

# ARTICLES

## DEVELOPMENT-PROCEDURE LAW IN JAPAN: ITS OPERATION AND EFFECTS ON LAW AND ECONOMY

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### INTRODUCTION

The land market in Japan has been the subject of increased scholarship since the collapse of Japan's "bubble economy" in the early 1990s. Many observers have focused on taxation and other financial aspects of land regulation, a focus justified by the fact that the land market played a large role in precipitating the rise and fall of the Japanese bubble economy.<sup>1</sup> Likewise, Japanese administrative procedure has also been the focus of international attention, in light of its significance as a structural trade

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1. See, e.g., Koichi Mera, *The Making of Japan's Failed Land Policy, in UNLOCKING THE BUREAUCRAT'S KINGDOM, DEREGULATION AND THE JAPANESE ECONOMY* 178-203 (Frank Gibney ed., 1998).

impediment.<sup>2</sup> However, there has been scant outside attention paid to the procedural laws regulating land development in Japan. This shortage of research is problematic. Procedural laws regulating land use, particularly approval-procedures for land development, can create significant impacts on a nation's economy. Development procedure law has not only affected Japan's domestic economic efficiency, but has created global effects as well given Japan's status as the world's second largest economy. Furthermore, in the areas of justice and society in Japan, the impacts of development-procedure law are significant and cannot be ignored.

Yet if observers are to suggest solutions for Japan's current land regulation problems, they cannot propose valid answers without a fundamental understanding of the procedural framework governing Japanese land use. This article, therefore, aims to fill the knowledge gap, first by presenting a fundamental explanation of Japanese development-procedure law, and second by analyzing the Japanese law in comparison with U.S. law. The first half of this article will explain procedures required for approval of a development project in Japan. For example, developers conduct meetings with, and ultimately acquire consent from, local residents regarding proposed development projects. These processes are extensive and complex, due to their quasi-legal nature and implementation at various levels of government, and will therefore be discussed in depth. This article will also explain procedures more familiar to U.S. audiences, such as the actual process of applying to the government for approval of a proposed development, and government reviews and determinations on such applications. Post-determination actions, such as government inspections or any appeals by the developer to a determination, will also be discussed.

The second half of this article will analyze both the legal and economic impacts created by Japanese procedural laws and practices by comparing Japan's system with building-permit procedures in the U.S. Specifically, the impacts that such laws and practices have on fundamental legal principles, such as procedural due process, balancing of equities, and the rule of law, will be explored in depth. Related economic issues, such as predictability, consolidation of procedure, documentation requirements,

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2. See, e.g., OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, UNITED STATES CALLS ON JAPAN TO UNDERTAKE SWEEPING REFORMS IN FOURTH ANNUAL SUBMISSION ON DEREGULATION AND COMPETITION POLICY (October 12, 2000); OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, 2001 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (2002).

and timely processing of applications, will also be examined in detail.

Ultimately, by explaining the fundamental development procedures in Japan, and by comparing Japan's system with U.S. paradigms, the author hopes to set the stage for future research into this important yet neglected area of Japanese law, and to stimulate discussion about alternative solutions to challenges stemming from current, conventional approaches.

## CHAPTER 1: OVERVIEW OF JAPAN'S GOVERNMENT AND LEGAL SYSTEM

An examination of Japan's development-procedure laws first requires an understanding of its government and legal systems. A basic overview of these systems follows hereinafter.<sup>3</sup>

The national (or "central") government is composed of a legislature, or "Diet," which enacts all statutory law (including statutes regulating land use).<sup>4</sup> The executive ("administrative" as it is called in Japan) power is vested in a Prime Minister and Cabinet.<sup>5</sup> Subordinate to the Cabinet in the executive branch are 13 administrative ministries and agencies, which because of their expertise in policy and drafting legislation, wield considerable political influence.<sup>6</sup> At the local level, there are 47 prefectures, which are analogous to provinces, and subordinate to the prefectures are municipal and county governments.<sup>7</sup>

Japan has its own particular vertical hierarchy of authority for laws, regulations, and other legal acts. The *Kempo* (Constitution), promulgated in 1947 is the law of highest authority in Japan.<sup>8</sup> Immediately beneath the Constitution in authority are *horitsu* (Diet-enacted statutory laws).<sup>9</sup> Below these statutes at the national level are a variety of *meirei*, or orders and ordinances. In approximate order starting from the highest authority are *seirei* (Cabinet Orders) issued by the Cabinet; *naikaku furei* (orders issued by the Prime Minister individually); and *shorei* and *sori furei* (ordinances issued by the Cabinet heads of the va-

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3. For a more detailed explanation of Japan's system of government, see, for example, Byron Shibata, *Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, WASH. U. J.L. & POL'Y 161, 166-69 (2002).

4. *Id.* at 166.

5. *Id.*

6. *Id.*

7. See, e.g., Shibata, *supra* note 3, at 167.

8. See, e.g., JAPAN: AN ILLUSTRATED ENCYCLOPEDIA, *supra* note 5, at 228-32.

9. See MERYLL DEAN, *ADMINISTRATIVE GUIDANCE IN JAPANESE LAW: A THREAT TO THE RULE OF LAW* (1991), reprinted in *THE GOVERNMENT AND POLITICS IN JAPAN*, 148 (University of Tokyo Press ed., 2nd ed. 1994).

rious ministries).<sup>10</sup> In addition, national government agencies and commissions can create *kisoku*, or regulations. Often, the purpose of the various orders, ordinances, and regulations is to clarify or implement (*shiko*) particular statutes.<sup>11</sup> Examples include *shiko seirei* (implementing orders) and *shiko kisoku* (implementing regulations).<sup>12</sup>

At the local government (prefectural and municipal) level, legislatures can enact *jorei* (ordinances), which are essentially local level statutes.<sup>13</sup> In addition, *kisoku* (regulations) can be created by head local administrative officials and commissions.<sup>14</sup> As with national *kisoku*, local *kisoku* often implement ordinances (*jorei shiko kisoku*).<sup>15</sup>

The aforementioned legislation, orders, and the like have a definite legal status and are enforceable under the law. However, less clear is the status of other supervisory directives (generally referred to as *kunrei*) issued by national and local administrative entities.<sup>16</sup> For example, national ministries and agencies issue *tsutatsu* (written circulars)<sup>17</sup> to delegate responsibilities to subordinate administrative entities such as local governments.<sup>18</sup> At the local level, there are various directives, many of which form the basis for informal *gyosei shido* ("administrative guidance").<sup>19</sup> *Kokuji* ("public notifications") are ostensibly mere announcements, usually to the citizenry, although some notifications are said to be used as a form of regulation or as a basis for administrative guidance.<sup>20</sup> Furthermore, *kitei* were originally internal administrative rules, but have been increasingly used as a basis for administrative guidance.<sup>21</sup> Likewise, *shido yoko* is written "outline guidance" from an administrative entity, and is

10. See, e.g., MASASHI KANEKO ET AL., HORNBOOK ON ADMINISTRATIVE LAW [HONBUKKU GYOSEI HO] 25-27 (2000); HIDEYUKI NAGANO & MASAJI KAWASAKI, ADMINISTRATIVE LAW UNDERSTOOD, [GYOSEI HO GA WAKKATA] 103-06 (2001).

11. See KANEKO, *supra* note 10, at 26.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 27-29.

17. *Id.* at 28.

18. *Id.* *Tsutatsu* are also issued to interpret and clarify provisions of statutes and central-government *meirei*. *Id.* Other inferior administrative bodies would include national administrative entities located in "local areas" (regions outside of Tokyo). *Id.* The author considers the interpretive function of *tsutatsu* and any other such regulatory documents issued by the Japanese bureaucracy to be without parallel in the United States. Although U.S. bureaucracies do have "quasi-judicial" powers, their authority to interpret statutes is limited, as legal interpretation is primarily the duty of the courts.

19. *Id.* at 27-29; NAGANO & KAWASAKI, *supra* note 10, at 107-08.

20. KANEKO ET AL., *supra* note 10, at 27-29.

21. *Id.*

reportedly quite common in the area of construction and land development.<sup>22</sup> Ultimately, such directives, together with their less formal administrative guidance progeny, do not appear to be legally enforceable, although they do have a strong de facto effect.<sup>23</sup> The role of such directives and administrative guidance has been debated, and some sectors in Japan have called for their formalization.<sup>24</sup>

## CHAPTER 2: DEVELOPMENT-APPROVAL PROCEDURES IN JAPAN

### I. JURISDICTION IN JAPAN

Regardless of the level of government at which a parcel of land is regulated, all land-use regulation in Japan ultimately begins at the national level. The national Diet and Cabinet holds ultimate authority over land use, although in practice, the Ministry of Land, Infrastructure, and Transport (hereinafter “Land Ministry”) is the main administrative entity regulating land use.<sup>25</sup> In addition, other ministries can regulate land use when a particular use relates to their respective areas of jurisdiction.<sup>26</sup> The Diet has also delegated much regulatory authority to the prefectures and municipalities. Thus, these three levels of government—national, prefecture, and municipal—each regulate land use to some degree.<sup>27</sup> Often, national laws are generally worded, but form the legal basis for more specific implementing orders and regulations. National laws also form the basis for local governments to create more specific regulations for localized needs, this local authority emanating from the Constitution and the Local Autonomy Law.<sup>28</sup>

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22. *Id.*

23. *Id.* See also CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* 268-71 (1982); Frank Upham, *Privatizing Regulation: The Implementation of the Large-Scale Retail Stores Law*, in *POLITICAL DYNAMICS IN CONTEMPORARY JAPAN* 396-426 (Gary D. Allinson & Yasunori Sone eds., 1993); MITSUO MATSUSHITA, *INTERNATIONAL TRADE AND COMPETITION LAW IN JAPAN*, 196-97 (1993).

24. See KANEKO ET AL., *supra* note 10, at 27-29; NAGANO & KAWASAKI, *supra* note 10, at 107-08.

25. See, e.g., Shibata, *supra* note 3, at 167-68.

26. The Ministry of Agriculture, Forestry, and Fisheries, for example, has jurisdictional authority when a land development affects national land or rivers, and other resources of national interest. See *Id.*

27. See, e.g., Toshi Keikaku Ho [City Planning Law], Law No. 100 of 1968, art. 15 & 22 (Japan) [hereinafter CPL].

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

## II. OVERVIEW OF LAND-USE REGULATION IN JAPAN AND THE DEVELOPMENT-APPROVAL SYSTEM

Japan's national government has a large number of laws that directly and indirectly regulate land use, more than in a given U.S. state.<sup>29</sup> Some laws, such as the Fundamental Land Law and Building Standards Law, are generally applicable to most land in Japan, while others, such as the Large Scale Retail Stores Location Law and Land Expropriation Law, are specialized in nature. However, the City Planning Law (hereinafter "CPL") is the key statute regulating the process for government approval of most proposed land developments. As such, the CPL forms the foundation for various implementing ordinances, regulations, and orders at both the national and local level. These more specific regulations supplement the CPL. In addition, other laws that regulate land development generally, such as the Fundamental Land Law and Building Standards Law, work in conjunction with the CPL.<sup>30</sup>

The CPL has a broad scope; it regulates matters such as city planning, urban development projects, and zoning; promotes balanced, socially beneficial development; and mitigates off-site impacts.<sup>31</sup> Regarding administrative procedure, the CPL creates a "development-approval" (*kaihatsu kyoka*) system, which appears to approximate the building-permit systems typically found in U.S. cities. Specifically, CPL article 29 requires development-approval for any "development act"<sup>32</sup> within Urban Planning Areas (large scale zones that contain most of the developed land in Japan).<sup>33</sup> A "development act" is defined as an activity with the principal purpose of constructing buildings or structures (*ken-*

29. See, e.g., Shibata, *supra* note 3, at 168.

30. In particular, the Building Standards Law is closely related to the CPL. For example, the two laws have highly interconnected regulations on zoning and bulk/density standards.

31. See generally CPL.

32. In Japanese, the term is "*kaihatsu koi*." *Id.* art. 4(12).

33. *Id.* art. 4(12). The Urban Planning Area is the largest zone classification in Japan. Within lands designated as Urban Planning Areas, development is permitted, whereas development outside the Area is highly restricted. Smaller zones (e.g., residential, industrial, and commercial) may be laid over the Urban Planning Areas. See CPL, Law No. 100 of 1968, art. 5. See also TAC ADMINISTRATIVE LAWS AND REGULATIONS RESEARCH GROUP [TAC HOKEI KENKYU KAI], YEAR 2000 REAL PROPERTY APPRAISER BASIC TEXT ADMINISTRATIVE LAWS AND REGULATIONS [2000 FUDOSAN KANTEISHI KIHON TEKISUTO GYOSEI HOKI] 32 [hereinafter TAC BASIC TEXT]; TAC CORPORATION, SHORTEST EXAMINATION PASSING TEXT FOR LAWS AND REGULATIONS ON REAL PROPERTY [FUDOSAN NI KAN SURU GYOSEI HOKI SAITAN GOKAKU TEKISUTO] (Shinichi Aikawa, ed.), 46-48 (2001) [hereinafter TAC PASSING TEXT]. About one-fourth of all land in Japan is located in Urban Planning Areas. See David L. Callies, *Urban Land Use and Control in the Japanese City: A Case Study of Hiroshima, Osaka, and Kyoto*, in THE JAPANESE CITY 136 (P.P. Karan & Kristin Stapleton eds., 1997).

*setsu butsu*), or “particular industrial structures” (*tokutei kosaku butsu*), which change the character of a given area. Examples of Class 1 structures include concrete plants, crushing facilities, and “hazardous” structures such as oil pipelines, ship and aircraft facilities, and electrical facilities.<sup>34</sup> Class 2 structures include exercise and leisure facilities (e.g., gymnasiums and parks) over one hectare in area, zoos, and cemeteries.<sup>35</sup>

Generally, prefectural governors (hereinafter “governors”) approve or deny applications for development.<sup>36</sup> Alternatively, they may opt to delegate this approval authority to the relevant municipal mayor.<sup>37</sup> However, in the special “designated cities,” “commissioned cities,” and “core cities,” mayors rather than governors have exclusive development-approval authority.<sup>38</sup>

### III. EXEMPTIONS FROM THE CPL DEVELOPMENT-APPROVAL PROCEDURE

A variety of development acts are exempt from the CPL development-approval process. CPL article 29 sets forth specific exemptions for 11 development act scenarios in City Planning Areas and Quasi-City Planning Areas.<sup>39</sup> A complete list is set forth in the appendixes of this article, but “in general,”<sup>40</sup> one key exemption encompasses development acts that are a maximum of 1,000 square meters in Urbanization Areas<sup>41</sup> or 3,000 square meters in unzoned (*misenbiki*) City Planning Areas.<sup>42</sup> Most single-family residences and small shops would likely fall under this exemption, which presumably exists because of the relatively minor off-site impacts created by such smaller developments. Likewise, most public infrastructure, buildings for public needs (e.g.,

34. *Id.* See also Toshi Keikaku Ho Shikorei [City Planning Law Implementing Order], Cabinet Order No. 13 of 1969 (Japan), art. 1 [hereinafter CPL Implementing Order]. “Dangerous structures” (*kiken butsu*) are also regulated by other laws such as the BSL, and thus function in coordination with the CPL.

35. CPL Implementing Order, art. 1.

36. CPL, art. 29(1), 87(2). See also *supra* notes 54-55.

37. Chiho Jichi Ho [Local Autonomy Law], Law No. 67 of 1957 (Japan), art. 252 part 17. [hereinafter Local Autonomy Law]. See also GAKUYO SHOBO CORPORATION, YOSETSU FUDOSAN NI KAN SURU GYOSEI HOKI [GENERAL EXPLANATION OF LAWS AND REGULATION ON REAL PROPERTY] 54-55 (Chiaki Kusaka & Kazuhiro Sakamoto eds., 22nd ed. 2000) (1975) [hereinafter General Explanation on Real Property].

38. CPL, art. 29(1), 87(2). See also GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 55.

39. See generally CPL, art. 29.

40. *Id.* The Japanese text uses the term “*gensoku toshite*,” which Japanese nationals often translate as “in principle.” The author, however, considers this translation to have no clear meaning in American English, and believes the best translation to be “generally,” “in general,” “general rule,” “in most situations,” etc.

41. CPL, art. 29(1).

42. *Id.*

schools and hospitals), and public-works activities are also exempt (presumably along the rationale of a sovereign right to develop land, and conduct activities affecting land, for public purposes). In addition to the article 29 exemptions, governors have some authority to grant discretionary exemptions.<sup>43</sup>

#### IV. OVERVIEW OF THE CPL DEVELOPMENT-APPROVAL PROCEDURE

CPL articles 29 through 52, are the key provisions on development-approval procedure. The appendix section of this article includes a summarized list of those key articles. However, in general terms, the CPL requires the following steps: Preliminary consultations with, and consent from, infrastructure managers and local landowners; submission of application for approval; government review of the application; and approval or rejection by the government.<sup>44</sup> If a proposed development is ultimately approved, the developer must keep the government apprised of any changes to the project. The government must publicly announce the completion of construction and must inspect the development. Furthermore, public infrastructure must be installed.<sup>45</sup>

Conceptually, the basic development-approval process can be broken down into three basic stages (although the CPL does not characterize the process in these terms): 1) pre-application "consultations," "explanatory meetings," and "consent-acquisition;" 2) application for development-approval, and government review and determination; 3) and various post-determination actions.

In the first main stage, developers must consult with entities responsible for operating and managing public infrastructure (hereinafter "infrastructure managers").<sup>46</sup> Developers also must acquire consent from infrastructure managers, as well as from individuals whose property rights might be affected by the development.<sup>47</sup> In addition to these initial requirements in the CPL, most local governments mandate some form of "preliminary consultations" with infrastructure managers, and "explanatory meet-

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43. CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 19. Governors can exempt areas over 300 square hectares from the approval requirement. *Id.* In the area known as the *San-Dai-Toshi-En* (the *Shuto*, *Kinki*, and *Chubu* regions in Japan, where much of the nation's population is packed), Governors can sometimes exempt land parcels up to 500 square meters in area. CPL, art. 29 part 2.

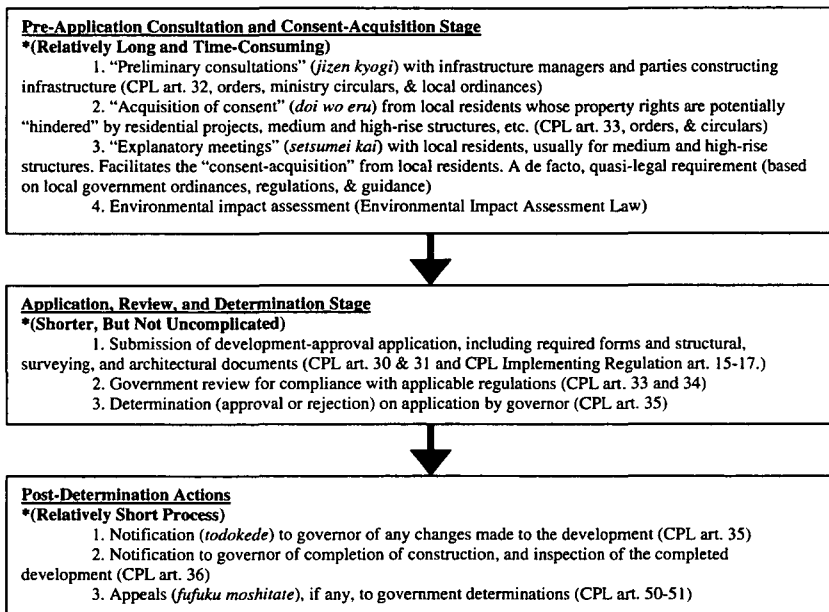
44. See CPL, art. 29-40.

