

Neighborhood Development Floating Zone

A Model Ordinance to Foster Green
Community Development Using the LEED for
Neighborhood Development Rating System



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LEED FOR NEIGHBORHOOD DEVELOPMENT PRIMER



LEED, or Leadership in Energy and Environmental Design, is redefining the way we think about the places where we live, work and learn. The LEED for Neighborhood Development (LEED-ND) Rating System—created through a collaboration of the U.S. Green Building Council (USGBC), Congress for the New Urbanism (CNU), and the Natural Resources Defense Council (NRDC)—is based on the principles of smart growth, New Urbanism, and green buildings. The result is a voluntary leadership standard for neighborhood development that provides criteria designed to help evaluate and guide development projects in terms of where they’re located, how they’re designed, and how they perform.

A national standard for green neighborhood planning and design, the LEED-ND rating system emphasizes site selection, design, and construction elements to bring buildings and infrastructure together on a district scale and relate the neighborhood to its local and regional context. Designed to respond to land use and environmental considerations, the LEED-ND rating system fosters exemplary development projects that address environmental, economic, and equity concerns.

With no minimum or maximum required size, LEED-ND projects may constitute whole neighborhoods, portions of neighborhoods, or multiple neighborhoods, or even a single building or small infill project that complements existing neighboring uses.

The LEED-ND rating system is divided into the following credit categories:

- **Smart Location and Linkage (SLL)**, which emphasizes project location on connected and previously developed sites with existing infrastructure, near transit, and away from important natural resources.
- **Neighborhood Pattern and Design (NPD)**, which recognizes compact, walkable, vibrant, mixed-use neighborhoods with good connections to nearby communities.
- **Green Infrastructure and Buildings (GIB)**, which recognizes building and infrastructure performance at the district scale that reduces energy and water use, encourages historic preservation, and minimizes waste.

The LEED-ND rating system consists of **prerequisites** that all projects must meet and a set of **credits**, from which each project can choose to earn enough points for certification. Each prerequisite and credit has a general statement of intent followed by specific performance thresholds or prescriptive measures. To earn LEED-ND certification, an applicant project must satisfy all of the prerequisites and qualify for a minimum number of points to attain the project ratings listed below.



LEED-ND certifications are awarded according to the following scale:

Certified	40–49 points
Silver	50–59 points
Gold	60–79 points
Platinum	80 points and above

The LEED-ND certification process is available to projects at all phases of development, with different awards based on development phase.

- **Stage 1:** Any time before the entitlement process begins or prior to a project earning half of its land-use entitlements, a successful project is awarded a letter stating that it has earned Conditional Approval of a LEED-ND Plan.
- **Stage 2:** After it is fully entitled by public authorities but no more than 75 percent constructed, the project can earn a Pre-Certified Plan certificate.
- **Stage 3:** Finally, when the project is complete, namely when certificates of occupancy are issued, the project can apply to be considered a LEED-ND Certified Neighborhood Development. If successful, a plaque for public display at the project site is issued and the project is listed as certified on the USGBC website.

For more detailed information on eligible project types and a fuller account of the benefits of the rating system, please see the introductory material in the LEED for Neighborhood Development Rating System, the LEED Reference Guide for Green Neighborhood Development, and the program’s website: new.usgbc.org/leed/rating-systems/neighborhoods.

LEED® 2009 for Neighborhood Development	
Total Possible Points**	110*
Smart Location & Linkage	27
Neighborhood Pattern & Design	44
Green Infrastructure & Buildings	29
* Out of a possible 100 points + 10 bonus points	
** Certified 40+ points, Silver 50+ points, Gold 60+ points, Platinum 80+ points	
Innovation & Design Process	6
Regional Priority Credit	4

I. INTRODUCTION & EXECUTIVE SUMMARY

Green neighborhood development is quickly rising in prevalence as local governments recognize its advantages and the important role that local codes play in fostering increasingly sustainable patterns of development. The benefits of green neighborhood development are many. They include greater walkability, alternative modes of mobility, and less auto dependence, which, in turn, saves residents thousands of dollars annually for each car not bought and operated, and lowers tail pipe exhausts: a major source of greenhouse gasses. More localized benefits include less water and air pollution, less impact on natural resources, more sustainable building practices, and lower energy consumption and costs.

Green neighborhood development includes housing of various types and prices and locates them in close proximity to places of work and needed services and goods. It preserves historic and cultural resources and respects the amenities that contribute to truly attractive and livable neighborhoods, including community gardens, vegetation, and walkable streets. By enticing residents to the streets and trails they feature, sustainable neighborhoods encourage and enable walking, biking, and recreation that leads to more physical activity and improved public health.



Rendering of Twinbrook Station in Rockville, MD, a LEED-ND pilot project certified at the gold level for its plan
Source: The JBG Companies

Although many communities have already taken significant action, many more are realizing that green neighborhood development practices—such as providing a mix of uses, building narrower streets, and locating parking behind or beside buildings—are not permitted under their municipal codes. Under such codes, approvals for projects meeting green development standards could be cost-prohibitive due to necessary zoning changes and resulting consultant fees. Where variances are needed, not only are development costs increased, but municipalities risk setting dangerous precedent. But for municipalities interested in updating local codes to accommodate and even incentivize a more sustainable development pattern, the task can be

somewhat daunting, especially in an economy where municipal budgets are limited and planning and legal staff time is at a premium. While communities across the country are employing myriad ways to create green neighborhoods, many of the methods (which include complete zoning overhauls and extensive, area-specific rezonings) are time consuming, staff-intensive, and costly; and not every community has the resources to implement such lofty initiatives.

Using as its standards the prerequisites and credits contained in the LEED-ND rating system, the model ordinance for green neighborhood development described here uses a technique developed over half a century ago and offers municipalities a cost-effective and efficient tool that can be used when a more involved process is not an option.

At the conclusion of World War II, a small village in New York created a new regulatory technique, the “floating zone,” to address a challenge: how to attract employers to acquire and reuse outdated large estates and other vacant land. They settled on an approach: build housing for young households who were seeking places to live at prices they could afford in the post-war economy. They created the floating zone, to accomplish this result, which allowed developers to purchase land zoned for single-family development at existing prices, and apply for medium density zoning if they could design the development properly. This technique serves communities and developers today who are challenged as well to create green neighborhoods at densities that foster connectivity, accessibility, affordability, and, ultimately, sustainability.

The model ordinance described here incentivizes the type of development valued by the adopting community by reserving the increased value of greater density until a project application is made. This allows developers to invest in project and neighborhood amenities that encourage walking, reduce automobile dependence, mitigate water and air pollution, lessen per-

household energy use and expense, decrease the risk of flooding, and reduce materials needed in construction. In this way, the many benefits of green neighborhood development can be achieved, allowing and even incentivizing developers to produce more sustainable development projects and improve our communities.

Part II, below, briefly introduces the advantages of using a floating zone to achieve green development. **Part III** provides an overview of the floating zoning mechanism, expands upon its origins to illustrate how such a zone might be used, and describes the benefits and drawbacks of using floating zoning versus the similar mechanism of overlay zoning. **Part IV** contains the model floating zone for green neighborhood development with annotated provisions. The ordinance first establishes its Purposes and Intent, provides a few basic Definitions, and sets forth its Applicability. It then contains instructions for a Pre-Application Process, followed by the District Standards, which incorporate the prerequisites and credits of the LEED-ND rating system (although local governments may substitute a similar green neighborhood development system, if so desired). It then establishes a process for Planning Board Review and Recommendation to the local legislative body, followed by a process for Rezoning and Map Amendment. Finally, it sets forth Final Project Review authority and procedures. The annotations in Part IV include coverage of several legal issues often raised in the context of floating zones or green development regulation, including: spot zoning, federal and state preemption, anti-trust law violations, and violations of the non-delegation of authority doctrine. **Appendix A** to this document presents an overview of states authorizing the use of floating zones. For convenience, **Appendix B** contains an annotation-free version of the model floating zone. Communities considering this model, however, are strongly advised to first review the annotated version of this ordinance contained in Part IV.

