August 21, 2001

Mr. Bill Klein
Mr. Stuart Meck
American Planning Association
122 S. Michigan Avenue, #1600
Chicago, Illinois 60603

Re: Growing Smart Model Code

Dear Mr. Klein and Mr. Meck:

Our four national organizations represent over 2 million members of the land use regulated community. We are a major portion of the companies and workers that keep the American economy going. We certainly understand the economic reality of regulation because we live with it every day. While we appreciate the efforts made by the American Planning Association (APA) with regard to the *Growing Smart Legislative Guidebook*, we have major reservations about the impending result of this effort. To attain smart growth, there must be smart process.

The undersigned organizations are deeply distressed about the manner the Directorate has handled the APA drafting/comment period. Over the last few years, we have monitored the progress of the *Growing Smart Legislative Guidebook* as the Directorate read, discussed, debated, and then decided countless land use issues for a model code; a Directorate led by APA and composed of governmental officials, public planners, and one representative each from the environmental and development communities. Much of what was decided we liked; much we disliked. However, we did not intervene. We abided by the APA process and accorded it respect. Then, at the eleventh hour, a faction that had had representatives on the Directorate was permitted to intervene in the proceedings and demand that issues already decided be reopened

EXHIBIT 3

and changed to their favor. Never mind that this environmental community already had a seat at the table. Never mind that the "built community" had only one seat out of a dozen, though very ably represented by Mr. Paul Barru of Colorado. To allow an organization that had representatives at the table through this long and thoughtful process, to intervene and reopen issues that have already been fully discussed and debated, undermines the progress APA had made in gathering consensus from all sides. Suddenly, due to this faction's intervention, changes are being made in mid-July covering many hundreds of pages, and comment is due hurriedly by mid-August

From what we can discern, a "model" land use legislative document that presented some balance – through strong language for comprehensive and detailed planning, many powerful regulatory tools, recognition of the need for certainty in the complicated land use process, and awareness that affordable housing, economic development, environmental protection, and property rights are all important values – is now greatly unbalanced. Two examples of this imbalance, include; (1) what is already a long, complex and expensive process is now made even more so because project "finality" is much more illusory and difficult to achieve (except where finality results in the death of a project); and (2) reading the proposed legislative document as a whole, it allows almost anyone to raise anything at any time in the regulatory or judicial process and undo what should be an orderly, considered, and democratic process.

In the name of even more environmental protection, controls for planning, zoning, and land use, which must meet the local police power standard requiring protection of the public health, safety or general welfare and comply with state and federal environmental controls, can be manipulated or misused by the inevitable not-in-my-back-yard (NIMBY) forces to stop needed uses for the total community. To take just one example with enormous significance, protection of the environment, which is vaguely defined as natural, open, historic or scenic areas,

is now raised at times by the model legislation to the same level as protection of public health, safety or general welfare. What about a protective right to jobs, to housing, to mobility -- or to the use of one's property? Is it not just as important to assess the impacts of a proposed development moratorium on those values?

If the APA model land use code is going to recommend altering the very police power formula that underlies all regulation and be considered balanced, it cannot stop with the environment. It must also place on an equal footing impacts on jobs, housing, property, and mobility. It seems truly ironic to imply that the current land use processes don't consider environmental factors. By definition, land use affects the environment. A model land use code must have fair process and equal substantive standards at all times if it is to work. And, even if the police power formula itself is not ultimately re-worked, the constant and express insertion of environmentalism into the code's land use processes and standards without an equivalent insertion of other values such as economic development and housing, means a model code that is unbalanced and, thus, unworkable.

We are also concerned about the lack of alternatives provided for in the model code. Each jurisdiction is unique. A range of alternatives should be presented so that each jurisdiction may choose the options best suited to their community. Each option should be presented in a neutral light so as not to recommend or imply a preferred approach. The most valuable legislative tool is a model code that offers a range of alternatives that the state and local legislators can consider.

Given these threshold observations on the draft model land use code's processes and standards, the following are some specific objections based on APA's July 9 memorandum and revamped June drafts as well as deep concerns we have held for some time. Also given the last minute nature of the changes to the draft code without any ability to compare this version with

the prior "completed" draft, we reserve the right to comment on other issues we may subsequently discover in our review:

1. Adoption and Amendment of Land Development Regulations – Section 8-103

We strongly oppose zoning by referendum. It is a destabilizing practice in the minority of places that allow it. Ill-informed emotion can easily override a thoughtful and deliberative planning and zoning process and everyone who relies on it. It is a classic tactic of exclusionary zoning proponents and, as such, should be condemned, not authorized, by any model code.