45. *Id.*

46. *Id.* art. 32.

47. *Id.*; CPL Implementing Order, art. 23.

ings” with local residents.<sup>48</sup> (In addition, the separate Environmental Impact Assessment Law sometimes requires an impact assessment of a proposed development.)<sup>49</sup> The second main stage is the actual application and government review process. During this stage, the government requires a large amount of documentation and reviews the documentation for compliance with CPL standards (as well as other standards, such as in construction and safety laws).<sup>50</sup> In the third and final stage, if an application is approved: 1) the developer must notify the governor upon completion of construction; 2) the development must be inspected; 3) the government must make a public announcement of the completion of the construction; and 4) public infrastructure and facilities must be installed.<sup>51</sup> In addition, a developer must generally keep the government apprised of any changes during the development process, such as changes to relevant documents or legal standing.<sup>52</sup> Finally, the CPL sets forth an appeals procedure for rejected applicants.<sup>53</sup> The following chart lays out the general flow of the development-approval process.



48. TAC BASIC TEXT, *supra* note 33, at 64.

49. CPL, art. 32-33. *See also infra* note 78.

50. *Id.* art. 33-35.

51. *Id.* art. 35 part 2.

52. *Id.*

53. *Id.* art. 50-51.

A more detailed discussion of each main stage follows hereinafter.

## V. PRE-APPLICATION CONSULTATION AND CONSENT-ACQUISITION STAGE

Before even applying for development-approval, the national government requires that a developer first consult with, and ultimately acquire development consent from, infrastructure management entities and individuals whose property rights might be "interfered with" (*samatageru*) by the development.<sup>54</sup> The general purpose of requiring consultations and consent-acquisition is to ensure "the smooth operation and planning of development and infrastructure in the relevant area."<sup>55</sup> The CPL, together with some implementing orders and ministerial circulars, sets forth details on the consultation and consent-acquisition requirements.

In addition to these national requirements, many local governments require a developer to explain to local residents the nature of the proposed development—often through public "explanatory meetings"—prior to submission of a development-approval application. Furthermore, many local governments have their own regulations setting forth details for the "preliminary consultations" with infrastructure managing entities.

In the following sections, the central government requirements will be explained first, followed by a discussion of the local government requirements.

### 1. Consultation Process

CPL article 32 requires developers to consult with entities that manage local public infrastructure (hereinafter "infrastructure managers"), prior to a developer's application for development-approval. The purpose of this requirement is to secure "appropriate facilities."<sup>56</sup> Because new developments can "create a need for new investment or have an effect on the structural planning" of such infrastructure, some ministry circulars (*tsutatsu*) have more specific requirements, such as prior consultations with entities managing public schools, water supply, electricity, gas, and rail transportation.<sup>57</sup> In addition to the

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54. *Id.* art. 32; CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 23. In Japanese, "*tekisetsu na shisetsu.*"

55. See CPL Implementing Order, art. 32; TAC BASIC TEXT, *supra* note 33, at 64-65.

56. See CPL, art. 32(3); TAC BASIC TEXT, *supra* note 33, at 64-65.

57. Toshi Keikaku Ho Ni Yoru Kaihatsu Kyoka Seido No Shiko Ni Tsuite [On Implementation of the Development-Approval System Based on the City Planning Law], circular no. 117, 156 of 1969 (from Construction Ministry city bureau chief and

consultation processes with infrastructure managers, CPL implementing order (*shikorei*) 23 requires consultation with parties that will construct new local infrastructure.<sup>58</sup> Some situations also require consultations with, and consent from, national ministries; mainly in situations where there will be an impact on national infrastructure, such as national highways.<sup>59</sup>

## 2. The “Consent-Acquisition” Process Generally

Developers are required to acquire consent (*doi*) for the development from two main groups. One group comprises local government entities, mainly managers of existing or future public infrastructure and facilities.<sup>60</sup> To acquire these entities’ consent, CPL article 32 explicitly requires consultations with infrastructure managers in order to secure “appropriate” infrastructure.<sup>61</sup> In addition to the CPL, some ministry circulars clarify such “consent-acquisition” responsibilities in more specific or complex scenarios, such as in situations involving multiple infrastructure managers of different types of agricultural water supply systems.<sup>62</sup>

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planning chief to prefectural governors), provision 3(2). Note that as part of the restructuring of the Japanese bureaucracy effective in 2001, the Construction Ministry was merged with other ministries into the Land, Infrastructure, and Transport Ministry. See, JAPAN ALMANAC 2002 70 (2001).

58. When a development area is over 20 square hectares, developers must “consult” (*kyogi*) with entities that will build compulsory school (grades 1-12) facilities in the area. See CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 23(1); TAC BASIC TEXT, *supra* note 33, at 64-65. Furthermore, in water-supply areas in development areas over 20 square hectares, developers must consult with any entities constructing water supply projects. CPL Implementing Order, art. 23(2). Any such water supply projects are to be enacted pursuant to article 3(5) of the Water Line Law. *Id.* In development areas over 40 square hectares, a developer must also consult with entities constructing any railroad projects or managing railroad lines. CPL Implementing Order, art. 23(4). Such activities are regulated by the Railroad Projects Law and Railroad Path Law. *Id.* Further, in “supply areas” larger than 40 hectares, entities engaged in general electrical projects or gas projects must also be consulted. CPL Implementing Order, art.23(3). Any such projects are to be developed pursuant to the Electricity Law and Gas Projects Law. *Id.*

59. See, e.g., DEVELOPMENT GUIDANCE SECTION, URBAN LANDSCAPE DIVISION, CITY PLANNING BUREAU, KYOTO CITY, TOSHI KEIKAKU HO NI MOTOZUKU KAIHATSU KYOKA SHINSEI TETSUZUKI NO SHIORI [BOOKMARK FOR DEVELOPMENT-APPROVAL PROCEDURE BASED ON THE CITY PLANNING LAW] 17 (2001) [hereinafter KYOTO DEVELOPMENT-APPROVAL BOOKMARK].

60. The author will use the term “infrastructure” throughout this article to generally refer to roads, public utilities, parks, schools, public halls, and all other developments and engineering works that are for the benefit of the general public.

61. CPL, art. 32(3).

62. Toshi Keikaku Ho Ni Yoru Kaihatsu Kyoka Seido No Shiko Ni Tsuite [On Implementation of the Development-Approval System Based on the City Planning Law], circular no. 117, 156 of 1969 (from Construction Ministry city bureau chief and planning chief to prefectural governors), provision 3(1).

The second main group that the CPL requires consent be acquired from comprises landowners whose property rights will be "interfered with" by the development act or its resulting buildings.<sup>63</sup> The statute's language is rather vague, but some *tsutatsu* provide more clarity. *Tsutatsu* appear to clarify the issue of consent-acquisition in specific scenarios. For example, ministry circulars call for the consent of local residents for any residential projects.<sup>64</sup> Circulars state that such consent should not only relate to issues of noise and environmental damage during construction, but also to details of the development plan itself.<sup>65</sup>

Furthermore, local-resident consent is sanctioned for "medium and high rise structures" (*chu koso kenchiku butsu*), presumably because of the large off-site impacts.<sup>66</sup> As one of the various off-site impacts that are possible, *tsutatsu* single out obstruction of sunlight access as a major consent issue.<sup>67</sup> To prevent obstruction of sunlight, developments should comply with those adjustments on which residents ultimately base their consent. Where necessary, local governments should participate in the process for securing a fair, measured, and smooth development.<sup>68</sup>

### 3. *Local Government Requirements for "Preliminary Consultations" and "Explanatory Meetings" with Infrastructure Managers and Local Residents: General Overview*

Prior to application for development-approval, many local ordinances require "preliminary consultations" (*jizen kyogi*) with local government entities regarding infrastructure issues. Such requirements are consistent with, and complementary to, the CPL article 32 requirements for preliminary consultations with local infrastructure managers.

Regarding the CPL article 33 requirement of consent-acquisition from "individuals with potentially affected rights" (local residents, based on ministry circulars and real-life application), the CPL is unclear as to *when* development consent must be acquired. However, various local governments mandate "explana-

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63. CPL, art. 33(14). The Japanese term in the provision is "*samatageru*," which translates as "interfere," although the author will also use the terms "affect" or "affected."

64. Takuchi Kaihatsu Shido Yoko Ni Kan Suru Sochi Hoshin [On Policy Measures Related to Outline Guidance on Residential Development], circular no. 54 of 1973 (from Construction Ministry administrative vice-minister to prefectural governors), provision (1)(VI)(2).

65. *Id.*

66. *Id.* provision (2)(1).

67. *Id.* provision (2)(1)(2).

68. *Id.*

tory meetings” (*setsumei kai*) with local residents as a prerequisite for application for development-approval pursuant to CPL article 30.<sup>69</sup> These meetings, of course, explain general and specific matters related to a proposed development. However, because some local governments appear to require *de facto* development consent from local residents, explanatory meetings also appear aimed at facilitating and implementing consent-acquisition with local residents. Therefore, consent-acquisition during the explanatory meetings can be construed to be a quasi-legal, *de facto* requirement that implements CPL article 33.

A discussion of “preliminary consultations”—and more importantly, the *de facto* requirement of “consent-acquisition” from local residents during “explanatory meetings”—immediately follows.

#### 4. “Preliminary Consultations” with Public Entities and Infrastructure Managers

Various local jurisdictions in Japan require developers to participate in infrastructure preliminary consultations with the relevant local government (usually with the infrastructure managing entities), in addition to the CPL article 32 requirements. Such jurisdictions set forth specific requirements and procedures via local ordinances and guidelines. For example, Hyogo Prefecture sets forth its own particular development procedures in *shido yoko* titled, “Large Scale Development and Transaction Preliminary Outline Guidance.”<sup>70</sup> Prior to applying for development-approval in Urbanization Control Areas and Unzoned Areas, developers must submit a variety of use and planning diagrams to the prefectural government, followed by preliminary consultations with the Hyogo governor.<sup>71</sup> If the governor rejects the proposal, the developer must consult with the prefecture’s Land-Use Adjustment Deliberation Council.<sup>72</sup>

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69. However, local government requirements for explanatory meetings with local residents may not necessarily include individuals who have property rights that might be affected by the development. Likewise, an “individual with property rights that might be affected by the development,” as defined by article 33 of the CPL, might not necessarily be a “local resident” under the law.

70. Dai Kibo Kaihatsu Oyobi Torihiki Jizen Shido Yoko [Large Scale Development and Transaction Preliminary Outline Guidance], Hyogo Prefecture Notification No. 185 of 1975, art. 3 [hereinafter Hyogo Outline Guidance].

71. *Id.*

72. Proposed golf courses rejected during the gubernatorial consultations must be submitted to the “Golf Course Development Review Council” for adjustments to the course plans. Hyogo Outline Guidance, art. 8.

### 5. "Explanatory Meetings" with Local Residents

Various local governments (but significantly, not the national government) require developers to hold explanatory meetings with local residents, prior to submission of a development-approval application pursuant to CPL article 30. An explanatory meeting usually appears required for large developments with taller buildings, presumably because of their high off-site impacts on the neighborhood and local residents. For example, the Tokyo Metropolitan Government requires explanatory meetings with local residents for any "medium and high rise structures" (*chu koso kenchiku butsu*).<sup>73</sup> Tokyo ordinances define local residents as people living within a distance that is twice the height of the proposed structure,<sup>74</sup> and define medium or high rise structures as those over ten meters, or structures over seven meters or over three stories in Class 1 and 2 Exclusively Low-Rise Residential Zones.<sup>75</sup> The governor "if necessary" can set forth requirements for the subject matter to be explained at the meetings.<sup>76</sup> Tokyo also requires developers to give "sufficient consideration" to potential off-site impacts, to attempt to understand local residents, and to avoid and resolve any problems that might arise.<sup>77</sup>

Similarly, other large cities such as Yokohama, Kyoto, Sapporo, Kawasaki, Kobe, and Chiba City also require some form of explanatory meetings with local residents.<sup>78</sup> Most of these cities

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73. Tokyo-To Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Funso No Yobo To Chosei Ni Kan Suru Jorei [Tokyo Metropolis Ordinance on Prevention of Disputes and Adjustments Related to Medium and High Rise Structures], Ordinance No. 64 of 1978, art. 4 & 6.

74. *Id.* art. 2(4).

75. *Id.* art. 2.

76. *Id.* art. 6.

77. *Id.* art. 4.

78. See Yokohama-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Ju-Kankyo No Hozen To Ni Kan Suru Jorei [Yokohama City Ordinance on Preservation of Residential Environments Relating to Construction of Medium and High Rise Structures and Miscellany], Ordinance No. 35 of 1993, art. 14-26; Sapporo-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Sapporo City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 32 of 2000, art. 13-30; Kobe-Shi No Ju-Kankyo To O Mamori Sodateru Jorei [Kobe City Ordinance on Preserving and Cultivating Residential Environments and Miscellany], Ordinance No. 51 of 1995, art. 16, 37, 38; Kyoto-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Oyobi Keisei Ni Kan Suru Jorei [Kyoto City Ordinance on Preservation and Structure of Residential Environments Relating to Construction of Medium and High Rise Structures], Ordinance No. 1 of 1999, art. 16-31; Kawasaki-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Kawasaki City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 48 of 2000, art. 11-18; Chiba-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Chiba City Ordinance on Pres-

define medium or high-rise structures as those exceeding ten meters in height, although some set the height at 15 meters for non-residential zones.<sup>79</sup> As in Tokyo, the general rule for these cities appears to be that a developer must hold explanatory meetings with local residents within a distance twice the height of the proposed structure.<sup>80</sup> Many of the cities also require explanatory meetings with local residents if they are within a set distance (e.g., 10-15 meters) of the development; if they will have their sunlight access obstructed in the morning and mid-afternoon; or if they will have their television or radio broadcast reception affected by the development.<sup>81</sup>

Even relatively small cities have explanatory meeting requirements. Musashino City in the Tokyo metropolitan area requires developers to hold explanatory meetings with "relevant parties," which presumably includes local residents.<sup>82</sup> Similarly, many of Tokyo's 23 wards have ordinances similar to those of the Metropolitan government, requiring explanatory meetings for medium and high rise buildings (although some wards require

ervation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 53 of 2000, art. 9-22.

79. For example, Yokohama, Kawasaki, and Chiba cities make such a differentiation. See Yokohama-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Ju-Kankyo No Hozen To Ni Kan Suru Jorei [Yokohama City Ordinance on Preservation of Residential Environments Relating to Construction of Medium and High Rise Structures and Miscellany], Ordinance No. 35 of 1993, art. 2; Kawasaki-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Kawasaki City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 48 of 2000, art. 2; Chiba-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Chiba City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 53 of 2000, art. 3.

80. For example, Yokohama, Sapporo, Kobe, Kyoto City, Kawasaki, and Chiba City have such a rule. See *supra* note 78.

81. Kyoto-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Oyobi Keisei Ni Kan Suru Jorei [Kyoto City Ordinance on Preservation and Structure of Residential Environments Relating to Construction of Medium and High Rise Structures], art. 16-31.

82. Musashino-Shi Jutaku-Chi Kaihatsu To Ni Kan Suru Shido Yoko [Musashino Outline Guidance on Development of Residential Land and Miscellany] (1971), art. 5. Musashino has a well-chronicled history of outline guidance and administrative guidance related to construction and development. See Upham, *supra* note 23, at 467; KANEKO, *supra* note 10, at 28. A famous case involves that city's residents, who pressured the municipal government to prevent new buildings from blocking sunlight and ventilation, and to maintain the quality of the neighborhood schools. See Upham, *supra* note 23, at 46. In response to those demands, Musashino and five other municipalities created outline guidance (*yoko shido*), which "recommended" that developers contribute free land for schools and limit building interference with residents' sunlight access. Musashino and other municipalities backed their administrative guidance with threats to withhold water and sewage services, as well as threats of withholding permits for vehicles to reach constructions sites. Later, almost 800 other municipalities issued similar guidance. *Id.*

meetings only when desired by local residents).<sup>83</sup> The wards' regulations approximate those of Tokyo and other major cities in Japan, with similar building-height and resident-area minimums triggering the meetings, protections for sunlight and other air-related interests, and dispute-resolution provisions with executive officials or local mediation councils.<sup>84</sup>

#### 6. "Consent-Acquisition" Through Explanatory Meetings and Associated Problematic Issues

Some local governments appear to require consent from local residents, prior to a developer's application for government approval of a proposed project.<sup>85</sup> It is important to note that the

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83. See, e.g., Tokyo-To Minato-Ku Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Funso No Yobo To Chosei Ni Kan Suru Jorei [Tokyo Metropolitan, Minato Ward, Ordinance on Prevention of Disputes and Adjustments Related to Medium and High Rise Structures and Miscellany], Ordinance No. 15 of 1979, art. 7; Tokyo-To Setagaya-Ku Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Funso No Yobo To Chosei Ni Kan Suru Jorei [Tokyo Metropolitan, Setagaya Ward, Ordinance on Prevention of Disputes and Adjustments Related to Medium and High Rise Structures and Miscellany], Ordinance No. 51 of 1978, art. 7; Ota-Ku Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Funso No Yobo To Chosei Seido [Ota Ward Ordinance on Prevention of Disputes and Adjustments Related to Medium and High Rise Structures], OTA WARD INTERNET OFFICIAL SITE, at <http://www.arcmedia.co.jp/laws/13000/13111.htm>; Tokyo-To Shinjuku-Ku Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Funso No Yobo To Chosei Ni Kan Suru Jorei [Tokyo Metropolitan, Shinjuku Ward, Ordinance on Prevention of Disputes and Adjustments Related to Medium and High Rise Structures and Miscellany], Ordinance No. 48 of 1994, art. 6; BUNKYU WARD INTERNET OFFICIAL SITE, at [http://www.zephyr.dti.ne.jp/~babi/jourei\\_bunyou.htm](http://www.zephyr.dti.ne.jp/~babi/jourei_bunyou.htm); ARAKAWA WARD INTERNET OFFICIAL SITE, at [http://www.city.arakawa.tokyo.jp/6/sumsi\\_soudan/funsou.htm](http://www.city.arakawa.tokyo.jp/6/sumsi_soudan/funsou.htm); Tokyo-To Toshima-Ku Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Funso No Yobo Oyobi Chosei Ni Kan Suru Jorei [Tokyo Metropolitan, Toshima Ward, Ordinance on Prevention of Disputes and Adjustments Related to Medium and High Rise Structures], ordinance 206, art. 6 (1978). As of this writing, some, but not all, of the ward governments (as some municipalities and prefectures) have made such regulations easily available on their Internet official sites. The wards that do not post their regulations electronically necessitate citizens to request such information directly. In the author's experience, city governments usually require the requesting party to physically pick up the information at the relevant government office, although some are willing to mail the information to the applicant.

