

# Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis

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Citations in this Article vary from *The Bluebook* format in one major respect. All of the main subject U.S. cities (Houston, Chicago, and Portland) sometimes use, in their municipal codes and ordinances, a dash to categorize the various rule provisions (e.g., art. 8.3-7 of Chicago's Zoning Ordinance). Such a citation could confuse readers. For example, the citation "Chicago, Ill., Zoning Ordinance, title 17, art. 8.3-7 (1923)" refers only to one provision in the ordinance, not a series of provisions (e.g., not article 8.3 through article 8.7). Thus, for the sake of clarity, in a series of provisions in the U.S. cities' codes, I used the citation style of "through," for example, "Houston, Tex., Code of Ordinances, ch. 42-182 through 42-184 (1968)." However, citations to Japanese laws and regulations will follow *The Bluebook* format. Thus, "Toshi Keikaku Ho [City Planning Law], Law No. 100 of 1968 (Japan), art. 1-5" would refer to articles 1 through 5 of that law.

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## INTRODUCTION

Land-use is a major topic in any society, but has become a major economic and trade issue in Japan, where the economy has been mired in a long recession officially since 1992.<sup>1</sup> The causes for the recession have been complex, which is understandable considering that Japan has the world's second largest economy. There is no single cause. A changing world economy, demographic and cultural changes, a meltdown of the financial system, a decline in corporate competitiveness, and failed bureaucratic and political policies have all contributed to the economic fall. One of the most significant

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1. Koichi Mera, *The Making of Japan's Failed Land Policy*, in UNLOCKING THE BUREAUCRAT'S KINGDOM, DEREGULATION AND THE JAPANESE ECONOMY 178 (Frank Gibney ed., 1998). See, e.g., Microsoft Encarta OnLine Encyclopedia, *Japan*, § V(A)(5) (20001), at <http://encarta.msn.com>. PETER HARTCHER, THE MINISTRY 95-122 (1998).

factors, however, has been the land market. Large increases in land values in the 1980s, followed by a sudden collapse of the market in the 1990s led to the collapse of the overall economy.<sup>2</sup>

Observers outside of Japan have a vested interest in seeing the Japanese economy, including its land market, recover from its current recession, because what affects Japan directly affects the entire world. However, it is difficult for outside observers to understand the nature of Japan's complex land problems, much less suggest solutions, without understanding the fundamental legal framework regulating land-use in Japan. Surprisingly, however, scholars have devoted little study to the foundations of Japanese land-use regulation.

Obviously no one article can thoroughly cover all aspects of land-use regulation in Japan, and certainly this Article does not attempt to do so. However, this Article does attempt to fully explain the zoning system, as well as other key fundamentals: the major land-use statutes; development bulk and density standards; and rules on nonconformities. In addition to familiarizing the reader about Japanese land-use, this Article compares the Japanese approach with the approach of some sample U.S. jurisdictions: Portland, Oregon; Chicago, Illinois; and Houston, Texas. A comparative analysis is useful as a reference point not only for understanding differences in legal approaches, but also for ascertaining merits and problems that are difficult to identify through a singular approach.

Finally, this Article is structured to allow the reader to easily access and refer to the presented information, according to the reader's needs or prior knowledge of the material. Hopefully, the analyses and conclusions in this Article can also form the basis for further research on land-use issues in Japan and the United States.

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2. Mera, *supra* note 1, at 178-203; *see also* HARTCHER, *supra* note 1. The land market was not the only culprit, as it was closely tied to the Japanese financial system, which was probably the primary trigger precipitating the recession.

## I. GOVERNMENT AND JURISDICTION

### A. *The Japanese System of Government*

Japan's national government drafts and enacts land-use statutory laws. Therefore, a basic understanding of the Japanese governmental structure is helpful. The national, or central, government is the sole sovereign authority in Japan.<sup>3</sup> The highest government entity is the national legislature, or Diet,<sup>4</sup> which enacts all statutory law, including statutes regulating land-use.

The executive power of the central government is vested in the Cabinet.<sup>5</sup> The Diet appoints members from among its own ranks to fill positions in the Cabinet, including the post of prime minister.<sup>6</sup> Subordinate to the Cabinet within the executive branch are thirteen administrative ministries and agencies.<sup>7</sup> These administrative entities generally have more power and influence than their U.S. counterparts.<sup>8</sup> This is because the Diet often defers to the ministries to draft legislation,<sup>9</sup> because of the heavy regulation of the Japanese economy,<sup>10</sup> and because of the traditional reluctance of the courts to strike down administrative acts.<sup>11</sup>

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3. Yoshiaki Yoshida, *Authority of the National and Local Governments Under the Constitution*, in JAPANESE CONSTITUTIONAL LAW 109, 111-12 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993).

4. KENPŌ, ch. IV, art. 41.

5. KENPŌ, ch. VI, art. 65. Note that the term "gyōsei" (administrative) is commonly used to refer to the executive branch in Japan.

6. See, e.g., KODANSHA LTD., JAPAN: AN ILLUSTRATED ENCYCLOPEDIA 1127 (1993) [hereinafter JAPAN: AN ILLUSTRATED ENCYCLOPEDIA].

7. See, e.g., Japan Almanac 2002 70-71 (2001). The original main twenty-two ministries and agencies that were created shortly after World War II were reorganized in January 2001 into the current administrative (bureaucratic) structure. *Id.*

8. See, e.g., CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 35-82 (1982). In parliamentary systems, bureaucracies play a large role in drafting legislation. *Id.*

9. See, e.g., MERYLL DEAN, ADMINISTRATIVE GUIDANCE IN JAPANESE LAW: A THREAT TO THE RULE OF LAW (1991), reprinted in THE GOVERNMENT AND POLITICS IN JAPAN, 263-64, 297-300 (University of Tokyo Press, 2d ed. 1994); JOHNSON, *supra* note 8, at 44-48. See also JAPAN: AN ILLUSTRATED ENCYCLOPEDIA, *supra* note 6, at 283.

10. JOHNSON, *supra* note 8, at 44-48.

11. Chapter VI creates an independent judiciary headed by a supreme court with the power of constitutional review. KENPŌ, Ch. VI, arts. 76(3), 81. See, e.g., Michael K. Young, Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan, 84 COLUM. L. REV. 923 (1984).

Subordinate to the central government are forty-seven prefectures (analogous to provinces) and subordinate to the prefectures are municipalities.<sup>12</sup> Both the prefectures and municipalities (local governments) have presidential systems, with separately elected legislative and executive branch officials.<sup>13</sup> The central government delegates authority to the local governments in order to implement certain administrative tasks.<sup>14</sup> However, power sharing, when states and nations each retain distinct sovereign powers, does not exist in Japan.<sup>15</sup> Unlike in federal systems, such as the U.S. government, the Japanese central government is the only sovereign authority in Japan.<sup>16</sup> Nonetheless, the Japanese Constitution requires the central government to respect local autonomy. The Constitution protects local governments by guaranteeing that the national government does not unnecessarily restrict or violate the rights of local governments.<sup>17</sup> Furthermore, local governments have the general authority to enact regulations or ordinances provided they do not contradict national laws.<sup>18</sup>

### *B. Regulatory Jurisdiction in Japan*

Japan's central government has sovereign jurisdiction over land-use regulation.<sup>19</sup> Although the Japanese Diet and Cabinet have ultimate authority over land-use, the Ministry of Land, Infrastructure, and Transport is the main administrative entity that regulates land-use.<sup>20</sup> However, other ministries are authorized to regulate land-use when a particular use relates to their respective areas of jurisdiction. For example, the Japanese Ministry of Agriculture, Forestry, and

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12. *Id.* at 900-01. In contrast with the parliamentary national government, local governments have separately elected executive and legislative officials. *Id.* Japanese "local public entities" (*chihō kōkyō dantai*) also include counties (*gun*), although counties are essentially irrelevant for purposes of this Article.

13. *Id.*

14. See KURT STEINER, LOCAL GOVERNMENT IN JAPAN 113-23 (1965).

15. *Id.* at 327.

16. See, e.g., *id.* at 300 (stating that local governments are not sovereign).

17. YOSHIDA, *supra* note 3, at 111.

18. JAPAN: AN ILLUSTRATED ENCYCLOPEDIA, *supra* note 6, at 901.

19. See Yoshida, *supra* note 3, at 115.

20. See, e.g., Ministry of Land, Infrastructure, and Transport Internet official site, at <http://www.mlit.go.jp/annai/annai.html> (last visited Apr. 27, 2002).

Fisheries has jurisdiction over land development activities affecting national land, national rivers, national properties, and other resources affecting national interests.<sup>21</sup> This system differs from the U.S. federal system, in which the states possess sovereign authority over land-use regulation.<sup>22</sup>

Although Japan's national government has sovereign jurisdiction over land-use regulation, the Diet has delegated much authority to the local governments. Thus, the three levels of government—national, prefectural, and municipal—each share jurisdiction over certain types of zoning, although it is the municipalities that predominantly zone.<sup>23</sup> The prefectures and national government zone in a limited number of larger impact situations.<sup>24</sup>

National laws form the basis for zoning designated areas throughout Japan. Some laws, as with the City Planning Law (CPL) and Building Standards Law (BSL), actually enumerate the zone categories local governments may apply within their borders.<sup>25</sup> Furthermore, other laws, as well as the CPL, authorize local governments to create their own particular zone classifications for their individual needs.<sup>26</sup> For example, several laws, such as the Special Measures Law on Preservation of the Historical Climate of Ancient Cities and the External Advertisements Display Law, address aesthetic concerns.<sup>27</sup>

Furthermore, local governments have the inherent legal powers derived from the Constitution and the Local Autonomy Law to create

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21. See, e.g., Kasen Ho [Rivers Law], Law No. 167 of 1964; Kokudo Shiyō Keikaku Ho [National Land-Use Planning Law] Law No. 92 of 1974 [hereinafter Land-Use Law].

22. See, e.g., David L. Callies, *Urban Land-Use and Control in the Japanese City: A Case Study of Hiroshima, Osaka, and Kyoto*, in THE JAPANESE CITY 134-35 (P.P. Karan & Kristin Stapleton eds., 1997).

23. Toshi Keikaku Ho [City Planning Law], Law No. 100 of 1968, art. 15 [hereinafter CPL].

24. *Id.* at arts. 15 & 22.

25. See *id.* at arts. 8 & 9; see also Kensetsu Kijun Ho [Building Standards Law], Law No. 201 of 1950, art. 48 [hereinafter BSL].

26. See, e.g., CPL, Law No. 100 of 1968, art. 8; BSL, Law No. 201 of 1950, art. 48; BSL, table No. 2.

27. Koto Ni Okeru Rekishi-teki Fudo No Hozon Ni Kan Suru Tokubetsu Sochi Ho [Special Measures Law on Preservation of the Historical Climate of Ancient Cities], Law No. 1 of 1966; Okugai Kokoku-Butsu Ho [External Advertisements Display Law], Law No. 189 of 1949.

zones for their particular needs.<sup>28</sup> This authority also allows local governments to create subcategories of zoning classifications that are set forth in national laws.<sup>29</sup>

### C. Regulatory Jurisdiction in the United States

In contrast with Japan, the U.S. national government has only limited authority to regulate land-use. Under the federal system guaranteed by the U.S. Constitution, only the states possess police power, which includes the authority to regulate land-use.<sup>30</sup> In the land-use arena, however, all states delegate some or all of this power to their local governments, usually to their municipalities.<sup>31</sup>

For example, Texas has delegated most of its land-use authority, and all of its zoning authority, to its municipalities.<sup>32</sup> Texas has traditionally refrained from involvement in numerous areas of land-use regulation.<sup>33</sup> Texas has remained a “reluctant regulator” even in the area of environmental regulation, which includes federal requirements and standards in such areas as water control.<sup>34</sup> Similarly, reflecting the local community approach toward land-use

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28. Interview with Norio Yasumoto, Professor, Law Faculty, Ritsumeikan University, in Kyoto, Japan (Nov. 14, 2001) (on file with author). Specifically, these powers come from Article 94 of the Constitution and Article 14 of the Local Autonomy Law. *Id.*

29. *Id.*

30. The power to regulate generally for the public health, safety, welfare, and morality is referred to as the “police power.” Based on the Tenth Amendment of the U.S. Constitution, only the states, and not the federal government, have this power. *See, e.g.,* DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 1-3, 676 (3d ed. 1999) [hereinafter CASES AND MATERIALS ON LAND USE].

31. The catalyst for such delegation was the U.S. Commerce Department’s 1922 Standard State Zoning Enabling Act, a model act for the states that contained provisions authorizing states’ local governments to zone. By 1930, most states had either adopted the act or enacted similar statutes. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 592 (2000). Zoning was challenged as unconstitutional, but was ultimately deemed a valid exercise of the police power in the landmark U.S. Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

32. E-mails from John Mixon, Professor of Law, University of Houston Law Center, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (Sept. 2 & 6, 2001) (on file with author).

33. Telephone Interview with John Mixon, Professor of Law, University of Houston Law Center (Nov. 9, 2001) (on file with author).

34. *Id.* However, Texas has one of the most aggressive open beaches law in the nation. E-mail from John Mixon, Professor of Law, University of Houston Law Center, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (May 14, 2002) (on file with author).

prevalent in the American Midwest, Illinois exercises little control over land-use generally and no control over zoning specifically.<sup>35</sup> Thus, Illinois has granted municipalities, such as Chicago, exclusive zoning authority within their city limits.<sup>36</sup>

A minority of U.S. states, including Hawaii and Florida, directly regulate land-use.<sup>37</sup> In Oregon, the state, county, and municipal governments share land-use regulatory authority. This Article's discussion is limited to the state and municipal levels. Although Oregon's state government does not zone, it actively participates in land-use regulation.<sup>38</sup> The state sets guidelines and approves local land-use plans to ensure statewide consistency.<sup>39</sup> Municipal governments, such as Portland, set the details for land-use regulation within their own borders. Specifically, Portland has created a Comprehensive Plan (Plan), as well as a zoning code, which implements the Plan and sets zoning throughout the city.<sup>40</sup>

#### *D. Comparative Analysis and Conclusions*

On one hand, Japan's system roughly parallels the approach of most U.S. states: heavy delegation to local, particularly municipal, governments, which are the main repositories of zoning authority in the United States.<sup>41</sup> Also, Japan's system of multiple levels of government regulation somewhat parallels Oregon's three government levels of land administration.

On the other hand, Japan's multiple layers of land-use

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35. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 25, 2001) (on file with author); Interview with Stuart Meck, Principal Investigator, American Planning Association in Chicago, Ill. (Aug. 24, 2001) (on file with author). See Interview with Julie Tappendorf, Esq., Holland & Knight L.L.P., in Chicago, Ill. (Aug. 28, 2001) (on file with author).

36. Chicago, Ill. Zoning Ordinance, title 17, art. 11.1 (1923).

37. These state governments exercise generalized control over land-use regulation. Other states relatively active in land-use regulation, in various degrees and with various methods, include Vermont, Georgia, Maine, Maryland, New Jersey, Rhode Island, and Washington. See, e.g., CASES AND MATERIALS ON LAND USE, *supra* note 30, at 676.

38. See Oregon Department of Land Conservation and Development, *Oregon's 19 Statewide Planning Goals and Guidelines Background*, at <http://www.lcd.state.or.us/goalhtml/goalsbkgrnd.html> (last visited Feb. 13, 2002).

39. *Id.*

40. Portland Comprehensive Plan, Ordinance 150580 (Introduction) (1980).

41. See Callies, *supra* note 22, at 135.

administration contrasts with most U.S. jurisdictions, such as Houston and Chicago, which have almost exclusive regulatory jurisdiction delegated by respective state governments. Indeed, the few state governments that actively regulate land-use often focus on particular geographic areas or specific concerns, such as in the case of California's regulation of the San Francisco Bay and its entire coastline.<sup>42</sup> Even Oregon is not truly a close match for Japan. Oregon's regulation occurs entirely at what would be considered the "local" level in Japan—the state, county, and municipal levels. Japan's national land-use regulatory system differs markedly from the U.S. federal system with its predominantly state land-use controls. Furthermore, unlike in Oregon, the division of authority between government levels in Japan is not always tidy or logical, and therefore jurisdictional issues are somewhat more complicated than in the United States.

## II. FUNDAMENTAL JAPANESE LAND-USE LAWS

Japan's national government has enacted numerous land laws, far more than found in any one U.S. state. Some of these laws regulate specific issues of concern, such as the Coasts Law, Agricultural Land Law, Urban Greenery Protection Law, Public Housing Law, and Urban Redevelopment Law.<sup>43</sup> Other laws are more fundamental and general in scope, such as the CPL and BSL, which will be discussed in following sections. However, two basic laws, the Fundamental Land Law (FLL) and National Land-Use Planning Law (Land-Use Law), demand a preliminary discussion because of their significance in the overall land-use regulatory framework.

### *A. Fundamental Land Law*

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42. CASES AND MATERIALS ON LAND USE, *supra* note 30, at 708-09. The exceptions to this rule include Hawaii, Maryland, and Florida, whose state governments exercise generalized control over land-use regulation. *Id.* at 675-709.

43. There are a multitude of other land-use laws, such as the Land Division Arrangement Law, which allows public redistribution of public lands for more logical arrangement of properties, street layouts, infrastructure, and public facilities. *See* Tochi Kukaku Seiri Ho [Land Division Arrangement Law], Law No. 119 of 1954. However, a discussion of such laws is beyond the scope of this Article, which is limited to a discussion of zoning administration and related administrative procedures.

## 1. Background

Japan's gradual emergence into an economic superpower created land-specific problems, which reportedly included "large increases in land prices, government difficulties in acquiring land for public facilities and infrastructure, and chaotic urban development."<sup>44</sup> When these land problems came to a head in the 1980s, the government responded by enacting new land laws.<sup>45</sup> In December 1988, the Ordinary Administrative Reform Propulsion Discussion Committee (Committee) submitted a report to the Prime Minister titled, Report on Measures for Land Prices and Other Issues (Report).<sup>46</sup> In the Report, the Committee stated its opinions on individuals' responsibilities toward land-use, the priority of public welfare goals in land-use, land-use planning, and the social costs and social justice issues related to profiteering from land development.<sup>47</sup> These opinions, along with writers who blamed high land prices partly on land speculation, reportedly influenced the Diet members who drafted the FLL.<sup>48</sup> The FLL differed from many Diet bills, which are often drafted by a ministry.<sup>49</sup> Ultimately, the ruling Liberal Democratic Party modified the draft, and the Diet passed the resulting bill in December 1989.<sup>50</sup>

## 2. Purpose and Principles

The FLL has numerous purposes: to clarify government and individual responsibilities; to set forth the bases for more specific land policies; to require planning; to act as the driving force for normal supply/demand relationships and sound land prices; to require appropriate land-tax policies; and to contribute to the stability of

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44. GAKUYO SHOBO CORPORATION, YOSETSU FUDOSAN NI KAN SURU GYOSEI HOKI [GENERAL EXPLANATION OF LAWS AND REGULATIONS ON REAL PROPERTY] 1 (Chiaki Kusaka & Kazuhiro Sakamoto eds., 22d ed. 2000) (1975) [hereinafter GENERAL EXPLANATION ON REAL PROPERTY].

45. *Id.*

46. *Id.*

47. *Id.* at 1-2.

48. *See id.* at 2; Mera, *supra* note 1, at 182.

49. Mera, *supra* note 1, at 182.

50. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2.

Japanese citizens' lives and development of citizens' health.<sup>51</sup>

As its name suggests, however, the FLL's main purpose is to establish the fundamental principles of land-use.<sup>52</sup> These fundamental principles are: (1) public interests in land are superior to private interests;<sup>53</sup> (2) land-uses shall be in accordance with uses appropriate to an area's natural, social, economic, and cultural conditions;<sup>54</sup> (3) speculative investments in land shall be restrained;<sup>55</sup> and (4) "appropriate burdens" shall be placed on parties profiteering from increases in land prices.<sup>56</sup> Each principle merits discussion in further detail.

The first principle, the superiority of public over private interests in land, is set forth in FLL Article 2. According to Article 2, land is a limited and vital resource for citizens and forms a fundamental basis for citizen activities.<sup>57</sup> In addition, the price of land affects trends in population, industry, land-use, social capital, and facilities, and can change social and economic conditions.<sup>58</sup> Thus, land prices affect the public interests.<sup>59</sup> Public interests are superior to private interests.<sup>60</sup>

The Japanese Constitution does state that "the right to own or to hold property is inviolable."<sup>61</sup> However, some observers have

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51. TAC Corporation, FUDOSAN NI KAN SURU GYOSEI HOKI SAITAN GOKAKU TEKISUTO [SHORTEST EXAMINATION PASSING TEXT FOR LAWS AND REGULATIONS ON REAL PROPERTY] 26 (Shinichi Aikawa ed., 2001) [hereinafter TAC PASSING TEXT].

52. Tochi Kihon Ho [Fundamental Land Law], Law No. 84 of 1989, art. 2 [hereinafter FLL]. The law uses the word *gensoku*, which is often translated into English as "principle." Although the word principle is used here, perhaps a more accurate word in this context would be "policy" or "premise."

53. FLL, Law No. 84 of 1989, art. 1.

54. FLL, Law No. 84 of 1989, art. 3; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

55. FLL, Law No. 84 of 1989, art. 4; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

56. FLL, Law No. 84 of 1989, art. 5; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

57. FLL, Law No. 84 of 1989, art. 2; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

58. FLL, Law No. 84 of 1989, art. 2; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

59. FLL, Law No. 84 of 1989, art. 2; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

60. FLL, Law No. 84 of 1989, art. 2; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

61. KENPŌ, ch.111, art. 29.

suggested that FLL Article 2, by using a proposition that land is different from other forms of property,<sup>62</sup> sets a constitutionally related, public interest limitation on real property rights.<sup>63</sup> Such a suggestion has serious implications because, while the Diet may define property rights through statutes, it is the province of the Japanese Supreme Court to interpret the Constitution.<sup>64</sup> Further, the author cannot discern any clear legal basis for the FLL's implied proposition that real property is different from other forms of property.

FLL Article 3 sets forth the principle that land-use must be in accordance with uses appropriate to an area's natural, social, economic, and cultural conditions.<sup>65</sup> Further, land-use policies and plans must be formulated for "appropriate and logical" land-use planning.<sup>66</sup>

FLL Article 4 sets forth the FLL's most unique principle: speculative investments shall be restrained.<sup>67</sup> Some authorities have interpreted "speculative investment" as buying for the sake of selling at a later date.<sup>68</sup> This is apparently one of the FLL's key provisions,<sup>69</sup> because the law was passed during the "bubble" period, which was marked by speculative land investments that both resulted from, and in turn fueled, increasing land prices.<sup>70</sup>

FLL Articles 3 and 4 reflect and reinforce the strong planning and regulatory philosophy found throughout much of Japan's economy. Article 4 shows a strong slant toward regulation for the purpose of controlling the land market for a purported public good. To effectuate this principle, FLL Article 13 requires the national and municipal governments to regulate land transactions in order to create

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62. See GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 1-3; TAC PASSING TEXT, *supra* note 51, at 27.

63. TAC PASSING TEXT, *supra* note 51, at 27.

64. KENPŌ, ch. III, art. 29; KENPŌ, ch. VI., art. 81.

65. FLL, Law No. 84 of 1989, art. 3; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

66. FLL, Law No. 84 of 1989, art. 3.

67. FLL, Law No. 84 of 1989, art. 4; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2-3.

68. FLL, Law No. 84 of 1989, art. 3; TAC PASSING TEXT, *supra* note 51, at 27.

69. TAC PASSING TEXT, *supra* note 51, at 26-29.

70. Mera, *supra* note 1, at 182-83.

“appropriate” land prices and eliminate the evil effects of inflationary land speculation on the citizenry.<sup>71</sup> FLL Article 13 also requires governments to attempt to ensure “appropriate” uses of land, specifically: high land utilization, appropriate conversions of land-uses, and preservation of appropriate environments.<sup>72</sup> Related to these objectives, FLL Article 12 requires governments to take measures for regulating land-use and planning for land-use, such as efforts to increase public lands and to promote an adequate supply of residential land.<sup>73</sup>

FLL Article 5 stipulates that when increases in land prices change social and economic conditions, “appropriate burdens” shall be placed on parties profiteering from such increases.<sup>74</sup>

It is noteworthy that the principles in the FLL are general and abstract in nature. Therefore, while the FLL acts as a foundation for policies, the FLL itself does not concretely or substantively affect individual rights or responsibilities related to land.<sup>75</sup> Nonetheless, FLL principles have reportedly been important because the FLL has formed, the foundation for other more specific land laws, such as the Aggregate Control of Real Estate-Related Loans.<sup>76</sup>

### 3. Responsibilities Toward Land

Pursuant to its purpose, the FLL clarifies the responsibilities of private businesses and citizens. In specific terms, private businesses must follow the fundamental principles in their land transactions,

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71. FLL, Law No. 84 of 1989, art. 13; *see also* TAC PASSING TEXT, *supra* note 51, at 27; TAC HOKEI KENKYUKAI, 2000 FUDOSAN KANTEISHI KIHON TEKISUTO GYOSEI HOKI [YEAR 2000 REAL PROPERTY APPRAISER BASIC TEXT ADMINISTRATIVE LAWS AND REGULATIONS] 4 [hereinafter TAC BASIC TEXT].

72. FLL, Law No. 84 of 1989, art. 12(1). FLL Article 12 uses the word “*kankyo*,” which translates literally into “environment.” However, although American readers might construe environment as referring to the natural environment, the Japanese term, in the author’s estimation, can encompass natural, built, and/or living environments.

73. FLL, Law No. 84 of 1989, art. 12(1); *see also* TAC BASIC TEXT, *supra* note 71, at 4.

74. FLL, Law No. 84 of 1989, art. 5. Although GENERAL EXPLANATION OF LAWS AND REGULATION ON REAL PROPERTY uses the term “parties profiteering,” the FLL itself uses the term “*kenri ni yu suru mono*” meaning parties with property rights. *See* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 26-27; FLL, Law No. 84 of 1989, art. 5.

75. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 2.

