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# Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews (Comment)

KATHRYN C. PLUNKETT<sup>1</sup>

## I. Introduction

In 1970, the federal government adopted the National Environmental Policy Act (NEPA)<sup>2</sup> to mitigate the accumulative environmental harm caused by federally undertaken or supported land development. The heart of NEPA is the requirement that federal agencies conduct environmental impact review (EIR) of the development projects they initiate or support.<sup>3</sup> EIR is a process that requires government decision-makers to determine whether projects will have a significant environmental impact and to consider how such impacts may be ameliorated. By stressing consideration of the detrimental environmental effects of government actions *before* they take place, NEPA strives to instill environmental values in government agencies, ensuring environmentally sound use of our nation's lands and resources.

Several states, including California, New York, and Washington, have enacted state environmental policy acts (SEPA's).<sup>4</sup> Like NEPA, the state statutes stress the importance of environmental protection and mandate EIR. While most SEPA's apply only to state agency actions, six states have applied the statutes to the actions of local government agencies. New York's SEPA, for ex-

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1. Second year law student at Pace University School of Law and research fellow with the Pace Land Use Law Center. I wish to thank Professor Daniel R. Mandelker, the Howard A. Stamper Professor of Law at the Washington University School of Law, for his invaluable assistance and guidance in preparing this comment. In addition, a special thank you to Professor John R. Nolon, Charles A. Frueauff Research Professor at Pace University School of Law, for his encouragement and editorial suggestions.

2. 42 U.S.C. §§ 4321- 4370 (2000).

3. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §1.01 (West 2d ed. 2001) [hereinafter NEPA LAW].

4. Nicholas A. Robinson, *SEQA's Siblings: Precedents from Little NEPA's in the Sister States*, 46 ALB. L. REV. 1155, 1157 (1982).

ample, emphasizes that "all agencies . . . are stewards of the air, water, land and living resources."<sup>5</sup> The application of SEPA to local government actions has contributed to recognition of the important role that local governments play in environmental protection.

Despite the environmental value of conducting EIRs, most local governments do not require such review of proposed development actions. This is because the majority of states have not adopted SEPA or do not apply their SEPA to local governments. Local governments, however, need not rely upon SEPA for authority to conduct environmental review of locally initiated, supported or approved land development projects. Under state municipal home rule and zoning and planning enabling acts, local governments in some states may find authority to adopt their own environmental impact review laws to ensure that local land use does not contribute to the degradation of the natural environment.<sup>6</sup>

While local EIR serves important environmental purposes, it also impacts local land use planning and regulation. EIR results in an additional layer of procedures and considerations in the land use decision-making processes by requiring impact assessment statements, environmental studies, public hearings, and published findings. When conducted in conjunction with traditional development approval processes such as subdivision and site plan review, a cumbersome process may result. In its *Growing Smart Legislative Guidebook*, the American Planning Association suggests methods of integrating EIR with local planning.<sup>7</sup> Integration methods aim to assess environmental impacts and to formulate mitigation measures at the planning stage so as to avoid the full EIR process for each development proposal. This approach saves municipalities' and developers' time and money, but does not subject large development projects to individual environmental reviews.

Part II of this article includes an overview of NEPA and the SEPA in Washington, California and New York, along with a description of how these statutes provide for local EIR. Methods of integrating EIR with local planning and land use regulation are

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5. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(b) (2002).

6. See N.Y. TOWN LAW § 272(a) (McKinney 2000).

7. AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 12-1* (Stuart Meck ed., 2002).

highlighted. Part III discusses the authority available to local governments to initiate local environmental impact review statutes and to integrate EIR with local planning. A local environmental impact statute adopted in South Carolina is presented, illustrating how local governments in states without SEPAs can implement EIR. Part IV discusses methods of integrating EIR with local planning processes in an effort to streamline local approval processes and provide for more effective and far-reaching protection of the environment. Local EIR illustrates how land use regulation and environmental law intersect to achieve comprehensive environmental protection.

## II. Environmental Impact Review (EIR): The National Environmental Policy Act and its Progeny

### a. The National Environmental Policy Act (NEPA)

A short overview of NEPA provides a context for discussing the role of EIR at the local level. The concept of EIR was introduced in the United States when Congress enacted NEPA in 1970.<sup>8</sup> Environmental impact review was a novel concept in the American legal system when NEPA was introduced. Prior to NEPA, most federal environmental legislation was “mission-oriented,” focusing on threats to specific natural resources.<sup>9</sup> However, this mission-oriented approach resulted in an underrepresentation of environmental considerations in short and long-term decision-making.<sup>10</sup> In order to instill environmental values in the decision-making process, an action-forcing element needed to be added. NEPA achieved this by requiring the preparation of an environmental impact statement for all federal actions that significantly affect the quality of the human environment.<sup>11</sup> Under NEPA, federal agencies must prepare a “detailed statement” on the “environmental impact of the proposed action, . . . any adverse environmental effects, . . . alternatives to the proposed action, . . . [and] the relationship between local short-term

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8. 42 U.S.C. §§ 4331 - 4370f (2000).

9. NEPA LAW, *supra* note 3, §1.02.

10. *Id.*

11. 42 U.S.C. § 4332(C) (“[A]ll agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official. . .”).

uses of man's environment and the maintenance and enhancement of long-term productivity."<sup>12</sup>

The NEPA process was intended to promote environmental awareness and well-informed decision-making.<sup>13</sup> NEPA imposes no substantive requirements on federal agencies to mitigate environmental impacts,<sup>14</sup> but rather establishes a national policy to "encourage productive and enjoyable harmony between man and his environment."<sup>15</sup> Senator Henry Jackson, the Senate author of NEPA, explained that the Act provided "a statutory foundation to which administrators may refer . . . for guidance in making decisions which find environmental values in conflict with other values."<sup>16</sup> The value of EIR, as mandated by NEPA, lies in the requirement that environmental considerations be a part of federal decision-making processes.

## b. State Environmental Policy Acts (SEPA) and the Effects on Local Governments

### i. Overview of State Environmental Policy Acts

NEPA was quickly followed by the enactment of state environmental policy acts (SEPA) in many states.<sup>17</sup> SEPA vary in the policy and procedures they require.<sup>18</sup> In the seventeen statutes substantially modeled after NEPA, all require the state government to prepare impact statements on government actions that have a significant effect on the environment.<sup>19</sup> However, much of the similarity among the state statutes with NEPA ends

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12. 42 U.S.C. §§ 4332(C)(i)-(iv).

13. WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES AND MATERIALS 235 (Lexis Law Publishing 2d ed. 1997).

14. See *Strykers Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980) (holding that NEPA does not impose substantive requirements on federal agencies to mitigate environmental harm); see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural").

15. 42 U.S.C. § 4321.

16. 115 CONG. REC. 40,416 (1969) (statement of Sen. Jackson).

17. The California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000 – 21177, was enacted in 1970; the Washington State Environmental Policy Act (SEPA), WASH. REV. CODE §§ 43.21C.010 – 43.21C.910, was enacted in 1971; the New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 – 8-0117, was enacted in 1976.

18. See NEPA LAW, *supra* note 3, §12.01.

19. Statutes substantially modeled after NEPA can be found in California, Connecticut, D.C., Georgia, Hawaii, Indiana, Maryland, Massachusetts, Minnesota, Montana, New York, North Carolina, Puerto Rico, South Dakota, Virginia, Washington, and Wisconsin.

here. SEPA's differ in the procedural and substantive determinations they require, the definition of an 'action,' whether local governmental agencies are covered, what the standards are for determining threshold significance, when an environmental impact statement is sufficient, and what the standards are for judicial review.<sup>20</sup> Consequently, the various SEPA's have very different effects on state agencies and local governments.

For the purposes of this article, the most significant SEPA's are those that apply to local government actions. Currently, six states require local governments to consider the environmental impact of actions they take that significantly affect the environment: California, New York, Washington, Minnesota, Massachusetts, and Hawaii.<sup>21</sup> Requiring local governments to consider environmental impacts affects a multitude of local planning and zoning decisions, including the adoption of zoning ordinances and amendments, the grant of zoning variances, subdivision approvals and special use permits, and the creation of comprehensive plans.<sup>22</sup> If SEPA requirements apply to local government actions and private developments that require local agency approvals, the municipality must first ensure that harmful environmental effects have been mitigated before development can proceed. This requires extensive time and cost on the part of both the municipality and the developer since the impact statement is required in addition to land use approvals.<sup>23</sup> Thus, the environmental review statute may provide an additional, and sometimes redundant, layer of procedures and requirements that can delay or even halt development altogether.

Some states, notably New York, California, and Washington, have recognized the redundancy of EIR and local planning processes and have encouraged local governments to implement integration methods. These methods include the formulation of

20. David Sive & Mark Chertok, *'Little NEPA's' and Their Environmental Impact Assessment Processes*, S91 A.L.I.-A.B.A. 1233, 1236 (1997); see also Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041 (1992); NEPA LAW, *supra* note 3, § 12.3.

21. See CAL. PUB. RES. CODE § 21100 (West 2002); N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2002); WASH. REV. CODE § 43.21C.020 (2002); MINN. STAT. § 116D.04(1)(a) (2002); MASS. GEN. LAWS ch. 30, § 61 (2002); HAW. REV. STAT. § 343-5(b) (2001). *But see* N.C. GEN. STAT. § 113A-4 (2002) (specifically excluding local government units' authority to conduct environmental review under North Carolina's SEPA).

22. See Sive & Chertok, *supra* note 20, at 1240.

23. NEPA LAW, *supra* note 3, §12.01.

master environmental impact reports,<sup>24</sup> generic environmental impact statements<sup>25</sup> and planned actions.<sup>26</sup> By conducting extensive environmental review at the planning stage, subsequent project review is limited, saving the time and resources necessary to conduct full EIR processes for each project. A review of the SEPA's in New York, California and Washington and their effect on local governments illustrates both the attributes and drawbacks of current local EIR processes.

ii. The New York State Environmental Quality Review Act (SEQRA)

In 1976, New York enacted the State Environmental Quality Review Act (SEQRA).<sup>27</sup> SEQRA's adoption followed a period of ambitious environmental legislation in New York, including the codification of the Environmental Conservation Law,<sup>28</sup> the adoption of the Tidal Wetlands Act,<sup>29</sup> and the creation of the Adirondack Park Agency. New York realized that "public health, welfare and enlightened self-economic interest required . . . the same sort of environmental laws as had been enacted in most sister states and by the Federal government."<sup>30</sup> Like NEPA, the thrust of SEQRA is the requirement that an environmental impact statement be prepared for all government actions that may have a significant adverse impact on the environment.<sup>31</sup> However, SEQRA goes beyond NEPA and imposes substantive requirements on agencies to mitigate detrimental environmental effects. SEQRA applies to actions taken by state and local agencies.<sup>32</sup> The word "actions" is defined as "projects or activities directly undertaken by any agency . . . or projects or activities involving the issuance to a person of a lease, permit, license certificate or other entitlement for use or permission to act by one or more agencies."<sup>33</sup> Agencies must choose alternatives which "to the maximum extent practicable, minimize or avoid adverse envi-

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24. See *infra* notes 125 – 28 and accompanying text.

25. See *infra* notes 50 – 62 and accompanying text.

26. See *infra* notes 184 – 208 and accompanying text.

27. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2002).

28. *Id.*

29. *Id.* § 25-0101.

30. Rosemary Nichols & Nicholas A. Robinson, *A Primer on New York's Revolutionized Environmental Laws: Part I*, 49 N.Y. ST. B. J. 41, 41 (1977).