84. *Id.* Most wards appear to classify structures in the ten meter range as "High Rises," and appear to require meetings for local residents within an area twice the height of the proposed building. Furthermore, the wards appear to desire to protect a wide variety of air-related interests, including ventilation, lighting, and broadcast signals (*denpa*). *Id.*

85. Interviews with Satoshi Murano, Musashino Sekkei Kobo Office, in Tokyo, Japan (Nov. 2, 2001) and in Kyoto, Japan (Nov. 16, 2001); interview with Noboru Ota, Obayashi Gumi Corporation, in Tokyo, Japan (Nov. 25, 2001); interview with Norihide Okazaki, Obayashi Gumi Corporation, in Tokyo, Japan (Nov. 25, 2001). The rationales for requiring consent are unclear and appear to vary from locality to locality. However, the author can offer at least one hypothesis: There appears to be a strong rights consciousness in the area of private property rights. In particular, Japanese nationals appear to have a strong rights-consciousness toward sunlight ac-

consent requirement appears to be a de facto (or at least a quasi-legal) rule rather than a de jure one. Indeed, national ministry circulars stipulate that it would “not be appropriate” for local governments to require a developer to “submit a form evidencing consent from all relevant parties.”<sup>86</sup> Consistent with this, various local ordinances do not require, on their face, that developers acquire consent from local residents. Kawasaki City official materials go so far as to state that “because there is no duty to acquire local resident consent, construction is legally possible even without consent.”<sup>87</sup>

Nevertheless, it is reportedly common for at least some local governments to require, de facto, local-resident consent as a prerequisite for proceeding on to the CPL approval application stage.<sup>88</sup> This practice is consistent with—and appears to facilitate and implement—the CPL article 33 requirement of acquiring consent from “individuals whose rights are interfered with (ostensibly local residents) by a proposed development.” Thus, one of the purposes of explanatory meetings appears to be facilitating consent-acquisition, although again this purpose is not officially stated by local governments.

In one respect, Japanese explanatory meetings appear to approximate the public hearings required for variances and high-impact developments in many U.S. cities. Certainly, there are

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cess, air access, and aesthetic view access. Traditionally, sunlight access was deemed necessary for basic living necessities, such as drying of clothes on outdoor laundry lines (still the preferred method of laundry drying in Japan, based on the author's personal observation). While U.S. landowners are concerned with sunlight access for its various aesthetic values, light access is not generally recognized as a justiciable right (unless expressly provided for by statute). Indeed, the author would venture to conclude that a court would find a landowner selfish in asserting only these interests at the expense of the public good. This general hypothesis tends to contradict the conventional wisdom about “groupism” in Japan versus “individualism” in the United States.

86. See, e.g., Takuchi Kaihatsu Shido Yoko Ni Kan Suru Sochi Hoshin [On Policy Measures Related to Outline Guidance on Residential Development], circular no. 54 of 1973 (from Construction Ministry administrative vice-minister to prefectural governors), provisions 1 (IV)(5), 1(VI)(2), 2(1)(1).

87. See Kawasaki official Internet site, at <http://www.city.kawasaki.jp/50/50kentyo/home/chukoso/q&a7.htm>. However, the materials make this statement only in the context of “the BSL and related laws and ordinances.” Further, the materials emphasize the word “legally” (*hoteki ni wa*), perhaps leaving open the possibility that consent might be required beyond statutes or ordinances. *Id.*

88. See, e.g., *Unkind Cut: A Court Ruling To Preserve A Scenic View Brings Both*, ASAHI SHINBUN, Dec. 20, 2002, <http://www.asahi.com/english/national/K2002122000368.htm>. Furthermore, a Japanese court, apparently for the first time, criticized a developer's argument that it was under no obligation to hold talks with local residents. See *Court Orders Developer to Lob a Building in Half*, ASAHI SHINBUN, Dec. 19, 2002, <http://www.asahi.com/english/national/K2002121900467.htm>. See also interviews with Satoshi Murano, *supra* note 85; interviews with Noboru Ota, *supra* note 85; interviews with Norihide Okazaki, *supra* note 85.

similarities in that both are public forums for relevant parties—particularly local residents who might be impacted by a proposed development—to obtain factual information and express their views on a proposed development. There are, however, fundamental differences. The main purpose of U.S. hearings is usually to gather information from various parties in order for a legislative or administrative body to make an informed decision on a particular application<sup>89</sup> and thus avoid erroneous findings of fact or applications of law.<sup>90</sup> In Japan, however, explanatory meetings for local residents also appear to facilitate the acquisition of local-resident consent to a development project. Indeed, the tendency for local Japanese administration to avoid direct management of explanatory meetings in development-approval applications<sup>91</sup> is evidence that such meetings are not for government decision-making, but rather are for communication with local residents.

#### 7. *Problematic Issues That Arise From Requiring Consent-Acquisition During the Explanatory Meetings*

Local governments appear to have traditionally avoided managing the consultation and consent-acquisition processes.<sup>92</sup> Local governments usually participate in the interactions between developers and local resident only if a conflict arises.<sup>93</sup>

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89. See, e.g., PORTLAND, OR., PLANNING CODE ch. 33.730 (1970); CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.7-11.9 (1923).

90. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); *Carey v. Phipps*, 435 U.S. 247, 259 (1978); DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW, THEMES FOR THE CONSTITUTION'S THIRD CENTURY 543 (2d ed. 1998) [hereinafter CONSTITUTIONAL LAW].

91. Interviews with Satoshi Murano, *supra* note 85; interview with Noboru Ota, *supra* note 85; interview with Norihide Okazaki, *supra* note 85.

92. The reasons for such behavior are unclear, but some observers believe that the tendency among the modern bureaucracy has been to avoid taking responsibility for fine-line issues. See, e.g., MASAO MIYAMOTO, YAKUSHO NO OKITE [RULES OF BUREAUCRATS] 139-56, 193-219 (1993). Others also note a strong deference to the desires of the citizenry in the land-use arena. Interview with Satoshi Murano, *supra* note 85. While deference to the desires of the citizenry is arguably positive in a democracy, the strong tendency toward risk avoidance has led to a vacuum of leadership in Japanese land use—a field, as in the U.S., that has a heavy delegation to local administration and thus a need for strong leadership by local bureaucracies. This practice also contradicts the traditional views of Japanese bureaucracy as a strong, elite institution steeped in a Confucian and Tokugawa-era tradition.

93. Many city ordinances appear to require government participation in the process only when a conflict (*funso*) arises between a developer and local residents. Such involvement would generally involve a mayor or local public mediation council (*chotei-iinkai*) providing mediation (*chotei*) or “public servicing” (*assen*; dispute resolution that is effectively the same as mediation). See, e.g., Yokohama-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Ju-Kankyo No Hozen To Ni Kan Suru Jorei [Yokohama City Ordinance on Preservation of Residential Environments Relating to Construction of Medium and High Rise Structures and Miscellany], Ordi-

This practice appears to have historical precedent; Japanese bureaucrats have traditionally placed such burdens entirely upon private developers in other areas of economic regulation.<sup>94</sup> Ultimately, the process becomes, in effect, a private process without public oversight.<sup>95</sup>

The disappearance of the Japanese bureaucracy during the explanatory meeting process can become problematic on both a legal and pragmatic level. On a legal level, the process is problematic because it arguably compromises due process, the rule of law, and basic equity by vesting interest groups with *de facto* veto authority over development applications (and thereby creating an extra layer of public approval authority). On a pragmatic level, the process has often played out with local residents in a stronger bargaining position than developers—because local governments tend neither to apply pressure nor provide incentives for residents to compromise.<sup>96</sup> Consequently, developers can expend considerable time and resources to acquire local residents' consent to a proposed project. A long, drawn out process of negotiation between developers and local residents can be avoided, but usually the developer must change its project plan to satisfy local residents, and thereby acquire consent quickly. Relatively smooth acquisition of consent appears possible, especially with developers skilled at “politicking” local resident groups and bu-

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nance No. 35 of 1993, art. 14-26; Sapporo-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Sapporo City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 32 of 2000, art. 13-30; Kobe-Shi No Ju-Kankyo To O Mamori Sodateru Jorei [Kobe City Ordinance on Preserving and Cultivating Residential Environments and Miscellany], Ordinance No. 51 of 1995, art. 16, 37, 38; Kyoto-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Oyobi Keisei Ni Kan Suru Jorei [Kyoto City Ordinance on Preservation and Structure of Residential Environments Relating to Construction of Medium and High Rise Structures], Ordinance No. 1 of 1999, art. 16-31; Kawasaki-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Kawasaki City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 48 of 2000, art. 11-18; Chiba-Shi Chu Koso Kenchiku Butsu No Kenchiku Ni Kakaru Ju-Kankyo No Hozen Ni Kan Suru Jorei [Chiba City Ordinance on Preservation and Adjustments Relating to Construction of Medium and High Rise Structures], Ordinance No. 53 of 2000, art. 9-22.

94. The virtual absence of the Japanese bureaucracy from explanatory meetings with landowners is by no means limited to land development situations. The well-chronicled mandatory consultations with residents in establishment of large retail stores has reportedly followed the same pattern. *See, e.g.*, Upham, *supra* note 23, at 285. This pattern of behavior may be systemic throughout the Japanese bureaucracy's regulation of the economy.

95. *Id.*

96. Interview with Satoshi Murano, Musashino Sekkei Kobo Office, in Kyoto, Japan (Nov. 16, 2001), *supra* note 85.

reaucrats, but lengthy negotiations appear more common.<sup>97</sup> Following sections of this article present a more detailed discussion of these problems.

#### 8. *Consequences for Developers If They Do Not Acquire Consent From Local Residents*

Because of the “explanatory meetings” and related de facto consent requirements, local bureaucracies could conceivably refuse receipt of an application if a developer fails to acquire local-resident consent.<sup>98</sup> Refusal of an application is particularly conceivable in jurisdictions, such as Yokohama and Kyoto City, which provide, as part of an application package, official forms for evidencing local-resident consent.<sup>99</sup> Beyond refusing applications, however, it is unclear what kind of persuasive or punitive mechanisms a local government has at its disposal to deal with those who do not acquire consent.

Local governments aside, local residents can sometimes be aggressive in enforcing the consent-acquisition requirement. Besides the obvious informal political pressures they can exert, local residents have in at least one case resorted to the courts to assert their interests. In a recent suit brought by the local residents of Kunitachi City in western Tokyo, developer Meiwa Land Corporation built a 43-meter tall condominium complex without acquiring consent from all local residents.<sup>100</sup> The Tokyo District

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97. See Glenn Newman, *An American Lawyer in Yokohama: The Regulation of Business in Japan*. Speech at the International Law Section of the Oregon Bar Association (Dec. 13, 2001) (transcript on file with author). Newman’s article was the only source the author discovered that described a quick consent-acquisition process.

98. The Japanese national bureaucracy, at least, has a history of stalling private parties, such as by refusing applications and notifications, often for the purpose of complying with administrative guidance (*gyosei shido*). See, e.g., MATSUSHITA, *supra* note 23, at 54; Mark Levin, *Bureaucratic Sumo Wrestling*, *ASIAN L.J.* 16-17 (1996); ROY LARKE, *JAPANESE RETAILING* 8 (1994).

99. See, e.g., Kyoto-Shi Toshi Keikaku Shiko Saisoku [Kyoto City Urban Planning Detailed Implementation Regulation], Regulation No. 110 of 1971, form no. 2; Yokohama-Shi Chu Koso Kenchiku Butsu To No Kenchiku Ni Kan Suru Ju-Kankyo No Hozon To Ni Kan Suru Jorei [Yokohama City Ordinance on Preservation of Residential Environments, Relating to Medium and High Rise Structures], Ordinance No. 35 of 1993, form no. 3. Reportedly, the City of Kobe also had such a documentation requirement in the past but has since discontinued it.

100. *Kenchiku Butsu Tekkyu No Seikyuu To Jiken (Case of A Demand for Removal of a Structure Et Al.)* Wa 6273 (Tokyo District Court., Dec. 18, 2002), at <http://www.linkclub.or.jp/~erisa-25/kosakuin/warehouse/kunitati/kousaihanketu.htm> (last visited Jan. 25, 2003). There appear to be few media-documentation of such outcomes, although cases such as *Meiwa Jisho* provide excellent insights into this phenomenon. Furthermore, the Tokyo District Court, apparently for the first time, criticized a developer’s argument that it was under no obligation to hold talks with local residents. See also Nao Shimoyachi, *Yokohama Neighborhood Seeks to Put Lid on Condos*, *THE JAPAN TIMES*, Aug. 6, 2002, <http://www.japantimes.com/cgi-bin/>

Court ordered the removal of the top 23 meters of the complex, along with monetary compensation to three residents.<sup>101</sup> However, as the Kunitachi City case is new, unique, narrow, and decided below the Supreme Court level, case law on this issue is far from clearly established.<sup>102</sup>

Because of the quasi-legal nature of the consent-acquisition requirement, the consequences of non-compliance are unclear. Because the requirement is *de facto*, rather than *de jure*, statutory laws and regulations do not contain clear penalties. Furthermore, despite the recent Kunitachi City decision, judicially created law is not well established, and it is therefore unclear what recourse a local resident would have to the courts if she withholds consent, but a developer nonetheless sidesteps her and begins construction.<sup>103</sup>

#### 9. *Reasons for Developers' Compliance With the Quasi-Legal, De Facto Consent-Acquisition Requirements*

Despite (or perhaps because of) uncertainties surrounding the consent requirement, developers generally attempt to comply. One explanation for this phenomenon might be because of the historical tendency of Japanese private parties to comply with bureaucratically imposed regulatory demands.<sup>104</sup> A pragmatic factor might be that although such requirements can be burdensome, and at times even onerous, developers usually are able to acquire consent. This is particularly true of developers who are politically adept at maneuvering through the delicate negotiations involving local-resident associations and local bureaucrats.<sup>105</sup> Very often, local residents appear reasonable in their dealings with a proposed development and consent if a develop-

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getartcile.pl5?nn20020806bl.htm; *Court Orders Complex to Lost Seven Floors*, THE JAPAN TIMES, Dec. 19, 2002, <http://www.japantimes.com/cgi-bin/getartcile.pl5?nn20021219al.htm>; *supra* note 88.

101. *Id.*

102. The case cited specific reasons for finding a new interest in "urban views," including the historic (dating back to Japan's Taisho Era (1912-1926) nature of the University Boulevard, where the disputed condominium was located, and the "cooperative" understanding among local residents to limit treetops and buildings to 20 meters. *Id.*

103. There have reportedly been civil cases wherein individual local residents have lost in attempts to enjoin developments on purely aesthetic grounds. Interview with Norihide Okazaki, *supra* note 85.

104. See, e.g., Frank Gibney, *The Making of Japan's Failed Land Policy*, in UNLOCKING THE BUREAUCRAT'S KINGDOM, *supra* note 1, at 9; Johnson, *supra* note 23, at 33-62; Newman, *supra* note.

105. See Newman, *supra* note. A "quid pro quo" method appears necessary to speed up the process. Newman points to "cozy relationship" between bureaucrats, developers, and residents. *Id.* This relationship appears similar to the "iron triangles" that exist in the U.S.

ment does not interfere unreasonably with their property rights, personal lifestyles or create unreasonable off-site impacts or nuisances.<sup>106</sup>

On the other hand, as previously explained, some residents appear more assertive in promoting their personal interests and opposing construction by refusing to give consent.<sup>107</sup> Although there have been rare cases of developers quitting a project altogether because of a few or even a single objecting neighbor,<sup>108</sup> even in these more onerous situations, a developer generally can resolve the objections and acquire an opposing resident's consent. One common solution is for the developer and local residents to agree to monetary compensation for any nuisance or inconvenience.<sup>109</sup> Alternatively, a developer might make relatively minor alterations to a project.<sup>110</sup> "Minor" changes, however, reportedly can include lopping a floor or two off of a structure, or altering the position of a building.<sup>111</sup> Yet another technique is to simply persuade an individual through earnest effort and a commitment to a long process of numerous consulta-

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106. Interviews with Satoshi Murano, *supra* note 85; interviews with Norihide Okazaki, *supra* note 85.

107. *See supra* note 100; interviews with Satoshi Murano, *supra* note 85; interview with Noboru Ota, *supra* note 85; interview with Norihide Okazaki, *supra* note 85.

108. Interviews with Satoshi Murano, *supra* note 85.

109. *Id.* The amount of such compensation appears to be based on what amount happens to be common in the industry at a given time. Thus, although in the past there were occasionally unusually large amounts requested by neighboring landowners, since the onset of the recession in the early 1990s, the amounts have appeared to be generally reasonable and consistent. *Id.* Increasing levels of development over the years, resulting in increased tolerance by the public about what constitutes a "reasonable" level of development, also seems to be a factor in lowering monetary compensation amounts. Interview with Satoshi Murano, Musashino Sekkei Kobo Office, in Tokyo, Japan (Nov. 2, 2001). The author also surmises that the ultimately weak legal position of landowners is another factor that has promoted settlements.

110. One example of such a compromise, albeit between neighbors, involved a resident of Meguro Ward, Tokyo, who sued a neighbor over sunlight blocked by the neighbor's new residence. Although the Tokyo High Court in 1996 ordered lowering of the roof by about 60 centimeters, the final adjustment to the roof came only when lawyers between the two parties worked out a compromise lowering the roof about 15 centimeters. *See Unkind Cut: A Court Ruling To Preserve A Scenic View Brings Both*, *supra* note 100.

111. Interviews with Satoshi Murano, Musashino Sekkei Kobo Office, in Kyoto, Japan (Nov. 16, 2001); Noboru Ota, Obayashi Gumi Corporation, in Tokyo, Japan (Nov. 25, 2001); Norihide Okazaki, Obayashi Gumi Corporation, in Tokyo, Japan (Nov. 25, 2001). *See also Unkind Cut: A Court Ruling To Preserve A Scenic View Brings Both*, *supra* note 100. According to the article, developers "admit that the most delicate aspect of putting up an apartment complex is dealing with the neighbors. Most, eventually, proceed, perhaps by reducing the building height to avoid never-ending negotiations." *Id.* In at least one case, one central Tokyo neighborhood association reportedly compelled a developer to cut five floors from an original plan for a 26-story apartment complex. *Id.*

tions.<sup>112</sup> Such private resolution methods are not unusual because some local bureaucracies have been extremely reluctant to allow a developer to submit a development application without local resident consent.<sup>113</sup>

In addition, to facilitate smooth consent-acquisition, developers sometimes conduct "initial surveys" and "initial communications" with local residents, even prior to the mandatory explanatory meetings.<sup>114</sup> Such initial communications smooth out subsequent meetings and the consent-acquisition process by identifying issues and planning appropriate courses of action.<sup>115</sup> Although "initial communications" are not required by law or mandated by government in any way, they appear common for larger, high-impact developments.<sup>116</sup>

Ultimately, although consent-acquisition is an achievable goal, the associated initial communications and explanatory meetings can be difficult. Thus, this procedural stage often becomes the most time-consuming and burdensome steps in the entire development process.<sup>117</sup> Indeed, when a local government requires de facto consent, local residents can at the very least impede the process for a considerable length of time.<sup>118</sup> In more extreme situations, as previously explained, a party might request compensation for any nuisance or impacts or minor alterations to a project. Ultimately, whatever approach a developer chooses, local-resident consent is acquired with considerable burden on a developer's time, personnel, and resources.

## 10. *Environmental Impact Assessments*

Some developments also require an environmental impact assessment prior to the application process. Although a detailed discussion is beyond the scope of this article, fundamental assessment standards are set forth in the national Environmental Impact Assessment Law. In general terms, the law requires developers to predict, prior to construction, the impact of certain

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112. Interviews with Noboru Ota, *supra* note 85; interview with Norihide Okazaki, *supra* note 85.

113. Interviews with Satoshi Murano, *supra* note 85; interview with Noboru Ota, *supra* note 85; interview with Norihide Okazaki, *supra* note 85.

114. *Id.* For sake of convenience, the author himself created the term "initial communications" to refer to such activities.

