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Development Agreements: Bargained-For Zoning That is Neither Illegal Contract Nor Conditional Zoning

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DEVELOPMENT AGREEMENTS: BARGAINED-FOR ZONING THAT IS NEITHER ILLEGAL CONTRACT NOR CONDITIONAL ZONING

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Historically, land development in North America meant the subdividing of vast tracts of land into individual building lots that formed cities and towns.[1] The two principal characteristics of this kind of development were the grid layout of streets and "the dominance of the house—the individual abode"—as the central architectural element of the city or town.[2] The grid layout facilitated future sale, since rectangular lots were easy to build on and could accommodate different uses.[3] This scheme contrasts with that "in European cities where churches, palaces and government buildings dominate the urban landscape," and cities are "designed around these symbols of belief and power."[4]

The North American developer is no longer free to decide alone what development there should be. A developer must comply with a myriad of both state and federal land use regulations and standards. As more regulatory steps are required and as standards evolve, the process of development has become more lengthy and encumbered. A development may well involve obtaining scores of permits from almost as many agencies.[5] Still, in large measure, the role of the developer remains dominant, beginning with the original concept and involving the assemblage of the materials, professionals, and other participants, such as lenders, investors, and community leaders, necessary for making the concept a reality.[6] The developer may be the one to locate the site, determine its suitability, articulate the development, negotiate with governmental officials, and oversee implementation.[7]

Environmental laws, both federal and state, requiring either protective or remedial measures in the case of sites contaminated with or exposed to

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1 GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 987 (2d ed. 1997).

2 *Id.*

3 *Id.*

4 *Id.*

5 *See* Donald G. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U. L. REV. 545, 546 (1979).

6 *See id.* at 987-88.

7 *Id.* at 988.

hazardous wastes, may render a development project either prohibitively expensive or illegal.[8] Property that once was an industrial site, a defense installation, or even a farm may present such risks.

Most essentially, development must be in accord with existing land use rules.[9] Local governments use four basic mechanisms for land use control.[10] First, zoning ordinances "impose limits on size and location of structures, the size and shape of lots and the use of land and structures."[11] Second, "general plans" specify the goals of future development, including a consideration of population density, infrastructure, transportation, and housing.[12] Third, there are subdivision controls for residential developments, in particular single-family developments, that establish standards for the location and design of streets, major utility lines, and other public infrastructure, and often dedication of land or payments for off-site improvements such as roads, parks, and schools.[13] Finally, "building codes" specify "building materials, structural elements, minimum habitability standards and in some cases aesthetic elements of new buildings."[14]

Zoning is an exercise of the police power—the power of the government to protect health, safety, welfare, and morals.[15] Generally, the police powers are said to reside originally in the state and are delegated to local governments through enabling legislation.[16] The adoption of a zoning ordinance pursuant to an enabling act is accomplished by an elected body, and the result is a legislative act generally entitled to a presumption

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8 In the federal regime, the primary law is the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, under which a developer who purchases a contaminated site may bear responsibility for its cleanup. Numerous other environmental regulatory laws limit uses on land, including the Clean Air Act of 1977, 42 U.S.C. §§ 7401-7642; the Clear Air Act Amendments of 1990, 42 U.S.C. §§ 7623-7624; the Clean Water Act of 1977 (covering wetlands and other bodies of water), 33 U.S.C. §§ 1252-1387; the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544; and the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464, to name a few.

9 LEFCOE, *supra* note 1, at 1039.

10 JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 898 (1998).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 898-99.

15 1 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 1.14 (4th ed. 1996).

16 1 *id.* § 2.19.

of validity.[17] Many of the early zoning enabling acts were modeled after the Standard Zoning Enabling Act, drafted and distributed by the United States Department of Commerce in the 1920s.[18] While the goal of the enabling acts was to allow for the enactment of ordinances aimed at exercising the police powers,[19] the acts were process-oriented, providing the authority for planning and specifying the role local agencies were to play in the process of zoning.[20] The standard act did not include substantive planning policies, leaving these to be developed in the process.[21] However, the standard act did contemplate the establishment of districts within the community by reference to "number, shape and area, as may be deemed best suited to carry out the purposes of [a zoning] act, and within such districts to regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land."[22] It prescribed that regulations governing uses of land be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and "with a view to conserving the value of buildings and encouraging the most appropriate use of land" throughout the municipality.[23]

Although zoning in the United States is commonly thought to have begun with the enactment of New York City's comprehensive zoning ordinance in 1916, it was the 1926 Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*,[24] where the Court upheld the constitutionality of municipal zoning regulations as incident to the police power when enacted pursuant to validly implemented land use plans that advance the legitimate public interest,[25] that prompted other states to adopt zoning legislation. Since then, every state has enacted laws enabling or requiring[26] municipalities to regulate land use via comprehensive plans.[27] The result is that a landowner cannot simply choose to use land as he

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17 Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 364 (Mass. 2003).