76. *See* Mera, *supra* note 1, at 183.

uses of land, and related supporting activities.<sup>77</sup> Businesses are also required to cooperate with government execution of land policies. Citizen's responsibilities are similar. They must respect the fundamental principles and strive to cooperate with government activities that execute land policies<sup>78</sup>

Perhaps of even more significance, the FLL also sets forth the public sector's responsibilities toward land. Generally, both the national and local governments are responsible for creating and executing overall land policy.<sup>79</sup> The FLL also requires mutual cooperation between the national and local governments in order to ensure consistency in land policies.<sup>80</sup> Both levels of government must also attempt to improve the administration and functioning of administrative agencies "from a comprehensive viewpoint."<sup>81</sup> They must also "take appropriate measures" to educate the public about fundamental land principles and communicate those principles through public announcements and other avenues.<sup>82</sup>

In addition, the national, prefecture, and municipal governments must each make "appropriate and logical" land-use plans,<sup>83</sup> although there is no written requirement for these governments to coordinate planning among each other. The national and local governments must also consider social, economic, cultural, and natural environmental conditions, and then predict future population and industry.<sup>84</sup>

#### 4. Land Taxation and Land Price Controls

The Cabinet has certain powers under the FLL. FLL Article 9 both empowers and requires the Cabinet to take appropriate fiscal and financial measures to execute its policies.<sup>85</sup>

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77. FLL, Law No. 84 of 1989, art. 7; TAC BASIC TEXT, *supra* note 71, at 3.

78. FLL, Law No. 84 of 1989, art. 8; TAC BASIC TEXT, *supra* note 71, at 3.

79. FLL, Law No. 84 of 1989, art. 6; TAC BASIC TEXT, *supra* note 71, at 3.

80. FLL, Law No. 84 of 1989, art. 6; TAC BASIC TEXT, *supra* note 71, at 3.

81. FLL, Law No. 84 of 1989, art. 18.

82. *Id.* at art. 6.

83. *Id.* at art. 11(1).

84. *Id.*

85. *Id.* at art. 9.

The FLL states that the national government must publicly announce “normal” land prices facilitating appropriate land taxes and prices.<sup>86</sup> Further, the national government must try to plan for balanced and rational land valuation.<sup>87</sup>

The nation and localities are authorized by FLL Article 14 to consider the unique characteristics of a given region, and if it is deemed applicable, place appropriate burdens on parties profiting from “social capital” services.<sup>88</sup> Such burdens are not limited to monetary burdens.<sup>89</sup> Governments also have the authority to enact “appropriate” tax policies in order to maintain “fair” tax burdens.<sup>90</sup> In doing so, the governments must take into account the fundamental principles of land planning when creating their tax policies.

The FLL also provides for establishment of a Land Policy Deliberation Council (LPDC) within the National Land Agency.<sup>91</sup> The prime minister can appoint up to twenty-three members who have “expert knowledge” on land.<sup>92</sup> The LPDC’s powers include prime minister inquiries and investigative surveys on issues such as comprehensive and fundamental land and national land-use policies.<sup>93</sup> The FLL also sets some procedural rules for the LPDC.<sup>94</sup> For example, the LPDC can, but is not required to, propose opinions to the prime minister directly or through administrative bodies’ heads.<sup>95</sup>

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86. *Id.* at art. 16. The FLL, however, does not define or provide standards for determining what constitutes “normal” land prices.

87. *Id.* at art. 16.

88. *Id.* at art. 14.

89. *Id.*

90. *Id.* at art. 15. As with its treatment of “normal” land prices in article 16, the FLL does not provide standards for determining what level of taxation is “fair.”

91. *Id.* at arts. 19-20.

92. *Id.* at art. 20.

93. *Id.* at arts. 19-20.

94. *Id.*

95. *Id.* at art. 19(3). The terms are set for a minimum of three years and a majority vote elects the head. *Id.* at art. 20; *see also* TAC BASIC TEXT, *supra* note 71, at 6. Special committees may also be established. *Id.* The members of both the council and the special committees are part-timers. *Id.*

## 5. Fundamental Land Law Administrative Procedure Issues

FLL Article 10 requires the Cabinet to make an annual written report to the Diet on land.<sup>96</sup> The report must include the Cabinet's fundamental land policies as well as its findings on land prices, uses, transactions, and other trends.<sup>97</sup> In formulating the report, the Cabinet must garner opinions on the plan by submitting it in draft form to the LPDC for opinions. The final step in the process is submission of the report to the Diet.

In addition, the FLL sets forth land-use law drafting procedures. Governments must reflect the opinions of residents and other related parties in their respective plans.<sup>98</sup> However, opinions from the LPDC are unnecessary, which is apparently a relief of a major procedural burden. Any changes to the plan require a determination by the national and local governments that such changes are necessary.<sup>99</sup>

The national and local governments must also conduct surveys on land-related issues in order to effectuate their planning of "comprehensive and efficient" policies on land.<sup>100</sup> Surveys, collection of written data, and other related activities must cover issues such as land-use, possession, and price trends.<sup>101</sup> Governments, for smooth execution of land policies, must consider protection of individual rights toward land<sup>102</sup> and must "attempt" to incorporate the assembled land data when formulating policy in relation to such protection. Furthermore, the government must "strive" to supply its land data, ostensibly to the citizenry.<sup>103</sup>

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96. FLL, Law No. 84 of 1989, art. 10.

97. *Id.*

98. *Id.* at art. 11(3).

99. *Id.* at art. 11(4).

100. *Id.* at art. 17.

101. *Id.*

102. *Id.*

103. *Id.*

## B. National Lands Use Planning Law

### 1. General Overview

Periods of great economic growth preceded implementation of the National Lands Use Planning Law. These periods included the so-called era of “high-speed economic growth,” which started in the 1950s, as well as Prime Minister Tanaka Kakuei’s policy of “restructuring the Japanese archipelago.”<sup>104</sup> Various problems were associated with the economic growth era, such as “concentration of population and industry in major cities, as well as ‘excessive’ capital flows into corporations, resulting in speculative land investment, abnormally high land prices, and chaotic development.”<sup>105</sup> The Diet’s enactment of the Land-Use Law in 1974, therefore, was reportedly a response to such problems.<sup>106</sup>

The overriding purpose of the Lands Use Law is to curb land prices.<sup>107</sup> The law creates a premise that land is a limited resource, and that the fundamental activities related to land are living and production.<sup>108</sup> Under this premise, the law sets forth fundamental principles on national land-use: the public welfare is superior to other considerations; there must be planning for preservation of natural resources; healthy and cultural living environments must be protected; and there must be planning for balanced development of national lands.<sup>109</sup>

To achieve its goals and principles, the Land Transaction Surveillance system “was incorporated into the Lands Use Law in 1987.”<sup>110</sup> This system subjects land transfers within designated areas to either an approval (*kyoka*) or notification (*todokede*) process.<sup>111</sup> The approval process is used in Regulation Areas (*kisei kuiki*), which

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104. See GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 5.

105. *Id.*

106. *Id.*

107. See Mera, *supra* note 1, at 182-83; TAC PASSING TEXT, *supra* note 51, at 26-27. The law is also aimed at promoting “sound land-use.” *Id.*

108. Lands Use Law, Law No. 92 of 1974, art. 2.

109. *Id.* at art. 2.

110. Mera, *supra* note 1, at 181.

111. See Mera, *supra* note 1, at 181-82; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 5; TAC BASIC TEXT, *supra* note 71, at 10-20.

are designated by the prefectures when speculative transfers occur in the area, or when there is a “danger” of sharp increases in land prices.<sup>112</sup> The recommendation system is used in Observation Areas (*kanshi kuiki*), which are designated by the prefectures when there is a “danger” of sharp increases in land prices,<sup>113</sup> or Watch Areas (*chushi kuiki*), which are designated when land prices jump above “appropriate” levels.<sup>114</sup> The prefectures may designate these areas only after consultation with prefectural Land-Use Deliberation Councils and the relevant municipalities.<sup>115</sup>

In Regulation Areas, where land transfers require development approval from the governor, the whole approval process requires involvement of numerous parties, including all of the parties desiring a land transfer, the relevant mayor, and the relevant governor.<sup>116</sup> Prior to even entering into a contract for transfer of the land, these parties must apply for approval of the transaction.<sup>117</sup> Although the relevant mayor must initially approve the application, the governor ultimately approves or rejects it.<sup>118</sup> A significant time limit exists (rather unusual for Japanese land-use laws). If government deliberations on the application take longer than six weeks with no answer, the proposed transaction is deemed approved.<sup>119</sup>

In contrast, Observation Areas and Watch Areas merely have a “notification” system, although notifications are only necessary when a land transaction involves land exceeding a certain size.<sup>120</sup> In these

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112. Lands Use Law, Law No. 92 of 1974, art. 12; TAC PASSING TEXT, *supra* note 51, at 32; TAC BASIC TEXT, *supra* note 71, at 12, 16-17. The law evidently uses the language “danger or possibility of danger” of sharp increases in land prices.

113. Lands Use Law, Law No. 92 of 1974, art. 27, part 3; TAC PASSING TEXT, *supra* note 51, at 38; TAC BASIC TEXT, *supra* note 71, at 11, 16-20.

114. Lands Use Law, Law No. 92 of 1974, art. 27, part 6; TAC PASSING TEXT, *supra* note 51, at 38; TAC BASIC TEXT, *supra* note 71, at 11, 19-20.

115. Lands Use Law, Law No. 92 of 1974, art. 27, part 3, part 6; TAC BASIC TEXT, *supra* note 71, at 14-16.

116. TAC PASSING TEXT, *supra* note 51, at 32-34; TAC BASIC TEXT, *supra* note 71, at 14-16.

117. TAC PASSING TEXT, *supra* note 51, at 32-34; TAC BASIC TEXT, *supra* note 71, at 14-16.

118. TAC PASSING TEXT, *supra* note 51, at 32-34; TAC BASIC TEXT, *supra* note 71, at 14-16.

119. TAC PASSING TEXT, *supra* note 51, at 32-34; TAC BASIC TEXT, *supra* note 71, at 14-16.

120. TAC PASSING TEXT, *supra* note 51, at 32-34; TAC BASIC TEXT, *supra* note 71, at 14-

two areas, a party need only meet the “investigative standards.”<sup>121</sup> Both parties must notify the relevant mayor, who, in turn, notifies the governor (or designated city mayor if the governor is unavailable).<sup>122</sup> The governor ultimately makes a judgment on the proposed use and whether the proposed transaction price is speculative.<sup>123</sup> “Suitable” prices are calculated based on studies of land prices and transactions in surrounding areas.<sup>124</sup> As with Regulation Areas, there are time frames—the government must issue a recommendation within six weeks of the notification.<sup>125</sup> The government can publicly issue a recommendation (*kankoku*) on the proposed development, but a party need not comply with the recommendation.<sup>126</sup> However, during the six week waiting period after notification, the parties are prohibited from concluding the proposed land-transfer contract.<sup>127</sup>

Even if the government does ultimately make recommendations on the proposed land transfer, the government has no legal enforcement powers.<sup>128</sup> If the parties ignore the recommendation, a contract concluding the land transfer is technically valid.<sup>129</sup> However, although a party can legally ignore a governor’s recommendation, the possibility of a public announcement about the recommendation has apparently been sufficient deterrence to ignoring recommendations.<sup>130</sup>

In the general framework of the Land-Use Law and its Land Price

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16. Observation Areas are set by the various prefectures. For Watch Areas, the land area is 2,000 square meters in Urbanization Areas, 5,000 square meters in all lands within City Planning Area zones (except for any Urbanization Area zones within City Planning Areas), and 10,000 square meters in lands outside City Planning Area zones. Lands Use Law, Law No. 92 of 1974, art. 27(4)(2); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 17.

121. Lands Use Law, Law No. 92 of 1974, art. 24; *see also* TAC PASSING TEXT, *supra* note 51, at 32-34.

122. Lands Use Law, Law No. 92 of 1974, art. 27(4)(1); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 19.

123. Yoshitsugu Kanemoto, *The Housing Question in Japan*, 27 REGIONAL SCI. & URB. ECON. 613, 640 (1997).

124. *See* TAC BASIC TEXT, *supra* note 71, at 7-25; TAC PASSING TEXT, *supra* note 51, at 32-38; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 5-26.

125. Lands Use Law, Law No. 92 of 1974, art. 27, part 5.

126. *See* Kanemoto, *supra* note 123, at 640.

127. *See* TAC PASSING TEXT, *supra* note 51, at 32-34.

128. *See* Kanemoto, *supra* note 123, at 640.

129. *Id.* at 640; *see also* TAC PASSING TEXT, *supra* note 51, at 33.

130. *See* Kanemoto, *supra* note 123, at 640; Mera, *supra* note 1, at 181-82.

Surveillance System, local governments are not required to give reasons for their decisions.<sup>131</sup> The system is a “black box,” which contrasts heavily with the emphasis on public deliberations and citizen consultation in administrative procedures in the CPL.

Tokyo, for example, made extensive use of the notification system during the economic bubble period in an attempt to suppress the explosion in land prices that occurred in Tokyo beginning in the mid-1980s.<sup>132</sup> Tokyo initially did not make this decision entirely on its own accord.<sup>133</sup> Prior to incorporation of the notification or approval system into the Land-Use Law, the National Land Agency in 1986 “requested” (presumably a *de facto* order) that Tokyo enact ordinances implementing such a system in Tokyo.<sup>134</sup> These ordinances decreased the minimum area of land necessary to create a Watch Area and increased the size of already existing Watch Areas.<sup>135</sup> However, after land prices began falling in 1991, Tokyo deemed that the Watch Areas and the notification system were generally no longer necessary, and by 1995, all but one Watch Area was eliminated.<sup>136</sup>

## 2. Lands Use Law Administrative Procedure Issues

All three levels of government—national, prefecture, and municipal—are to some degree involved with the law, most prominently in the area of planning.

The law requires all three levels of government to create plans for uses of national lands.<sup>137</sup> In specific terms, the Land Ministry creates a national Land-Use Plan, which is then approved by the Cabinet; the prefectures create prefectural plans based on the national plan; while the municipal governments create municipal plans based on the

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131. Mera, *supra* note 1, at 181.

132. BUREAU OF CITY PLANNING, TOKYO NO TOSHI ZUKURI 1998 [PLANNING OF TOKYO 1998] 25 (1998) [hereinafter PLANNING OF TOKYO].

133. Mera, *supra* note 1, at 181.

134. *Id.*

135. PLANNING OF TOKYO, *supra* note 132, at 25.

136. *Id.*

137. Lands Use Law, Law No. 92 of 1974, art. 4; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 5.

prefectural plan.<sup>138</sup> The prefectures must also create Fundamental Land-Use Plans.<sup>139</sup> The prefectures create these plans after consultation with relevant mayors and Land Use Planning Localities Deliberation Councils.<sup>140</sup> Consultation with, and consent of, the Land Minister is a requirement for implementation of these plans.<sup>141</sup> The Fundamental Land-Use Plans are based on the national plan and the prefectural plans.<sup>142</sup> They contain five Area Designations: City Areas, Agricultural Areas, Forest Areas, Natural Park Areas, and Natural Preservations Areas.<sup>143</sup> However, only City Areas, which are under the jurisdiction of the CPL are relevant to this Article.<sup>144</sup>

### *C. Analysis of the Fundamental Land Law and Lands Use Law*

The most striking feature of the FLL and Lands Use Law is the heavy emphasis on economic goals, specifically control of land prices.

Some U.S. jurisdictions have adopted land policies that directly affect land prices. For example, some experts have observed that Oregon's Urban Growth Boundary (UGB) system, which allows development only within designated UGB borders, has a strong effect on land prices. In general, land prices within UGBs have exhibited a tendency to rise.<sup>145</sup> In addition, the rationale for Oregon's UGB system is rooted strongly in economic efficiency arguments including prevention of sprawl and the infrastructure costs associated with that type of growth pattern.<sup>146</sup>

However, the goal of suppressing rising land prices through direct

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138. Lands Use Law, Law No. 92 of 1974, arts. 4-8.

139. Lands Use Law, Law No. 92 of 1974, art. 9; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 7.

140. Lands Use Law, Law No. 92 of 1974, art. 9(10)-(12).

141. Lands Use Law, Law No. 92 of 1974, art. 9(10), 9(12).

142. Lands Use Law, Law No. 92 of 1974, art. 9(10).

143. Lands Use Law, Law No. 92 of 1974, art. 9(2).

144. City Areas require "development, maintenance, and preservation" of land. Lands Use Law, Law No. 92 of 1974, art. 9(4).

145. See, e.g., Robert Cervero, *Growing Smart by Linking Transportation and Urban Development*, 19 VA. ENVTL. L.J. 357, 362 (2000); Quintin Johnstone, *Government Control of Urban Land-Use: A Comparative Major Program Analysis*, 1994, 39 N.Y.L. SCH. L. REV. 373, 430 (1994).

146. See Oregon Department of Land Conservation and Development, *supra* note 38.

intervention and control by the government is unique to Japan. Some Japanese observers have expressed amazement at the Japanese government's resort to "authoritarian" measures such as the Land-Use Law, which was clearly a direct and substantial interference with the free functioning of the real estate market.<sup>147</sup>

Few would argue that the rising price of land in Japan, especially during the bubble period, was problematic for the nation. The increase of land prices fostered land speculation by some investors and made the prospects of home ownership, particularly in large cities, difficult for the many members of the middle class.<sup>148</sup> However, resolving the problem by increasing legal regulation of the already heavily regulated land market was questionable and has been subject to criticism.<sup>149</sup> According to some observers, the policy embodied in the FLL and Land-Use Law was a single-minded attempt to control land prices at all costs (including a market-oriented economy or efficient land-use system).<sup>150</sup> The traditional attempt to solve problems through increased regulation, or "dysfunctional policy responses to dysfunctional policies"<sup>151</sup> as one analyst describes it, is anachronistic in light of the government's current push toward deregulation. The premises underlying the FLL and Land-Use Law need serious rethinking in Japan's current moribund land market.<sup>152</sup> In particular, the FLL needs revision if it is truly to function as a basic land law that will balance the need for predictability with

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147. Mera, *supra* note 1, at 181.

148. Mera, *supra* note 1, at 179; Kanemoto, *supra* note 123, at 613-15.

149. Mera, *supra* note 1, at 178-203; Interviews with John Tofflemire, Ikoma/CB Richard Ellis, in Tokyo, Japan (Aug. 7, 2001 & Sept. 2, 2001) (on file with author).

150. Mera, *supra* note 1, at 180.

151. Interview with John Tofflemire, Director, Investment Services, Ikoma/CB Richard Ellis, in Tokyo, Japan (Aug. 7, 2001) (on file with author).

152. In 1990, the valuation of all land in Japan was three times higher than the value of all land in the United States. Kanemoto, *supra* note 123, at 625. Since the initial sudden drop in land prices starting in 1992, the land market has declined steadily, and its overall decline has continued through 2001 (although the decline is somewhat more contained in the *Dai-San-Toshi-En* region). See Ministry of Land, Infrastructure, and Transport, Heisei 13 Ban Tochi Hakusho [Land White Paper 2001] 120-21 (2001); Japan Almanac 2002, 208-09 (2001). Land Ministry statistics also show a steady, although not necessarily consecutive, decline in both residential and non-residential construction since 1992. See Ministry of Land, Infrastructure, and Transport Internet official site, at [http://www.mlit.go.jp/toukeijouhou/chojou/ex/ken-e\\_u.xls](http://www.mlit.go.jp/toukeijouhou/chojou/ex/ken-e_u.xls), & at [http://www.mlit.go.jp/toukeijouhou/chojou/ex/ken-e\\_i.xls](http://www.mlit.go.jp/toukeijouhou/chojou/ex/ken-e_i.xls) (last visited Mar. 11, 2002).

private landowners and developers, while at the same time providing the flexibility for changing future needs in Japan's economy and population.

Japan's system certainly has no parallel in the United States. The fundamental reasons for this phenomenon are likely historical and cultural.<sup>153</sup> For example, in the American Midwest, the availability of vast expanses of land in an ever-westward expanding America contributed to attitudes that regarded land as a fungible commodity rather than a scarce resource.<sup>154</sup> Similarly, in Western states such as Texas, a self-image of rugged, individualistic frontiersmen has fostered, in addition to a general hostility toward government regulation, a strong desire for land-use to be free from government interference.<sup>155</sup>

However, not all U.S. jurisdictions necessarily share this view toward land. Local communities in the Pacific Northwest, such as Portland, have a stronger appreciation of the fragility of land, a perception of land as more of a resource than a commodity, and citizens with a stronger psychological desire for land in its natural state. These areas thus tend to welcome governmental regulation of land.<sup>156</sup> Even in jurisdictions that do not welcome governmental land regulation, such as Dallas, Texas, governments have historically restricted the unfettered use of land.<sup>157</sup> Yet even in these jurisdictions,

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153. See, e.g., Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 527-88.

154. *Id.* Arguably, these attitudes were not restricted to the American Midwest but deeply embedded in the United States from the earliest days of the nation. Free from established traditions or preconceived notions about a proper financial system, some early U.S. leaders such as Senator William Maclay bandied about ideas of using the "western lands [as] the natural fund for the redemption of [the] national debt." See RICHARD BROOKHISER, ALEXANDER HAMILTON, AMERICAN 102-03 (1999). In fact, Maclay wrote that he would be "happy" if government stocks were made nonnegotiable "except by commutation into lands." Bosselman, *supra* note 153.

155. Telephone Interview with John Mixon, Professor of Law, University of Houston Law Center (Nov. 9, 2001) (on file with author).

156. Interview with Stuart Meck, Principal Investigator, American Planning Association in Chicago, Ill. (Aug. 24, 2001) (on file with author). Meck observes that citizens there have an "even spiritual attachment" to land and nature. *Id.*; see, e.g., E-mail from Stuart Meck, Principal Investigator, American Planning Association, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (May 31, 2002) (on file with author).

157. Telephone Interview with John Mixon, Professor of Law, University of Houston Law Center (Nov. 9, 2001) (on file with author). For example, Dallas reportedly attempted to

the government has refrained from directly controlling the buying and selling of land. The predominant laissez-faire attitude toward the economy in the United States might be a factor that has prevented enactment of American laws similar to the Lands Use Law and the FLL.

### III. JAPANESE ZONING: CITY PLANNING LAW AND BUILDING STANDARDS LAW

Numerous national laws regulate land-use in Japan for the purposes of land-use planning, urban planning, safety, aesthetics, prevention of nuisance-like activities and off-site impacts, preservation of natural resources and the environment, and protection of economic interests. Two of the most important of these laws in the context of zoning are the CPL and BSL.

#### *A. Purposes of the City Planning Law and Building Standards Law*

##### 1. City Planning Law

The CPL is the foundational law upon which a host of executing city plans, land-use regulations, construction regulations, and activities related to city facilities are based.<sup>158</sup> The law works in conjunction with other land-use laws to regulate land-use in Japan.<sup>159</sup> The purpose of the CPL is to set forth standards for items such as the creation of a city plan, the substance of city plans, and city planning projects and activities.<sup>160</sup> The law is also designed to promote planning for sound development and orderly maintenance of land, balanced development of national lands, and contribute to the public

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introduce a zoning system prior to the U.S. Supreme Court's decision affirming the constitutionality of zoning. *Id.* (referring to *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)).

158. See GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 26.

159. *Id.*

160. CPL, Law No. 100 of 1968, art. 2. The terms "projects and activities" refer to the Japanese term "jigyo." *Id.* Although the author does not believe one word fully and accurately captures the meaning of the term, the author will use both "projects" and "activities" interchangeably, depending on what the context requires.

welfare.<sup>161</sup>

The CPL also sets forth three fundamental principles for city plans:<sup>162</sup> (1) plans should provide for sound harmonization of urbanization with agricultural, forestry, and fisheries industries;<sup>163</sup> (2) plans should secure healthy and cultural urban lifestyles, as well as functional urban activities;<sup>164</sup> and (3) based on appropriate limits, plans should provide for logical uses of land.<sup>165</sup>

## 2. Building Standards Law

The BSL is the primary Japanese law on land development bulk and density standards, and has two main purposes.<sup>166</sup> The first purpose is setting minimum standards for siting, structure, facilities, and uses.<sup>167</sup> The second purpose is planning for the preservation of citizens' life, health and property, and to promote the public welfare.<sup>168</sup> The law has specific provisions for ensuring safe building construction, preventing fire damage, and promoting sanitation.<sup>169</sup>

However, the BSL is not merely a construction code, as a parallel ordinance might be in the United States; it also contains land-use zoning standards.<sup>170</sup> While the CPL sets forth the zoning categories, requires local governments to zone, and sets forth land-use standards, the BSL sets forth performance and some use restrictions to be applied in those zones.<sup>171</sup> Thus, the CPL and the BSL are the two

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161. CPL, Law No. 100 of 1968, art. 2.

162. *Id.*

163. *Id.* The text does not actually use the word urbanization, however, "harmonization with agricultural, forestry, and fisheries industries" logically relates to harmonization with urbanization or development. *Id.*

164. *Id.*

165. *Id.*

166. *See generally* BSL, Law No. 201 of 1950.

167. *Id.*

168. *Id.*

169. *See generally id.* at ch. 3. Chapter 3 is devoted to construction standards, while the other chapters deal with use zoning, fire protection, sanitation, and other concerns. *See also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 77.

170. BSL, Law No. 201 of 1950, art. 48 & tables; *see also* Callies, *supra* note 22, at 139-40.

171. *See* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 77. However, the BSL does not set forth all of the performance and use standards for structures built in Japan. For example, CPL Articles 42 and 43 also set forth restrictions for Urbanization Control Areas

main laws that work in conjunction to control land planning and building development.<sup>172</sup>

Specific provisions of the BSL are explained and analyzed in following sections of this Article.

### *B. Zoning Designated in the City Plan*

As previously explained, all three levels of government in Japan—municipal, prefecture, and national—zone, although it is the municipalities that set zones the majority of the time.<sup>173</sup> However, Japan's prefectures can set some zones, either when large areas of land are involved, or when a special type of zoning classification that affects prefecture interests is involved.<sup>174</sup> In a similar vein, the national government can zone when one of the large Urban Planning Area zones overlap two or more prefecture borders.<sup>175</sup> The details of this dynamic can be best understood in chart form, as provided in the Appendix of this Article.

The CPL requires both the prefectures and municipalities to draft a city plan (*toshi keikaku*). The city plan must set forth policies on development and preservation of land.<sup>176</sup> A locality's city plan must enumerate land-use district categories,<sup>177</sup> generally termed in the United States as either "zones" or "zoning."<sup>178</sup> In the CPL and other relevant Japanese laws, there are different terms for the various zoning categories, and the author has translated these terms as either areas (*kuiki*), zones (*chiiki*), or districts (*chiku*).<sup>179</sup> However, unless otherwise indicated, use of the word "zone" in this Article refers to these categories in an individual or collective context.

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(because in general, no zoning is permitted in those areas). *Id.*

172. See GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 77.

173. CPL, Law No. 100 of 1968, art. 15, part 1.

174. *Id.* at art. 15, part 2.