115. *Id.*

116. *Id.*

117. See, e.g., *Unkind Cut: A Court Ruling To Preserve A Scenic View Brings Both*, *supra* note 100.

118. *Id.* See also interviews with Satoshi Murano, *supra* note 85; interview with Noboru Ota, *supra* note 85; interview with Norihide Okazaki, *supra* note 85.

types of development acts on the environment.<sup>119</sup> Essentially, large-scale, high-impact developments—such as new residential subdivision projects, distribution areas, and industrial parks—trigger the assessment requirement.<sup>120</sup> Public developments such as large roads, railroads, power plants, airports, and dams also fall under the law.<sup>121</sup> The process involves multiple parties and numerous reports. The law requires a developer to draft three main reports: An Environmental Impact Assessment Method Report, an Environmental Impact Assessment Preparatory Report, and a final Environmental Impact Assessment Report.<sup>122</sup>

At the local level, many prefectures and major cities create their own assessment systems based on the Environmental Impact Assessment Law.<sup>123</sup> For example, Tokyo Metropolis has established a system which appears aimed at clarifying the Assessment Law, creating implementation systems, and setting rules for particular local needs.<sup>124</sup>

## VI. APPLICATION, REVIEW, AND DETERMINATION STAGE

### 1. *Development-Approval Application Process*

After acquiring local-resident consent via explanatory meetings, developers may then apply for development-approval. In order to receive the governor's approval, a developer must submit an application package containing a variety of documents<sup>125</sup> as required by CPL article 30 and CPL Implementing Regulation articles 15, 16, and 17. Required documentation includes structural, surveying, and architectural diagrams subject to detailed technical specifications, such as diagrams depicting the proposed development from a variety of angles,<sup>126</sup> or preparation by a certified architectural professional.<sup>127</sup> CPL Implementing Order article 15 requires the developer to state the purpose of the proposed structure, as well as the start and completion dates of

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119. See Kankyo Eikyo Hyoka Ho [Environmental Impact Assessment Law], Law No. 851 of 1998.

120. *Id.*

121. *Id.*

122. ENVIRONMENTAL IMPACT ASSESSMENT INVESTIGATION ROOM, ENVIRONMENTAL MANAGEMENT DIVISION, ENVIRONMENTAL PRESERVATION BUREAU, TOKYO METROPOLITAN GOVERNMENT, TOKYO KANKYO EIKYO HYOKA SEIDO (TOKYO METROPOLITAN GOVERNMENT ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM) 7 (2000) [hereinafter TOKYO ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM].

123. See, e.g., Kagoshima University Internet site, at <http://www.joreimaster.leh.kagoshima-u.ac.jp>.

124. See generally TOKYO METROPOLITAN GOVERNMENT ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM, *supra* note 122.

125. CPL, Law No. 100 of 1968, art. 30.

126. CPL Implementing Order 16 & 17.

127. E.g., CPL, art. 30(1), 30(2), 31.

construction. Evidence of consultations and consent from public infrastructure managing entities is also required.<sup>128</sup> The CPL's more esoteric requirements include documentation evidencing the qualifications of the relevant architect and construction entity.<sup>129</sup> In addition to these national requirements, local governments through ordinances and other regulations can require additional documentation.<sup>130</sup>

## 2. *Government Reviews for Compliance with Development Regulations (Including CPL Articles 33 and 34)*

Although specific construction standards are set forth in the BSL, CPL articles 33 and 34 set forth some general standards governing most development acts. Summarized lists of the article 33 and 34 standards are included in the appendixes of this article.

The article 33 development-approval standards apply to three main types of development acts: acts in Urbanization Areas and unzoned (*misenbiki*) City Planning Areas; acts with the "primary purpose" of constructing Class 2 particular industrial structures in Urbanization Control Areas developments; and acts with the primary purpose of constructing Class 1 particular industrial structures in Urbanization Control Areas.<sup>131</sup> The article 33 standards are relaxed for persons who develop their own house or place of business,<sup>132</sup> but are less relaxed if such developments are over one square hectare.<sup>133</sup>

The article 34 standards supplement article 33. A governor shall not approve a development act unless the act conforms to one of the scenarios listed in article 34.<sup>134</sup> However, these standards only apply to development acts in Urbanization Control Areas (but generally do not apply to development acts for Class 2 particular industrial structures).<sup>135</sup>

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128. *Id.* art. 30(2).

129. *Id.* 30(4) & 31.

130. *See, e.g.*, KYOTO DEVELOPMENT-APPROVAL BOOKMARK, *supra* note 59, at 15-18; Osaka Prefectural Government Internet official site, at <http://www.pref.osaka.jp/kenshi/yasasiku/aramasi.htm>.

131. TAC BASIC TEXT, *supra* note 33, at 65. Inside Urban Planning Areas, a governor (or sometimes the Land Minister) must decide lands into either Urbanization Areas or Urbanization Control Areas. CPL, art. 7. Inside Urbanization Areas, development is officially promoted. *Id.* Development within Urbanization Control Areas is discouraged, although further zoning (and therefore development) is permissible in rare circumstances. *Id.* art. 7. Furthermore, governors can refrain altogether from applying either zone classification, and leave land unzoned as a "*misenbiki*" area. *See, e.g.*, TAC PASSING TEXT, *supra* note 33, at 47.

132. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 56-58.

133. *Id.*

134. art. 34.

135. *Id.*

The CPL authorizes the national government, through Cabinet Orders, to set technical regulations necessary for implementing the article 33 standards.<sup>136</sup> Also, the CPL authorizes local governments to enact ordinances that strengthen the article 33 standards or harmonize its supplementing technical regulations.<sup>137</sup> A local government may do so if, in consideration of the locality's environment and its unique character, it determines that it would be "difficult" (*konnan*) to plan for environmental protection and prevention of natural disasters, or that such an ordinance would not affect environmental protection and disaster prevention measures.<sup>138</sup> Local governments may also, if they determine it necessary to preserve the environment and character of residences in the locality, pass ordinances regulating the minimum plot area of buildings in the development area.<sup>139</sup>

Ultimately, the governor must approve a proposed development if it conforms with the article 33 and 34 standards, as well as the CPL and any implementing ministerial orders (*meirei*).<sup>140</sup>

### 3. Government Review of Development Applications

As previously explained, prefectures or designated cities are the main authorities for approving development applications. Generally, once a development application is submitted, it will be circulated through numerous government sections, departments, and bureaus, where the application will be reviewed for compliance with relevant laws and ordinances.<sup>141</sup> Reviews will, as a matter of course, cover key planning and construction laws such as the CPL and BSL.<sup>142</sup> However, there are many other laws that might control depending on the particular scenario, and a large number of government bureaus might be involved as a result.<sup>143</sup>

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136. *Id.* art. 33(2).

137. *Id.* art. 33(3), (4).

138. *Id.*

139. *Id.*

140. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 56.

141. Interviews with Shozo Nakayama, Residential Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001); Hisanari Kameyama, Construction Guidance Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001); Hisanari Hamano, City Planning Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001).

142. *Id.*

143. For example, the Natural Parks Law requires central government approval for developments impacting national parks, while the Road Law requires central government approval for developments impacting national highways and other roads.

#### 4. Timeframes for Approval

The CPL does not impose time limits on the development-approval process. Furthermore, Japan's Administrative Procedure Law merely requires that the administrative processing commence "without delay,"<sup>144</sup> and that administrative agencies set and publicize standard timeframes for normal processing and determinations on applications.<sup>145</sup> Furthermore, the law applies mainly to the national government, while generally exempting local administrative bodies from its requirements.<sup>146</sup>

The Construction Ministry (now part of the Land Ministry) issued a public notification (*kokuji*) to governors urging local governments to strive for "smooth and efficient" processing of applications.<sup>147</sup> Furthermore, the notification calls on local governors to set standard processing timeframes<sup>148</sup> from initial acceptance of an application to final decision, and encourages local governments to "generally" stay within those timeframes.<sup>149</sup> Some local governments apparently set and strive to observe such time standards. For example, many cities in Kyoto Prefecture have internal rules and guidelines with timeframes for processing applications.<sup>150</sup> Those cities reportedly attempt to stay within these limits for most developments.<sup>151</sup> Processing applications within such timeframes is reportedly a realistic goal, as applications at that point are entirely within the government's control—a marked contrast to the consultation and consent-acquisition process, which is effectively controlled by private par-

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144. Gyosei Tetsuzuki Ho [Administrative Procedure Law], Law No. 88 of 1993, art. 7 [hereinafter Administrative Procedure Law].

145. *Id.* art. 6.

146. Most local administrative entities are exempt from the law. *Id.* art. 2(2). There are many specific exemptions for central government administrative entities as well. *See id.* art. 2.

147. *See generally* Kaihatsu Kyoka Ni Kan Suru Jimu To No Jinsoku Na Shori Ni Tsuite [On Fast Processing by Administration and Miscellany in Relation to Development-Approval], notification no. 29 of 1982 (from Construction Ministry planning bureau chief to prefectural governors), provision 1. The notification actually uses the terms "*jinsoku to enkatsu*," which more literally translated means "fast and smooth."

148. *Id.* provision 1(5).

149. The statute uses the term "*gensoku toshite*." *Id.* As explained previously, the term does not connote a bright-line mandatory rule. *See supra* note 40.

150. Interviews with Shozo Nakayama, Residential Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001); Hisanari Kameyama, Construction Guidance Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001); Hisanari Hamano, City Planning Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001).

151. *Id.*

ties.<sup>152</sup> More detailed explanations of such local standards are presented in later sections of this article.

5. *Determinations (Shobun) on Development Applications: Approval or Rejection*<sup>153</sup>

Governors are required to approve or reject applications "without delay"<sup>154</sup> and in writing.<sup>155</sup> If the governor rejects the application, he must provide the reasons for the rejection.<sup>156</sup> If the governor approves, he must prepare a record of the approval and keep it on public file.<sup>157</sup> This written registry must include the date of approval, the type of structure, the type, location, and area of public facilities, and reasons for approval.<sup>158</sup> Ministerial orders may also set other required items for this approval registry.<sup>159</sup>

## VII. POST-DETERMINATION ACTIONS

### 1. *Changes During Construction of the Approved Development*

If a developer makes any changes to the development plans after they are approved, she must notify the governor of such changes. For example, the developer must notify the governor if she stops construction.<sup>160</sup> Notification is also required if the developer transfers to another party the rights in an approved development. However, the relevant governor must officially recognize the transfer and change in the party's legal status for those approval rights to vest in the transferee.<sup>161</sup> Major changes (e.g., location, building type, architectural plans) to an already approved development act requires the governor's approval,<sup>162</sup> and the developer must submit a revised application document including any items required by Land Ministry ministerial ordinance.<sup>163</sup> However, some minor changes do not require gubernatorial approval, but rather only a notification (*todokede*) to the

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152. Interview with Satoshi Murano, Musashino Sekkei Kobo Office, in Kyoto, Japan (Nov. 16, 2001).

153. CPL, Law No. 100 of 1968, art. 35.

154. *Id.* art. 35(1).

155. *Id.* art. 35(2).

156. TAC BASIC TEXT, *supra* note 33, at 70.

157. CPL, art. 46, 47(1)-(4). In addition, the government must honor requests to access the approval document by showing a copy of the approval. *Id.* art. 47(5).

158. *Id.* art. 46, 47.

159. CPL Implementing Order, art. 47(1)-(6).

160. CPL, *Id.* art. 38.

161. *Id.* art. 44, 45.

162. *Id.* art. 35(2), (1).

163. *Id.* art. 35 part 2(2).

governor of the developer's changes.<sup>164</sup> Such notifications must be made "without delay."<sup>165</sup>

## 2. *Notification to Governor of Completion of Construction, and Inspection of the Completed Development*

The relevant party must notify the governor upon completion of the development activity.<sup>166</sup> Thereafter, the governor must order an inspection of the completed structure "without delay" to confirm whether it conforms to the previously approved construction plans.<sup>167</sup> If the structure passes inspection, the governor is required to issue a formal certificate of inspection approval<sup>168</sup> and make a public announcement of the completion of construction, again "without delay."<sup>169</sup>

## 3. *Public Infrastructure*

The CPL also regulates management and control (*kanri*) of any public infrastructure built in connection with a development act. Management of such facilities vests in the city the day after public announcement of the completion of construction.<sup>170</sup> Under some circumstances, an entity other than the city (e.g., prefectures or the nation) may vest with management authority.<sup>171</sup>

## 4. *Appeals to Administrative Decisions*

The CPL provides a procedure for appealing rejections. Pursuant to article 50, a party may submit a "plea of appeal"

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164. *Id.* art. 35(2)(3); CPL Implementing Regulation, Construction Ministry Ordinance No. 49 of 1969, art. 28(4); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 60.

165. *Id.* Changes requiring only notifications are 1) changes in the planned shape of the floor area, although such changes are not exempt if they: i) increase floor area by more than ten percent, or ii) increase floor area by more than 1,000 square meters (but parties building structures for their own residence or personal business use are generally exempted from this requirement); 2) the following development acts on land plots less than one square hectare: i) development acts for the primary purpose of constructing one's own home, ii) construction of one's own place of business; 3) changes to the construction party's name and address; and 4) changes in construction start and completion dates. *Id.* See also TAC BASIC TEXT, *supra* note 33, at 71.

166. CPL, art. 36.

167. *Id.*

168. *Id.* The certification requirement must comply with any relevant ministerial ordinances. *Id.*

169. *Id.* art. 36.

170. *Id.* art. 39.

171. In general, the infrastructure's land will also vest in the entity that will manage the infrastructure. See *Id.* art. 40(2); GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 63.

(*fufuku moshitate*) and request a prefectural Development Review Council (*kaihatsu shinsa kai*) to review the decision.<sup>172</sup>

Unlike with other stages in the CPL, the appeals process has some mandatory time limits. The relevant Development Review Council must make a determination on the disputed decision within two months of accepting a plea of appeal,<sup>173</sup> (although according to the Administrative Appeals Review Law, a decision to reverse an initial government decision is generally valid only if made within 30 days of the original rejection.<sup>174</sup>) The Council must hold a public hearing and hear the oral testimony of the petitioner, the entity that rejected the application, and other "related" parties or their representatives.<sup>175</sup> If a party is still aggrieved after review by the Council, it may appeal the administrative decision to the Land Minister.<sup>176</sup> A party may appeal to the courts only after exhausting all administrative appellate remedies.<sup>177</sup>

### CHAPTER 3: COMPARATIVE ANALYSIS OF DEVELOPMENT-APPROVAL AND PERMITTING PROCEDURES—SIMILARITIES

This article so far has described the overall flow of administrative procedures for acquiring development-approvals and permits. In Japan, developers must submit a development-approval package with information related to the development, including various technical diagrams and documentation. This process appears to parallel the initial steps in the building-permit process for U.S. cities such as Chicago, Illinois; Portland, Oregon; and Houston, Texas; cities representative of the many regulatory approaches found in the U.S.<sup>178</sup> The next stage in both countries generally calls for government review of the proposed development to ensure compliance with substantive land-use regulations.

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172. CPL, Law No. 100 of 1968, art. 50. "*Fufuku*" in Japanese appears to be usually translated as "dissatisfaction" or "objection," but the author considers the term "appeal" more appropriate in this context.

173. *Id.* art. 50(2).

174. *Id.* art. 50, 51.

175. *Id.* art. 50(3).

176. *Id.* art. 52; TAC BASIC TEXT, *supra* note 33, at 74.

177. CPL, art. 52.

178. See, e.g., CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11 (1923); PORTLAND, OR., PLANNING CODE ch. 33.700-33.815; HOUSTON, TEX., CODE OF ORDINANCES ch. 42-20 through 42-78. Although no one article can comprehensively describe the myriad of regulatory systems in the American federal scheme, these cities, in the author's opinion, represent both what is common to many U.S. cities (e.g., "one stop shopping" for permits, zoning in Chicago and Portland, regulatory jurisdiction in Portland and Houston), and what is diverse (e.g., state-government regulation in Portland, non-zoning in Houston). For a parallel study involving these cities in the context of zoning, see generally Shibata, *supra* note 3, 161 (2002).

Finally, both countries allow exceptions to their generally applicable regulations. In these respects, the basic schemes in Japan and the U.S. appear similar.

### I. BOTH NATIONS HAVE SEPARATE PROCEDURES FOR SMALLER AND LARGER SCALES OF DEVELOPMENT PROJECTS

One major example of the many similarities between U.S. and Japanese development-procedure is the establishment of separate procedures for developments of different scales. Both nations distinguish between smaller and larger developments, and create accordingly separate permit procedures. As explained previously, Japan exempts smaller scale developments from its CPL development-approval procedures.<sup>179</sup> Likewise, various U.S. jurisdictions differentiate between smaller and larger developments. For example, Chicago, Illinois creates special regulations and permitting procedures for "Planned Developments."<sup>180</sup> Although the building-permit process for many developments in Chicago is relatively simple and straightforward, many larger developments require approval as a Planned Development. Chicago's zoning ordinance lists a variety of goals that are to be achieved through Planned Developments, such as creation of districts for specialized purposes; achievement of land-use and community goals on a "unified rather than on a lot-by-lot approach;" improvement of amenities; and promotion of economic, efficient land use, and creative design.<sup>181</sup>

Certain types of developments *must* be constructed under the Planned Development ordinance.<sup>182</sup> This requirement is unusual in that most U.S. jurisdictions give the developer the option to designate a project a Planned Development.<sup>183</sup> Chicago lists 16 specific situations which require a Planned Development approval procedure.<sup>184</sup> Most of these scenarios involve multi-fam-

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179. Again, this is a major exemption because it includes developments under 1,000 square meters in Urbanization Areas (and 3,000 square meters in City Planning Areas) and presumably encompasses many small shops and most single-family dwellings.

180. CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11 (1923).

181. *Id.* Other goals include accomplishing the purposes of zoning; promoting appropriate and harmonious variety in physical development; and promoting a beneficial urban environment. *Id.* These goals are similar to many of the vaguely-worded purposes found in Japan's CPL.

182. *Id.* art. 11.11-1 (1923).

183. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (August 24, 2001).

184. CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11-1.

ily or multiple dwelling developments over two acres.<sup>185</sup> Other types of mandatory Planned Developments include multi-acre educational facilities, and commercial and manufacturing developments that are near Residence Districts.<sup>186</sup>

The procedures for approving Planned Developments are virtually identical to those for amendments to the Chicago Zoning Ordinance, and thus are much different from the permit procedures for smaller developments.<sup>187</sup> Specifically, Planned Development approval procedures include specific time-frames.<sup>188</sup> The Commissioner of Planning and Development must submit applications to the Chicago Plan Commission within five days of receipt.<sup>189</sup> Furthermore, Planned Developments trigger public notice and public participation requirements.<sup>190</sup> The Chicago Plan Commission must schedule a hearing and provide public notice of the hearing within seven day after receiving an application.<sup>191</sup> The hearing must be held no later than 60 days from the receipt of the application, and must provide "reasonable" opportunity for all interested parties to express their opinions.<sup>192</sup> There is also a 30-day limit on the public hearings, subject to possible extension at the request of (only) the developer.<sup>193</sup>

Likewise, Portland, Oregon has created different building-permit procedures for smaller and larger developments. Portland imposes a "Type I" Review Procedure for most smaller conforming developments. Type I is a ministerial, or non-discretionary, and is usually in conjunction with applications for building permits or home occupation permits.<sup>194</sup> Type I review

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185. CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11-1(e), (f), (g), (h), (i), (j).

186. CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11-1(c), (d), (k), (l), (m). Other mandatory PDU developments include hospitals, churches, and community centers. *Id.*

187. *Id.* title 17, art. 11.11-3. There are guidelines that the Commissioner of Planning and Development, the Chicago Plan Commission and the City Council must consider when determining whether to approve a Planned Development. There are 15 main points in the guidelines, which appear to relate to the zoning, traffic patterns, density, and facilities existing in the particular neighborhood; zoning, use, and density regulation existing in the area; the scale of the proposed development; and measures that should be taken to mitigate off-site impacts and promote aesthetics and economics. *Id.* art. 11.11-2. "Minor changes," as defined by the zoning ordinance, to Planned Developments, do not require any government approval. *Id.* art. 11.11-3(c).

