision III. Rate of Growth Ordinances*

**Introductory Note:** This provision is a substitute for ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter III, entitled Land Use Regulation, specifically § 4360, dealing with rate of growth (“cap”) ordinances. No other New England state expressly authorizes a rate of growth ordinance. This land use control tool, sometimes referred to as a “cap,” limits the number of building permits that a municipality will issue in a given period, usually a year. Whether other states adopt such an ordinance, as a necessary emergency measure (in the same manner that moratoriums are adopted), is problematic.<sup>20</sup> At least one New England state, New Hampshire, has judicially limited the use of “caps” in much the same way that this legislative provision would limit them; see *Beck v. Town of Raymond*.<sup>21</sup> The provision presented below recognizes and builds on a strategy that Maine has used for some time in its approach to planning and land use control, *i.e.*, that some land use regulatory measures are so important that they may be imposed; other regulatory measures have such a potential for abuse that when, and if, they are used, their use must conform to state imposed parameters and limitations that ensure fairness and equal treatment.<sup>22</sup> Examples in the first group include statutory provisions requiring all Maine municipalities to make space available for group homes,<sup>23</sup> to make

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20. See Note, *State-Sponsored Growth Management As A Remedy For Exclusionary Zoning*, 108 HARV. L. REV. 1127 (1995) (arguing that rate of growth ordinances enacted at the state level are a solution to the exclusionary zoning that occurs when decisions are left solely to the local authorities). The note makes the relevant observation that “[g]rowth-management statutes typically provide for administrative implementation of statewide land-use policies, and require each locality to use its zoning power in the interests of the state as a whole rather than in the local interest.” *Id.* at 1128.

21. 394 A.2d 847 (N.H. 1978). The court stated:

Towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge. They must develop plans to insure that municipal services, which normal growth will require, will be provided for in an orderly and rational manner. . . . An ideal solution to the problem of parochial growth restrictions is effective regional or state-wide land-use planning.

*Id.* at 852.

22. Problems associated with the irrationality and lack of state standards for local decision-making were described decades ago by many, among them Fred Bosselman, who explained how local governments, unfettered by regional policy considerations, had systematically excluded locally undesirable development of state and region-wide benefit while actively promoting other types of development without regard for its adverse impact on state and regional values. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1 (1971). Richard Babcock identified similar problems with the lack of state standards, noting that “the criteria for decision-making are exclusively local, even when the interests affected are far more comprehensive.” RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 153 (1966). Cf. Orlando E. Delogo & Susan E. Spokes, *The Long-Standing Requirement That Delegations of Land Use Control Power Contain “Meaningful” Standards to Restrain and Guide Decision-Makers Should Not Be Weakened*, 48 ME. L. REV. 49 (1996).

23. ME. REV. STAT. ANN. tit. 30-A, § 4357-A(2) (West 1996 & Supp. 2003) (“In order to implement the policy of this State that persons with disabilities are not excluded by municipal zoning ordinances from the benefits of normal residential surroundings, a community living arrangement is deemed a single-family use of property for the purposes of zoning.”). *Id.*

space available for manufactured housing,<sup>24</sup> and to zone shoreland areas.<sup>25</sup> Examples in the second group (regulatory tools with a potential for abuse) include the imposition of moratoria,<sup>26</sup> impact fees,<sup>27</sup> and contract zones;<sup>28</sup> the use of each of these regulatory devices in Maine is statutorily circumscribed for the reasons noted above. Finally, the statutory provisions cited above, and the proposed "cap" legislation presented here, seem worthy of examination by planners and regulators in other states; the precise language could, of course, be appropriately tailored to fit the legislative format and style of the respective state. If adopted, these similar provisions would serve the same ends being served in Maine, *i.e.*, some important planning steps would be required, some important land uses would have space provided for them, and some important procedural protections and safeguards would be in place. A higher statewide level of consistency, fairness, and uniformity would be obtained.

**This proposed statutory language amends ME. REV. STAT. ANN. tit. 30-A, § 4360 by deleting the present language in its entirety and substituting the following language.<sup>29</sup>**

**§ 4360. Rate of growth ordinances ("caps")**

**1. Legislative intent.**

A "rate of growth" ordinance is intended to be a temporary measure allowing municipalities (if necessary) to slow the rate of growth in order to provide needed infrastructure to better absorb that growth. It is not a measure designed to allow municipalities to avoid growth, or to avoid their duty to provide those municipal services needed to meet population increases and/or population movement in a safe and orderly manner. It is the intent of the Legislature to allow municipalities pursuant to their home rule authority to limit the number of building and/or development permits issued in any calendar year in settings where the need for such a limitation has been shown, and where the "rate of growth" ordinance (sometimes referred to as a "cap") meets all of the requirements in this section.

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24. ME. REV. STAT. ANN. tit. 30-A, § 4358 (West 1996 & Supp. 2003). *See also supra* text accompanying note 12.

25. ME. REV. STAT. ANN. tit. 38 §§ 435-449 (West 2001 & Supp. 2003). *See also supra* text accompanying note 10.

26. ME. REV. STAT. ANN. tit. 30-A, § 4356 (West 1996 & Supp. 2003) (imposing a 180-day limit on the use of moratoria, unless reasonable progress is being made to alleviate the need giving rise to the moratoria, in which case an additional 180 days may be imposed; but in no circumstances may a moratorium extend beyond one year in Maine).

27. ME. REV. STAT. ANN. tit. 30-A, § 4354 (West 1996 & 2003).

28. ME. REV. STAT. ANN. tit. 30-A, § 4352(8) (West 1996 & Supp. 2003). Maine is not alone in its use of this strategy of increasing the state role in planning; since the late 1960s a large number of state legislatures have sought to achieve a broader perspective and state role in land use decision-making, including Hawaii, Florida, Oregon, Minnesota, and Colorado among others. *See supra* note 5 relating to measures taken in Oregon.

29. The proposed statute presented here is a far more comprehensive provision than the present one-sentence section. The current rate of growth ordinance simply reads: "A municipality that enacts a rate of growth ordinance shall review and update the ordinance at least every 3 years to determine whether the rate of growth ordinance is still necessary and how the rate of growth ordinance may be adjusted to meet current conditions." ME. REV. STAT. ANN. tit. 30-A, § 4360 (West 1996 & Supp. 2003).

## **2. Need.**

Before a “rate of growth” ordinance may be enacted, the municipality must hold a public hearing to address the question of need. The burden shall be on the municipality to demonstrate that it has experienced a sharp increase for at least a two-year period in its rate of growth, as measured by the annual number of building permits issued, over historic levels of growth in the municipality. Specifically, the municipality must show that the average rate of growth for the two preceding calendar years exceeds by more than 50% the average rate of growth for the five calendar years preceding these two years. Alternatively, the municipality may show (by compelling evidence) that some element of essential public infrastructure, *e.g.*, roads, water supply, waste water treatment plant capacity, school space, etc., is in such short supply that continued growth at the rate of the average of the two preceding calendar years poses a health or safety risk. If either of the above showings is made, the municipality will be deemed to have presumptively demonstrated a “need” sufficient to justify the imposition of a rate of growth ordinance.

## **3. The number of building permits that must issue annually under a rate of growth ordinance.**

Once the “need” requirement for the enactment of a rate of growth ordinance has been met, the municipality may set the rate of growth, *i.e.*, the annual number of building permits that issue in a calendar year, at a level no lower than either: 50% of the average number of building permits issued during the preceding two calendar years; or at the average number of building permits issued during the preceding seven calendar years, whichever is lower. Alternatively, municipalities meeting the “need” requirement may establish a higher annual rate of growth than the above calculation would allow, balancing their need to slow down the rate of growth they are experiencing with a willingness to absorb as large a portion of that growth as seems reasonable.

## **4. Duration of a rate of growth ordinance.**

A rate of growth ordinance, at a level determined pursuant to subsection 3, may be put in place for a one- or two-year period. If predicated on infrastructure needs that are being remedied by new construction that is in progress but not yet complete, the rate of growth ordinance may be extended until the construction is complete or up to three years, whichever is less. Under no circumstances may a rate of growth ordinance be in place for a period longer than three years. A municipality may not have a rate of growth ordinance in place for more than three years in any seven year period.

## **5. Exemptions.**

Notwithstanding the provisions of subsection 3, in any municipality adopting a rate of growth ordinance three categories of housing shall not be included in any numerical building permit limitation: (i) intra-family transfers of land (not to exceed one per family in any three-year period) for the purpose of allowing a family member (the grantee) to build a single family house; (ii) camps, cottages, or any other type of seasonal housing that by its location, design, or type of construction cannot be used on a year-round basis; and (iii) publicly or privately sponsored low- or moderate-income and/or elderly housing as defined by federal or state law, and/or regulations of the State Planning Office or the Maine Housing Authority.

## 6. The allocation of building permits under a rate of growth ordinance.

In any municipality adopting a rate of growth ordinance, the number of building permits to be issued in any calendar year may be divided in half and issued commencing January 1 and July 1 of that year. Unused permits from the first half of the year shall be carried over to the second half of the year. Unused permits from the second half of the year shall be carried over to the next year if a rate of growth ordinance is in place the next year. All permits shall be issued on a first come, first served basis; there may be no preference for local residents or local builders. However, when the number of building permit applications exceeds the number of permits available in any given period, preference shall be given to those applicants who seek a single building permit over those who (in order to construct an approved subdivision) seek multiple permits. Multiple-permit applicants shall be dealt with on a strict time sequence basis—the oldest approved subdivision shall receive all of the building permits needed to complete that subdivision before later approved subdivisions may obtain their needed permits.

## 7. Enforcement.

A municipal rate of growth ordinance that is not in compliance with these statutory provisions and which thus inappropriately limits development within the community is a violation of legislative intent entitling landowners or developers operating within the municipality and/or the Attorney General's office to seek appropriate remedial relief.

Commentary: The intent of this provision is clear—to make certain that rate of growth (“cap”) ordinances may be enacted by Maine municipalities in settings where sharp increases in growth (as measured by the number of building permits issued annually) threaten the health and safety of the community. Such ordinances are a type of temporary emergency measure that must be available when needed. Maine’s highest court has noted that rate of growth ordinances are different from moratoria.<sup>30</sup> The Court is certainly correct; but having said that, there are more similarities between these two land use control tools than there are dissimilarities. Both are extreme measures; both impinge significantly on property owners who would use their property in ways that are certainly legal, usually undertaken as a matter of right, and economically valuable. Both are susceptible to being used merely to exclude people and/or development activities a community does not like. The latter is not a constitutionally permissible justification for a moratorium, a rate of growth ordinance, or any other police power ordinance. It follows then that rate of growth ordinances, like moratorium ordinances, must be justified by a showing of need, and must be circumscribed in many of the same ways that moratorium ordinances are already circumscribed by existing provisions of Maine law.<sup>31</sup>

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30. *Home Builders Ass'n of Maine, Inc. v. Town of Eliot*, 2000 ME 82, ¶¶ 6-10, 750 A.2d 566, 569-71.