II. ADVANTAGES OF A FLOATING ZONE APPROACH

Communities may use this model floating zone ordinance to establish a new district in the local zoning code and invite developers who wish to propose projects meeting sustainability goals (such as those intended for LEED-ND certification) to apply to the local legislative body for the new district to be mapped to their parcels. Using a floating zone mechanism in this context has five key advantages:

- First**, it allows the community to memorialize green development standards that meet local needs in a single zoning district by incorporating them as zoning standards, which can be affixed to appropriate parcels.
- Second**, the burden of identifying the most environmentally and economically preferable sites for green development is born by the LEED-ND rating system, which takes environmental considerations into account, and by developers, who understand the construction costs, design, and markets most appropriate for these new LEED-ND-based zoning standards. In other words, communities can rely on an established tool and set of metrics to offload a regulatory burden associated with green zoning.
- Third**, the ordinance creates a relatively streamlined process for the developer and community to rezone land and secure site plan approval. Using this model, communities with limited staff and resources can save the time and expense of a more traditional review and revision of their zoning ordinance, while still increasing environmental sustainability. Likewise, developers save the time and expense involved in taking LEED-ND projects through the typical hurdles they face at the municipal level, while still meeting the LEED-ND standards and more efficiently obtaining the entitlements necessary for certification.
- Fourth**, without such a mechanism at the ready, many developers are forced to apply for variances in order to obtain full entitlements for certification. By avoiding the need for variances, costs to the developer are dramatically reduced (thereby further incentivizing green development) and communities avoid creating dangerous precedent for future variances.
- Fifth**, a floating zone approach, when applied in low and medium density areas, preserves the value of the increased density permitted under LEED-ND for developers who are building the type of sustainable development desired by the community. This prevents the economic windfall that results from a rezoning approach, which would cause current property owners to sell their land to developers of sustainable projects at an inflated price.

In sum, this model floating zone is meant for local governments that desire green development but that are faced with limited staff, time, and resources. The floating zone approach saves a more limited municipality time and money, while still creating an incentive mechanism to further greener, more socially and environmentally responsible development, and while still allowing the local government to have significant control over the approval process.

III. FLOATING ZONES EXPLAINED

A. OVERVIEW OF FLOATING ZONES

Floating zones—typically used to incentivize a particular type of development—are “flexible” zoning districts because of their departure from traditional Euclidean zoning models and the increased flexibility they offer to developers and communities in the application of their standards. In creating a floating zone, a zone classification is authorized for future use, but not placed on the zoning map. Rather, developers of compliant parcels are invited to make an application to have the zone applied in a particular location. Floating zones contain standards that supplant the underlying zoning; they can constitute a wholesale replacement of the underlying zone or they can leave in place provisions of the underlying zone where it is consistent with the objectives of the floating zone. A locality can apply the floating zone to a particular area upon the petition of a developer, at the local legislature’s initiative, or upon the recommendation of the planning board or commission. Upon approval, the parcel is rezoned to reflect the new use and becomes a small zoning district. The zoning map is amended to apply the floating district to that parcel of land, and the parcel’s development is governed by the use, dimensional, and other provisions of the floating zone.

Flexible zoning districts, such as floating zones, must be authorized under state law, either under specific language in the zoning enabling act or under state court interpretations holding that these flexible zoning districts are legal. Initially, these techniques met resistance, as challengers argued in court that these zoning districts constitute spot zoning or violate the uniformity requirement in the original zoning enabling act. The courts in many states have declared that floating zoning is legal under the planning and zoning enabling acts, home rule statutes, local charters, or other land use laws adopted by the state legislature. (See [Appendix A](#) for a discussion of states authorizing the use of floating zoning.)

Court decisions often are based on the conclusion that such zoning encourages the most appropriate use of the land and advances the general welfare. These are concepts that were embodied in the original zoning enabling act, which was used by most states when they first delegated authority to local governments to adopt zoning and other land use regulations. The enabling act contains a provision that authorizes district regulations to encourage the most appropriate use of the land. In states where the enabling acts are liberally construed, courts uphold these flexible zoning district options, particularly where they are adopted to achieve the objectives of the comprehensive plan or pursuant to a formally adopted special area plan. Local officials and planners should consult municipal counsel for assistance on determining the legality of these techniques under applicable state law.

Among other uses, floating zones can be used to advance sustainable neighborhood projects, as well as to incorporate green development criteria into more general development standards. They are excellent alternatives to traditional zoning, offering the opportunity to achieve better street networks, bike networks, access to civic space, heat island reduction, access to transit, and a variety of other sustainability features.

B. THE ORIGINS OF FLOATING ZONES: RODGERS V. TARRYTOWN

The best method for fully understanding the utility and functionality of the floating zone mechanism is to understand its origin—the seminal case approving floating zoning: *Rodgers v. Tarrytown*, 96 N.E.2d 731 (N.Y. 1951), which was decided by the highest court of New York State in 1951 and has been relied upon by subsequent cases in many other states.

Following World War II, the Village of Tarrytown, New York, was in need of adequate housing that was affordable enough for young veterans and their families—a workforce that would induce employers to establish businesses in the village. Village leaders did not want to rezone parcels for multi-family housing because the result would be to provide current landowners with an economic windfall the moment the rezoning occurred, which would, in turn, increase the sale price of the land to developers of multi-family housing. These developers would then be forced to pass that increased cost along to the purchasers, thereby decreasing affordability. Village leaders also did not want to decide where this type of development should be located without the input of multi-family housing developers who had superior knowledge of regional real estate markets and where they wanted to build.



Tarrytown Music Hall
Source - Ed Otterman, Creative Commons

To solve this problem, the board of trustees (the village's legislative body) amended the general zoning ordinance to create a new district, "Residence B-B"—a floating zone, and the first of its kind in the country. The ordinance allowed not only one- and two-family dwellings, but also garden apartments. The boundaries of the new district were not delineated in the ordinance but were to be "fixed by amendment of the official village building zone map, at such times in the future as such district or class of zone is applied, to properties in [the] village." The ordinance erected exacting standards of size and physical layouts for the zone: "a minimum of ten acres of land and a maximum building height of three stories were mandated; setback and spacing requirements for structures were carefully prescribed; and no more than 15% of the ground area of the plot was to be occupied by buildings"—in other words, parcels had to be capable of being buffered from the surrounding neighborhood to mitigate any negative effects of the increased density and new type of multi-family buildings it allowed.

The effect of this floating zone was to invite owners / developers to purchase favorable and compliant parcels at their current listing price and apply to the village for those parcels to be rezoned to a new use at a higher density.

A year and a half after the amendment was enacted, a developer sought to have her property, consisting of almost 10.5 acres, placed in a Residence B-B classification. After repeated modification of her plans to meet suggestions of the village planning board, that body gave its approval, and, several months later the board of trustees, also approving, passed an ordinance applying the district to her property, changing the district or zone of said property to Residence B-B, and amending the official Building Zone Map of the Village of Tarrytown accordingly. Soon after, the owner of a residence on a six acre plot about a hundred yards from the subject property brought an action to have the village's two amendments declared invalid.

