TABLE OF CONTENTS

Based on material provided in part by:

Land Use Law Center
Pace Law School
78 North Broadway
White Plains, NY 10603

Center of Excellence for Sustainable Development
A Project for the U.S. Department of Energy

Eastern Michigan University
Ypsilanti, MI 48197

INNOVATIVE LAND USE CONTROLS

I. OVERLAY ZONING

DEFINITION
An overlay district is created by identifying a special resource or development area and adopting new provisions that apply in that area in addition to the provisions of the zoning ordinance. The provisions of an overlay district can be more restrictive or more expansive than those contained in the zoning district. The term "overlay district" refers to the superimposition of the new district's lines on the zoning map's district designations. An overlay district can be coterminous with existing zoning districts or contain only parts of one or more such districts.

Overlay zones create a framework for conservation or development of special geographical areas. In a special resource overlay district, overlay provisions typically impose greater restrictions on the development of land, but only regarding those parcels whose development, as permitted under the zoning, may threaten the viability of the natural resource. In a development area overlay district, the provisions may impose restrictions as well, but also may provide zoning incentives and waivers to encourage certain types and styles of development. Overlay zone provisions are often complemented by the adoption of other innovative zoning techniques, such as floating zones, special permits, incentive zoning, cluster development and special site plan or subdivision regulations.

PURPOSE
The purpose of an overlay zone is to conserve natural resources or realize development objectives without unduly disturbing the expectations created by the existing zoning ordinance. The existing zoning provisions may properly regulate the relevant district, in general, but more specific and targeted provisions may be needed to accomplish pressing land use objectives. Within that context, an overlay zone establishes land use regulations that must be enforced by local authorities under the terms of the law or ordinance adopting the overlay district.

WHEN
An overlay ordinance may be adopted to encourage appropriate development in a specific area or when the zoning ordinance is considered to be inadequate to protect a particular resource area. Instead of changing the provisions of the zoning, applicable to all land parcels in the area, the local legislature may want to adopt special provisions applicable to those parcels that have particular development constraints or potential. The overlay district is most often thought of, and is sometimes defined, as a technique for conserving a fragile natural resource area such as an aquifer, wetland resource area, watershed or tidal basin. The underlying zoning may otherwise permit the subdivision of all land in such an area, a plan which, if implemented, might destroy the resource area.

To accomplish a more appropriate land use pattern, an overlay district can be adopted that contains special clustering or set back provisions, to protect environmentally constrained areas. Additional provisions can be added that are not typically found in zoning ordinances such as grading, landscape restoration, and limitations on the development of steep slopes. Overlay

districts, however, have broad application to a variety of contexts. They can be used, for example, to accomplish the redevelopment or rehabilitation of deteriorated neighborhoods. Within a designated redevelopment overlay district, developers can be given a variety of incentives to redevelop contaminated or substandard properties, rehabilitate substandard structures or provide needed community facilities or affordable housing. Overlay districts can, at the same time, be used to further the development and conservation objectives of the community. For example, the locality can adopt a conservation area overlay district in one or more environmentally constrained areas and a development area overlay district along a transportation corridor to provide for greater, and more cost-effective development patterns.

Adopting both overlay districts simultaneously provides needed tax revenue, housing, jobs and commercial activity while protecting the quality of life and the environment through the conservation of threatened natural resource areas. A variety of techniques can be employed to accomplish the objectives of both overlay districts; a developer, for example, can be given zoning incentives in the development district in exchange for purchasing a conservation easement on land in the conservation district. When development and conservation areas overlap municipal borders, communities can enter into intermunicipal agreements to adopt and enforce compatible overlay zones. In this way, the efforts of one community to achieve appropriate land uses along a shared transportation corridor or in an intermunicipal natural resource area can be enhanced greatly.

AUTHORITY

A local government's authority to create an overlay district is implied in the delegation of the power to enact zoning restrictions and create zoning districts. One purpose of zoning is to ensure that its provisions consider the character of areas and their particular suitability for particular uses with a view to conserving the value of buildings and encouraging the most appropriate use of the land throughout the municipality. The decision as to how various properties are classified or reclassified rests with the local legislative body. Its judgment and determination are considered conclusive, beyond interference from the courts, unless shown to be arbitrary.

IMPLEMENTATION

The procedures for adopting an overlay district are the same as for adopting a zoning or rezoning provision. Once relevant studies have been completed, the district identified and its substantive provisions are drafted, public notice must be given and a public hearing held. The provisions of the overlay district law or ordinance can contain special techniques or procedures for accomplishing its objectives such a site plan or subdivision standards, clustering permission, or a floating zone.

Compliance with environmental review provisions of state law and conformance with the comprehensive plan are also required. Following the adoption of the overlay district, the municipality should make appropriate notations on its zoning map to provide effective notice of its applicability. As with the adoption of other land use controls where the expectations of property owners and local citizens are to be affected, the municipality may want to precede these formal steps with a variety of informal meetings not only to gain public acceptance, but to influence the creation of the overlay district law or ordinance.