175. *Id.* at art. 22.

176. *Id.* at art. 7.

177. *Id.*

178. *Id.*

179. The term "Chiiki" appears to be translated often as "district" in English-language literature on the subject. See, e.g., Callies, *supra* note 22, at 134-55. However, the author believes the term, in the context of the CPL, more closely parallels the U.S. word for a common land-use "zone" and is more easily understood and identifiable to the layperson if translated consistently throughout this Article as such.

### *C. Urban Planning Areas*

The largest and most fundamental zone classification in Japan is the Urban Planning Area.<sup>180</sup> Inside an Urban Planning Area, the CPL permits and requires city planning, as well as associated subzoning.<sup>181</sup> Urban Planning Areas reportedly cover approximately one-quarter of the land in Japan.<sup>182</sup> Outside of Urban Planning Areas, development is highly restricted.<sup>183</sup> Thus, most development in Japan occurs within Urban Planning Areas. Designation as an Urban Planning Area is therefore critical for the potential development of any large land area in Japan.

Prefectural governors (governors) usually decide, after consultation with affected mayors and deliberation councils, what land within their prefectures will be designated as Urban Planning Areas.<sup>184</sup> The Minister of Land, Transport, and Infrastructure (Land Minister) usually has ultimate approval authority, and in situations where a particular area of land physically overlaps more than one prefecture, the Land Minister can designate an Urban Planning Area himself.<sup>185</sup>

A Semi-Urban Planning Area zone category also exists, although it is rarely used.<sup>186</sup> Municipalities, not the prefectures, zone these areas.<sup>187</sup> Municipalities must consider social, environmental, and agricultural promotion issues in such areas.<sup>188</sup>

### *D. Inside the Urban Planning Area: Urbanization Areas, Urbanization Control Areas, and Unzoned Areas*

Within an Urban Planning Area, a governor or the Land Minister must decide what lands to further divide into Urbanization Areas or

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180. See CPL, Law No. 100 of 1968, art. 5; see also TAC BASIC TEXT, *supra* note 71, at 32; TAC PASSING TEXT, *supra* note 51, at 46-48.

181. CPL, Law No. 100 of 1968, art. 5.

182. See Callies, *supra* note 22, at 136.

183. CPL, Law No. 100 of 1968, art. 5.

184. *Id.* at art. 5(1)-(3).

185. *Id.* at art. 5(1)-(4).

186. *Id.* at art. 5, part 2(1).

187. *Id.* at art. 5, part 2(1).

188. *Id.*

Urbanization Control Areas.<sup>189</sup> Inside Urbanization Areas, the CPL states that development is to be “promoted.”<sup>190</sup> In reality, however, development in these areas is merely permitted and is subject to the full gamut of zoning and other regulation. The CPL sets forth two scenarios in which Urbanization Areas should be designated.<sup>191</sup> One scenario is for already urbanized land areas.<sup>192</sup> The second scenario is for areas that should be developed through “preferential and logical planning over a ten year period.”<sup>193</sup>

In contrast, development within Urbanization Control Areas is “discouraged,” both de jure and de facto, although further zoning, and therefore development, is permissible in rare circumstances.<sup>194</sup>

In addition to designating land as an Urbanization Area or Urbanization Control Area, governors have a third option. They can altogether refrain from using either zone category. Such unzoned areas are sometimes referred to as *misenbiki* areas.<sup>195</sup> In these areas, smaller use zones are allowed only in rare situations “when necessary.”<sup>196</sup>

Thus, although zoning and development is legally permissible anywhere inside an Urban Planning Area, in reality, zoning in the Urbanization Control Areas and *misenbiki* areas is allowed only in a limited number of narrowly defined situations.<sup>197</sup> The majority of zoning and development, therefore, occurs in Urbanization Areas. It is in these areas where any zones can be applied and where the process of zoning is easiest.

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189. *Id.* at art. 7.

190. *Id.*

191. See CPL Law No. 100 of 1968, arts. 7, 13; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 30; TAC PASSING TEXT, *supra* note 51, at 47.

192. CPL Law No. 100 of 1968, art. 7(1); see also GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 30; TAC PASSING TEXT, *supra* note 51, at 47.

193. CPL Law No. 100 of 1968, art. 7(1); see also GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 30; TAC PASSING TEXT, *supra* note 51, at 47.

194. CPL, Law No. 100 of 1968, art. 7.

195. See, e.g., TAC PASSING TEXT, *supra* note 51, at 47.

196. See TAC PASSING TEXT, *supra* note 51, at 47; CPL, Law No. 100 of 1968, art. 7.

197. CPL, Law No. 100 of 1968, art. 7.

*E. Smaller Zone Categories: The Area District Category*

There are numerous zone classifications in addition to the fundamental Urban Planning Area designation, and the large Urbanization Area and Urbanization Control Area districts. The most significant subzones are grouped within an Area District category. Within the Area District category there are approximately thirty zoning classifications which roughly correspond to U.S. “base” and “overlay” zones, and local governments can choose any of them when planning and zoning.<sup>198</sup>

Of the roughly thirty zones in the Area District Category, twelve are collectively known as Use Zones, which approximately correspond with typical U.S. base zones.<sup>199</sup> The twelve Use Zones separate and restrict land-uses to residential (with varying height limits), commercial, and industrial, and allow some mixes of those uses.<sup>200</sup> Specifically, the Use Zones are: (1) Class 1 Exclusively Low Rise Residential Zone: for protection of the residential environment of low rise residences;<sup>201</sup> (2) Class 2 Exclusively Low Rise Residential Zone: aimed primarily at protecting the residential environment of low rise residences;<sup>202</sup> (3) Class 1 Exclusively Medium and High Rise Residential Zone: for protection of the residential environment of medium to high rise residences;<sup>203</sup> (4) Class 2 Exclusively Medium and High Rise Residential Zone: aimed primarily at protecting the residential environment of primarily medium to high rise residences;<sup>204</sup> (5) Class 1 Residential Zone: for protection of the residential environment of residences;<sup>205</sup> (6) Class 2 Residential Zone: aimed primarily at protecting the residential environment of residences;<sup>206</sup> (7) Quasi-Residential Zone: for planning of promotion of convenience of enterprises in areas characterized as road thoroughfares, and for harmonizing such

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198. *Id.* at arts. 8, 9.

199. *Id.* at arts. 8(1)(1), 9(1)-(12).

200. *Id.* at art. 9(1)-(12).

201. *Id.* at art. 9(1).

202. *Id.* at art. 9(2).

203. *Id.* at art. 9(3).

204. *Id.* at art. 9(4).

205. *Id.* at art. 9(5).

206. *Id.* at art. 9(6).

enterprise activities with the protection of residences;<sup>207</sup> (8) Neighborhood Commercial Zone: for residents in neighborhood residential areas, to increase the convenience of commercial and related enterprises whose main activities supply articles for daily necessities and other goods;<sup>208</sup> (9) Commercial Zone: aimed primarily at increasing the convenience of commercial and related activities;<sup>209</sup> (10) Quasi-Industrial Zone: aimed primarily at promoting the convenience of industries that do not pose a danger of degrading the environment;<sup>210</sup> (11) Industrial Zone: aimed primarily at promoting the convenience of industry;<sup>211</sup> (12) Exclusively Industrial Use Zone: for promoting the convenience of industry.<sup>212</sup>

*F. The Area District Category: Zones Used Exclusively as Overlay Zones*

Four zones in the Area District Category are purely layover zones. These zones include: Special Use District,<sup>213</sup> High-Rise Residential Guidance District,<sup>214</sup> Height District,<sup>215</sup> and Height Use District.<sup>216</sup>

These zones can be designated only on top of a Use Zone.<sup>217</sup> Significantly, mayors, not governors, designate these overlay zones.<sup>218</sup> A more detailed explanation of these zones is included in the Appendix of this Article.

The Special Use Districts permit special land designations for promoting special purposes, such as environmental protection,

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207. *Id.* at art. 9(7).

208. *Id.* at art. 9(8).

209. *Id.* at art. 9(9).

210. *Id.* at art. 9(10).

211. *Id.* at art. 9(11).

212. *Id.* at art. 9(12).

213. *Id.* at art. 9(13).

214. *Id.* at art. 9(15).

215. *Id.* at art. 9(16).

216. *Id.* at art. 9(17).

217. *See id.* at arts. 8, 9(13)-(16); Toshi Keikaku Ho Shikorei [City Planning Law Implementing Order], Cabinet Order No. 13 of 1969, art. 3 [hereinafter CPL Implementing Order].

218. *See, e.g.*, TAC PASSING TEXT, *supra* note 51, at 50.

industrial development, education, and recreation.<sup>219</sup> The other three zones permit special restrictions on building heights and volumes.<sup>220</sup>

*G. The Area District Category: More Specialized Zones*

Many of the Area District category zones are for the purpose of achieving more specialized purposes. Unlike with some other Area District zones, the zones in the following list are legally permissible anywhere inside an Urban Planning Area, even in land areas without a Use Zone (a Japanese “base zone”) designation.<sup>221</sup> These zones include: Particularized Urban District;<sup>222</sup> Fire Protection Zones and Quasi-Fire Protection Zone;<sup>223</sup> Aesthetic District;<sup>224</sup> Scenic Districts;<sup>225</sup> Port Districts;<sup>226</sup> Historical Climate Special Preservation Districts;<sup>227</sup> First Class Historical Climate Preservation District and Second Class Historical Climate Preservation District;<sup>228</sup> Green Space Preservation District;<sup>229</sup> Distribution Business District;<sup>230</sup> Productive Green District;<sup>231</sup> Districts for the Preservation of Traditional Structures;<sup>232</sup> Districts for Prevention of Noise Impediments Caused by Airplanes<sup>233</sup> and Special Districts for Prevention of Noise Impediments Caused by Airplanes;<sup>234</sup> Parking Facilities District;<sup>235</sup> and Particularized Use Restriction Zone, which, unlike the foregoing zones, can only be designated in Urbanization

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219. See CPL, Law No. 100 of 1968, art. 9(13); CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 3. The CPL also mentions amusement and medium/high-rise residential purposes. *Id.*

220. CPL, Law No. 100 of 1968, art. 9(15)-(17).

221. *Id.* at arts. 8, 9.

222. *Id.* at arts. 8(14), 9(18).

223. *Id.* at arts. 8(1)(5), 9(19).

224. *Id.*

225. *Id.* at arts. 8(1)(7), 9(21).

226. *Id.* at arts. 8(1)(9), 9(22).

227. *Id.* at art. 8(1)(10).

228. *Id.* at art. 8(1)(11).

229. *Id.* at art. 8(1)(12).

230. *Id.*

231. *Id.* at art. 8(1)(14).

232. *Id.* at art. 8(1)(15).

233. *Id.* at art. 8(1)(16).

234. *Id.* at art. 8(1)(16).

235. *Id.* at art. 8(1)(8).

Control Areas.<sup>236</sup> In practice, however, these zones are usually used as layover zones on top of Use Zone lands.<sup>237</sup> Municipal governments set these zones in their city plans, except for the Scenic Districts and Seaside Districts, which are set by the prefectures.<sup>238</sup>

A more detailed list of these zones is included in the Appendix of this Article.

#### *H. The Area District Category: Other Zones*

Some of the Area District category's less commonly used zone categories include Promotion Areas and Areas for Promoting Conversion of Un-utilized Land, both of which are restricted to Urbanization Areas.<sup>239</sup> In the Area for Promoting Conversion of Un-utilized Land zone, local governments must plan for and promote "sufficient" use of land in these zones.<sup>240</sup> The CPL sets forth five conditions, including a minimum plot area of 5,000 square meters, for governments to zone land with this classification.<sup>241</sup>

The Promotion Area zone is for the purpose of promoting and achieving specialized government planning objectives. Four sub-zones fall within this category:<sup>242</sup> Urban Redevelopment Promotion Zone; Land Parcel Arrangement Promotion Area Zone; Residential Area Management Promotion Zone; and Urban Disaster Recovery Promotion Zone.

All Promotion Area zones require planning for the purpose of promoting small or medium area scale development.<sup>243</sup> The names of these zones are basically self-explanatory, but the Urban Disaster Recovery Promotion Zone provides emergency planning to revitalize areas hit by major disaster.<sup>244</sup> The Land Parcel Arrangement

236. *Id.* at art. 8(1)(2), part 2, 9(13).

237. *See, e.g.*, PLANNING OF TOKYO, *supra* note 132, at 19-22; CITY PLANNING SECTION, CITY PLANNING BUREAU, KYOTO CITY, KYOTO-SHI NO TOSHI KEIKAKU [CITY PLANNING FOR KYOTO CITY] 8-16 (1998) [hereinafter CITY PLANNING FOR KYOTO CITY].

238. TAC PASSING TEXT, *supra* note 51, at 50.

239. CPL, Law No. 100 of 1968, art. 10, part 2 & part 3.

240. *Id.* at art. 10, part 3.

241. *Id.* at art. 10, part 3(1)-(5).

242. *Id.* at art. 10, part 2.

243. *Id.*

244. *Id.* at art. 10, part 4. A direct translation of the zone's name would include the word "propulsion" (*suishin*), not "promotion." However, the author believes the term "promotion" is

Promotion Area is significant because in this zone, local governments may re-set boundaries for streets and other public spaces such as parks.<sup>245</sup> One drawback, however, is that usable land in an area might actually decrease after government re-sets boundaries.<sup>246</sup>

### *I. District Plans and District Plan Zones*

The CPL permits local governments to draw up neighborhood-scale, specialized District Plans to supplement the overall basic City Plans.<sup>247</sup> The CPL allows only six types of District Plans, for particularized needs and purposes. The Six District Plans are: (Basic) District Plan,<sup>248</sup> Residential High Utilization District Plan,<sup>249</sup> Redevelopment District Plan,<sup>250</sup> Fire Protection Maintenance Districting Plan,<sup>251</sup> Road Districting Plan,<sup>252</sup> and Village Districting Planning.<sup>253</sup>

For the purpose of implementing a District Plan, a municipality can zone land as a District Plan Zone.<sup>254</sup>

Descriptions of each District Plan and their corresponding District Plan Zone are included in the Appendix of this Article. However, in general terms, these plans are aimed at accommodating or promoting high rise residences, urban redevelopment, fire and noise prevention, and agriculture.<sup>255</sup> Some of the special regulations that can be imposed in these areas pertain to floor-to-area ratios (FARs) and transferable development right (TDR) systems.<sup>256</sup>

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a more appropriate translation into U.S.-based English.

245. CPL, Law No. 100 of 1968, art. 10 part 2(4).

246. TAC BASIC TEXT, *supra* note 71, at 125.

247. CPL, Law No. 100 of 1968, arts. 12(4), 12(5), 13(1).

248. *Id.* at arts. 4(9), 12(4)(1).

249. *Id.* at art. 4, item 9; *id.* at art. 12.4, item 1; *see also* TAC PASSING TEXT, *supra* note 51, at 56.

250. CPL, Law No. 100 of 1968, arts. 4(9), 12(4)(1).

251. *Id.*

252. *Id.*

253. *Id.*

254. CPL, Law No. 100 of 1968, art. 4(9), 12(4)(1).

255. *Id.*; *see also* TAC PASSING TEXT, *supra* note 51, at 56.

256. *See, e.g.*, CPL, Law No. 100 of 1968, ch. 4(2), art. 12(5)(1). *See also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 42-43.

In addition to the six fundamental plan categories, municipalities have the option of creating different sub-categories and titles for their particular needs.<sup>257</sup>

### *J. Projects and Project Zones*

The CPL allows designation of a variety of City Planning Projects.<sup>258</sup> Depending on the type of project, the national, prefectural, or municipal governments designate the project.<sup>259</sup> Most City Planning Projects can be set only in Urbanization Areas, although there are exceptions.<sup>260</sup> There are two main categories of City Planning Projects: Urban Area Development Projects and Urban Infrastructure Projects.<sup>261</sup> Within these two main categories, there are several project subcategories that can be designated by government entities. The Appendix of this Article provides a list of the various City Planning Projects.

Related to planning projects is a major, specialized zone category called the Urban Development Projects Scheduling Area.<sup>262</sup> This zone is for the purpose of “early planning and securing large-scale development and infrastructure.”<sup>263</sup> This zone classification is reportedly premised on the principle that speculative investments in land are problematic for future purchases of lands projected for public projects.<sup>264</sup> Thus, by zoning certain land as areas slated for later projects, prefectural governments can theoretically, at the early stages of planning, ensure smooth construction of these projected projects.<sup>265</sup> This zone category contains six sub-zone categories. In

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257. CPL, Law No. 100 of 1968, art. 12(4); *see also* TAC BASIC TEXT, *supra* note 71, at 48.

258. *See* CPL, Law No. 100 of 1968, arts. 12, 13; *see also* TAC PASSING TEXT, *supra* note 51, at 54.

259. CPL, Law No. 100 of 1968, arts. 12, 13.

260. *Id.*

261. *See* TAC BASIC TEXT, *supra* note 71, at 54.

262. CPL, Law No. 100 of 1968, art. 12(2); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 38-39; TAC BASIC TEXT, *supra* note 71, at 45.

263. *See* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 38-39; TAC BASIC TEXT, *supra* note 71, at 45.

264. *See* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 38-39; TAC BASIC TEXT, *supra* note 71, at 45.

265. *See* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 38-39; TAC

lands designated with these zone classifications, specialized projects may be planned and projected.<sup>266</sup>

#### IV. EXAMPLES OF ZONING IN SOME JAPANESE CITIES

##### *A. Kyoto City*

Kyoto City (as opposed to Kyoto Prefecture) has created a Declaration, Master Concept, and Master Plan for Kyoto as a whole, as well as Master Plans for the city's individual districts.<sup>267</sup> The Declaration and Master Concept set forth general ideals and concepts about Kyoto's present state and future development.<sup>268</sup> The Master Plan for the city sets forth general goals for social issues and land-use planning.<sup>269</sup> The inclusion of social goals in the Master Plan reflects the more active role of government, which appears both accepted and expected, in Japan.<sup>270</sup> The Master Plan's land-use planning goals include promoting environmental protection, planning for natural disasters, diversifying and improving public transportation, beautification, preserving historical structures, increasing the city's vitality, and building traffic and information infrastructures.<sup>271</sup> Kyoto also has Plan Implementation policy goals that relate to how the city's political and administrative systems and operations should function in order to carry out the goals of the Master Plan.<sup>272</sup>

Kyoto is one of Japan's first planned cities.<sup>273</sup> When the Emperor Kammu moved the capital from Nara to Kyoto in 794, he designed

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BASIC TEXT, *supra* note 71, at 45.

266. See GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 38-39; TAC BASIC TEXT, *supra* note 71, at 45.

267. See generally POLICY PLANNING SECTION, POLICY PROMOTION OFFICE, GENERAL PLANNING BUREAU, KYOTO CITY, KYOTO-SHI TOSHI KEIKAKU NO GAIYO [OUTLINE OF THE MASTER PLAN OF KYOTO CITY] (2001) [hereinafter KYOTO CITY PLAN OUTLINE].

268. KYOTO CITY PLAN OUTLINE, *supra* note 267, at 3.

269. *Id.* at 6-33.

270. *Id.* The social goals include promotion of human rights, active lifestyles, education of children, community building, equality of social service, increasing birthrates, and public health. *Id.*

271. *Id.*

272. *Id.* at 34-35.

273. CITY PLANNING FOR KYOTO CITY, *supra* note 237, at 5.

the city as a smaller scale version of China's capital.<sup>274</sup> The city was very rationally planned, with a symmetrical, rectangular grid design.<sup>275</sup> Today, the boundaries of Kyoto are much larger, although the city's major thoroughfares still retain a rational north-south, grid-like orientation.<sup>276</sup>

In accordance with the CPL, Kyoto has a city plan, which sets annual goals, projects population trends, and proposes the appropriate positioning and acreage of the various zoning designations.<sup>277</sup> The Kyoto city plan also assigns, in general terms, land-use functions to certain areas within the city, including commercial and business uses in the Fushimi and city center areas, industrial uses along Kyoto's Katsura river, and residential uses in the mountainside areas of Higashiyama, Kitayama, and Nishiyama.<sup>278</sup>

Throughout the city, Kyoto City applies, in varying degrees, all of the Use Zone designations made available by the CPL.<sup>279</sup> Further, Kyoto also makes extensive use of the other specialized zoning authorized by the CPL, such as Aesthetic Districts, Scenic Districts, and Height Districts.<sup>280</sup> Kyoto has subcategorized these zones, however, to allow more elaborate regulation and guidance.<sup>281</sup> For example, Kyoto has five subcategories for its Height Districts.<sup>282</sup> These categories are differentiated by maximum permissible building heights, ranging from ten meters to forty-five meters.<sup>283</sup> The Height Districts are very important, as they cover almost all of the developable land in the city, approximately ninety-five percent of Kyoto's Urban Planning Area.<sup>284</sup> Predominate in this area are the low and medium height categories in the ten to twenty meter maximum

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274. *Id.*

275. *Id.*

276. *See, e.g., id.* at 6.

277. *Id.* at 9.

278. *Id.*

279. *Id.* at 11.

280. *Id.* at 12-15.

281. DEPARTMENT OF URBAN LANDSCAPING, CITY PLANNING BUREAU, KYOTO CITY, SCENIC LANDSCAPES IN KYOTO: CONSERVATION, RENAISSANCE AND CREATION 3 (1997) [hereinafter SCENIC LANDSCAPES IN KYOTO].

282. CITY PLANNING FOR KYOTO CITY, *supra* note 237, at 12.

283. *Id.* The five sub-categories allow maximum heights of ten, fifteen, twenty, thirty-one, and forty-five meters. *Id.*

284. *Id.*

range.<sup>285</sup>

Likewise, Kyoto has five subcategories for its Scenic Districts, which restrict building densities, such as building heights and setbacks, and set forth architectural design standards.<sup>286</sup> Finally, there are five subclassifications for Kyoto's Aesthetic Districts.<sup>287</sup> Most types of development in any of the five subcategories require the approval of the mayor.<sup>288</sup> The categories are designated based on the architecture and natural landscape in a given area, and each category has different building height limits and architectural standards.<sup>289</sup>

As permitted by the CPL,<sup>290</sup> Kyoto has created Special Use Districts for its own particular needs. Kyoto created Building Adjustment Districts and Natural Landscape Preservation Districts in order to protect the integrity of the hill and mountain areas of Kyoto as well as the urban parts within those areas.<sup>291</sup>

Kyoto, because of its disproportionately large number of ancient temples, shrines, and other buildings, predictably places a heavy emphasis on historical and aesthetic preservation. Kyoto also created zoning designations that specifically protect the city's rich architectural heritage. For example, Kyoto created Traditional Building Group Areas, Historical Climate Preservation Areas, Historic Building Group Areas, and Special Preservation Areas for Traditional Buildings.<sup>292</sup> Kyoto passed various ordinances to create these zones and set forth administrative procedures for such zones.<sup>293</sup> For example, the Kyoto City Historic Building Group Districts

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285. *Id.*

286. SCENIC LANDSCAPES IN KYOTO, *supra* note 281, at 11-12. The density standards include restrictions on building heights, FARs and setbacks, while the design standards relate to roofing, walls, and external projections such as stairs. *Id.* Generally, as one might expect in a city such as Kyoto with many ancient buildings, the standards appear aimed at preserving and promoting traditional Japanese architectural design. *Id.*

287. *Id.* at 2-4.

288. *Id.* at 3.

289. *Id.* The architectural standards mainly regulate building rooftops, and require certain types of traditional Japanese designs. *Id.*

290. CPL, Law No. 100 of 1968, art. 9(13).

291. CITY PLANNING FOR KYOTO CITY, *supra* note 237, at 14-15.

292. *See generally* URBAN LANDSCAPE SECTION, URBAN LANDSCAPE DEPARTMENT, CITY PLANNING BUREAU, KYOTO CITY, PRESERVATION DISTRICTS FOR GROUPS OF HISTORIC BUILDINGS IN KYOTO 1 (2000) [hereinafter PRESERVATION DISTRICTS IN KYOTO].

293. *Id.*

Ordinance requires the mayor's permission for any changes to buildings in the four places in Kyoto designated as Historic Building Group Areas.<sup>294</sup> Kyoto also has a Kyoto Municipal Urban Landscape Ordinance, which authorizes the city to designate areas as Special Preservation Areas for Traditional Buildings.<sup>295</sup> Within the two areas currently zoned with this classification, the city subsidizes the required preservation of townhouses and restoration of traditional structures.<sup>296</sup>

In addition to using the CPL, Kyoto also uses the External Advertisement Display Law to create Areas for Restrictions on External Commercial Displays and Areas for Prohibiting External Commercial Displays, which have six and five subcategories respectively.<sup>297</sup> These zones are aimed at both protecting the aesthetics of the city and regulating displays inside buildings which face, and can be seen from, the outside.<sup>298</sup>

### *B. Tokyo*

The Tokyo Metropolis uses all of the CPL's Use Zone categories, although Tokyo makes relatively sparse use of the Industrial districts and the Class 2 Exclusively Low Rise Districts.<sup>299</sup> Tokyo has also created eleven Special Use Zone categories for its particular needs, although it has actually implemented only five of the categories, namely Special Industrial Districts, Educational Districts, Special Business Districts, Entertainment and Leisure Districts, and five types of Medium and High Rise Districts.<sup>300</sup> In addition, Tokyo makes heavy use of the District Plan Zones.<sup>301</sup> Tokyo uses most of the District Plan categories enumerated in the CPL, and has

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294. *Id.* at 22.

295. *Id.* at 1.

296. *Id.*

297. See Okugai Kokoku-Butsu Ho [External Advertisements Display Law], Law No. 189 of 1949; see also Interview with Norio Yasumoto, Professor, Law Faculty, Ritsumeikan University in Kyoto, Japan (Nov. 14, 2001) (on file with author); CITY PLANNING FOR KYOTO CITY, *supra* note 237, at 14.

298. CITY PLANNING FOR KYOTO CITY, *supra* note 237, at 14.

299. PLANNING OF TOKYO, *supra* note 132, at 19.

300. *Id.* at 19-21.