31. Caps are most likely to be upheld where they are a part of a comprehensive approach to growth, and are not a reactive or a NIMBY-type measure. *See, e.g., W.R. Grace & Co.-Conn. v. Cambridge City Council*, 779 N.E. 2d 141, 149-50 (Mass. App. Ct. 2002) (court upheld a municipal rate of development area on a parcel owned by the plaintiff, holding that “[a] municipality may impose reasonable time limitations on development, at least where those restrictions are temporary and adopted to provide controlled development while the municipality engages in comprehensive planning studies.”)

The above legislation accomplishes this end—it states the Legislature’s intent; it delineates two ways by which the “need” requirement may be met; and it establishes a mechanism for setting the “level” (the number of building permits that must issue annually) in each setting where a “cap” is imposed. Finally, the legislation is clear as to the duration of an enacted “cap”; it fashions an exemption for certain types of housing, and it establishes a mechanism for allocating “cap” permits in a nondiscriminatory manner. Maine’s present rate of growth statutes do none of this; nor were any of these essential limitations fashioned by Maine’s highest court in dealing with the only case involving “caps” that has come before it to date: *Home Builders Association of Maine, Inc. v. Town of Eliot*.<sup>32</sup> This is why the proposed legislation is necessary; it will provide for the prudent use of rate of growth ordinances, and prevent (or at least make more difficult) the misuse of this tool. Legislatures and courts in other states have not hesitated to carefully hedge the use of “caps,” see *Beck v. Town of Raymond*.<sup>33</sup> Maine would do well to follow suit.

#### *Provision IV. Local Authority for Comprehensive Plans*

**Introductory Note:** This provision is offered as an amendment to ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter II, entitled Growth Management Program, specifically § 4323, dealing with comprehensive plans. As stated in the introductory note to Provision I, all of the New England states have statutory provisions that facilitate planning and land use regulation at state, regional and/or local levels of government. None of these states, however, require that the planning process, as well as the completion and adoption of a comprehensive plan, including state approval, must occur by a specified date. Nor do they make clear that an adopted and approved comprehensive plan must precede (and is an essential prerequisite to) the adoption of land use regulations. The following provision, while facilitating the widest range of comprehensive planning activities, including the preparation of specialized, more focused subsidiary planning documents, makes clear that any and all land use controls follow, grow out of, and implement comprehensive plans;<sup>34</sup> they do not come first—the tail does not wag the dog.<sup>35</sup> The proposed

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32. 2000 ME 82, ¶ 17, 750 A.2d at 572 (upholding a town “permit limitation ordinance,” which placed a cap on growth permits, allowing up to forty-eight per year).

33. 394 A.2d 847 (N.H. 1978). See *supra* text accompanying note 21.

34. The Smart Growth Network, a partnership between the United States Environmental Protection Agency, The American Planning Association and many other nonprofit groups, has advocated for a strong comprehensive plan and planning process in order to take a holistic approach to future development and to implement policies of importance to the local community. Of the many principles the Smart Growth Network envisions being integrated into a comprehensive plan are a mixing of land uses, preserving open space, promoting compact building design, and creating walkable neighborhoods. See SMART GROWTH NETWORK, GETTING TO SMART GROWTH: 100 POLICIES FOR IMPLEMENTATION, i, 3-8 (Jan. 29, 2002), available at <http://www.smartgrowth.org/pdf/gettosg.pdf>. See also AM. PLAN. ASS’N, POLICY GUIDE ON SMART GROWTH 1-2 (Apr. 15, 2002), available at <http://www.planning.org/policyguides/pdf/smartgrowth.pdf>.

35. These more focused activities would include a broad range of planning initiatives, including many generally described as “environmental planning.” As Jerry Weitz has argued, unless areas of critical state concern are regulated at the state and/or regional levels, the local comprehensive planning process will generally not provide the consistency of protection needed for sensitive environments of the states. One reason for this is that local governments do not have sufficient information about critical areas in their



legislation also makes clear that the programmatic goals of an approved comprehensive plan or any subsidiary planning document may be achieved by exercising powers other than the police power, *e.g.*, the spending and borrowing powers of government. Two New England states, Maine<sup>36</sup> and Rhode Island,<sup>37</sup> provide for state level review of local comprehensive plans, presumably to assure consistency between local and state planning goals.<sup>38</sup> Other states would do well to follow suit.

**This proposed statutory provision amends ME. REV. STAT. ANN. tit. 30-A, § 4323 by deleting the present language in its entirety and substituting the following language.**

**§ 4323. Local authority for growth management**

**1. Legislative intent.**

Comprehensive planning, including the preparation and adoption of a comprehensive plan, followed by the adoption of appropriate plan enforcement ordinances, codes, regulations, and policies is essential to ensure the economical, safe, and orderly growth of Maine municipalities. It is the intent of the Legislature to allow municipalities pursuant to their home rule authority to undertake the widest possible range of these planning and land use control activities subject only to the general limitations contained in chapter 187, and the specific requirements and limitations of this section.

**2. Comprehensive planning and the adoption of a comprehensive plan.**

A municipality that would undertake any aspect of growth management and/or exercise any control over individual developments or the development process in the community must first establish a "local planning committee" in accordance with § 4324(2) and adopt a "comprehensive plan" in accordance with § 4324(9). All municipalities must prepare and adopt a comprehensive plan no later than January 1, 2010. The comprehensive plan adopted must meet the requirements of § 4312(3) and § 4326, and must be reviewed, approved, and certified by the State Planning Office pursuant to § 4347-A. To adjust to changing conditions, an adopted and approved comprehensive plan must be revisited, revised, updated, and re-adopted no less frequently than at ten-year intervals. Revised and re-adopted plans must also be approved and certified by the State Planning Office as outlined above.

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jurisdictions, and good environmental planning cannot take place simultaneously with good comprehensive planning when basic technical assistance is unavailable from the regions or state . . . Local governments could not be expected to integrate into the first round of local plans the management plans that the state eventually would develop for regionally important resources. Integration of regionally important resources into local plans must therefore occur after the initial round of local planning.

JERRY WEITZ, *SPRAWL BUSTING: STATE PROGRAMS TO GUIDE GROWTH* 308-09 (1999).

36. See ME. REV. STAT. ANN. tit. 30-A, § 4347-A (West 1996 & Supp. 2003).

37. See R.I. GEN. LAWS § 45-22.2-9 (1999 & Supp. 2003). See also § 45-22.2-6, which outlines the "required elements" of a comprehensive plan. This legislation makes clear (perhaps even more strongly than Provision IV) that subsidiary elements (or plans) should be an integral part of an adopted comprehensive plan and the planning process.

38. The most comprehensive recent analysis of state level review of local comprehensive plans in states outside of New England is found in WEITZ, *supra* note 35.

### 3. Plan implementation.

After, but not before, an adopted and approved comprehensive plan (or a revised plan) is in place, a municipality may control growth and/or development activities taking place in the community by adopting plan implementing ordinances, codes, or regulations including, but not limited to, zoning ordinances, subdivision control ordinances, site approval ordinances, and historic district ordinances. As needed to implement an adopted and approved (or revised) comprehensive plan, a municipality may utilize any of the land use control tools and mechanisms outlined in chapter 187, and/or may utilize the municipality's police powers to fashion such other controls as they deem necessary, *e.g.*, contract zoning, impact fees, clustered and/or planned unit development, floating (unmapped) and/or overlay zones, the transfer of development rights, etc. All such plan implementing actions of a municipality must be in furtherance of the municipal comprehensive plan; they must comply with the State's planning goals outlined in § 4312(3); and they must be in accordance with § 4326, particularly subsection 3-A.

### 4. Other plan implementing actions.

In addition to the plan implementing tools and controls outlined in subsection 3 of this provision, a municipality may control growth and/or development activities taking place in the community by:

(A) expanding or preparing subsidiary plans (or elements) of its comprehensive (or revised) plan, such as but not limited to, a transportation plan, a park and open space plan, a financial or capital budgeting plan, a housing plan, etc.;

(B) exercising its borrowing and/or spending powers to achieve any of the programmatic goals outlined in a comprehensive (or revised) plan or any subsidiary plans; and

(C) creating on a permanent or ad hoc basis, commissions, task forces, committees, auxiliary and/or advisory bodies, such as but not limited to: conservation commissions, housing authorities, task forces or committees, historic district commissions or committees, park and/or open space committees, etc.

### 5. Enforcement.

Municipal ordinances or actions not in compliance with the provisions of this section (revised § 4323) and/or with the substantive requirements relative to comprehensive planning found in § 4312(3) and § 4326, particularly subsection 3-A, are a violation of legislative intent entitling landowners or developers operating within the municipality and/or the Attorney General's office to seek appropriate remedial relief.

**Commentary:** This expanded section dealing with planning and plan implementation makes several important points. First, the planning and plan implementing powers of local governments are extensive; these powers need to be and are more fully delineated in this provision than they are under present Maine law. Second, there is an appropriate sequencing of these undertakings: planning comes first, followed by the adoption and approval of a comprehensive plan. The comprehensive plan (and revisions thereto) is the overarching document, the grand design.

Once this statement is in place, it is appropriate to talk about plan implementation, but not before. Any other sequencing gets the cart before the horse. The planning literature,<sup>39</sup> as well as statutes<sup>40</sup> and case law in most states,<sup>41</sup> suggest that this approach is widely followed. Prior to 2001, this seemed to be the approach (implicitly, if not expressly) followed in Maine;<sup>42</sup> but the Law Court's recent holding in *Braddon v. Town of Vassalboro*,<sup>43</sup> overturned this assumption. The court characterized a "site approval ordinance" as a permissible building code and allowed this land use control device to be put in place in a setting where the town had no plan, no zoning ordinance, and no subdivision controls.<sup>44</sup> Moreover, the development approval granted by the town in this case was not only in violation of state planning guidelines,<sup>45</sup> but would over time (as other developments were approved pursuant to this enactment) give rise to a pattern of development, a de facto zoning ordinance, that would be totally random and incapable of being undone. The above statutory provision, which clarifies and expands existing legislation, is intended to overturn the Law Court's holding in *Braddon* by making clear that development proposals may not be denied or approved by any ordinance, code, or regulation prior to the adoption of a comprehensive plan.