LIMITATIONS AND CONCERNS

In adopting an overlay district ordinance or law, the municipality must address several issues: 1. The municipality should consider whether its objectives can be met by simply amending the underlying zoning ordinance. It may be that the provisions of the zoning ordinance create a valid base line for development still applicable to a large number of parcels in the area but that the overlay district is needed for a significant number of special circumstances. 2. The municipality must be cautious that the provisions contained in the overlay district are sufficiently specific to provide clear guidance or incentives to the owners of properties and any administrative body involved in approving proposals. The Court of Appeals has warned that standards governing the issuance of special permits may not be so general as to allow unchecked discretion on the part of a planning or zoning board. Where the authority to issue special permits and land use approvals is retained by the Town Council, the standards can be less specific, but their application must not be arbitrary and capricious. 3. The overlay district's burdens must be imposed on as uniformly as possible under the circumstances. Recent U.S. Supreme Court decisions warn against singling out particular property owners to bear public burdens unreasonably. 4. The provisions of the district must be reasonably related to the accomplishment of the law's objectives. If the overlay district prohibits the use of significant portions of a landowner's property, the courts may search for a close relationship between the impacts of the development of the property and the regulation that restricts that development

REFERENCES:

1. Overlay Zoning, Matt Bavoso and Timothy Jones, Land Use Law Center, 1996.

II. FLOATING ZONES

DEFINITION

A floating zoning district defines a use, such as an office complex, research laboratory, or multifamily housing, that the community wants to encourage. The floating zone can be affixed to a qualifying parcel of land, either upon the application of the parcel's owner or upon the initiative of the local legislature. Upon approval, the parcel is rezoned to reflect the new use and becomes a small zoning district; its development is governed by the use, dimensional and other provisions of the floating zone ordinance. The floating zone ordinance contains a number of provisions intended to mitigate the impact of its development on the surrounding area. Normally, for a parcel to be eligible for rezoning under a floating zone, it must be of a sufficient size to insure that the development can be fitted properly into its surroundings. An owner who requests that the zone be applied to a particular parcel must demonstrate that a variety of impacts will be properly handled, such as traffic and site access; water and sewer service; design continuity; effect on natural resources; visual and noise impact; preservation of open space; and the effect on nearby property values.

PURPOSE

The purpose of adding one or more floating zones to a community's zoning ordinance is to add flexibility to that ordinance, enabling it to accommodate new land uses. As a community's needs change, uses that are not readily accommodated by the adopted zoning ordinance may be desired by local leaders. These uses may be unique and have a relatively significant, but manageable impact on their surroundings. Local officials may be unclear as to where such uses should best

be accommodated and where developers would prefer to locate them to insure that they are successful economically.

WHEN

Floating zones are usually added to existing zoning ordinances to define certain uses that the community desires but, for various reasons, it does not know where those uses should be located. Floating zones allow developers some needed flexibility in locating sites and determining how new land uses can be designed and buffered to fit into their surroundings. In some communities, where affordable housing is desired, for example, a multifamily district may be created by the legislature, but not located on the zoning map. This allows developers the maximum flexibility to scout out sites and design developments that mix housing types, tenures and costs to accomplish the municipality's objective of producing affordable housing while requiring the project fit properly into the neighborhood. Similarly, a community may want to create an office park but not want to limit the location of such a facility to give developers ample opportunity to find a site that is most suited to current market needs.

Since both multifamily housing and office parks can be buffered, serviced and designed to fit into a variety of contexts, the municipality may be comfortable with the floating zone mechanism to enhance the community's chances of attracting private capital for such developments, without unduly impacting adjacent properties.

AUTHORITY

The authority of local governments to adopt floating zones is part of the municipal authority to divide the community into zoning districts. In addition to the use of a floating zone to create garden apartments in a single-family zone, the technique has allowed land, otherwise zoned, to be used for laboratories and office parks, gasoline stations, high rise housing, mixed use developments, and clustered residential developments.

IMPLEMENTATION

Floating zones are adopted by the local government, after public hearing, notice and environmental review, just as other zoning provisions or amendments. The ordinance should provide that the designation of parcels to which the floating zone is to apply, and the amendment of the zoning map, shall be commenced upon the application of the land owner or initiative of the municipality.

In determining whether to affix a floating zone to a parcel, the local board must determine whether a proposed development can be harmonized with surrounding uses and conditions. Floating zone ordinances can require applicants to demonstrate the impacts of proposed development on matters such as traffic, schools, municipal services and tax base. Review of applications for a floating zone designation may be made by the legislature itself or delegated to the local planning or zoning board of appeals, if sufficient standards are established by the legislature to guide the decision making process.

LIMITATIONS AND CONCERNS

Floating zones often allow for more intensive use of the property than the underlying zoning. This can upset the expectations of nearby property owners. Although the courts have held that

property owners have no "eternally vested right to [an existing zoning] classification if the public interest demands otherwise," fairness requires that the expectations of property owners be respected and accommodated without compromising the public interest in proper land use.

For this reason, floating zones should establish specific requirements that properties must meet before they can be rezoned to the new district classification. Critical among these is the size of an eligible lot. These requirements, and any standards applied to a property whose use is reclassified under the application of a floating zone, are essential techniques that allow public objectives to be realized while protecting the character of the community and the expectations of property owners in the vicinity.