301. *Id.* at 21.

designated seventy-one District Plan Zones.<sup>302</sup>

Tokyo also designated some of its land with several of the CPL's specialized zone classifications including Aesthetic Districts, Height Districts, Height Use Districts, Fire Protection and Quasi-Fire Protection Zones, and Particularized Block Districts.<sup>303</sup> Tokyo created three subcategories for its Height Districts to fit the conditions of a particular area.<sup>304</sup> Official Tokyo publications state that these districts are to maintain "adequate sunshine, air-circulation and lighting and alleviate the sense of crowding from adjacent high-rise buildings."<sup>305</sup> However, Tokyo makes more extensive use of the Particularized Block Districts (*tokutei gai ku*) in order to permit large maximum height limits, thereby accommodating large skyscrapers.<sup>306</sup> The district itself is for the purpose of "improvement, development, and maintenance" of "attractive" city blocks (a block would normally include adjoining streets), according to the CPL.<sup>307</sup> Special limits on building volumes, heights, and wall positioning may be set in these districts.<sup>308</sup> The bulk standards in BSL Articles 52-59.2 do not apply in these districts. BSL Article 60, however, sets applicable standards. For example, FARs and height limits must be within the limits set by the relevant city plan and positioning of walls and poles (or pillars used in place of walls) must conform to the limits set forth in the particular city plan.

As applied in Tokyo, Particularized Block Districts cover fifty-three blocks for a total of ninety-five hectares.<sup>309</sup> The wards in Tokyo with the most high rises include: Minato, with eighty-one high-rises between sixty and one hundred meters and twenty-three high-rises above one hundred meters; Chiyoda, with sixty-five high-rises between sixty and one hundred meters and twenty-four high-rises above one hundred meters; and Shinjuku, with twenty-three of

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302. *Id.* at 21. This figure is as of the 1998 fiscal year.

303. *Id.* at 19-22.

304. *Id.* at 19.

305. *Id.* at 21.

306. CPL, Law No. 100 of 1968, arts. 7(1)(4), 9(18); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

307. CPL, Law No. 100 of 1968, arts. 7(1)(4), 9(18); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33; PLANNING OF TOKYO, *supra* note 132, at 21.

308. CPL, Law No. 100 of 1968, arts. 7(1)(4), 9(18).

309. PLANNING OF TOKYO, *supra* note 132, at 21.

each.<sup>310</sup> In particular, Shinjuku has a long history of planning as a Particularized Block District and is famed for its skyscrapers in a nation where skyscrapers are an aberration because of earthquakes. Initially designated as an “important area” in the 1946 Capital Revitalization Plan, in 1960 Shinjuku had ninety-six hectares of its land designated as a Particularized Block District through the Shinjuku Secondary City Center Construction Plan and Plan to Create an Office Area.<sup>311</sup> Today, this Particularized Block District contains the massive Tokyo Metropolitan Government Offices complex and many other nearby skyscrapers.<sup>312</sup> As previously explained, Tokyo’s extensive use of Particularized Block Districts is rather unique in Japan. However, because Tokyo is Japan’s political and economic center, as well as the country’s largest population center, it is not surprising that Tokyo has a high concentration of skyscrapers in a large number of Particularized Block Districts.

Based on laws other than the CPL, Tokyo created a variety of other zone categories. For example, based on the Capital Area Servicing Law, Tokyo created Neighboring Area Servicing Regions, Urban Development Areas, Neighboring Area Green Space Maintenance Areas, and Industry and Miscellany Limitation Areas, all which have construction restrictions on buildings such as factories, technical colleges, and universities.<sup>313</sup> There is also a Capital Area Servicing Green Area Maintenance Area Law, which allows designation of a Neighboring Green Space Special Area for Nature Preservation.<sup>314</sup>

Unlike Kyoto City, Tokyo did not create special zones regulating signs based on the External Advertisement Display Law. Tokyo does, however, have ordinances that regulate the manner and use of signs

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310. *Id.* Runners-up are Shinagawa ward (20, 7), Shibuya ward (5, 2), and Eto ward (12, 5). *Id.* Note that the word for “ward” in Japanese is “*ku*.”

311. TAC PASSING TEXT, *supra* note 51, at 69.

312. The Shinjuku Particularized Block District has been dubbed by some observers as “*Nihon No Matenro*” (Japan’s Skyscraper). See TAC PASSING TEXT, *supra* note 51, at 69. At 243 meters in height with two forty-eight floor towers, the Tokyo government complex was dubbed a “Tower of Babylon” by the media in criticism of its extravagant cost and scale.

313. PLANNING OF TOKYO, *supra* note 132, at 19-22; see also Shuto-En Seibi Ho [Capital Area Servicing Law] Law No. 82 of 1956, arts. 2, 25.

314. PLANNING OF TOKYO, *supra* note 132, at 19-22.

and has an approval system for certain sign uses and situations.<sup>315</sup> These sign regulations, however, are less restrictive and detailed than in Kyoto.<sup>316</sup>

Although the topic is beyond the scope of detailed treatment within this Article, Tokyo's twenty-three wards can also create their own particularized zones. For example, Setagaya ward has enacted an ordinance titled the Setagaya Ward City-Making Ordinance, which creates some particularized District Plan zones as authorized by the CPL.<sup>317</sup> Specifically, the ordinance creates two zones, City-Making Guidance Districts and City-Making Propulsion Districts, which are designed to "promote safe, livable, comfortable urbanization development and servicing."<sup>318</sup>

### C. Kobe

As with the other Japanese jurisdictions subject to the CPL, Kobe City uses all of the CPL's Use Zones.<sup>319</sup> Kobe also uses some of the ancillary Area District zone categories: Fire Protection Zones, Quasi-Fire Protection Zones, Scenic Districts, Seaside Districts, Productive Green Districts,<sup>320</sup> Preservation of Districts for the Protection of Traditional Structures, and Aesthetic Districts.<sup>321</sup> Kobe is also unexceptional in using the Height Zone overlay category.<sup>322</sup>

Kobe parallels some of the Japanese jurisdictions in its particularized application of the CPL. For example, as with Kyoto City, Kobe is somewhat unusual in creating five subcategories for the

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315. See Tokyo Metropolitan Government Internet official site, at <http://www.toshikei.metro.tokyo.jp/keijiban> (last visited Apr. 27, 2002).

316. Interview with Satoshi Murano, Musashino Sekkei Kobo Architectural Office, in Kyoto, Japan (Nov. 16, 2001) (on file with author).

317. See Setagaya-Ku Toshi Zukuri Jorei [Setagaya Ward City Making Ordinance], Ordinance No. 17 of 1996, ch. 1.

318. *Id.*

319. See PLANNING DIVISION, URBAN PLANNING BUREAU, CITY OF KOBE, URBAN PLANNING IN KOBE (2001).

320. See City of Kobe Internet official site, at <http://www.city.kobe.jp/cityoffice/33/landuse/index.htm> (last visited Apr. 27, 2002).

321. Kobe-Shi Toshi Keikan Jorei [Kobe City Urban Scenery Ordinance], Kobe City Ordinance No. 59 of 1978, chs. 2, 3 [hereinafter Kobe Urban Scenery Ordinance].

322. See City of Kobe Internet official site, at <http://www.city.kobe.jp/cityoffice/33/yoto0109/link/yoto1.htm> (last visited Apr. 27, 2002).

Height Zone category.<sup>323</sup> Kobe uses some or all of these subcategories as overlays on Use Zones, with the exception of Exclusive Industrial Zones.<sup>324</sup> Furthermore, like Tokyo, Kobe has created a large number of District Plan Zones, most of which appear specific to discrete areas of Kobe. However, although Kobe's fifty-seven District Plan zones<sup>325</sup> are only a few more in number than Tokyo's, Kobe has proportionately many more District Plan zones than Tokyo because Kobe is a much smaller city than Tokyo.<sup>326</sup>

Kobe appears rather unique in its creation of zones aimed at engineering specific types of "scenic formation."<sup>327</sup> Specifically, Kobe has Scenic Formation Districts specific to the urban environment, roads, coastal areas, external angles, public squares, and "important" buildings.<sup>328</sup>

## V. LAND-USE REGULATION IN HOUSTON

### *A. Main and Ancillary Land-Use Controls*

#### 1. Chapter 42

Houston, famed as a city without zoning, actually has several regulations, programs, and incentives that directly and indirectly control land-use. Houston has a variety of ordinances that directly regulate land-use, but the main ordinance regulating land-use is Chapter 42, the "Land Development Ordinance," which regulates the density and bulk of land development in Houston. The ordinance appears aimed at regulating Houston's urban environment, supporting urban revitalization, and is presumably rooted in its police power regulatory authority.<sup>329</sup>

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323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. See Kobe Urban Scenery Ordinance, Kobe City Ordinance No. 96 of 1980, ch. 2; City of Kobe Internet official site, at <http://www.city.kobe.jp/cityoffice/33/yoto0109/link/yoto1.htm> (last visited Apr. 27, 2002).

329. Chapter 42 does not expressly state these purposes nor its legal basis, although both can be implied based on a reading of the code as a whole.

Chapter 42 establishes rules for planning and plotting of land developments and subdivisions,<sup>330</sup> street right-of-way requirements,<sup>331</sup> minimum lot sizes in suburban and urban areas,<sup>332</sup> compensating open space requirements (COS—in reality, set-aside requirements regulating density),<sup>333</sup> building-to-street setback requirements,<sup>334</sup> creation of prevailing setbacks areas without deed restrictions,<sup>335</sup> and planning requirements for multi-family residential developments.<sup>336</sup> Chapter 42 reportedly underwent a major revision in 1998 with new bulk and density standards for the purpose of supporting urban revitalization.<sup>337</sup> Ultimately, the bulk and density standards in Chapter 42 form a key part of Houston's land-use regulatory system, and will be explained further in a separate section of this Article.

## 2. Other Land-Use Ordinances

Houston has land-use ordinances for a variety of narrower, more clearly defined purposes than Chapter 42. For example, Chapter 28 regulates the placement of certain types of “noxious” uses, such as hotels, hazardous enterprises, junkyards, and correctional facilities within the city.<sup>338</sup> Similarly, Chapter 41 regulates, within subdivisions, the location of cellular towers,<sup>339</sup> fences,<sup>340</sup>

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330. *See generally* Houston, Tex., Code of Ordinances, ch. 42-1 through 42-83 (1968).

331. *Id.*

332. *Id.* at ch. 42-182 through 42-183.

333. *Id.* at ch. 42-184 through 42-185.

334. *Id.* at ch. 42-150 through 42-159.

335. *Id.* at ch. 42-163. These regulations allow “Special Building Line Requirement Areas,” which allow preservation of an existing setback pattern on an urban block without deed restrictions. *See also* City of Houston Planning and Development Department Internet official site, at [http://www.ci.houston.tx.us/departme/planning/related\\_dev\\_ord.htm](http://www.ci.houston.tx.us/departme/planning/related_dev_ord.htm) (last visited Apr. 27, 2002).

336. Houston, Tex., Code of Ordinances, ch. 42-230 through 42-236 (1968).

337. *See* City of Houston Planning and Development Department Internet, *Chapter 42: Houston's Land Development Ordinance*, at <http://www.ci.houston.tx.us/departme/planning> (last visited Apr. 27, 2002). The amendments were reportedly also designed to make the chapter “user friendly in terms of its organization and [make] use of simple English, supported where necessary with illustrations.” *Id.*

338. *See* Houston, Tex., Code of Ordinances, ch. 28 (1968); City of Houston Planning and Development Department Internet official site, at [http://www.ci.houston.tx.us/departme/planning/related\\_dev\\_ord.htm](http://www.ci.houston.tx.us/departme/planning/related_dev_ord.htm) (last visited Apr. 27, 2002).

339. *See* Houston, Tex., Code of Ordinances, ch. 41-53.1 (1968); City of Houston Planning

landscaping,<sup>341</sup> signs, and lights.<sup>342</sup> Houston further regulates uses of signs through a detailed Sign Code.<sup>343</sup> This code regulates the design, construction, and quantity of proposed signs, based on the sign type and type of street where the sign is to be located.<sup>344</sup> Houston also has regulations that more directly regulate nuisances.

Houston has ordinances regulating automobiles, streets, and sidewalks. Houston's Chapter 26, for example, sets requirements for minimum numbers of parking lots on business and residential sites.<sup>345</sup> Chapter 40 sets limits on street obstructions and nuisances,<sup>346</sup> as well as on street vending and cafes.<sup>347</sup> Chapter 29 regulates the location of mobile homes within the city.<sup>348</sup>

Houston addresses aesthetic concerns through regulations such as Chapter 33. This chapter provides standards and incentives for planning trees and shrubs.<sup>349</sup> The latter sections of Chapter 33 also provide standards for designation of historic preservation structures and districts.<sup>350</sup> In conjunction with this chapter, Houston also has a

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and Development Department Internet official site, at [http://www.ci.houston.tx.us/department/planning/related\\_dev\\_ord.htm](http://www.ci.houston.tx.us/department/planning/related_dev_ord.htm) (last visited Apr. 27, 2002).

340. Houston, Tex., Code of Ordinances, ch. 41-54, 41-55 (1968).

341. *Id.* at ch. 41-56.

342. *Id.* at ch. 41-56.1.

343. See City of Houston Planning and Development Department Internet official site, at <http://www.ci.houston.tx.us/department/planning/signper.htm> (last visited Apr. 27, 2002). For all but the most nonobvious signs, only licensed contractors are allowed to install signs and permits are generally required. *Id.*

344. See Houston Code of Ordinances, ch. 46 (1968). Only city licensed sign contractors are allowed to obtain permits for the purpose of erecting, altering, or repairing signs. Sign permits are administered by the Sign Administration Division of the Planning and Development Department. The only signs exempted from the licensed-contractor requirement, but still possibly subject to the permit requirement, are: "[n]on-electrical ground signs no taller than ten feet" and no wider than fifty square feet in size, "or one hundred square feet taller and than eight feet"; "[n]on-electrical marquee or wall signs . . . mounted on surfaces no higher than sixteen feet above grade" level; "signs which meet all other" sign code provisions, "such as number of signs per business," and assure their "placement on private property does not create a traffic hazard or encroach on utility easements." Houston Planning and Development Department Internet official site, at <http://www.ci.houston.tx.us/department/planning/signper.htm> (last visited Apr. 27, 2002).

345. Houston, Tex., Code of Ordinances, ch. 26 (1968).

346. *Id.* at ch. 40-11 through 40-27.

347. *Id.* at ch. 40-8 through 40-10.1. The same chapter of the ordinance also sets forth performance standards for materials used in cement sidewalks. See *id.* at ch. 40-92.

348. *Id.* at ch. 29.

349. Houston Code of Ordinances, ch. 33-101 through 33-109 (1968).

350. Houston Code of Ordinances, ch. 33-201 through 33-270 (1968).

historic preservation ordinance and historic pre-incentive ordinance to protect historical sites and structures.<sup>351</sup>

Houston promotes economic development through a variety of programs. Although Houston does not have zoning, it does have three Special District designations for promotion of economic development. These include Enterprise Zones (EZs), Tax Increment Reinvestment Zones (TIRZs), and Enhanced Enterprise Communities (EECs).<sup>352</sup> Houston has many other tax incentive programs to promote economic development. For example, it has tax abatement programs to promote affordable housing, improve brownfields, redevelop blighted areas, encourage certain types of businesses, and encourage new investment and employment opportunities.<sup>353</sup> Some of these programs require a specific type of development project,<sup>354</sup> while others are site specific.<sup>355</sup>

#### *B. Unique Aspects of Land-Use Regulation in Houston: Restrictive Covenants*

As in many other parts of the United States, many private parties in Houston have recorded restrictive covenants in landowner deeds. These covenants restrict the type and intensity of uses allowed in many of the city's neighborhoods and subdivisions. Any landowner can attempt to privately enforce the covenant or enforce it through such organizations as a homeowners association or civic club.<sup>356</sup>

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351. See Houston Planning and Development Internet official site, at [http://www.ci.houston.tx.us/departme/planning/Hist\\_pre.htm](http://www.ci.houston.tx.us/departme/planning/Hist_pre.htm) (last visited Aug. 20, 2002).

352. See Houston Planning and Development Department Internet official site, at [http://www.ci.houston.tx.us/departme/planning/enterprise\\_zones.htm](http://www.ci.houston.tx.us/departme/planning/enterprise_zones.htm) (last visited Apr. 27, 2002).

353. See Houston Planning and Development Department Internet official site, at [http://www.ci.houston.tx.us/departme/planning/Tax\\_abatement.htm](http://www.ci.houston.tx.us/departme/planning/Tax_abatement.htm) (last visited Apr. 27, 2002).

354. For example, Economic Development Tax Abatements are available for projects for modernizing or upgrading existing facilities, or for leasehold improvements. See Houston Planning and Development Department Internet official site, at [http://www.ci.houston.tx.us/departme/planning/Tax\\_abatement.htm](http://www.ci.houston.tx.us/departme/planning/Tax_abatement.htm) (last visited Apr. 27, 2002).

355. For example, Redevelopment Tax Abatements are restricted to Tax Abatement Districts and Enterprise Zones, while Residential Tax Abatements are restricted to Enterprise Zones. See Houston Planning and Development Department Internet official site, at [http://www.ci.houston.tx.us/departme/planning/Tax\\_abatement.htm](http://www.ci.houston.tx.us/departme/planning/Tax_abatement.htm) (last visited Apr. 27, 2002).

356. See Houston Planning and Development Department, *Connections*, at <http://www.ci.houston.tx.us/citygovt/connections.pdf> (last visited Apr. 27, 2002).

Lands with restrictive covenants are recorded in the Harris County Clerk's Office.<sup>357</sup>

However, Houston is rather unique in that the city, as a party litigant empowered by state litigation, can enforce many of these restrictive covenants. Texas' system of private restrictive covenants enforceable by the government has become famous as an alternative to zoning and as a primary land-use regulatory tool. Texas Property Code Chapter 20 authorizes Harris County, where Houston is situated, to enforce restrictive covenants.<sup>358</sup> Furthermore, landowners can seek enforcement of a covenant through the city's legal department and through the Justice of the Peace Courts.<sup>359</sup> Ultimately, however, Houston's legal department will enforce only covenants restricting residential use, setbacks, lot sizes, and the type and number of structures on a lot.<sup>360</sup>

Ultimately, these covenants are significant in Houston because every developer of a subdivision reportedly imposes such restrictive covenants on lots during the subdivision process.<sup>361</sup> This Article analyzes the merits of this system in a subsequent section.

## VI. ZONING IN CHICAGO

### *A. Purpose of Zoning*

Chicago has sixteen goals in its zoning ordinance, including: promoting the character and stability of areas in the city;<sup>362</sup> promoting orderly and beneficial development;<sup>363</sup> providing light, air, privacy and convenience access to property;<sup>364</sup> limiting street congestion for

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357. *Id.*

358. Reid C. Wilson, Wilson, Cribs, Gorem & Flaum, PC, *Modification and Creation of Restrictive Covenants*, (sec. C. Creation), at <http://www.neosoft.com/~wcfg/restrict.htm> (last visited Apr. 27, 2002).

359. See Houston Planning and Development Department, *Connections*, at <http://www.ci.houston.tx.us/citygovt/connections.pdf> (last visited Apr. 27, 2002).

360. See Houston Planning and Development Department, *Connections*, at <http://www.ci.houston.tx.us/citygovt/connections.pdf> (last visited Apr. 27, 2002).

361. See, e.g., Bernard H. Siegan, *Oregon Land-Use Symposium: Opening Remark: Keynote Address*, 14 ENVTL. L. 645, 649 (1984).

362. Chicago, Ill., Zoning Ordinance, title 17, art. 2(3) (1923).

363. *Id.*

364. *Id.* at art. 2(4).

safety and convenience;<sup>365</sup> preventing overcrowding and “undue concentration” of structures;<sup>366</sup> and conserving the taxable value of the city’s land and buildings.<sup>367</sup> However, the overarching goal is to “promote and to protect the public health, safety, morals, comfort, convenience, and the general welfare of the people.”<sup>368</sup> In their totality, Chicago’s sixteen zoning goals represent the “minimum requirements for the promotion of the public health, safety, morals, and welfare.”<sup>369</sup> These police power purposes are also typical in Portland and most other U.S. cities, and fall comfortably within Chicago’s police powers.<sup>370</sup> Finally, Chicago’s zoning ordinance, by providing a clear legal foundation that defines and limits powers and duties of administrative agencies and officials, provides for a clear administration of its substantive provisions.<sup>371</sup>

The purpose section of Chicago’s zoning ordinance also states that the tools for implementing the ordinance’s goals are regulations related to: separation of uses;<sup>372</sup> building location, construction, and alteration;<sup>373</sup> building lines;<sup>374</sup> intensities of uses;<sup>375</sup> construction standards;<sup>376</sup> prohibitions of incompatible uses;<sup>377</sup> off-street parking and loading;<sup>378</sup> protection against noxious fumes, fires, and hazards;<sup>379</sup> and gradual elimination of nonconformities.<sup>380</sup>

Overall, the language of Chicago’s zoning code is rather general, especially when compared with Portland’s zoning code.<sup>381</sup> The general nature of Chicago’s zoning purposes appears to reflect the absence of the kind of comprehensive long-term planning found in

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365. *Id.* at art. 2(10).

366. *Id.* at art. 2(12).

367. *Id.* at art. 2(13).

368. *Id.* at art. 2(1).

369. *Id.* at art. 5(1).

370. See CASES AND MATERIALS ON LANDS USE, *supra* note 30, at 1-3, 676.

371. Chicago, Ill., Zoning Ordinance, title 17, art. 2(15) (1923).

372. *Id.* at art. 2(2).

373. *Id.*

374. *Id.* at art. 2(7).

375. *Id.* at art. 2(5).

376. *Id.* at art. 2(7).

377. *Id.* at art. 2(8).

378. *Id.* at art. 2(10).

379. *Id.* at art. 2(11).

380. *Id.* at art. 2(14).

381. See *infra* Part VII.

cities such as Portland. Indeed, arguably, the zoning code reflects the dynamic in Chicago where local neighborhoods, aldermen, the city council, and the mayor drive city land-use policies, rather than systematic, coordinated planning.<sup>382</sup>

### *B. Zoning*

Chicago's zoning ordinance achieves its goals through: separation of business, commercial, manufacturing, and other land-uses,<sup>383</sup> restrictions on use intensities;<sup>384</sup> prohibitions on mixing incompatible uses;<sup>385</sup> numerous performance standards on bulk, density, and building lines;<sup>386</sup> regulations on off-street parking and loading,<sup>387</sup> restrictions on noxious and hazardous activities;<sup>388</sup> regulations that gradually eliminate nonconformities;<sup>389</sup> and flexible regulatory schemes such as permission for special uses and designation of special districts.<sup>390</sup>

The bulk of Chicago's zoning ordinance sets forth a variety of use districts. Chicago has Residence Districts, Business Districts, Commercial Districts, and Manufacturing Districts.<sup>391</sup>

The Residence Districts group together uses appropriate for residential areas "according to the type of structure and intensity of development."<sup>392</sup> Within this category are single family residence and general residence districts.<sup>393</sup> The former subcategory allows one-family home uses along with other low intensity uses, such as schools and parks.<sup>394</sup> The latter permits the same uses as in single family

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382. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 25, 2001) (on file with author); Interview with Stuart Meck, Principal Investigator, American Planning Association in Chicago, Ill. (Aug. 24, 2001) (on file with author).

383. See, e.g., Chicago, Ill., Zoning Ordinance, title 17, arts. 2(2), 4, 5, 7, 8, 9 (1923).

384. See, e.g., *id.* at arts. 2(2), 5, 7-10.

385. See, e.g., *id.* at arts. 2(8), 5, 7-10.

386. See, e.g., *id.* at art. 7-10.

387. See, e.g., *id.* at arts. 2(10), 5.8.

388. See, e.g., *id.* at art. 2(11).

389. See, e.g., *id.* at arts. 2(14), 6.1.

390. See, e.g., *id.* at art. 2(8).

391. *Id.* at art. 7-10.

392. *Id.* at art. 7.2.

393. *Id.* at art. 7.3-1 through 7.3-8.

394. *Id.* at art. 7.3-1, 7.3-2.

districts, plus townhouses, apartments, multiple family homes, and group housing.<sup>395</sup> These districts also allow uses such as universities and hospitals.<sup>396</sup>

Article 8 sets forth regulations for Business Districts. The Business District category contains subcategories of Retail, Service, and Central Business districts, each of which has further subclassifications.<sup>397</sup> The three Retail Districts, Local, Restricted, and General, contain cumulative use systems, meaning that in each higher use district, an increasing variety of retail stores are permitted.<sup>398</sup> The two Service Districts, Restricted and General, appear to be overlap zones for the Retail Districts, and allow a wider variety of services and goods not permitted in the Retail Districts.<sup>399</sup> Finally, the Central Business Districts, which include the subdistricts of Restricted and General, permit certain types of retailing, wholesaling, offices, and even light industry uses that are compatible with Chicago's Central Business District.<sup>400</sup> Chicago's zoning ordinance also prescribes uses by right, permitted uses,<sup>401</sup> and special uses<sup>402</sup> for Business Districts.

Article 9 regulates land-use in Commercial Districts. Commercial Districts permit use intensities that are "in between" the use intensities allowed in the Residential or Business Districts and the Industrial Districts.<sup>403</sup> There are five Commercial Districts subcategories<sup>404</sup> with a variety of permissible uses, including higher intensity retail, wholesale, and distribution as well as lower intensity manufacturing.<sup>405</sup> Some Commercial Districts are strategically

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395. *Id.* at art. 7.3-3 through 7.3-8.

396. *Id.*

397. *Id.* at art. 8.2.

398. *Id.* at art. 8.2, 8.3. The rationale for allowing increasingly intensive uses appears to be that each higher district will serve incrementally larger surrounding geographic areas.

399. *Id.* at art. 8.2-4, 8.2-5, 8.3-4, 8.3-5.

400. *Id.* at art. 8.2-6, 8.2-7, 8.3-6, 8.3-7.

401. *Id.* at art. 8.3. For example, any of the various Business District sub-categories would allow small retail goods and food stores. *Id.*

402. *Id.* at art. 8.4. Examples of special uses include infrastructure facilities and meeting halls, public facilities, amusement parks, stadiums, nightclubs, and tattoo parlors. *Id.*

403. *Id.* at art. 9.3, 9.4.