188. *Id.*

189. *Id.* art. 11.11-3(a) (1923).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. PORTLAND, OR., PLANNING CODE, ch. 33.700.010.B (1970).

does not require public hearings, but does require public notice to all property owners within 100 feet of the lot in question, and to recognized organizations where the lot is located.<sup>195</sup> In contrast, Type II and III Procedures are discretionary land-use reviews,<sup>196</sup> and are often used for larger developments such as aviation terminals,<sup>197</sup> major event entertainment,<sup>198</sup> and commercial developments in residential zones.<sup>199</sup> Portland's Planning Director reviews all Type II Procedure applications.<sup>200</sup> As with Type I Procedure, Type II Procedure requires public notice but no public hearings.<sup>201</sup> However, unlike with Type I Procedure, appeals of decisions are allowed.<sup>202</sup> Type III Review Procedures require public notice, public hearings, and allow appeals to the ultimate administrative decision.<sup>203</sup>

Ultimately, such differential treatment is justifiable in both the United States and Japan because of the increased off-site impacts and increased infrastructure burdens created by larger scale developments.<sup>204</sup> These more complex procedural requirements also appear reasonable. Larger developments stand to earn larger profits because of the economy of scale involved. Developers can therefore absorb greater expenditures of time and resources as a "cost of doing business," while earning an acceptable profit. Thus, increased procedural burdens appear justifiable for larger developments. The benefits to the public (protection against major detrimental off-site impacts) are large, while the economic scale of the development often results in a relatively small burden on the developer.

#### CHAPTER 4: MAJOR DIFFERENCES EXIST RELATING TO FUNDAMENTAL ISSUES OF JUSTICIABLE LAW AND ECONOMIC EFFICIENCY

Despite the similarities between the American and the Japanese development-procedural law, significant differences exist.

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195. *Id.* ch. 33.700.015.

196. *Id.* ch. 33.730.020, 33.730.030.

197. *Id.* ch. 33.815.200.

198. *Id.* ch. 33.815.215.

199. *Id.* ch. 33.815.110.

200. *Id.* ch. 33.720.020 (1970).

201. *Id.* The public notice requirements are greater than for Type I reviews; notice to property owners within 150 feet when inside an Urban Growth Boundary (UGB) and within 500 feet when outside a UGB, as well as notice to organizations within 400 feet of the lot. *Id.* ch. 33.730.020.C (1970).

202. *Id.*

203. *Id.* ch. 33.730.030 (1970).

204. Interviews with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (August 24, 2001); interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (August 28, 2001).

Several differences relate to fundamental principles of law and justice, such as protection of the rule of law, notions of procedural due process, and balancing of equities for the parties involved. Other differences have an economic aspect. For example, the processing of development applications in the two nations varies because of their different layers of approval procedures, documentation requirements, and time limits. Other economic differences, such as the predictability of the business climate caused by local-resident interest group activities, also exists. The remainder of this article will discuss the legal and economic aspects of the Japanese development-procedure and compared it with the U.S. procedures.

## CHAPTER 5: COMPARATIVE ANALYSIS— FUNDAMENTAL ISSUES OF LAW AND JUSTICE

### I. DUE PROCESS ISSUES: OVERVIEW OF U.S. DUE PROCESS JURISPRUDENCE

One major difference between the U.S. and Japanese jurisdictions relates to the notion of procedural due process. In the U.S. context, the right to procedural due process serves to protect two general interests: First, due process should prevent “an erroneous or distorted conception of the facts or the law.”<sup>205</sup> Secondly, it secures the general feeling, or the “appearance and reality,” of justice.<sup>206</sup>

Under U.S. constitutional jurisprudence, the right to due process is triggered only when certain thresholds are present. Only a threat to “life, liberty, and property” rights—as opposed to other types of rights, mere interests, or expectations—triggers due process requirements.<sup>207</sup> Acts or decisions made by a given government body can be characterized as either judicial (or “quasi-judicial”) or legislative,<sup>208</sup> but it is only when an act or decision is deemed judicial that due process applies.<sup>209</sup> The premise is that legislative decisions are made by officials elected by,

205. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976); DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 543 (2nd ed. 1998) [hereinafter *CONSTITUTIONAL LAW*].

206. See, e.g., *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951); *CONSTITUTIONAL LAW*, *supra* note 90 at 543.

207. U.S. CONST. amend. V, XIV, §. 1; *CONSTITUTIONAL LAW*, *supra* note 90 at 543-45.

208. See, e.g., *CONSTITUTIONAL LAW*, *supra* note 90 at 543-45.

209. See, e.g., DAVID L. CALLIES ET AL., *CASES AND MATERIALS ON LAND USE* 77-82, 357 (3rd ed. 1999) [hereinafter *CASES AND MATERIALS ON LAND USE*] (citing *Fasano v. Board of County Commissioners of Washington County*, 507 P.2d 23 (1973)).

and therefore accountable to, the voting public, and that legislation generally involves broad policy decisions affecting the general public rather than discrete groups or individuals.<sup>210</sup> In the event due process is required, due process standards on government decisions include 1) providing relevant parties notice and an opportunity to be heard, so that they may adequately present and rebut evidence, 2) acting impartially, with minimal *ex parte* contact and without substantial pressure from outside interests, and 3) making decisions based upon findings of fact and conclusions of law.<sup>211</sup>

## II. JAPANESE LAW EMPHASIZES THE RIGHTS OF LOCAL RESIDENTS RATHER THAN THE RIGHTS OF THE DEVELOPER-APPLICANT

In Japan, development-procedure laws, such as the CPL, provide parties with considerable procedural rights and protections. Specifically, the requirements for “preliminary consultations” and “consent-acquisition” vest local residents with rights and protections that could be considered similar to U.S. procedural due process rights. It is important to note, however, that the term “due process” is not expressly used by the CPL or other laws to describe such rights and protections. Furthermore, it would be inaccurate to characterize Japan’s consultation and consent protections as exactly identical with U.S. due process rights.<sup>212</sup> Nonetheless, an analysis of the Japanese law reveals an implied notion and presupposition of procedural rights that are analogous to U.S. due process rights. Thus, the author will use the term “due process rights” to refer to those Japanese procedural rights and protections (such as preliminary consultations and consent-acquisition requirements) analogous to U.S. due process rights.

As a general proposition, in the United States, local residents are usually not afforded a major role in building approval processes. Granted, local residents are provided opportunities for hearings in some situations, but there are usually significant limitations.<sup>213</sup> In a “ministerial” approval situation, public par-

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210. See, e.g., CONSTITUTIONAL LAW, *supra* note 90 at 544.

211. See, e.g., CASES AND MATERIALS ON LAND USE, *supra* note 209 at 357.

212. The author considers such a characterization to be inaccurate, and ultimately too simplistic, because of the historic (German), structural (Civil <code>law), and evolutionary (dearth of case precedent in this area) foundations of Japanese law. The vastly different cultural and social contexts in which notions of procedural rights have developed in the U.S. and Japan also preclude such a characterization.

213. For example, Chicago’s PDU process requires hearings to provide “reasonable opportunity for all interested parties to express their opinions.” However, the

ticipation is often limited. In Chicago, for example, a Planned Development triggers public notice and public participation requirements, specifically a "reasonable opportunity for all interested parties to express their opinions."<sup>214</sup> However, Chicago places a significant limit on local-resident participation through clear time limits on public hearings.<sup>215</sup> Public hearings in Chicago must be held no later than 60 days from the receipt of the application, and must conclude within 30 days.<sup>216</sup> Even in "discretionary" approval situations, notice and hearing opportunities are typically limited to government determinations that are quasi-judicial rather than legislative.<sup>217</sup> Thus, while a rezoning by an administrative body would usually require notice and hearings, a rezoning by a legislature normally would not.<sup>218</sup> The rationale is that the process of legislating laws and procedures for ministerial approvals of development applications (but not for discretionary approvals such as rezoning) is presumed to provide sufficient due process to parties other than the developer-applicant, i.e., local residents.<sup>219</sup>

Japanese notions of due process appear to differ significantly from those of the U.S. in several respects. First, Japanese law provides extensive due process protections to parties other than the developer-applicant (i.e., local residents). In fact, Japanese procedural law appears to emphasize the rights of the local resident, arguably at the expense of the developer-applicant. Specifically, the Japanese practice of preliminary consultations provides a high degree of procedural protection to local residents. Prime examples of this are the CPL and local ordinances requiring "preliminary consultations" and "explanatory meetings" with local residents. As a result of this heavy emphasis on local-resident rights, the due process rights of the developer-applicant are compromised. Indeed, in Japan, the courts have never held that development procedures violate a developer-applicant's due process rights. If Japanese procedure were applied in the U.S., it would probably violate the due process rights of

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PDU process has many bright-line time limits. See CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11-3 (1923).

214. *Id.* art. 11.11-3(a).

215. *Id.*

216. *Id.*

217. See, e.g., CONSTITUTIONAL LAW, *supra* note 90 at 544; CASES AND MATERIALS ON LAND USE, *supra* note 209 at 357 (citing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, (1915); *Jacobs, Visconi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir.1991); *Nasierowski Bros. Inv. & Co. v. City of Sterling*, 497, 501-02 (9th Cir.1990); *Harris v. County of Riverside*, 904 F.2d 497, 501-02 (9th Cir. 1990).

218. *Id.*

219. See, e.g., CONSTITUTIONAL LAW, *supra* note 90 at 544.

the developer-applicant. Specifically, significant involvement by local residents would, in all likelihood, adversely affect the developer-applicant's right to an impartial government decision, which ultimately requires insulation from external interest groups.<sup>220</sup> It could be argued that Japan's "preliminary consultations" and "explanatory meetings" are somewhat similar to U.S. public hearings, where individuals can voice their opinions about the aesthetic or other impacts of a proposed new development or rezoning.<sup>221</sup> However, the Japanese requirement of local resident consent-acquisition appears more onerous in at least some situations. At the very least, consent-acquisition places influence with local residents. Such influence, moreover, is not constrained by time limits on public hearings found in U.S. cities such as Chicago. At its most extreme, consent-acquisition vests *de facto* veto authority in the hands of non-party applicants, thereby creating another layer of public approval authority in the hands of private interest groups. This practice would, arguably, constitute a clear violation of the U.S. requirement of reasoned decisions by neutral government bodies detached from *ex parte* contact.<sup>222</sup>

### III. RIGHTS THAT TRIGGER DUE PROCESS RIGHTS AND PROTECTIONS

Another significant difference between the U.S. and Japanese systems is the threshold standard which triggers the due process rights of local residents. As previously explained, in the United States, only a threat to life, liberty, or property triggers the right to due process and its associated procedural requirements. Generally speaking, if a land development project in the U.S. otherwise conforms with zoning, building codes, and the like, it is usually a legal stretch to find a threat to local residents' life, liberty, or property rights. Likewise in Japan, it would probably be a stretch to find such rights threatened by an otherwise legally conforming development project.

This begs the question of what rights, then, do trigger the due process rights of Japanese local residents. A broad reading of the relevant Japanese codes, regulations, ordinances, and case decisions suggests that such rights are triggered by threats to aes-

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220. See, e.g., *Marshall v. Jerrico, Inc.* 446 U.S. 238 (1980); *Mathews v. Eldridge*, 424 U.S. 319, 344. (1976) See also CONSTITUTIONAL LAW, *supra* note 90 at 543; CASES AND MATERIALS ON LAND USE, *supra* note 209 at 357.

221. The difference between the U.S. approach and Japanese approach can be characterized as merely one of degree, although the author considers the degree of non-applicant (local resident) involvement in itself to be significant.

222. See, e.g., *Marshall v. Jerrico, Inc.* 446 U.S. 238; *Mathews v. Eldridge*, 424 U.S. at 344. See also CONSTITUTIONAL LAW, *supra* note 90 at 543; CASES AND MATERIALS ON LAND USE, *supra* note 209 at 357.

thetics and the character of a community, specifically the potential impact on matters such as traffic,<sup>223</sup> sunlight,<sup>224</sup> urban landscape,<sup>225</sup> or the stability of the general character of a community (the “living environment” as the Japanese call it).<sup>226</sup> In the civil suit involving residents of Kunitachi City and developer Meiwa Land<sup>227</sup> the Tokyo District Court was the first court to recognize that local residents have a legally protected interest (*rieki*) in aesthetic urban views.<sup>228</sup> The Court held that the neighboring landowners created and preserved a city view based on mutual self-regulation and a sense of social duty, and that the developer lost sight of its social mission by focusing on its own gain and disregarding the opposition of local residents.<sup>229</sup> Ultimately, the case appears to reinforce the premises behind the various de facto and de jure regulations that require extensive meetings and consultations between local residents and developers.

The Kunitachi City case may have been a landmark case in expressly recognizing new aesthetic rights, but it was not a surprising decision. The Japanese courts had already recognized an individual’s right to sunlight (*nisshoken*) in his neighborhood, a right rejected by most U.S. courts.<sup>230</sup> Furthermore, the types of rights recognized in that case are consistent with statutory proce-

223. See e.g., Dai-Kibo Koritempo Ricchi Ho [Large Scale Retail Stores Location Law], Law No. 91 of 1998, art. 4, 5, 7 [hereinafter Large Scale Retail Stores Location Law]; Guidelines on Issues Openers of Large-Scale Retail Stores Should Consider (Draft) (1999), §. II(1)(1)-(1)(1)(5) (unpublished copy of U.S. government translation on file with author).

224. The Japanese Supreme Court recognized solar rights in the landmark *Case Recognizing the Formation of the Tort of Construction of a Building That Infringed on Neighboring Residences’ Access to Sunlight* [*Rinsetsu Kyotaku No Nissho Tsufu Wo Shingai Suru Kenbutsu Kenchiku Ni Tsuki Fuho Koi No Seiritsu Ga Mitomerareta Jirei*] Wo 32 (Sup. Ct., June 27, 1972), at <http://courtdomino3.courts.go.jp/schanrei.nsf/FMain?OPENAGENT&0&1E333603410E764249256CBA001A4CE4&1> (last visited Jan. 25, 2003). The right to sunlight is implied by the Building Standards Law, art. 28, 54-56, part 2, and appears extrapolated from art. 25 of Japan’s constitution. See <http://www.architects.jp/column208.htm> (last visited Jan. 25, 2003).

225. *Kenchiku Butsu Tekkyo No Seikyuu To Jiken* (Case of A Demand for Removal of a Structure Et Al.) 6273 (Tokyo District Court., Dec. 18, 2002), at <http://www.linkclub.or.jp/~erisa-25/kosakuin/warehouse/kunitati/kousaihanketu.htm> (last visited Jan. 25, 2003).

226. See Large Scale Retail Stores Location Law, *purpose*.

227. See *supra*, section V.8.

228. *Kenchiku Butsu Tekkyo No Seikyuu To Jiken* (Case of A Demand for Removal of a Structure Et Al.) 6273 (Tokyo District Court., Dec. 18, 2002), at <http://www.linkclub.or.jp/~erisa-25/kosakuin/warehouse/kunitati/kousaihanketu.htm> (last visited Jan. 25, 2003).

229. *Id.* The term for “self-restriction” is *jiko kisei*, the term for “duty” is *gimu*, and the term for “social mission” is *shakai-teki shimei*.

230. See, e.g., *Fountainbleu 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.

dures (such as the CPL's and LRSLL's "explanatory meetings" and "preliminary consultations") which benefit local residents rather than developer-applicants. Therefore, it would be reasonable to conclude that the aesthetic rights recognized in the Kunitachi case had already been presupposed in Japanese procedural law, and that Japanese development-procedural is aimed, at least in part, at protecting such rights.

#### IV. BROAD RATIONALES FOR JAPANESE DUE PROCESS IN THE CONTEXT OF LAND DEVELOPMENT

Unlike the issue of which rights trigger the right to due process procedural protections, the broad goals of due process appear similar in U.S. and Japanese land development scenarios. Japanese decision-making procedures—which involve participation and opinions by all community members, consultations by the government when government authorities are involved, and the cessation of the proposed action until consent is acquired—appear aimed at protecting the "general feelings of justice," a goal identified by U.S. due process jurisprudence.

Likewise, the other main U.S. rationale for due process, prevention of mistakes in fact-finding or determinations of law, is arguably relevant in the Japanese context, although Japanese bureaucrats' heavy scrutiny in the application process tends to weaken such arguments. To reiterate, however, it is the protection of the dignity of the local resident that appears to be the more important value served by Japanese development procedure. As one Japanese attorney has observed, local residents usually consent to development projects that are proposed in their neighborhoods based on a general "feeling of satisfaction," which derives from participation in the relevant proceedings, and which contrasts with the more "scientific" U.S. approach of analyzing or quantifying a project's off-site impacts.<sup>231</sup>

#### V. EQUITABLE BALANCING BETWEEN PARTIES' RIGHTS AND INTERESTS

From the standpoint of basic equity and fairness, the Japanese approach has some merits. The opportunity for local residents to participate in land-use decisions promotes transparency and public participation. Such a process is arguably more democratic and transparent than some U.S. procedures—such as Chicago's standard building-permit and Portland's stan-

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321 (1985); O'Neill v. Brown, 242 Ill. App.3d 334 (1993). See also Shibata, *supra* note 3 at 248-49.

231. Interview with Masahiko Kawakami; attorney, White & Case L.L.P., in Tokyo, Japan (July 11, 2002).

dard Type I land-use reviews—where public officials exclusively control the process. Furthermore, the Japanese system assures that local residents will have adequate safeguards against potential nuisances and off-site impacts. With explanatory meetings and consent-acquisition, the protection of aesthetics, community character, and other interests is usually assured.

On the other hand, as previously explained, these processes also cater to the interests of neighboring local residents over the interests of the developer. This is mainly a result of the requirement that local landowners consent to a proposed development.

There is an implicit balancing of interests by any government when it makes a decision on an application for a development permit or other forms of approval. Although government decisions often presuppose a consideration of power relationships, the government should not merely balance the relative economic power and social influence of the interest groups involved (such as developers and local residents). Rather, there should be an empirical concept of what society as whole, through its republican government, rationally determines to be a just and equitable balance between competing social value interests. Based on a comprehensive consideration of the value interests at stake, the citizenry and government should form a broad-viewed, empirical concept of what that appropriate balance is. In the area of land use, there is a value interest in protecting individuals from nuisances and other infringements on the use and enjoyment of their land. At the same time, there is also a value interest in promoting the public good through economically productive and beneficial land uses. A fair and just legal framework balances these competing value interests, and as a result, also facilitates an efficient, rational, and predictable regulatory system.

On the whole, the Japanese land-use framework appears rationally balanced. However, any de facto requirement for development consent from local residents skews a just and rational balance in favor of local residents. Japan's quasi-legal consent requirements clearly favor the interests of neighboring residents over the interests of developers, other members of society, and other public interests. Such protection of local residents' interests—arguably to the point of indulgence—is problematic in the context of balancing social value interests and equities.