Although a property owner may believe that a parcel meets all the stipulated requirements of the floating zone, a thorough review of the proposed redevelopment and its impacts on the surrounding area must be conducted before the parcel's eligibility for the floating zone can be determined. This can create a disincentive for an owner to invest the time and funds needed to apply for the floating zone. It suggests that the local authority should be as specific as possible about where and when a floating zone application will be approved when designing the floating zone provisions.

REFERENCES:
1. Floating Zones, Michael Murphy and Joseph Stinson, Land Use Law Center, 1996.

III. CLUSTER ZONING

DEFINITION
Cluster zoning is a method of land subdivision in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands. Cluster development may not allow greater density than if the land were subdivided into lots conforming to the minimum lot size and density requirements of the zoning district in which the property is located.

Normally, land is subdivided and developed in conformance with the dimensional requirements of the local zoning ordinance. Zoning usually requires that the entire parcel be divided into lots that conform to minimum lot sizes and that buildings on subdivided lots conform to rigorous set-back, height and other dimensional requirements. So, for example, in a half acre residential zone, a property owner will be required to lay out lots of no less than one half acre in size and place homes on them that are at least 30 feet from the front lot line and no more than 35 feet high.

Under cluster development, the locality permits a land developer to vary these dimensional requirements. This can allow, for example, homes to be placed on quarter acre lots in a half acre zone. The land that is saved by this reconfiguration may then be left undeveloped to serve the open space or recreational needs of the development and the community. Often this land is owned and maintained, if necessary, by a homeowners' association.

Municipalities are authorized, but not required, to use this cluster development method. The ability to encourage or require cluster development is linked to the local government's authority to review and approve land subdivision, a function normally delegated to the local planning board. The town law delegating cluster authority to town governments, for example, states: "the town board may, by local law or ordinance, authorize the planning board to approve a cluster development simultaneously with the approval of a [subdivision] plat." Parallel provisions exist in the village and general city law.

The local law or ordinance exercising a community's cluster development authority can delegate broad or narrow authority to the planning board to cluster permitted development. It can be limited to one project at a time, to one zoning district, to a certain area within the community, to parcels with particular natural resource characteristics such as wetlands or steep slopes, or to accomplish certain stated purposes. The local law or ordinance can grant the planning board authority to alter all of the dimensional requirements of the zoning ordinance to accomplish its objectives, or to alter only certain of those requirements, such as the required lot size. The uses permitted by the zoning ordinance may not, however, be changed under this authority.

The flexibility that localities enjoy under their authority to cluster development is seldom appreciated. Often, for example, it is assumed that land developers may elect the cluster development method, but may not be required to do so. If the locality wishes, however, it can require development to be clustered to meet local objectives. Under cluster development authority, the planning board may be authorized to permit multi-family housing in a single family zone; again, however, without increasing the permitted number of houses. Further, clustering can be done in commercial and industrial zoning districts; it is not limited to residential districts, as is often assumed.

PURPOSE

According to the state statutes, the purpose of cluster development is to "enable and encourage flexibility of design and development of land in such a manner as to preserve the natural and scenic qualities of open lands." Clustering also accomplishes other purposes, such as lowering site development costs, preserving on-site resources such as viewsheds, archeological sites, or other significant natural features, reducing the number of access points to adjacent roads, and allowing a wide variety of layouts and design schemes for subdivisions in the community. New York's highest court stated that "economy, flexibility and scenic beauty are all appropriate reasons for permitting cluster zoning" and that it allows "more efficient use of land containing unusual features..., for facilitating economical provision of streets and utilities, as well as for preserving the natural and scenic qualities of open lands."

WHEN

The limitations of traditional zoning requirements, including its rigorous lot size and set back provisions, have long been recognized. Their essential function, for most communities, is to establish the maximum density at which land can be developed. By knowing this maximum density, the community can determine its future service and facility needs and otherwise plan its future. As applied to particular parcels and neighborhoods, however, the rigorous dimensional requirements can limit the ability of the planning board to create developments that best meet local needs.

Where, for example, part of the community borders a stream, straddles a ridge, exhibits a certain historical quality, contains productive agricultural soils, or lacks open space and recreational facilities, laying out each new home in the middle of half acre lots that are distributed evenly throughout the area may not be the best approach to subdividing and developing the land. In these situations, the local legislature may want to give the planning board the flexibility to adjust the dimensional requirements of the zoning ordinance in order to preserve the stream, avoid development of slopes, enhance historical design themes, preserve a viable farm, or obtain open space and recreational amenities.

AUTHORITY

The powers of local governments to establish cluster zoning are established by the zoning enabling legislation of the state. The planning board may establish conditions on the ownership, use and maintenance of the open lands preserved by clustering, if necessary, to assure the preservation of the natural and scenic qualities of the open lands. The courts have ruled that a developer may not be forced to convey title to the preserved open lands to the locality. Once the municipality has delegated cluster authority to the planning board, it may not retain authority to review the planning board's decisions. If it wishes, however, the local authority may retain the authority to approve any conditions imposed on the subdivision by the planning board.