*Provision V. Clustered, Planned Unit, High Density, and In-fill Development*

Introductory Note: This provision amends ME. REV. STAT. ANN. tit. 30-A Chapter 187, Subchapter III, entitled Land Use Regulation, by adding a new section dealing with clustered, planned unit, high density, and in-fill development. Most of the

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39. Among these sources are EDWARD J. KAISER ET AL., *URBAN LAND USE PLANNING* (4th ed. 1995), and Charles J. Hoch, *Making Plans*, in *THE PRACTICE OF LOCAL GOVERNMENT PLANNING* 19-40 (Charles J. Hock et al., eds., 3rd ed. 2000).

40. See, e.g., CAL. GOV'T CODE § 65300 (West 2003) ("Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning."); MD. ANN. CODE art. 28, § 7-108 (2003) (requiring regional master plans); MO. REV. STAT. § 89.340 (2003) (requiring a "city plan"). See also Patricia E. Salkin, *Sorting Out New York's Smart Growth Initiatives: More Proposals and More Recommendations*, 8 ALB. L. ENVTL. OUTLOOK 1, 24-30 (2002) (discussing New York smart growth initiatives and legislative proposals requiring local communities to enact comprehensive plans).

41. See *Ex parte City of Huntsville*, 684 So. 2d 123, 125 (Ala. 1996) ("([Zoning] regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets, to secure safety . . . to promote health and the general welfare, . . . to prevent the overcrowding of land, to avoid undue concentration of population and to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.") (quoting ALA. CODE §11-52-72 (1975)); see also Charles M. Haar, "In Accordance With a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955); David McBride & Richard Babcock, *The Master Plan—A Statutory Prerequisite to a Zoning Ordinance?* 12 LAND USE & ZONING DIGEST 353 (1960); Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976); Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalizations: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 STETSON L. REV. 603 (1987).

42. See *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 52 (Me. 1968).

43. 2001 ME 137, 780 A.2d 299.

44. *Id.* at ¶ 9, 780 A.2d at 302.

45. See ME. REV. STAT. ANN. tit. 30-A, § 4312 (West 1996).

New England states have statutory provisions that define, and to a greater or lesser degree, authorize at least some of the development types addressed here.<sup>46</sup> None of these statutory provisions, however, are as broad or explicit as the legislation outlined below. More importantly, these four types of development are central to present planning and regulatory efforts (throughout New England and beyond) aimed at limiting sprawl.<sup>47</sup> They more fully utilize existing infrastructure in core areas of municipalities; at the same time these types of development can be designed to preserve the amenity and livability characteristics of these areas.<sup>48</sup> The legislation proposed here not only requires higher densities of development in municipal core areas, but permits the use of a range of other governmental measures to facilitate this end. These steps are critical if we are serious about addressing sprawl. In short, if we do not allow higher densities of development in core areas of municipalities, development activities will have no alternative but to move to outlying areas.<sup>49</sup> This is precisely what we do not want. After careful examination of this proposed legislation, individual states can (and should) tailor it to meet their particular needs.

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A, by adding a new § 4361.**

**§ 4361. Clustered, planned unit, high density, and in-fill development**

**1. Legislative intent.**

The Legislature finds that clustered development, planned unit development, high density development, and in-fill development, when undertaken in or near the core areas of any municipality at density levels that approximate, or in some instances exceed, historic density patterns in these core (or near-core) areas, are

46. See generally, CONN. GEN. STAT. ANN. § 8-2d (West 2001) (dealing with planned unit developments); § 8-2g (dealing with density limits for affordable housing); § 8-2i (dealing with inclusionary zoning, which promotes the development of housing affordable to persons and families of low and moderate income); and § 8-2j (dealing with village districts); MASS. GEN. LAWS ANN. ch. 40A, § 9 (West Supp. 2003) (dealing with clustered, planned unit, and other higher density developments); N.H. REV. STAT. ANN. § 674:16 (Supp. 2003) (dealing with innovative land use controls as further defined in § 674:21); and § 674:21 (allowing innovative land use controls, including: timing incentives, phased development, intensity and use incentives, transfer of development rights, planned unit development, cluster development, impact zoning, performance standards, flexible and discretionary zoning, environmental characteristics zoning, inclusionary zoning, accessory dwelling unit standards, impact fees, and village plan alternative subdivisions); R.I. GEN. LAWS §§ 45-24-46, 45-24-47 (1999 & Supp. 2003) (dealing with developments subject to "special provisions" and modifications, including clustered and planned unit developments); VT. STAT. ANN. tit. 24, § 4406 (Supp. 2003) (dealing with existing small lots), and § 4407 (dealing with planned unit and other types of unique development).

47. See generally JULIE CAMPIOLI ET AL., ABOVE AND BEYOND: VISUALIZING CHANGE IN SMALL TOWNS AND RURAL AREAS (2002); DIANE R. SUCHMAN & MARTA GOLDSMITH, DEVELOPING SUCCESSFUL INFILL HOUSING (2002); and DOUGLAS R. PORTER ET AL., MAKING SMART GROWTH WORK (2002).

48. For the benefits of high density development and an argument for a return to "traditional" mixed use and connectivity in development, see generally ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000), and in particular the chapter entitled *How to Make a Town*. *Id.* at 183-214.

49. See *id.* at 10-11.

all mechanisms that prevent sprawl, conserve open space, enhance the amenity characteristics of new development, and reduce the public and private costs of new development. These advantages are achieved by more densely developing a portion of larger parcels, by utilizing existing unused (passed over) parcels of land, and/or by redeveloping abandoned buildings and lots within, or immediately adjacent to, built up areas of a municipality. New development in these settings is often able to utilize existing infrastructure (roads, water, sewer, public utility lines, etc.); new infrastructure (when needed) and associated costs are kept to a minimum; and such developments are often in close proximity to existing churches, schools, shops, and related municipal services thereby increasing the degree to which these developments function as part of a neighborhood. It is the intent of the Legislature that municipalities pursuant to their home rule authority shall authorize and facilitate these types of development.

## **2. Required municipal actions.**

Two types of action are specifically required: First, all municipalities must identify individual parcels, and provide suitable areas (appropriately zoned) that allow clustered, planned unit, high density, and in-fill development particularly within core (and near-core) areas of the municipality. Second, in order to facilitate such development, all municipalities must (either within the framework of conventional zoning or by using contract or overlay zoning techniques) allow reasonable departures from otherwise applicable spatial standards and development requirements that the underlying (or more traditional) zoning would impose.

## **3. Other municipal actions.**

Beyond the requirements outlined in subsection 2, municipalities, in order to encourage and facilitate these types of development, may need to amend comprehensive plans, adopt other supportive land use controls, and/or utilize their spending and borrowing powers. To accomplish the legislative intent, outlined in subsection 1, municipalities may also appoint such boards, task forces, or study groups as they deem appropriate.

## **4. Enforcement.**

Municipal ordinances or actions that have the effect of prohibiting, directly or indirectly, these types of development within the community are a violation of legislative intent entitling landowners or developers operating within the municipality and/or the Attorney General's office to seek appropriate remedial relief.

## **5. Limitations.**

Nothing in this provision requires municipalities to allow any development in any setting that does not adequately protect the public's health and safety.

**Commentary:** This new statutory provision is patterned after existing Maine statutory provisions (previously noted) in which the State requires municipalities to make space available for particular uses, *i.e.*, group homes<sup>50</sup> and manufactured housing.<sup>51</sup> In the same vein, the State has long required municipalities to zone shoreland areas.<sup>52</sup> Municipalities traditionally had the power to address any/all of

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50. ME. REV. STAT. ANN. tit. 30-A, § 4357-A (West Supp. 2003).

51. ME. REV. STAT. ANN. tit. 30-A, § 4358 (West 1996 & Supp. 2003).

52. ME. REV. STAT. ANN. tit. 30-A, §§ 435-449 (West 2001 & Supp. 2003).

these types of development, but fears, biases, and a failure to appreciate the significance of the underlying need and the costs of not acting had long stayed their hand. Once the State, taking the larger and long-run view, put the required provisions in place, municipalities by and large complied. The benefits that followed were real; there were almost no adverse consequences, and municipal anxieties largely melted away. Here too, municipalities have long had the power to take the steps required by this provision, but for a variety of reasons they have not for the most part acted. This is so in spite of the fact that most municipalities have come to understand that sprawl is a costly and an environmentally unsound pattern of development. Moreover, many individual citizens as well as municipal leaders express appreciation for the densities, the mixed uses, and the quality of life found in the core areas of cities and villages throughout the state, *e.g.*, Portland's Old Port, West End, and Munjoy Hill areas; Bangor's downtown; Yarmouth's village; Wiscasset's village; and a revived waterfront in Belfast, among many others. But in most of these municipalities present zoning ordinances would today not allow these desirable areas to be replicated (or even enlarged)—a perverse irony. Instead, we remain committed to development patterns that require one house on one lot; one-half-, one-, two-, and five-acre (or more) minimum lot sizes. In addition, height limits, setback and sideyard requirements, and many other regulatory specifications, today foster the very sprawl we would avoid. The legislation proposed here strikes a different balance. It fully embraces statewide, anti-sprawl development patterns that are absolutely necessary at this point in time. At the same time, it does not abandon (or bar the use of) conventional zoning mechanisms that have long been used; they may still be used by municipalities in those areas of the community where these tools remain appropriate. It does, however, require municipalities to take a more aggressive anti-sprawl approach, to allow higher density development in some areas of the community in exchange for open space, and to find and/or use in core areas of the municipality existing spaces that can accommodate the very type of (mixed and higher density) development that we say we like and want. Such development at this time is both economically and environmentally prudent. It is very likely that once municipalities adjust to these new (but historically familiar patterns of urban core development) we will again find (as we did with group homes, manufactured housing, and shoreland zoning) that the benefits of accommodation far outweigh any real or imagined adverse effects.

#### *Provision VI. Low- and Moderate-Income Housing*

Introductory Note: This provision amends ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter III, entitled Land Use Regulation, by adding a new section dealing with the placement of low- and moderate-income housing. All of the New England states as part of their panoply of planning and land use control legislation have provisions intended to facilitate the development of low- and moderate-income (affordable) housing;<sup>53</sup> none of these states, however, require that all municipalities provide suitably zoned land for such housing.<sup>54</sup> This is not the only

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53. See *infra* note 67 and accompanying text.

54. However, in its Comprehensive Plan requirements, Florida does require local governments to provide standards, plans, and principles for all anticipated housing needs of the community, including low- and moderate-income housing, mobile homes, and group homes. FLA. STAT. ANN. § 163.3177(6)(f)(1) (2003).

stumbling block to the creation of affordable housing, but according to housing experts, it is a major factor.<sup>55</sup> The legislation presented below addresses this problem; it requires municipalities to designate appropriate land areas in which affordable housing (whether publicly or privately sponsored) is a permitted use. The legislation also requires municipalities to allow reasonable departures from otherwise applicable standards and requirements in order to facilitate the actual construction of this sorely needed housing. This legislation, though tailored to fit into Maine's statutory framework, contains language and approaches that seem useful and that could be adapted by states (in or out of New England) seriously concerned with meeting low- and moderate-income housing needs.