The local governments that require consent by local landowners also seem to ignore the concept that, in addition to landowners neighboring a proposed development, other persons have the right, or at least an "expectancy," as U.S. courts have held,<sup>232</sup>

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232. See, e.g., CASES AND MATERIALS ON LAND USE, *supra* note 209 at 355.

to develop the land that they own. This concept forms the premise behind U.S. Supreme Court decisions recognizing “regulatory takings” as violative of the Takings Clause under the Fifth Amendment of the U.S. Constitution.<sup>233</sup> In contrast, Japanese local governments—by de facto requiring consent from local residents—show either a conscious disregard, or outright ignorance, of this concept. Furthermore, at the national level, Japan has a land-use “constitution”—the Fundamental Land Law—which clearly limits private land-use rights. The law restricts land-use rights by establishing four basic principles: 1) a private interest in land is subordinate to public interests, 2) land uses must be in accordance with local conditions, 3) land speculation must be restrained, and 4) the government can place “appropriate” burdens on land speculators.<sup>234</sup> Significantly, the Fundamental Land Law does not have any principles establishing the rights of individuals to freely use their land.<sup>235</sup> Indeed, a reading of the fundamental principles indicates that the law is diametrically opposed to such a concept.<sup>236</sup> The historical reasons for this phenomenon are likely many, such as a historically high population density with low amounts of arable land, a traditionally weak consciousness of individual rights, a strong tradition of heavy government regulation, and a Confucian and community-oriented social structure.<sup>237</sup> In any event, there appears to be a lack of awareness, among some government circles in Japan, that a developer has a right, or at least strong expectation, to use her

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233. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), was the first U.S. decision holding that regulations can limit a landowner’s right to freely use her land to such a degree, that they constitute a taking of property under the 5th Amendment. About 50 years after *Pennsylvania Coal*, the U.S. Supreme Court attempted to create a clearer standard to determine when a regulation becomes a taking in *Penn Central Transportation Company v. New York*, 438 U.S. 104 (1978). Later cases provided additional rules in more specific scenarios. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

234. Tochi Kihon Ho [Fundamental Land Law], Law No. 84 of 1989, art. 2-5 [hereinafter FLL].

235. The FLL does call for consideration of protecting individual land rights, but does so for the purpose of “smooth execution of land policies,” and in the context of gathering information on land ownership, use, and other topics in order to form such policies. FLL, art. 17. FLL article 17 is not related to the fundamental policies in FLL articles 2 through 5.

236. Furthermore, the context of heavy land speculation and land development in Japan at the time of the enactment of the FLL indicates the term “private interest” that is alluded to in FLL article 2 was not directed at landowners who held on to their property for long periods. Rather, the term “private interests,” based on that context and a reading of the principles as a whole, was apparently directed at those who freely speculated or developed land.

237. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 1-2.

own land for productive use, and that regulation itself can deprive a developer of her land rights.<sup>238</sup>

Furthermore, this regulatory approach can create extreme problems in a variety of scenarios. One example does not even involve a private development but rather a development by the government: for 23 years, Narita International Airport, which had only one runway, was unable to undertake much needed expansion.<sup>239</sup> This was wholly inadequate for the primary international airport in the world's second largest economy.<sup>240</sup> Around the time of this writing, an extra runway has been built—but shorter than originally planned, and at only half the size of the existing runway—to accommodate a group of landowners who vigorously opposed any expansion of the airport and refused to sell their land.<sup>241</sup> The fact that the Japanese government will cater to individual desires, even in the case of a public development with an enormous impact on the national economy,<sup>242</sup> parallels the unbalanced approach taken by some local governments toward individuals affected by proposed development projects.<sup>243</sup>

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238. See *supra* note 233.

239. The airport had originally been planned with three runways: A main 4,000 meter runway, and two shorter runways of 3,200 and 25,000 meters. The government had originally intended to acquire this land through its eminent domain powers. However, individuals and other private groups (mainly farmers) who were to lose their land (farms), ultimately opposed the proposed taking, which these groups perceived as strong-arm tactics and an arbitrary exercise of power by the government. Ultimately, strong opposition and violence erupted between the government and private opposition groups, which led to the government abandoning all but the 4,000 meter runway. See, e.g., *Chiba Nyusu, Narita Kuukou Zantei Heikou Kasouro Kensetsu No Ikisatsu Chuu Ni Uita Tousho Keikaku [Narita Airport: Complicated Events Surrounding Construction of Provisional Parallel Taxiing Runway; Original Plan Up in the Air]* MAINICHI INTERACTIVE, Nov. 27, 2001, at <http://www.headlines.yahoo.co.jp/hl?a=20011127-00000004-mai-112>.

240. *New Narita runway completed amid local farmers' opposition* KYODO NEWS SERVICE, Oct. 31, 2001, available in Lexis News Library, Japan Country Files. Narita's single runway, unsurprisingly, has reached capacity, at about 360 flights per day. There are more than 30 countries awaiting allocation of new slots at Narita. See, e.g., *Japan Completes 2nd Runway at Narita*, JIJI PRESS TICKER SERVICE, Oct. 31, 2001, Lexis News Library, Japan Country Files.

241. The parties with the most direct interest in an expansion of Narita appear to be "(e)ight families, or a total of 36 people, plus one farmer-apprentice" who work and live in the area. Statement by the Toho Farmers (Narita), Press Conference, Foreign Correspondents Club of Japan (June 8, 1999), at [http://www.jca.apc.org/narita/toho\\_e.html](http://www.jca.apc.org/narita/toho_e.html). However, the second runway was evidently shortened to 2,180 meters to accommodate three homes that would have abutted the end of the runway. *Id.*

242. Narita stands to lose international flights to other airports, such as Hong Kong, Shanghai, and Inchon, which can also serve as the air transportation hubs for the Asia region. JIJI PRESS TICKER SERVICE, *Japan Completes 2nd Runway at Narita*, *supra* note 240.

243. Some observers, as well as the farmers who are the main parties affected by the expansion of the airport, would argue that a government expropriation of land for the airport amounts to a totalitarian attack against private individuals. See State-

In conclusion, instead of managing competing interest groups based on an empirical determination of a just and equitable balance of value interests, the Japanese regulatory system is weighed heavily in favor of residents neighboring a proposed development. This slanted approach bears reconsideration. In light of the current need for economic growth, and in line with the post-war trend toward stronger protection of individual rights,<sup>244</sup> a more balanced approach toward land-use regulation would probably be more appropriate in the Japanese administrative process.

## VI. THE RULE OF LAW

Administrative practices in Japan also raise concerns about the rule of law in the development-approval process. Arguably, many U.S. jurisdictions are weakening the rule of law by allowing their elected officials to delegate land-use regulatory decisions to bureaucratic officials.<sup>245</sup> If this is true, then the rule of law in Japan is arguably eviscerated in some areas of land-use regulation. Specifically, Japanese local governments neglect their public responsibilities when they impose the burden of managing "explanatory meetings" on private developers. Furthermore, such local government officials fail to continue the historical Japanese practice, identified by some observers, of strong management by administrative officials.<sup>246</sup> Japanese procedures requiring local-resident explanatory meetings and consent-acquisitions are much less predictable than the permitting procedures of the U.S. subject cities. Consequently, such procedures weaken the rule of law in Japan's land-use regulatory system.

The issue of the rule of law not only relates to fundamental justice, but also implicates issues of procedural predictability and its associated economic consequences. In essence, the rule of law directly correlates to the predictability of a legal regulatory

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ment by the Toho Farmers (Narita), *supra* note 241. Indeed, the farmers in the area reported that the government apologized for its attempts to force the farmers off of their land (which led to protests and physical battles) and its lack of due process in the initial construction of the airport. Nonetheless, after that time, the government and opposition farmers reportedly met 15 times to discuss the issue between November 1991 and May 1993, and 12 more times between September 1993 and October 1994. *Id.* The author would argue that such consultations, together with payment of just monetary compensation if the government elected to exercise its taking power, and the public purpose involved here (the Narita expansion is arguably a compelling public purpose), should constitute due process of law.

244. Interview with Yuichi Ohira, Professor, Law Faculty, Ritsumeikan University, in Kyoto, Japan (Dec. 6, 2001).

245. Interview with Stuart Ho, Investment Capital Group, in Honolulu, Hawaii (Feb. 21, 2001)

246. See, e.g., JOHNSON, *supra* note 23, at 33-48; DAVID HALBERSTAM, *THE RECKONING* 17-18 (1986); interview with Yuichi Ohira, *supra* note 244.

framework, because predictable regulation fosters a strong "rule of law" regime. The following section will discuss in detail the issue of procedural predictability and other economic issues.

## CHAPTER 6: COMPARATIVE ANALYSIS—DIFFERENCES RELATED TO ECONOMIC EFFICIENCY, PREDICTABILITY, AND TIME

### I. ECONOMIC PREDICTABILITY

The issue of procedural predictability in the context of land-use administration has strong economic implications. The level of predictability in a land-use regulatory system is arguably proportional to the benefits to a developer, and on a macroeconomic scale, proportional to land development activity on a regional or national level.<sup>247</sup> A problem associated with the Japanese procedures involving local residents is the lack of predictability. If a developer is lucky, initial communications, explanatory meetings, and consent-acquisition will all proceed smoothly. However, if by chance the developer encounters residents who strongly oppose a development, the time delays can be considerable. In contrast, the subject U.S. cities place a stronger emphasis on predictability through tighter government control over the permit-application process. For example, many Japanese localities require preliminary consultations with local *residents*, rather than with the government, whereas even in a U.S. city such as Portland, its "pre-application conferences" are solely between the developer and the government. Portland's city government is able to maintain exclusive control over such conferences, and thus avoid the unpredictability caused by local-resident participation in Japan's system.<sup>248</sup> And by exercising tight control over the process, U.S. cities such as Portland ultimately promote procedural and economic predictability.

### II. CONSOLIDATED APPROVAL PROCEDURE

Examination of development procedure in Japan and the U.S. also reveals major differences related to the convenience of the approval process. Various U.S. cities have attempted, to some degree, to create a consolidated procedure for applicants—"one stop shopping." For example, Houston, Texas, touts that its residential development procedure is a "one-stop" process.<sup>249</sup> Likewise, Oregon appears to emphasize efficiency in the ap-

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247. Interview with Stuart Ho, *supra* note 245.

248. PORTLAND, OR., PLANNING CODE ch. 33.630.050 (1970).

249. Indeed, Houston claims that the one-stop process allows a plan to "be reviewed and a building permit issued within just a few hours." However, for commercial developments, the process is effectively a two-step process—plat and plan

proval process by requiring its local governments to create a “consolidated procedure”<sup>250</sup> for issuing permits. In accordance with this mandate, Portland has created a unified permit issuing procedure.<sup>251</sup> Unlike Houston or Portland, Chicago funnels zoning and occupancy permit applications through the building-permit application process, and is therefore unusual in that respect.<sup>252</sup> Nonetheless, the ultimate effect of Chicago’s system is to create a consolidated process, through the building-permitting stage, for most applications. Many other U.S. cities follow the consolidated procedure approach.

One structural factor underlying these consolidated approval procedures is the predominance of a single level of government in the process.<sup>253</sup> In most of the U.S., only the municipal governments control the development-permit issuing process.<sup>254</sup> Even in Oregon, a jurisdiction with relatively strong state regulation over land use, the state government has little active involvement in the approval process.<sup>255</sup> Rather, the state sets general guidelines and principles via its 19 “Statewide Planning Goals,” and approves local land-use plans to ensure consistency with those guidelines.<sup>256</sup> The municipalities set the details for land-use regulation within their own borders.<sup>257</sup> To that end, Portland, as with all of Oregon’s municipalities, has created a

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reviews. See Houston Planning and Development Department Internet Official Site, at <http://www.ci.houston.tx.us/departme/planning/resiplan.htm>.

250. See OR. REV. STAT. ch. 227.175 (1999).

251. PORTLAND, OR., PLANNING CODE ch. 33.730 (1970).

252. CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.5 (1923).

253. The reasons for these differences are unclear, but the observer can surmise that they stem from the divergent historical traditions of the two nations’ political structures. The U.S. has always had a tradition of local control—rooted in America’s colonial political development, and inherent in the fundamental concepts of democratic self-government and ultimately federalism. Although the federal government has become more active in regulation since the 1930s, the traditions of local government control in land-use remain strong. See Shibata, *supra* note 3, at 168-69. In contrast, Japan since the Meiji Era has always had a strong central government that has exercised control over land-use. However Japan’s new Constitution after World War II saw the incorporation of American-style ideas of local autonomy. See Shibata, *supra* note 3, at 167-68. Nonetheless, Japan’s tradition of central control remains strong, resulting in a hybrid of national and local control over land use. Regarding the U.S. consolidated procedures (“one stop shopping”) in the U.S., their rationales are probably rooted in economic efficiency theories; that business activity is stimulated when regulations do not hinder developments that otherwise comply with zoning, safety and other standards.

254. See, e.g., Shibata, *supra* note 3, at 169-70.

255. See, e.g., Shibata, *supra* note 3, at 170.

256. See generally Oregon Department of Land Conservation and Development Internet Official Site, at <http://www.lcd.state.or.us/goalhtml/goalsbkggrnd.html>.

257. *Id.*

mandatory Comprehensive Plan, and a zoning code to implement the Plan.<sup>258</sup>

In contrast, Japan's CPL evidences no attempt by the national government to create a streamlined, efficient procedure. Indeed, at least two levels of government, prefectural and municipal, participate in the development-approval process. At both levels, many bureaucratic bureaus, departments, and sections have their hands in the "cookie jar" of development-application review. In addition, the national government is indirectly involved in the development process by creating the procedural framework in the CPL, and by issuing Cabinet and ministerial regulations that clarify the CPL, such as the various documentation requirement rules.<sup>259</sup> The national government is also actively involved with land-use regulation: the national government is required to provide technical and financial assistance to parties who have acquired development-approval in Urbanization Areas,<sup>260</sup> and the Land Ministry has authority to hear appeals to administrative decisions relating to land-use regulation. Furthermore, there are numerous other national laws, such as the Environmental Impact Assessment Law, that regulate land use, many of which impose additional procedural requirements. Moreover, the national government participates in the development-approval process through its authority to hear appeals from parties whose development applications are rejected by the prefectural government.

Indeed, one executive from a Japanese development corporation identified for the author 19 laws with separate application requirements for various development processes.<sup>261</sup> The author's count of statutes in a typical land-law digest yielded almost 50 laws directly related to land use, not to mention other laws such as the civil code which indirectly relate to land use.<sup>262</sup> This volume of statutory regulation and degree of land-use involvement by Japan's national government is extremely high when compared with the U.S. cities in this study. The central government's degree of regulation has no parallel in any U.S. state government, and certainly makes U.S. federal control over land use seem light in comparison.

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258. *Id.*

259. *See, e.g.*, CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 15-17.

260. CPL, Law No. 100 of 1968, art. 48. The requirement is to promote "positive urbanization" in those areas. *Id.*

261. Documents on file with author, received on condition of anonymity.

262. *See* TOKYO LAW AND ECONOMICS INSTITUTE PUBLISHING [TOKYO HOKEI GAKUIN SHUPPAN], CONCISE REAL PROPERTY FUNDAMENTAL (SIX) LAWS [TOKYO SHOSAI FUDOSAN ROPPO] (Tokyo Law and Economics Gakuin Instructors' Room, ed. 2001).

Local governments in Japan actually create extra burdens on developers by adding their own particular procedures. Again, many local governments require “preliminary consultations” and “explanatory meetings” with infrastructure managers and local residents. Furthermore, the de facto requirements for consent-acquisition from local residents can necessitate surveys and consultations prior to even the legally mandated preliminary consultations. Ultimately, various local governments create numerous additional layers of bureaucratic regulation, which add to the considerable procedural hurdles already imposed by national laws.

In conclusion, various U.S. cities have made efforts, in varying degrees and approaches, to create streamlined, consolidated building-permit issuing procedures that are relatively simple and convenient for developers. In contrast, numerous national laws and local regulations in Japan create a complex and relatively cumbersome development-approval process.

### III. REQUIREMENTS FOR SUBMISSION OF SUPPORTING DOCUMENTATION

The jurisdictions analyzed in this article differ as to the types of documentation they require. In general, however, they all require some form of a survey or site plat of the development area, as well as design plans for landscaping, utilities, and the proposed structure. U.S. cities such as Chicago and Portland also require multiple copies of required documentation.

Cities’ documentation requirements reflect their different regulatory philosophies. For example, Portland sometimes requires that plans specifically accommodate public transportation, traffic, and pedestrian circulation in the development area.<sup>263</sup> This requirement is consistent with Portland’s heavy emphasis on transportation planning. In contrast, other U.S. cities require relatively few documents, apparently reflecting their basic policy of minimizing regulation on development. Houston, for example, has review procedures for plats (applicable to most larger developments), which merely require submission of a “development plat package” including a copy of the registered subdivision plat, an application form, a certified survey, and a site plan.<sup>264</sup> Furthermore, many documents can be submitted electronically on Houston’s official website.<sup>265</sup>

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263. See, e.g., PORTLAND, OR., PLANNING CODE ch. 33.140.240 (1970).

264. HOUSTON, TEX., CODE OF ORDINANCES ch. 42-46 (1968).

265. E-mail from Allen Largent, Assistant Director, Building Inspection, Houston Planning and Development Department, to Byron Shibata, Assistant Professor, Law Faculty, Ritsumeikan University (Nov. 30, 2001) (on file with author).

In contrast, Japan requires substantially more documentation than the subject U.S. cities. The number of documents required by the CPL and its implementing orders alone exceeds any requirements found in the U.S. cities. Compounding matters, Japanese local governments impose additional documentation requirements, such as financial documentation. For example, Kyoto City requires a developer to provide documentation evidencing capital, loan financing, credit, budget planning, and ability to complete the development project.<sup>266</sup> Such financial documentation requirements are arguably superfluous, as a reasonably competent developer would presumably not expend time and resources on a development project which it could not expect to complete. Furthermore, creditors and other vested interests would presumably want assurances that a developer could complete a project.<sup>267</sup> In general, U.S. jurisdictions would probably consider requirements for financial documentation to be excessive. Portland, for example, requires a financial-related document, but only a Performance Guarantee, such as a performance bond.<sup>268</sup>

#### IV. MANDATORY TIME LIMITS ON APPROVAL AND PERMIT PROCEDURES

Some U.S. cities, such as Portland, have many legal time limits on government processing of permit applications. Portland has clear timeframes which vary depending on the applicable level of review (Type I, II, or III).<sup>269</sup> In addition, there are specific time standards for both public notice and hearings (in the Type II and III administrative review procedures, respectively). All of Portland's procedures require that any quasi-judicial review be completed within 120 days of application.<sup>270</sup> On the other hand, some U.S. cities such as Chicago have few mandatory time limits. Nonetheless, the time limits they do have can be significant. Chicago's PDU process, for example, has clear time limits, such as a 30-day limit on the public hearings, subject to possible extension at the request of the developer only.<sup>271</sup>

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266. KYOTO DEVELOPMENT-APPROVAL BOOKMARK, *supra* note 59, at 30.

267. For example, Bernard Siegan has stated that in the case of developments in Houston, lending companies want assurances and therefore impose private pressure on developers to ensure that a building will stand, for at least the duration of the mortgage. See Bernard H. Siegan, *Oregon Land Use Symposim: Opening Remark: Keynote Address*, 14 ENVTL.L. 645, 647 (1984). Siegan, therefore, argues that the free market itself creates controls and provides assurances in developments. *Id.*

268. Portland, Or., Planning Code, ch. 33.700.050 (1970).

269. See generally PORTLAND, OR., PLANNING CODE ch. 33.730 (1970).

270. *Id.* 33.730.010. These requirements are based on Oregon state mandates. *Id.*

271. CHICAGO, ILL., ZONING ORDINANCE title 17, art. 11.11-3 (1923).

Japan has few mandatory timeframes in its development code, but has made some modest efforts in recent years to promote timely processing. Japan's Administrative Procedure Law, for example, appears to have had a positive effect on processing of applications, although it imposes no formal time limits.<sup>272</sup> Nonetheless, the tradition of vesting bureaucrats with a large degree of authority but with few limits,<sup>273</sup> like many traditions, has been slow to change. It might be time to reconsider the wisdom of vesting bureaucratic officials in Japan with few restrictions on their authority, given the infamous stalling tactics of many bureaucratic officials,<sup>274</sup> as well as the recent scandals that have plagued the national bureaucracy.<sup>275</sup>

#### V. INTERNAL GOVERNMENT TIME STANDARDS AND NON-LEGAL FACTORS AFFECTING PROCESSING TIMES

In the United States, business, political, and popular pressures can expedite government processing of development-approval applications. For example, in American cities such as Houston, popular pressure reportedly can, and does, move government to increase staffing levels to maintain efficient processing of permit applications.<sup>276</sup> Further, in its official publications, Houston implies that it has informal time-processing goals: housing development applications, for example, are reportedly processed in an average of a few hours, although large develop-

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272. Interview with Norio Yasumoto, *supra* note 28.