31. N.Y. ENVTL. CONSERV. LAW § 8-0109(2).

32. *Id.* § 8-0105(3).

33. *Id.* § 8-0105(4)(i).

ronmental effects. . . .”<sup>34</sup> A summary of the SEQRA procedures illustrates the extensive responsibilities SEQRA places on local governmental agencies.

The first step in the review process is defining the type of action. Under SEQRA, the Department of Environmental Conservation (DEC) promulgates regulations implementing the provisions of the Act.<sup>35</sup> The regulations contain lists of Type I and Type II actions.<sup>36</sup> Type I actions require the preparation of a full environmental assessment form (EAF).<sup>37</sup> Such actions include the adoption of a municipality’s comprehensive plan, changes in a zoning district affecting more than twenty-five acres, and construction of new residences and other buildings that meet certain thresholds.<sup>38</sup> Type II actions do not require environmental review. These include: repairs of existing structures involving no substantial changes, maintenance of existing landscape, granting of area variances for single, two, and three family residences, official acts of a ministerial nature not involving discretionary decisions, and emergency actions.<sup>39</sup> Actions not listed as Type I or Type II are known as unlisted actions.<sup>40</sup>

After a determination of the type of action, an environmental assessment form is completed and circulated to all agencies involved in the decision-making process. Then the lead agency is established.<sup>41</sup> The lead agency has the responsibility of making the final determination of significance and imposing mitigation conditions.<sup>42</sup> Often, the lead agency is the local board that has the responsibility to grant the necessary permits. If the lead agency determines that the action may have a substantial adverse impact on the environment, a positive declaration is issued. If no significant impacts are found, a negative declaration is issued and no further environmental review is necessary. The New York courts have adopted a fairly low threshold for the finding of a positive declaration. A positive declaration should be made when “the ac-

34. *Id.* § 8-0109(1).

35. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.1 – 617.19 (2002).

36. *Id.* §§ 617.4 - 617.5.

37. *Id.* § 617.2(m). An EAF is defined as “a form used by an agency to assist it in determining the environmental significance or nonsignificance of actions. . . .” *Id.*

38. *Id.* § 617.4(b).

39. *Id.* § 617.5(b).

40. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(ak) (2002). Unlisted actions are defined as “actions not identified as a Type I or Type II action. . . .” *Id.*

41. *Id.* § 617.6(b).

42. *Id.* § 617.6.



tion may fairly be said to have a potentially significant adverse effect.”<sup>43</sup> This is a “more demanding” threshold than is required under NEPA.<sup>44</sup> If a positive declaration is made, an environmental impact statement (EIS) must be prepared.<sup>45</sup>

Section 617.9 of the regulations establishes the content of the draft EIS, including a description of the action, a description of the setting, and “a statement and evaluation of the potential significant adverse environmental impacts.”<sup>46</sup> In *Webster Associates v. Town of Webster*, the court established a ‘reasonableness’ test for determining the sufficiency of an EIS, stating that the test “is whether the EIS was compiled with objective good faith and whether the resulting statement would permit a decision-maker to fully consider and balance the environmental factors.”<sup>47</sup> There is an opportunity for public hearing and a public comment period before the final environmental impact statement (FEIS) is completed. The FEIS must include the draft EIS, any substantive public comments, and the lead agency’s response to the comments.<sup>48</sup> The final decision on the project sets forth the necessary mitigation measures for the project to proceed. Local SEQRA decisions are subject to judicial review. The courts have concluded “the test of SEQRA compliance is whether the approving agency has taken a ‘hard look’ at the relevant areas of environmental concern and taken those concerns into account to the fullest extent possible.”<sup>49</sup>

New York State local governments are also authorized to adopt Generic Environmental Impact Statements (GEISs).<sup>50</sup> The GEIS is a broad, conceptual EIS that assesses the environmental impacts of related or similar actions, a sequence of actions, or “an entire plan or program having wide application or restricting the range of future alternative policies or projects.”<sup>51</sup> It should set forth “specific conditions or criteria under which future actions

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43. *H.O.M.E.S. v. N.Y. State Urban Dev. Corp.*, 418 N.Y.S.2d 827, 832 (N.Y. App. Div. 1979) (quoting *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972)).

44. *Id.*

45. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.1(c) (2002).

46. *Id.* § 617.9(b)(5).

47. 447 N.Y.S.2d 401, 414 (Sup. Ct. 1981), *rev'd on other grounds*, 59 N.Y.2d 220 (1983).

48. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(b)(8).

49. *Glen Head – Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay*, 453 N.Y.S.2d 732, 737-38 (N.Y. App. Div. 1982) (citations omitted).

50. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.10(b) (2002).

51. *Id.* § 617.10(a).

will be undertaken or approved. . .”<sup>52</sup> If future development is carried out in conformance with the conditions and thresholds established in the GEIS, no further SEQRA compliance is required.<sup>53</sup> This means that “it is possible that developers of individual projects will not be required to prepare lengthy and costly environmental impact studies.”<sup>54</sup>

The GEIS allows local governments to streamline EIR at the project stage.<sup>55</sup> The regulations authorize the preparation of a GEIS on the adoption of comprehensive plans.<sup>56</sup> In New York, towns, cities, and villages are authorized, but not required, to adopt comprehensive plans.<sup>57</sup> The New York Court of Appeals has noted that “the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use.”<sup>58</sup> A comprehensive plan is defined as the written or graphic materials such as maps, studies, resolutions or reports that establish the future growth of a community.<sup>59</sup> The statutes suggest elements for inclusion in the plan, including a general statement of goals, consideration of natural resources and sensitive environmental areas, existing and proposed recreational facilities and parkland.<sup>60</sup> Under SEQRA and the New York General Town, Village, and City Laws, comprehensive plans must undergo SEQRA review before they are enacted. The statutes note that the comprehensive plan may also be designed to serve as, “or be accompanied by, a generic environmental impact statement pursuant to the SEQRA” so as to limit SEQRA review at the project development stage.<sup>61</sup> Courts have stressed the importance of GEIS at the comprehensive planning stage, noting that “a GEIS may be essential as a practical matter for proposed regulations of widespread application.”<sup>62</sup>

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52. *Id.* § 617.10(c).

53. *Id.* § 617.10(b).

54. John R. Nolon, *Local Land Use Controls that Achieve Smart Growth*, 31 *Envtl. L. Rep.* (Envtl. L. Inst.) 11025 (Sept. 2001).

55. *See* Sterk, *supra* note 20, at 2041 (noting that the environmental review process has proven time-consuming and costly).

56. N.Y. COMP. CODES R. & REGS. tit. 6, § 618.10(a)(4) (2002).

57. *See* N.Y. TOWN LAW § 272(a) (McKinney 2000).

58. Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968).

59. *See* N. Y. TOWN LAW § 272(a)(2)(a).

60. *See id.* § 272(a)(3).

61. *Id.* § 272(a)(8).

62. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 5.03[1] (1990). [hereinafter GERRARD].

New York State local governments must strictly follow SEQRA procedures.<sup>63</sup> However, the regulations specifically authorize and encourage local governments to implement their own local EIR procedures.<sup>64</sup> Any individual procedures adopted by a local community “must be no less protective of environmental values, public participation and agency and judicial review” than are contained in SEQRA and its regulations.<sup>65</sup> Local governments may amend the lists of Type I and Type II activities, allowing the community to determine the environmental resources and problems that need to be better protected.<sup>66</sup> The time periods for the preparation and review of SEQRA documents may be varied.<sup>67</sup> SEQRA also gives authority to local governments to study and adopt plans for areas of environmental significance.<sup>68</sup> This means that local governments may designate critical environmental areas and conduct cumulative impact analyses of projects affecting these areas.<sup>69</sup> The New York City EIR regulations illustrate how a local government can utilize its authority under SEQRA to create its own EIR procedures.

### 1. New York, New York

New York City’s Environmental Quality Review (CEQR) reveals the extent to which local governments can expand and adapt the requirements of the New York environmental review

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63. *Id.* § 7.04[2][a] (“There are two lines of cases that review agency compliance with the procedural requirements of SEQRA. The first line holds that strict procedural compliance is mandated, with no deviations allowed; the second is somewhat more forgiving of procedural irregularities. The first line was dominant in the 1980s, but in the 1990s more courts have found minor procedural defects not to have been fatal to the entire SEQRA review process.”).

64. *Id.* § 8A.02.

65. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14(b) (2002). The New York courts have interpreted the interactions between SEQRA and local environmental review statutes. See *In Matter of Harley Rendezvous Inc., v. Town of Duanesburg Zoning Bd. of Appeals*, 502 N.Y.S.2d 599 (1986) (holding that town’s environmental impact review act violated SEQRA by giving the town board authority to delegate lead agency responsibility for environmental review, noting that “action of the town board is not and cannot be required to implement the provisions of [SEQRA] as such requirement would constitute impermissible exercise of power by a local agency.”); see also *Glen Head – Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay*, 88 A.D.2d 484 (1982) (“Literal compliance [with SEQRA] is required because the Legislature has directed that the policies of the State and its political subdivisions shall be administered ‘to the fullest extent possible’ in accordance with SEQRA.”).

66. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.4(a)(2), 617.5(b) (2002).

67. *Id.* § 617.14(b).

68. *Id.* § 617.14(g).

69. For ability to designate critical environmental areas see *id.*

act. A commentator notes that “[t]he City’s implementation of SEQRA has offered an opportunity for experimentation and novel procedures.”<sup>70</sup> New York City’s efforts to broaden local environmental review under SEQRA have “transcended those of other municipalities or state agencies” in New York.<sup>71</sup> CEQR was enacted in 1977 by an Executive Order issued by Mayor Abraham D. Beame.<sup>72</sup>

When enacted, CEQR was substantially similar to the regulations issued by the state under SEQRA, but did contain one major difference that proved to be significant. Initially, CEQR designated two city agencies, the Department of Environmental Protection (DEP) and the Department of City Planning (DCP)<sup>73</sup> as the co-lead agencies for every city action arising under CEQR.<sup>74</sup> The integration of the city environmental and planning departments illustrated the City’s recognition that environmental review and city planning procedures should be combined.<sup>75</sup> The DEP and DCP integrated the provisions of CEQR with the city’s land use procedures under the Uniform Land Use Review Procedures (ULURP).<sup>76</sup> The procedures of the Board of Standards and the City Board of Appeals were meshed with the CEQR provisions as well.<sup>77</sup> The co-lead agencies oversaw all aspects of the CEQR process. Together, the agencies “reviewed Project Data Statements<sup>78</sup> for sufficiency, issued determinations of environmental significance, scoped draft EISs, reviewed preliminary draft EISs for adequacy, reviewed preliminary final EISs for adequacy, and prepared Statements of Findings.”<sup>79</sup> The co-lead agency designation was an attempt to integrate the environmental review pro-

70. GERRARD, *supra* note 62, § 8A.03.

71. *Id.* § 8A.02.

72. N.Y.C. Exec. Order 91 (1977).

73. The Department of City Planning was an agency established to advise the City Planning Commission. See GERRARD, *supra* note 62, § 8A.03.

74. *Id.*

75. New York City was one of the most ardent critics of the adoption of SEQRA. While the importance of EIR was recognized, the City felt that the SEQRA process should be “dovetailed with existing procedures and should not bring the wheels of government to a virtual halt with added delays and costs.” Letter from the City of New York, to the Honorable Hugh L. Cary 1 (June 27, 1975) (on file with the author).

76. GERRARD, *supra* note 62, § 8A.03.

77. *Id.*

78. Project Data Statements are the equivalent of SEQRA’s EAF. J. Kevin Healy, *The Environmental Review Process in the City of New York: CEQR*, 5 PACE ENVTL. L. REV. 93, 94 (1987) [hereinafter Healy].