18 1 YOUNG, *supra* note 15, § 2.21.

19 This meant that limitations could be placed not only on uses of land, but also on the density of the development in an area, the height of buildings, and their location on lots. DANIEL MANDELKER, LAND USE LAW § 3.07 (5th ed. 2003).

20 *Id.* § 3.05.

21 *Id.*

22 *Id.* § 4.17.

23 1 YOUNG, *supra* note 15, § 2.24.

24 272 U.S. 365 (1926).

25 *Id.* at 387, 390, 395-96.

26 *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS, CASES & MATERIALS 67 (2d ed. 2000); 1 YOUNG, *supra* note 15, § 2.19.

27 Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Conflicts*, 7 HARV. NEGOT. L. REV. 337, 343 (2002).

desires, but must obtain permission for a particular use from the local government to ensure that the desired use is consistent with the comprehensive plan and the health, safety, and welfare of the community. Thus, a landowner may be required to obtain subdivision approval before dividing a given parcel for development or a building permit before initiating new construction.

The traditional zoning process consists of the adoption of a comprehensive plan and the issuance of local zoning ordinances pursuant to the plan.[28] The adoption of local zoning ordinances is accomplished by a hearing and public participation.[29] Zoning ordinances are adopted for the long-term, and amendments are typically allowed only where mistake is shown in the original zoning or significant, unanticipated changes have been made since the enactment of the last comprehensive rezoning plan in a relatively well-defined area surrounding the property.[30]

"[S]tandard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district . . . ."[31] Thus, characteristic of the Euclidean model of zoning is the seemingly rigid division of the land into discrete areas, each assigned a particular use—residential, heavy industrial, or agricultural.[32] The idea was that through mandatory

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[28] *See* 1 YOUNG, *supra* note 15, § 5.02. The elements of a comprehensive plan include consideration of land use, transportation issues, environmental concerns, and housing issues. MANDELKER, *supra* note 19, § 3.10. A comprehensive plan will also include a statement of the objectives of the municipality regarding the municipality's future development, as well as short-and long-range implementation strategies. *Id.* Not all enabling acts, though, required a comprehensive plan as a predicate for enacting zoning legislation. 1 YOUNG, *supra* note 15, § 5.04. Instead, some courts have held that all that is required is that the land use controls be comprehensive. 1 *id.*

[29] 1 YOUNG, *supra* note 15, §§ 2.25, 4.11.

[30] Mayor of Rockville v. Rylyns Enters., 814 A.2d 469, 483 (Md. 2002); Bd. of Alderman v. Conerly, 509 So. 2d 877, 883 (Miss. 1987). However, not all jurisdictions impose this limitation on rezoning. MANDELKER, *supra* note 19, § 6.31. Otherwise, judicial review of rezoning focuses on the consistency of the rezoning with the comprehensive plan. *Id.* § 6.32.

[31] Ryan, *supra* note 27, at 352; *see also* 1 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 5.01[1] (2004).

[32] 1 ROHAN, *supra* note 31, §5.01[1]. Different uses still may occur within a single district. *See* 1 YOUNG, *supra* note 15, § 5.25. Different uses may be tolerated because of the varying circumstances of the land or use of the property. *See* 1 *id.* Land in the same district near a highway may be treated differently than land not near a highway. 1 *id.* (citing Charter Township of Oshtemo v. Cent. Adver. Co., 336 N.W.2d 823, 826 (Mich. Ct. App. 1983)). In other words, "a zoning ordinance may be uniform in its application even though some uses in a district do not comply with the restrictions imposed in such district or incompatible uses are permitted in an adjacent [parcel]." 1 *id.* In addition, non-

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separation of uses, each class of land would be protected from the negative impacts of other types of uses.[33] Euclidean zoning was also designed to achieve stability and evenhandedness in land use planning on the assumption that development would proceed in appropriate zones, and minor adjustments would be made only as necessary in unanticipated cases of hardship in which a variance[34] might be granted or a special use permit or exception issued.[35] Although land could be rezoned, this was not a

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conforming uses must be tolerated by the municipality unless they constitute a nuisance, are extended, are abandoned, or are extinguished by eminent domain. Pa. N.W. Distrib., Inc. v. Zoning Hearing Bd., 584 A.2d 1372, 1375 (Pa. 1991); *see also* 1 YOUNG, *supra* note 15, § 6.05; MANDELKER, *supra* note 19, § 5.69.

[33] *See* 1 ROHAN, *supra* note 31, § 5.01[2].