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A, by adding a new § 4362.**

**§ 4362. Low- and moderate-income housing**

**1. Legislative intent.**

The Legislature recognizes that low- and moderate-income housing is (and has been) in short supply in most areas of the state. Notwithstanding the considerable efforts of federal, state, and local instrumentalities, as well as private (often not-for-profit) organizations to provide such housing, the economics of this housing market (*i.e.*, low profit margins) coupled with difficulty in finding sites on which such housing may be placed has perpetuated this shortage. It is the intent of the Legislature to address the latter problem by directing municipalities pursuant to their home rule authority to identify and authorize, by appropriate zoning enactments, individual parcels and larger land areas within the municipality on which low- and moderate-income housing may be placed.

**2. Required municipal actions.**

Two types of action are specifically required: First, all municipalities must identify individual parcels and provide a range of larger suitable land areas, appropriately zoned, on which low- and moderate-income housing (whether publicly or privately sponsored) may be placed as a matter of right. Such zones must be mixed use and/or mixed housing zones. Low- and moderate-income housing may not be put in a zone in which it is the only permitted use. Second, in order to facilitate the construction of such housing, all municipalities must (either within the framework of conventional zoning or by using contract and/or overlay zoning techniques) allow reasonable departures from otherwise applicable spatial standards and development requirements that the underlying (more traditional) zoning would impose.

**3. Other municipal actions.**

Beyond the requirements outlined in subsection 2, municipalities, in order to encourage the actual construction of low- and moderate-income housing, may utilize other police power tools (such as their spending and borrowing powers) and/or may appoint such boards, task forces, or authorities as they deem appropriate to facilitate the building of this type of housing.

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<sup>55</sup> See Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 WASH. U. J.L. & POL'Y 195, 197 & n.7 (2000). See generally Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 511 n.8 (2003).

#### 4. Enforcement.

Municipal ordinances or actions that have the effect of prohibiting, directly or indirectly, the construction of low- or moderate-income housing within the community are a violation of legislative intent entitling landowners, developers, sponsors, or the potential occupants of such housing living or operating within the municipality, and/or the Attorney General's office to seek appropriate remedial relief.

#### 5. Limitations.

Nothing in this section requires municipalities to allow any low- or moderate-income housing development in any setting that does not adequately protect the public's health and safety, including that of the occupants of such housing.

Commentary: This new statutory provision is not a cure-all for the unavailability of low- and moderate-income housing; it is intended to deal with only one aspect of the problem: the difficulty of finding sites. Whether we admit it, or not, low- and moderate-income housing in many municipalities has become a "classic" LULU/NIMBY. When an application to build such housing is on the table, the tone and rhetoric of opposition may have a certain civility to it, but the end result is often the same: this type of housing, for one reason or another, cannot be placed here, there, or anywhere. This provision recognizes that this problem is one of statewide significance and requires municipalities to do what they do best—inventor their own land, identify and/or find sites suitable for such housing, and then make a legislative judgment, a policy judgment, that allocates, through zoning, land for low- and moderate-income housing use. Any ensuing debate must then focus on the merits of a particular application: is the project well designed, and does it meet the development standards for such housing? If the answer to these questions is yes, the project must be approved. If the answer is no, the project must be reconfigured—so be it. The important point is that the availability and suitability of sites for this use will no longer be debatable; when a particular application is being reviewed, the legislative judgment that found the land "suitable" for this use will have already been made. Those who would provide such housing will then be able to address more or less objective factors—the LULU/NIMBY factors will have been largely removed. Most housing experts believe that this one step (identifying and allocating suitable sites for low- and moderate-income housing) is critically important—that it will make this type of housing more readily available.<sup>56</sup> Finally, this provision leaves those municipalities that are more sympathetic to meeting these housing needs completely free to exercise their wider bonding and spending powers to accomplish this end.

#### *Provision VII. LULU/NIMBY Developments*

Introductory Note: This provision amends ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter III, entitled Land Use Regulation, by adding a new section dealing with the placement of "locally unwanted land uses" (LULU) and develop-

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56. See, e.g., John D. Landis & Richard LeGates, *Housing Planning and Policy*, in *THE PRACTICE OF LOCAL GOVERNMENT PLANNING 227, 227-64* (Charles J. Hoch et al. eds., 3d ed. 2000).



ments subject to "not in my back yard" (NIMBY) attitudes.<sup>57</sup> No other New England state has fashioned legislation that attempts to deal with LULU/NIMBY issues as broadly as this proposed provision (and the two following provisions) would. They should be seen as an integrated package. Together they recognize that LULU/NIMBY problems are real; that society needs many of these LULU activities; that finding space for these activities is only the first step to solving the problem; that a necessary second step would require objective decision making with respect to these types of development; that "conditioned" approval of these activities is often possible; that financial incentives can be helpful in addressing these problems; and finally that an objective state level review mechanism often has a prophylactic effect leading to the actual placement of these activities (because municipalities behave more responsibly than they otherwise would when their decisions must be fully explained, and are subject to administrative and judicial review). Most of the New England states, like Maine, have sought to address one or two types of development that often fall into the LULU/NIMBY category, but none have created legislation as broad as what is presented here.<sup>58</sup>

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A, by adding a new § 4363.**

**§ 4363. The placement of locally unwanted land uses (LULU's) and developments subject to not in my back yard (NIMBY) attitudes**

**1. Legislative intent.**

The Legislature finds that the number of LULU developments subject to NIMBY attitudes is large and increasing. Yet many of these uses and developments are economically valuable and/or essential to the needs of society at large. Moreover, these activities are invariably legal and capable of being suitably positioned somewhere in the municipality. Further, if allowed in suitable locations, these

57. Other acronyms that planners use to describe this attitude are BANANA ("Build Absolutely Nothing Anywhere Near Anything"), CAVE ("Citizens Against Virtually Everything"), and NOPE ("Nowhere on Planet Earth"). PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, *LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW* 285 (1st ed. 1998). Washington State has recognized NIMBY in its statutes. WASH. REV. CODE § 36.70A.10 (2004); see also Philip A. LaRorque, *Where Will Our Children and Parents Live? Sustainable Development: A Builder's Perspective on Preserving Open Space to Promote Communities*, ALB. L. ENVTL. OUTLOOK 22, 23 (1999); Patrick Stevin, *NIMBYISM: A Mandate for Citizen Participation?*, FLA. B.J., Feb. 2004, at 38.

58. See the Introductory Note to Provision VI dealing with affordable, low- and moderate-income housing. See also ME. REV. STAT. ANN. tit. 30-A, § 4357-A (West 1996 & Supp. 2003) (dealing with group homes), and § 4358 (dealing with manufactured housing); CONN. GEN. STAT. ANN. § 8-119t (West 2001) (dealing with independent living arrangements for handicapped and developmentally disabled persons); MASS. GEN. LAWS ch. 40A, § 3 (Supp. 2003) (limiting regulation of religious facilities, manufactured housing, group homes, and childcare facilities); N.H. REV. STAT. ANN. §§ 674:31, 674:32 (1996) (dealing with manufactured housing); R.I. GEN. LAWS § 45-24-37 (1999) (dealing with permitted uses and specifically recognizing group homes and day care facilities); and VT. STAT. ANN. tit. 24, § 4406(4) (Supp. 2003) (dealing with providing space for, and treating equally, all forms of housing). However, in closing, it is important to reiterate that no New England state presently deals as comprehensively with LULU/NIMBY developments and activities as do the provisions that are proposed in this article.

uses and developments are often capable of being approved with appropriate conditions to guard against whatever risks or potential harms they might pose. Instead, these uses and developments are often denied access and/or planning approval for reasons that are obscure at best, and exclusionary and impermissible at worst. This being the case, it is the intent of the Legislature to require municipalities pursuant to their home rule authority to find suitable space for the widest possible range of land use activities, and to require that denials of access to a municipality and/or of planning approval be predicated on objective factors and substantial evidence in the whole record fashioned at the time a LULU applicant seeks access to, or planning approval from, a municipality.

## **2. Required municipal actions.**

Three types of action are specifically required: First, though each municipality cannot be required within its zoning ordinance to provide space for every conceivable land use, municipalities are required to provide through zoning (either as a permitted or a conditional use) a locational alternative for the widest possible range of land use activities. Second, applicants for uses not specifically enumerated in a zoning ordinance must be permitted to argue that their proposed use is “uniquely suited to a particular land area or zone”; or is “similar to” a permitted or conditional use allowed in a particular zone; or “poses no greater risks” than a permitted or conditional use allowed in a particular zone. Third, any municipality that denies a LULU all access to the community, and/or that allows access but denies planning approval to a proposed LULU development, must demonstrate that its decision is reasonable, *i.e.*, predicated on objective data, planning and/or technical criteria, and borne out by substantial evidence on the whole record compiled in the course of processing the applicant’s development proposal. A denied applicant must be provided with a final planning board or municipal order stating the reasons for denial.

## **3. Other municipal actions.**

Beyond the requirements outlined in subsection 2, municipalities, when dealing with LULU developments, shall whenever possible fashion necessary and appropriate conditions to address any risks and/or potential health and safety problems the proposed developments may create, rather than simply denying the application on the basis of these factors. Municipalities may also utilize the provisions of § 4325 to fashion shared regional approaches to the siting of LULU/NIMBY activities and developments.

## **4. Enforcement.**

Municipal ordinances or actions that have the effect of directly or indirectly prohibiting LULU/NIMBY types of development within the community are a violation of legislative intent entitling landowners or developers operating within the municipality and/or the Attorney General’s office to seek appropriate remedial relief.

## **5. Limitations.**

Nothing in this section requires municipalities to allow any LULU/NIMBY activity or development in any setting that does not adequately protect the public’s health and safety.