IMPLEMENTATION

The first step in adopting cluster development provisions is for the local government body to enact a law or ordinance authorizing the planning board to adjust the dimensional requirements of the zoning ordinance in particular circumstances. This act must specify the particular zoning districts in which clustering is to be permitted. The act also must contain the circumstances under which clustering is permitted, the objectives it is to accomplish, whether clustering may be required of a land developer and which provisions of the zoning ordinance may be altered. These provisions of the act will define how broad the authority and discretion of the planning board will be in applying the cluster technique to subsequent subdivisions.

The developer must submit a conventional subdivision plan, or "plat," so that the planning board may determine the density of development that would be allowed without clustering. The planning board must exercise its judgment to determine the density that would be permitted if a conventional subdivision were approved. Then, a clustered subdivision plat may be submitted which places the permitted density on a portion of the site, leaving the remainder as undeveloped open space or as a recreational facility.

All of the requirements of subdivision approval must be met as the clustered subdivision application is reviewed and approved. These include compliance with the provisions of the comprehensive plan, the environmental review procedures imposed by state and local law, the public notice, hearing and other requirements applicable to all subdivision approvals, as well as the cluster development law or ordinance adopted by the local legislature.

After the clustered subdivision is approved and formally filed, a copy of the approved plat must be filed with the municipal clerk who is required to place appropriate notations and references regarding the permitted development on the zoning map of the municipality.

LIMITATIONS AND CONCERNS

The law usually does not spell out a detailed method of determining the permitted density that can be clustered. Density should not exceed the number of lots which could be permitted, in the planning board's judgment, if the land were subdivided into lots conforming to the requirements of the zoning ordinance and conforming to all other applicable requirements.

How, exactly, are planning boards to determine what the density of a conventional subdivision should be if they do not subject it to a complete review under all applicable requirements, including environmental review? If, however, a subdivider is forced to go through a nearly complete review of a conventional subdivision which he does not intend to build, a disincentive to clustering has been created. The time and cost of this review will be significant and wasted, from one perspective, because the clustered subdivision will have to be fully reviewed at substantial additional expense of time and money.

The planning board must have sufficient information to make a credible judgment as to the density permitted for a conventional subdivision, but does not need to follow all the formal steps required in the conventional subdivision process. If the applicant fails to submit sufficient information and detailed drawings to allow the planning board to perform this function, the board may deny the application.

Localities must be careful in designing their clustering system to avoid uneven, arbitrary and discriminatory treatment of applicants for subdivision approval. The act giving the planning board authority to cluster must contain sufficient guidelines to assure that like situations are treated in a similar fashion. If the local legislature decides to give the planning board cluster authority on a project-by-project basis, careful monitoring of its application must be done to assure even-handed treatment of applicants.

REFERENCES:

1. Cluster Development, Michael Murphy and Joseph Stinson, Land Use Law Center, 1996.

IV PLANNED UNIT DEVELOPMENT (PUD)

DEFINITION

Planned unit development (PUD) zoning provisions permit large lots to be developed in a more flexible manner than allowed by the underlying zoning. PUD ordinances may allow developers to mix land uses, such as residential and commercial, on a large parcel and to develop the parcel at greater densities, and with more design flexibility, than otherwise allowed by the underlying zoning district. PUD provisions often require developers to compensate for the impacts of their projects by setting aside significant and usable open space, providing infrastructure needed to service the development, or offering other community facilities and services.

There is no statutory definition of a PUD. Usage of the technique by local governments has established a number of optional methods of designating large lots for more flexible development. PUD ordinances typically leave the underlying zoning in place and offer an alternative to landowners to develop the site in accordance with the PUD provisions.

PURPOSE
Most PUD ordinances state that their purpose is to achieve greater design flexibility and economies of scale in the development of large lots within the community. For example, a PUD provision stating that its purpose is "to provide a means of developing those land areas within the community considered appropriate for new residential, recreational, office space, commercial or industrial use, or a satisfactory combination of these uses, in an economic and compatible manner, while encouraging the utilization of innovative planning and design concepts or techniques in these areas." is commonly used

WHEN
A developing community that anticipates receiving a rezoning or site plan application for the development of a large shopping mall or discount warehouse could use a mixed-use PUD ordinance to negotiate significant design and use changes in the development. Instead of ending up with another faceless commercial strip, the community may use its PUD provisions to provide the leverage, incentives and process necessary to encourage the development of a commercial project with a neighborhood feel, reinforced by the addition of some residential uses, community facilities and attractive landscaping and building design.

The same community, faced with the prospect of one or more large residential developments, could avoid the proliferation of single lot subdivisions or uniform condominium developments by using PUD provisions to provide for some on-site shopping and services for homeowners. This can be accomplished by adopting a residential PUD provision that allows mixing a variety of housing types and styles with some neighborhood commercial uses. Through design flexibility and control, an appropriate neighborhood can be created, properly serviced by infrastructure and appropriately landscaped and designed to protect surrounding areas from its impacts.

An urban community could adopt a PUD ordinance as a means of attracting developers of unique large lots. By offering a mix of land uses and flexible design options, developers obtain the freedom they need to develop a project that is economically and environmentally viable for the site. In a similar way, a rural community could adopt PUD provisions, in advance of development, as its way of indicating the areas that are appropriate for mixed-use and more intense development.