2. Consistency of Land Development Regulations with Local Comprehensive Plan – Section 8-104

Making void or voidable those land use actions or laws deemed inconsistent with a comprehensive plan is an idea that may sound good as a goal to strive for but, in practice, would cause uncertainty and havoc. A land use action that complied with all laws should not be subject to interpretive attack under the comprehensive plan. The predictability that law is supposed to give a community would instead be supplanted by chronic uncertainty, making financing of needed improvements much more difficult to attain and undermining the regulatory review process on which the community relies.

3. General Review of Land Development Regulations – Section 8-107

Reversing the presumption of reasonableness for land use laws not reviewed every five years by the locality puts in serious jeopardy all those projects proceeding through the development process, subjecting them to the same dangers and collateral attacks as referenced in Section 8-104 above. Citizens using governmental processes should not be punished for the inability of government to carry out its ministerial functions. To address this concern, alternative sanctions and incentives for the localities to meet these deadlines need to be provided.

4. Site Plan Review – Section 8-302

Subsection (5)(i), in referring to what an ordinance must contain, refers to standards covering preservation of natural resources existing on the site. Per Section 8-303(2)(c), the qualifier "critical and sensitive" needs to be inserted before "natural resources" or no new development could be built, only redeveloped.

5. Uniform Development Standards – Section 8-401

For the reasons stated above in points 2 and 3 concerning instability in the development process, we oppose the denial of a "presumption of reasonableness" if a state agency fails to review its development standards every five years.

6. Vested Right to Develop – Section 8-501

We strongly oppose the new "significant and visible construction" vested rights rule. This is so late in the "process" as to be no rule of protection at all because it is based on the out-dated common law rule that, in simpler regulatory times, a person could get permission to build relatively quickly, and then construction would commence. That is not today's world, as evidenced by the very "Growing Smart" code being created here. This code has thousands of pages of procedural and substantive requirements, hearings, administrative exhaustion rules, and more, all with the purpose or effect of making it exceedingly difficult to secure approval of any proposed development in a reasonable and market-sensitive period of time. One of the precious few protections accorded property owners in all these pages is a vested rights rule, but it must be sensible. After going through a long, complex, and exceedingly costly review process for a project proposal, it's extremely unrealistic to not provide finality until the process is substantially over and "significant, visible construction" is underway. It is especially disconcerting that while the project applicant must act in "good faith" to assert a vested right, no such concomitant "motive" requirement applies to other individuals or groups who may seek to monopolize the

land use process. The actions, not the motives, of all parties should be the relevant indications of good faith.

7. Development Impact Fees – Section 8-602

We object to the change in the Commentary, which attempts to undercut the rule of proportionality for impact fees. A statement has now been inserted saying, "[t]hough the U.S. Supreme Court has not yet applied the Dolan test [of essential nexus and rough proportionality] to an impact fee case . . ., [Dolan is still important]." But the Supreme Court did, and so have numerous lower courts, state and federal, none of which is cited among the other cases in the Commentary.

In Ehrlich v. Culver City, 512 U.S. 1231 (1994), the Supreme Court vacated a California Court of Appeals judgment upholding an impact fee imposed on a project. The lower court had found Nollan, Dolan's 1987 predecessor case, inapplicable to fees (money exactions). The Supreme Court, after vacating the state court judgment, then remanded the case "for further consideration in light of Dolan," decided earlier in 1994. On remand, the California Supreme Court held that Dolan is applicable to fees attached as conditions to a project. 911 P.2d 429 (Cal. 1996).

8. Moratoria – Section 8-604

We strongly oppose the broadening of a moratorium's purpose. A development moratorium is only defensible from a legal and policy standpoint if it is enacted to protect "public health or safety" and the government acts in good faith to cure the public facility emergency as quickly as possible. This is the core principle of many American court decisions addressing moratoria. By its very nature, a moratorium as generally used in the United States is an admission of public facility failure; it is essentially an "outside the process" procedure, one that is susceptible to great abuse by government and, thus, must be carefully circumscribed.

Most recently, Pennsylvania courts have overruled temporary development moratorium. In *Naylor v. Helman Township* (773 A.2d 770, June 20, 2001), owners of undeveloped real estate brought action against the township, seeking to invalidate an ordinance imposing a one-year moratorium on new subdivision and certain land development while a township revised its comprehensive plan, zoning, subdivision, and land development ordinances. The state Supreme Court reversed the lower court summary judgment ruling for the township, holding that the local government had stretched its zoning powers too far. In *Shaner v. Perry Township* (2001 WL 476561, May 8, 2001), where the township filed an equity action to force landowners and tenants to pave two lots, and denied occupancy permits for other prospective tenants, the state's Commonwealth Court ruled that the township engaged in de facto taking, laying the groundwork for a developer to collect compensation for lost development opportunities because of a temporary moratorium. And, the U.S. Supreme Court has agreed to hear a key moratoria case next term. The draft legislation unfortunately makes moratoria just another tool in the land use toolbox. It can now be imposed for "environmental" reasons, to stop everything while a comprehensive plan is prepared or while regulations are developed, or for some other compelling need. Moratoria can even be imposed on "smart growth areas" and last for 1.5 years, a long time for land to be rendered useless. In addition, Section 8-604 permits states and localities to impose "temporary" (however long that is) moratoria or policies on state permits or local rezoning. In short, both the rationale and duration of moratoria are so expanded by Section 8-604 as to raise major issues of abuse, unfairness, and takings.