**Commentary:** This new statutory provision will not cure LULU/NIMBY problems overnight, but coupled with the provisions that follow dealing with financial

incentives and providing an appeals mechanism when development applications for such activities are turned down on what appear to be impermissible grounds, we will have turned an important corner. The point that no one seems to disagree with is that LULU/NIMBY problems are real, and getting worse. Moreover, there is widespread recognition of the fact that many of these activities are absolutely essential—we need them, they are economically valuable, and they contribute to the larger society's well-being.<sup>59</sup> Nevertheless, we have reached the point in some municipalities (indeed, in whole regions of the State) that we cannot put these land use activities anywhere.<sup>60</sup> This provision focuses on two critical problems: First, space for the widest possible range of LULUs must be provided in each municipality. Second, denials of planning approval for these activities must be predicated on objective criteria. All of the other features of this provision, *i.e.*, that developers may demonstrate the similarity of their activity to already permitted uses, that a complete record must be kept, that this record must bear out any municipal denial of development approval, and that "conditioned approval" (rather than summary denial) is the way to deal with these difficult to locate activities, simply reinforce the two central thrusts of this proposed legislation. Finally, passage of this proposed legislation has important policy implications. Notably, it asserts or reasserts several fundamental propositions, *i.e.*, that the State is and must be concerned with the larger public good, and that NIMBY attitudes are, when viewed closely, mean-

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59. Further, there have been emphatic calls in the planning literature for creation of standards to address the issue of regionally difficult-to-site land uses. See WEITZ, *supra* note 35 at 159-60. In Washington, this has been partially addressed with a program to identify "essential public facilities. . . . Local plans must include a process for identifying and siting certain regional facilities that would otherwise be difficult to site because of . . . NIMBY and . . . LULU" pressures. *Id.* The state office of financial management is central to this process:

- (1) The comprehensive plan of each county and city that is planning under [this chapter] shall include a process for identifying and siting essential public facilities. Essential public facilities include those facilities that are typically difficult to site . . .
- (4) The office of financial management shall maintain a list of those essential state public facilities that are required or likely to be built within the next six years. The office of financial management may at any time add facilities to the list.
- (5) No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

WASH. REV. CODE § 36.70A.200 (2003). These legal provisions do not address large scale private developments, but programs in Florida and Georgia do, as would the Provision we currently propose. See WEITZ, *supra* note 35 at 160.

60. A recent example in Maine was the rejection by the voters of Harpswell of a proposed liquefied natural gas (LNG) facility that would have been developed on property that was once used by the Navy to store jet fuel. The Town stood to receive more than \$8 million a year in lease fees and property tax revenues. Dennis Hoey, *Harpswell rejects LNG*, PORTLAND PRESS HERALD, Mar. 10, 2004 at A1. See also Orlando E. Delogu, "NIMBY" is a National Environmental Problem, 35 S.D. L. REV. 198 (1990); Peter W. Salsich, *Affordable Housing: Can Nimbyism be Transformed into Okimbyism?* 19 ST. LOUIS U. PUB. L. REV. 453 (2000); NAT'L LOW INCOME HOUS. COALITION, THE NIMBY REPORT: SMART GROWTH & AFFORDABLE HOUSING (Jaimie A. Ross ed., 2001), available at [www.nlihc.org/nimby](http://www.nlihc.org/nimby).

spirited, parochial, and unworthy of us.<sup>61</sup> For example, when a home for unwed mothers, or a battered woman's shelter, or an AIDS hospice is barred from a community on LULU/NIMBY grounds, these client groups do not go away; the problems these facilities would address do not end. The people involved, people who would be benefited by these facilities, are simply dealt with more meanly and their needs are not met: that is, or should be, unacceptable. These people are real, and their problems are real and far too prevalent in the society today. They must be addressed. Passage of this proposed legislation will enable us to deal more effectively with these LULU/NIMBY issues.

#### *Provision VIII. Financial Incentives*

**Introductory Note:** This provision is offered as an amendment to ME. REV. STAT. ANN. tit. 30-A, Chapter 223, Subchapter II, entitled State Funds, specifically § 5681, dealing with state-municipal revenue sharing. This amendment is designed to provide an economic incentive to carry out Provisions IV through VII of these legislative proposals.<sup>62</sup> No New England state currently offers any significant level of direct financial incentive to municipalities that undertake and complete the preparation of comprehensive plans and plan implementing regulatory controls. Nor are there financial incentives to municipalities to engage in largely state sponsored anti-sprawl strategies that today are widely recognized as essential. At the same time, however, municipal planning and land use control implementing strategies (in Maine and elsewhere) obviously impose a variety of direct and indirect costs on municipalities. The failure to provide state financial support leaves it to municipal governments alone to bear the costs for what we have already recognized is a shared state and local governmental responsibility—it simply becomes another unfunded state mandate. If we really want municipal governments to engage in comprehensive planning, and to put in place modern anti-sprawl land use control measures that meet the long-term needs of both levels of government in a manner that is consistent, fair, and assures developers and property owners through-

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61. Many environmental justice scholars have rightly argued that NIMBY attitudes often drive necessary but unwanted development disproportionately to minority and low income communities. See Michael B. Gerrard, *The Victims of NIMBY*, 21 *FORDHAM URB. L.J.* 495, 495-97, 522 (1994) (arguing that NIMBY efforts by affluent towns often lead to undesirable facilities and/or land uses being moved to minority communities); Charles P. Lord, *Community Initiatives: Environmental Justice Law and the Challenges Facing Urban Communities*, 14 *VA. ENVTL. L.J.* 721, 727 (1995) (finding that "a neighborhood such as Roxbury is likely to be a target for land uses that have high public health impacts and low employment benefits. At the same time, the industries that do provide jobs are likely to have heavy environmental impacts that go largely unregulated."); ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 33 (1990) (pointing out that hard-fought battles by environmentalists to prevent industrial siting often have the unintended effect of driving those facilities to areas near more vulnerable groups of people); Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 *B.C. ENVTL. AFF. L. REV.* 437, 441-43 (1988).

62. Economic incentives are specifically targeted toward the following proposed statutory provisions, which are to be found in title 30-A, as an encouragement to municipalities to adopt such provisions: the new § 4323 (dealing with comprehensive planning), the new § 4361 (dealing with clustered, planned unit, high density, and in-fill development), the new § 4362 (dealing with low- and moderate-income housing), and the new § 4363 (dealing with LULU/NIMBY developments).

out the state of equal treatment under the law, this funding oversight must be corrected.<sup>63</sup> The legislation proposed here does precisely this. It provides meaningful financial incentives to municipalities to engage in a course of conduct that will serve both their and the state's best interests. Obviously, individual states can scale their financial contribution up or down to reflect their individual fiscal circumstances and the sense of priority they would give to these undertakings. A brief experiment along these lines was undertaken in Maine in the late 1980s but was sharply limited for budgetary reasons in 1991.<sup>64</sup>

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A, § 5681 by adding a new subsection 5-A.**

**§ 5681. State-municipal revenue sharing**

**5-A. Economic incentives to carry out planning and land use control objectives**

**A. Legislative intent.**

The Legislature finds and reiterates here that the preparation of municipal comprehensive plans, coupled with the enactment of land use regulatory controls that implement adopted and approved plans is of the utmost importance to, and in the long-term best interest of, the entire State and deserves state fiscal support. Such plans and plan implementing controls will enable both state and local community planning goals to be met; at the same time they will limit sprawl. In addition to providing fiscal support for the planning process itself, the Legislature (by providing added fiscal support) would specifically facilitate clustered, planned unit, high density, and in-fill developments; developments that meet low- and moderate-income housing needs; and developments subject to LULU/NIMBY pressures. The Legislature recognizes that there are many direct and indirect costs imposed on municipalities that pursue any, or all, of these undertakings. This being the case, it is the intent of the Legislature to ease the fiscal burdens on those municipalities that participate in meeting these state sponsored planning and land use control objectives by increasing the state's municipal revenue sharing contribution, beyond the amounts allocated in § 5681(4-A) and (5) in the manner outlined below.

**B. Revenue sharing fund increases.**

In addition to the level of revenue sharing funds provided annually under § 5681(4-A) and (5), an additional 1.0% of taxes imposed under Title 36, Parts 3 and 8, shall be transferred by the State Treasurer from the General Fund to the Local Government Fund and set aside for distribution to municipalities in accordance with the following schedule. Set

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63. The importance and effectiveness of such state support has been demonstrated in Oregon. See generally *PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION* (Carl Abbott et al. eds., 1994).

64. See ME. REV. STAT. ANN. tit. 30-A, §§ 4341-4344 (West 1991) (repealed in 1991). What little remains of these financial assistance mechanisms is found in ME. REV. STAT. ANN. tit. 30-A, §§ 4345-4346 (West 1996 & Supp. 2003) (allowing a municipality to request, but not guaranteeing, financial or technical assistance for the purpose of planning and implementing a growth management program).

aside funds that remain undistributed at the end of each month will be returned by the State Treasurer to the General Fund.

(1) Municipalities that have completed and adopted a comprehensive plan (including required updates of that plan as specified in amended § 4323(2)), which plan and updates have been reviewed, approved, and certified by the State Planning Office, pursuant to § 4347-A, shall have their basic monthly revenue sharing fund allocation increased by 10%. The 1% set aside in the Local Government Fund shall be utilized for this purpose.

(2) After a certified comprehensive plan (or a revised plan) is in place, municipalities that have adopted land use control ordinances that incorporate provisions allowing clustered, planned unit, high density, and in-fill development (as specified in the new § 4361(2)), and that have approved a minimum of ten new development applications after the date of enactment of this legislation, shall have their basic monthly revenue sharing fund allocation increased by a further 10%. After initial qualification, continuing receipt of these funds is contingent upon approval of no fewer than three similar developments per year. The 1% set aside in the Local Government Fund shall be utilized for this purpose.

(3) After a certified comprehensive plan (or a revised plan) is in place, municipalities that further undertake to prepare a housing plan and/or a housing component to their comprehensive plan, and that have adopted land use control ordinances that provide a range of areas in which low- and moderate-income housing may be placed as a matter of right (as specified in the new § 4362(2)), and that after the date of enactment of this legislation have approved a minimum of five new low- or moderate-income housing development applications (creating not less than fifty new units of such housing) and/or that have increased the total number of low- and moderate-income housing units in the municipality to the state required minimum of 10% of the total municipal housing stock, shall have their basic monthly revenue sharing fund allocation increased by yet another 10%. After initial qualification, continuing receipt of these funds is contingent upon approval of at least one new low- or moderate-income housing development application per year and/or continuing to meet the 10% state minimum for such housing in a municipality. The 1% set aside in the Local Government Fund shall be utilized for this purpose.

(4) After a certified comprehensive plan (or a revised plan) is in place, municipalities that have adopted land use control ordinances that facilitate the siting of LULU/NIMBY developments (as specified in the new § 4363(2) and (3)), and that after the date of enactment of this legislation have approved a minimum of ten new development applications (at least five of which are in core or near-core areas of the municipality) meeting the LULU/NIMBY definition, such as but not limited to, group homes, public housing, waste

disposal facilities, communication towers, transmission lines, prison facilities, recycling facilities, gravel pits or other mining activities, manufactured housing subdivisions, power generating facilities, waste water treatment facilities, etc., shall have their basic monthly revenue sharing fund allocation increased by a final 10%. After initial qualification, continuing receipt of these funds is contingent upon approval of at least two similar developments per year. The 1% set aside in the Local Government Fund shall be utilized for this purpose.