[34] A variance grants the landowner the authority to use property in a manner prohibited by the zoning ordinance. *See* MANDELKER, *supra* note 19, § 6.41. It refers to administrative relief from the zoning restrictions that may be granted where enforcement of the restrictions would result in unnecessary hardship. *Id.* Unnecessary hardship may be established by a showing that the zoning ordinance "renders the property unsuitable for any purpose," Commons v. Westwood Zoning Bd. of Adjustment, 410 A.2d 1138, 1143 (N.J. 1980), and "that the plight of the owner is due to unique circumstances and not to the general conditions of the neighborhood which may reflect the unreasonableness of the zoning ordinance itself." Otto v. Steinhilber, 24 N.E.2d 851, 853 (N.Y. 1939). But, self-inflicted hardship would not justify a variance. MANDELKER, *supra* note 19, § 6.50. It must also be shown that the variance would not be contrary to the public interest. *Id.* § 6.41. A variance may apply to uses, for example retail stores and single family homes; or area requirements, such as density, height of buildings, and setbacks. *Id.* § 6.42. Some states also authorize variances upon a showing of "practical difficulties," but usually in the case of area and opposed to use variances. *Id.* § 6.48. The practical difficulties test includes a consideration of "the significance of the economic injury, the magnitude of the variance . . . , whether the difficulty [is] self-created, and whether other feasible alternatives could avoid the difficulty," as well as the effect of the variance on the surrounding neighborhood. *Id.* Often, zoning acts provide the standards the administrative agency must apply when acting on request for variances, *id.* § 6.41, and often provide for the imposition of conditions in granting a variance, *id.* § 6.51.

[35] MANDELKER, *supra* note 19, § 6.39. A special or conditional use permit is an exception to the existing zoning in a particular district, allowing a different use than is expressly permitted as of right by the ordinance. *Id.* § 6.39. It is approved by an administrative board, or legislative body. 1 YOUNG, *supra* note 15, § 9.17. The "device interposes an administrative review of the probable effect of a proposed use at a specific site and authorizes the imposition of conditions designed to protect adjacent land from the foreseeable impact of the proposed use." 1 *id.* The standards for granting special use permits are set out in the zoning act, allowing uses on a lot-by-lot, use-by-use basis. 1 *id.* § 9.18. A special exception is an administrative device that allows additional uses, which are conditionally compatible within each zone, but which should not be allowed unless specific

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practical way of addressing changing uses and needs of landowners and the community because of the cumbersome legislative process involved. Later, floating zones[36] and planned unit developments,[37] which are special

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statutory standards assuring compatibility are met by the landowner. 1 *id.* § 9.17. A special exception recognizes that "certain uses, considered . . . essential or desirable for the welfare of the community . . . , are entirely appropriate and not essentially incompatible with the basic uses" in a given district, but may not be appropriate at "every and any location . . . or without conditions . . . , by reason of special problems the use presents." MANDELKER, *supra* note 19, § 6.54. Some zoning acts use special use permits interchangeably with special exceptions. 1 YOUNG, *supra* note 15, § 9.17. However, one treatise notes a difference. *See* 1 *id.* The special exception, "is less versatile than the special use permit in that the only question to be determined by the administrative body is whether the property owner has established . . . facts which entitle him to the exception [and r]eview of the probable impact on the neighborhood," is not often done. 1 *id.* And, with a special exception, no authority to impose conditions is usually present. 1 *id.* While the standards for granting or denying a request for special uses and exceptions are contained in the zoning ordinances, they are generally quite vague and broad. For example, some use language such as "in the 'pubic interest,' serve the 'public welfare,' [or] consistent with the 'spirit and intent' of the zoning ordinance." MANDELKER, *supra* note 19, § 6.53 (discussing zoning standards, noting that some courts have struck down such standards as too vague to meet the constitutional delegation of legislative power).

[36] MANDELKER, *supra* note 19, § 6.61. A floating zone is a zoning district usable for a specific purpose or class of purposes. *Id.* The zoning authority does not assign a floating zone district a place on the zoning map, and it is later established by amendment to the zoning ordinance. *Id.* § 6.61. The floating zone ordinance will contain "standards for the approval of [such a] zone, such as density and site development standards." *Id.* With a floating zone, the municipality may determine allowable uses as conditions dictate and may enable the municipality to impose more limitations on development than under the general zoning ordinance. *Id.* Floating zones are discussed further *infra* at text accompanying notes 213 to 218.

[37] MANDELKER, *supra* note 19, § 9.24. A planned unit development (PUD) is a zoning device allowing a mix of uses within the same district, often including residential, commercial, and even industrial uses. *Id.* Because development is planned and viewed as an entity, the developer is benefited, for example, by being able to achieve site planning by varying lot sizes, setbacks, and other site development requirements, as well as by building at higher densities in some parts of the development. *Id.* The municipality is benefited, for example, by the developer's commitment to the preservation of open and natural areas elsewhere. *Id.* A PUD is contained in the zoning ordinance. *Id.* § 9.25. The zoning ordinance may require the governing body to adopt a new PUD zoning district for a proposed PUD before it can be reviewed and approved by an agency with delegated authority on matters of approval. *Id.* The governing body may adopt it as a floating zone or as a special exception. *See id.* This Article discusses PUDs further *infra* at text accompanying notes 311 to 336.

and more flexible zoning devices, developed.