273. See JOHNSON, *supra* note 23, at 60-62, (1982). Johnson observes that most of the early Meiji-era national bureaucrats were drawn from the former elite *samurai* caste, and became *tenno no kanri* ("officials of the emperor"). *Id.* Johnson argues the modern philosophy among national bureaucrats toward governance is the direct result of the curriculum at the Tokyo University law department, which since the Meiji era has graduated the bulk of national ministry officials. *Id.* at 63. This outlook, Johnson argues, is managerial rather than legal. *Id.* See also MITSUO SHINDO, ADMINISTRATIVE GUIDANCE: SECURITIES SCANDALS RESULTING FROM ADMINISTRATIVE GUIDELINES (1992), reprinted in THE GOVERNMENT AND POLITICS IN JAPAN 210 (1994). Shindo quotes Ezra Vogel's JAPAN AS NUMBER ONE, in which Vogel argues that, "MITI (then the Ministry of International Trade and Industry, now the Ministry of Economics, Trade and Industry) officials do not approach their talks legalistically. Their view is that rapidly changing conditions require the most adjustment to individual predilections and special circumstances than is permitted by relying on legal precedent." *Id.*

274. See Levin, *supra* note 98, at 16-17; MATSUSHITA, *supra* note 23, at 54. In the past, bureaucrats would use stalling tactics to compel compliance with administrative guidance. *Id.* See also LARKE, *supra* note 98, at 68; Newman *supra* note 97.

275. See, e.g., Levin, *supra* note 98, at 16-17.

276. E-mail from Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, to Byron Shibata, Assistant Professor, Law Faculty, Ritsumeikan University (Nov. 27, 2001) (on file with author). The general practice appears to be that a new official is hired when the Houston permitting departments can no longer keep up with processing demands in a timely manner. *Id.*

ment processing averages about 11 days.<sup>277</sup> Likewise, in Chicago, applicants can impose informal pressure to speed up the process,<sup>278</sup> and given the reportedly strong influence of neighborhood associations and aldermen in Chicago,<sup>279</sup> informal pressure might well be effective in keeping reasonable review timeframes. Furthermore, Chicago's administrative bodies have reportedly established internal policies to process applications in a timely manner. For example, Chicago's Zoning Committee and Board maintain internal time standards on processing cases and maintain records on the numbers of cases they process.<sup>280</sup> In variance determinations, Chicago's review committees and boards reportedly have internal guidelines on timeframes, record the numbers of applications they process, and attempt to process cases within reasonable time periods.<sup>281</sup>

Like these U.S. cities, some Japanese local governments have made efforts to keep their internal processing times reasonable. Kyoto Prefecture has established timeframes for the various stages a developer engages in prior to submitting an application for development-approval. Nonetheless, the biggest procedural stumbling blocks that remain are caused by those procedures—primarily the explanatory meeting and consent-acquisition stages—which are controlled mainly by local residents, who are sometimes unconcerned with, and therefore unaffected by, political or popular pressure. Thus, although government in Japan is speeding up its processing of applications, some stages in the process continue to move slowly.

## VI. ISSUES OF TIME AND ECONOMIC EFFICIENCY IN APPROVAL AND PERMIT PROCESSES

Two major issues in any development-approval process, whether in the U.S. or Japan, are time and economic efficiency. In general, because time delays increase the economic risks to private developers, longer permitting and approval timeframes discourage land development, whereas shorter timeframes promote development.<sup>282</sup> U.S. municipalities that welcome land de-

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277. See Houston Planning and Development Department Internet Official Site, at <http://www.ci.houston.tx.us/department/planning/resiplan.htm>.

278. Interview with Thomas Smith, Director of Development Policy, Department of Planning and Development, City of Chicago, in Chicago, Ill. (August 28, 2001).

279. Interview with Martin Jaffe, Associate Professor, Urban Planning & Policy Program, University of Chicago at Illinois, in Chicago, Ill. (August 24, 2001); interview with Stuart Meck, Principal Investigator, American Planning Association in Chicago, Ill. (August 24, 2001).

280. Interview with Thomas Smith, *supra* note 278.

281. *Id.*

282. Interview with Stuart Ho, *supra* note 247. At least in the United States, time increases risks because of the unpredictability of future economic cycles,

velopment, such as Las Vegas and other cities in Nevada, reportedly promote this goal through short development procedures.<sup>283</sup> Likewise, quick processing of development permits in Houston, Texas, is reportedly one reason why development and the economy there boomed in the late 1990s and early 2000s.<sup>284</sup>

In contrast, Japanese approval procedures for larger developments have traditionally been slow. Some experts believe that the economic effects of time delays might be less injurious to developers in Japan than in the United States.<sup>285</sup> Nonetheless, time lags have, at the very least, historically impeded the ability of developers to commence construction activities.<sup>286</sup> Japanese government processing of development application packages was slower in the past than today, particularly during the economic growth periods and development booms of the 1960s through early 1990s.<sup>287</sup> Beginning with the current recession, application processing in Japan has apparently become more efficient, probably because of an increased realization by government about the need for efficient development and economic stimulus. Nonetheless, in absolute terms, the approval process reportedly continues to be slow.

One cause for slower approval processing is that local governments (as well as quasi-public entities involved in the process) do not fall under the Administrative Procedure Law, which represents an attempt to limit unreasonably slow time processing.<sup>288</sup> Most delays in procedure, however, appear likely to crop up in the preliminary and initial stages of Japan's development-approval process. As previously explained, prior to applying for development-approval, developers must generally consult with, and obtain the consent of, infrastructure managing entities. These procedures are sometimes lengthy, but are reportedly reasonable on the whole.<sup>289</sup> These procedures are similar to Portland's "pre-application conferences" as both are aimed at identifying development design problems and recommending appropriate technical changes.

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changes in law, inflation and interest rate changes. *Id.* See also, Siegan, *supra* note 267.

283. *Id.*

284. See *The Blob that Ate East Texas*, THE ECONOMIST, June 23, 2001, at 60-62.

285. Interview with John Tofflemire, Ikoma/CB Richard Ellis, in Tokyo, Japan (August 7, 2001). In Japan, the time value of money (the rate of return on investments) is generally lower than in the United States, so the impact of time delays is reportedly not as large as in the U.S. *Id.*

286. Interview with Norihide Okazaki, *supra* note 85

287. *Id.*

288. Administrative Procedure Law, Law No. 88 of 1993, art. 4(1).

289. Interviews with Satoshi Murano, *supra* note 85; interviews with Noboru Ota, Obayashi Gumi Corporation, in Tokyo, *supra* note 85.

However, it is the procedures involving local residents that can be most time-consuming and burdensome. As previously explained, the CPL requires consent from local landowners, and some local governments require developers to hold explanatory meetings for local residents. If these procedures move smoothly, the entire development-approval process can be completed in a matter of months.<sup>290</sup> However, because of the *de facto* consent requirement, opposition by a few local residents, or even one vigorous local resident, is conceivably enough to halt the entire process.<sup>291</sup> Developers' responses to such situations are usually effective, but resolving such problems can, in many cases, take much longer than a few months.<sup>292</sup>

Apparently even more time-consuming are the "initial communications" with local residents, which precede the preliminary consultation stages. Such activities are not required by the Japanese national or local governments. Usually, a developer initiates such surveys and communications if he himself determines that such action would facilitate smooth acquisition of consent from local residents—usually for large developments. Such communications and surveys are very burdensome because they usually involve individual, face-to-face meetings with local residents.<sup>293</sup> It is unsurprising, therefore, that such activities can take up to several years to complete.<sup>294</sup>

In conclusion, the first stages of the approval process—explanatory meetings and consent-acquisition with local residents—are time-consuming because of the essentially privatized nature of the process, and because of the *de facto* requirements for consent by local residents.<sup>295</sup> Initial communications, which precede even the government-imposed preliminary consultations, can take even longer. From the standpoint of economic efficiency, such processes can be very problematic because of the potential for lengthy (and therefore costly) time delays.

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290. Interviews with Noboru Ota, *supra* note 85; Norihide Okazaki, *supra* note 85.

291. Interviews with Satoshi Murano, *supra* note 85.

292. *Id.*

293. Interviews with Noboru Ota, *supra* note 85; interview Norihide Okazaki, *supra* note 85.

294. *Id.*

295. This practice by the Japanese bureaucracy of *de facto* delegation of management authority to private parties has precedent in other scenarios, such as previously alluded to in the context of retail store developments. *See, e.g.*, Upham, *supra* note 23, at 285. Thus, such delegation appears consistent with the Japanese bureaucracy's general behavior in its regulation of the overall economy.

## CONCLUDING COMMENTS

The development-approval and building-permit procedures in Japan and the United States are similar in some respects. In all of the jurisdictions studied in this article, the development procedures are more stringent for larger developments than for smaller ones. Further, informal pressures to keep administrative review and processing times reasonable are somewhat effective in both countries.

There are, however, a variety of differences. Specifically, many U.S. cities, such as Chicago and Portland have some form of consolidated process—"one stop shopping"—for building permits. In contrast, Japan does not have a consolidated process, and its more cumbersome approval procedure often slows down processing. Japan and various U.S. cities such as Chicago do not have official time limits on permit processing, although they do have informal standards and target timeframes. Portland is the exception, with time limits in several key procedural stages. The requirements for supporting documentation vary widely, in both nature and quantity, according to the goals and needs of the particular city. In general, however, Japanese jurisdictions require a relatively large number of documents.

Perhaps most significant in the Japanese context is the unique requirement that a developer acquire local residents' consent to a proposed development. Some local governments appear to require consent from local residents—usually during "explanatory meetings"—as a prerequisite for filing an application for development-approval with the government. This quasi-legal, *de facto* requirement for "consent-acquisition" during explanatory meetings imposes a burdensome and time-consuming process on developers. Ultimately, consent-acquisition and explanatory meetings can create potential problems with slow processing of applications.

Japan's development-approval procedures are problematic from an economic and legal perspective. From the economic perspective, the relatively slow pace of Japanese procedure is inefficient. The incentives for developers to commence new projects are potentially hindered by slow processing times and by some localities' complex, multi-layered procedures and duplicious documentation requirements. Incentives for new development can also be affected by the lack of predictability in the Japanese system, which is the result of requiring developers to acquire consent to a proposed project from local residents.

From a legal perspective, the participation of local residents in the approval process weakens the rule of law. Other legal consequences of the Japanese system relate to due process. Notions

of due process and the procedural protections afforded to developer-applicants and local residents in Japan appear quite different from those in the U.S. Whereas American jurisprudence focuses on the due process rights of the developer-applicant, Japanese laws and practices appear to emphasize the rights of local residents. The threshold standards in Japan and the U.S. that trigger due process rights, and their associated procedural protections, are also quite different. Property rights, along with the rights to life and liberty, are the only triggers for due process rights in the United States. In contrast, rights in Japan that trigger due process include aesthetic rights and rights to a stable community. Finally, the fundamental balance of rights and equities appears skewed by the requirement for consent-acquisition from local residents.

Ultimately, Japan's government faces great challenges with its land market, regulatory system, and overall economy at the start of the 21st century. In the past, local U.S. jurisdictions have faced similar land-use challenges, and are certain to face new challenges in the future. We can conclude, therefore, that both nations have many procedural regulations which demand analysis, revision, or incorporation in a trans-national context, so as to identify solutions to problems common to both nations. Indeed, there are many issues, such as city-planning procedures and administrative-appeal processes, which are beyond the scope of this article yet significant and worthy of future analysis. Ultimately, land-development procedures in any nation—if they are to be effective—must be flexible enough to respond to the needs of a dynamic, changing society. Therefore, it would bode well for governments in both the U.S. and Japan to consider new and different procedural approaches in order to solve their many challenges in the land-use arena.

## APPENDIXES

I. SUMMARIZED LIST OF CPL ARTICLES 29  
THROUGH 51<sup>296</sup>

Article 29: Requires development-approval for most development acts; sets forth government jurisdiction for development-approval authority; and sets forth exceptions to the approval requirement.

Article 30: Sets forth the basic information and documentation required for application for development-approval. Required information includes the zoning and size of the development area; the type of building proposed; a variety of planning documents; identity of the construction entity for the development; and any other documents required by Land Ministry ministerial order.

Article 31: Stipulates that Land Ministry ministerial order shall clarify the details of requirements for planning documents and documents that require preparation by a "certified professional."

Article 32: Requires applicants to consult with, and obtain the approval of, managers of public infrastructure in regard to the proposed development. Also requires consultation and approval with the same managers on the siting of public infrastructure (The details for such consultations are to be set by Land Ministry ministerial order).

Article 33: Sets 14 main standards that must be met for development-approval.

Article 34: Enumerates 12 main development act scenarios permitted in Urbanization Control Areas.

Article 35: Requires governors to provide written notification of their approval or rejection of development applications.

Article 35, part 2: Requires government approval for any changes to an already approved development act. Authorizes an approval system for major changes, or alternatively a notification system for minor changes, the details of which are to be clarified by Land Ministry Ministerial Order.

Article 36: Requires inspection of the completed development in order to confirm compliance with approval conditions and standards. Requires prefectural governments to create an official inspection form, the details of which are to be set by Land Ministry Ministerial Order. Further requires public announcement that construction of the development is completed.

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296. CPL, Law No. 100 of 1968, art. 29-52 part 2. In Japanese, designated cities are "*shitei shi*," commissioned cities are "*inin shi*," and core cities are "*chukaku shi*."

Article 37: Sets various restrictions on building construction.

Article 38: Requires developers to notify the governor if they cancel construction of a development.

Article 39: Generally requires municipalities to take over management of public infrastructure related to a development, after completion of the development.

Article 40: Sets forth a general rule that, when new infrastructure facilities have been built to replace old infrastructure, the land with the new infrastructure will vest in the government, while the land with the old infrastructure will vest in the developer.<sup>297</sup>

Article 41: Relates to regulation of land that does not have a "Use Zone" designation. Allows governors to set, in such land areas, FARs, maximum heights, "outer wall positioning" (set-backs), and other regulations on building positioning, structure, and infrastructure. Governors can exempt a developer from these regulations if they determine there will be no interference with the environment (natural or built), or when granting an exemption is in the public interest.

Article 42: Prohibits building, alteration, or changes to the use of a structure, unless approved by the governor, or unless the structure is a Class 1 particular industrial structure conforming to local ordinance. Also exempt from this rule are developments constructed by the national government and that are per agreement between the relevant governor and relevant national administrative entities.

Article 43: In Urbanization Control Areas, prohibits construction, alterations, or changes to the use of a Class 1 particular industrial structure not regulated by article 29, unless approved by the governor.<sup>298</sup> Sets forth exceptions to this rule.<sup>299</sup>

Article 44: Allows inheritors or other parties that have acquired legal rights to an approved development to continue construction of the development.

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297. Infrastructure facilities vest in either the national or relevant local government, apparently based on the situation. *Id.* art. 40.

298. Specifically, structures not regulated by CPL article 29(2) and article 29(3). *Id.* art. 40. The standards for gubernatorial permission must conform with CPL articles 33 and 34. *Id.* art. 43(2).

299. The exceptions are for development acts for Class 1 Particularized Industrial Structures not regulated by CPL articles 29(2) and 29(3), if such a development act fits within one of the following scenarios: 1) constructed by a municipal government, national government, or port authority; 2) constructed as part of a city planning project; 3) for emergency disaster relief purposes; 4) for temporary purposes; 5) in an area regulated by CPL article 29.1.9.; or 6) for regular maintenance or "simple" development acts. *Id.* art. 43(1)-(6).

Article 45: Relates to article 44. Requires gubernatorial approval if one party wishes to legally replace another party that previously acquired a development-approval.

Article 46: Requires governors to maintain a written registry of all approved developments.

Article 47: Requires governors to provide copies of information in the registry upon public request. Also sets forth six basic items that must be in the registry required by article 46:

- 1) Date of development-approval
- 2) Use of the planned structure
- 3) Type and positioning of public infrastructure
- 4) Any other details of the approved development relating to public infrastructure
- 5) Any limits set by CPL article 41, item 1
- 6) Any other items mandated by Land Ministry Ministerial Order.

Article 48: Requires municipal governments to provide necessary expertise and financial support for developments within Urbanization Areas.

(As of this writing, Article 49 had been repealed by amendment)

Articles 50, 51 and 51 part 2: Provide a system for administrative appeals to determinations on applications for development-approval.

## II. CPL ARTICLE 29: SCENARIOS EXEMPT FROM DEVELOPMENT-ACT APPROVAL PROCEDURE REQUIREMENTS (APPLICABLE ONLY TO DEVELOPMENT ACTS IN CITY PLANNING AREAS AND QUASI-CITY PLANNING AREAS):<sup>300</sup>

1. In Urbanization Areas, unzoned City Planning Areas, and Quasi-City Planning Areas: Development acts not exceeding a size set by Cabinet Order.<sup>301</sup>
2. In Urbanization Control Areas, unzoned City Planning Areas, and Quasi-City Planning Areas: Construction of buildings for agricultural, forestry or fishing purposes, or for worker residences related to those purposes. (Details to be set by Cabinet Order.)<sup>302</sup>

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300. *Id.* art. 29(1)(1)-(11). *See also* GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 55.

301. CPL, Law No. 100 of 1968, art. 29(1).

302. *Id.* *See also* CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 20.

3. Construction of the following infrastructure: Train stations, social welfare facilities, medical facilities, schools (excluding universities and trade and technical colleges), citizen halls, transformer substations, and other "necessary" public infrastructures.<sup>303</sup>
4. Development acts undertaken by the national government, prefectures, designated cities, center cities, commission cities, and local semi-public and public entities such as office associations, local associations, port authorities, and local-area development project organizations.
5. City Planning Project activities
6. Land Planning Arrangement Project activities
7. Urban Redevelopment Project activities
8. Residential Area Maintenance Project activities
9. Activities for implementing dredging of Reclamation Areas
10. Activities for implementing emergency disaster first aid operations
11. "Normal" maintenance activities, "simple" construction, and other acts specified by Cabinet Order.

### III. SUMMARIZED LIST OF DEVELOPMENT- APPROVAL STANDARDS IN CPL ARTICLE 33<sup>304</sup>

Article 1: The development must conform to any applicable zoning.

Article 2: Open areas for public uses (e.g., roads, parks, public spaces, and water supplies for fires) must be arranged in scale and structure so as not to affect environmental preservation, disaster prevention, traffic safety, and efficient project activities. Roads in the development area must be planned so as to be connectable with main roads outside the development area. The government must also consider the following issues:

- A. Scale and shape of the development area, and conditions of neighboring areas
- B. Geographical conditions and topographical features of the development area
- C. Use of the proposed structure
- D. Scale of the development area and location of the proposed structure.

Article 3: Effective drainage infrastructure must be provided for in the development area (in accordance with regulations in the

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303. CPL Implementing Order, art. 21.

304. CPL, art. 33; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 56-57.

Sewer Law, article 2(1)). Drainage infrastructure must have adequate capacity, positioning, and facilities to prevent flooding. Developers must consider the following points:

- A. Precipitation conditions in the area
- B. Items A through D in the preceding item 2.

Article 4: In general, developers must plan for water supply infrastructure with siting, structure, and capacity that is adequate for projected demand. Developers must consider the same issues set forth in points A through D in the preceding item 2.