79. GERRARD, *supra* note 62, § 8A.03.

cess with the intricate planning and zoning requirements of the city.<sup>80</sup>

A 1986 challenge to the co-lead agency system ended the procedure. In *Coca-Cola Bottling Company v. Board of Estimate of the City of New York*,<sup>81</sup> the New York Supreme Court held that the co-lead agency designation violated SEQRA.<sup>82</sup> SEQRA explicitly requires that the determination of significance be made by the agency that is principally responsible for making the ultimate decision on the action.<sup>83</sup> By allowing the DCP and the DEP to make findings and determinations, the decision-making power was wrongfully delegated.<sup>84</sup> In affirming the decision, the Court of Appeals noted that "the final determination [of environmental significance] . . . must remain with the lead agency principally responsible for approving the project."<sup>85</sup> The challenge illustrated that local governments were limited by SEQRA, and thus could not substantially deviate from its provisions when utilizing their authority to implement their own environmental regulations. In 1991, the City Planning Commission (CPC) adopted new environmental review regulations that, among other things, created a new system for designating lead agencies and created the Mayor's Office of Environmental Coordination.<sup>86</sup>

In general, the CEQR procedure is similar to SEQRA. Non-discretionary city actions that may have a significant effect on the environment require a detailed analysis of the environmental effects.<sup>87</sup> Applications for discretionary actions must be accompanied by a preliminary statement of the environmental impact,

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80. Healy, *supra* note 78.

81. Case No. 29, 646/85, slip. op. (Sup. Ct. N.Y. Nov. 19, 1986), *aff'd without opinion*, 521 N.Y.S.2d 964 (App. Div. 1987), *aff'd*, 532 N.E.2d 1261 (N.Y. 1988).

82. 532 N.E.2d at 1263.

83. See GERRARD, *supra* note 62, § 8A.03[1].

84. *Id.*

85. 532 N.E.2d at 1265.

86. The purpose of this entity is to provide both procedural and substantive expertise and advice to the other city agencies. The MOEC may assist agencies with their applications and "maintain[s] technical standards and methodologies for environmental review." See GERRARD, *supra* note 62, § 8A.04[3]. As part of this responsibility, the MOEC prepares the CEQR Technical Manual. The manual includes specific analytical frameworks for different types of environmental impacts, such as traffic, air quality and shadows. See *id.* § 8A.04 for a thorough description of the contents of the MOEC technical manual. Though MOEC cannot make official decisions, it is an integral part of the decision-making process, as it is often sent environmental assessment statements and environmental impact statements for review.

87. Healy, *supra* note 78, at 94.

referred to as a project data statement.<sup>88</sup> Under the new lead agency provisions, the rules either designate a specific lead agency depending on the action or set forth factors to consider for the appointment of the lead agency. Where only one agency is involved, that agency is necessarily the lead agency.<sup>89</sup>

The project data statement is circulated to all interested agencies and a determination of significance is made.<sup>90</sup> If the project may have a significant adverse effect, a positive declaration is made.<sup>91</sup> The lead agency has the option of making a conditional negative declaration when the action is found to have no detrimental effects as long as certain mitigation measures are implemented.<sup>92</sup> If a positive declaration is made, a draft EIS is prepared. One major difference between SEQRA and CEQR is that CEQR provides for a mandatory scoping session to determine the contents of a required EIS.<sup>93</sup> State regulations allow, but do not require, such scoping sessions. After the DEIS is completed, it is submitted for public hearing and review.<sup>94</sup> The lead agency issues a notice of completion and then bases its findings and decisions on the FEIS.<sup>95</sup> While the CEQR process is substantially similar to SEQRA, the review procedures at each stage of the process are extensive. The city requires exhaustive detail in the environmental impact statements, which are often reviewed by many different city agencies.<sup>96</sup>

### iii. The California Environmental Quality Act (CEQA)

The California Environmental Quality Act (CEQA)<sup>97</sup> was adopted in 1970, shortly after the enactment of NEPA. Commentators note that it is “arguably the most important law governing land-use planning in California.”<sup>98</sup> More than an environmental protection act, CEQA has an impact on planning and land use regulation that “permeates the daily practice of California local plan-

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88. *Id.*

89. GERRARD, *supra* note 62, § 8A.04[2].

90. Healy, *supra* note 78, at 94.

91. *Id.*

92. *Id.* at 100.

93. *Id.* at 101.

94. *Id.*

95. *Id.* at 94.

96. See GERRARD, *supra* note 62, § 8A.05[4][b].

97. CAL. PUB. RES. CODE §§ 21000 – 21177 (West 2001).

98. Robert B. Olshansky, *The California Environmental Quality Act and Local Planning*, 62 J. AM. PLAN. ASS'N 313, 313 (1996).

ning."<sup>99</sup> Though it was patterned after NEPA,<sup>100</sup> it applies to both state and local governments, includes substantive requirements, and applies to many different types of actions and approval processes that have a significant effect on the environment. CEQA illustrates that state environmental policy acts can have much broader effects than were embodied in NEPA.

Early in CEQA's history, controversy developed as to whether the act applied to local land use approval processes. In the landmark case of *Friends of Mammoth v. Board of Supervisors of Mono County*,<sup>101</sup> the Supreme Court of California held that the provisions of CEQA applied to local government approvals of private development. The court noted that the legislative intent of the act demanded a broad interpretation of the types of actions that are subject to environmental review in California.<sup>102</sup> The legislature subsequently amended the act to clarify that "all local agencies shall prepare, or cause to be prepared . . . an environmental impact report on any project that they intend to carry out or approve which may have a significant effect on the environment."<sup>103</sup> As a result, CEQA greatly affects local governments, since the majority of discretionary land use permitting decisions occur at the local level.<sup>104</sup>

When a local government is faced with a project or action that requires discretionary approval, the CEQA process applies.<sup>105</sup> The first step is determining whether an environmental review is required. All ministerial actions are exempt from environmental review.<sup>106</sup> Projects "determined not to have a significant effect on the environment" do not require an environmental review.<sup>107</sup> If a project must undergo review, an initial study is conducted by the permit-issuing agency to determine whether the project may have

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99. *Id.*

100. See *Keith v. Volpe*, 352 F. Supp. 1324, 1337 (C.D. Cal. 1972) (noting that CEQA's resemblance to NEPA when first enacted was "uncanny").

101. 502 P.2d 1049 (Cal. 1972).

102. *Id.* at 1054-55.

103. CAL. PUB. RES. CODE § 21151 (West 2001).

104. See Ralph Catalano & Joseph DiMento, *Local Government Response to State Environmental Impact Assessment Requirements: An explanation and Typology*, 7 ENVTL. L. 25 (1977) (noting that "Friends of Mammoth . . . made the question of EIR content significant to a greatly expanded population. The holding that CEQA applied to publicly permitted private projects made the issue of content and the intertwined issue of substantive implications of EIR findings relevant to virtually every Californian. . .").

105. See generally, NEPA LAW, *supra* note 3.

106. CAL. PUB. RES. CODE § 21080(b)(1).

107. *Id.* § 21084.

a significant effect on the environment.<sup>108</sup> If a negative declaration is issued after the initial study, no further review is required.<sup>109</sup> If the project might have significant environmental effects that cannot be mitigated, the agency must prepare an Environmental Impact Report (EIR).<sup>110</sup> The EIR must include a description, the location, and the probable environmental effects of the project, as well as feasible mitigation measures.<sup>111</sup> Feasible is defined as “capable of being accomplished in a successful manner in a reasonable period of time, taking into account economic, environmental, social and technological factors.”<sup>112</sup> Scoping processes are permitted, but not required, in an attempt to foster early consultation with the public and among interested agencies.<sup>113</sup> The regulations stress that the EIR is an informational document.<sup>114</sup> The agency is required to respond to the identified effects, but is not explicitly mandated to mitigate them. The response may be merely a statement explaining why “the specific economic, legal, social, technological, or other benefits of a proposed project outweigh the unavoidable adverse environmental effects.”<sup>115</sup> This provision has caused some to question the substantive effects of CEQA.<sup>116</sup>

Comprehensive land use planning is mandatory in California.<sup>117</sup> A municipality’s comprehensive plan must contain seven elements: land use, circulation, housing, conservation, open-space, noise, and safety.<sup>118</sup> The land use element designates proposed uses of land and recommends density and building intensity limits for designated districts.<sup>119</sup> The conservation element must address the conservation, development, and utilization of the

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108. CAL. CODE REGS. tit. 14, § 15063 (2002).

109. *Id.* § 15064(f)(3).

110. *Id.* § 15064(f)(1). If the significant effects can be mitigated, then a mitigated negative declaration is issued. *See id.* § 15064(f)(2).

111. *Id.* § 15126.

112. CAL. PUB. RES. CODE § 15364 (West 2001).

113. *Id.* § 15083.

114. CAL. CODE REGS. tit. 14, § 15121 (2002).

115. *Id.* § 15093.

116. *See* Sean Stuart Varner, *The California Environmental Quality Act After Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 PEPP. L. REV. 1447, 1452 (1992).

117. *See* CAL. GOV’T CODE § 65300 (West 2002) (“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.”).

118. *Id.* § 65302.

119. *Id.* § 65302(a).



state's natural resources.<sup>120</sup> The general plan may "include any other elements or address any other subjects which, in the judgment of the legislative body, relate to the physical development of the county or city."<sup>121</sup> All general plans and amendments must undergo CEQA review before they are adopted.<sup>122</sup> Local governments have much discretion in the creation of the comprehensive plan. All subsequent zoning and land use decisions must be consistent with the municipality's plan.

The values embodied in the required local planning process are complementary to the goals of CEQA, despite noted differences in "scope, procedure and legal effect."<sup>123</sup> Under CEQA, there are numerous ways in which planning and EIR can be integrated to provide efficient and comprehensive local EIR. One of the methods is "streamlined environmental review."<sup>124</sup> Streamlined environmental review is achieved with the use of a master environmental impact report (Master EIR), a tool that is used to reduce the impact review required for subsequent projects that fall within its scope. A Master EIR can be created for a comprehensive plan, a regional transportation plan, a wildlife conservation plan, or a large project to be completed in many phases, among other activities.<sup>125</sup> The Master EIR should include the same information required for a project EIR, but should anticipate the types of projects that will be proposed, including information on desirable locations, maximum densities, and potential impacts.<sup>126</sup> Then, when subsequent projects are proposed, initial studies are conducted to determine whether any new environmental impacts may occur. If no new significant impacts are found, then no further environmental review is required for the approval of the project.<sup>127</sup> If new impacts are detected, either a mitigated negative declaration is issued or a full EIR is created.<sup>128</sup>

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120. *Id.* § 65302(d).

121. *Id.* § 65303.

122. *See City of Santa Ana v. City of Garden Grove*, 160 Cal. Rptr. 907 (Cal. Ct. App. 1979).

123. Daniel R. Mandelker, *Melding State Environmental Policy Acts with Land-Use Planning and Regulations*, 49 LAND USE & ZONING DIG. 3, 4 (1997); *see also* Olshansky, *supra* note 98 (noting the complementary goals, but also noting the conflicting aspects of these two tools).

124. CAL. PUB. RES. CODE §§ 21156 – 21159.9 (West 2001).

125. *Id.* § 21157.

126. *Id.* § 21157(b).

127. *Id.* § 21157.