Although PUD development is designed for large lot development, this does not necessarily mean that its use is limited to communities with one or more large lots that are under single ownership. The PUD provisions can be drafted to present an opportunity to the owners of several medium-sized or smaller lots to work together to combine ownership and take advantage of the PUD development option.

AUTHORITY
There is no separate authorization under town, village and city law for including planned unit development provisions in the local zoning ordinance. This authority is implied in the delegation to local governments of the power to enact zoning restrictions and create zoning districts. One purpose of zoning is to ensure that its provisions consider the character of areas and their suitability for particular uses with a view to conserving the value of buildings and encouraging

the most appropriate use of the land throughout the municipality. Several court decisions have considered various applications of PUD ordinances, implicitly upholding their legality.

The Court has made it clear that "how various properties shall be classified or reclassified rests with the local legislative body; its judgment and determination will be conclusive, beyond interference from the courts, unless shown to be arbitrary." The court noted that "changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise. Accordingly, the power of the [locality] to amend its basic zoning ordinance in such a way as to reasonably promote the general welfare cannot be questioned." A zoning ordinance is not flawed because a district created by its provisions is not affixed to particular land at the time that district is created. It is necessary, however, that PUD provisions be adopted in accordance with the locality's comprehensive plan.

IMPLEMENTATION

The process of adding PUD provisions to the local zoning ordinance is identical to adopting any zoning amendment. The provisions must be drafted, published, subjected to public hearing, adopted and filed. The challenge of implementation is to choose an appropriate method of designating sites for PUD development, to provide for flexible site and building design and to determine how PUD developments shall be approved by local authorities.

The PUD ordinance can designate one or more particular sites for development that the community currently knows it wants developed in a more flexible manner than provided for by the underlying zoning. In this instance, it can leave the underlying zoning provisions in place or require that the site be developed as a PUD.

Alternatively, the ordinance can allow PUD development in certain types of situations, generally, and provide for later site designation, upon application by one or more landowners or upon the initiative of the local legislature. This latter approach allows the locality to use the PUD technique when confronted by a large-scale development whose owner is seeking a rezoning of the land or is applying for as-of-right approval under the existing zoning.

The PUD ordinance must state its purpose, contain standards for site and building development and describe a process for reviewing and approving individual projects. Care should be taken in drafting these provisions so that landowners, developers and neighbors are as informed as possible of the community's objectives and standards.

If the local council is to retain the authority to review and approve PUD applications, the standards contained in the ordinance can be more general, legally, although a certain degree of specificity is still helpful in clarifying when and where the community desires PUD development. Where the local planning or zoning board is delegated the responsibility of reviewing and approving PUD applications, the legislature must be more specific in delegating its authority.

LIMITATIONS AND CONCERNS

When considering the addition of PUD provisions to the zoning code, local officials are presented with several critical questions. Should specific sites be designated for PUD development or should PUD development simply be allowed with the sites to be designated later upon the application of land owners or developers? Where sites are to be designated at a later time, what technique should be used to identify them and what local body should make that decision? If PUD development is to be allowed, but the sites are to be identified later, in which existing zoning districts should the PUD provisions apply? How specific should the criteria be that define the sites that are eligible for PUD designation? What should be, for example, the minimum size lot that is eligible? How specific should the standards governing the design of PUD projects be? How can these standards be written to minimize the impact of the PUD development on the surrounding neighborhood?

REFERENCE:

1. Planned Unit Development, Michael Murphy and Joseph Stinson, Land Use Law Center, 1996, available via the Land Use Law Center's web site on the Internet - - www.law.pace.edu.

V. INCENTIVE ZONING

DEFINITION

A local government can provide a system of zoning incentives to land developers in exchange for the provision of community benefits by those developers. In setting up such a system, the legislature leaves existing zoning provisions in place, but permits more intensive development of the land in exchange for certain community benefits. Incentives can be provided to developers of raw land or to those who propose the expansion of existing structures, the adaptive reuse of older buildings, or the redevelopment of brownfield sites and other distressed parcels in older, developed areas.

The incentives that may be offered to developers include adjustments to the density of development, for example, allowing more residential units or a greater building floor area than is otherwise permitted under the zoning ordinance. Incentives can also include adjustments to the height, open space, use or other requirements of the underlying zoning ordinance.

These incentives are given in exchange for the developer providing one or more community benefits, including open space or parks, affordable housing, day care or elder care, or "other specific physical, social or cultural amenity of benefit to the residents of the community."

Where the community benefit cannot feasibly or practically be provided directly by individual developers, the system can provide for developers to make cash payments to the locality. Such sums must be held in a trust fund to be used exclusively for the community benefits specified.

Incentive zoning has been used frequently to induce land developers to provide affordable housing for senior citizens, local workers or low and moderate income citizens. The developer is allowed to build a greater number of homes than otherwise permitted by the zoning ordinance and to sell or rent some of these "bonus units" at market value. In return, the developer is required to use some of that profit to reduce the cost of the affordably constructed residential

units. These affordable homes must then be rented or sold to persons or families of low or modest income, or senior citizens.