In 1951, New York State's highest court upheld the village's amendments as valid and the action of the trustees proper. In doing so, the court stated that while stability and regularity are important, zoning is by no means static. Property owners have no eternally vested right to a zoning classification, particularly where the public interest demands otherwise. Further, the court stated:

"The Tarrytown board of trustees was entitled to find that there was a real need for additional housing facilities; that the creation of [the floating zone] would prevent young families, unable to find accommodations in the village, from moving elsewhere; would attract business to the community; would lighten the tax load of the small home owner, increasingly burdened by the shrinkage of tax revenues resulting from the depreciated value of large estates and the transfer of many such estates to tax exempt institutions; and would develop otherwise unmarketable and decaying property. The village's zoning aim being clear, the choice of methods to accomplish it lay with the board... That it called for separate legislative authorization for each project presents no obstacle or drawback..."

The court rejected the argument that the board of trustees, by following the course that it did, divested itself or the planning board of power to regulate future zoning with regard to garden apartments. In doing so, the court stated that the mere circumstance that an owner possesses a ten-acre plot and submits plans conforming to the physical requirements prescribed by the amendment will not entitle him or her, *ipso facto*, to a Residence B-B classification. It is still for the board to decide whether the grant of such a classification accords with the comprehensive zoning plan and benefits the village as a whole. The court further noted that the action of a board must be reasonable; it may not arbitrarily or unreasonably deny applications of other owners for permission to construct garden apartments on their properties.

The court also addressed the contention that the first ordinance was invalid because, in proclaiming a Residence B-B district, it set no boundaries for the new district and made no changes on the zoning map:

“True, until boundaries are fixed and until zoning map changes are made, no new zone actually comes into being, and neither property nor the rights of any property owner are affected. But it was not the design of the board of trustees by that enactment to bring any additional zone into being or to affect any property or rights; the ordinance merely provided the mechanics pursuant to which property owners might in the future apply for the redistricting of their property. In sum, the...amendment was merely the first step in a reasoned plan of rezoning, and specifically provided for further action on the part of the board. That action was taken by the passage of the [second] ordinance which fixed the boundaries of the newly created zone and amended the zoning map accordingly... [T]he two amendments, read together...accomplished a rezoning of village property in an unexceptionable manner... [T]o condemn the action taken by the board in effectuating a perfectly permissible zoning scheme and to strike down the ordinance designed to carry out that scheme merely because the board had employed two steps to accomplish what may be, and usually is, done in one, would be to exalt form over substance and sacrifice substance to form.”

This early neo-Euclidian case confirmed the power of a municipality to establish new zoning techniques. In doing so, the *Rodgers* court established that so long as the public purpose is clear to encourage the most appropriate use of the land then, the means chosen are for the municipality to decide. As a result, *Rodgers v. Tarrytown* upheld the technique of floating zoning and opened the door for a wide variety of other smart growth techniques such as performance zoning, transfer of development rights, and overlay zoning.

C. FLOATING ZONES VS. OVERLAY ZONES

Overlay zones¹ can foster sustainable development by using LEED-ND standards to develop the zone’s regulations or by directly incorporating specific LEED-ND standards. For an example of a model overlay zone that directly incorporates LEED-ND standards, see the *LEED-ND Planners Guide & Model Ordinance* (Jan. 2011), developed by Criterion Planners. As discussed in the Criterion model, one benefit of an overlay zone approach rather than a floating zone is that it enables land use, transportation, and capital improvement planning and investment to be strategically located in relation to long-term goals. Also, the initial task of mapping areas eligible for sustainable development will proactively engage developers, citizens, and policy-makers on a collective, organized basis, rather than wait for individual property owners to initiate the process (for example, by applying for the mapping of a floating zone).

For a local government to properly implement an overlay zoning approach to LEED-ND, however, a significant amount of due diligence is necessary. The municipality must prepare criteria for and map all sensitive environmental resources and lands within the community meeting the LEED-ND locational prerequisites; it must identify and eliminate provisions in current codes that are inconsistent with LEED-ND standards; and it must create new code provisions necessary to enable projects to achieve LEED-ND prerequisites and credits. In addition, because the overlay zone is created and mapped in one traditional rezoning process, LEED-ND standards that are incorporated will eventually become outdated as new versions of the rating system are created, and the municipality will be tasked with updating the standards of the overlay zone accordingly. If a municipality chooses to incorporate by reference the LEED-ND rating system “and all future versions” as a mechanism to avoid having to update the zone requirements, it will face serious legal issues related to the doctrine of non-delegation. (See [Part IV, annotations to Section 107, Legal Issue Addressed: Doctrine of Non-Delegation](#) for a thorough discussion of this issue.)

¹ In overlay zoning, a mapped district is superimposed on one or more established zoning districts, or portions of districts. Property within the overlay is then subject to two sets of regulations: those contained in the underlying zoning district and those provided for by the overlay zone itself. The provisions of an overlay district can be more restrictive or more permissive than those contained in the underlying district. Overlay zoning can be used to protect large scale critical environmental areas from development or to promote growth in areas that support higher density development.

While the overlay approach is more aggressive in requiring sustainable development in pre-established locations, a floating zone may be preferable in some communities for the reasons described in Part II above, particularly reasons (2) and (5): floating zones relieve municipal staff of the burden to identify the most environmentally appropriate and economically feasible areas for sustainable development and they can be more attractive to developers because they provide increased economic value and flexibility.

IV. A FLOATING ZONE FOR GREEN NEIGHBORHOOD DEVELOPMENT²

Communities may use this flexible zoning technique to memorialize LEED-ND or other green neighborhood development standards in a single zoning district by incorporating them as eligibility conditions and district regulations, which can be affixed to appropriate locations. The existence of this district within the code allows a municipality to pave the way for smarter decisions, more integrated infrastructure, and a greener community. Under this approach, developers who propose projects that they intend to certify under LEED-ND or other such standards may apply to the local legislative body for this new zoning district to be mapped to their parcels, thereby removing barriers to certification within the applicable local zoning code. The application is referred to the local planning board for a full review, and the planning board then sends its detailed recommendations to the local legislative body, which may then map the zone to the applicant's property.

The model ordinance below establishes a new zoning district—the Neighborhood Development Floating Zone (NDFZ)—drawing on the prerequisites and credits of the LEED-ND rating system as green development standards. Each section is annotated for additional clarity.

SECTION 101: PURPOSE & INTENT

- A. The purpose of the Neighborhood Development Floating Zone (NDFZ) is to create a new zoning district to further the [City/Town/Village] of []'s commitment to enhancing the public welfare and assuring that further development in certain locations is consistent with the [City/Town/Village]'s desire to create a more sustainable community by incorporating green development standards into the design, construction, and maintenance of buildings. This zoning district seeks to encourage projects in locations that are most appropriate for green development.
- B. The NDFZ district is created to secure the benefits of green neighborhood development, which include energy conservation; reduction in fossil fuel and potable water usage; preservation of existing natural resources including habitat, water bodies, wetlands, agricultural lands, steep slopes, and floodplains; increased local food production, tree canopies, and quality of neighborhood design; health benefits associated with more walkable and bikeable streets and paths; increased access to transit, neighborhood schools, recreational facilities, and civic and public places; reductions in impervious surfaces, stormwater runoff, light pollution, and the heat island effect; recycling of solid waste, building materials, and waste water; redevelopment of brownfields; promotion of renewable energy, district heating and cooling, and the adaptive reuse of existing buildings, historic preservation, and infill development; and the use of existing infrastructure. These needed benefits are consistent with the [City/Town/Village] of []'s commitment to enhancing public health, safety, and welfare, and they constitute the comprehensive planning rationale for the adoption of the NDFZ district.