128. *Id.* § 21157(c); *see also id.* § 21083.3(b) ("If a development project is consistent with the general plan of a local agency and an environmental impact report was certi-

CEQA also allows for program EIRs to be conducted on proposed local comprehensive plans.<sup>129</sup> Like the Master EIR, the program EIR limits subsequent project review to those “effects on the environment which are . . . not addressed as significant effects in the prior environmental impact report.”<sup>130</sup> Tiered EIRs<sup>131</sup> and focused EIRs<sup>132</sup> provide additional streamlining methods. The California General Plan Guidelines stress the usefulness of master, program, tiered and focused EIRs, noting the need to minimize redundant environmental review.<sup>133</sup>

Limited review of subsequent projects results in a reduction in the time, money and resources expended on individual project impact review. In California, local governments have the tools available to evaluate comprehensively the environmental impact that development will have on their community early in the planning process, to create a general plan incorporating the findings, and thus, to efficiently plan for future development with limited adverse environmental effects. The city of Modesto, California has taken steps that illustrate how local governments in California can conduct environmental review in an efficient manner.

### 1. Modesto, California

Modesto, California is an example of a local government that has adopted a Master EIR to limit the environmental review performed on subsequent projects.<sup>134</sup> In Modesto, the Planning Commission is the governmental agency that advises the City Council on all land use matters.<sup>135</sup> The Commission is part of the city’s

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fied with respect to that general plan, the application of this division to the approval of that development project shall be limited to effects on the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report.”).

129. CAL. PUB. RES. CODE § 21083.3 (West 2001); *see also* CAL. CODE REGS. tit. 14, § 15168 (2002).

130. CAL. PUB. RES. CODE § 21083.3.

131. CAL. CODE REGS. § 15152 (2002). *See infra* note 155 and accompanying text.

132. CAL. PUB. RES. CODE § 21158; *see also id.* § 21083.3. A focused EIR is “an EIR on a subsequent project identified in [a Master EIR].” MICHAEL REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 323 (Solano Press 9th ed. 1996).

133. *See* STATE OF CALIFORNIA GENERAL PLAN GUIDELINES, GOVERNOR’S OFFICE OF PLANNING AND RESEARCH (Nov. 1998), *available at* <http://ceres.ca.gov/planning/genplan/gpg.pdf>.

134. *Id.* at 109.

135. MODESTO, CAL. MUN. CODE § 10-1.102 (2002), *available at* <http://www.ordlink.com/codes/modesto> (last visited Apr. 16, 2002).

Community Development Department, which is authorized by the municipal code to “[p]rovide long range planning services, including advance planning, land use, transportation and utility planning services, and provide services associated with updates to and amendments of the City’s General Plan.”<sup>136</sup> In 1995, the Planning Commission adopted an Urban Area General Plan, which serves as a blueprint for the future development of the city.<sup>137</sup> A Master EIR for the Urban Area General Plan was created in accordance with the California Public Resources Code,<sup>138</sup> with the intent of providing for “substantial reduction of the environmental review of subsequent projects.”<sup>139</sup> The Master EIR “provides a comprehensive analysis of the physical effects on the environment from buildout of the land uses contained in the City’s General Plan . . . [and] provides a complete program of mitigation measures.”<sup>140</sup> It also serves as the “basis for further environmental review such as focused EIRs or project-level studies to determine if a development proposal is in conformance with the General Plan.”<sup>141</sup> In addition to the Master EIR, Modesto also utilizes specific plans “to provide standards for development of a particular area at a finer level of detail than that provided by the General Plan.”<sup>142</sup>

The Master EIR describes the process required to reduce the environmental review of subsequent projects. In order for a project to be considered for limited review, it must be explicitly listed in the Master EIR.<sup>143</sup> Modesto has created three sub-areas within the city: a Redevelopment Area, a Baseline Developed Area, and a Planning Urbanizing Area.<sup>144</sup> Depending on which sub-area the subsequent project is in, the application of the Master EIR differs. In the Redevelopment and Baseline Developed Areas, the subsequent projects are required to incorporate all applicable mitigation measures listed in the Master EIR in order to have limited

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136. *Id.* § 2-3.80.

137. See MODESTO PLANNING DOCUMENTS, at [http://www.ci.modesto.ca.us/cdd/Planning\\_Division/plng\\_documents.asp.htm](http://www.ci.modesto.ca.us/cdd/Planning_Division/plng_documents.asp.htm) (last visited Apr. 16, 2002).

138. See Cal. Pub. Res. Code § 21126 (West 2001).

139. MODESTO CITY COUNCIL, CITY OF MODESTO FINAL MASTER ENVIRONMENTAL IMPACT REPORT FOR THE URBAN AREA GENERAL PLAN, Resolution No. 95-408, I-38 (1995).

140. MODESTO PLANNING DOCUMENTS, at [http://www.ci.modesto.ca.us/cdd/Planning\\_Division/plng\\_documents.asp.htm](http://www.ci.modesto.ca.us/cdd/Planning_Division/plng_documents.asp.htm) (last visited Apr. 16, 2002).

141. *Id.*

142. See *id.*

143. MODESTO CITY COUNCIL, CITY OF MODESTO FINAL MASTER ENVIRONMENTAL IMPACT REPORT FOR THE URBAN AREA GENERAL PLAN, at IV-19-3 (1995).

144. *Id.* at IV-19-3.

environmental review.<sup>145</sup> The Planning Urbanization Areas are composed of smaller Comprehensive Planning Districts, which each have their own comprehensive plans outlining future development in the specific area.<sup>146</sup> Each comprehensive plan has a focused EIR based upon the Master EIR.<sup>147</sup> Thus, for subsequent projects in the Planning Urbanization Areas to undergo limited review, the project must incorporate the mitigation measures outlined in both the Master EIR and focused EIR.<sup>148</sup> If, after the initial study, the city determines that the subsequent project is explicitly listed in the Master EIR and that the project has adopted the applicable mitigation measures, further environmental review is not required.<sup>149</sup>

The City of Modesto has adopted all of the mitigation measures set forth in the Master EIR into the General Plan; therefore, the mitigation measures are fully enforceable.<sup>150</sup> The Master EIR lists possible negative impacts of projects, such as the degradation of air quality, generation of noise, loss of productive agricultural lands and increased demand for water supply.<sup>151</sup> For each of these impacts, mitigation measures are set forth. For example, if a project will result in an increased demand for water supply and will require additional pipeline facilities, the city “shall require that developments reduce their potable water demand by implementing water conservation measures.”<sup>152</sup> If land proposed for development is within a flood zone, the proposed development plan must include a drainage plan which “identif[ies] 100-year flood elevations” and “provide[s] the location and capacity of retention/detention basins and/or drainage channels to accommodate the increment in flows of water and siltation created by the project.”<sup>153</sup> By being aware of these mitigation measures, developers know early in the development process which measures are necessary for project approval.

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145. *Id.* at I-38.

146. *Id.* at IV-19-4.

147. *Id.* at III-12.

148. *Id.* at I-38.

149. MODESTO CITY COUNCIL, CITY OF MODESTO FINAL MASTER ENVIRONMENTAL IMPACT REPORT FOR THE URBAN AREA GENERAL PLAN, at I-38 (1995).

150. *Id.* at IV-19-5; see CAL. PUB. RES. CODE § 21081.6(a)(2)(b) (West 2001).

151. MODESTO CITY COUNCIL, CITY OF MODESTO FINAL MASTER ENVIRONMENTAL IMPACT REPORT FOR THE URBAN AREA GENERAL PLAN, at II-3 – II-4 (1995).

152. *Id.* at II-4.

153. *Id.* at II-7.

The utilization of Master EIRs, focused EIRs and specific plans illustrate the tiering process recommended under CEQA.<sup>154</sup> Tiering allows an agency to produce a series of EIRs, "typically moving from general regional concerns to more site-specific considerations with the preparation of each new document."<sup>155</sup> A local planner in Modesto notes that developers and the municipality favor tiered review because it provides consistency in the development process.<sup>156</sup> By allowing for analysis of impacts and implementation of mitigation measures at each of these stages, significant subsequent impact review is not required for every proposed project, thus saving time and resources during the project approval process.

#### iv. The Washington State Environmental Policy Act

Washington's State Environmental Policy Act (SEPA) was enacted in 1971. Like NEPA, SEQRA, and CEQA, Washington's SEPA was created to "encourage productive and enjoyable harmony between man and his environment."<sup>157</sup> The act emphasizes, "each person has a fundamental and inalienable right to a healthful environment."<sup>158</sup> The Washington Supreme Court has interpreted this policy statement to be stronger than that of NEPA.<sup>159</sup> Responsibility to fulfill this policy is placed on all state agencies.<sup>160</sup> Therefore, local governments must comply with the provisions of SEPA when reviewing "proposals for legislation and other major actions having a probable significant, adverse environmental impact."<sup>161</sup> SEPA grants substantive authority to local and state agencies to deny approval for projects or to impose conditions on applications for development.<sup>162</sup> In *Polygon Corporation v. City of Seattle*, the Washington Supreme Court noted that SEPA mandated local agencies to substantively review projects and that the Act supplemented the existing powers of state and local governments.<sup>163</sup> The decision to deny or mitigate a project

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154. See CAL. PUB. RES. CODE § 21083.3.

155. REMY, *supra* note 132, at 314.

156. Telephone Interview with Miguel Galvez, Associate Planner, City of Modesto Community Development Department, Planning Division (Mar. 20, 2002).

157. WASH. REV. CODE § 43.21C.010 (2002).

158. *Id.* § 43.21C.020(3).

159. See *Leschi Improvement Council v. Wash. State Highway Comm'n*, 525 P.2d 774, 782 (Wash. 1974).

160. WASH. REV. CODE § 43.21C.020.

161. *Id.* § 43.21C.031(1).

162. See *Polygon Corp. v. City of Seattle*, 578 P.2d 1309 (Wash. 1978).

163. *Id.* at 1313.

must be based on policies “incorporated into regulations, plans or codes which are formally designated.”<sup>164</sup>

The traditional SEPA process is similar to that of California and New York. However, in Washington, the process is not as important as the substantive results of the impact review.<sup>165</sup> When a ‘major’ action is presented to a local governmental agency for approval, the agency must determine whether the project will have a significant effect on the environment. Actions include the issuance of project permits and approvals, the adoption of comprehensive plans, and zoning and land-use regulations. Certain types of actions are exempt under the SEPA rules promulgated by the Department of Ecology.<sup>166</sup> The courts have interpreted ‘significant’ to mean “more than a moderate effect on the quality of the environment.”<sup>167</sup> The rules set forth a threshold determination process designed to aid the appointed lead agency in determining the significance of an action.<sup>168</sup> An environmental checklist is completed in order to guide the lead agency in assessing the significance of any environmental impact and in determining whether a negative or positive declaration is required.<sup>169</sup> The lead agency must make a threshold determination based upon the environmental checklist and any possible mitigation measures the applicant will implement.<sup>170</sup> If a determination of non-significance (DNS) is made, no further environmental review is required.<sup>171</sup> A mitigated DNS requires the applicant to integrate mitigation measures into the project.<sup>172</sup>

If the project is found to significantly affect the environment, an environmental impact statement must be prepared.<sup>173</sup> Washington law favors concise and clear EISs, highlighting the probable adverse environmental impacts of the project and reasonable alternatives, over longer, more exhaustive impact statements.<sup>174</sup> Like New York and California, public comment periods are part of

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164. WASH. REV. CODE § 43.21C.060 (2002).

165. See William H. Rodgers, *The Washington Environmental Policy Act*, 60 WASH. L. REV. 33, 68 (1984).

166. WASH. ADMIN. CODE § 197-11-300 (2002).

167. *Norway Hill Prot. Ass'n v. King County Council*, 552 P.2d 674, 680 (Wash. 1976).