PURPOSE

The purpose of incentive zoning is to advance the locality's physical, cultural and social objectives, in accordance with the comprehensive plan, by having land developers provide specific amenities in exchange for zoning incentives. Development brings with it the need to provide municipal services and facilities to serve and absorb the impacts of additional population, traffic, sewage, water consumption and the like. One cost effective way of providing those municipal services and facilities is to concentrate new development in serviceable districts by providing density bonuses, or incentives, to developers in such districts on the condition that they provide or pay for the services and facilities needed in the area or in the community as a whole.

WHEN

Generally, community benefits, such as infrastructure and municipal services, are paid for in two ways. Normally, they are covered by the municipality directly out of the revenues derived from taxing real property. Occasionally, they are required to be provided by the developers of specific projects to mitigate the direct impacts of those developments on the community. These developers may be required to pay impact fees, in lieu of providing facilities such as parks, traffic improvements or water system improvements necessitated by the project. Where authorized by law, requirements for the provision of community benefits or the payment of fees must bear some rough proportionality to the measurable impacts that the specific development will have on the community.

Incentive zoning provides a third alternative: having developers use some of the economic benefits afforded by the incentives to provide or pay for facilities and services. Because economic incentives are used to encourage developers to provide needed benefits and because such systems are voluntary, they tend not to be opposed by developers who often challenge impact fees and mitigation requirements where no benefits are offered to them. Finally, because an incentive zoning system can be designed with the needs of an entire district or service area in mind, it can be a more potent system of meeting community facility and service needs than proceeding one development project at a time.

AUTHORITY

Municipalities have long been empowered to adopt incentive zoning systems. The underlying authority can be found in the zoning enabling statutes of the town, village and city law and the municipal home rule law. The general grant of authority in the zoning enabling statutes gives municipalities the authority to adopt incentive zoning systems.

IMPLEMENTATION

The system of zoning incentives must be adopted by the local legislative body: the town board, village board of trustees, or the city council. Incentive zoning provisions are adopted in the same manner as other zoning ordinances, laws or amendments. Requirements for public notice and hearings, conformance with the comprehensive plan and compliance with environmental review

must be followed. Each existing zoning district in which incentives can be awarded must be designated and incorporated in any zoning map adopted in conjunction with the system.

A procedure for applying the zoning incentives to specific parcels must be established by the local legislature, including:

- the specific incentives that may be granted to an applicant;

- the community benefits that must be provided by an applicant;

- the standards for approving an application for incentives, including how to assess that the benefits received are adequate given the incentives granted;

- the requirements for submitting an application for incentives, and the process for reviewing, approving and imposing conditions on applications for incentives.

- provisions for public notice and hearing prior to the award of incentives, where a hearing is required by the law or ordinance under which the zoning incentive system was adopted; and

- provisions for the receipt of cash in lieu of the direct provision by the developer of the benefits, where the legislature determines that such benefits are not immediately feasible or otherwise practical. In such an instance, the legislature must establish a trust fund into which all cash payments are deposited. This fund is to be used exclusively for the specific benefits authorized by the incentive zoning system.

LIMITATIONS AND CONCERNS

Although legislation in some jurisdictions has made local authority and procedures for creating incentive zoning systems very clear, there remain many questions to be addressed in the design and execution of any particular incentive program. How, for example, does the municipality insure that the benefit will be provided over time? If the benefit provided is affordable housing, for example, what mechanisms will be used to insure that the units are sold or rented appropriately over time? If the benefit is day care, how does the municipality insure that the space provided by the developer is occupied by a viable day care provider over a reasonable period?

Residents and property owners in the district where the increased development will occur must be convinced of the advantages to them of the incentive zoning system. Since they will be effected by the additional development, measures to mitigate that affect must be adequate and convincing. The local authority must find that the area can absorb the additional development, but local residents might argue that the development should be spread throughout the community. The advantages to the developer and the community need to be carefully thought out and articulated to meet this inevitable concern.

REFERENCES:

1. Incentive Zoning, Michael Murphy and Joseph Stinson, Land Use Law Center, 1996.

VI. TRANSFER OF DEVELOPMENT RIGHTS (TDR)

DEFINITION
Transfer of development rights (TDR) is the process by which development rights are transferred from one lot, parcel, or area of land in a sending district to another lot, parcel, or area of land in one or more receiving districts. Local governments are allowed great flexibility in designing a TDR program; they can establish conditions that they deem "necessary and appropriate" to achieve the purposes of the TDR program.

To implement a transfer of development rights program, the local government identifies a "sending district" where land conservation is sought and a "receiving district" where development of property is desired and can be serviced properly.

In many TDR programs, the zoning provisions applicable to the sending district are amended to reduce the density at which land can be developed. While losing their right to develop their properties at the formerly permitted densities, property owners in the sending district are awarded development rights. These development rights are regarded as severable from the land ownership and transferable by their owners.

TDR programs usually establish some method of valuing the development rights that are to be transferred from the sending to the receiving district. Some communities establish development rights "banks" which purchase development rights from land owners in sending districts and sell them to landowners in receiving districts.

Property owners in the receiving district are eligible to apply for zoning incentives that increase the densities at which their lands may be developed. To qualify for these incentives, the property owners must purchase the development rights from landowners in the sending district or from the development rights bank.