404. *Id.* at art. 9.3.2. The five subcategories are Restricted Commercial, General Commercial, Commercial Manufacturing, Motor Freight Terminal, and Commercial/Office districts. *Id.*

405. *Id.* at art. 9.3, 9.4.

located to accommodate the Residence and Business Districts, but allow uses that are of a higher intensity, and thus incompatible with the character of those other districts.<sup>406</sup>

Regulations for the Commercial Districts permit activities as uses by right or as special uses.<sup>407</sup> Three of the subcategories, Restricted Commercial, General Commercial, and Commercial Manufacturing, allow similar uses and tend to differ from one another in the intensity of permitted uses and density and bulk requirements.<sup>408</sup>

In Manufacturing Districts, industrial activities such as production, repairing, and storage are allowed.<sup>409</sup> However, other types of retail and service businesses, public facilities, and medical facilities are also allowed.<sup>410</sup> Significantly, no residential uses are allowed.<sup>411</sup> There are subcategories of Restricted Manufacturing, General Manufacturing, and Heavy Manufacturing Districts which provide for increasing intensities of industrial uses.<sup>412</sup>

Chicago also allows for designation of Special Districts. The purpose of designating such districts is to preserve certain areas that have unique cultural, historic, or other characteristics.<sup>413</sup> Most have density restrictions, such as minimum lot areas, height limits, and minimum yard requirements.<sup>414</sup>

In addition to the Special District designation, Chicago appears to protect historic areas through the Chicago Landmark Designation Ordinance, which allows designation and protection of structures, sites, and objects of “special historical, community, architectural, or aesthetic interest or value.”<sup>415</sup>

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406. *Id.* at art. 9. Furthermore, the Commercial/Office District subcategory allows lower intensity manufacturing, and acts as a buffer zone between Industrial Districts and Residential Districts. The Motor Freight Terminal District subcategory accommodates large scale trucking, and these districts are positioned for efficient coordination with city roads. *Id.*

407. *Id.* at art. 9.3, 9.4.

408. *Id.* at art. 9.3.

409. *Id.* at art. 10.3, 10.4.

410. *Id.*

411. *Id.*

412. *Id.* at art. 10.2.

413. *Id.* at art. 10A.

414. *See generally id.*

415. Chicago, Ill. Landmark Ordinance, 2-120-580 (1968).

### *C. Unique Aspects of Zoning in Chicago*

Some of Chicago's zones have unique characteristics. The Planned Manufacturing Districts, created in response to the restructuring of the industrial economy in the 1980s, are one example.<sup>416</sup> The rarity of such zones in the United States perhaps reflects its more prevalent laissez-faire economic policies. Likewise, Chicago's designation of Special Districts is rather unique for the United States. Although Chicago's Special Districts are not unique in themselves (they are, for example, analogous to Portland's Special Plan Districts and Japan's Plan Districts), they are unique by U.S. standards because of their large number. Chicago currently has twenty Special Districts, reflecting the strong neighborhood character of the city.<sup>417</sup>

Chicago's Planned Development regulations are unique because in some situations, such as proximity to public open space, proximity to the Chicago River, and the size of the land parcel, designation as a planned development becomes mandatory.<sup>418</sup> These automatic triggering scenarios are justified by the large impact nature of planned developments, which necessitate a higher degree of government oversight.<sup>419</sup> This contrasts with other jurisdictions in which a Planned Development designation would be optional.<sup>420</sup>

Although Chicago separates uses, it provides for incrementally increasing intensity of uses for each higher zone level. For example, in the B1-1 to B1-5 Business Districts, generally only small retail stores such as drug stores, and dry cleaners and tailor shops are

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416. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 24, 2001) (on file with author). *See generally* Chicago, Ill. Zoning Ordinance, ch. 16-8 (1923).

417. Interview with Julie Tappendorf, Esq., Holland & Knight L.L.P., in Chicago, Ill. (Aug. 28, 2001) (on file with author).

418. Chicago, Ill. Zoning Ordinance, title 17, art. 11.11-1 (1923).

419. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 24, 2001) (on file with author). Large developments move the permitting and approval process from ministerial to discretionary in nature. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author).

420. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 24, 2001) (on file with author).

permitted.<sup>421</sup> Each level within the Business District category allows uses permitted in the lower categories, plus additional, more intensive uses. For example, the highest level, B7, allows B1 level uses plus high impact uses such as hotels, warehousing, and vehicle sale and rental establishments.<sup>422</sup> The Resident Districts, specifically, the two single family residence districts and six general residence districts, follow a similar pattern.<sup>423</sup>

Although Chicago is not as plan comprehensive as a jurisdiction such as Portland or Japan, the city does have a large amount of planning for discrete areas or special purposes, including central business district plan areas, commercial strip revitalization areas, neighborhood level open spaces, and tax increment financing areas.<sup>424</sup> In addition, Chicago's Lakeside Protection Ordinance is rather unique. Many cities, in contrast, site their industry on the shoreline.<sup>425</sup>

## VII. ZONING IN PORTLAND

### *A. Oregon and Portland Involvement in Zoning*

#### 1. Oregon Involvement

The state of Oregon, as with all U.S. states, has the authority to zone and generally regulate land-use for the public good.<sup>426</sup> In contrast with most U.S. states which delegate most or all of this authority to county or municipal governments,<sup>427</sup> Oregon retains significant involvement in land-use regulation. Oregon, however, does not draft detailed city plans or set zoning boundaries. It leaves that to its two-hundred and forty cities and thirty-six counties.<sup>428</sup> The state requires all counties and cities to create a comprehensive plan,

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421. Chicago, Ill. Zoning Ordinance, title 17, art. 8.3-1 (1923).

422. *Id.* at art. 8.3-7.

423. *Id.* at art. 4.1.

424. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 24, 2001) (on file with author).

425. *Id.* See generally Chicago, Ill. Zoning Ordinance, ch. 16-4 (1923).

426. See *supra* note 329.

427. See, e.g., Callies, *supra* note 22, at 135.

428. See, e.g., S. 10, 1973 Leg. (Or. 1973); Oregon Land-Use Information Center, *Oregon's Statewide Planning Program*, at <http://darkwing.uoregon.edu/~pppm/landuse/introduction.htm> (last visited Apr. 27, 2002).

zone, and create ordinances to implement those plans and zoning.<sup>429</sup> In addition, the state creates general policies on land-use, sets planning requirements for the counties and municipalities, and reviews those plans for consistency with state guidelines.

Oregon issues Statewide Planning Goals and Guidelines that set forth general principles, goals, and directions under which city and county governments must make more specific, and conforming, plans and ordinances.<sup>430</sup> The Guidelines are “intended to be instructive, directional and positive,” but “are not intended to be a grant of power to the state to carry out zoning from the state level under the guise of guidelines.”<sup>431</sup>

The Goals are among the most important state planning laws.<sup>432</sup> Oregon’s nineteen Statewide Planning Goals are rather general in nature, but all city and county comprehensive plans, ordinances, and regulations must conform with these guidelines.<sup>433</sup> Of the nineteen goals, Goal 2, Land-Use Planning, is perhaps the most important. This goal does not set forth substantive land-use objectives, uses, or standards (because the goals require local governments to do it.)<sup>434</sup> Rather, Goal 2 generally requires overall coordination and uniformity of planning between Oregon’s different levels of government, clear factual evaluations of land-use situations and needs, goal planning and the means to achieve the goals, transparency in the process of planning and access to information, and citizen involvement.<sup>435</sup>

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429. Oregon Land-Use Information Center, *Oregon’s Statewide Planning Program*, at <http://darkwing.uoregon.edu/~pppm/landuse/introduction.htm> (last visited Apr. 27, 2002).

430. See Oregon Statewide Planning Goal 2: Land-Use Planning OAR 660-015-0000(2); Oregon Department of Land Conservation and Development, *A Summary of Oregon’s Statewide Planning Goals*, at [http://www.lcd.state.or.us/goalspdfs/goals\\_summary.PDF](http://www.lcd.state.or.us/goalspdfs/goals_summary.PDF) (last visited Apr. 27, 2002).

431. See Oregon Department of Land Conservation and Development, *Fast Facts—March 2001*, at <http://www.lcd.state.or.us/fastpdfs/fastfacts.pdf> (last visited Apr. 27, 2002). Further, the Guidelines are not intended to be “limiting local government to a single course of action when some other course would achieve the same result.” *Id.*

432. The Oregon Land-Use Information Center, *Oregon’s Statewide Planning Program*, at <http://darkwing.uoregon.edu/~pppm/landuse/introduction.htm> (last visited Apr. 27, 2002).

433. See Oregon Statewide Planning Goal 2: Land-Use Planning OAR 660-015-0000(2); Oregon Department of Land Conservation and Development, *A Summary of Oregon’s Statewide Planning Goals*, at [http://www.lcd.state.or.us/goalspdfs/goals\\_summary.PDF](http://www.lcd.state.or.us/goalspdfs/goals_summary.PDF) (last visited Apr. 27, 2002).

434. *Id.*

435. *Id.*

Many of the goals have a strong environmental protection focus. Some goals require inventory and/or protection of natural resources such as agriculture, forests, air, water and land resources, and coastal shorelands.<sup>436</sup> Other goals call for evaluation of economic and infrastructure needs, requiring inventory, projections, and planning to meet present and future needs in areas such as housing, infrastructure, and the state economy.<sup>437</sup> Yet other goals encompass a mix of issues. For example, because agriculture and wood products are two of Oregon's largest industries, Goals 3 and 4, on Agricultural and Forest Lands respectively, call both for preservation of the environment and protection of Oregon's economic interests.<sup>438</sup>

## 2. Portland Involvement

Pursuant to Oregon's requirements for coordinated land planning between the state and local governments, Portland's Comprehensive Plan addresses fourteen of the nineteen state goals.<sup>439</sup> The Plan also addresses eleven development issues relating to goals and policies specific to Portland: metropolitan coordination, urban development, neighborhoods, housing, economic development, transportation, energy, environment, citizen involvement, plan implementation and review procedures, and public facilities.<sup>440</sup>

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436. See Oregon Department of Land Conservation and Development, *A Summary of Oregon's Statewide Planning Goals*, at [http://www.lcd.state.or.us/goalspdfs/goals\\_summary.PDF](http://www.lcd.state.or.us/goalspdfs/goals_summary.PDF) (last visited Apr. 27, 2002).

437. *Id.* Related areas include recreation (Goal 8), public facilities, and police and fire services (Goal 11), transportation (Goal 12), energy (Goal 13), and urbanization (Goal 14). *Id.*

438. See Oregon Statewide Planning Goal 3: Agricultural Lands OAR 660-015-0000(3); Oregon Statewide Planning Goal 4: Forest Lands OAR 660-015-0000(4); Oregon Department of Land Conservation and Development, *A Summary of Oregon's Statewide Planning Goals*, at [http://www.lcd.state.or.us/goalspdfs/goals\\_summary.PDF](http://www.lcd.state.or.us/goalspdfs/goals_summary.PDF) (last visited Apr. 27, 2002). Oregon's agricultural and forestry wood industry represented a value of almost \$3.4 billion in 1997. See State of Oregon Department of Land Conservation and Development, *Fast Facts—March 2001*, at <http://www.lcd.state.or.us/fastpdfs/fastfacts.pdf> (last visited Apr. 27, 2002). Likewise, Goal 14's requirement that local governments create Urban Growth Boundaries (UGBs) serves to protect the natural environment while promoting efficient infrastructure development. *Id.*

439. Portland Comprehensive Plan, Ordinance 150580, Introduction (1980). The remaining five state goals do not apply to Portland because they deal with coastal areas or areas outside its UGB.

440. *Id.* at Table of Contents. The eleven major areas are metropolitan coordination, urban development, neighborhoods, housing, economic development, transportation, energy, the natural environment, citizen involvement, plan review and administration, public facilities, and

As required by its Comprehensive Plan, Portland has a Comprehensive Plan Map, which describes future permissible locations and levels of development.<sup>441</sup> The Comprehensive Plan Map's designations set forth maximums, but not minimums, for uses and development intensities in the city.<sup>442</sup>

Portland's Zoning Code, however, actually implements the zoning regulations described in the Comprehensive Plan Map.<sup>443</sup> The zoning code, which is Title 33 of the Portland City Code, is a document separate from the Comprehensive Plan.<sup>444</sup> However, as the Comprehensive Plan's major implementation tool, the zoning code must be consistent with the plan.<sup>445</sup>

### *B. Purpose of Planning and Zoning*

The purpose of Portland's Comprehensive Plan is "to provide a coordinated set of guidelines for decisionmaking to guide the future growth and development of the city."<sup>446</sup> In specific terms, the plan provides for: goals and policies for land-use and public facilities; a comprehensive plan map, zoning code, and accompanying regulations; a guide for major public investments; and a process for review and amendment of the plan.<sup>447</sup>

The Portland zoning code sets forth zoning classifications and standards. The code's purpose is implementation of the comprehensive plan and protection of its citizens' "health, safety, and

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urban design. *Id.*

441. *Id.* at Introduction.

442. *Id.*; see *Baker v. City of Milwaukie*, 533 P.2d 772 (1975) (establishing that a "zoning map" may not allow developments or uses more intense than allowed by the Comprehensive Plan Map); see also *Maracci v. City of Scappoose*, 552 P.2d 552 (1976) (holding that the Comprehensive Plan Map sets maximums for ultimate future developments, not minimums). A zoning map may designate a use with an intensity lower than allowed in the Comprehensive Plan Map. See Portland Bureau of Planning, *Comprehensive Plan Goals and Policies*, at <http://www.planning.ci.portland.or.us/CompPlan/CP1.htm> (last visited Apr. 27, 2002).

443. Portland Comprehensive Plan, Ordinance 150580, Introduction (1980).

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

general welfare.”<sup>448</sup> Given its official purpose, Portland’s zoning code is clearly within the ambit of the city’s police powers.

### C. Zoning

#### 1. Basics of Zoning in Portland

Pursuant to Oregon’s State Planning Goal 14, the city of Portland has designated UGB.<sup>449</sup> The UGB is, in effect, a large, fundamental zone that separates “urbanizable” land, which is inside the UGB, from outside land.<sup>450</sup> The outside land is to be agricultural, forests, or low density residential.<sup>451</sup> The city has also designated an Urban Planning Boundary,<sup>452</sup> as well as an Urban Services Boundary, within which the city “can meet the [public’s] service needs most effectively at the lowest cost.”<sup>453</sup>

Zone boundaries are shown on Official Zoning Maps that are a part of the zoning code but published separately.<sup>454</sup> Portland has five fundamental Base Zones: Open Space, Single Dwelling Residential, Multi-Dwelling Residential, Commercial, and Employment and Industrial.<sup>455</sup>

Open Space Zones are designed to “preserve and enhance public and private open, natural, and improved park and recreational areas,” which provide outdoor recreation and natural beauty, protect fragile environmental areas, and preserve stormwater systems.<sup>456</sup> These zones allow only agriculture as a use by right, but allow such conditional uses as parks, mining, and utilities.<sup>457</sup>

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448. Portland, Or. Planning Code, ch. 33.10.010 (1970).

449. Portland Comprehensive Plan, Ordinance 150580, Goal 1.1 (1980).

450. See Oregon Department of Land Conservation and Development, *Fast Facts—March 2001*, at <http://www.lcd.state.or.us/fastpdfs/fastfacts.pdf> (last visited Apr. 27, 2002).

451. See Oregon Department of Land Conservation and Development, *Fast Facts—March 2001*, at <http://www.lcd.state.or.us/fastpdfs/fastfacts.pdf> (last visited Apr. 27, 2002).

452. See, e.g., Portland Comprehensive Plan, Ordinance 150580, Goal 1.2 (1980).

453. Portland Comprehensive Plan, Ordinance 150580, Goal 1.3 (1980).

454. Portland, Or. Planning Code, ch. 33.10.050 (1970).

455. See generally *id.* at ch. 33.100 through 33.140.

456. *Id.* at ch. 33.100.010.

457. *Id.* at ch. 33.100.100. Portland’s zoning code allows uses by right or special uses, and for this purpose creates different use categories. In each of the five Base Zones, any given activity is restricted as either a “primary use,” “conditional use,” or “accessory use.” Primary

The purpose of the Single Dwelling Zones is to preserve land and provide opportunities for individual households.<sup>458</sup> There are six subcategories, five of which are for the purpose of allowing different development densities.<sup>459</sup> The Multi-Family Dwelling Zone category has six subcategories, which allow for increasing densities.<sup>460</sup> In these zones, a greater variety of housing types, such as mobile homes and single room units, and higher density uses are allowed than in the Single Family Dwelling Zones.<sup>461</sup>

Commercial Zones implement the commercial policies found in Portland's Comprehensive Plan.<sup>462</sup> There are eight subcategories, which support surrounding residential areas or larger communities or regions.<sup>463</sup> These zones allow a variety of commercial and mixed uses, as well as a variety of development densities, not only for urban and traditional commercial areas, but also for residential areas, office areas, and major streets.<sup>464</sup>

The Employment and Industrial Zones permit industrial uses or mixed uses with a "strong industrial orientation" and commercial uses for the purpose of supporting a broad service and employment base.<sup>465</sup> There are six subcategories that promote primarily industrial employment opportunities that would be inappropriate for residential areas, that require separation of industrial uses and intensities, and that promote the industrial policies of Portland's Comprehensive Plan Central Employment map designation.<sup>466</sup> In these zones, industrial

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uses are subcategorized as either "allowed uses," which are uses by right, or "limited uses," which are uses that are allowed subject to additional use and/or performance-standard regulations. Conditional uses are subject to additional use and performance standards, as well as to additional review and approval procedures. Accessory uses are allowed if they comply with specific regulations set forth in the zoning code. *Id.* at ch. 33.100 through 33.140.

458. *Id.* at ch. 33.110.010.

459. *Id.* at ch. 33.110.020.

460. *Id.* at ch. 33.120.030.

461. *See generally id.* at ch. 33.110, 33.120.

462. *Id.* at ch. 33.130.010.

463. *Id.* at ch. 33.130.030.

464. *Id.* Allowed uses in Commercial Zones include single family residences, retailing, offices, utilities, parks, schools, colleges, medical centers, religious institutions, and daycare centers.

465. *Id.* at ch. 33.140.010.

466. *Id.* at ch. 33.140.030.

park developments are allowed, with relaxed zoning requirements and thus greater design flexibility.<sup>467</sup>

## 2. Overlay Zones

Portland makes extensive use of Overlay Zones. There are thirteen Overlay Zones related to ground and air transport, natural environment protection, design overlays, land-use densities, and curbs on urbanization.<sup>468</sup> Overlay Zones achieve land-use objectives through a variety of use restrictions, bulk standards, and occasional procedural requirements.<sup>469</sup> The Overlay Zones are used to address specific, narrow land-use concerns, but in general do not appear to resort to the Plan Districts' more drastic alterations to the underlying Base Zoning regulations. For example, by limiting only building heights, the Aircraft Landing Zone overlay provides for safer aircraft operations around Portland's International Airport.<sup>470</sup>

Portland's Overlay Zones serve a variety of functions. Nuisance prevention, one of the keystones of U.S. zoning in general, is promoted through designation of Buffer Zones, which provide extra buffering between residential and nonresidential zones not sufficiently provided by normal base zoning.<sup>471</sup> Buffering is achieved by limiting motor vehicle access, increasing setbacks, additional landscaping requirements, and prohibiting signs. For developments to qualify for an exemption from the buffering requirements, some extra regulatory burdens of proof are required.<sup>472</sup>

Efficient infrastructure development, a keystone of Oregon and Portland planning, is facilitated in zones such as the Light Rail Transit Station Zone, which allows mixed commercial and residential uses and higher bulk standards for more efficient land-uses and for environments friendly to pedestrians near transit stations.<sup>473</sup> These

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467. *Id.* at ch. 33.140.400 through 33.140.480. Relaxation is permissible because these areas are usually large enough to create an inner character without being incompatible with surrounding uses. *Id.* at ch. 33.140.100.

468. *Id.* at ch. 33.400 through 33.480.

469. *Id.*

470. *Id.* at ch. 33.400.

471. *Id.* at ch. 33.410.

472. *Id.*

473. *Id.* at ch. 33.450.

zones set prohibitions on some uses, minimum and maximum FARs, set vehicle access requirements, minimum and maximum parking access requirements, and requirements on landscaping and building-to-street setbacks.<sup>474</sup>

Likewise, in land areas designated as Future Urban Zones, development is limited everywhere outside the UGB. Development can also be restricted within UGB, in cases where extension of full urban services would not be cost effective or would cause unacceptable harm to the environment.<sup>475</sup> Only new land developments of at least twenty acres in area are permitted in these zones.<sup>476</sup>

Agricultural protection is another major goal in Oregon and Portland. Overlay zones such as Greenway Zones ensure protection and consistency with Portland's various greenery standards.<sup>477</sup> Numerous use restrictions and performance standards including FARs, landscaping, and setbacks, apply in these zones.<sup>478</sup>

### 3. Special Plan Districts

Portland's zoning code allows designation of special Plan Districts, which are land areas that have their own unique land-use regulations. Plan Districts contrast with base and overlay zones, which are intended to be generally applicable throughout the city.<sup>479</sup> Currently, Portland has approximately twenty such districts.<sup>480</sup>

The Plan Districts are designated when other, more common, zoning mechanisms cannot achieve the desired results because of a particular area's unique concerns.<sup>481</sup> Criteria for designation of a Plan

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474. *Id.*

475. *Id.* at ch. 33.435.

476. *Id.* These zones must be applied to all lands designated as natural resources on the Metro Regional Land-Use Framework Map. *Id.*

477. *Id.* at ch. 33.440. Specifically, the greenery standards are in Portland's Willamette Greenway Plan and Willamette Greenway design guidelines. *Id.*

478. *Id.* at ch. 33.440.

479. *Id.* at ch. 33.500.

480. *Id.* ch. 33.505, 33.585. Examples of Plan Districts include the Albina Community Plan District (to prevent commercial activities from overwhelming residences) and the Swan Island Plan District (to permit special repair-facility uses to promote the growth of Portland's Ship Repair Yard). *Id.*

481. *Id.* at ch. 33.500.050. "Unique concerns" include unique physical, economic, or

District include: a legislative finding that an area has special characteristics or problems and that existing base or overlay zoning in the area is inadequate; a legislative study or plan documenting how a Plan District will best address the special concerns; and Plan District conformity with the Comprehensive Plan and the general intent of base and overlay zoning.<sup>482</sup>

#### *D. Unique Aspects of Zoning in Portland*

##### 1. Urban Growth Boundaries

As previously explained, Portland's Comprehensive Plan conforms with Oregon Planning Goal 2's requirement that localities designate a UGB.<sup>483</sup> Pursuant to this requirement, Portland has designated a UGB, as well as an Urban Services Boundary and Urban Planning Area, in its city planning and zoning maps.<sup>484</sup>

Although the UGB preserves agriculture and nature outside its borders,<sup>485</sup> the UGB's overriding purpose is to prevent sprawl, which is the spread of low-density, "leapfrogging" development from developed areas. Sprawl is undesirable because of the costs and economic efficiencies of extending public utilities, infrastructure, and transportation links to such areas, according to official state publications.<sup>486</sup> Oregon's Department of Land Conservation and Development identified efficient public transportation spending as a key method of limiting sprawl because a "single highway project, such as a new bypass, may cost tens of millions of dollars."<sup>487</sup>

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historic attributes; regions subject to rapid changes in land-use; or public facilities requiring particularized regulations. *Id.*

482. *Id.* at ch. 33.500.050.

483. Portland Comprehensive Plan, Ordinance 150580, Goal 1.1 through 1.5 (1980).

484. *Id.*

485. Interview with Stuart Meck, Principal Investigator, American Planning Association, in Chicago, Ill. (Aug. 24, 2001) (on file with author); *see also* Oregon Department of Land Conservation and Development, *A Summary of Oregon's Statewide Planning Goals* (Goals 2-6, 8, 14-19), at [http://www.lcd.state.or.us/goalspdfs/goals\\_summary.PDF](http://www.lcd.state.or.us/goalspdfs/goals_summary.PDF) (last visited Apr. 27, 2002).

486. *See generally* Oregon Department of Land Conservation and Development Internet official site, at <http://www.lcd.state.or.us/goalhtml/goalsbkgrnd.html> (last visited Apr. 27, 2002).

487. *Id.* Thus, the DLCDC and Oregon's Department of Transportation have collaborated to

## 2. Detail of Regulations

Overall, Portland's zoning regulations are much more detailed than the regulations in Chicago or Houston. This level of detail appears to be a direct result of Oregon imposing its planning requirements on local governments. The detail of planning and regulation in Portland appears in many sections of the zoning code, but is very prominent in its regulations on variances and exceptions. Portland does allow flexibility in the application of its zoning regulations. However, the zoning code appears to limit discretionary decisionmaking. The code sets forth specific quantitative criteria or qualitative factual scenarios with which a proposed use must conform in order for exceptions or variances to be permitted.<sup>488</sup> For example, there are exceptions to maximum height requirements, setbacks, and trees, but only if set quantitative standards are met.<sup>489</sup>

## 3. Separation and Screening of Land Uses

Portland places a strong emphasis on physical separation and screening of properties, apparently for aesthetic and nuisance prevention purposes. One of the most prominent examples of Portland's commitment to screening and separating uses for aesthetic and nuisance considerations is Chapter 33.248, titled Landscaping and Screening.<sup>490</sup> The entire chapter sets forth a number of requirements including: landscaping and screening requirements for protecting the natural environment and aesthetics; provisions for tree "screening" between public and private areas as well as between different land-uses; and generally promoting trees and other vegetation.<sup>491</sup> There are also two levels of density and height landscaping requirements for achieving these goals, depending on the desired level of screening.<sup>492</sup>

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create the Transportation and Growth and Management Program (TGM) for integrating transportation and land-use planning. TGM provides grants to local governments for transportation/land-use planning. *Id.*

488. Portland, Or., Planning Code, ch. 33.805 (1970).

489. *See, e.g., id.* at ch. 33.130.215, 33.130.220, 33.130.227.

490. *Id.* at ch. 33.248.

491. *Id.* at ch. 33.248.010.

492. *Id.* at ch. 33.248.020.

Similarly, general standards for trees on private property<sup>493</sup> and public streets can be found throughout the code.<sup>494</sup> The Portland zoning code contains general provisions requiring visual screening of garbage, mechanical equipment, and other unsightly features.<sup>495</sup>

Related to screening of uses for aesthetic purposes, Portland has imposed a variety of aesthetic standards, such as requirements for ground floor windows,<sup>496</sup> and street facing facades in the Employment and Industrial Zones.<sup>497</sup>

#### 4. Pedestrian Access

Portland has a reputation as a pedestrian friendly city. This reputation is supported by Portland's Planning Goal 6, which calls for promoting walking as a mode of transportation and creation of opportunities for convenient walks between destinations.<sup>498</sup> Through its zoning code, Portland has made a concerted effort to achieve its goal of making the city accessible to pedestrians. For instance, street facing façade requirements are for creation of a "pleasant pedestrian environment."<sup>499</sup> The code also contains Pedestrian Standards for creating "usable pedestrian circulation system(s),"<sup>500</sup> and requires that buildings have street connection systems, or "transit street main entrance(s)" which enable convenient access to main entrances.<sup>501</sup>

Likewise, Portland's numerous bulk and density standards help create an urban environment that accommodates pedestrians. For instance, one of the stated purposes of Portland's setback requirements is the creation of environments inviting to pedestrians<sup>502</sup> and the reduction of reliance on automobiles.<sup>503</sup> Likewise, there are bulk and density standards for main entrances to homes, for purposes

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493. *Id.* at ch. 33.110.282, 33.120.