168. WASH. ADMIN. CODE § 197-11-310 (2002).

169. *Id.* § 197-11-315.

170. *Id.* § 197-11-330.

171. *Id.* § 197-11-340.

172. *Id.* § 197-11-350.

173. *Id.* § 197-11-360.

174. WASH. ADMIN. CODE § 197-11-400 (2002).

the EIS process. The SEPA Handbook stresses the importance of organized, constructive public comment and feedback.<sup>175</sup> The agency considers all of the documentation developed during the SEPA process to reach a final decision to deny or to approve a project with mitigation measures.<sup>176</sup>

The enactment of the Growth Management Act (GMA) in 1990 has had a great effect on EIR in Washington. The Act made planning mandatory for many cities and counties in Washington.<sup>177</sup> Comprehensive planning is stressed as a means for reducing urban sprawl, promoting affordable housing, and encouraging citizen participation in the planning process, among other purposes.<sup>178</sup> Environmental considerations are stressed in the Act, with emphasis placed on conservation of open space and natural resources and protection of the environment.<sup>179</sup> Under the GMA, “[a]ll counties and cities are required to develop an integrated project review process that: combines both procedural and substantive environmental review with permit review. . . .”<sup>180</sup> Integration of environmental review and planning is included in SEPA as well. Local governments are encouraged to, “[u]tilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man’s environment.”<sup>181</sup> The GMA provides opportunity for local governments to integrate planning and environmental protection mechanisms.

Like New York and California, statutory authority exists for local governments to streamline environmental impact review and planning initiatives. For example, SEPA does not require exhaustive subsequent environmental impact review for planned actions. A planned action is one whose environmental impacts have been adequately addressed in a comprehensive plan, a community plan, or a phased development.<sup>182</sup> As long as the comprehensive plan

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175. See WASHINGTON DEPARTMENT OF ECOLOGY, SEPA HANDBOOK, available at <http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbframe.htm> (last visited Dec. 5, 2002).

176. WASH. ADMIN. CODE § 197-11-655.

177. See WASH. REV. CODE § 36.70A.040 (2002) for requirements of who must plan.

178. *Id.* § 36.70A.020.

179. *Id.*

180. See WASHINGTON DEPARTMENT OF ECOLOGY, SEPA HANDBOOK § 8.1.1, available at <http://www.ecy.wa.gov/programs/sea/sepa/handbk/hbframe.htm> (last visited Dec. 5, 2002).

181. WASH. REV. CODE § 43.21C.030 (2002).

182. *Id.* § 43.21C.031(2)(a).

has identified specific adverse environmental impacts and has taken steps to avoid or mitigate the impacts, threshold determination and impact review of subsequent projects is not required.<sup>183</sup>

The GMA also emphasizes streamlining. The Act instituted a pilot environmental planning project, aimed at simplifying and enhancing coordination between SEPA and the planning act.<sup>184</sup> The Act created a growth management planning and environmental review fund, the monies of which are to be used by local governments to conduct SEPA reviews. The provision notes that, “[d]etailed environmental analysis integrated with comprehensive plans, sub-area plans, and development regulations will facilitate planning for and managing growth, allow greater protection of the environment, and benefit both the general public and private property owners.”<sup>185</sup> The entire act stresses integration of the land-use and environmental review permitting processes. Thus, both SEPA and the GMA extend specific authority to local governments to implement streamlined environmental review impact review procedures by considering environmental impacts at the planning, rather than the project stage.

### 1. Tumwater, WA

The City of Tumwater, Washington is an example of a local government that has implemented methods of achieving the integration goals of SEPA and the GMA. Pursuant to SEPA, Tumwater has adapted the state EIR provisions to meet the special environmental needs of this city located on the southern tip of the Puget Sound.<sup>186</sup> The local EIR process is described in Tumwater’s environmental policy ordinance.<sup>187</sup> While the EIR process is substantially consistent with SEPA, the ordinance sets forth local timing requirements, describes the local lead agency determination process and responsibilities, defines the local requirements for a mitigated determination of non-significance, and sets forth additional elements to be covered in the EIS if one is required.<sup>188</sup>

Authority to integrate the EIR process with the land use approval process is found in the city’s development code administra-

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183. *Id.* §§ 43.21C.03, 43.21C.240(1).

184. *Id.* § 36.70A.385.

185. *Id.* § 36.70A.490.

186. *Id.* § 43.21C.120.

187. See TUMWATER, WASH. MUN. CODE § 16.04.090 (2002).

188. *Id.* §§ 16.04.050, 16.04.070, 16.04.110.



tion ordinance.<sup>189</sup> The ordinance states that its purpose is “to comply with state guidelines for combining and expediting development review and integrating environmental review and land use development plans.”<sup>190</sup> When a project permit application is submitted, the city must determine whether there is consistency between the project and the development regulations or the comprehensive plan.<sup>191</sup> If the city determines that “the requirements for environmental analysis, protection and mitigation measures in the applicable development regulations, comprehensive plan and/or in other applicable local . . . laws provide adequate analysis of and mitigation for the specific adverse environmental impacts of the application” then the city “shall not impose additional mitigation under SEPA during project review.”<sup>192</sup> The ordinance also provides for planned actions. Subsequent projects that are consistent with planned actions do not require a threshold determination or the preparation of an EIS.<sup>193</sup>

Tumwater has also adopted stand-alone environmental protection statutes that contain development standards. For example, the Aquifer Protection ordinance states that, “aquifer protection techniques will be applied on a city-wide basis for development construction.”<sup>194</sup> The ordinance sets forth standards for the design and construction of underground storage tanks, aboveground storage facilities and stormwater retention facilities.<sup>195</sup> The fish and wildlife habitat protection ordinance mandates the submission of a Habitat Protection Plan when a protected habitat will be affected by development.<sup>196</sup> The plan must contain “[a] description of the nature, density and intensity of the proposed development . . . [t]he applicant’s analysis of the effect of the proposed development, . . . [and a] plan by the applicant which shall explain how he will mitigate any adverse impacts to protected fish or wildlife habitats created by the proposed development.”<sup>197</sup> These standards provide developers with the information necessary to create development proposals that mitigate adverse environmental impacts of the project. The city has the

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189. *Id.* § 14.02.010.

190. *Id.*

191. *Id.* § 14.04.010.

192. *Id.* § 14.04.020.

193. TUMWATER, WASH. MUN. CODE § 14.04.030 (2002).

194. *Id.* §16.24.050.

195. *Id.*

196. *Id.* § 16.32.090.

197. *Id.*

substantive authority to impose the mitigation measures on development projects.<sup>198</sup> If the project's environmental checklist reflects that the standards have been followed and the mitigation measures have been implemented, a determination of non-significance may be granted, therefore ending the EIR process.

Tumwater's comprehensive plan addresses environmental concerns. The comprehensive plan consists of eleven elements, including a conservation plan, a land use plan and a transportation plan.<sup>199</sup> The city's conservation plan identifies critical environmental areas and suggests methods to protect and conserve these important areas. The city's land use plan "describes the general distribution and location of land uses, including housing, commerce, industry, recreation, open spaces, public utilities and facilities, and other land uses to accommodate future growth."<sup>200</sup> The city has adopted the comprehensive plan into its municipal code, thereby gaining substantive authority to enforce any environmental protection policies contained in the plan.<sup>201</sup> If the comprehensive plan provides adequate environmental analysis and mitigation of adverse environmental impacts, subsequent project review is not required if developers have adopted the mitigation measures in their development proposals.<sup>202</sup>

A Tumwater planner notes that though these integration tools exist, it is difficult to foresee all of the long-range environmental effects of development or to forecast where development will occur.<sup>203</sup> Therefore, subsequent project review is sometimes inevitable. For example, in 1997, Tumwater was given a grant to create a summary plan for the Littlerock area, which addressed the environmental effects of development in this area.<sup>204</sup> However, the Littlerock summary plan did not include an analysis of the specific environmental effects of 'big box' development.<sup>205</sup> When the city received a project proposal for such a development

198. *Id.* § 16.04.150.

199. The other elements are a capital facilities plan, an economic development plan, a housing plan, innovative techniques, a joint plan, land for public purposes/essential public facilities plan, parks and recreation plan and utilities plan. OVERVIEW OF TUMWATER COMPREHENSIVE PLAN, available at [http://www.ci.tumwater.wa.us/tumwater\\_comprehensive\\_plan.htm](http://www.ci.tumwater.wa.us/tumwater_comprehensive_plan.htm) (last modified Mar. 15, 2002).

200. *Id.*

201. TUMWATER, WASH. MUN. CODE § 16.04.150 (2002).

202. *Id.* § 14.04.020.

203. Telephone Interview with Tim Smith, Tumwater Senior Planner, City of Tumwater Planning and Facilities Department (Mar. 20, 2002).

204. *Id.*

205. *Id.*

in the Littlerock area, the EIR conducted on the summary plan was not sufficient and, therefore, additional EIR was required.<sup>206</sup> Despite the insufficiency of the summary plan, it did provide the municipality with helpful environmental information about the area.<sup>207</sup> While challenges in long-range environmental planning exist, planners note the integration of SEPA and GMA procedures facilitates the development process and provides consistency for both municipalities and developers.<sup>208</sup>

### III. The Authority Of Local Governments To Conduct Environmental Impact Review

As seen in California, Washington, and New York, SEPAs provide authority for local governments to adapt the state EIR procedures to local needs. In addition to the authority granted under SEPAs, local governments have authority to engage in environmental protection under traditional land use authority granted in zoning and planning enabling statutes and home rule laws. Recently, there has been a proliferation of local environmental laws such as stand alone natural resource protection ordinances, natural resource zoning districts, and environmentally conscious comprehensive plans.<sup>209</sup> Commentators opine that implied authority to adopt such laws has existed since the adoption of the zoning and planning enabling statutes in the 1920's.<sup>210</sup> Regardless of its genesis, the authority to adopt local environmental laws has been recognized, and provides local governments with an opportunity to contribute to state and national efforts to prevent pollution, protect natural resources and foster environmentally sensitive land use. In some states, this authority can be utilized by local governments to adopt local EIR laws, whether or not the state has adopted a SEPA.

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206. *Id.*

207. *Id.*

208. *Id.*; see also Vicki Morris, *SEPA Document Trends since GMA and Regulatory Reform*, available at <http://www.djc.com/news/enviro/11123746.html> (July 12, 2001) ("There is still a lot to be done to implement regulatory reforms adopted six years ago. There continue to be limits on staff time, experience and financial resources. However, improved land use plans, development regulations and administrative procedures, developed with a broader base of technical input, seem to be producing the desired results: making growth and development more environmentally compatible.").

209. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002).

210. See Earl Finbar Murphy, *Euclid and the Environment*, in CHARLES HAAR & JEROLD S. KAYDEN, *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* (1989).

## a. Overview of Local Authority

Local governments have no inherent power of their own.<sup>211</sup> Under the Tenth Amendment, “powers not delegated to the United States . . . are reserved to the States respectively, or to the people.”<sup>212</sup> As established in *Gibbons v. Ogden*,<sup>213</sup> the states retain the police power: “the power of a state to regulate its police, its domestic trade and to govern its own citizens.”<sup>214</sup> The police power “has developed into a flexible notion relied upon to uphold a broad variety of state and local measures.”<sup>215</sup> Authority for local governments to adopt local laws is derived from an express or implied grant of power delegated by the state.<sup>216</sup> The scope of local government power depends upon the existence and interpretation of the delegated powers.