This rigidity of Euclidean zoning came at the expense of flexibility, allowing for little modification or adoption of regulations to particular uses within zones. Moreover, the assumptions underlying Euclidean zoning were incorrect. Euclidean zoning underestimated the effects of the dynamism of a growing economy and rapidly changing technologies in private preferences and municipal needs, and it overestimated the ability of officials to anticipate market demand for new uses. Euclidean zoning was also naïve as to the vulnerability of zoning and government regulations to market demand and political pressure. These changes in the economy and urban and suburban demographics forced local governments to regularly adjust the zoning scheme, raising the question of whether "changes in zoning would be the product of rational, comprehensive planning or the result of *ad hoc* bargaining."[38] It seems that nearly a century of zoning experience shows a very different practice than first contemplated by the standard act,[39] such that current zoning practice little resembles the early notion of planned development. Today, numerous different uses may be permissible within a particular district, and the special-use process frequently provides only very generalized standards for issuance of a permit, and it operates ineffectively as a limiting tool. Rather than rigid adherence to the zoning map, the current model for land use control is through bargaining, making particularized decisions regarding the suitability of a proposed use, and thus in effect administering land development on a case-by-case basis.[40] Bargaining takes place over variances, conditional use permits, amendments to the zoning ordinance, and development agreements.[41] Each of these devices offer not only flexibility, but also the opportunity for the bargaining municipality to demand exactions[42] or make concessions.[43]

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38 DWYER & MENELL, *supra* note 10, at 1010.

39 Ryan, *supra* note 27, at 348; *see also* 1 ROHAN, *supra* note 31, § 5.01.

40 *See* Ryan, *supra* note 27, at 349; Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 16-17 (2000) (recognizing the bargaining environment generated by modern zoning models); Carol M. Rose, *Planning and Dealing: Piecemeal Land Use Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849 (1983); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 960 (1987).

41 Ryan, *supra* note 27, at 350.

42 The extent to which a municipality may demand exactions is limited to those bearing a rational nexus between the legitimate state interest and the permit condition exacted by the government, Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987), and to those having a rough proportionality between the exaction and the impact of the development, Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

Even when the existing zoning permits a proposed project, the development project that is only proposed may vanish with unanticipated changes in political and market conditions or in the land use regulatory scheme. These kinds of changes are risks that are difficult to anticipate and control. In most jurisdictions, absent a vested right to develop,[44] the local land use regulatory body retains the right to alter and apply newly enacted zoning or other land use requirements at any time to a proposed development. The right to alter remains until quite late in the development process, indeed even up to the commencement of construction.[45] The

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[43] The extent to which a municipality can make concessions is limited by the reserved powers doctrine, discussed *infra* Part III.A.

[44] The "vested rights" doctrine enables a developer to complete development in accordance with rules in place at a certain point in the development process. Terry D. Morgan, *Vested Rights Legislation*, 34 URB. LAW. 131, 131 (2002). It is premised on notions of estoppel. *Id.* However, the point at which a right to develop arises varies considerably among the jurisdictions. *See id.* at 132-33. In some jurisdictions, the right to develop arises at the filing of an application for a building permit. *See id.* Other jurisdictions require the commitment of substantial resources toward development. *See id.* Two somewhat discernible rules exist for determining the point of vesting: the "last discretionary approval rule," under which, as the name suggests, a developer acquires a vested right to complete a project that is substantially commenced upon acquiring the last discretionary approval necessary for its completion, and the "building permit rule," under which a developer acquires vested rights upon obtaining a building permit and incurring substantial liability in good faith reliance on the permit. Brad K. Schwartz, Note, *Development Agreements: Contracting for Vesting Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 723-24 (2001); *see also* GROWING SMART LEGISLATIVE GUIDEBOOK (Stuart Meck ed., 2002); Barry R. Knight & Susan P. Schoettle, *Current Issues Related to Vested Rights and Development Agreements*, 25 URB. LAW. 779, 780-81 (1993) (identifying four sources for vested rights as equitable estoppel, the Constitution, legislation, and contract development agreements); Ralph D. Renaldi, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77 (1994).

[45] *See, e.g.*, Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 553 P.2d 546, 551 (1976). In *Avco Community Developers, Inc.*, under the authority of pertinent permits, the developer had undertaken studies for the development of the tract, proceeded to subdivide and grade it, completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract, and had spent more than $2 million and incurred liability of nearly $750,000 before being able to apply for a development permit from the Coastal Commission. *Id.* at 549. The Coastal Commission refused to issue a development permit, and no building permit could be issued until a development permit was obtained. *Id.* at 548-49. The California Supreme Court ruled that the developer had acquired no vested rights entitling it to proceed with actual construction. *Id.* at 554. The rationale was that by requiring a building permit as a prerequisite to obtaining a vested right to actually build, the court was preserving for

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possibility of such changes can make the development process appear ad hoc and precarious, and reliance on the traditional zoning adjustments, such as variances or special use permits under criteria that are less than concrete, does little to minimize the risks to a developer.