² This neighborhood development floating zone approach, as with any new endeavor to implement robust standards for sustainable growth, requires the careful attention of counsel for both the public and private sector actors involved. Planners are encouraged to consult municipal counsel regarding the jurisdictional limitations and potential complications arising from the use of third-party standards.

SECTION 101 ANNOTATIONS

Section 101 sets forth the purposes and intent of the ordinance: to create more sustainable neighborhoods that achieve a number of specific benefits that advance the public health, safety, and welfare and support the legal authority of the municipality to adopt such a floating zone.

Courts that have validated floating zones have generally found it helpful that the purposes of the zoning were consistent with the locality's comprehensive plan. Thus, findings contained in the purposes clause of the floating zone should establish the comprehensive planning rationale for the ordinance and be compatible with the comprehensive plan of the community.

Additionally, communities should note that some jurisdictions require the record to include support for the benefits claimed or problem allegedly remedied by the particular ordinance. In such jurisdictions, the benefits described in Section 101 (B) should be bolstered by references to supporting studies. For example, the "health benefits associated with more walkable and bikeable streets and paths" could be supported by CDC documentation on the important health benefits of walking* paired with a meta-analysis on the relationship between the existence of such infrastructure and exercise.**

* See, e.g., U.S. Dep't of Health and Human Servs., Physical Activity and Health: A Report of the Surgeon General 118-42 (1996), available at <http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>.

** See, e.g., Reid Ewing & Robert Cervero, Travel and the Built Environment: A Meta-Analysis, 76 J. Am. Plan. Ass'n 265, 275 (2010).

SECTION 102: DEFINITIONS

1. **"Applicant"** - Any person or entity having a legal interest in a Proposed Project applying for a rezoning under this district, or the authorized agent of any such person or entity.
2. **"LEED-ND"** - The Leadership in Energy and Environmental Design (LEED) for Neighborhood Development Rating System, created by the U.S. Green Building Council (USGBC) for its use in certifying projects that constitute green neighborhood developments.
3. **"Proposed Project"** - The land and buildings subject to a proposal submitted by an Applicant for a rezoning under this district.
4. **"Smart Location and Linkage"** - The LEED-ND credit category dealing with the locational requirements of the rating system (such as, for example, selection of a "Smart Location" near exiting communities and public transit infrastructure, avoidance of "Imperiled Species and Ecological Communities," "Wetland and Water Body Conservation," "Agricultural Land Conservation," and "Floodplain Avoidance").
5. **"GBCI"** - The Green Building Certification Institute, which is the third-party organization charged with administering project certification under the USGBC's LEED rating systems.

SECTION 102 ANNOTATIONS

Communities may consider developing additional definitions, as necessary, from the LEED-ND rating system. It should be noted, however, that the rating system changes over time. Any definitions incorporated from the then-current version of LEED-ND will need to be updated as new versions of the rating system become available.

SECTION 103: APPLICABILITY

- A. This zoning district applies to Proposed Projects for which Applicants plan to seek certification under the LEED-ND rating system and who can demonstrate to the satisfaction of the Planning Board³ and Local Legislative Body⁴ that they can satisfy all LEED-ND Smart Location & Linkage prerequisites.
- B. Projects that comply with Section 105 of this law are subject to modified and expedited site plan and subdivision review (as provided in Section 108) following rezoning and map amendment.

SECTION 103 ANNOTATIONS

Section 103 clarifies that the NDFZ is a new zoning district added to the relevant title of the local zoning code and applicable to any development that complies with the LEED-ND locational prerequisites. This ensures that the floating zone will be applied only in those neighborhoods in the community that have existing infrastructure, that are compact in their development pattern, and that support transit use and connectivity to services (for example), and avoid environmentally vulnerable areas. It also ensures that the district will not be applied in areas incompatible with the more sustainable pattern of land development accomplished under LEED-ND, such as areas where larger lot single-family homes, sensitive environmental lands, or fertile agricultural soils predominate. In this way, the zone is self-limiting.

Communities may consider adding a provision to Section 103 that further limits application of the NDFZ. For example: “It is the intention of the Local Legislative Body to apply this district to neighborhoods that have characteristics compatible with the LEED-ND rating system and to avoid its use in neighborhoods with conditions incompatible with these characteristics. As such, mapping of the NDFZ is not permitted within the [insert districts] districts, unless waiver is provided by the Local Legislative Body.”

Because LEED-ND projects typically have significantly longer entitlement and construction periods than most projects (such as those obtaining certification under the LEED for New Construction rating system), USGBC created a three-stage system for when an application may be submitted for certification. While Stage 3 certification is applicable only once a project is complete (and would therefore not be seeking a rezoning) and Stage 1 certification is applicable only for projects with up to 50 percent of entitlements, Stage 2 certification requires that all land use entitlements be obtained. As such, because the NDFZ incorporates the prerequisites and locally-accepted credits of the LEED-ND rating system, the NDFZ will assist developers in meeting eligibility requirements for Stage 2 certification through a showing that the zone has been mapped to the project site. (See the LEED-ND Primer *supra* for more information on the Stages of LEED-ND certification.)

Legal Issue Addressed: Spot Zoning

Section 103 also addresses the legal issue of spot zoning. Spot zoning in many jurisdictions is a shorthand description of the legal flaw that exists when a zoning amendment does not conform to comprehensive planning objectives. More specifically, spot zoning occurs when a zoning amendment arbitrarily and unreasonably singles out a small parcel of land and permits the owner to use it in a manner inconsistent with the permissible uses in the area, for the benefit of the owner of such property and to the detriment of others. In *Rodgers v. Tarrytown*, discussed earlier (see [Part III. B. The Origins of Floating Zones: Rodgers v. Tarrytown](#)), the court dealt directly with this issue, finding that so long as an ordinance displays evidence of comprehensive planning, it is not spot zoning, even if it singles out and affects but one small plot or creates in the center of a large zone small areas or districts devoted to a different use. The test for spot zoning is whether the zoning was (continued)

³ For purposes of the model floating zone provisions presented here, the term “Planning Board” refers to the administrative body charged with the review and approval of development projects in the adopting locality. The term should be changed within a given jurisdiction to refer to the appropriate body.

⁴ For purposes of the model floating zone provisions presented here, the term “Local Legislative Body” refers to the board that is authorized to adopt and amend zoning laws in the adopting locality. The term should be changed within a given jurisdiction to refer to the appropriate body.

SECTION 103 ANNOTATIONS (continued)

accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community, not whether the particular zoning under attack consists of areas fixed within larger areas of different use. A significant fact in the Rodgers case was that the zoning amendment applied to the entire territory of the village and accorded each and every owner of ten or more acres identical rights and privileges. In that same vein, so too does the NDFZ. As set forth in Section 103, any property within the municipality that meets the Applicability requirements is entitled to have the NDFZ applied. As stated in the commentary to Section 101 above, findings contained in the purposes clause of the community's floating zone should establish the comprehensive planning rationale for the ordinance.