PURPOSE
The purpose of a TDR program is to protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource.

An effective TDR program allows a community, whose zoning ordinance creates a hard to service, spread out development pattern, to develop in a more cost-effective manner. An effective TDR program can increase the tax base while minimizing the costs of servicing land development; it can preserve threatened conservation areas while allowing owners of land in that area to be compensated through the sale of some or all of their former development rights.

WHEN
TDR programs are most often created in response to a perceived crisis in the area that becomes the sending district. That area, for example, may contain a precious resource such as an endangered species, a valuable economic resource such as viable agricultural soils, or a drinking water supply whose existence is threatened by development.

The TDR technique was also designed to combat inefficient land development patterns that can result from the build out of conventional zoning ordinances. Once the community realizes that its zoning ordinance is creating a high cost, environmentally questionable pattern of land use, it can create a TDR program to adjust zoning densities. Instead of rezoning to lower densities in the sending areas and increasing densities in the receiving areas, (creating a loss of investment expectations in the former and a windfall in the latter) the community can elect to provide for the transfer of development rights as its method of changing its zoning strategy.

AUTHORITY

The authority to create a TDR program is implied from the delegation of authority to local governments to adopt zoning ordinances and create zoning districts.

IMPLEMENTATION

In creating a TDR program, all procedures required for adopting and amending local zoning ordinances or laws, including all provisions for notice and public hearing, must be followed. The local TDR program must be established in accordance with the comprehensive plan.

An appropriate sending district must consist of natural, scenic, recreational, agricultural, forest, or open land or sites of special historical, cultural, aesthetic or economic values sought to be protected. Municipalities may establish development rights banks to purchase development credits from landowners in sending districts and to sell them to landowners in receiving districts.

Receiving districts must be found that contain adequate resources and infrastructure to accommodate the increased development. The community must determine that the additional development is compatible with that permitted in the underlying zoning ordinance. A local TDR program must provide for the execution and filing of conservation easements on land in the sending district whose development rights have been purchased under the program. The easement must specify that it is enforceable by the local government. The program must, in addition, provide for the reassessment of the property tax value, of any parcel whose development rights have been transferred.

LIMITATIONS AND CONCERNS

TDR programs are complex. They require municipalities to engage in a sophisticated analysis of the impacts of the program in both sending and receiving districts. Programs typically raise significant issues that concern residents and owners in both sending and receiving districts. How much development potential is to be lost in the sending districts? How are these development "rights" to be measured and valued? How can a viable market for these rights be created? How many properties in the receiving district must be eligible for more intense development to create a viable market for the development rights created by the program in the sending district? Should a development rights bank be created? How is the administration of the bank and the execution and filing of the required conservation easement documents to be handled? What process should be put in place to review and approve development projects in the receiving district?

A particularly difficult aspect of designing a TDR program is determining how to define and value the development rights that are severed from the land and eligible to be transferred. A

formula can be used to quantify the development rights to be transferred based on such factors as the lot area, floor area, floor area ratios, density, height limitations or any other criteria that effectively quantifies an appropriate value. The formula chosen converts development rights into specific development credits. When a development credit is purchased, it carries the right to a certain additional density in the receiving district.

How development rights are valued and a market for them created will determine the viability of the TDR program and, perhaps, its legal validity. In recent programs, the agencies created from two to two and one-half times the demand for development credits in the receiving district as the number of development credits in the sending district. For this market to work, there must be development pressure in the receiving area resulting in a desire by landowners to purchase development credits from the sending area. Whether such ratios can be established and whether sufficient development pressures exist are factors that must be considered by local leaders who create TDR programs.

ALTERNATIVE APPROACHES

In the description of a TDR program above, it is assumed that the zoning ordinance applicable to the sending district is to be amended to reduce the density at which the land may be developed. This could be called a mandatory TDR program. This definition is based on the way in which TDR programs have most often been structured, not on any limitation in the TDR authority.

However, a TDR program could be set up that leaves the existing zoning in place in the sending district and simply allows the development permitted by that zoning to be severed and transferred to the receiving district. Under such a program, the density incentives in the receiving district could be awarded to property developers in exchange for cash deposits into a dedicated fund which could be used to purchase conservation easements from willing landowners in the sending district. The development rights of the landowners in the receiving district are otherwise unaffected by the program. This could be called a voluntary TDR program.

Further, there is no requirement that any zoning change in the sending district take all development rights away from properties in that district. Where the sending area can be protected by reducing densities and, for example, clustering the remaining development on unconstrained portions of the land, some development rights can remain attached to the land rather than severed and made transferable. The owners of land in the sending district could be allowed to develop at a fraction of the previously allowed density and awarded fewer development credits as a result. This could be called a partial TDR program.

Whether to adopt a mandatory, voluntary, complete or partial TDR program depends greatly on the character of the land in the sending district and its vulnerability to development. Some commentators even suggest that the base densities in the receiving zone be lowered by zoning amendments when the TDR program is created to insure a larger market for the transferable development rights.