This Article explores the new model of land use decision-making that is based upon bargaining with the landowner. The fact of a bargain raises the issue of whether such bargaining amounts to "contract zoning" based upon a bilateral contract between the municipality and the landowner, which is largely held to be illegal, or a related form of bargaining, not involving an exchange of promises in the context of a bilateral agreement—"conditional zoning." Part II of this Article discusses the emergence of the development agreement, which involves a contract with a municipality and the developer under which the developer is assured that new zoning ordinances adopted after the date of the agreement will not apply to the development. Part III considers the effect of the reserved powers doctrine on the ability of governments to contract and the issue of transparency in making zoning decisions. It further offers an in-depth consideration of the murky concepts of contract and conditional rezoning and reviews why the courts look at these concepts with such suspicion. This section analyzes significant rulings from the courts in the jurisdictions that most often considered the question. Part IV considers contract zoning compared to conditional zoning. Part V shows how conditional zoning, once maligned, has gained acceptance by the courts. Part VI discusses the conditional use zoning device in North Carolina. Part VII briefly mentions the use of concomitant agreements employed in a few jurisdictions, under

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localities regulatory flexibility in the development process to meet changing circumstances and needs. *Id.* Otherwise, there would be "a serious impairment of the government's right to control land use policy." *Id.* This decision was the impetus for the enactment of the California development agreement statute, discussed later. *See* Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 553 (2001) (upholding repeal of exemption for oil drilling effectively nullifying leases for exploration and development where all costs were "soft costs," such as for engineering, consultants, and lawyers). For an overview of vested rights and estoppel claims, see 4 EDWARD H. ZIEGLER JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING ch. 70 (2004). Depending upon the particular circumstances of the case, a governmental action that essentially destroys the landowner's reasonable investment-backed expectations could result in a taking, compensable under the Fifth Amendment. For a discussion of regulatory takings, see generally John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 38 (1996); Steven J. Eagle, *The Supreme Court's Evolving Takings Jurisprudence: A First Look at Tahoe-Sierra*, PROB. & PROP., Nov./Dec. 2002, at 5; Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post Enactment Buyers*, 61 OHIO ST. L.J. 89 (2000).

which a municipality has the power to enter into an agreement with a developer as to zoning in exchange for the developer's promise to develop in a certain way. Part VIII then returns to some theoretical questions posed earlier. Part IX considers whether development agreements can be upheld against a challenge that they amount to contract or conditional zoning and explains why development agreements can and should be encouraged. Finally, Part X offers some conclusions about the future of land use planning.

II. THE DEVELOPMENT AGREEMENT AS AN IMPORTANT BARGAINING DEVICE, MOVING AWAY FROM TRADITIONAL EUCLIDIAN ZONING

In recent years, "land use decision-making has shifted significantly from the planned toward the particularized, affording more ad hoc responses to individual development proposals."[46] In a fluid society, adherence to the rigid Euclidean model for zoning, which consists of the division of land into zones with identical uses within each zone, has been found to be inadequate for achieving a rational and effective land use plan since it precludes the zoning authority from considering particular and perhaps beneficial uses for a parcel within the zone. Municipal land use bargaining is rapidly becoming "the universal language of land use planning," as public and private parties to land use disputes adopt the bargaining model to obtain mutually agreeable solutions based on mutually beneficial exchange.[47] Under the bargaining model, the emphasis is placed on flexibility and change through the use of variances,[48] special use permits and exceptions,[49] incentive and bonus zoning,[50] conditional zoning,[51] floating zones,[52] planned unit developments,[53] and development agreements.[54] With these devices, zoning determinations are often made administratively based on actual uses discerned from concrete proposals that allow municipalities to assess the potential impact of uses in a

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[46] Ryan, *supra* note 27, at 349; *see also* Rose, *supra* note 40; Wegner, *supra* note 40.

[47] Ryan, *supra* note 27, at 338.

[48] *See supra* note 34.

[49] *See supra* note 35.

[50] Incentive and bonus zoning allow for exceptions to the zoning regulations in a particular district, typically allowing greater density or relaxing height restrictions on buildings constructed in the district. *See* 2 ROHAN, *supra* note 31, § 8.01.

[51] *See* discussion *infra* Parts III-VI, VIII-X.

[52] *See* 2 ROHAN, *supra* note 31, § 8.01.

[53] *See supra* note 37.