SECTION 104: PRE-APPLICATION PROCESS

- A. Prior to submitting an application for rezoning under this district, the Applicant must participate in a preliminary conference with [insert appropriate planning and development staff] in order to discuss the nature of the Proposed Project, desired results, and submittal requirements.
- B. During the preliminary conference, the parties must review, at a minimum, the LEED-ND credits the Proposed Project is expected to earn, and the documentation necessary to demonstrate that the Proposed Project will meet applicable LEED-ND prerequisites, pursuant to Section 105(B).

SECTION 104 ANNOTATIONS

Section 104 creates a pre-application process, within which any developer interested in submitting an application under the NDFZ would meet with the local planner and other appropriate economic development and code enforcement staff in a mandatory work session. This meeting, held prior to a developer's petition for rezoning, provides an opportunity for the applicant and municipality to communicate fully about the results desired. It also provides staff an opportunity to review with the developer any requirements associated with application submittal and helps to avoid conflict and confusion later in the approval process.

It is particularly important that the parties use the preliminary conference to settle on the credits the developer is expected to earn, which will ultimately become standards contained in the rezoning (pursuant to Section 105 *infra*). Such a meeting allows helpful bargaining regarding densities to be awarded, infrastructure to be provided, and other strategies to achieve the most sustainable project possible that is compatible with conditions in the subject neighborhood. It also provides an opportunity for economic development staff to discuss additional incentives available, where appropriate.

Finally, the preliminary conference gives the local planner the opportunity to better understand the nature of the Proposed Project and to suggest what information will need to be submitted during the subsequent approval process (such as information necessary to determine the compatibility of the Proposed Project to conditions in the surrounding neighborhood, pursuant to Section 106 *infra*).

SECTION 105: DISTRICT STANDARDS

- A. The Applicant will submit with the petition for rezoning the current version (as of the time of Application) of the LEED-ND rating system⁵ under which the project will seek certification and proof of project registration with GBCI.
- B. The Applicant must submit documentation demonstrating to the satisfaction of the Planning Board and the Local Legislative Body that its Proposed Project can meet all LEED-ND Smart Location & Linkage prerequisites. Documentation under this requirement should constitute a Smart Location & Linkage Prerequisite Review from GBCI⁶ or proof of Stage 1 LEED-ND certification. In the event that the Applicant does not wish to request Smart Location & Linkage Prerequisite Review from GBCI or has not achieved Stage 1 certification, then sufficient documentation should be determined during the Pre-Application process set forth in Section 104.
- C. District Standards include all prerequisites and credits contained within the LEED-ND rating system, with the exception of those excluded from adoption (pursuant to Section 107(A)(ii)) at the time of rezoning of the Proposed Project.

SECTION 105 ANNOTATIONS

Through Section 105, the NDFZ places the burden on the Applicant—who is requesting that the new zone be affixed to his or her land—to select parcels appropriate for green development and to demonstrate that the property can satisfy the LEED-ND Smart Location and Linkage prerequisites. This approach also rightfully puts in the hands of the developer—who understands construction costs, design, and markets—the responsibility of selecting a location where such green development is economically feasible (as opposed to a traditional rezoning approach under which the municipality itself must identify appropriate areas). The floating zone approach also, in this way, adapts easily to changing market conditions. Similarly, this Section automatically adjusts to future changes in LEED-ND, without facing the legal issues typically presented by automatic updates of third-party standards, because it is based on the submissions of Applicants who will incorporate these changes into their petitions for rezoning.

SECTION 106: PLANNING BOARD REVIEW AND RECOMMENDATION

- A. The Planning Board may require the Applicant to submit any information necessary to determine the compatibility of the Proposed Project to conditions in the surrounding neighborhood, such as density, height, site conditions, building form, and area requirements.
- B. The Planning Board shall review these materials and the Applicant's documentation that the Proposed Project conforms to the Smart Location & Linkage prerequisites of the LEED-ND rating system (as submitted pursuant to Section 105(A)).
- C. The Applicant may also submit any information necessary for the Planning Board, in consultation with legal counsel and [insert appropriate local building official], to determine that specific LEED-ND prerequisites and credits, as applied to the Proposed Project, would conflict with a local, state, or federal legal requirement.
- D. The Planning Board shall, based upon its review of these materials and documentation, advise the Local Legislative Body as to whether the proposal furthers the purposes of this law, whether the Proposed Project meets LEED-ND Smart Location & Linkage prerequisites, whether to take action to enable the Proposed Project to meet the remaining LEED-ND prerequisites, and whether to exclude particular prerequisites or credits from applicable District Standards based upon incompatibility with the surrounding neighborhood.

⁵ The LEED-ND rating system is readily available for download on USGBC.org.

⁶ Once a project is registered with GBCI, the project team has the option to request a preliminary determination as to whether a project site complies with the Smart Location & Linkage prerequisites.

SECTION 106 ANNOTATIONS

Neighborhoods vary and each project is uniquely scaled. As such, Section 106(A) authorizes the Planning Board to require the Applicant to submit information necessary to determine the compatibility of the Proposed Project with the “surrounding neighborhood.” This language, which is typical of many local codes and state enabling laws, leaves it to the local board to determine what constitutes the surrounding neighborhood, and affords the local government the discretion necessary to execute requirements in context.

Section 106(D) requires the Planning Board to, among other things, make recommendations to the Local Legislative Body as to whether to take action to enable the Proposed Project to meet any LEED-ND prerequisites. This provision is meant to address situations where a prerequisite cannot be met because, for example, a local capital project is needed or because of a deficiency in local regulations. In such cases, the developer is encouraged to discuss with the Planning Board how the community can help meet the prerequisite. The Planning Board may then, at their discretion, make recommendations to the Local Legislative Body.

Legal Issue Addressed: Federal & State Preemption

Section 106(C) is, in part, intended to address federal and state preemption concerns raised by potential District Standards selected from LEED-ND’s Green Infrastructure and Buildings credit category, which goes beyond the purview of typical zoning codes, treading into the areas of building energy and water use.

Under the Energy Policy and Conservation Act (42 U.S.C. §§ 6201-6422), as amended by the National Appliance Energy Conservation Act (“NAECA”) (42 U.S.C. §§ 6201-6422) and the Energy Policy Act of 1992 (“EPACT”) (42 U.S.C. §§ 6201-6422), state codes may not be used as a means of setting mandatory state appliance standards (regarding energy and water use) in excess of federal standards. Local codes, however, are not superseded, so long as they meet seven requirements—the notable requirement being that a municipality may not require buildings to use appliances with a higher level of energy efficiency than required by federal efficiency standards. Although a federal court case from the District of New Mexico, *Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, No. 08-633, 2010 WL 8056412, at *1 (D.N.M. Sept. 30, 2010), dealt directly with this issue, it is not controlling elsewhere.* It is, however, instructive and municipalities should be cautious when treading on similar terrain. The *Albuquerque* court found that even where a performance-based standard, such as LEED, requires the use of products that meet but do not exceed federal efficiency standards, in practical application, homeowners must make other modifications to reach energy efficiency targets. Therefore, municipalities requiring compliance with such a standard would, in effect, impose a penalty for the use of products that do not exceed federal standards. The effect of this, the court found, was to impermissibly require the use of appliances that exceed federal efficiency standards.**

Local governments should also note the potential for state preemption issues raised by green development legislation. While each state will have different limitations on local control, some may prohibit local governments from amending (actually or effectively) state code requirements related to buildings, energy, plumbing, etc. As such, LEED-ND’s Green Infrastructure and Buildings credit category also presents potential preemption issues where specific inconsistencies between the LEED requirement and the state code are identified. (continued)

* A similar case from Washington State, *Bldg. Indus. Ass’n v. Wash. State Bldg. Code Council*, No. 10-CV-05373, 2011 WL 485895, at *1 (W.D. Wash. Feb. 7, 2011), held that the Washington State Energy Code was not preempted by federal efficiency standards (though this case is also not definitive or controlling in other states).