Making these choices is one of the more complicated aspects of designing a local TDR program. Most programs have opted for simplicity by proscribing most development in the sending district

and providing for the severance and transferability of that development to properties in the receiving district where the existing zoning is otherwise left in place.

REFERENCES:

1. Transfer of Development Rights, Joseph Stinson, Land Use Law Center, 1996.

2. Transfer of Development Rights, Maanvi Mitra, Land Use Law Center, 1996.

3. Richard J. Roddewig and Cheryl A. Inghram, Transferable Development Rights Programs: TDRs and the Real Estate Market Place, American Planning Association Planning Advisory Service Report No. 401, May 1987. APA, 122 South Michigan Ave. Chicago, Il., 60603.

4. Transfer of Development Rights, N.Y. Department of State Legal Memorandum, Office of Local Gov't Services, 162 Washington Ave., Albany, N.Y. 12231; (518) 473-3355.

V. PERFORMANCE ZONING

DEFINITION

"Performance zoning" is an alternative to traditional land use zoning. Whereas traditional land use zoning specifies what uses land can be put to within specified districts, performance zoning specifies the intensity of land use that is acceptable. In other words, it deals not with the use of a parcel, but the performance of a parcel and how it impacts surrounding areas.

PURPOSE

There are advantages to the performance zoning approach. In some ways it requires less administrative involvement, since variances, appeals and re-zonings are not necessary. It also gives more flexibility both to the municipality and to the developer, allowing more of a range of land uses, as long as their impact is not negative. This allows for more innovation and the incorporation of new technologies that may not be accommodated in more traditional zoning ordinances. This encourages more communication between the public and private sectors.

Also, performance zoning is more effective in the preservation of natural features, since it evaluates directly the impact, rather than indirectly through listing permitted and denied uses.

WHEN

Performance zoning has a primary objective of protecting natural resources and a secondary objective of providing flexibility in the design of residential developments. The performance zoning approach to residential development addresses the primary objective by limiting the amount of development intrusion that may occur in the various natural resources. In addition to the natural resource protection standards, the zoning technique contains three primary performance criteria: minimum open space, maximum density, and maximum impervious surface. The intensity of development for each residential development is determined through a site evaluation and compliance with the three performance standards.

The protection of natural resource features is accomplished by limiting the extent of development intrusion into each resource. A specific minimum open space standard is assigned

to each natural resource. For example, floodplains and wetlands must remain as 100 percent open space--no development may occur on these natural resources. For a slope of 25 percent or greater, 80 percent must remain as open space with no more than 20 percent being altered or developed.

The first step for a developer working under the performance zoning concept is to map the natural resources on the site and determine the buildable area. The determination of the buildable area is accomplished through an analysis known as the site capacity calculations. These calculations make performance zoning and the application of natural resource protection standards site specific. The bottom line of the site capacity calculations is the required open space and the maximum number of dwelling units for the subject site. The key to calculating those numbers is the net buildable site area, which is the area of the site that is suitable for building. Briefly, the net buildable site area is calculated by subtracting the area within the right-of-way of existing roads and the protection area of each natural resource from the total site acreage. The site capacity calculations produce two open space figures. The first is the protection area for the natural resources on the particular site. The other is a calculated area based on the minimum open space requirement for the zoning district. The larger of the two numbers is used to calculate the net buildable site area, and is the minimum required open space for that tract. Thus, the natural features directly influence the required minimum open space and the net buildable site area for each tract of land proposed for residential development.

The second objective--providing flexibility in the design of residential developments--is accomplished by permitting a full range of dwelling unit types. The list of permitted dwelling unit types ranges from single-family detached to apartments. The flexibility is realized in two ways. First, it gives the applicant's designer flexibility in working with a site that is constrained by natural features. On a tract with a high percentage of natural resources, the maximum density could be achieved with townhouses and garden apartments, whereas the maximum number of dwelling units would not be possible with single-family houses or even twins. Second, a developer has flexibility to respond to market conditions. For example, if a developer determines there is a market for townhouses, he/she can propose them without requesting a zoning change to a district which permits townhouses.

AUTHORITY
The powers of local governments to establish performance zoning are established by the zoning enabling legislation of the state.

IMPLEMENTATION
Studies have indicated perhaps the best approach to zoning is a combination of traditional zoning and performance zoning. Including components of performance zoning could encourage the following:

- Establishing a community vision;
- Greater involvement and participation of all stakeholders in the community;
- Protecting and preserving the environment;
- More collaborative rather than confrontational planning processes;
- Conditionally approving developments at a higher level;

- Reducing the number of districts; and
- Re-engineering existing systems to remove obstacles to quick approvals, new designs and building technologies.[1]

LIMITATIONS AND CONCERNS

A primary disadvantage of performance zoning is that as a result of its flexibility it is subject to a steeper learning curve. In traditional ordinances, land uses are listed as absolutes--either allowed or not allowed. Under performance zoning uses are determined through sometimes confusing calculations of a variety of factors. This requires local zoning administrators to be more adept at making appropriate and fair determinations based on sometimes subjective criteria, and can lead to more legal challenges.

REFERENCES

[1]"Performance-Based Zoning Model." http://www.steppingstones.ca/library/pbzone.htm, 29 Sept. 1998.