9. Regulation of Critical and Sensitive Areas and Natural Hazard Areas – Section 9-101

Critical areas ordinances at the local level should be optional, not mandatory. This is a major expansion of local authority; true critical areas are generally regulated at the state level. Especially objectionable is the purposes clause: among the law's five purposes are to "conserve the natural resources of the community; prevent contamination of the natural environment." Neither "natural resources" nor "natural environment" is defined or qualified as those that are "critical and sensitive," as the heading would imply. These terms are both vague and overbroad, allowing for easy denial or highly restrictive approval of well planned, needed projects that meet all requirements. Equally objectionable is the wide-open definition of "critical and sensitive areas," which "means lands and/or water bodies that provide protection to or habitat for natural resources, or ..." again, neither "critical" nor "sensitive" is used to define or qualify "natural resources."

In other words, despite the heading reference to "critical and sensitive," this phrase is not used to define or limit "natural resources" and "natural environment." Because virtually every land use proposal (including those that comply with the comprehensive plan, zoning ordinance, subdivision ordinance, state and federal environmental laws, and other laws) affects "natural resources" or the "natural environment," this ordinance authorizes objections for just about everything. Thus, in the highly charged atmosphere of project hearings, the environmental consideration, whether really valid or not, can be easily used to trump other public goals (housing, economic development, transportation needs) that do not have the benefit of ordinances that address these areas.

10. Historic Districts and Landmarks; Design Review – Section 9-301

We strongly object to the change made by APA to now bring under historic review the interiors of structures. Virtually nowhere in the United States is this allowed, and for good reason.

We also object to the change made in subsection (8) (previously subsection (9)). Whereas the language had been clear that a historic review board could not deny a use permitted as of right by the zoning ordinance, language has been added at the eleventh hour that development can be denied, even development necessary for the permitted use. What seemed to have been protected is now taken away.

We urge that two important property owner protections, typical of historic ordinances, be added to the model ordinance. First, "Nothing in this Section shall deny reasonable, economic use of a person's property nor cause undue hardship to a property owner." Because of the broad regulatory power exercised by historic review boards and the often intrusive subjective judgments made by those boards as applied to private property, such boards need clear guidelines in their enabling law of their constitutional and equity limits.

And second, language should be added that an owner has the right to appeal an adverse decision to the Board of Appeals, and from there to court. When an historic review board goes too far, an owner must have a right to administrative review by the appeals board, and thereafter to a court.

11. Mitigation – Section 9-403

Owners should not be required, in each instance, to "create equivalent areas elsewhere." They should be allowed to pay a fee-in-lieu of recreating a resource, so that government or another private party can use the money for resource creation in other parts of the community.

In subsection (6), we again object, for the reasons stated above in points 2, 3 and 5, to the denial of a "presumption of reasonableness" to state standards that are not reviewed every five years.

Mitigation standards should also have the direct involvement of economic development agencies, not just environmental and planning agencies. Serious consideration needs to be given to economic and market-related conditions when drafting the mitigation standards.

12. Land Use Incentives – Section 9-501

We object to the requirement in subsection 5 that an incentives ordinance can only be adopted if the local comprehensive plan has a community design element and an amenities-justifying-density bonuses element. This is totally unnecessary and counterproductive. Amenity incentives require case-by-case, project specific review flexibility based on ordinance criteria. An incentives ordinance should not be tied inflexibly to the broad-ranging comprehensive plan as a prerequisite.

We also oppose the requirement in subsection 6 that an applicant must enter into a "development agreement" with the locality. Why does the APA want to make this process so complicated and expensive? Plus, for the overwhelming majority of states with no development agreement statutes, incentive zoning would not be allowed. As is so often done today, the incentive/amenity quid pro quo can simply be made a part of the conditions of approval of the development plan and enforced as such.

It should also be provided that in any incentives ordinance, the developer can provide the public amenity off-site if approved by the locality.

13. Definitions – Section 10-101

We are unclear about the difference between "adversely affected" and "aggrieved." Normally, "aggrieved" means showing specific concrete injury or harm, yet that is the definition for "adversely affected," which is confusing. More important, we strongly appose a "prejudice" standard for standing because it allows almost anyone to file suit against an approved project merely because the don't like it, regardless of any concrete, individualized harm.