Historically, local authority was strictly construed. In his influential *Treatise on the Law of Municipal Corporations*, John F. Dillon set forth the general rule of construction for ambiguous grants of authority:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, —not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . All acts beyond the scope of the powers granted are void.<sup>217</sup>

Many states have rejected Dillon’s Rule in favor of a broader interpretation of local government authority. Alaska has interpreted its Constitution to “provide the maximum powers to the legislature and to the local government.”<sup>218</sup> Iowa and North Carolina

211. See OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW § 27 (1982).

212. U.S. CONST. amend. X.

213. 22 U.S. 1 (1824).

214. *Id.* at 226.

215. Michael F. Reilly, *Transformation at Work: The Effect of Environmental Law on Land Use Control*, 24 REAL PROP. PROB. & TR. J. 33, 35 (1989).

216. See JOHN F. DILLON, TREATISE ON MUNICIPAL CORPORATIONS vol. 1, at 448-55 (5th ed. 1911).

217. *Id.* § 237.

218. *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1121 (Alaska 1978).

have both repealed Dillon's rule.<sup>219</sup> Broader interpretation of local authority results in more implied powers attributed to local governments. The ability of a local environmental law to withstand judicial review depends on the state's interpretation of the scope of the local land use authority granted in enabling statutes and the home rule law.

b. Authority to Enact Land Use Regulations: Enabling Acts and Home Rule

The promulgation of the Standard Zoning and Planning Enabling Acts in the mid 1920's provided a statutory basis for granting specific land use authority to local governments. The drafters of the Acts recognized that the regulation of land use is a legitimate local police power concern. The Standard Zoning Act provided a basic grant of power to local governmental bodies to adopt zoning regulations "in accordance with a comprehensive plan and designed to . . . promote health and general welfare."<sup>220</sup> In *Euclid v. Ambler*, the Supreme Court upheld zoning as a valid exercise of the powers delegated to a local government, concluding that the creation of zoning districts did not infringe on individual property rights as guaranteed by the 5th and 14th Amendments.<sup>221</sup> This case paved the way for the current system of local land use regulation exercised throughout the United States.

Many states have adopted the language of the standard zoning and planning enabling acts in their state statutes, thereby expressly delegating land use authority to the local governments. In New York, the statutory authority to adopt zoning regulations is contained in what is loosely called a zoning enabling act.<sup>222</sup> The enabling act empowers towns, villages, and city legislatures to regulate "the height and size of buildings, the percentage of the lot

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219. See IOWA CONST. art. 3, § 38A (municipal home rule authority); *Id.* § 39A (county home rule authority); N.C. GEN. STAT. § 160A-4 (2002) (declaring policy of broad construction of municipal powers); Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 442 S.E.2d 45, 49-50 (N.C. 1994) (contrasting narrow construction under Dillon's rule with "legislative mandate" of broad construction of municipal powers under section 160A-4).

220. See DANIEL R. MANDELKER, LAND USE LAW §§ 4.15 - .16 (Lexis Law Publishing 4th ed. 1997) (1982) [hereinafter LAND USE LAW].

221. 272 U.S. 365 (1926).

222. John R. Nolon, *Local Authority to Adopt Environmental Laws*, available at [http://www.pace.edu/lawschool/landuse/loc\\_envlaw2\\_nolon.html](http://www.pace.edu/lawschool/landuse/loc_envlaw2_nolon.html) (last visited Dec. 5, 2002) (citing N.Y. TOWN LAW §§ 261, 262, 263 (McKinney 2002); N.Y. VILLAGE LAW §§ 7-700, 7-702, 7-704 (McKinney 2002); and similar language in N.Y. GEN. CITY LAW §§ 20(24), (25) (McKinney 2002)).

to be occupied, the size of yards, the density of population, and the location and use of buildings” for the purposes of “lessening congestion, promoting the general welfare, preventing overcrowding, avoiding undue concentrations of population, and facilitating the provision of supportive infrastructure.”<sup>223</sup> The regulations are made for the purpose of encouraging the most appropriate use of the land.<sup>224</sup> Similar language empowering local governments to regulate land use is found in other states’ statutes.<sup>225</sup>

In addition to the specific authority granted in zoning and planning enabling acts, a majority of state constitutions authorize municipal home rule.<sup>226</sup> Municipal home rule is a general grant of authority in the state constitutions to local governments to pass local laws. Constitutional home rule provisions specify “an area of concern in which local governments can legislate without specific statutory authority.”<sup>227</sup> The provisions may state that the local government can regulate its ‘municipal’ or ‘corporate’ affairs or “property, affairs and government.”<sup>228</sup> The scope of the home rule power varies from state to state.<sup>229</sup> Some states have also granted legislative home rule, an express grant of home rule authority contained in statutes adopted by the state legislature. Under legislative home rule, “local governments may exercise all powers the state legislature is capable of delegating to them even though the legislature has not delegated the power.”<sup>230</sup> Most courts have held that home rule authority encompasses the power to pass zoning and planning laws, thereby granting local governments additional authority to adopt land use regulations.<sup>231</sup>

State constitutions and statutes convey grants of home rule authority whose language and interpretations differ.<sup>232</sup> In New

223. John R. Nolon, *Local Authority to Adopt Environmental Laws*, at [http://www.pace.edu/lawschool/landuse/loc\\_envlaw2\\_nolon.html](http://www.pace.edu/lawschool/landuse/loc_envlaw2_nolon.html) (last visited Dec. 5, 2002).

224. *See id.*

225. California has established a zoning enabling act similar to that of New York, but with some changes in the distribution of administrative responsibilities at the local level and an expansion of regulatory authority.

226. *See* LAND USE LAW, *supra* note 220, § 4.24.

227. *Id.*

228. N.Y. CONST. art. IX, § 2(b)(2).

229. *See* LAND USE LAW, *supra* note 220, § 4.25.

230. *Id.* § 4.24.

231. *Id.* § 4.25. For authority in New York, *see* *Sherman v. Frazier*, 446 N.Y.S.2d 372 (N.Y. App. Div. 1982). “A town board is enabled to adopt zoning regulations by virtue of its Municipal Home Review Law powers as well as those granted by the Town law.” LAND USE LAW, *supra* note 220, at 377.

232. In California, the state constitution grants municipalities the general power to “make and enforce all ordinances and regulations in respect to municipal affairs,

York, local governments have both constitutional and legislative home rule authority. Under Article IX of the New York Constitution, as implemented by the Municipal Home Rule Law, localities are given the authority to adopt laws relating to their "property, affairs or government," for "the protection and enhancement of its physical and visual environment," and for the matters delegated to them under the statute of local governments.<sup>233</sup> The statute of local governments grants local governments the power "to adopt, amend and repeal zoning regulations" and to "perform comprehensive or other planning work relating to its jurisdiction."<sup>234</sup> The provisions of the home rule law are to be "liberally construed."<sup>235</sup> There are four general limitations on home rule power. Legislation enacted under home rule must fall within the general or specific authority granted by the law, it must be consistent with the state constitution and general laws,<sup>236</sup> it must not be preempted by state legislation,<sup>237</sup> and the procedures contained in the home rule law must be followed.

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subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws." CAL. CONST. art. XI, § 5, cl. a. The courts have held that a local government may enact a general law, even if the law is in direct conflict with a general state statute, when the area is a "municipal affair," and not a matter that is a "statewide concern." *Whisman v. San Francisco Unified Sch. Dist.*, 86 Cal. App. 3d 782, 789 (1978).

233. N.Y. MUN. HOME RULE LAW §§ 10.1(i), 10.1(ii)(a)(11) (McKinney 2002). The Statute of Local Governments also conveys home rule authority. See N.Y. STAT. LOCAL GOV'TS § 10 (McKinney 1994).

234. N.Y. STAT. LOCAL GOV'TS §§ 10(6), 10(7) (McKinney 1994).

235. N.Y. MUN. HOME RULE LAW § 51.

236. "Towns and villages have the authority to supersede provisions of the Town Law and Village Law, respectively. Cities have the authority to supersede the provisions of any general statute unless the State Legislature has indicated that a particular statute is not be superseded by local law." Joe Stinson, *The Home Rule Authority of New York Municipalities in the Land Use Context*, at <http://www.pace.edu/law-school/landuse/stinso.html> (last visited Jan. 20, 2003).

237. The requirement for consistency with the constitution and general statutes is a significant limitation on the home rule power of local governments. A local law will be inconsistent where it directly conflicts with or contradicts a provision of the constitution or a general statute. Furthermore, a local law will be inconsistent if the State Legislature has evinced its intent to preempt local regulation of a particular subject. Such an intention may be expressly stated by the Legislature, or it may be implied by such factors as the comprehensiveness of the state regulatory scheme, the nature of the subject being regulated, the need for statewide uniformity in regulation, etc. The purpose and legislative history of general statutes are often determinative in deciding whether there is an implied intent to preempt local legislation.

## c. Authority to Enact Local Environmental Impact Review

The important question for purposes of this article is whether statutory land use authority or municipal home rule authorizes local governments to adopt local EIR statutes. This question is especially pertinent in states that do not have SEPA's that apply to local governments. If existing grants of zoning, planning, and home rule authority are broadly construed so as to include the authority of a local government to protect the natural environment, an argument can be made that local governments have the authority to adopt EIR laws.<sup>238</sup>

The enactment of local environmental laws in various states reveals that local governments are utilizing their statutory and home rule powers as authority to protect and preserve the environment.<sup>239</sup> The diversity of ecological, geographical, and biological conditions among communities has prompted local governments to enact laws to protect their unique natural attributes. These local laws include aquifer protection statutes, fish and wildlife habitat protection statutes, timber harvesting regulations, and scenic resource protection.<sup>240</sup> Local governments may also include environmental considerations in their zoning and land use regulations by creating zoning districts that preserve environmentally sensitive areas of a community, or require subdivision plats to provide for the preservation of natural resources. Comprehensive plans may provide a legal basis for the protection of the environment by identifying the preservation of natural resources and open space as a community goal and specifying how that goal is to be achieved.<sup>241</sup>

The articulation of environmental values in state constitutions and statutes supports the use of local authority to implement environmental protection measures. New York's Municipal

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See Joe Stinson, *The Home Rule Authority of New York Municipalities in the Land Use Context*, at <http://www.pace.edu/lawschool/landuse/stinso.html> (last visited Jan. 20, 2003).

238. It is interesting to note that many states declare a policy of environmental protection in their state constitutions. See Bruce Ledewitz, *The Challenge of, and Judicial Response to, Environmental Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 33 (1991).

239. See Nolon, *supra* note 209; see also Kenneth C. Driggers & David A. Savage, *Protecting South Carolina's Environment Through Local Government Land Use*, 2 S.C. ENVTL. L.J. 1 (1992).

240. John R. Nolon and Kristen Kelley, *Local Environmental Law: Natural Evolution or a Mutant Form?*, ENVTL L. IN N.Y. (pts. 1 & 2), vol. 12, No. 9 (2001), vol. 12, No. 10 (Lexis Publishing 2001).

241. *Id.*



Home Rule law authorizes local governments to adopt land use laws “for the protection and enhancement of its physical and visual environment.”<sup>242</sup> One of the purposes of the New York zoning enabling act is to encourage, “the most appropriate use of the land throughout the municipality.”<sup>243</sup> In Colorado, the Land Use Act was created “to encourage uses of land and other natural resources . . . to conserve soil, water, and forest resources. . . .”<sup>244</sup> In Washington, the Growth Management Act emphasizes the consideration of the effect of growth on the natural environment. The Constitution of North Carolina establishes the protection of the environment as a proper function of local governments.<sup>245</sup> These statutory and constitutional provisions emphasize the role of local governments in the protection of the environment.