(5) Municipalities that have completed all of the steps (1) through (4), and that maintain in their land use control ordinances those provisions, and application review processes, that facilitated this compliance, so that approval of these types of development (clustered, planned unit, high density, in-fill, low- and moderate-income housing, and LULU/NIMBY developments) is not just possible, but is actually achieved at least at the rates specified, will have qualified on a continuing basis to have their basic monthly revenue sharing fund allocation increased by an aggregate 40%. All of these incentive distributions shall be drawn from the 1% set aside in the Local Government Fund.

#### C. State Planning Office responsibilities.

(1) It shall be the responsibility of the State Planning Office to determine whether the specific requirements of § 5681(5-A)(B)(1) through (4) have been and continue to be met by any municipality seeking one, or more, of the incentives (revenue sharing fund increases) outlined, and to certify this compliance to the State Treasurer. The Treasurer shall not pay out to any municipality set aside planning and land use control incentive monies (from the Local Government Fund) without Planning Office certification, and shall immediately cease such payments when the Planning Office withdraws a municipality's certification for one, or more of the delineated incentives.

(2) The Planning Office is authorized, pursuant to the provisions of ME. REV. STAT. ANN. tit. 5, §§ 8051 through 8064, to promulgate such regulations, including municipal reporting requirements, as it deems necessary to carry out any of the certification requirements outlined in (C)(1).

**Commentary:** The intent of this proposed legislation seems clear—it commits the State to meet its fair share of what are now municipal fiscal obligations arising from the comprehensive planning process, and the implementation of modern land use control regulatory measures. It also induces municipalities to act in a highly responsible manner to meet their own and a wide range of state planning (including anti-sprawl) objectives. The set aside incentive funds (given the present scope and level of Maine's sales and income tax as of this date) will produce roughly twenty million dollars annually. An amount significantly lower than this, particularly in the first few years after this legislation is adopted, is more likely to be distributed. A reasonable estimate of this figure over years one through three is

three to five million dollars, growing over a three- to five-year period to five to ten million dollars. When the time frame for compliance and certification is extended to five to ten years, and beyond, the annual payout could reach ten to fifteen million; ideally, the full twenty million dollars will be distributed when, and if, a large majority of Maine towns qualify for two, three, or all four incentives. That the fund might exceed annual distributions for some period of time is not a concern because of the provision that channels undistributed revenues back to the State's General Fund. On the other hand, if our outermost expectations are met and all (or even most) Maine municipalities at some point qualify for all four incentive distributions, the set aside fund would have to generate forty million dollars annually. The one percent set aside rate would then need to be increased incrementally to two percent, but this scenario is unlikely for at least a decade or more. A more likely scenario (one that could begin sooner) would raise the set-aside rate as suggested and correspondingly increase the incentives created beyond the levels proposed here. Though these figures may seem large to some, every study to date suggests that the costs of unplanned growth and sprawl are considerably larger.<sup>65</sup> A useful analogy is to pollution costs, which experience has shown are infinitely higher than the costs of reasonable pollution control.<sup>66</sup> The incentives created by this proposed legislation, and the expenditures they entail, seem minimally necessary to achieve the ends we seek. Obviously, the amounts could be adjusted upward or downward by Maine (or any other state) commensurate with the respective state's budgetary resources and its commitment to these planning and land use control objectives. But it must be borne in mind that the objectives we would achieve cannot be obtained on the cheap—there is no such thing as a “free lunch.” If we wish to seriously address planning and land use control on a statewide basis and in a manner that shares the costs involved, significant and meaningful financial incentives must be created—anything less is a sham.

#### *Provision IX. State Level Administrative Review*

**Introductory Note:** This provision is offered as an amendment to ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter III, entitled Land Use Regulation, by adding a new section creating a state level administrative body to review municipal rate of growth, “cap” ordinances enacted pursuant to ME. REV. STAT. ANN. tit. 30-A, § 4360, and denials of development approval and/or the imposition of unreasonable conditions to development approvals arising out of rights and duties imposed by ME. REV. STAT. ANN. tit. 30-A, §§ 4361 through 4363. Several New England states presently have mechanisms that provide a level of state administrative review of local government denials of planning approval for low- and moderate-

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65. Among these excessive costs are: roads and utility extensions; declines in economic opportunity in traditional town and city centers; disinvestment in existing buildings, facilities, and services in urban and village centers; relocation of jobs to peripheral areas at some distance from population centers; declines in number of jobs in some sectors, such as retail; isolation of employees from civic centers, homes, daycare and schools; and reduced ability to finance public services in urban centers. For a review of these issues, see Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 URB. LAW. 159, 159-81 (1997).

66. As an example, one state study of recently passed anti-smog legislation in California estimated that the costs of the new air pollution control law are \$3.2 billion, as compared to \$6.6 billion in health benefit costs. Gary Polakovic, *State OKs New Plan for Clean Air*, L.A. TIMES, Oct. 24, 2003, at 2.2.



income housing.<sup>67</sup> These mechanisms are clearly aimed at facilitating the creation of such housing. They provide a developer of this type of housing with a means of recourse beyond local officials who may be unsympathetic to the need for such housing, and/or who would impose such stringent limitations or conditions on development approval that this type of housing would be all but impossible to build in that community. The experience of these states suggests that state level administrative reviews are not often triggered; their very existence gives rise to a desired prophylactic effect.<sup>68</sup> Local governments, aware that state review is possible, examine low- and moderate-income housing development proposals in a more balanced and reasonable manner. They wish to avoid state level review and the more uncertain outcomes it may produce. They wish to control locally the number, density, location, and conditions attached to housing of this type. This is acceptable as long as it is done reasonably so that neither the state nor the developer has any basis for complaint. The legislation proposed here fully accepts the underlying rationale of these existing state review mechanisms—it simply extends that rationale to a wider range of desired state land use control and development objectives. Beyond developers who face unreasonable constraints on the building of low- and moderate-income housing, developers facing unreasonable “cap” ordinances, irrational limitations on clustered, planned unit, high density, and in-fill development, and/or irrational LULU/NIMBY attitudes will also have recourse to corrective state level administrative review. The review proposed here gives municipalities a full opportunity to justify their actions, *e.g.*, the reasonableness of “cap” ordinances, denials of development approval and/or conditions of approval attached to a particular development. If there is a reasonable basis for a municipal decision, it must be sustained. State level review is not intended to be a vehicle for substituting state judgment for reasonable local decision making. But, if no reasonable basis for a local determination can be provided, state review can, and should, overturn it.<sup>69</sup> The developer may then proceed free of the unreasonable constraint. Finally, it is anticipated that the review mechanism created here, though broader in scope than those presently existing in other New England states,<sup>70</sup> will not (after a

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67. See generally, CONN. GEN. STAT. ANN. § 8-30g (West 2001) (creating a mechanism for state level review of adverse local affordable housing decisions); MASS. GEN. LAWS ch. 40B §§ 20-23 (West 1994 & Supp. 2003) (creating a similar mechanism); and R.I. GEN. LAWS §§ 45-53-1 to 45-53-7 (1999 & Supp. 2003) (creating a state level low- and moderate-income housing appeals board designed to review adverse local decisions with respect to such housing). For an excellent overview of Connecticut’s law in practice, see generally Peter J. Vodola, *Survey: Connecticut’s Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235 (1997).

68. Cf. Vodola, *supra* note 67, at 1275.

69. Again we are discussing shared responsibility between local governments and the state, especially regarding land use decisions that have impacts beyond the borders of the local government. As Steve Belmont has described it, “[s]tate and federal officials must recognize that city officials and neighborhood activists cannot be trusted to act in the best social and environmental interest of the city and metropolis.” STEVE BELMONT, CITIES IN FULL: RECOGNIZING AND REALIZING THE GREAT POTENTIAL OF URBAN AMERICA 451 (2002). Though he was describing cities, the same reasoning applies to small local governments: creation of the proposed administrative review body would represent the State of Maine by meeting part of its responsibility to protect resources and interests that can reasonably be viewed as extending beyond the borders of a single municipality.

70. See *supra* text accompanying note 67.

period of initial testing) be triggered with unacceptable frequency. The same prophylactic effect that other states have experienced with respect to low- and moderate-income housing will almost certainly be experienced here with respect to the broader range of issues proposed for Board review. In short, local governments will want to remain in control of their land use regulation destinies. Acting reasonably is a small price to pay for retaining such control.

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A, by adding a new § 4364.**

**§ 4364. State level administrative review of a limited range of local land use control regulations and denials of development approval**

**1. Legislative intent.**

Reiterating the purpose and goals outlined in § 4312, particularly subsection 5, the Legislature finds that a state level administrative review body charged with reviewing a limited range of local land use control ordinances, regulations and/or denials of development approval in accordance with the following provisions is an essential mechanism to promote an even-handed, fair, and comprehensive state-wide approach to land use planning and the regulation of development. Accordingly, it is the intent of the Legislature by this enactment to create such a body within the State Planning Office, and to clothe this body with the powers and duties outlined below.

**2. Creation of a State Land Use Regulation Review Board.**

**A.** There is hereby created a three-member State Land Use Regulation Review Board. For the purpose of taking any authorized action, the presence of two members of the Board shall constitute a quorum. The Governor shall designate one of the three members to be the chair.

**B.** The three members shall be appointed by the Governor, subject to review by the joint standing committee of the Legislature having jurisdiction over local government matters, and to confirmation by the Senate. One member of the Board shall be a full-time employee of the State Planning Office recommended by the State Planning Director who must have experience and complete familiarity with State planning goals and the implementation of local growth management programs as outlined in §§ 4312 through 4347-A; one member of the Board shall be a full-time planner with a degree in public administration or planning; one member of the Board shall be an attorney with extensive practice experience in land use planning law and/or administrative law.

**C.** The initial appointment of one of the three Board members shall be for a period of one year; the initial appointment of the second of the three Board members shall be for a period of two years; the initial appointment of the third Board member shall be for a period of three years. All subsequent appointments of Board members shall be for a period of three years. Board members may not be appointed to serve more than two three-year terms. In cases where an appointed Board member is unable to complete his/her term, the Governor shall appoint a replacement to fill the unexpired portion of that member's term.

D. The non-full-time state employee members of the Board are entitled to compensation according to the provisions of ME. REV. STAT. ANN. tit. 5, § 12004-D.

E. Board members are governed by the conflict of interest provisions of ME. REV. STAT. ANN. tit 5, § 18.

F. The Board shall be housed within, and shall be provided with administrative and technical staff support services by, the State Planning Office. The Attorney General's office shall provide the Board with such legal counsel as is necessary for the Board to carry out its duties.