If judicial review is limited to land use decisions, and land use decisions are defined in part as development permit application decisions, then development permit is too narrowly defined since it gives a list of typical actions covered. For example, it doesn't expressly include preliminary plan decisions or historic review decisions, which should be on any such list.

14. Mediated Agreement – Section 10-504

This "escape valve" procedure is too complex and cumbersome to be of any real use in most cases, especially in the small property type of cases. In particular, requiring both a development agreement and legislative approval is exceedingly burdensome and unnecessary. It should be one or the other. The local land use regulatory agency is fully authorized and capable to review cases of hardship and make appropriate findings and conclusions based on the facts, law and comprehensive plan. If a party is dissatisfied, they can then appeal to the Board of Appeals.

15. Judicial Review – Section 10-603

In the Commentary, in discussing the need for finality on a land use application before going to court, it states that the "federal rules require two applications, but one application should be sufficient" for the purposes of this code. The "two applications" statement is incorrect and should simply be deleted. First, the so-called "federal rule" is actually a reference to a footnote in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353, n.9 (1986), in which the Supreme Court observed that, in a takings case, where an owner makes an "exceedingly grandiose" proposal, a less intensive use may be approved, which would negate a takings challenge. The Court was clearly dealing only with constitutional takings claims and never required a mechanistic "two applications" for a case to ripen. Second, the Court strongly reaffirmed these points recently in Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2458-59 (2001), as well as Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).

16. Exhaustion of Remedies – Section 10-604

We strongly oppose the requirement that after a local or state agency has (1) rendered an adverse decision, an applicant cannot go to court to protect its rights without (2) going to the appeals board, (3) seeking some conditional use, and (4) seeking a variance. This, four-level process is unnecessary and unrealistic. Indeed, numbers (3) and (4) are not remedies for a denied application. No developer should be required to undertake another type of project when a desired permitted use is denied. No one should be required to seek a variance where a desired permitted use is denied. Besides, doesn't this model code outlaw "use variances"? To make an applicant go through a time-consuming, expensive process and seek approval of projects or uses it has no interest in pursuing before having his or her day in court makes an already burdensome process even more so. This proposed process stands in strong contrast to the rationale articulated in Suitum and Palazzolo.

17. Standing and Intervention – Section 10-607

We strongly oppose allowing any individual who participated at a hearing to have standing to sue or the right to intervene in a lawsuit without having to show "aggrievement" (special injury) (subsection 4). The standard throughout the United States is that special injury must be shown for a person to be "aggrieved" enough to have legal standing. To allow anything less means that a locality's decision can be taken to court at any time by almost anyone and the locality's coffers and all parties in the matter would be involved in expensive and quite probably frivolous litigation.

18. Review and Supplementation of Record – Section 10-613

We strongly oppose allowing a court to supplement the record of the locality's challenged decision (subsection 1(d)). The general rule in the United States is that a court's review is limited to seeing if the locality's decision is based rationally on the record before it. To permit courts to "supplement" the record opens the door to abuse and judicial second-guessing. Under this procedure, the locality will no longer be the final decision-maker based on the facts and plans and policies before it; it will be the courts and those who decide strategically to sue later and bring in "new evidence" during the lawsuit. The courts across the nation have repeatedly opined that they are not planning and zoning boards and do not have the requisite skills to do so. Courts are to review administrative and legislative actions for procedural violations, bias, and arbitrary actions; they are not equipped to know the parameters of local market conditions and planning issues. Indeed, taking the objectionable provisions of Sections 10-604 (Exhaustion of Remedies), 10-607 (Standing) and 10-613 (Supplementation of Record) together, there will clearly be less certainty and greater instability in the land use process. If the goal of the APA is to endorse high hurdles to economic development, then this process should be

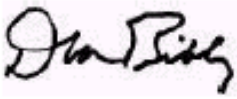
adopted. If, however, the goal of the APA is to have a more balanced planning process, then this proposal is greatly off the mark.

For all of the above reasons, as representatives of the regulated community and private landowners with a deep frustration over the recent "Growing Smart" turn of events at the eleventh hour, we ask that this letter be provided to each of the members of the Directorate prior to their September meeting in Chicago, IL.

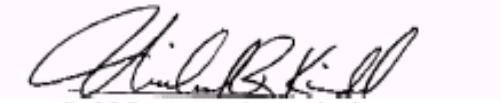
Thank you.

Sincerely,

National Association of Industrial and
Office Properties



National Multi Housing Council



Self Storage Association

T. Peter Quane

American Road & Transportation
Builders Association

cc: David Engel, HUD
Jim Hoben, HUD
Edwin Stromberg, HUD

Enclosure