Local EIR represents an additional environmental protection tool that can be upheld under a broad grant of authority to a local government. The authority to adopt local EIR requirements can be argued to fall within a local government’s home rule power to enact general laws of a municipal concern since the process involves the regulation of local land use to protect local health and safety. Because it involves local land regulation, a local EIR law may also fall within the land use authority granted by zoning and planning enabling acts. When state constitutions or statutes articulate environmental values, the home rule requirement that the local law be consistent with the general law is satisfied.<sup>246</sup> When land use enabling acts and home rule laws are broadly construed, local authority to enact environmental laws may be implied.<sup>247</sup>

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242. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11) (McKinney 2002).

243. N.Y. TOWN LAW § 263 (McKinney 1994); N.Y. VILLAGE LAW § 7-704 (McKinney 1996).

244. COLO. REV. STAT. § 24-65-102 (2001).

245. N.C. CONST. art. XIV, § 5.

246. As stated in NEPA, the purpose of EIR is to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321 (2002). The state environmental impact review statutes share the same goals. *Id.* The establishment of local EIR extends this purpose by fostering environmental values at every level of agency decision-making.

247. The authority to enact local EIR processes may be limited by traditional constraints on local government land use authority, such as preemption, procedural and substantive due process requirements, and constitutional takings. These considerations are beyond the scope of the article.

## d. An illustration from Mount Pleasant, South Carolina

The town of Mt. Pleasant, South Carolina recently enacted a local environmental impact review procedure, independent of any state mandate. This local action is significant, since it is an illustration of purely local EIR. Unlike New York, Washington and California, South Carolina does not have a statewide environmental impact review policy. Consideration of the authority of local governments in South Carolina and the Mt. Pleasant ordinance suggests that, even when statewide EIR requirements do not exist, local governments may initiate local EIR to protect unique environmental resources and assets.

In South Carolina, municipalities derive their powers from both home rule authority and enabling statutes. The South Carolina Constitution authorizes the legislature to provide for "the structure and organization, powers duties, functions and responsibilities of the municipalities . . . by general law."<sup>248</sup> The Constitution also expressly abolishes Dillon's Rule, providing that, "[t]he provisions of [the] Constitution and all laws concerning local government shall be liberally construed in their favor," and that any powers granted local government by the constitution and laws "shall include those fairly implied and not prohibited by [the] Constitution."<sup>249</sup> This broad grant of local authority was statutorily implemented by the South Carolina legislature by provisions such as the following: "All counties of the State . . . have authority to enact regulations, resolutions, and ordinances . . . respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them."<sup>250</sup> These provisions enlarge the scope of local government authority. Under home rule, local governments in South Carolina "may enact regulations deemed necessary and proper for the general welfare un-

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248. S.C. CONST. art. VIII, § 7.

249. *Id.* § 17; see also *Southern Bell Tel. & Telegraph Co. v. City of Aiken*, 306 S.E.2d 220, 221 (S.C. 1983) (holding Article VIII of the South Carolina Constitution was completely revised for the purpose of accomplishing home rule and granted renewed autonomy to local government).

250. S.C. CODE ANN. § 4-9-25 (Law. Co-op. 1994); see also *id.* § 5-7-10. "The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities." *Id.*; see also *Williams v. Town of Hilton Head*, 429 S.E.2d 802, 805 (S.C. 1993) (holding that the South Carolina legislature intended to abolish Dillon's Rule when enacting S.C. CODE ANN. § 5-7-10).

less such regulations are actually inconsistent with the Constitution or general law of the state.”<sup>251</sup>

Local governments in South Carolina derive their express zoning and planning powers from the South Carolina Local Government Planning Enabling Act.<sup>252</sup> Enacted in 1994, the purpose of the act was to consolidate the local planning and zoning statutes in a comprehensive law and recognize new planning and zoning powers.<sup>253</sup> The act provides that a local government may create a planning commission, whose “duty and function” it is to create “plans and programs . . . designed to promote public health, safety, morals, convenience, prosperity, or the general welfare.”<sup>254</sup> Comprehensive plans must include, but are not limited to, seven elements: (1) population, (2) economic development, (3) natural resources, (4) cultural resources, (5) community facilities, (6) housing, and (7) land use.<sup>255</sup> The act notes that “specific planning elements must be based upon careful and comprehensive surveys and studies of existing conditions and probable future development and include recommended means of implementation.”<sup>256</sup> All zoning and land use regulations must be in accordance with the comprehensive plan.<sup>257</sup> The zoning and planning act also authorizes specific zoning techniques such as cluster development, floating zones, and planned development districts.<sup>258</sup> However, the act makes clear that “any other planning and zoning techniques may be used.”<sup>259</sup> When making revisions to the zoning ordinance, the municipality is authorized to consider “the protection of . . . ecologically sensitive areas.”<sup>260</sup>

South Carolina home rule authority is broadly construed. The South Carolina Local Government Planning Act extends the planning and zoning authority of local governments and emphasizes protection of the environment. It is perhaps this broad authority and evolving environmental ethic that persuaded the

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251. Douglas T. Kendall, *Preserving South Carolina's Beaches: The Role of Local Planning in Managing Growth in Coastal South Carolina*, 1 S.C. ENVTL. L.J. 61, 69 (2000). For a general discussion of South Carolina Home Rule see *Hospitality Ass'n of S.C., Inc. v. County of Charleston*, 464 S.E.2d 113 (S.C. 1995).

252. S.C. CODE ANN. §§ 6-29-310 to 6-29-1200 (Law. Co-op. 1994).

253. See Kendall, *supra* note 251, at 65.

254. S.C. ANN. CODE § 6-29-340 (Law. Co-op. 1994).

255. *Id.* § 6-29-510.

256. *Id.* § 6-29-340.

257. *Id.* § 6-29-720(B).

258. *Id.* § 6-29-720(C).

259. *Id.*

260. S.C. CODE ANN. § 6-29-710(A)(4) (Law. Co-op. 1994).

Town of Mount Pleasant, South Carolina, to adopt a local environmental impact review ordinance.<sup>261</sup> The purpose of the ordinance is to “provide a basis for assessing a proposed major development project’s favorable or unfavorable impact on the town’s overall environment and infrastructure, natural ecology, and economic, historic, social, and related public resources.”<sup>262</sup> The ordinance requires an impact assessment for development projects that meet certain thresholds. The developer must provide a general description of the project, identify data about the impacts upon municipal facilities, services, and resources.<sup>263</sup> The town Planning Director reviews the impact assessment and may conduct independent field investigations for verification.<sup>264</sup> If negative impacts are identified, the Town Council determines whether the impacts are “acceptable and in the public interest.”<sup>265</sup> If not, the Council has the authority to request the developer to mitigate negative impacts.<sup>266</sup> If the mitigation cannot be satisfactorily achieved, the impact assessment approval request can be denied.<sup>267</sup>

Like the statewide policies in New York, California, and Washington, the Mount Pleasant impact assessment process requires extensive review of the impacts of individual development projects. Developers must submit information concerning the impacts upon “public services and facilities, the environment, natural resources, historical and archaeological resources, local housing needs, the local economy and other areas affecting the health, safety, general welfare and quality of life in the town.”<sup>268</sup> In this sense, the impact assessment reviews effects on both the built and natural environment of the town. There is an extensive traffic impact assessment process, which requires the developer to submit a Transportation Impact Assessment Data Form.<sup>269</sup> The

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261. See MT. PLEASANT, S.C. CODE OF ORDINANCES tit. XV, § 156.054, available at [http://www.amlegal.com/nxt/gateway.dll/South%20Carolina/Mount%20Pleasant/title00051.htm/chapter00061.htm?f=templates\\$fn=altmain-nf.htm\\$3.0#JD\\_156.054](http://www.amlegal.com/nxt/gateway.dll/South%20Carolina/Mount%20Pleasant/title00051.htm/chapter00061.htm?f=templates$fn=altmain-nf.htm$3.0#JD_156.054) (last visited Dec. 6, 2002).

262. *Id.* § 156.054(A).

263. *Id.* § 156.054(E)(2).

264. *Id.* § 156.054(F).

265. *Id.* § 156.054(G).

266. *Id.*

267. MT. PLEASANT, S.C. CODE OF ORDINANCES tit. XV, § 156.054(G), available at [http://www.amlegal.com/nxt/gateway.dll/South%20Carolina/Mount%20Pleasant/title00051.htm/chapter00061.htm?f=templates\\$fn=altmain-nf.htm\\$3.0#JD\\_156.054](http://www.amlegal.com/nxt/gateway.dll/South%20Carolina/Mount%20Pleasant/title00051.htm/chapter00061.htm?f=templates$fn=altmain-nf.htm$3.0#JD_156.054) (last visited Dec. 6, 2002).

268. *Id.* § 156.054(E).

269. *Id.* § 156.054(E)(2)(d).

impact assessment must address the negative effect the development will have on marshes, creeks, rivers, plant and animal habitats and buffer zones and must describe the steps taken to mitigate the negative effects and protect the natural resources.<sup>270</sup> The impact assessment is submitted with the development sketch plan and reviewed by the Town Council prior to the submission of a final plat.<sup>271</sup>

Considering the broad constitutional and legislative home rule authority that is granted to local governments in South Carolina, this local environmental impact review ordinance likely falls within the powers granted to local governments. As noted above, the Constitution provides that local authority shall include those powers "fairly implied and not prohibited by [the] Constitution."<sup>272</sup> The Code explicitly states that local governments may enact local laws "respecting any subject as appears to them necessary and proper for the security, general welfare, and convenience of counties or for preserving health, peace, order, and good government in them."<sup>273</sup> Protection of the environment can be construed as a local law respecting the general welfare of the community.

Since there is no statewide EIR process in South Carolina, local governments have much flexibility in determining the scope of protection afforded by EIR ordinances. In addition, the flexibility of local zoning and planning allows local governments to utilize the planning and EIR integration methods discussed below. Local governments in South Carolina can tailor the EIR process to meet the unique needs of their communities and provide for harmonious community development.

#### IV. Integrating Environmental Impact Review with Local Planning

As seen in New York, Washington, California, and South Carolina, authority and opportunity exist for local governments to enact their own local environmental impact review laws. Where statewide environmental policy acts exist, local governments may

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270. *Id.* § 156.054(E)(2)(j).

271. *Id.* § 156.054(H).

272. S.C. CONST. art. VIII, § 17.

273. S.C. CODE ANN. § 4-9-25 (Law. Co-op. 1994); *see also id.* § 5-7-10. "The powers of a municipality shall be liberally construed in favor of the municipality and the specific mention of particular powers shall not be construed as limiting in any manner the general powers of such municipalities." *Id.*; *see also Williams v. Town of Hilton Head*, 429 S.E.2d 802 (S.C. 1993) (holding that the South Carolina legislature intended to abolish Dillon's Rule when enacting S.C. CODE ANN. § 5-7-10).

be limited in the procedures they can enact, but they have been given the planning and EIR tools to integrate these two processes to provide for more efficient, streamlined environmental protection. In states such as South Carolina, where no statewide environmental review policy exists, local governments have an opportunity to initiate EIR and integrate it with planning so as to avoid the procedural drawbacks of the traditional EIR process.

The Growing Smart Legislative Guidebook issued by the American Planning Association includes suggestions and model legislation for achieving integration between state environmental policy acts and local planning.<sup>274</sup> Noting the duplicative requirements of planning and environmental review and the different goals of the two processes, the guidebook suggests three methods of integration. This section will describe how local governments can take advantage of their existing authority to implement these integration methods and improve upon the integration methods that are already authorized, in an effort to improve the local EIR process.