### 3. Issues appealable to the Board.

The only issues subject to review by the Board are the following:

A. Assertions by property owners within a municipality, by developers operating within that municipality, or by the Attorney General's office, that a rate of growth ("cap") ordinance enacted by the municipality is not in compliance with the provisions of amended § 4360.<sup>71</sup>

B. Assertions by property owners within a municipality, or by developers operating within that municipality, or by the Attorney General's office, that the requirements of §§ 4361, 4362, and 4363 (as outlined herein)<sup>72</sup> have not been complied with; or, if complied with, that the municipal development application process has resulted in the unreasonable denial of, or the attachment of unreasonable conditions to, an application made pursuant to the municipal ordinance for one of these types of development.

C. In settings where property owners and/or developers operating within a municipality assert that the municipal development application process has resulted in the unreasonable denial of, or the attachment of unreasonable conditions to, an application for one of the types of development subject to Board review, the complainant, before appealing to the State Land Use Regulation Review Board, shall first seek relief before the Municipal Zoning Board of Appeals if such a body exists in the municipality. If relief is not obtained, the statutory period within which judicial review of Board of Appeals decisions must be filed shall be tolled to allow the complainant to obtain review by this Board.

### 4. Parties that may appear before the Board.

The only parties that may appear before the Board are representatives of the Attorney General's office, property owners residing in, or developers operating within, a municipality who raise an issue subject to Board review pursuant to subsection 3 above, and designated representatives of the municipality; the latter are charged with defending the municipal ordinance and/or the actions taken pursuant thereto that are under review.

### 5. The powers and duties of the Board.

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71. See *supra* Provision III of this legislative package.

72. See *supra* Provisions V, VI, and VII of this legislative package relating respectively to clustered, planned unit, high density, and in-fill development; the development of low- and moderate-income housing; and LULU/NIMBY developments.

A. Pursuant to, and in compliance with, the Maine Administrative Procedure Act, ME. REV. STAT. ANN. tit. 5, commencing with § 8001, the Board may adopt such practice, administrative, procedural, interpretive, and substantive rules as it deems necessary to carry out the review functions assigned to it.

B. Upon receipt of an application for review, the Board shall make an initial determination of reviewability. If it finds the matter reviewable under subsection 3 above, it shall notify all of the parties of its determination and promptly schedule such further proceedings as its rules require. With respect to all issues deemed reviewable, the review shall be predicated solely on a reasonable interpretation of the language of the municipal ordinance in question and/or on the record fashioned by the municipality in the course of its development review processes. If the Board finds that the ordinance in question is in compliance with the relevant state statute, the municipal ordinance is entitled to be sustained. If the Board finds that the record fashioned by the municipality in the course of its development review processes sustains the denial of development approval and/or sustains conditions attached to a development approval, the municipal action is entitled to be sustained. The Board is not free to hear additional witnesses, take additional testimony, or to augment the record that produced the municipal decision. The Board is free to receive briefs and/or to hear oral arguments outlining opposing interpretations of the ordinance language, and opposing views with respect to whether the body of evidence in the record either sustains, or does not sustain the municipal action under review.

If the Board finds that an application for review presents issues or matters that are not reviewable under subsection 3 above, it shall set forth its reasons for its non-reviewability determination and promptly return the application to the party seeking review. The disappointed party may, within thirty days of the Board's decision, seek judicial review of this (the Board's) reviewability determination, pursuant to subsection 8 of this section. In these situations, the Board's determination (though only jurisdictional in character and not substantive) shall be deemed a "final Board decision"; judicial review in such cases is limited to the question of reviewability.

C. The Board shall issue its reviewability determination within thirty days of receipt of an application for review; in cases where the Board determines that the matter presented is reviewable, it shall have an additional 120 days (from the date of its reviewability determination) to complete its substantive review and render its decision. All Board decisions must be in writing, dated, and must fully set forth the Board's findings of fact and the reasoning that underlies its ultimate conclusion. The Board may schedule such meetings as it deems necessary to discharge its workload within the time frames outlined. All proceedings of the Board shall be recorded.

#### **6. The standard of review to be used by the Board.**

The Board shall apply a "substantial evidence on the record as a whole" standard of review in determining whether a municipal ordinance subject to review complies with the statute, or whether a municipal development application record is

sufficient to sustain a denial of approval, and/or conditions attached to a development approval. In reviewing a municipal ordinance or record, the Board shall not give weight to anecdotal testimony predicated on unfounded assertions, fears, or apprehensions; it may give weight only to objective data, planning and/or technical (engineering) data or criteria.

#### **7. The scope of relief that may be granted by the Board.**

**A.** When review by the Board determines that the defects in a municipal ordinance and/or in a development application record are minor, and the municipality evidences a willingness to correct these deficiencies and bring the ordinance into compliance with state statutes, and/or a willingness to augment a development application record so that it reasonably sustains either the denial of the proposed development, or the approval of the development with reasonable conditions, the Board, with appropriate instructions, may remand the issue being reviewed to the municipality for further action at that governmental level.

**B.** When review by the Board determines that the defects in a municipal ordinance and/or in a development application record are major, *i.e.*, when the ordinance in significant ways violates state statutes, or the record falls far short of sustaining a denial of, or sustaining conditions attached to the particular development proposal being reviewed, the Board shall so indicate these facts in its decision, and may grant approval to the developer to proceed with the project. In cases where development approval is granted by the Board, and not by municipal authority, the Board shall accept any conditions on the approval tendered by the municipality that the Board determines to be reasonable.

#### **8. Judicial review.**

Final Board decisions may be challenged by the non-prevailing party or by the Attorney General by appeal to the Superior Court. Such appeals shall be taken in accordance with ME. REV. STAT. ANN. tit. 5, Chapter 375, Subchapter VII; the appeal shall be limited to review of the whole record. This whole record shall include all materials fashioned at the municipal level and presented to the Review Board, and those materials, fashioned in the course of the administrative review process, including, to the extent necessary for judicial review, a transcript of proceedings before the Board, and a copy of the Board's final decision. The Board's decision is entitled to be sustained if, when viewed in light of the whole record, it is supported by substantial evidence, and therefore is neither arbitrary nor capricious.

**Commentary:** The intent of this proposed legislation is to create a mechanism that gives real meaning to the fundamental concepts of uniformity, fairness, and equal treatment under the law to property owners and developers subject to municipal land use controls. At the same time, this mechanism and the ever-present possibility of Attorney General involvement in the review process breathes life into state-wide planning guidelines and limitations, and supports the shared responsibility of both state and local governments to accommodate low- and moderate-income housing needs, anti-sprawl strategies, and the locating of LULU/NIMBY developments. In the same way that judicial review of agency decision making causes agencies

(at all levels of government) in Maine and in the rest of the nation to act more responsibly than they otherwise might, the very existence of a State Land Use Regulation Review Board will cause municipal governments to act more responsibly, and to act in a manner that is demonstrably reasonable when they deal with those important planning and land use control issues that are made subject to review. The Board usurps no prerogative of local government except the prerogative to ignore state statutes and/or to act unreasonably. Given our form of government and the concepts of "due process" that inhere in our constitution it cannot be seriously maintained that any such irresponsible prerogatives exist. The powers and duties of the Board have been carefully crafted with an eye to limiting their scope, limiting the issues that may be brought to the Board, limiting those who may trigger Board review, and affording municipalities broad latitude to sustain their ordinances and the actions they have taken pursuant to those ordinances. Only when the Board finds an inordinate level of municipal recalcitrance is it empowered to fashion a remedy approving a particular development proposal that is being blocked by unwarranted and unsustainable municipal conduct; even here the Board must fashion conditions of approval that fully protect the reasonable health and safety concerns of local residents. Finally, to assure that the Board itself does not act unreasonably, it is subject to judicial review, and of course, the long-term workings of the Board may be fine-tuned by legislative amendment as experience and need dictate. In short, this is a necessary review mechanism, a mechanism that, as noted, has worked in a more limited form in other New England states, has worked in analogous judicial review settings, and will work here. If our rhetoric about statewide planning goals, fairness, and uniform treatment under the law is to have meaning, it deserves adoption.

*Provision X. Enforcement, Judicial Review, and the Exercise of Initiative Powers*

**Introductory Note:** This proposed legislation amends ME. REV. STAT. ANN. tit. 30-A, Chapter 187, Subchapter V, entitled Enforcement of Land Use Regulations, by adding a new section dealing with Attorney General enforcement duties and limiting judicial review and initiative powers in planning and land use regulation settings. All of the New England states, indeed all states, have a panoply of administrative and judicial review mechanisms by which planning and land use regulatory decisions may be challenged by a wide (perhaps too wide) range of aggrieved and/or disaffected parties.<sup>73</sup> From Zoning Boards of Appeal to citizen initiative mecha-

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73. See generally, CONN. GEN. STAT. ANN. §§ 8-6 to 8-9 (2001 & Supp. 2003) (dealing with zoning boards of appeal, judicial review of board decisions, and judicial review of planning and zoning commission decisions); MASS. GEN. LAWS ch. 40A, §§ 12-17 (1994 & Supp. 2003) (dealing with zoning boards of appeal, appeals to zoning administrators, appeals to permit granting authorities, and finally judicial review of planning and regulatory decisions), and MASS. GEN. LAWS ch. 41, §§ 81Z, 81AA, & 81BB (dealing with boards of appeal and judicial review of subdivision control laws); N.H. REV. STAT. ANN. §§ 677:1-677:19 (1996 & Supp. 2003) (outlining an extensive array of rehearing, administrative and judicial review mechanisms); R.I. GEN. LAWS §§ 45-23-66 to 45-23-73 (1999 & Supp. 2003) (dealing subdivision law appeals and judicial review), and §§ 45-24-63 to 45-24-71 (dealing with zoning boards of appeal, judicial review of board decisions, and appeals of zoning enactments and amendments thereto); and VT. STAT. ANN. tit. 24, §§ 4461-4476 (1992 & Supp. 2003) (outlining administrative and judicial review mechanisms applicable to planning and land use regulatory decisions). Maine has similar statu-

nisms;<sup>74</sup> from Attorney General enforcement to municipal code enforcement officers; from developers to abutters to citizen interest groups; small substantive decisions and larger policy issues may be reviewed and affirmed or overturned as facts and circumstances dictate. Nothing proposed here significantly alters these essential review mechanisms which are an integral part of our democratic system, concepts of "due process," and which provide important "checks and balances" and legitimacy to a land use control regulatory system. But there are settings where enforcement and review powers are not brought to bear when perhaps they should be, and other settings where there is too much review. The latter include instances where review has been inappropriately used as a tool of delay by those who wish to impose costs upon the developer, and/or by those who simply do not agree with, and would overturn by any means at hand the decisions that have been made by elected officials or administrative bodies. The legislation proposed here will modestly address these excesses. It includes mechanisms requiring the Attorney General to protect and defend state planning goals and guidelines and to challenge municipal and developer actions inconsistent with these guidelines and related implementing statutes.<sup>75</sup> At the same time this legislation would make the use of review mechanisms for purposes of delay more difficult. It would narrow slightly Maine's use of initiative powers to conform such use to widely accepted national norms. All of these steps are essential if we are serious about achieving the State's planning goals and making room for the types and variety of development (some quite unpopular, but nonetheless necessary) addressed in this legislative package.