494. *Id.* at ch. 33.100.230, 33.110.285, 33.120, 33.130.300, 33.140.305.

495. *Id.* at ch. 33.140.240.

496. *Id.* at ch. 33.130.230, 33.140.230.

497. *Id.* at ch. 33.140.265.

498. Portland Comprehensive Plan, Ordinance 150580, Goal 6.11 (1980).

499. Portland, Or., Planning Code, ch. 33.110.232, 33.120.232 (1970).

500. *Id.* at ch. 33.140.240.

501. *Id.* at ch. 33.140.242, 33.130.242.

502. *See, e.g., id.* at ch. 33.120.220, 33.130.215, 33.140.215.

503. *See, e.g., id.* at ch. 33.120.275.

including “ensur(ing) that pedestrians can easily find the main entrance.”<sup>504</sup> Density regulations to preserve pedestrian friendly environments are discussed in more detail in the bulk and density standards section of this Article.

## VIII. COMPARATIVE ANALYSIS OF ZONING IN THE SUBJECT JURISDICTIONS

### *A. Jurisdictional Issues*

Viewed from one perspective, Japan approximates the jurisdictional approach of most U.S. states: heavy delegation to local (particularly municipal) governments, the main repositories of zoning authority in the United States. In addition, involvement by multiple levels of government in Japan somewhat parallels Oregon’s experience with three levels of land administration.

On the other hand, Japan’s multiple level administrative system differs dramatically from most U.S. jurisdictions. In contrast with Japan, U.S. cities such as Houston and Chicago have almost exclusive regulatory jurisdiction as delegated to them by their respective state governments. Indeed, the relatively few state governments that actively regulate land-use often focus on specific concerns or geographic regions, such as California’s regulation of the San Francisco Bay and its entire coastline.<sup>505</sup> Even the U.S. example of Oregon is not a truly close match with Japan. Oregon’s regulation occurs entirely at what would be considered the “local” level in Japan—the state, county, and municipal levels. Japan’s national land-use regulation differs markedly from the U.S. experience of a federal system with predominantly state land-use controls. Furthermore, unlike in Oregon, the division of authority between government levels in Japan is not always tidy or logical. Jurisdictional issues are therefore somewhat more complicated than in the United States.

Arguably, the jurisdictional regimes in the United States and Japan reflect some basic attitudinal differences toward government in

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504. See, e.g., *id.* at ch. 33.110.230, 33.120.230.

505. Besides Oregon, the exceptions to this rule include Hawaii, Florida, Vermont, Georgia, Maine, Maryland, New Jersey, Rhode Island, and Washington. See *supra* note 40.

the two countries. Houston's system arguably reflects a U.S. distrust toward government regulation of the economy and a dislike of interference with private land rights. Furthermore, Chicago's system arguably reflects the preference for local community control at least in the area of land-use, in the U.S. federal system.

However, an argument could be made that Portland's experience demonstrates that U.S. land-use controls do not always reflect a preference for free market economics, private property rights, or local government regulation. With its top-down zoning and regulatory structure, Oregon's jurisdictional system more closely parallels Japan than it resembles Houston or Chicago. Further, as with Japan's national government, which provides guidance to local governments, the Oregon state government provides overall guidance to its local governments.

### *B. Purposes*

#### 1. General Purposes and Statutory Language

The purposes of the CPL and BSL are worded in rather general and vague language, typical of many laws in Japan. Such language would be also unexceptional in the United States, where many jurisdictions have land-use statutes with similarly vague and general wording. Indeed, of the U.S. and Japanese jurisdictions in this Article, only Oregon's Statewide Planning Goals and Portland's Comprehensive Plan Goals and Policies state their goals with a significant degree of specificity and detail.

#### 2. Specific Goals

However, there are some differences between planning purposes in the United States and Japan. Specifically, Japan's CPL sets forth three fundamental principles for city plans.<sup>506</sup> Of these, the principle that "plans shall provide for sound harmonization of urbanization with agricultural, forestry, and fisheries industries"<sup>507</sup> is unique. This

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506. CPL, Law No. 100 of 1968, art. 1.

507. *Id.* at art. 2. The text does not actually include the word "urbanization," but the author

principle singles out specific industries for protection, unlike in the subject U.S. jurisdictions. Although Oregon does mention agricultural and forestry protection in its Planning Goals, it does so within the context of generally promoting other industries and protecting natural resources. The presence of agricultural, forestry, and fishing protection in the CPL indicates that such interests, and probably the political power of the groups that represent these interests, remain strong even in an advanced industrial society such as Japan.

### *C. Base Zones and Use Zones*

The Base Zones in Chicago and Portland are very similar to the Use Zones in Japan. All three jurisdictions have essentially three types of zones: (1) residential, (2) commercial, and (3) industrial. There are some relatively minor differences in how these jurisdictions subcategorize these basic zones. For example, for residential zones, Japan creates low and high rise subcategories, whereas Chicago and Portland subcategorize residential zones into single dwelling and multi-dwelling zones. For commercial zones, Chicago and Portland only have a Commercial Zone category, whereas Japan has Neighborhood Commercial and Residential Commercial subcategories. And for industrial zones, Portland has created an Employment and Industrial Zone, while Japan has both an Industrial Zone and a Quasi-Industrial Zone, which allows some mixed uses. Again, however, these differences are minor. The use of zoning in Chicago, Portland, and Japan to separate land-uses into essentially three classifications, residential, commercial, and industrial, is strikingly similar.

### *D. Overlay Zones and Area District Zones*

As David Callies has observed, overlay zones, essentially the Area District zones, are used more extensively in Japan than in the United

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believes the “harmonization with agricultural, forestry, and fisheries industries” logically corresponds with urbanization or development.

States.<sup>508</sup> Certainly, there are more overlay zone choices in Japan than in the subject U.S. jurisdictions: Japan has about twenty, in comparison with thirteen in Portland and none in Chicago.<sup>509</sup> This disparity is likely the result of Japan's national government creating zones for application by localities. In such a system, a large number of specialized zones appears necessary for the planning needs of individual cities to be met. Indeed, the fact that mayors, and not the nation or prefectures, set Area District zones indicates these zones are for localized needs.

Chicago is the only zoned jurisdiction in this study that does not have a class of overlay zones. However, the Special Districts, Planned Manufacturing Districts, and Lake Michigan Protection Districts in effect function as overlay zones.<sup>510</sup> Furthermore, any areas or buildings designated as historical landmarks under the city's Landmark Ordinance are also, as applied, a type of overlay zone.<sup>511</sup>

In contrast, Portland makes extensive use of overlay. In this respect, Portland parallels Japan, which has a large number of Area Districts, Promotion Areas, and other overlay type zones.<sup>512</sup> Furthermore, the purposes of Portland's overlay zones and Japan's Area District zones are similar. Both types of zones regulate uses and development densities for specialized needs and planning goals. Furthermore, many of these zones share substantive similarities. For example, Portland and Japan have Overlay and Area District zones, respectively, both of which protect green spaces, limit airplane noise,

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508. Callies, *supra* note 22, at 154.

509. See CPL, Law No. 100 of 1968, arts. 8, 9.13-9.20; Portland, Or., Planning Code, ch. 33.400-480 (1970); Chicago, Ill., Zoning Ordinance, title 17 (1923).

510. E-mail from Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (Nov. 21, 2001) (on file with author). Chicago's Planned Manufacturing Districts reportedly function as an overlay zone in specified industrial areas by requiring good faith efforts to transfer industrial property to industrial entities before any attempts to change the property to a nonindustrial use. The Lake Michigan Protection District also functions as an overlay because of its increased regulations. *Id.*; see also Chicago, Ill., Lake Michigan and Chicago Lakefront Protection Ordinance, ch. 16-4 (1973); Chicago, Ill., Planned Manufacturing Districts Ordinance, ch. 16-8 (1991); Chicago, Ill., Zoning Ordinance, title 17, art. 10 (1923).

511. E-mail from Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (Nov. 21, 2001) (on file with author).

512. See, e.g., Callies, *supra* note 22, at 154.

protect natural scenic beauty, and preserve historic structures.

However, notwithstanding such similarities, Japanese and U.S. overlay zones often differ in both nature and application. For example, the goal of preserving historic structures in U.S. cities such as Chicago and Houston is achieved through historic preservation ordinances, which are separate from zoning and other land-use regulations. In these cities, historic sites are preserved via their designation as historic landmarks, not through zoning per se. It must be noted, however, that some U.S. cities do use historic preservation zones, such as Raleigh, North Carolina, and Honolulu, Hawaii.<sup>513</sup>

Furthermore, some of Japan's Area District zones have unique substantive characteristics. Some of the zones are for specialized purposes, such as the Particularized Use Restriction Zones and Particularized Street Districts, which are solely for regulating density.<sup>514</sup> Some of the other specialized zones include Fire Protection Zones for fire safety, Aesthetic Zones for aesthetics of the built environment, and Parking Facilities Districts for promoting parking spaces.<sup>515</sup> In the United States, such specialized goals are more often met through safety regulations and building codes, bulk and density regulations such as in Houston, or density requirements specific to particular base zones such as in Chicago.

Furthermore, unlike Portland's Overlay Zones, many of Japan's Area District zones are not for regulating uses. Rather, many of the Area Districts adjust the form of the urban landscape, through bulk and density regulation<sup>516</sup> or through rearrangement of streets and other public properties such as parks.<sup>517</sup> The latter function likely has historical roots because most Japanese cities were not planned in a logical grid-like system, if planned at all, and consequently are not

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513. E-mail from David Callies, Benjamin A. Kudo Professor of Law, William S. Richardson School of Law, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (Dec. 7, 2001) (on file with author). *See, e.g.,* A-S-P Associates v. City of Raleigh, 258 S.E.2d 444, *reprinted in* CASES AND MATERIALS ON LANDS USE, *supra* note 30, at 433-46.

514. CPL, Law No. 100 of 1968, art. 9(14), 9(18).

515. *Id.* at arts. 8, 9(19), 9(20).

516. Such Area District zones include Particularized Use Restriction Districts, Particularized Street Districts, High-Rise Residential Guidance Districts, Height Districts, and Height Use Districts. *Id.* at art. 9(17), 9(18), 9(15), 9(16), 9(17).

517. For example, there is a Promotion Area zone sub-category called the Land Parcel Arrangement Promotion Area. *Id.* at art. 10, part 2.

appropriate for modern transportation and land-use patterns.<sup>518</sup> Because of the relatively young character of most U.S. cities, even in a relatively older city such as Chicago, these considerations do not appear to be as important.

### *E. Special Districting*

Both Japan and some of the U.S. cities use special districts, which are designated to meet the needs of discrete land parcels or neighborhoods. Chicago provides for Special Districts, while Portland provides for Special Plan Districts. Japan's CPL also provides for special District Plans for the planning needs of individual areas. However, Japan's system is relatively narrow and restrictive. The CPL sets only six district plan categories from which municipalities can choose and there is a restricted set of uses and densities allowed in each district.<sup>519</sup> In contrast, regulations in Chicago and Portland allow special districts to generally supplement or modify the standard zoning regulations, and have almost no restrictions on the types of uses or levels of density that can be set in these districts.<sup>520</sup>

Some cities in the United States and Japan make extensive use of Special Districts. Chicago has seventeen districts, reflecting its tendency to plan at the neighborhood, rather than city, level. Similarly, Portland has designated twenty Special Plan Districts, perhaps reflecting the detailed planning character of the city. Likewise, Tokyo, a much larger city than either Chicago or Portland, has seventy-one District Plan zones.

### *F. Large Scale Zones*

For lack of a better term, Japan and Oregon have similar large scale zones characterized by large land areas with one type of classification in which smaller base and overlay zones can be

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518. Interview with Satoshi Murano, Musashino Sekkei Kobo Architectural Office, in Tokyo, Japan (Nov. 2, 2001) (on file with author).

519. CPL, Law No. 100 of 1968, art. 12, part 4.

520. See, e.g., Chicago, Ill., Zoning Ordinance, title 17, art. 5.1 (1923); Portland, Or., Planning Code, ch. 33.500.010. (1970).

designated. Specifically, Oregon's UGBs parallel Japan's Urbanization Areas, in that development outside of these zones is highly restricted. Furthermore, the land area inside these zones is projected to be sufficient for a community's development needs over a long time period (twenty years for UGBs and ten years for Urbanization Areas). Clearly, this type of overarching, large scale zoning system is absent in most U.S. jurisdictions, including Houston and Chicago.

On one hand, the rationales for large scale zones in Japan and Oregon appear similar. In Japan, one of the primary reasons for designating Urbanization and Urbanization Control Areas appears to be limiting encroachment of urban development into agricultural areas, although not explicitly stated in the CPL.<sup>521</sup> Likewise, Oregon's Planning Goal 3 calls for preservation of agricultural lands, while Planning Goal 14 includes retention of agricultural land as one of the standards for determining the boundaries of a UGB. In addition to agriculture, however, Oregon aims to protect the natural environment through the UGB system.<sup>522</sup>

On the other hand, the main purpose of Oregon's UGB system, prevention of sprawl and promotion of economically efficient development and infrastructure pathways, does not appear to exist in Japan's system. Although Japan's large scale zoning system might have the unintended effect of preventing sprawl, the CPL does not appear intended for this purpose.

There are more differences between large scale zones in Japan and Oregon. In Japan, there are several large scale zoning possibilities: an Urban Planning Area, which is an even larger zone than the Urbanization Area, as well as a Semi-Urban Planning Area and an Urbanization Control Area. In contrast, land in Oregon is simply zoned either inside or outside the UGB. Furthermore, in Oregon,

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521. Interview with John Tofflemire, Director, Investment Services, Ikoma/CB Richard Ellis, in Tokyo, Japan (Aug. 7, 2001) (on file with author); see also CPL, Law No. 100 of 1968, art. 34. Article 34 of the CPL limits uses in Urbanization Control Areas to mainly rural, agricultural, fishery, and forestry uses. The article also talks of limiting encroachment of urbanization into Urbanization Control Areas. *Id.*

522. See Oregon Department of Land Conservation and Development, *A Summary of Oregon's Statewide Planning Goals*, at [http://www.lcd.state.or.us/goalpdfs/goals\\_summary.PDF](http://www.lcd.state.or.us/goalpdfs/goals_summary.PDF) (last visited Feb. 25, 2002).

local governments ultimately designate UGBs, whereas in Japan, the national, prefectural, and municipal governments all have some involvement in the designation of large scale zones. Finally, unlike with Japan's Urbanization and Urbanization Control Areas,<sup>523</sup> Oregon's UGBs can be modified relatively easily.<sup>524</sup> Evidencing this are reported changes from 1992 through 1996, when seventy-five proposals to expand UGBs were approved, adding 5,162 acres to the UGBs.<sup>525</sup>

### *G. Restrictive Covenants and Issues of Their Merits Relative to Zoning*

#### 1. Review of Restrictive Covenants and Comparison with Other Jurisdictions

Houston can enforce many restrictive covenants between private parties. As authorized by chapter 230 of Texas's Local Government Code, the city can enforce restrictive covenants recorded with Harris County.<sup>526</sup> Although Houston's covenanting system might seem unique, it is not entirely without replication in other jurisdictions. Portland can also enforce some private covenants. In limited situations, the Portland zoning code requires restrictive covenants, which allow the city to terminate occupancy and seek injunctive relief in cases of a use violation.<sup>527</sup> However, Portland's zoning code

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523. The author was unable to identify a provision in the CPL providing for modifications to the Urbanization Areas and Urbanization Control Areas. Thus, the author surmises that the procedure for any such changes would probably be a redrafting of the prefectural urban plan, a very time consuming process under CPL Article 18.

524. Oregon Department of Land Conservation and Development, *Fast Facts—March 2001* (last visited Feb. 25, 2002), at <http://www.lcd.state.or.us/fastpdfs/fastfacts.pdf>. For a city to amend its UGB, it "must comply with the statewide planning goals and standards for establishing an urban growth boundary. *Id.* at 3.

525. See Oregon Department of Land Conservation and Development, *Fast Facts—March 2001*, at <http://www.lcd.state.or.us/fastpdfs/fastfacts.pdf> (last visited Feb. 25, 2002).

526. See Reid C. Wilson, *Modification and Creation of Restrictive Covenants*, (sec. C. Creation), at <http://www.neosoft.com/~wcfgf/restrict.htm> (last visited Feb. 25, 2002); See also Houston Planning and Development Department, *Connections*, at <http://www.ci.houston.tx.us/citygovt/connections.pdf>, at 32-36.

527. Portland, Or., Planning Code, ch. 33.700.060 (1970).

provides for a scheme that appears much more limited scope than Houston's code.

## 2. Debate on Merits of Restrictive Covenants versus Zoning

Some commentators have stated that restrictive covenants achieve one goal of zoning: to maintain consistent residential neighborhood characteristics through uniformity of land-use, but without restrictions on land outside of residential subdivisions or developed neighborhoods.<sup>528</sup> This goal is reportedly due to the fact that developers do not generally impose restrictive covenants on land until it is ready to develop.<sup>529</sup> Furthermore, most covenants in Houston are used in residential areas to preserve residential stability.<sup>530</sup> Thus, most lands in Houston, by some accounts, approximately eighty-five to ninety percent, are free of covenants limiting their productive use.<sup>531</sup>

Some observers have also commented that covenants in Houston are usually more restrictive than zoning regulations in other cities.<sup>532</sup> For example, a subdivision developer will typically impose a covenant on a given lot, restricting the lot to single family use, controlling building heights, setbacks, construction standards, and maintenance of common areas.<sup>533</sup> Observers have also commented that in very wealthy areas, uses are heavily controlled, while less affluent neighborhoods usually prefer less restrictive covenants.<sup>534</sup> Thus, Houston's system, as one might expect, reportedly allows slightly more mixed land-uses (outside of covenanted residential neighborhoods) than in zoned cities.<sup>535</sup>

Although some commentators have advocated Houston's covenanting system as an effective alternative to zoning,<sup>536</sup> some

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528. *See, e.g.*, Siegan, *supra* note 361, at 650.

529. *Id.* at 650.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.*

535. *See The Blob That Ate East Texas*, THE ECONOMIST, June 23, 2001, at 31.

536. *See* Bernard H. Siegan, *Non-Zoning is the Best Zoning*, 31 CAL. W. L. REV. 127 (1994); *see also* Siegan, *supra* note 361, at 650.

observers have noted the practical limitations in such a system. First, Houston's city government has not, as a party litigant empowered by state law, always been active in entering suits to enforce covenants.<sup>537</sup> Finite budgeting and personnel resources have limited the city in vigorous enforcement of restrictive covenants.<sup>538</sup> Also, Houston's government has reportedly focused mainly on enforcement of use restrictions and usually refrained from enforcing other restrictions such as those on aesthetics.<sup>539</sup>

The onus, therefore, has fallen on private citizens to move for judicial enforcement of covenants.<sup>540</sup> However, as with any privately initiated legal action, there are variables such as finances, time, and the individual energy of a given party.<sup>541</sup> Predictably, wealthier communities and individuals have been the most active in enforcing covenants.<sup>542</sup> Furthermore, in the initial covenanting of new residential subdivisions, expensive developments usually impose greater restrictions than modest developments.<sup>543</sup> Thus, in reality, restrictive covenants have been most effective in restricting land-uses in Houston's wealthier neighborhoods, while less effective in other areas.<sup>544</sup>

The economic efficiency of a nonzoned city that relies on restrictive covenants is questionable. Some observers have commented that the restrictive covenanting system is economically more efficient than zoning and other forms of direct government control.<sup>545</sup> Such observers state that restrictive covenants allow market forces, such as the demand by private banks for assurances in mortgage lending, to create standards on construction and land-use.<sup>546</sup>

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537. Telephone Interview with John Mixon, Professor of Law, University of Houston Law Center (Nov. 9, 2001) (on file with author); *see also* E-mail from John Mixon, Professor of Law, University of Houston Law Center, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (May 14, 2002) (on file with author).

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

542. *Id.*

543. *Id.*

544. *Id.*

545. *See* Siegan, *supra* note 361, at 646-47.

546. *Id.*

Furthermore, private actors are free to adequately satisfy housing and other demands when unhampered by zoning regulations.<sup>547</sup> Such free market forces, in addition to the large economies of scale made possible in Houston's zone free environment, have reportedly led to lower building and land costs than in other cities.<sup>548</sup> Thus, some have argued that although Houston has little direct government regulation, the city nonetheless has effective land-use and building standards at lower development and property costs than in other cities.

Other observers, however, have dismissed these arguments. For example, Dallas also reportedly has many large scale developments, even though it is a city with a strong tradition of zoning.<sup>549</sup> Furthermore, it is unclear whether the absence of zoning is the sole reason for lower land costs in Houston.<sup>550</sup> For example, many developments in Houston's outer areas do not require much infrastructure connection with the center region because of the existence of water aquifers in those areas.<sup>551</sup> Thus, according to some, Houston's lower development costs are a function of many macroeconomic factors, with zoning playing a minor role in the equation.<sup>552</sup>

Ultimately, it is unclear whether restrictive covenanting and minimal government regulation is superior to zoning and direct regulation of land. Nonetheless, it is a unique system that, at the very least, has been effective in protecting residential land-uses. Indeed, the system has not led to developmental anarchy in Houston. Therefore, it is at least a viable alternative model to zoning. It is also arguably an economically efficient way of promoting desirable building standards and land-uses.

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547. *Id.* at 649-50.

548. *See The Blob That Ate East Texas*, *supra* note 535.

549. Telephone Interview with John Mixon, Professor of Law, University of Houston Law Center (Nov. 9, 2001) (on file with author).

550. *Id.*

551. *Id.*

552. *Id.*

## IX. BULK AND DENSITY REGULATIONS

*A. Japan: Building Standards Law and City Planning Law*

In conjunction with the CPL, the BSL sets forth various bulk and density regulations<sup>553</sup> for the Use Zones enumerated in the CPL. The BSL and CPL regulate building-coverage ratios, FARs, building heights, line angles, sunlight and air access, setbacks, and various other performance standards.

The BSL has numerous bulk and density regulations that are of general applicability, irrespective of the zoning of a particular area. For example, BSL Article 28 sets forth general requirements for sunlight and aeration of “habitable rooms” such as school rooms and hospitals.<sup>554</sup> Article 8 also requires such buildings to have windows, establishing the minimum number of windows necessary for effective natural lighting and ventilation.<sup>555</sup>

Wall setback requirements may be set by the relevant head executive official (“*tokutei gyōsei chō*” such as mayors or governors) upon consent of the prefectural Building Review Council.<sup>556</sup> In such cases, public notice and hearings are required.<sup>557</sup> Similarly, the BSL has setback requirements for buildings in relation to streets.<sup>558</sup> Generally, for roads designed for automobile traffic, the minimum setback is two meters.<sup>559</sup> For some types of buildings, such as buildings over three meters or over 1,000 square meters in area,

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553. Unless otherwise specifically indicated, the author throughout this Article, for sake of convenience, will use either the term “bulk” or “density” to refer generically to bulk and density standards.

554. BSL, Law No. 201 of 1950, art. 28. Specifically, “habitable rooms” include houses, schools, hospitals, medical clinics, dormitories, boarding houses, or “other such buildings.” *Id.*

555. BSL, Law No. 201 of 1950, art. 28. This ratio is required to be one to seven for residences, and between one to five and one to ten for other buildings. Other specifics are to be set by Cabinet Order. *Id.*

556. BSL, Law No. 201 of 1950, arts. 46, 47.

557. *Id.*

558. *Id.* at arts. 43, 44; *see also* TAC BASIC TEXT, *supra* note 71, at 94-95; TAC PASSING TEXT, *supra* note 51, at 89.

559. BSL, Law No. 201 of 1950, arts. 43, 44; *see* TAC BASIC TEXT, *supra* note 71, at 94-95; TAC PASSING TEXT, *supra* note 51, at 89. Exceptions are allowed for some buildings with open spaces, provided the building in question conforms with standards set by Land Ministry ministerial order, and approved by the relevant administrative agency and the Building Review Council. *See* TAC BASIC TEXT, *supra* note 71, at 94-95.

mayors are authorized by BSL Article 43 to increase this setback requirement.<sup>560</sup>

These and other BSL standards, both use and bulk, do not apply to certain types of buildings, mainly national treasures, cultural properties, and historic properties as designated under the Cultural Properties Protection Law, and artworks designated under the Important Artworks Protection Law.<sup>561</sup> Such properties may be rebuilt to bring them back to their original condition, but generally, such restorations must be approved by both the relevant mayor and Construction Deliberation Council.<sup>562</sup> Nonconforming structures are also exempt from the BSL standards.<sup>563</sup>

### 1. Japanese Bulk and Density Regulations in Use Zoned and Unzoned (*Misenbiki*) Areas

The BSL, in conjunction with the CPL, also requires that a city plan set certain bulk and density standards for certain zones.<sup>564</sup> Major examples are as follows.

#### 1. Maximum building-coverage area ratios (*kenpei ritsu*), with ratios specific to the following zones:<sup>565</sup>

The five exclusive use zones (Class 1 Exclusively Low-Rise Residential Zones, Class 2 Exclusively Low-Rise Residential Zones, Class 1 Exclusively Medium and High-Rise Residential Zones, Class 2 Exclusively Medium and High-Rise Residential Zones, Exclusively Industrial Use Zones)<sup>566</sup>

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560. See TAC BASIC TEXT, *supra* note 71, at 94-95.

561. BSL, Law No. 201 of 1950, art. 3.

562. *Id.*

563. *Id.* at art. 10.

564. See, e.g., *id.* at arts. 43-55, 56 part 2. Some of the bulk and density regulations specific to a particular zone can also be found in BSL Articles 56 through 67, and Article 68 part 5(2).

565. *Id.* at art. 53; see also TAC BASIC TEXT, *supra* note 71, at 99; TAC PASSING TEXT, *supra* note 51, at 78; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 101-102.