** See Jason James, Ctr. for Climate Change Law, Columbia Law Sch., *Legal Analysis of Model Municipal Green Building Ordinance at 14-16*. (2010).

SECTION 106 ANNOTATIONS (continued)

To address the potential for this state preemption issue, and with the *Albuquerque* case as guidance on the issue of federal preemption, Section 106(C) provides the Applicant with an opportunity to present information indicating that requiring a specific prerequisite or credit as part of the District Standards would conflict with a state or federal legal requirement, while, under Section 107 *infra*, the Local Legislative Body determines what, if any, LEED-ND prerequisites and credits to exclude from the required District Standards.

Legal Issue Addressed: Anti-Trust Law Violations

Under federal law, acts of municipalities to unreasonably suppress competition are impermissible.* As such, Section 106(C) also provides the Applicant the opportunity to present information indicating that requiring a specific prerequisite or credit as part of the District Standards would result in an antitrust violation (i.e., would conflict with this federal legal requirement), while, under Section 107 *infra*, the Local Legislative Body determines what, if any, LEED-ND prerequisites and credits to exclude from the required District Standards.

Municipal green development regulations that mandate compliance with third-party rating systems such as LEED can raise antitrust concerns. The LEED rating systems, although the most widely known, are not the only option available to developers and local governments. In addition, these third-party standards may reference the products of private entities. For example, the LEED rating systems contain credits pertaining to wood certified by the Forest Stewardship Council (FSC), potentially suppressing competition between FSC-certified wood and that certified by the Sustainable Forestry Initiative (SFI) or other comparable entities.

Although the NDFZ requires compliance to a certain extent with a third-party standard, it provides adequate flexibility to avoid stifling competition. By using the floating zone approach, the NDFZ merely exists within the community's zoning code until a developer interested in green development requests application of the zone to his or her property. Under this floating zone mechanism, no compliance with the credits of LEED-ND or other third-party green development system is ever mandated and, in fact, if no land owner requests application of the zone, the third-party rating system is never implicated. Even when it is implicated, the municipality merely uses the rating system as a source for standards, pursuant to Section 107(A), freely selecting any inappropriate or undesirable standards for exclusion.

* Although the Local Government Antitrust Act of 1984 (15 U.S.C. §§ 34-36) grants local governments immunity from damages, it still leaves them liable for declaratory and injunctive relief for antitrust law violations. This is the case unless their activity was specifically authorized by clearly-articulated and affirmatively-expressed state policy to displace competition with regulation or monopoly public service. Lester D. Steinman, *Mandating Compliance with Third-Party Green Building Standards: Red Flags for Local Governance*, Mun. Law., Summer 2009, at 15.

SECTION 107: REZONING AND MAP AMENDMENT

- A. The Local Legislative Body shall, following its review of the Planning Board’s report and Applicant’s petition and supporting documentation:
- i. Determine whether the Applicant’s Proposed Project is eligible for the NDFZ. If the Proposed Project cannot meet a LEED-ND Smart Location and Linkage prerequisite, the Local Legislative Body may deem the project ineligible.
 - ii. Determine what, if any, LEED-ND prerequisites and credits to exclude from the required District Standards. The Local Legislative Body may elect to exclude from District Standards any LEED-ND prerequisite or credit that it finds is inappropriate for the location of the Proposed Project or is overly burdensome, with the exception of the Smart Location & Linkage prerequisites.
- B. After this review by the Planning Board, the Local Legislative Body shall in its discretion rezone the property as NDFZ subject to conditions it believes are necessary to achieve the purposes of this law, to protect the character of the affected neighborhood, and to prevent any adverse environmental impacts.

SECTION 107 ANNOTATIONS

Section 107 allows a municipality to customize its District Standards to the specific context and in light of a particular development project. Specifically, under Section 107(A)(ii), the NDFZ provides opportunity, with each application, for the community to exclude certain LEED-ND prerequisites and credits from the applicable District Standards, based upon contextual appropriateness. This gives the Local Legislative Body the opportunity to determine what is needed to achieve the desired level of sustainability in a given neighborhood and to eliminate credits that, in the aggregate, may be overly burdensome or cost prohibitive (if, for example, they would result in a project being forced to achieve LEED Platinum level certification or the equivalent, when the Applicant intended on achieving a lower level of certification).*

It should be noted that although LEED-ND prerequisites and credits may be excluded from applicable District Standards pursuant to Section 107(A)(ii), this does not alter a Proposed Project’s obligation to satisfy the prerequisites and applicable credits necessary to achieve actual LEED-ND certification from GBCI. Municipalities may wish to consider adding a NDFZ provision to this effect.

Legal Issue Addressed: Doctrine of Non-Delegation

Although the non-delegation of authority doctrine, which prohibits a legislative body from delegating to a private party its discretion and power to legislate, frequently comes into play when municipalities promulgate green development legislation, it is not a barrier to the application of the NDFZ. The NDFZ gives the municipality control over the regulatory process. Under the provisions of Sections 106 and 107, each application of the NDFZ offers opportunity for the municipality to review the current LEED-ND rating system and make an assessment as to which standards, if any, should not be applied as District Standards. Additionally, actual LEED-ND certification is not required under the NDFZ as a prerequisite to the receipt of any entitlement. Although project registration is required under Section 105(A), this provision merely ensures that the Applicants display a commitment to LEED-ND certification. The municipality itself determines not only the standards contained within the zone but also whether compliance with those standards has been achieved. This feature of the NDFZ will immunize the local law from any claim that the legislature has delegated its authority to a third party. It is still within the Applicant’s discretion to make the ultimate decision to obtain certification based upon market or other factors. Though, of course, if an Applicant is already required to meet the Smart Location and Linkage prerequisites and to comply with District Standards based upon the LEED-ND rating system, there is certainly strong motivation to obtain actual certification.

* This is an illustrative example; it should be noted that an added burden and increased costs do not always result in a higher level of certification, nor does a Platinum level of LEED certification necessarily require greater expenditures than a lower level (though this is frequently the case).

SECTION 108: FINAL PROJECT REVIEW BY THE PLANNING BOARD

- A. The Planning Board is instructed to review each project that has been rezoned NDFZ expeditiously in light of its thorough review during the rezoning process and the importance of green neighborhood developments as declared in the purpose and intent provisions of this law.
- B. The Planning Board is hereby authorized to establish a streamlined site plan and subdivision review process for Proposed Projects rezoned pursuant to this district. Additional materials and documentation may be required by the Planning Board to conduct this review.
- C. During this review, the Planning Board shall apply only those site plan and subdivision standards not inconsistent with the District Standards adopted through this NDFZ.

SECTION 108 ANNOTATIONS

Section 108 establishes a separate and expedited process for the Planning Board to follow for the review of the details of an applicant's full project proposal. This recognizes that in the rezoning process under this district, the Planning Board will have conducted a thorough review of the Proposed Project.

Section 108(C) waives any standards contained in existing site plan and subdivision regulations that are inconsistent with the LEED-ND prerequisites and credits determined to be applicable under Section 105—effectively reducing the possibility for discretionary and unforeseeable conditions, while still substituting a standard for a standard.