[54] Development agreements limit the power of the government to apply new ordinances to ongoing developments. 2 ROHAN, *supra* note 31, § 9A.01.

concrete situation.[55] The model also provides municipalities with significant leverage over potential development in order to obtain concessions from developers.[56]

Though zoning ordinances contain standards for granting variances and special use permits and exceptions, these devices retain an ad hoc flavor and their application is not entirely predictable.[57] As such, municipalities and developers have sought more formal and predictable ways to achieve particular results from land use decision-making, such as in development agreements.[58] A growing number of states have enacted legislation authorizing the making of land use decisions through this device.[59] Development agreements between developers and municipal governments respond to the uncertainties inherent in the use of the minor adjustment mechanisms found in Euclidean zoning and in vested rights.[60] They are negotiated agreements between a developer and the local government under which the local government agrees to apply the land use rules, regulations, and policies in effect on the date of the agreement in exchange for the developer's promise to develop in a certain way.[61]

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55 Ryan, *supra* note 27, at 349 (citing Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 166-67 (1989)).

56 *Id.* (citing Cordes, *supra* note 55, at 167).

57 *Id.* at 349.

58 *See* 2 ROHAN, *supra* note 31, § 9A.01. In *1515-1519 Lakeview Boulevard Condominium Ass'n v. Apartment Sales Corp.*, 43 P.3d 1233 (Wash. 2002), the Washington Supreme Court ruled that "a local government and a property owner may reach an arms length, bargained-for agreement which may include waivers of liability for risks created by [a] proposed use of property because of the shape, composition, location or other characteristic unique to the property sought to be developed." *Id.* at 1237. In that case, the city contended that

> innovative land use instruments, such as exculpatory covenants, should be encouraged because the Growth Management Act, chapter 36.70A RCW, [was] channeling development onto more and more marginal lots[;] that property owners of land marginal for development because of the composition, topography, location, or other characteristic of the property, should be free to propose creative solutions, and accept the risks of development.

Id.

59 *See infra* note 65 and accompanying text.

60 Schwartz, *supra* note 44, at 720.

61 *See* Michael H. Crew, *Development Agreement After* Nollan v. California Coastal Commission, *483 U.S. 825 (1987)*, 22 URB. LAW. 23, 28 (1990); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 *(continued)*

Development agreements may also involve zoning changes or amendments to the comprehensive plan.[62]

A. *The Benefits to the Developer and the Municipality*

Under the development agreement model of land use controls, the developer gains the following: (1) certainty as to the governing regulations for the development project; (2) the ability to bargain for support and the coordination of approvals; (3) easier and less-costly financing because of the reduction of the risk of non-approval; (4) the ability to negotiate the right to freeze regulations as to changes in the project; (5) predictability in scheduling the phases of the development; and (6) a change in the dynamics of the development process from confrontation to cooperation.

The municipality gains the following: (1) the facilitation of comprehensive planning and long-range planning goals; (2) commitments for public facilities and off-site infrastructure; (3) public benefits otherwise not obtainable under regulatory takings doctrine; and (4) the avoidance of administrative and litigation costs and expenditures.

Development agreements thus offer both flexibility and certainty—flexibility to the local government by incorporating terms and conditions in the agreements that may be different from those expressed in the land use regulations, and certainty to the developer by setting the governing standards and rules for the duration of the development project. Recently, a California court of appeals ruled that a development agreement statute applied equally to the planning stage of development and to projects that have been approved for actual construction.[63] Such a construction of the statute, the court said, was entirely consistent with the overall purposes of the statute to "encourage[] the creation of rights and obligations early in a project in order to promote public and private participation during planning, especially when the scope of the project requires a lengthy process of obtaining regulatory approvals."[64]

STETSON L. REV. 761, 762 (1993); Knight & Schoettle, *supra* note 44, at 787-88; Schwartz, *supra* note 44, at 720.

[62] *See* CAL. GOV'T CODE § 65864(b) (West 1997).

[63] Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 100 Cal. Rptr. 2d 740, 745 (2000).

[64] *Id.* In that case, the development agreement pertained to the planning of the development project that met the requirements of the statute, though the county had not approved an actual development, but had "establishe[d] the scope of the [p]roject and precise parameters for future construction as well as a procedure to process [p]roject approvals." *Id.* The agreement also provided for public use improvements that the developer may not have offered if the county failed to make corresponding commitments as outlined in the agreement. *Id.* It was nonetheless necessary for the court to construe the agreement as an approval of the project because it "committe[d] the parties to a definite

(*continued*)

Though they are local in nature, development agreements usually are entered into pursuant to state enabling legislation. California was the first state to enact such legislation in 1980, and thirteen states have followed.[65] Development agreements are said to require enabling legislation because of their effect upon the powers of local governments, both conferring and limiting. Nonetheless, because development agreements potentially empower local officials to control land use in more effective ways than