566. BSL, Law No. 201 of 1950, art. 54(2); TAC PASSING TEXT, *supra* note 51, at 78.

Class 1 Residential Zones, Class 2 Residential Zones,  
Quasi-Residential Zones, Industrial Zones

Commercial and Neighborhood Commercial Districts

Unzoned areas

2. FARs (*yōseki ritsu*), with ratios specific to the following  
zones:<sup>567</sup>

Class 1 Exclusively Low-Rise Residential District and  
Class 2 Exclusively Low-Rise Residential Districts

Class 1 Exclusively Medium and High-Rise Residential  
Districts and Class 2 Exclusively Medium and High-Rise  
Residential Districts

Class 1 Residential Zones, Class 2 Residential Zones,  
Quasi-Residential Zones, Neighborhood Commercial Zones,  
Quasi-Industrial Zones

Commercial Zones

High-Rise Residential Guidance Districts

Unzoned areas

3. Building height regulations and “line angle” (*shasen*)  
regulations for particular zones and situations:<sup>568</sup>

Class 1 and Class 2 Exclusively Low-Rise Residential  
Zones: Building height regulations

All Use Zones and Unzoned Areas: Line angle regulations  
for parts of a structure facing a road

567. BSL, Law No. 201 of 1950, art. 52(1); *see also* TAC BASIC TEXT, *supra* note 71, at 100-105; TAC PASSING TEXT, *supra* note 51, at 79; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 96-101.

568. BSL, Law No. 201 of 1950, arts. 55, 56; TAC BASIC TEXT, *supra* note 71, at 105-09. These regulations, as with the BSL regulations generally, apply to “*kenchiku butsu*,” which could include not only buildings, but bridges, towers, and the like. However, the author will generically use the terms “buildings” and “structures” synonymously for the sake of a more natural translation.

Residential Zones (except for Class 1 and Class 2 Exclusively Low-Rise Residential Zones): Line angle regulations for parts of a structure facing a neighboring property

Class 1 and Class 2 Exclusively Low-Rise Residential Zones, and Class 1 and Class 2 Exclusively Medium to High-Rise Residential Zones: Line angle regulations for parts of a structure facing North

4. Minimum sunlight hour requirements specific to:<sup>569</sup>

Class 1 and 2 Exclusively Low-Rise Residential Zones: For buildings with eaves or parapets over seven meters or for buildings over three stories, 3-5 hours maximum shadow time in areas no more than ten meters from the relevant site, or 2-3 hours maximum for areas more than ten meters from the site.

Class 1 and 2 Exclusively Medium and High-Rise Residential Zones: For buildings over ten meters, same shadow time as in Class 1 and 2 Exclusively Low-Rise Residential Zones.

Class 1 and 2 Residential Zones; Quasi-Residential Zones, Neighborhood Commercial Zones, Quasi-Industrial Zones: For structures over ten meters, 4-5 hours maximum shadow time in areas no more than ten meters from the relevant site, or 2.5-3 hours maximum in areas more than ten meters from the site.

Unzoned areas: For structures over ten meters, 4-5 hours maximum shadow time in areas no more than 10 meters from the relevant site, or 2.5-3 hours maximum for areas more than 10 meters from the site.

## 2. Japanese Bulk and Density Regulations in the Area Districts

The CPL sets forth several bulk and density regulations specific to some of the Area District zones. Notable examples include: (1)

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569. BSL, Law No. 201 of 1950, art. 56(2), table no. 4. See author's comments on the term *kenchiku butsu*, *supra* note 568.

Particularized Use Restriction Zones;<sup>570</sup> (2) High Rise Residential Guidance Districts;<sup>571</sup> (3) Height Districts;<sup>572</sup> (4) Height Use Districts;<sup>573</sup> and, (5) Particularized Urban Districts.<sup>574</sup>

### *B. Portland*

The Portland Zoning Code has density and bulk standards for each of its five major base zoning categories. The standards in the base zones are, on the whole, not unusual. The various base zones' Development Standards, or density standards, include the typical minimum and maximum restrictions on setbacks, building heights, building-to-lot coverage ratios, and FARs.<sup>575</sup> However, some of the five major base zones do have regulations not generally found in the other subject jurisdictions. The Commercial Zones for example, regulate minimum landscaped areas, ground floor windows, and parking.<sup>576</sup> Likewise, the Employment and Industrial Zones also have ground floor window standards and minimum landscaping requirements.<sup>577</sup> In addition to parking and street bulk regulations in specific zones, there are also standards that are generally applicable throughout much of the city. Specifically, Chapter 33.266 titled Parking and Loading sets forth bulk requirements for motor vehicle parking, bicycle parking, and vehicle loading activities throughout Portland.<sup>578</sup>

Portland also makes extensive use of Overlay Zones, some of which have particularized bulk and density standards. For example,

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570. CPL, Law No. 100 of 1968, arts. 8(1)(2), 9(13); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 32.

571. CPL, Law No. 100 of 1968, arts. 8(1)(2) part 2, 9(14)-(16); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 32.

572. CPL, Law No. 100 of 1968, arts. 8(1)(2) parts 2 & 3; 9(14)-(16); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 32.

573. CPL, Law No. 100 of 1968, arts. 8(1)(2) part 2, 8(1)(2) part 3, 9(13); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 32.

574. CPL, Law No. 100 of 1968, arts. 8(1)(4), 9(18); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 32.

575. Portland, Or., Planning Code, ch. 33.100.200, 33.110.200, 33.120.200, 33.130.300, 33.140.200 (1970).

576. *Id.* at ch. 33.130.220, 33.130.225, 33.130.290.

577. *Id.* at ch. 33.140.225, 33.130.230, and 33.130.235.

578. *Id.* at ch. 33.266.

development in Future Urban Zones is limited to creation of new lots of at least twenty acres.<sup>579</sup> Buffer Zones require specialized buffering among zones and properties through setback and landscaping requirements.<sup>580</sup> Greenway Zones ensure environmental protection and consistency with the Willamette Greenway Plan and Willamette Greenway design guidelines, and include numerous bulk standards such as FARs, landscaping, and building setbacks.<sup>581</sup>

Portland's density restrictions appear to promote aesthetics, but are not restricted to that purpose. As previously explained, Portland's Planning Goal 6 calls for pedestrian convenience in the city. Several of Portland's regulations are designed to achieve this goal.<sup>582</sup> For instance, the city's Light Rail Transit Station Zones permit high use densities for more efficient use of land and a "pedestrian friendly" atmosphere near transit stations.<sup>583</sup> Another purpose of the city's bulk regulations is privacy. Setback requirements in the Commercial and Employment and Industrial zones exemplify regulations in Portland designed to protect the privacy of residents in abutting residential areas.<sup>584</sup>

As with Chicago and Japan, many of Portland's bulk regulations appear to be geared toward both preserving access to light and air as well as other purposes. For example, setback requirements in Single Dwelling Zones are not only for the purpose of maintaining access in the event of a fire, but also for securing air and light.<sup>585</sup> In the Commercial and Employment and Industrial Zones, setback requirements are also geared toward preserving access to light and air in addition to preserving the character of the neighborhood.<sup>586</sup> Furthermore, Portland's zoning code allows for designation of Superblocks, which are large, vacated commercial sites with restrictions attached so as to prevent loss of light, air, and access,

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579. *Id.* at ch. 33.435.

580. *Id.* at ch. 33.410.

581. *Id.* at ch. 33.440.

582. Related to this is the purpose of reducing reliance on automobile transportation. *See, e.g., id.* at ch. 33.110.230, 33.120.220, 33.120.275, 33.130.215, 33.120.230.

583. *Id.* at ch. 33.450.

584. *Id.* at ch. 33.130.215, 33.140.215.

585. Setback requirements in the Commercial and Employment and Industrial Zones are also for this purpose. *See id.* at ch. 33.110.220, 33.130.215, 33.140.215.

586. *Id.* at ch. 33.130.215, 33.140.215.

which could result from development.<sup>587</sup>

Ultimately, Portland's zoning code limits the density of development in its city for a variety of purposes. In addition to obvious aesthetic concerns, setback requirements, for example, are sometimes used to secure access to light and air.<sup>588</sup> Furthermore, some density standards are designed to protect residential privacy, such as the setback requirements in the Commercial and Employment and Industrial zones.<sup>589</sup>

### C. Houston

Consistent with its general laissez-faire approach to land-use regulation, Houston has relatively few bulk and density standards. These few include requirements on minimum lot areas, compensating open space (COS), setbacks, and streets.<sup>590</sup>

The bulk and density standards in Houston's Chapter 42 were revised in 1998 to support higher density developments in urban areas.<sup>591</sup> In Suburban areas, the standard minimum lot size for single family developments is currently 5,000 square feet.<sup>592</sup> Thus, the standard minimum lot area was reduced to 3,500 square feet,<sup>593</sup> and 100 to 720 square feet of COS is required, depending on the size of the lot.<sup>594</sup> In urban areas, the COS requirements range from 240 to 600 square feet,<sup>595</sup> although developers may opt to comply with a

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587. Superblocks are concentrated in Portland's Central City plan district, although they are designated in other areas of the city as well.

588. Setback requirements in Single Dwelling Zones, Commercial Zones, and Employment and Industrial Zones are for this purpose. See Portland, Or., Planning Code, ch. 33.110.220, 33.130.215, 33.140.215.

589. *Id.* at ch. 33.130.215, 33.140.215.

590. See, e.g., Houston, Tex., Code of Ordinances, ch. 42-150 through 42-187 (1968).

591. *Id.* at ch. 42-183; see also Houston Planning and Development Department, *Chapter 42: Houston's Land Development Ordinance*, at <http://www.ci.houston.tx.us/departme/planning/download/chap42.pdf> (last visited Mar. 11, 2000).

592. Houston, Tex., Code of Ordinances, ch. 42-182 (1968); see also Houston Planning and Development Department, *Chapter 42: Houston's Land Development Ordinance*, at <http://www.ci.houston.tx.us/departme/planning/download/chap42.pdf> (last visited Mar. 11, 2000).

593. Houston, Tex., Code of Ordinances, ch. 42-183 (1968); see also Sources cited *supra* note 592.

594. See sources cited *supra* note 593.

595. Houston, Tex., Code of Ordinances, ch. 42-182, 42-183 (1968); see also Houston

performance standard alternative if the building-to-lot coverage area ratio in question does not exceed sixty percent.<sup>596</sup> A density limitation of twenty-seven units per acre also exists.<sup>597</sup>

Houston's setback regulations generally require ten to twenty-five feet of separation from the street, depending on the type of street and structure.<sup>598</sup> The rationale behind creating setback areas without deed restrictions is to preserve the prevailing building line character of a given area.<sup>599</sup> There are standards for creation of setback requirements,<sup>600</sup> such as inclusion of all properties within at least one blockface and single family homes on at least half of the lots in the proposed area.<sup>601</sup> The required setback distance is generally proportionate to either the severity of the off site impact or the street in question.<sup>602</sup> The general setback requirement is fifteen feet, although most single family residential homes require a ten feet street setback,<sup>603</sup> most buildings abutting a major thoroughfare require twenty-five feet, and most private streets require five feet.<sup>604</sup> Procedural requirements include application, public hearing, director of planning recommendation to the Planning Commission, a decision by the Planning Commission, and ultimate approval or rejection by the City Council.<sup>605</sup>

#### D. Chicago

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Planning and Development Department, *Chapter 42: Houston's Land Development Ordinance*, at <http://www.ci.houston.tx.us/departme/planning/download/chap42.pdf> (last visited Mar. 11, 2000).

596. Houston, Tex., Code of Ordinances, ch. 42-183 (1968); *see also* Houston Planning and Development Department, *Chapter 42: Houston's Land Development Ordinance*, at <http://www.ci.houston.tx.us/departme/planning/download/chap42.pdf> (last visited Mar. 11, 2000).

597. *See* sources cited *supra* note 596.

598. Houston, Tex., Code of Ordinances, ch. 42-150 (1968).

599. *Id.* at ch. 42-163.

600. *Id.*

601. *Id.* Other requirements include current and actual existence of a prevailing building line, and sufficient support by landowners for creation of a setback requirement in the area. *Id.*

602. *Id.* at ch. 42-150.

603. *Id.* This requirement applies only to urban areas; requirements are different for suburban areas. *Id.*

604. *Id.* at ch. 42-150.

605. *Id.* at ch. 42-163.

Discussions with Chicago officials revealed that the city allows a higher development density in its downtown districts than in almost any other city.<sup>606</sup> For example, in its higher density General Central Business Districts, Chicago allows FARs ranging from 7-1 to 16-1, which contrasts with the 4-1 FAR maximum allowed in Portland's Commercial Zones.<sup>607</sup> Indeed, those Chicago districts allow development densities that are higher than in any other city in North America.<sup>608</sup>

Chicago's use districts have a wide variety of bulk and density standards. The Residence, Business, and Commercial Districts set forth a variety of standards on lot areas, building heights, FARs, and yard requirements.<sup>609</sup> These districts also set bulk standards relating to signs and off street parking and loading.<sup>610</sup> The Manufacturing Districts have density standards for FARs, and off street loading and parking.<sup>611</sup> These districts, incidentally, also have many performance standards on noise, vibrations, smoke and particulate matter, toxic and noxious matter, and glare and heat.<sup>612</sup> In addition, most of Chicago's Special Districts have density standard restrictions, such as minimum lot areas, height limits, and minimum yard requirements.<sup>613</sup>

One purpose of the Chicago zoning code is to provide "adequate light, air, privacy, and convenience of access to property."<sup>614</sup> Historically, light and air access has been a key part of the zoning ordinance.<sup>615</sup> The ordinance has thus restricted the bulk and density

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606. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author). New York City comes close, but Chicago's permitted densities are nonetheless higher. *Id.*; see also Chicago, Ill., Zoning Ordinance, title 17, arts. 7.6, 9.6. (1923).

607. Chicago, Ill., Zoning Ordinance, title 17, art. 4.1 (1923); Portland, Or., Planning Code, ch. 33.130.205 (1970).

608. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author); see also Chicago zoning ordinance, arts. 7.6, 9.6.

609. Chicago, Ill., Zoning Ordinance, title 17, arts., 7.5 through 7.9, 8.4 through 8.8, 9.5 through 9.8 (1923).

610. *Id.* at title 17, arts. 7.11 through 7.12, 8.9 through 8.11, 9.9 through 9.11. The Residence Districts also have bulk standards on townhouses. See *id.* at title 17, art. 7.13.

611. *Id.* at art. 10.12, 10.15, 10.16.

612. *Id.* at art. 10.5 through 10.11.

613. *Id.* at art. 10A.

614. *Id.* at title 17, art. 2(4).

615. Interview with Thomas Smith, Director of Development Policy, Department of

of land development for the purpose of assuring light, air, and health.<sup>616</sup> In practice, light and air access has not been difficult to achieve in low rise residential areas, obviously due to low building heights.<sup>617</sup> However, in the lakefront and central parts of Chicago, it has reportedly been difficult to ensure air and light access.<sup>618</sup> Nonetheless, the city's general policy has always been that in high density areas, a residential building should always receive light and air in the rear, some in the front, but with no guaranteed access at the sides.<sup>619</sup> Indeed, all residential areas in the city have thirty feet setbacks for the sole purpose of light and air.<sup>620</sup> Furthermore, in several of Chicago's districts, buildings can only cover fifty percent of a lot, for the purpose of light and air access.<sup>621</sup> In reality, however, because many buildings in Chicago are pre-zoning code, and thus nonconformities, a casual look at the city skyline might erroneously lead an observer to conclude that the city has not attempted to protect light and air access.<sup>622</sup>

## X. COMPARATIVE ANALYSIS OF BULK AND DENSITY STANDARDS

### *A. General Comparisons*

In general, Japanese and U.S. bulk and density standards have more in common than not. Many of the bulk standards in the Japanese CPL and BSL can be found in at least some of the subject U.S. cities: FARs, building coverage ratios, height regulations, and setback requirements. Such density standards, in addition to lot size regulations, appear in most of the regulations in Portland, Chicago, Houston, and Japan.

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Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author).

616. Chicago, Ill., Zoning Ordinance, title 17, art. 2(5) (1923).

617. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author).

618. *Id.*

619. *Id.*

620. *Id.*

621. *Id.*

622. *Id.*

Although Houston, Portland, and Chicago share many common bulk and density standards, they also have some unique standards. Among Chicago's other unusual bulk standards are its tree requirements.<sup>623</sup> Although other cities such as Portland have landscaping and tree requirements, Chicago's tree requirements are highly detailed. The Chicago zoning ordinance contains detailed planting and volume standards, among other requirements.<sup>624</sup> Incidentally, Japan's CPL and BSL do not contain any such requirements, although some can be found in the CPL Implementing Regulation and other laws.<sup>625</sup> As for other U.S. cities, Houston is unique in setting COS and street performance standards. Meanwhile, Portland's requirements for ground floor windows in its Commercial Zones and Employment and Industrial Zones are particular to Portland.

The bulk standards in the subject U.S. cities appear to be related to performance standards. Examples of this are Chicago's nuisance performance standards for smoke and noxious and toxic matter, restrictions on reflective glare and vibrations in Portland and Chicago, and noise restrictions in Portland, Houston, and Chicago.

### *B. Protection of Sunlight and Air Access*

The concern that a city landscape might turn into a mass of closely packed, urban canyons is a planning issue shared by governments in both Japan and the United States

In one respect, the explicit enumeration of air and light access purpose in the Portland zoning code is rather unusual for a U.S. jurisdiction and parallels the wording of sunlight regulations in the Japanese BSL. On the other hand, the purpose of Portland's light and air requirements, although not clearly stated, appears to be for protection of aesthetics. In the Comprehensive Plan's section on the environment, Portland does not mention light protection as one of the

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623. Chicago, Ill., Zoning Ordinance, title 17, art. 5.13 (1923).

624. *Id.*

625. CPL Implementing Regulation, Construction Ministry Ordinance No. 49 of 1969, art. 23. The Japanese law regulating large retail stores has various standards regulating noise, noxious fumes, etc. *See generally* Dai-Kibo Koritenpo Ricchi Ho [Large Scale Retail Stores Location Law], Law No. 91 of 1998.

considerations in protecting urban livability.<sup>626</sup> Portland's Comprehensive Plan, on its face, appears to reflect the typical view of many American courts that U.S. common law rights to sunlight are mainly aesthetic in nature.<sup>627</sup> In this respect, Portland's purposes are much different from those in the Japanese BSL, which protects sunshine access not only for aesthetics, but for lifestyle and health reasons as well.

Similarly, Chicago's zoning ordinance states reasons for protecting light access beyond aesthetics, which include protecting the public health.<sup>628</sup> Indeed, when the zoning ordinance was first enacted in the early Twentieth Century, tuberculosis and other communicable diseases were quite prevalent in some areas of Chicago due to crowded living conditions and associated problems of light and fresh air.<sup>629</sup> Thus, the air and light provisions were originally not established only for aesthetics, as they would be in many U.S. jurisdictions,<sup>630</sup> but were also initially a response to this health problem.

The manner in which Japanese and U.S. jurisdictions tackle protection of sunlight and air access are similar, yet are at the same time different. Most U.S. jurisdictions assure light and air access through density restrictions on building heights, FARs, sideyards, setbacks, and the like. Portland, for example, specifically states that its setback requirements are for securing sunlight access, among other purposes.<sup>631</sup> Likewise, as previously explained, Chicago assures light

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626. The goal does, however, mention noise prevention as one such consideration. *See* Portland Or. Comprehensive Plan, Ordinance 150580 (1980) (latest revision 1999).

627. *See, e.g.,* Fountainbleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (1959); Sylvia Tenn, Trustee of Doxon Realty Trust v. 889 Assocs., Ltd. 127 N.H. 321 (1985); O'Neill v. Brown, 242 Ill. App.3d 334 (1993). These cases also stand for the proposition that plaintiffs are not likely to win cases merely involving zoning regulations that do not generally protect sunlight access (because of the mainly aesthetic concerns involved with sunlight access and an individual's right to develop his property to the height he desires), and must therefore prevail on the basis of other legal theories, such as tort nuisance. *Id.*

628. Chicago, Ill., Zoning Ordinance, title 17, art. 2(5) (1923).

629. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (Aug. 24, 2001) (on file with author).

630. *See supra* note 627.

631. Setback requirements in Single Dwelling Zones, Commercial Zones, and Employment and Industrial Zones are for this purpose. Portland, Or., Planning Code, ch. 33.110.220, 33.130.215, 33.140.215 (1970).

and air through setbacks,<sup>632</sup> building coverage area ratios,<sup>633</sup> and other density regulations.

In contrast to the subject U.S. cities, Japan uses a variety of regulatory tools to secure light and air access. In addition to bulk and density restrictions, Japan also has some unique regulations for the specific purpose of securing light access. The BSL's standards on minimum sunlight hours, which cannot be impeded by shadows from surrounding structures, are one example. Specifically, the BSL requires local governments to set forth, in city plans, sunlight requirements, which usually apply to Use Zones and are based on BSL standards.<sup>634</sup> The sunlight requirements are based on the number of hours of sunlight, per day, that must reach a neighboring land plot.<sup>635</sup> These requirements vary according to the zone. Residential zones generally require a higher number of sunlight hours per day.<sup>636</sup>

Also unique to Japan are the BSL's sunlight line angle (*shasen*) requirements, which appear to have the same purpose as the sunlight requirements of securing light and air access for neighboring buildings.<sup>637</sup> Based on a variety of factors, the line requirements stipulate angles at which a building's outer walls' vertical slants must be set.<sup>638</sup> These factors include the relevant zone, the building height, the roof angle, whether an outer wall is facing either building or a road, and the amount of setback from the boundary of the lot.<sup>639</sup> The BSL contains quantitative formulae, set forth in attached tables, that are more detailed than any single performance standard in the U.S. cities in this study.<sup>640</sup> It must be noted, however, that although the subject U.S. cities do not have sunlight line angle requirements, some U.S. cities have historically used line angle regulations as a method

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632. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author).

633. *Id.*

634. Municipalities can set their own unique sunlight requirements via ordinances in unzoned areas. See GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 115.

635. BSL, Law No. 201 of 1950, art. 56(2).

636. *Id.* at table 4; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 115.

637. BSL, Law No. 201 of 1950, art. 56.

638. *Id.*

639. *Id.*

640. *Id.*; see also *id.* at tables 3 & 4.

of securing light and air.<sup>641</sup>

Japanese local governments have discretion in application of sunlight standards. For example, building heights can be relaxed if the local executive head official and Construction Review Council determine doing so will not damage the local residential environment.<sup>642</sup> Furthermore, municipalities can pass ordinances setting forth specific sunlight requirements within their jurisdictions and can set such particularized requirements based on the climatic factors in their particular areas.<sup>643</sup>

The BSL's sunlight requirements do not apply in Commercial, Industrial, and Exclusive Industrial Use zones,<sup>644</sup> presumably because neighborhood character and atmosphere are not major concerns in these zones. Likewise, the Particularized Urban Districts (*tokutei gai ku*) are also exempt from this requirement, which is one reason why Shinjuku is one of the few areas in Japan with skyscrapers over fifty-five stories.<sup>645</sup>

In conclusion, although both Chicago and Portland have provisions protecting light access, they are not worded as strongly or clearly as is Japan's BSL. Furthermore, unlike in Japan, Chicago and Portland only use setbacks and other density requirements, without resorting to specific light requirements.<sup>646</sup> At the same time, however, Chicago's provisions appear to leave the door open for more specific sunshine provisions designed to protect the physical, or perhaps even the psychological, health of its citizenry. Ultimately, however, Chicago, Portland, and Houston for that matter, all exemplify the U.S. tendency to use bulk regulations, rather than specific regulations directed toward air and light requirements, to ensure adequate open space, both vertically and horizontally, for healthy living environments.

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641. JOHN MIXON, TEXAS MUNICIPAL ZONING LAW I-22 (1999).

642. BSL, Law No. 201 of 1950, art. 56, part 2(3).

643. *Id.*

644. TAC PASSING TEXT, *supra* note 51, at 85.

645. *Id.* at 69.

646. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author).

## XI. NONCONFORMITIES IN THE SUBJECT JURISDICTIONS

*A. Chicago*

Chicago does allow nonconformities. However, for the sake of consistent and logical application, the zoning ordinance does not allow a nonconforming use to last indefinitely.<sup>647</sup> Rather, the ordinance requires a gradual elimination of nonconforming uses through amortization periods.<sup>648</sup> For most zones, this period is thirteen years, although the period is fifteen years for the B2 Restricted and B3 Retail Business Districts.<sup>649</sup>

Yet, the zoning ordinance does not require amortization for a large number of nonconforming situations.<sup>650</sup> Uses that are nonconforming with some density requirements, such as FARs, building heights, maximum floor areas, and lot area per dwelling unit, are allowed indefinitely.<sup>651</sup> Nonconformities related to yard requirements and off street parking and loading spaces are also exempt.<sup>652</sup> Likewise, nonconforming uses in Manufacturing Districts, Commercial Districts, and some uses in Residential Districts are also exempt from amortization.<sup>653</sup>

Repairs and alterations to a building will not change its nonconforming status, although additions or enlargements will.<sup>654</sup> Restoration of a damaged building is permitted if started within one year of the damage, if the repairs return the building to its previous condition, and if the value of repairs is under a set amount.<sup>655</sup> Furthermore, discontinuance of a nonconforming use for six months or longer automatically ends the nonconforming status.<sup>656</sup>

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647. Chicago, Ill., Zoning Ordinance, title 17, art. 6.1 (1923).

648. *Id.* at art. 2(14).

649. *Id.* at art. 6.5-4.

650. *Id.* at art. 6.3.

651. *Id.*

652. *Id.*

653. *Id.*

654. *Id.*

655. *Id.*

656. *Id.* at art. 6.5-2 (1923).

### B. Portland

The Portland Zoning Code allows nonconformities. Like Chicago's code, the nonconforming uses are allowed for the purpose of eventually bringing a use into conformance with a change in zoning. The government must first determine that a use or site has, in fact, legal nonconforming rights.<sup>657</sup> The standards for permitting a nonconformity are based on the degree of the nonconformity's impact on the area.<sup>658</sup> Generally, residential nonconformities have less of an impact than commercial or industrial uses and thus have fewer restrictions.<sup>659</sup> Expansions of a nonconformity are permissible if they satisfy various requirements such as being limited to the area bound by 1991 property lines.<sup>660</sup> Changes to a structure are allowed in limited situations, and are subject to either a Type I or Type II discretionary review.<sup>661</sup> Nonconforming rights are lost if a use is discontinued for two years.<sup>662</sup>

### C. Japan

Under BSL Article 3(2), nonconforming structures (*kizon futekikaku kensetsu butsu*) are exempt from current regulations.<sup>663</sup> The BSL defines nonconformities as structures that existed prior to execution or application of the provisions of the BSL and exempt from the BSL's regulations.<sup>664</sup> Any enlargements, large scale remodeling, and overhauls will cause the building to lose its nonconforming status,<sup>665</sup> but executive officials can relax (*kanwa*) the standard rules for such changes.<sup>666</sup> Although the Japanese do not appear to have an equivalent to the term "vested rights,"

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657. Portland, Or., Planning Code, ch. 33.258.038, 33.258.075 (1970).