It should be noted that some jurisdictions do not provide authority within the zoning process to amend site plan and subdivision standards. Specifically, while under some state prescriptions, zoning laws also may regulate site plan development and land subdivision (as well as a host of additional supplemental topics), in other states, separate enabling acts may empower localities to adopt individual site plan and subdivision regulations. As such, municipal counsel should be consulted to determine permissibility of Section 108(C) under applicable state law. Some jurisdictions will need to take action separate from this floating zone to achieve the effect of Section 108(C).

APPENDIX A

LEGAL AUTHORITY

The courts in many states have declared that flexible zoning techniques like floating zones, overlay zones, and planned unit development districts are legal under the planning and zoning enabling acts, home rule statutes, local charters, or other land use laws adopted by the state legislature.⁷ Nearly thirty states authorize local floating or overlay zoning by case law or statute. Court decisions often are based on the conclusion that such zoning encourages the most appropriate use of the land and advances the general welfare. These are concepts that were embodied in the original zoning enabling act, which was used by most states when they delegated authority to local governments to adopt zoning and other land use regulations. The following states have definitively authorized floating zoning, though its legality has yet to be challenged in others. Citations to case law are provided for the assistance of legal counsel.

- **California** (*Orinda Homeowners Comm. v. Bd. of Supervisors*, 11 Cal. App.3d 768, 90 Cal. Rptr. 88 (Cal. Ct. App. 1970)).
- **Colorado** (*Carron v. Bd. of County Comm'rs*, 976 P.2d 359 (Colo. App. 1998)); *Dillon Companies, Inc. v. City of Boulder*, 183 Colo. App. 248 (Colo. App. 1973)).
- **Connecticut** (*Loh v. Town Plan and Zoning Comm'n*, 282 A.2d 894 (Conn. 1971); *Sheridan v. Planning Bd. of Stamford*, 159 Conn. 1, 266 A.2d 396 (Conn. 1969); *Hawkes v. Town Plan and Zoning Comm'n of Farmington*, 156 Conn. 207, 240 A.2d 914 (Conn. 1968); *Pleasant Valley Neighborhood Ass'n v. Planning and Zoning Com'n of South Windsor*, 15 Conn.App. 110, 543 A.2d 296 (Conn. App. Ct. 1988)).
- **Delaware** (*McQuail v. Shell Oil Co.*, 40 Del. Ch. 396 (Del. 1962)).
- **Idaho** (*South Fork Coal. v. Bd. of Com'rs of Bonneville County*, 792 P.2d 882 (Idaho 1990)).
- **Indiana** (*Wildwood Park Cmty. Ass'n v. Fort Wayne City Plan Comm'n*, 396 N.E.2d 678 (Ind. Ct. App. 1979)).
- **Kentucky** (*Bellemeade Co. v. Priddle*, 503 S.W. 2d 734 (Ky. 1974)).
- **Maryland** (*Bigenho v. Montgomery County Council*, 237 A.2d 53 (Md. 1968); *Beall v. Montgomery County Council*, 212 A.2d 751 (Md. 1965); *Huff v. Zoning Bd. of Appeals*, (Md. 1957); *Rockville Crushed Stone, Inc. v. Montgomery County*, 552 A.2d 960 (Md. Ct. Spec. App. 1989); *Montgomery County v. Greater Colesville Citizens Ass'n, Inc.*, 521 A.2d 770 (Md. Ct. Spec. App. 1987); *Floyd v. County Council of Prince George's County*, 461 A.2d 76 (Md. Ct. Spec. App. 1983); *Wheaton Moose Lodge No. 1775 v. Montgomery County*, 397 A.2d 250 (Md. Ct. Spec. App. 1979)).
- **Massachusetts** (*Cerel v. Town of Natick*, 309 N.E.2d 893 (Mass. App. Ct. 1974)).
- **Missouri** (*Treme v. St. Louis County*, 609 S.W.2d 706 (Mo. Ct. App. 1980) (may be superseded by regulation, as in *Redpath v. Missouri Highway and Transportation Commission*, 14 S.W.3d 34 (Mo. Ct. App. 1999)).
- **New Jersey** (*Rudderov v. Twp. Comm. of Mount Laurel Tp.*, 297 A.2d 583 (N.J. Super. Ct. App. Div. 1972)).
- **New York** (*Town of North Hempstead v. Village of North Hills*, 342 N.E.2d 566, 38 N.Y.2d 334 (N.Y. 1975); *Rodgers v. Village of Tarrytown*, 302 N.Y. 115, 96 N.E.2d 731 (N.Y. 1951); *Beyer v. Burns*, 576 N.Y.S.2d 599 (N.Y. App. Div. 1991)).
- **Pennsylvania** (*Donahue v. Zoning Bd. of Adjustment of Whitemarsh Twp.*, 412 Pa. 332, 194 A.2d 610 (Pa. 1963)).
- **South Carolina** (S.C. Code Ann. § 6-29-720(C)(2) (2010)).
- **Washington** (*Hale v. Island County*, 88 Wash. App. 764 (1997); *Lutz v. Longview*, 83 Wash.2d 566, 520 (1974)).
- **Wisconsin** (*State ex rel. Zupancic v. Schimenz*, 46 Wis.2d 22 (1970)).

⁷ See 1 Am. Law. Zoning § 9:80 (5th ed.) ("Most courts that have had occasion to rule on the issue have given the floating zone full or limited approval."); 83 Am. Jur. 2d *Zoning and Planning* § 415 ("Floating zones have generally won judicial approval"); Edward H. Ziegler, *Rathkopf's The Law of Zoning and Planning* Vol. 1, p. 11-19 ("More generally, court decisions have upheld the validity under zoning enabling acts of both the 'floating zone' and 'planned use development' approval techniques, both of which usually require either legislative or administrative prior discretionary reviews of development proposals before a use is allowed in such districts."); *Id.* Vol. 3, p. 45-12 ("Most recent court decisions have upheld the authority of municipalities to utilize floating zones under existing enabling legislation.").

APPENDIX B

FLOATING ZONE FOR GREEN NEIGHBORHOOD DEVELOPMENT (WITHOUT ANNOTATIONS)

Communities considering this Floating Zone for Green Neighborhood Development are strongly advised to first review the annotated version in Part IV, above.

Communities may use this flexible zoning technique to memorialize LEED-ND or other green neighborhood development standards in a single zoning district by incorporating them as eligibility conditions and district regulations, which can be affixed to appropriate locations. The existence of this district within the code allows a municipality to pave the way for smarter decisions, more integrated infrastructure, and a greener community. Under this approach, developers who propose projects that they intend to certify under LEED-ND or other such standards may apply to the local legislative body for this new zoning district to be mapped to their parcels, thereby removing barriers to certification within the applicable local zoning code. The application is referred to the local planning board for a full review, and the planning board then sends its detailed recommendations to the local legislative body, which may then map the zone to the applicant's property.

The model ordinance below establishes a new zoning district—the Neighborhood Development Floating Zone (NDFZ)—drawing on the prerequisites and credits of the LEED-ND rating system as green development standards. This neighborhood development floating zone approach, as with any new endeavor to implement robust standards for sustainable growth, requires the careful attention of counsel for both the public and private sector actors involved. Planners are encouraged to consult municipal counsel regarding the jurisdictional limitations and potential complications arising from the use of third-party standards.