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course of action aimed at assuring construction of the project, provided certain contingencies [were] met." *Id.* "While further agreement and discretionary approvals [were] necessary, every approval or denial permitted by the Agreement [was] designed to advance the project in accordance with the standards for . . . development adopted by the County in the . . . Area Plan." *Id.* at 745-46. The court pointed out that though the statute was limited to actual projects, the statute did not require that the parties defer development agreements until the beginning of constructions, and it did not require, as a prerequisite, any particular stage of project approval. *Id.* at 746. "In fact, by permitting conditional development agreements when property is subject to future annexation, [the statute] expressly permitted local governments to freeze zoning and other land use regulation before a project was finalized." *Id.* (citing Nat'l Parks & Conservation Ass'n v. County of Riverside, 50 Cal. Rptr. 339 (1996)). In the court's view, nothing "limite[d] the statute to development agreements which create[d] 'vested rights' to complete construction of a project according to completed plans." *Id.*

[65] ARIZ. REV. STAT. ANN. § 9-500.05 (West Supp. 2004-05); CAL. GOV'T CODE § 65864 (West 1997); COLO. REV. STAT. § 24-68-102 (2003); FLA. STAT. ANN. § 163.3220 (West 2000); HAW. REV. STAT. § 46-121 (1993); IDAHO CODE § 67-6511 (Michie Supp. 2004); LA. REV. STAT. ANN. § 33:4780.21 (West 2002); MD. ANN. CODE art. 66B, § 13.01 (1997); NEV. REV. STAT. ANN. 278.0201 (Michie 2002); N.J. STAT. ANN. § 40:55D-45 (West 1991); OR. REV. STAT. § 94.504 (2003); S.C. CODE ANN. § 6-31-10 (West 2004); VA. CODE ANN. § 15.2-2303.1, -2297 (Michie 2003); WASH. REV. CODE ANN. § 36.70B.170 (West 2003); *see also* Azalea Lakes P'ship v. Parish of St. Tammany, 859 So. 2d 57, 61-63 (La. Ct. App. 2003) (upholding the validity of a development agreement statute against a charge of unconstitutional delegation of legislative power); Save Our Springs Alliance & Circle C Neighborhood Ass'n v. City of Austin, No. 03-03-00312-CV, 2004 Tex. App. LEXIS 4060, at *14-15 (Tex. App. May 6, 2004) (upholding a development agreement entered into pursuant to a statute as a validly enacted amendment to a zoning ordinance, entitling the developer to rely on that change in requesting a development permit); City of Richland v. Franklin Tiegs, No. 20821-4-III, 2003 Wash. App. LEXIS 108 (Wash. Ct. App. Jan. 28, 2003) (upholding development agreement statute); R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH. L. REV. 955 (2001) (discussing ways to enter into valid development agreement under discrete sections of the Texas Local Government Code). *See generally* Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990); Wegner, *supra* note 40, at 995; Comment, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173 (1985).

under zoning ordinances, their use has been sanctioned, even in states with no statutory enabling law, as an exercise of their auxiliary and implied powers under the zoning laws.[66]

A practical and legal limitation on development agreements is that they only bind the contracting parties—the developer and the municipality signing the agreement. Projects that require approval from other governmental entities (such as the local coastal commission or environmental protection agency) remain at risk. However, this can be addressed by a multi-party development agreement.

1. *Common provisions in the development agreement enabling statutes*

a. *Municipality's authority to act*

The municipality may be required to first pass an enabling ordinance or resolution establishing the details of development agreement procedures and requirements that the executive branch of the governmental unit must follow.[67]

b. *Goals*

Most statutes identify the purposes and goals of such agreements, such as:

> a) to bring increased "certainty" and "assurance" to the development process, which in turn will "strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development,"[68]
>
> b) to achieve predictability, and public benefits,[69] including "affordable housing, design standards, and on

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[66] *See* Bollech v. Charles County, 166 F. Supp. 2d 443, 452-54 (D. Md. 2001) (upholding a development agreement against a charge of abdication of police powers where the agreement itself stated that the development would be subject to any changes in state or federal law and that it did not require absolute deference to the existing zoning); Giger v. City of Omaha, 442 N.W.2d 182, 192-93 (Neb. 1989) (upholding a development agreement against challenge that municipality bargained away its police powers). *See generally* Jennifer G. Brown, *Concomitant Agreement Zoning: An Economic Analysis*, 1985 U. ILL. L. REV. 89.

[67] ARIZ. REV. STAT. ANN. § 9-500.05(A) (West Supp. 2004); CAL. GOV'T CODE § 65865(c) (West 1997); HAW. REV. STAT. § 46-124 (1993); FLA. STAT. ANN. § 163-3223 (West 2000).

[68] CAL. GOV'T CODE § 65864(b) (West Supp. 2004).