Article 5: If there is a District Plan (*chiku keikaku*) for the development area, building uses and development planning must conform to the plan.

Article 6: The developer must set the location of public buildings and facilities, based on 1) the purposes of the development, 2) consideration of environmental preservation of the surrounding area, and 3) convenience to the development area.

Article 7: If the land in the development area is unstable and susceptible to landslides, floods, and the like, a development plan must provide for safe development through ground improvements, setting barrier walls, and the like.

Article 8: In general, development acts shall not be permitted in areas "with a danger of disasters," in areas where prevention of landslides is promoted, or in areas with steep slopes that are prone to sudden collapses.

Article 9: When a development exceeds a scale set by Cabinet Order (currently set at one hectare), measures must be taken to preserve and protect trees, for protecting the environment both in the development area and in neighboring areas.

Article 10: When a development exceeds a scale set by Cabinet Order (currently one hectare), green belts and buffer zones must be designed to negate noise and vibrations that will be created by the proposed structure, and to protect the environment both in the development area and in neighboring areas.

Article 11: When a development exceeds a scale set by Cabinet Order (currently 40 hectares), the development must be recognized as not interfering with road, rail, and other forms of transportation.

Article 12: The developer must have the means and capital necessary for constructing the development (but Cabinet Orders can set exceptions to this general rule).

Article 13: The developer must have the ability to complete construction (but Cabinet Orders can set exceptions to this general rule).

Article 14: Within a development area, if the proposed development or related construction activities will interfere with the land rights of other parties, the developer must obtain the consent of an "adequate" (*soto*) number of those landowners. Article 33's standards are relaxed for persons who construct their own house or place of business.<sup>305</sup> In general, such developers are exempt from items 8, 12, and 13, while those persons developing their own residences are additionally exempt from items 2 and 4.<sup>306</sup> However, for larger development acts (over one square hectare) to construct one's own business structure or particular industrial structures, a developer would only be exempt from item 8.<sup>307</sup>

#### IV. SUMMARIZED LIST OF SOME DEVELOPMENT-APPROVAL STANDARDS IN CPL ARTICLE 34: DEVELOPMENT ACT SCENARIOS PERMITTED IN URBANIZATION CONTROL AREAS<sup>308</sup>

Article 1: Construction of stores that sell, process, and repair the "daily necessities" of residents in the area.<sup>309</sup>

Article 2: Construction of Class 1 particular industrial structures and other structures necessary for the valid use of natural or scenic resources.

Article 3: Construction of Class 1 particular industrial structures and other structures necessary for special temperature, humidity, and air condition; or for structures that are "difficult" (*konnann*) to construct in Urbanization Areas.

Article 4: Construction of structures for agricultural, forestry, and fishery uses.

Article 5: Construction of projects that group together stores, factories, "small or medium-sized company cooperative projects," or the like supported by the national or prefectural governments.

Article 6: Construction of structures and Class 1 particular industrial structures with a substantial relationship to pre-existing factories in Urbanization Control Areas.

Article 7: Construction of Class 1 particular industrial structures and other structures used for storage and disposal of hazardous materials.

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305. GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 56-58.

306. *Id.*

307. *Id.*

308. CPL, art. 34; GENERAL EXPLANATION ON REAL PROPERTY, *supra* note 37, at 58-60.

309. The article of the text uses the term *nichijo seikatsu no tame hitsuyo na buppin*, which the author translated rather loosely as "daily necessities."

Article 8: Construction of Class 1 particular industrial structures and other structures that are difficult to build or unsuitable for Urbanization Areas.<sup>310</sup>

Article 8, Part 3: Development acts for structures that would not be a hindrance to preservation of environments in areas that 1) border, or "are close to," an Urbanization Area; 2) are deemed to constitute a contiguous "lifestyle" (*seikatsu*) extension of the Urbanization Area, in the context of natural, social, and other conditions; and 3) would usually contain 50 or more adjacent (*rentan*) structures. Details to be set by local ordinances and Cabinet Orders.

Article 8, Part 4: When the development act does not present a danger of increasing urbanization in areas neighboring the development area, and when the development act would be "difficult or markedly inappropriate" in an Urbanization Area. Details to be set by local ordinances and Cabinet Orders.

Article 10: When deciding on the following development acts, the governor must first work through the local Development Deliberation Council: (*i*) when a development act exceeds an area (to be set by Cabinet Order), but is deemed not to present a danger to planned urbanization; (*ro*) where there is no danger of urbanization promotion in neighborhoods around the development area, or for development that are "difficult or markedly inappropriate" in Urbanization Control Areas.

#### V. DOCUMENTATION REQUIRED BY CPL ARTICLES 30 AND 31, AND CPL IMPLEMENTING REGULATION ARTICLES 15, 16, AND 17

1. Location, zoning, and scale of the area of development.<sup>311</sup>
2. Type of structure (Information on scale, however, is not required.)<sup>312</sup>
3. Party that will build the structure.<sup>313</sup>
4. Design plans drafted by a "licensed professional"<sup>314</sup> when the area of development is over one square hectare.<sup>315</sup> (Ministerial order sets the licensing requirements, which are based on a combination of education and experience.<sup>316</sup>)

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310. See also CPL Implementing Order article 29(3).

311. CPL, Law No. 100 of 1968, art. 30(1).

312. *Id.* art. 30(2).

313. *Id.* art. 30(4).

314. *Id.* art. 31.

315. CPL Implementing Regulation, Construction Ministry Ordinance No. 49 of 1969, art. 18.

316. An individual may be deemed to be a "licensed professional" based on a combination of education and experience. CPL Implementing Regulation, art.

5. Certification of consultation with, and consent from, public infrastructure management entities.<sup>317</sup>
6. Other documentation as required by any implementing regulations.<sup>318</sup>
  - A. CPL Implementing Regulation article 15 requires:<sup>319</sup>
    - 1) Starting and completion dates of construction
    - 2) Purpose of the structure (e.g., residential, non-residential, or office)
    - 3) In Urbanization Control Areas, the reason for the development and its compliance with CPL article 34.
  - B. CPL Implementing Regulation article 16 requires:<sup>320</sup>
    - 1) Architectural plan document (including architectural planning, description of the development area, applicable zoning, description of the current state of the development area, land-use plan, and public infrastructure planning.)
    - 2) Architectural planning diagrams including:
      - a. Profile diagram of any precipices (*gake*)
      - b. Profile diagram of any retaining walls (*yoheki*)
      - c. Diagram of "current situation" (*genjo*) of the development area (includes public facilities and trees)
      - d. Land-use planning diagram (includes, but not limited to boundaries of development area; public infrastructure positioning and structure; proposed building structure; proposed land uses; positioning of public infrastructure and trees; positioning and structure of buffering areas [*kanshotai*]).
      - e. Plane angle diagram of site preparation planning
      - f. Plane angle diagram of water supply infrastructure.
  - C. CPL Implementing Regulation article 17 requires document "attachments:"<sup>321</sup>
    - a. Development area location diagram
    - b. Development area zoning map

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19(1); CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 19(1)(i), (ro), (ha), (ho), (he), (ni), (to).

317. CPL, Law No. 100 of 1968, art. 30(2).

318. *Id.* art. 30(5).

319. CPL Implementing Regulation, art. 15.

320. *Id.* art. 16.

321. *Id.* art. 17.

- c. Documentation of the qualifications of the licensed professional referred to in CPL article 31 and CPL Implementing Regulation articles 18 and 19.
- d. Special documentation related to developments (apparently for persons with land rights, other than the actual landowners, who wish to construct one's own home or office in Urbanization Control Areas) controlled by CPL article 34.

## VI. KYOTO PREFECTURE AND KYOTO CITY— EXAMPLES OF LOCAL GOVERNMENT PROCEDURES

As discussed in the main body of this article, local governments in Japan play a significant role in the development-approval process. In addition to administering key stages of the overall process, the prefectures and municipalities enact their own specific ordinances, regulations, and guidance, which provide more detailed supplementation to the national law. A complete discussion of local government controls is beyond the scope of this article, but Kyoto Prefecture and Kyoto City can provide examples of development-approval procedural requirements specific to Japan's localities.

### A. KYOTO PREFECTURE

Kyoto Prefecture administers the development-approval process everywhere within the prefecture except in Kyoto City, which as a large "designated city" (*shitei toshi*) has authority over developments within its borders. On top of the approval procedures set by the CPL, Kyoto Prefecture has established and implemented its own particular administrative procedures.

Kyoto Prefecture imposes different development-approval procedures depending on the zoning and scale of the proposed development.<sup>322</sup> There are separate procedures for Urbanization Areas, Urbanization Control Areas, and *misenbiki* (unzoned) areas.<sup>323</sup> Within each area, approval procedures are generally limited or unnecessary for small-scale developments, and become increasingly complex as the size of a proposed development increases.<sup>324</sup>

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322. Construction Guidance Section, Public Works Construction Department, Kyoto Prefectural Government, TOSHI KEIKAKU HO NI MOTO ZUKU KAIHATSU SHINSEI TO NO TEBIKI [MANUAL ON DEVELOPMENT APPLICATIONS AND MISCELLANY BASED ON THE CITY PLANNING LAW] 2-4 (2000) [hereinafter KYOTO PREFECTURE DEVELOPMENT MANUAL].

323. *Id.* See also *supra* note 33 for an explanation of these basic zoning classes.

324. *Id.*

### 1. *Developments in Urbanization Areas*

As most developments in Japan occur within Urbanization Areas, this section will focus on approval procedure for developments in these areas. Within Kyoto Prefecture's Urbanization Areas, there are four variations to the basic procedures, depending on the size of the development area. For instance, development-approvals are not required for small developments (usually up to either 500 or 1,000 square meters depending on the municipality).<sup>325</sup>

For developments no larger than 0.5 square hectares, only the standard CPL articles 32 and 33 consultation and consent-acquisition procedures apply. Generally, the prefecture's various municipal governments oversee these procedures.<sup>326</sup> Kyoto Prefecture specifies that a developer acquire consent from 1) landowners inside the development area, 2) neighboring landowners, and 3) public infrastructure managing parties.<sup>327</sup> Consultations with parties that will manage public infrastructure scheduled for construction are also required.<sup>328</sup> Upon applying for development-approval, a developer must submit evidence of fulfilling the consent and consultation requirements.<sup>329</sup>

For developments ranging from 0.5 hectares to 20 hectares, both the basic CPL articles 32/33 procedures and Kyoto's own procedures apply.<sup>330</sup> More specifically, Kyoto requires two prefectural public committees—the "Development Planning Preliminary Deliberation Council" and the "Development Act Liaison Conference"—to review and provide consent for the proposed development.<sup>331</sup> For developments larger than 20 hectares, all of the aforementioned procedures apply, plus further layers at the pre-application stage.<sup>332</sup> The prefecture requires a developer to consult with, and receive from, the relevant city government an "opinion document" that evidences consent to

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325. *Id.*

326. Interview with Shozo Nakayama, Residential Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001); interview with Hisanari Kameyama, Construction Guidance Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001); Hisanari Hamano, City Planning Section, Public Works Construction Division, Kyoto Prefectural Government, in Kyoto, Japan (October 22, 2001).

327. KYOTO PREFECTURE DEVELOPMENT MANUAL, *supra* note 322, at 12.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* Kyoto Prefecture requires that the Development Act Liaison Conference be held under the auspices of the prefectural government's Public Works Construction Department. *Id.*

332. *Id.*

the proposed development.<sup>333</sup> The developer must also obtain the consent of the "Kyoto Prefecture Land Issues Countermeasures Consultation Council."<sup>334</sup>

## 2. Timeframes for the Approval Process

For the basic CPL articles 32/33 process of preliminary consultations and consent-acquisition from infrastructure managers, Kyoto Prefecture has an informal standard timeframe of 44 days—30 days for Kyoto Prefecture's preliminary procedures and 14 days for the CPL's consultation and consent process.<sup>335</sup> Kyoto Prefecture also sets an informal standard of 44 days for clearing review by the Development Planning Preliminary Consultation Council and the Development Act Liaison Conference.<sup>336</sup>

## 3. Documentation Requirements

Kyoto Prefecture also requires a large amount of documentation in addition to the documents required by the CPL. When applying for development-approval by the Kyoto governor, the developer must submit roughly a dozen documents specified by Kyoto regulations.<sup>337</sup> These documents include:<sup>338</sup>

1. Power of attorney
2. Diagram of the position of the development area
3. Diagram of the zoning of the development area
4. Diagram of the current state of the area
5. Land-use plan map
6. Plane angle diagram of drainage facilities plan
7. Plane angle diagram of land preparation plan
8. Vertical angle diagram of land preparation plan
9. Copies of public diagrams (related to such facts as boundaries of the development area and recordation of land survey)
10. Other documents deemed necessary by the governor.

In addition, Kyoto Prefecture requires numerous documents for the Preliminary Consultation Council and the Development Act Liaison Conference, most of which relate to site and con-

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333. *Id.* Although this general rule applies to developments over 0.5 square hectares for the Development Planning Preliminary Deliberation Council, developments up to one square hectare are exempt for review by the Development Act Liaison Conference, *Id.*

334. KYOTO PREFECTURE DEVELOPMENT MANUAL, *supra* note 322, at 2.

335. Interview with Shozo Nakayama, *supra* note 326; interview with Hisanari Kameyama, *supra* note 326; interview with Hisanari Hamano, *supra* note 326.

336. *Id.*

337. KYOTO PREFECTURE DEVELOPMENT MANUAL, *supra* note 322, at 12.

338. *Id.* at 11-17.

struction planning.<sup>339</sup> The Development Planning Preliminary Consultation Council also requires a "development-planning preliminary consultation request form" and a "development-planning explanation form."<sup>340</sup> Further, the Development Act Liaison Conference requires a special "Development Act Liaison Conference explanation form" and "determination status announcement form."<sup>341</sup>

## B. KYOTO CITY

### 1. General Overview

Like Kyoto Prefecture, Kyoto City follows the basic development-approval procedures set forth in CPL articles 29-40.<sup>342</sup> Kyoto City also imposes some additional procedural requirements upon an applicant, prior to submission of an application for development-approval. Specifically, an applicant must submit a summary outlining the major points of the proposed development to the "Development Deliberation Council Administrative Bureau" in Kyoto City Hall.<sup>343</sup> The government then presents this information to the Kyoto Development Deliberation Council for "preliminary review."<sup>344</sup> The preliminary review is intended to facilitate the planning of "appropriate operations and smooth operations," and to "provide necessary guidance" about "various legal regulations and public facilities and infrastructure."<sup>345</sup> Furthermore, as in Tokyo, Kyoto requires an applicant to prepare an environmental impact assessment.<sup>346</sup> Various parties with land rights in the relevant properties must be notified in accordance with the CPL notification requirements.<sup>347</sup>

After the preliminary review stage, the applicant must consult with relevant departments at the city, prefecture, and national level.<sup>348</sup> Kyoto City publications list about 20 such government departments, such as the Land Ministry's National Land Office in Kyoto, Kinki Regional Servicing Bureau; and prefectural- and city-level river, water, and sewer sections.<sup>349</sup>

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339. *Id.* at 5-10.

340. *Id.*

341. *Id.*

342. KYOTO DEVELOPMENT-APPROVAL BOOKMARK, *supra* note 59, at 15, 18-23.

343. *Id.* at 14.

344. *Id.* at 18. Thirteen copies must be presented to the bureau, which is actually part of Kyoto City Hall's Development Guidance Section, Urban Landscape Division, City Planning Bureau. *Id.*

345. *Id.* at 16.

346. *Id.* The assessment is required by the "Ordinance On Kyoto Municipal Environmental Impact Assessments and Miscellany." *Id.*

347. KYOTO DEVELOPMENT-APPROVAL BOOKMARK, *supra* note 59, at 18.

348. *Id.* at 17.

349. *Id.*

For new developments, reconstructions, and other construction activities within Urbanization Control Areas, an applicant must also comply with a "construction approval" process.<sup>350</sup> In general, the process requires 1) submission, to the government, of a variety of charts and plans relating to the development and the relevant area; 2) a preliminary review stage; 3) a review stage; 4) and the final approval by the government.<sup>351</sup> For construction approval, various standards related to water lines, ground stability, and the like must be satisfied.<sup>352</sup> However, a variety of exemptions to the approval requirement exist.<sup>353</sup>

Finally, Kyoto City has special requirements for some types of developments. Developments exceeding a certain scale, for instance, are regulated by Kyoto ordinances on "City Formation Related to Land Use." The ordinances require the applicant to first notify the mayor and hold an explanatory meeting for local residents about the proposed development.<sup>354</sup> For construction of larger stores, special notification procedures are required by the "Large Scale Retail Stores Location Law" and "Medium Scale Retail Stores Location Law."<sup>355</sup>

## 2. Documentation Requirements

Kyoto City requires the applicant to prepare more documentation than the CPL does.<sup>356</sup> In general, Kyoto requires the types of positioning, zoning, planning, and structural diagrams typically required by municipalities in both the U.S. and Japan. For example, Kyoto requires a variety of water and drainage planning diagrams, as well as road planning maps. Some of the more unusual required documents include park planning maps, soil distribution diagrams, and natural disaster planning maps.<sup>357</sup>

Kyoto City also requires more highly specialized documents,<sup>358</sup> including:

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350. *Id.* at 24-27.

351. For developments in Kyoto City, the required documentation must be submitted to the Development Guidance Section, Urban Landscape Division, City Planning Bureau of Kyoto City Hall. *Id.*

352. The standards are set forth in CPL Implementing Order art. 36. See KYOTO DEVELOPMENT-APPROVAL BOOKMARK, *supra* note 59, at 25; CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 36.

353. KYOTO DEVELOPMENT-APPROVAL BOOKMARK, *supra* note 59, at 24.

354. *Id.* at 16.

355. *Id.* at 18.

356. *Id.* at 14, 30-43.

357. *Id.*

358. See Kyoto-Shi Toshi Keikaku Shiko Saisoku [Kyoto City Urban Planning Detailed Implementation Regulation], Kyoto City Regulation No. 110 of 1971, forms 1-5; CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 16.

1. Statement of qualifications of the person who drafts required plans and diagrams (including graduation certificate and copy of license)<sup>359</sup>
2. Explanation of the architectural plan,<sup>360</sup>
3. Written record of land and buildings in the area of development<sup>361</sup>
4. Documentation of consent by landowners (including stamps by signature seals)<sup>362</sup>
5. "Capital planning" documents<sup>363</sup>
6. Certification of capital funds and loan financing<sup>364</sup>
7. Documents for budgeting of construction costs
8. Documents for the planning of ultimate completion of the project
9. Documentation of applicant's funding and credit (includes tax payment certification; copy of "license to engage in the business of the sale and purchase of residential land and buildings" (presumably if the applicant is engaged in that business); and registration of incorporation (if the applicant is a corporate person)<sup>365</sup>
10. Documentation of the competency of the party that will construct the development.<sup>366</sup>

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359. Kyoto-Shi Toshi Keikaku Shiko Saisoku [Kyoto City Urban Planning Detailed Implementation Regulation], Kyoto City Regulation No. 110 of 1971, form 3.

360. *Id.* form 1.

361. *Id.* form 4.

362. *Id.* form 2.

363. CPL Implementing Order, Cabinet Order No. 13 of 1969, art. 16.

364. Kyoto-Shi Toshi Keikaku Shiko Saisoku [Kyoto City Urban Planning Detailed Implementation Regulation], form 3.

365. *Id.* form 5. Regarding the licensing documentation, the Japanese text states, "*takuchi kenbutsu torihiki-gyo menkyosho no utsushi.*" *Id.*

366. Documentation includes "notification of approval based on the Construction Industry Law," and if the applicant is a corporate person, registration of incorporation. *Id.*