SECTION 101: PURPOSE & INTENT

- A. The purpose of the Neighborhood Development Floating Zone (NDFZ) is to create a new zoning district to further the [City/Town/Village] of []'s commitment to enhancing the public welfare and assuring that further development in certain locations is consistent with the [City/Town/Village]'s desire to create a more sustainable community by incorporating green development standards into the design, construction, and maintenance of buildings. This zoning district seeks to encourage projects in locations that are most appropriate for green development.
- B. The NDFZ district is created to secure the benefits of green neighborhood development, which include energy conservation; reduction in fossil fuel and potable water usage; preservation of existing natural resources including habitat, water bodies, wetlands, agricultural lands, steep slopes, and floodplains; increased local food production, tree canopies, and quality of neighborhood design; health benefits associated with more walkable and bikeable streets and paths; increased access to transit, neighborhood schools, recreational facilities, and civic and public places; reductions in impervious surfaces, stormwater runoff, light pollution, and the heat island effect; recycling of solid waste, building materials, and waste water; redevelopment of brownfields; promotion of renewable energy, district heating and cooling, and the adaptive reuse of existing buildings, historic preservation, and infill development; and the use of existing infrastructure. These needed benefits are consistent with the [City/Town/Village] of []'s commitment to enhancing public health, safety, and welfare, and they constitute the comprehensive planning rationale for the adoption of the NDFZ district.

SECTION 102: DEFINITIONS

1. **“Applicant”** - Any person or entity having a legal interest in a Proposed Project applying for a rezoning under this district, or the authorized agent of any such person or entity.
2. **“LEED-ND”** - The Leadership in Energy and Environmental Design (LEED) for Neighborhood Development Rating System, created by the U.S. Green Building Council (USGBC) for its use in certifying projects that constitute green neighborhood developments.
3. **“Proposed Project”** - The land and buildings subject to a proposal submitted by an Applicant for a rezoning under this district.
4. **“Smart Location and Linkage”** - The LEED-ND credit category dealing with the locational requirements of the rating system (such as, for example, selection of a “Smart Location” near exiting communities and public transit infrastructure, avoidance of “Imperiled Species and Ecological Communities,” “Wetland and Water Body Conservation,” “Agricultural Land Conservation,” and “Floodplain Avoidance”).
5. **“GBCI”** - The Green Building Certification Institute, which is the third-party organization charged with administering project certification under the USGBC’s LEED rating systems.

SECTION 103: APPLICABILITY

- A. This zoning district applies to Proposed Projects for which Applicants plan to seek certification under the LEED-ND rating system and who can demonstrate to the satisfaction of the Planning Board⁸ and Local Legislative Body⁹ that they can satisfy all LEED-ND Smart Location & Linkage prerequisites.
- B. Projects that comply with Section 105 of this law are subject to modified and expedited site plan and subdivision review (as provided in Section 108) following rezoning and map amendment.

SECTION 104: PRE-APPLICATION PROCESS

- A. Prior to submitting an application for rezoning under this district, the Applicant must participate in a preliminary conference with [insert appropriate planning and development staff] in order to discuss the nature of the Proposed Project, desired results, and submittal requirements.
- B. During the preliminary conference, the parties must review, at a minimum, the LEED-ND credits the Proposed Project is expected to earn, and the documentation necessary to demonstrate that the Proposed Project will meet applicable LEED-ND prerequisites, pursuant to Section 105(B).

⁸ For purposes of the model floating zone provisions presented here, the term “Planning Board” refers to the administrative body charged with the review and approval of development projects in the adopting locality. The term should be changed within a given jurisdiction to refer to the appropriate body.

⁹ For purposes of the model floating zone provisions presented here, the term “Local Legislative Body” refers to the board that is authorized to adopt and amend zoning laws in the adopting locality. The term should be changed within a given jurisdiction to refer to the appropriate body.

SECTION 105: DISTRICT STANDARDS

- A. The Applicant will submit with the petition for rezoning the current version (as of the time of Application) of the LEED-ND rating system¹⁰ under which the project will seek certification and proof of project registration with GBCI.
- B. The Applicant must submit documentation demonstrating to the satisfaction of the Planning Board and the Local Legislative Body that its Proposed Project can meet all LEED-ND Smart Location & Linkage prerequisites. Documentation under this requirement should constitute a Smart Location & Linkage Prerequisite Review from GBCI¹¹ or proof of Stage 1 LEED-ND certification. In the event that the Applicant does not wish to request Smart Location & Linkage Prerequisite Review from GBCI or has not achieved Stage 1 certification, then sufficient documentation should be determined during the Pre-Application process set forth in Section 104.
- C. District Standards include all prerequisites and credits contained within the LEED-ND rating system, with the exception of those excluded from adoption (pursuant to Section 107(A)(ii)) at the time of rezoning of the Proposed Project.

SECTION 106: PLANNING BOARD REVIEW AND RECOMMENDATION

- A. The Planning Board may require the Applicant to submit any information necessary to determine the compatibility of the Proposed Project to conditions in the surrounding neighborhood, such as density, height, site conditions, building form, and area requirements.
- B. The Planning Board shall review these materials and the Applicant's documentation that the Proposed Project conforms to the Smart Location & Linkage prerequisites of the LEED-ND rating system (as submitted pursuant to Section 105(A)).
- C. The Applicant may also submit any information necessary for the Planning Board, in consultation with legal counsel and [insert appropriate local building official], to determine that specific LEED-ND prerequisites and credits, as applied to the Proposed Project, would conflict with a local, state, or federal legal requirement.
- D. The Planning Board shall, based upon its review of these materials and documentation, advise the Local Legislative Body as to whether the proposal furthers the purposes of this law, whether the Proposed Project meets LEED-ND Smart Location & Linkage prerequisites, whether to take action to enable the Proposed Project to meet the remaining LEED-ND prerequisites, and whether to exclude particular prerequisites or credits from applicable District Standards based upon incompatibility with the surrounding neighborhood.

SECTION 107: REZONING AND MAP AMENDMENT

- A. The Local Legislative Body shall, following its review of the Planning Board's report and Applicant's petition and supporting documentation:
 - i. Determine whether the Applicant's Proposed Project is eligible for the NDFZ. If the Proposed Project cannot meet a LEED-ND Smart Location and Linkage prerequisite, the Local Legislative Body may deem the project ineligible.
 - ii. Determine what, if any, LEED-ND prerequisites and credits to exclude from the required District Standards. The Local Legislative Body may elect to exclude from District Standards any LEED-ND prerequisite or credit that it finds is inappropriate for the location of the Proposed Project or is overly burdensome, with the exception of the Smart Location & Linkage prerequisites.
- B. After this review by the Planning Board, the Local Legislative Body shall in its discretion rezone the property as NDFZ subject to conditions it believes are necessary to achieve the purposes of this law, to protect the character of the affected neighborhood, and to prevent any adverse environmental impacts.

¹⁰ The LEED-ND rating system is readily available for download on USGBC.org.

¹¹ Once a project is registered with GBCI, the project team has the option to request a preliminary determination as to whether a project site complies with the Smart Location & Linkage prerequisites.

SECTION 108: FINAL PROJECT REVIEW BY THE PLANNING BOARD

- A.** The Planning Board is instructed to review each project that has been rezoned NDFZ expeditiously in light of its thorough review during the rezoning process and the importance of green neighborhood developments as declared in the purpose and intent provisions of this law.
- B.** The Planning Board is hereby authorized to establish a streamlined site plan and subdivision review process for Proposed Projects rezoned pursuant to this district. Additional materials and documentation may be required by the Planning Board to conduct this review.
- C.** During this review, the Planning Board shall apply only those site plan and subdivision standards not inconsistent with the District Standards adopted through this NDFZ.