**This proposed statutory language amends  
ME. REV. STAT. ANN. tit. 30-A by adding a new § 4452-A.**

**§ 4452-A. Attorney General enforcement duties and limits on judicial review and the exercise of initiative powers in planning and land use regulation cases.**

**1. Legislative intent.**

Reiterating the purposes and goals outlined in § 4312, particularly subsection 5, and the Legislative intent expressed in [Provisions III-VII, and IX of this proposed legislative package], the Legislature finds that to achieve these objectives it is necessary to bring the Attorney General's enforcement powers more directly to bear. At the same time tactics, whether through litigation or the use of initiative powers, that seek little more than to delay achievement of objectives laid out in the State's planning and land use regulatory statutes must be deterred. It is the intent of the Legislature by the provisions in this section to address these issues.

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tory provisions. See ME. REV. STAT. ANN. tit. 30-A, § 4353 (West 1996 & Supp. 2003) (establishing zoning boards of appeal, which includes a general right to judicial review of final administrative action), and §§ 4451-4453 (creating mechanisms for municipal enforcement of land use laws and ordinances).

74. See ME. CONST. art. IV, Pt. 3, § 18 (creating direct state level initiative powers), and § 21 (authorizing the initiative at municipal governmental levels). The latter mechanism has been utilized (creatively, and sometimes less so) to fashion and amend local zoning ordinances.

75. See *Buck v. Town of Yarmouth*, 402 A.2d 860, 863 (Me. 1979) (clarifying that the public interest and general laws of the state must ultimately be enforced by the Attorney General of the State).

A mechanism is fashioned that more fully directs enforcement of state land use planning purposes, goals, objectives, statutes, etc., by the Attorney General; and limitations are placed on the power of those who would litigate and/or use initiative processes to unreasonably delay achievement of purposes and goals embodied in state statutes, municipal ordinances, and administrative actions taken pursuant thereto.

## **2. Enforcement duties of the Attorney General's Office.**

To achieve compliance with state planning and land use regulatory statutes such as, but not limited to, § 4323 as amended (dealing with comprehensive plans), § 4360 as amended (dealing with "cap" ordinances), the new § 4361 (dealing with clustered, planned unit, high density, and in-fill development), the new § 4362 (dealing with low- and moderate-income housing), the new § 4363 (dealing with the placement of LULU/NIMBY developments), and the new § 4364 (creating a state level Board of Review), the State Planning Office, through the State Planning Director, may formally request the Attorney General to bring appropriate enforcement proceedings against municipalities and/or developers arguably not in compliance with these or related statutes, local ordinances, and/or administrative actions growing out of these planning and land use regulatory statutes or ordinances. Upon such request the Attorney General's Office working with the technical assistance of the State Planning Office shall bring such proceedings as it deems necessary to effectuate the desired compliance.

## **3. Limitations on suits challenging land use ordinances and/or administrative actions taken pursuant to such ordinances.**

Beside the usual "case or controversy," "standing," and "prudential" requirements imposed on aggrieved parties who would judicially challenge land use control ordinances and/or administrative actions taken pursuant to such ordinances, the party initiating such a suit must have participated (individually, through counsel, or in some written form) in the proceedings that gave rise to the final action being challenged, and must have raised to the decision-making body, prior to the final action being complained of, all relevant objections thereto. In addition, an aggrieved party challenging a land use control ordinance and/or administrative actions taken pursuant to such an ordinance must demonstrate some unique or particularized actual injury, or the imminent and likely threat of such injury. The injury may be economic or may be the infringement of some other protected interest; the injury must be other than (more specific than) a generalized harm to the municipality or to the public at large.

## **4. Limitations on the use of initiative mechanisms to challenge municipal land use ordinances and/or administrative actions taken pursuant to such ordinances.**

Citizen groups may not use initiative mechanisms to overturn or revoke presumptively valid municipal ordinance(s) (or parts thereof) required to be adopted by, or predicated upon, state planning and land use regulatory statutes; nor may such groups use initiative mechanisms to overturn or revoke municipal actions (whether legislative in form, such as a contract rezoning, or purely administrative, such as a planning board approval) that grant, or authorize the granting of, development permission, and required building permits, to an individual project developer or applicant. Initiative mechanisms may continue to be used affirmatively at the local government level to put prospective, broad, purely legislative policy alternatives before a local electorate.



Commentary: The intent of these provisions is to: First, put a powerful tool in the hands of the State Planning Office to gain compliance with state planning and land use regulatory statutes by enabling the Office to invoke the enforcement assistance of the Attorney General (an assistance that has not always been readily available in the past) and second, to put relatively minor, and not difficult, participatory and harm demonstration burdens on those who would litigate the invalidity of land use ordinances and administrative actions taken pursuant thereto. These threshold requirements will make nuisance suits (suits that seek little more than to delay ordinances and actions that are presumably in compliance with state planning and land use regulatory statutes) more difficult. Finally, the use of local initiative mechanisms simply to overturn ordinances that may be unpopular but that comply with state planning and land use regulatory statutes is barred;<sup>76</sup> also barred is the use of local initiative to overturn individual site specific administrative type planning approvals granted to particular developers and projects.<sup>77</sup> This Provision recognizes a dichotomy between broad, prospective policy making by initiative (usually permitted) and intrusions into administrative, quasi-judicial decision making by initiative (that is seldom permitted). This dichotomy has been widely recognized and sustained by the courts in a majority of jurisdictions.<sup>78</sup> The proposed provision expressly preserves the right to use the initiative to address the broadest range of policy questions, *i.e.*, to attempt to put in place any statutorily permitted policy

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76. A recent Maine example occurred when Scarborough voters overturned town council approval of a mixed-use cluster style development that was styled as the "Great American Neighborhood," and that was endorsed by the Maine State Planning Office. Mark Peters, *Voters Reject "Great Neighborhood": Scarborough Residents Decide the Proposed Cluster Development is Too Large for the Town to Handle*, PORTLAND PRESS HERALD, July 30, 2003, at A1. After the initiative vote, the State Department of Transportation withdrew \$2 million dollars that was pledged to facilitate traffic improvements in, and proximate to, the project site. They reasoned that, if the project was not going to be built, the improvements were not as essential; moreover, the state transportation cost benefits of a large "anti-sprawl" project would be lost. Justin Ellis, *Developers Suing Scarborough; ALC Development Corp. Says the Town is Violating its Own Growth Plan and State Law*, PORTLAND PRESS HERALD, Jan. 28, 2004, at B2. An attempt at a compromise settlement between the developer and town failed, and, at time of publication of this article, litigation is moving forward. See *Complaint of ALC Development v. Town of Scarborough* (Me. Super. Ct., Cumb. County, Sept. 12, 2003) (on file with author). See also *Kittery Retail Ventures, LLC v. Town of Kittery*, CV-02-162 (Me. Super. Ct., Yor. Cty., May 29, 2003) (Fritzsche, J.) (currently on appeal to the Maine Supreme Judicial Court) (Superior Court upheld a referendum that successfully amended the zoning code to eliminate transfer of development rights and reduce the maximum buildable area in response to a proposed retail outlet mall, and also upheld a second referendum to make the first referendum apply retroactively in order to affect the proposed development).

77. See SALSICH & TRYNIECKI, *supra* note 57, at 165-69, for an overview of case law on the use of initiative or referendum to enact or overturn zoning ordinances. See generally RICHARD J. SCHEURER & GRANT P. NESBITT, *INITIATIVE AND REFERENDUM IN THE LAND USE PROCESS* (2003).

78. See *Glover v. Concerned Citizens for Fuji Park*, 50 P.3d 546, 549-50 (Nev. 2002), see also *Garvin v. Ninth Judicial Dist. Ct.*, 59 P.3d 1180, 1190 (Nev. 2002) (narrowing *Glover* to the extent that it relied upon the *Forman* test which the *Garvin* court narrowed in scope). The *Forman* test has been affirmed as "[a]n ordinance originating or enacting a permanent law or laying down a rule of conduct or course of policy for the guidance of the citizens or their officers and agents is purely legislative in character and referable, but an ordinance which simply puts into execution previously-declared policies, or previously-enacted laws, is administrative or executive in character, and not referable." *Forman v. Eagle Thrifty Drugs & Markets*, 516 P.2d 1234, 1236 (1973).

option or alternative. Again, this limitation on the use of initiative mechanisms seems both modest and appropriate; it will only bar the misuse of the tool, not its creative possibilities.

### III. CONCLUSIONS

The authors have no illusion that the passage of these ten provisions will cure the land use problems facing Maine and its municipalities; moreover, passage of this proposed legislative package, or of even some of these provisions, does not seem imminent. As necessary as many of these provisions seem to planners, land use lawyers, and those actively involved in anti-sprawl efforts, each provision (and clearly the aggregate) strains the delicate political balance between state governmental powers and deeply rooted "home rule" powers. What does seem possible is the beginning of a new dialogue between those charged with land use and environmental control responsibilities at a state level, and those who have historically exercised land use control powers at the local governmental level. In the course of this dialogue, the benefits of a more shared relationship between the two levels of government can be more carefully articulated; the true costs of sprawl can begin to be better understood; the fairness and the degree to which the state should bear the fiscal burden for achieving statewide land use objectives can be examined; the viability of many of the suggestions laid out in these ten provisions can begin to be appreciated. But in the final analysis, it is an ambivalent state legislature that must act. In times past the Maine legislature has shown great courage and foresight, *e.g.*, passage of the Site Law, the creation of LURC, mandatory shoreland regulation, legislation requiring towns to find space for group homes and manufactured housing, are just a few examples. At other times, the legislature has backed away from its responsibility, *e.g.*, its withdrawal of funding for comprehensive planning, its failure to create mechanisms to enforce state planning guidelines, to limit "caps," to foster higher density development in urban core areas. Whether the pressures of increasing sprawl will enable the legislature at some point to overcome the resistance of local governments to change along the lines suggested in this Article is problematic. One hopes the "political will" will be found—but one is never sure.