Many commentators point to existing drawbacks in the current methods of environmental impact review. The environmental review process is criticized for being too time-consuming and costly.<sup>275</sup> Duplication can occur between the environmental review process and the development regulations.<sup>276</sup> Overlapping land-use and environmental regulations “are perceived by landowners, developers and builders . . . as burdensome and intrusive.”<sup>277</sup> Duplication can result in “additional compliance costs and delays . . . because agencies must consider the same environmental impacts more than once to satisfy different statutory requirements.”<sup>278</sup> In California, CEQA was criticized by several task forces and commissions as “too broad and cumbersome” and “a leading symbol of over-regulation, responsible for the downturn

274. See AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stewart Meck ed., 2002) [hereinafter GROWING SMART]. DANIEL R. MANDELKER, INTEGRATING STATE ENVIRONMENTAL PLANNING ACTS ch. 12 suggests three alternatives for integrating state environmental policy acts with local planning.

275. See Sterk, *supra* note 20, at 2041.

276. Mandelker, *supra* note 123, at 3.

277. Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 77 (1996).

278. GROWING SMART, *supra* note 274, at 12-3.

in California's economy."<sup>279</sup> Some note that project-by-project impact analysis "misses the big picture" since it focuses on short-term, rather than cumulative environmental effects.<sup>280</sup> One critic complains that in New York, "[i]mpact statements do nothing to focus the attention of decision-makers on a municipality's overall environmental condition."<sup>281</sup> Others note that the environmental review process is often used by 'not-in-my-backyard' advocates to delay the development approval process in the hope of forcing developers to withdraw projects due to increased cost and lost profits.<sup>282</sup> Thus, the negative procedural aspects of environmental review often overshadow the important environmental protection goals it serves to achieve.

The integration of planning and zoning can be utilized by local governments to overcome the procedural drawbacks of current environmental impact review schemes. As noted above, California, Washington, and New York have attempted to mitigate the negative procedural aspects of project-by-project environmental impact review by giving local governments the tools to integrate EIR with land use planning. Integration of planning and EIR has been acknowledged as a means of increasing environmental protection while improving the review process.<sup>283</sup> A publication of the State of Washington Office of Community Development notes that, "[l]inking growth management and environmental policy laws saves money, improves environmental protection, and fosters economic development."<sup>284</sup> In 1993, more than 60 bills were introduced in the California legislature to revise and streamline CEQA.<sup>285</sup> While Integration of local environmental review with planning and land use regulation is not without its own draw-

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279. Olshansky, *supra* note 98 (citing numerous studies that were conducted noting the inefficient process of CEQA).

280. GROWING SMART, *supra* note 274, § 12-3.

281. Sterk, *supra* note 20, at 2054 (noting that EIS insulates "decision-makers from the big picture—the cumulative effect of many similar projects on the environment as a whole. A particular project may contribute only infinitesimally toward degradation of the environment, but many projects, in the aggregate, may have a significant impact. Incremental decisions on individual projects may be sound if viewed in isolation, but may contribute to bad overall policy.").

282. Varner, *supra* note 116, at 1484.

283. NEPA includes opportunity for program statements on generally related activities, including actions that have relevant similarities such as common timing, impacts and methods of implementation. See NEPA Law, *supra* note 3, at § 9.02[7] (citing 40 C.F.R. § 1502.4(b)(2) (2001)).

284. OFFICE OF GROWTH MANAGEMENT, COMBINING SEPA AND GMA, at [http://www.oed.wa.gov/info/lgd/growth/fact\\_sheets/SEPA\\_GMA.tpl](http://www.oed.wa.gov/info/lgd/growth/fact_sheets/SEPA_GMA.tpl) (last visited Dec. 6, 2002).

285. Olshansky, *supra* note 98.

backs,<sup>286</sup> there are ways to implement the two processes to provide for efficient and effective local EIR.

The APA Growing Smart Model Legislative Guidebook suggests three methods of integrating SEPA's with local planning.<sup>287</sup> These methods can also be used to integrate purely local environmental impact review statutes, such as those that exist in Mt. Pleasant, South Carolina, with local planning schemes. By conducting environmental impact review at the planning stage, instead of the project stage, many of the procedural drawbacks of project-by-project environmental impact review can be avoided. If extensive environmental analysis is conducted at the planning stage, no additional environmental review need be conducted at the project stage. This consistent approach to environmental impact review can result in beneficial effects for both municipalities and developers, while long-term, comprehensive environmental protection is fostered.

The first approach suggested by the Growing Smart Legislative Guidebook is the environmental analysis of alternatives in the comprehensive plan. This requires the planning agency to "prepare an environmental analysis of conceptual alternatives to the development proposals in the plan, perhaps through some combination of matrix and narrative." This option would require a statutory amendment authorizing planning agencies to conduct environmental analyses. If local environmental impact review procedures allowed analysis in the plan to serve as a substitute for project review, further environmental review would be necessary only if there were site-specific problems not addressed in the plan. As seen in California and Washington, some states have urged local governments to include environmental elements in their comprehensive plans.<sup>288</sup> In addition, the state planning acts and planning departments encourage integration between planning and environmental review.<sup>289</sup> If this sort of integration is imple-

286. GROWING SMART, *supra* note 274, § 12-6.

287. *Id.* §§ 12-1 to 12-32.

288. See CAL. PUB. RES. CODE § 21083.3 (West 2001); WASH. REV. CODE § 36.70A.020 (2002).

289. See WASH. REV. CODE. § 36.70A.385 (allowing pilot programs between the planning department and local governments); CAL. PUB. RES. CODE § 21080.5(d)(3)(A)(B) (allowing exemption from CEQA requirements if the regulatory agency plan or documentation contains environmental information. The information must include a "description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity" and the plan must be available "for a reasonable time for review and comment by other public agencies and the general public.").



mented with the hope of streamlining environmental review, the environmental analysis in the plan must be extensive to ensure that subsequent developments fall within the alternatives suggested in the plan and therefore do not require the full local EIR process.

The second option suggested in the Growing Smart Legislative Guidebook is the creation of an environmental program statement on a comprehensive plan. Subsequent projects are exempt from further environmental review unless there are site-specific environmental conditions that are not addressed in the program statement. This option eliminates repetitious review of environmental impacts at the project stage. By partially setting aside the environmental review statute requirements, the development approval process proceeds faster and more efficiently. This option has already been implemented in California and New York. California allows the creation of a Master EIR. California statutes and guidelines acknowledge that this option streamlines the environmental review process and limits duplication of environmental impact analysis.<sup>290</sup> As seen in Modesto, California, the Master EIR serves as a basis for determining if subsequent developments are in conformance with the general plan. New York statutes allow a comprehensive plan to be accompanied by a GEIS, which can eliminate further environmental review at the project stage.<sup>291</sup> Local governments can implement this option by creating local EIR statutes that allow program statements or master environmental impact review statements to be created. When environmental impact review is included as an integral part of the planning process, local governments can rely upon their planning and zoning authority to implement EIR.

The third option suggested in the Growing Smart Legislative Guidebook relies upon “environmental requirements contained in a comprehensive plan and development regulations as a substitute for SEPA environmental review when a project receives development approval.”<sup>292</sup> Rather than an integration of planning and environmental impact review statements, this alternative envisions a set-aside of the environmental review statute by relying on the comprehensive plan and the land use regulations to mitigate environmental impacts. The planning statute “must be inclusive enough to authorize planning for environmental problems

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290. See CALIFORNIA GENERAL PLAN GUIDELINES, *supra* note 133, at 108.

291. N.Y. GEN. CITY LAW § 28-a (McKinney 2002).

292. GROWING SMART, *supra* note 274, at 12-13.

considered in environmental reviews, such as project alternatives and cumulative impacts” and must also authorize the mitigation of significant impacts.<sup>293</sup> Washington has enacted statutes that authorize the use of environmental analysis in plans and development regulations as a substitute for SEPA review.<sup>294</sup> Tumwater, Washington has utilized this authority by adopting environmental protection ordinances that contain development standards. The legislative guidebook notes that this type of environmental review may in fact provide more substantive results since environmental impact review sometimes lacks a substantive component. Under traditional land use authority, local governments could provide for compliance with environmental analysis and the implementation of mitigation measures in land use regulations as part of the development approval process.<sup>295</sup> This would serve as an alternative to implementing a separate local environmental impact review statute, while maintaining environmental protection techniques.

As seen in Washington, California and New York, some local governments are already authorized to implement these integration methods to streamline SEPA procedures with local planning efforts. These methods can also be used by local governments that do not have SEPAs, such as Mt. Pleasant, South Carolina, when local environmental impact review statutes are adopted. Even in states that have not abolished Dillon’s Rule, these methods can be adopted to create less cumbersome local EIR processes while still maintaining “needed protection from environmental damage by land use development.”<sup>296</sup> If implemented correctly, the methods will result in positive changes in the EIR process for developers, municipalities, and environmentalists alike.<sup>297</sup>

## V. Conclusion

Since the adoption of NEPA, EIR has served as an important federal and state environmental protection tool. EIR is “an antici-

293. *Id.*

294. WASH. REV. CODE. §§ 43.21C.240(1), 36.70B.030(4) (2002).

295. *See also* Sterk, *supra* note 20, at 2090. Sterk suggests that local zoning decisions should be exempt from state environmental review statutes since “statutory authority independent of SEQRA would permit officials to deny variances, special permits or zoning amendments if environmental factors dictated.” *Id.* He notes that the only loss to not having the state environmental review statute would be informational. *Id.*

296. GROWING SMART, *supra* note 274, at 12-16.

297. *Id.* at 12-15.

patory, participatory environmental management tool,”<sup>298</sup> “a technique not just to protect environmental quality, but also to promote the ordered growth of society.”<sup>299</sup> By mandating that federal and state decision-makers conduct EIR, NEPA and the SEPA’s recognize that “[e]nvironmental quality will be the result of many isolated and discrete decisions, each one structured so as to avert environmental degradation.”<sup>300</sup> This paper has illustrated that EIR can also be conducted by local governmental agencies as a means of mandating consideration of the adverse environmental effects of land development. As seen in New York City, Modesto and Tumwater, some local governments already conduct EIR as a result of state requirements. As seen in Mount Pleasant, authority may also exist in states that have not adopted SEPA’s or do not apply SEPA’s to local actions for local governments to adopt EIR under their existing land use and home rule authority.

The Growing Smart Legislative Guidebook illustrates that there is opportunity for all local governments, regardless of the scope of local authority, to enact legislation that integrates local land use regulation and EIR. When EIR is conducted in coordination with local land use regulations, a more efficient development approval process results and environmental protection is achieved. By requiring environmental analysis in comprehensive plans, conducting EIS on comprehensive plans or including the consideration of environmental impacts in local land use regulations, local governments can efficiently evaluate the effects of local planning and development. The federal government recognizes that “[c]ontinued significant improvement in environmental quality can best be achieved by fostering local stewardship of our resources . . . .”<sup>301</sup> EIR represents an additional environmental protection tool local governments can use as their stewardship of environmental quality continues to evolve.

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298. CHRISTOPHER WOOD, ENVIRONMENTAL IMPACT ASSESSMENT: A COMPARATIVE REVIEW 1 (1995).

299. Nicholas A. Robinson, *SEQRA’s Siblings: Precedents From Little NEPA’s in the Sister States*, 46 ALB. L. REV. 1155, 1175 (1982).

300. *Id.* at 1155.

301. President George W. Bush, President of the United States, *A Blueprint for New Beginnings*, at [www.whitehouse.gov/news/usbudget/blueprint/bud11.html](http://www.whitehouse.gov/news/usbudget/blueprint/bud11.html) (last visited Jan. 20, 2003).