658. *Id.* at ch. 33.258.010.

659. *Id.*

660. *Id.* at ch. 33.258.050.

661. *Id.*

662. *Id.*

663. BSL, Law No. 201 of 1950, art. 3(2).

664. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 133.

665. BSL, Law No. 201 of 1950, art. 3(3).

666. *Id.* at art. 86 part 2; Kensetsu Kijun Ho Shikorei [Building Standards Law Implementing Order], Cabinet Order No. 338 of 1950, art. 137(2)-137(9); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 79.

nonconforming rights appear to vest in a building from the point of construction.<sup>667</sup> As with already constructed buildings, if a developer makes reconstructions, large scale overhauls, or design changes during the construction, the construction will lose nonconforming status.

The laws do not appear to set an amortization period for nonconformities. Thus, a nonconforming use in Japan can, in theory, continue forever.<sup>668</sup> Furthermore, as buildings are generally torn down more frequently in Japan than in the United States, some of the U.S. issues with amortization would likely not appear in Japan, even with set time limits.

*Tokutei gyōsei chō* have discretion to “take measures” regarding nonconformities in order to promote or protect safety or sanitation.<sup>669</sup> Such measures include prohibition of the use, reconstruction, transfer, or removal of the structure.<sup>670</sup> Similarly, for nonconformities that interfere with promotion of the public interest,<sup>671</sup> *tokutei gyōsei chō* can take measures including prohibition of the use, reconstruction, transfer, and removal of the structure.<sup>672</sup> However, if an official takes such action, the approval of the local Takings Commission is required,<sup>673</sup> and the particular municipality must pay compensation.<sup>674</sup> Interestingly, in such situations, altogether elimination of the nonconforming status is not an option.<sup>675</sup>

In addition to nonconformities, many culturally and historically protected buildings are exempt from the BSL.<sup>676</sup> Such buildings must be designated or recognized, through laws such as the Cultural Protection Law and Law Concerning Protection of Vital Art Objects, as national treasures, vital cultural properties, vital artistic items, or

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667. BSL, Law No. 201 of 1950, art. 3; *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 79-80.

668. Interview with Norio Yasumoto, Professor, Law Faculty, Ritsumeikan University, in Kyoto, Japan (Nov. 14, 2001) (on file with author).

669. BSL, Law No. 201 of 1950, art. 10.

670. *Id.*

671. *Id.*

672. *Id.* at art. 11.

673. *Id.*

674. *Id.*

675. *Id.*

676. CPL, Law No. 100 of 1968, art. 3; *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 78.

the like.<sup>677</sup> *Tokutei gyōsei chō* can, with consent of the relevant prefectural Construction Review Council, create ordinances based on the Cultural Protection Law to designate buildings as Cultural Preservation Buildings (*hōzon kenchiku butsu*) for preservation and changes for current trends.<sup>678</sup> *Tokutei gyōsei chō* can also, through ordinances and with the approval of the Land Minister, relax the BSL standards in districts for “preservation of traditional building groups.”<sup>679</sup>

#### *D. Comparison of Nonconformities in the Subject Jurisdictions*

In providing for nonconformities, Chicago, Houston, and Japan generally parallel one another. The jurisdictions are also similar in specific ways as well. For example, Chicago and Houston both aim to gradually eliminate nonconformities through amortization periods. Likewise, in all of the subject jurisdictions, alterations of a nonconformity will generally result in loss of nonconforming status.

However, each jurisdiction has some unique characteristics. Chicago, for example, has many exemptions. Furthermore, Chicago’s general policy has been to refrain from amortizing its older buildings and to promote building rehabilitation and reuse.<sup>680</sup> Thus, many of Chicago’s oldest buildings still stand as nonconforming structures, converted-use structures, or historic landmarks.<sup>681</sup> Portland is unique because of its standard for approving nonconformities based on the degree of their off site impacts.<sup>682</sup> This sliding scale standard is in contrast to the usual standard that a building simply exist prior to the relevant regulation.

Japan has perhaps the most unusual nonconformity regime. Japan’s nonconformity rules are rather permissive. There are no

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677. *Id.*

678. *Id.*

679. BSL, Law No. 201 of 1950, art. 85, part 2.

680. E-mail from Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, to Byron Shibata, Assistant Professor of Law, Ritsumeikan University (May 30, 2002) (on file with author).

681. *Id.* Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (Aug. 28, 2001) (on file with author).

682. Portland, Or., Planning Code, ch. 33.258.010 (1970).

standards explicitly stated for approving a nonconformity application. In addition, there are no amortization periods in the CPL or BSL, so a nonconformity can theoretically continue indefinitely. Finally, although alteration of a use results in loss of nonconforming status, government officials have apparently unlimited discretion to exempt a nonconformity from this requirement.

Japan is also unique in protecting many legally designated historic buildings from the BSL's regulations. As many historic buildings presumably were built prior to enactment of the BSL, the necessity of this rule is unclear, and furthermore appears to be redundant.

#### CONCLUSION

The zoning systems in the subject U.S. jurisdictions and Japan share many similarities. In both countries, there is a heavy delegation of zoning authority to local, mainly municipal, governments. Likewise, the goals and purposes of the zoning systems in both countries tend to be rather general and worded in vague and generalized terms. Portland is an exception to this general rule. Furthermore, special districts, for particular needs in individual areas, are used in both the United States and Japan. Perhaps the greatest similarities between Japan and the U.S. subject cities, however, are their base and overlay zone categories. The base zones, in particular, appear on a fundamental level to be virtually identical among the subject jurisdictions.

Other similarities exist. For example, the subject U.S. cities and Japan provide for nonconformities in approximately the same fashion, although Japan has more permissive standards. The regulations on development bulk and density in the United States and Japan also share many similarities. The two countries employ many of the same fundamental regulatory tools, including FARs, building coverage ratios, minimum and maximum height restrictions, and building setback requirements. However, a major difference exists between the regulations on sunlight and air access. The subject U.S. jurisdictions provide for such access primarily through bulk regulations on building heights, FARs, setback and sideyard requirements, and the like. Japan employs such regulations, but provides even stronger protections through building line angle

regulations, and by actually mandating the minimum number of sunlight hours that must be free of shadows from neighboring buildings.

There are other differences between the U.S. and Japanese approaches toward land-use regulation. Japan has some national laws without parallel in the United States. Specifically, the FLL and Lands Use Law focus heavily on regulating the land market in Japan. These laws authorize stringent, direct regulations on land transactions for price-control purposes, and are without comparison in the United States.

Furthermore, there are also some differences with the zoning systems in the subject jurisdictions. For example, in Japan, the municipal, prefectural, and national governments are all relatively active in administration of zoning. In contrast the United States has tendency to concentrate zoning authority at the municipal level. Minor differences exist in the U.S. and Japanese jurisdictions' zoning classifications, such as with Japan's use of a relatively large number of overlay zones, including historical preservation zones. Large scale zones covering wide geographical areas are common in Japan but unusual in the United States, with the exception of such cities as Portland, which has different policy reasons for employing such zones. Furthermore, differences in zoning systems are by no means limited to the international context. This Article has identified U.S. domestic peculiarities, such as Houston's restrictive covenant system, and Oregon's multiple levels of government zoning administration, which in some respects resembles Japan's system.

Land-use regulations in any nation are ultimately responses to the particular exigencies of a given jurisdiction, and are, fundamentally, creatures of larger policies and goals. The land-use systems in the United States and Japan are examples of the variety of available regulatory approaches. No system is empirically perfect, but a greater understanding of land-use systems throughout the world can increase the number of laws and policies at a government's disposal. Governments in both the United States and Japan, therefore, should comprehensively analyze international land systems in order to effectuate and continually improve their own land-use regimes.

## APPENDIXES

CHAPTER 1: GOVERNMENT JURISDICTION OVER  
DESIGNATION OF ZONING IN JAPAN

This section endeavors to clarify jurisdiction over designation of zoning classifications in Japan. This dynamic is most easily understood in chart form.<sup>683</sup>

1. Minister of Land, Infrastructure, and Transport:<sup>684</sup>

A. City Planning Areas when they overlap two or more prefecture borders

2. Prefectures:<sup>685</sup>

A. City Planning Areas (except when they overlap more than one prefecture)

B. Urbanization Areas and Urbanization Control Areas

C. A limited number of Area District zones (but municipal governments set most of the Area District zones):<sup>686</sup>

1) Use Zones and High-Rise Residential Guidance Districts in City Planning Areas that lie within the borders of designated cities, *San-Dai-Toshi-En* areas, or their surrounding areas.

2) Scenic Districts (if over ten hectares in area)

3) Seaside Districts

4) Green Preservation Districts (if over ten hectares in area)

5) Historic Climate Special Preservation Districts

6) Class 1 and Class 2 Quasi-Historic Climate Special Preservation Districts

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683. See TAC BASIC TEXT, *supra* note 71, at 50; TAC PASSING TEXT, *supra* note 51, at 34.

684. CPL, Law No. 100 of 1968, art. 22; TAC BASIC TEXT, *supra* note 71, at 34; TAC PASSING TEXT, *supra* note 51, at 50.

685. CPL, Law No. 100 of 1968, art. 15; CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 9(1); TAC BASIC TEXT, *supra* note 71, at 34; TAC PASSING TEXT, *supra* note 51, at 50.

686. TAC PASSING TEXT, *supra* note 51, at 50; TAC BASIC TEXT, *supra* note 71, at 34.

- 7) Distribution Business Districts
- 8) Districts for Prevention of Noise Impediments Caused by Airplanes

The prefectures can also designate the following project and facilities:<sup>687</sup>

- A. Urban Development Project Scheduling Areas
  - B. Urban Area Development Projects (there are exceptions in which municipalities have jurisdiction)
  - C. Urban Facilities in cases when “from a broad overall perspective, the prefectures should make such decisions.”<sup>688</sup>
- Although mayors usually designate facilities, examples of when governors may designate facilities include:

- 1) Large public roads; e.g., national or prefectural highways
- 2) Parks
- 3) Green areas
- 4) Open squares (over ten hectares)
- 5) Ports
- 6) Universities
- 7) Trade and specialty high schools
- 8) Public offices
- 9) Distribution business areas
- 10) Residential subdivisions with more than 2,000 residences

### 3. Municipalities:<sup>689</sup>

A. Area District zones (not including the zones designated by governors, as indicated above):

- 1) The 11 Use Zones
- 2) Special Use Zones

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687. CPL, Law No. 100 of 1968, art. 12; TAC BASIC TEXT, *supra* note 71, at 34; TAC PASSING TEXT, *supra* note 51, at 50.

688. TAC BASIC TEXT, *supra* note 71, at 34.

689. CPL, Law No. 100 of 1968, art. 15; TAC BASIC TEXT, *supra* note 71, at 34; TAC PASSING TEXT, *supra* note 51, at 50.

- 3) Height Districts
- 4) High Utilization Districts
- 5) Particularized/Specialized Street Districts
- 6) Fire Protection Zones and Quasi-Fire Protection Zones
- B. District Plan Areas
- C. Promotion Areas
- D. The following Urban Area Development Projects (all others fall under prefectural jurisdiction):
  - 1) Land Planning Arrangement Projects under fifty hectares
  - 2) Urban Revitalization Projects under three hectares
  - 3) Residential Area Management Projects
- E. Areas for Promotion of Conversion of Unutilized Land
- F. Urban Fire Area Revitalization Promotion Zones
- G. Urban Facilities (However, governors can designate these facilities if a particular facility is “large in scale”)

## CHAPTER 2: AREA DISTRICT CATEGORY

### I. AREA DISTRICT CATEGORY: ZONES THAT ARE USED EXCLUSIVELY AS OVERLAY ZONES

1. *Special Use Districts*: Permit special land designations for promoting specialized purposes, such as environmental protection, industrial development, education, and recreation.<sup>690</sup>

2. *High-Rise Residential Guidance Districts*: Permit specialized maximum limits on building-coverage ratios, FARs, and site areas for buildings.<sup>691</sup> The high-rise residences permitted in these districts are to be “very convenient” and differentiated from other residential structures.<sup>692</sup> These districts can be set, via the city plan, as overlays

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690. CPL, Law No. 100 of 1968, art. 9(13); CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 3. The CPL also mentions amusement and medium and high rise residential purposes. *Id.*

691. CPL, Law No. 100 of 1968, art. 8(3). The law specifies that this article relates to the bulk regulations in BSL article 52(1). *Id.*

692. CPL, Law No. 100 of 1968, art. 9(15).

in the Class 1 and Class 2 residential zones, Quasi-Residential Zones, Neighborhood Commercial Zones, and Quasi-Industrial Zones.<sup>693</sup>

3. *Height Districts*: Permit particularized minimum and maximum building heights for preserving the environment and planning for increased land usage.<sup>694</sup>

4. *Height Use Districts*: Permit particularized minimum and maximum restrictions on a building's FAR, maximums for building-coverage ratios, and minimums for building-coverage ratios and setbacks, for planning of "logical and sound" high land-use and urban renewal.<sup>695</sup>

## II. AREA DISTRICT CATEGORY: MORE SPECIALIZED ZONES

1. *Particularized Use Restriction Zones* (can only be designated in Urbanization Control Areas): For protection of the environment and promotion of rational land-use. Special bulk and density limitations on buildings are permitted in this zone.<sup>696</sup> Local governments set, through ordinances, use restrictions in these zones, based on standards set in Cabinet Orders.<sup>697</sup>

2. *Particularized Urban Districts*: For maintenance and improvement of streets and roads within the district.<sup>698</sup> Special limits on FARs, heights, and positioning of walls (wall setbacks) may be set.<sup>699</sup> When these districts adjoin one another, transfer of FARs between districts is permitted.<sup>700</sup> This zone is usually designated to allow increases in bulk and density to allow construction of tall buildings.<sup>701</sup>

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693. *Id.*

694. CPL, Law No. 100 of 1968, arts. 8(3), art. 9(16).

695. CPL, Law No. 100 of 1968, art. 9(17).

696. CPL, Law No. 100 of 1968, arts. 8(1)(2) part 2, 9(13).

697. BSL, Law No. 201 of 1950, art. 49(2).

698. CPL, Law No. 100 of 1968, arts. 8(14), 9(18).

699. CPL, Law No. 100 of 1968, art. 9(18).

700. INTRODUCTION OF URBAN LAND-USE PLANNING SYSTEM IN JAPAN 3 (1998).

701. TAC PASSING TEXT, *supra* note 51, at 69; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

3. *Fire Protection Zones and Quasi-Fire Protection Zones*: For protection against fires, and planning for measures to fight and extinguish fires, in urban areas.<sup>702</sup>

4. *Aesthetic Districts*: For protection of aesthetics.<sup>703</sup> Municipalities, through ordinances (*jorei*), may set special limits on building structure, siting, and facilities.<sup>704</sup>

5. *Scenic Districts*: For preservation of natural scenery through regulation of matters including architecture, residential developments, and cutting of trees.<sup>705</sup> Prefectures may set ordinances creating such districts, based on standards set forth in ministerial ordinances (*shorei*).<sup>706</sup>

6. *Port Districts*: For operation of ports and harbors. Buildings that interfere with such operations can be restricted by ordinances.<sup>707</sup> Subcategories of this zone include commercial harbor districts, special supplies harbor districts, industrial districts, railroad connection harbor districts, fishery harbor districts, bunker harbor districts, and safety harbor districts.<sup>708</sup>

7. *Historical Climate Special Preservation Districts*: For structuring the main parts of a zone for preservation of the historical climate (*fudo*) of ancient cities.<sup>709</sup> These districts are set within Historical Climate Preservation Areas, which are set by the Land Minister.<sup>710</sup>

8. *Class 1 Historical Climate Preservation Districts and Class 2 Historical Climate Preservation Districts*:

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702. CPL, Law No. 100 of 1968, arts. 8(1)(5), (9)(19).

703. CPL, Law No. 100 of 1968, arts. 8(1)(6), (9)(20).

704. *Id.*

705. CPL, Law No. 100 of 1968, arts. 8(1)(7), (9)(21).

706. *Id.*

707. CPL, Law No. 100 of 1968, arts. 8(1)(9), 9(22); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33. These zones are also regulated by articles 39 and 40 of the Port Law. CPL, Law No. 100 of 1968, arts. 8(1)(9), 9(22); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

708. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

709. CPL, Law No. 100 of 1968, art. 8(1)(10); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33. These zones are also regulated by article 6(1) of the Special Measures Law on Preservation of Ancient Cities. CPL, Law No. 100 of 1968, art. 8(1)(10); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

710. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

A. Class 1: For preservation of an area's historical climate planning should strictly restrict changes to the current state of the area.<sup>711</sup>

B. Class 2: For restricting great changes to the current state of an area; planning should maintain and preserve an area's historical climate.<sup>712</sup>

9. *Green Space Preservation Districts*: For preventing disorganized urbanization.<sup>713</sup> Allows planning for appropriate buffering, and for traditional, cultural, and natural environment purposes.<sup>714</sup>

10. *Distribution Business Districts*: For planning of smooth distribution in large cities.<sup>715</sup> In these areas, buildings shall be limited to structure types such as freight stations, warehouses, and wholesale distribution markets and stores.<sup>716</sup>

11. *Productive Green Districts*: A zone category that can be used for agricultural lands over 500 square meters and located in Urbanization Areas.<sup>717</sup> These zones can be set in a City Plan if agricultural uses in a given area can—based on irrigation, the agricultural market, and other factors—be continued.<sup>718</sup>

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711. CPL, Law No. 100 of 1968, art. 8(1)(11); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

712. CPL, Law No. 100 of 1968, art. 8(1)(11); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

713. CPL, Law No. 100 of 1968, art. 8(1)(12); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34. These zones are also regulated by article 3 of the City Green Space Preservation Law. CPL, Law No. 100 of 1968, art. 8(1)(12); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

714. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

715. CPL, Law No. 100 of 1968, art. 8(1)(13); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34. These zone areas are also regulated by articles 4 and 5 of the Law on Servicing of Distribution Business Urban Areas. CPL, Law No. 100 of 1968, art. 8(1)(13); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

716. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

717. CPL, Law No. 100 of 1968, art. 8(1)(14); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34. These zones are also regulated by article 3 of the Productive Green Areas Law. CPL, Law No. 100 of 1968, art. 8(1)(14); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

718. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

12. *Districts for the Preservation of Traditional Structures*: For preservation of traditional structures and surrounding areas that can be considered, in effect, to be a part of such structures.<sup>719</sup>

13. *Districts for Prevention of Noise Impediments Caused by Airplanes*: A zone category that can be designated on land around airports for prevention of noise.<sup>720</sup>

14. *Special Districts for Prevention of Noise Impediments Caused by Airplanes*: For noise prevention; in general, schools, hospitals, and residential uses are not permitted.<sup>721</sup>

15. *Parking Facilities Districts*: Requires planning for securing use and smooth traffic flows in areas where there is a likelihood of marked increases in automobile traffic.<sup>722</sup> These zones can be set within Commercial Zones, Neighborhood Commercial Zones, the Residential zones, Quasi-Residential Zones, and Quasi-Industrial Zones.<sup>723</sup> Prefectures can enact ordinances requiring parking facilities for construction or alteration to structures over 2,000 square meters.<sup>724</sup>

### CHAPTER 3: DISTRICT PLAN AND DISTRICT PLAN ZONES

As the following list indicates, some District Plan zones are overlay zones for Use Zones, while others can be placed in areas without (base) zoning, or in areas planned for minimal development. Some of the special regulations that can be imposed in District Plans pertain to FARs and transferable development right (TDR) systems.<sup>725</sup>

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719. CPL, Law No. 100 of 1968, art. 8(1)(15); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34. These zones are also regulated by article 83, part 3 of the Cultural Properties Protection Law. CPL, Law No. 100 of 1968, art. 8(1)(15); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

720. CPL, Law No. 100 of 1968, art. 8(1)(16); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

721. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 34.

722. CPL, Law No. 100 of 1968, art. 8(1)(8); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33. These zones are also regulated by Article 3 of the Parking Lot Law. CPL, Law No. 100 of 1968, art. 8(1)(8); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

723. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 33.

724. *Id.*

725. *See, e.g.*, CPL, Law No. 100 of 1968, ch. 4(2), art. 125(1); GENERAL EXPLANATION

1. *(Basic) District Plan*: Allows use and performance standards for planning of city areas on a very localized scale. Zones for implementing these plans are allowed in either Urbanization Areas or Urbanization Control Areas.<sup>726</sup>
2. *Residential High Utilization District Plan*: For planning of residential areas with mid- to high-rise buildings. Zones implementing these plans can employ special use and performance standards. These zones can be laid over any Use Zone (although they are reportedly used mainly in the Exclusively Residential Use Zones.)<sup>727</sup>
3. *Redevelopment District Plan*: For redevelopment activities (specific restrictions for which are set forth in the Urban Redevelopment Law). Zones implementing these plans are allowed anywhere inside an Urban Planning Area.<sup>728</sup>
4. *Fire Protection Maintenance Districting Plan*: For special safety regulations related to fires caused by natural disasters. Specific regulations are in a separate law titled the Law for Promotion of Maintenance of Fire Protection Districting in Crowded City Areas. Zones implementing these plans can be laid over any Use Zone.<sup>729</sup>
5. *Road Districting Plan*: For mitigation of noise emanating from major roads. Particulars related to such plans are set forth in the Maintenance of Major Roads Law. Zones implementing these plans are allowed anywhere inside an Urban Planning Area.<sup>730</sup>
6. *Village Districting Plan*: For planning of agricultural and residential needs. Zones implementing these plans are allowed inside Urbanization Control Areas and Agricultural Promotion Areas.<sup>731</sup>

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ON REAL PROPERTY, *supra* note 44, at 42-43.

726. CPL, Law No. 100 of 1968, arts. 4(9), 12, part 4(1).

727. *Id.*; TAC PASSING TEXT, *supra* note 51, at 56.

728. CPL, Law No. 100 of 1968, arts. 4(9), 12 part 4(1).

729. *Id.*

730. *Id.*

731. *Id.*

## CHAPTER 4: PROJECTS AND PROJECT ZONES

Generally, City Planning Projects, listed as follows, are allowed only in Urbanization Areas.<sup>732</sup> However, the Land Planning Arrangement, Urban Revitalization, and Residential Area Management projects are also allowed in Promotion Districts.<sup>733</sup> Those four project types are relatively small in scale,<sup>734</sup> whereas the New Residential Area Development, Industrial Estate Development, and New City Foundation Management projects (as well as all of the Urban Facilities projects) are relatively large.<sup>735</sup>

In regard to “government office” projects and “distribution business” projects, only national entities or municipalities can designate and construct those projects.<sup>736</sup>

1. Urban Area Development Projects<sup>737</sup>
  - A. New Residential Area Development Project
  - B. Industrial Estate Development Project
  - C. New City Foundation Management Project
  - D. Land Planning Arrangement Project
  - E. Urban Area Redevelopment Project
  - F. Residential Area Management Project
2. Urban Infrastructure Projects<sup>738</sup>
  - A. Infrastructure for Residential Subdivision Developments over 20 Hectares
  - B. Infrastructure for Government Office Group Areas
  - C. Distribution Business Districts
  - D. Other urban infrastructure

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732. *Id.* at arts. 12, 13; see TAC PASSING TEXT, *supra* note 51, at 54.

733. CPL, Law No. 100 of 1968, arts. 12, 13; see TAC PASSING TEXT, *supra* note 51, at 54.

734. TAC PASSING TEXT, *supra* note 51, at 54.

735. CPL, Law No. 100 of 1968, arts. 12, 13; TAC PASSING TEXT, *supra* note 51, at 54; TAC BASIC TEXT, *supra* note 71, at 43.

736. CPL, Law No. 100 of 1968, arts. 11, 13; TAC BASIC TEXT, *supra* note 71, at 43.

737. CPL, Law No. 100 of 1968, arts. 11, 12, 13; TAC BASIC TEXT, *supra* note 71, at 54.

738. See sources cited *supra* note 737.

3. Urban Development Projects Scheduling Areas<sup>739</sup>
  - A. New Residential Subdivision Development Project Scheduling Area
  - B. Industrial Estate Development Project Scheduling Area
  - C. New City Foundation Projects Scheduling Area
  - D. Over 20-Hectare Area Residential Facility Scheduling Area
  - E. Public Infrastructure Scheduling Area
  - F. Distribution Business Scheduling Area

#### CHAPTER 5: PUBLIC INFRASTRUCTURE ITEMS

CPL article 11(1) lists the following public infrastructure items, which if necessary, must be designated in city plans.<sup>740</sup>

1. Roads, city high-speed railroads, parking lots, car “terminals,” and other transportation infrastructure
2. Parks, green spaces, squares, cemeteries, and other open areas
3. Water supply, electricity, gas, water pipes, waste disposal, waste incineration, and other supply and disposal infrastructure
4. Rivers, canals, and other waterways
5. Schools, libraries, research facilities, and other educational and cultural infrastructure
6. Hospitals, childcare, and other medical and social welfare facilities
7. Marketplaces, slaughterhouses, and crematoriums.
8. Residential subdivision infrastructure (with more than 50 residences), including accompanying roads.
9. Group public office infrastructure (for group national or municipal buildings, along with accompanying roads and other infrastructure)

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739. CPL, Law No. 100 of 1968, art. 12(2); *see also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 44, at 38-39; TAC BASIC TEXT, *supra* note 71, at 45.

740. CPL, Law No. 100 of 1968, art. 11(1); TAC BASIC TEXT, *supra* note 71, at 43.

10. Distribution-business areas
11. Electrical power plants and infrastructure to protect against fire and the natural elements

Furthermore, large scale infrastructure may be designated in the Urban Development Project And Miscellany Plan Area zones.<sup>741</sup> In these zones, the following infrastructure items can be designated:<sup>742</sup>

1. Residential subdivision infrastructure if the particular subdivision is over twenty hectares
2. Infrastructure for government “office group districts”
3. Distribution Business Districts

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741. CPL, Law No. 100 of 1968, art. 12 part 2; TAC BASIC TEXT, *supra* note 71, at 43.

742. CPL, Law No. 100 of 1968, art. 12 part 2.