[69] HAW. REV. STAT. § 46-121 (1993).

and off-site infrastructure,"[70]

c) for the vesting of development rights as solutions to the problems caused by the lack of certainty in the development process.[71]

c. *Minimum provisions*

The statutes typically require that a development agreement specify certain substantive terms, including the following:

a) a description of the land subject to the agreement;

b) a statement of the permitted uses, including density, intensity, maximum height, and size of the proposed buildings;

c) provisions for reservations or dedications of land for public purposes;

d) conditions, terms, restrictions, and requirements for public infrastructure;

e) the phasing or time of construction.[72]

d. *Conformance with comprehensive plans*

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[70] S.C. CODE ANN. § 6-31-10(B)(4) (West 2004).

[71] HAW. REV. STAT. § 46-121 (1993); LA. REV. STAT. ANN. § 33-4780.21(1) (West 2002) ("The lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning," which would make "maximum efficient utilization of resources at the least economic cost to the public."); S.C. CODE ANN. § 6-31-10(B)(4) (West 2004).

[72] CAL. GOV'T CODE § 65865.2 (West 1997); FLA. STAT. ANN. § 163.3227(d), (f), (h) (West 2000) (requiring also that the agreement contain a description of the public facilities that will service the development; a description of local development permits approved or needed to be approved; and a description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for public health, safety, or welfare of its citizens); HAW. REV. STAT. § 46-126 (1993); MD. ANN. CODE art. 66B, § 13.01(f) (Supp. 1997); NEV. REV. STAT. ANN. 278.0201(1) (Michie 2002); N.J. STAT. ANN. § 40:55D-45.2(A) (West 1991); OR. REV. STAT. § 94.504(2) (2003); S.C. CODE ANN. § 6-31-60 (West 2004). The Arizona statute provides that the development agreement *may* also specify such things as density and intensity of use, and maximum height and size of proposed buildings. ARIZ. REV. STAT. ANN. § 9-500.05(G)(1)(c) (West 1996). The Louisiana statute provides that the statute *shall* specify such things. LA. REV. STAT. ANN. § 33:4780.24 (West 2002); *see also* VA. CODE ANN. § 15.2-2303.1(B) (Michie 2003); OR. REV. STAT. § 94-518 (2003); WASH. REV. CODE ANN. § 36.70B.170(3) (West 2003) (setting forth development standards that apply).

As a condition of enforceability, most statutes require development agreements to comply with local comprehensive plans.[73]

e. *Duration*

Some statutes limit the duration of a development agreement to a specific number of years, although extensions by mutual agreement following a public hearing may be obtained.[74] Others provide that a development agreement may include commencement dates for construction[75] or the duration of the agreement.[76]

f. *Amendment, cancellations, exceptions*

As with any contract, amendments can be accomplished by mutual agreement.[77] However, under all the statutes, despite the terms of the agreement, the municipality reserves the power to cancel the agreement unilaterally when required to ensure public health, safety, or welfare.[78]

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[73] ARIZ. REV. STAT. ANN. § 9-500.05(B) (West 1996); CAL. GOV'T CODE § 65867.5 (West 1997); FLA. STAT. ANN. § 163.3231 (West 2000); HAW. REV. STAT. § 46-129 (1993); NEV. REV. STAT. ANN. 278.0203 (Michie 2002); S.C. CODE ANN. § 6-31-70 (West 2004); VA. CODE ANN. § 15.2-2303.1(B) (Michie 2003); WASH. REV. CODE ANN. § 36.70B.170(1) (West 2003).

[74] FLA. STAT. ANN. § 163.3229 (West 2000) (ten years); MD. ANN. CODE art. 66B, § 13.01(g) (Supp. 1997) (five years).

[75] CAL. GOV.'T CODE § 65865.2 (West 1997); FLA. STAT. ANN. § 163.3227(2) (West 2000); HAW. REV. STAT. § 46-126 (1993); NEV. REV. STAT. ANN. 278.0201 (Michie 2002).

[76] LA. REV. STAT. ANN. § 33:4780.24 (West 2002).

[77] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-500.05C (West Supp. 2004); LA. REV. STAT. § 33:4780.30 (West 2002); MD. ANN. CODE art. 66B, § 13.01(h) (Supp. 1997); OR. REV. STAT. § 94-522 (2003); S.C. CODE ANN. § 6-31-100 (West 2004). But in Hawaii, if the county determines that a proposed amendment would "substantially alter" the original agreement, a public hearing must be held. HAW. REV. STAT. § 46-130 (1993); *see also* FLA. STAT. ANN. § 163.3225 (West 2000) (requiring a hearing upon entering into, amending, and revoking an agreement).

[78] *See, e.g.*, CAL. GOV.'T CODE § 65865.3 (West 1997); HAW. REV. STAT. § 46-127 (1993). In Louisiana, this is so in the case of newly incorporated municipalities as to development agreements entered into prior to incorporation. LA. REV. STAT. ANN. § 33:4780.25 (West 2002). In Hawaii, the current (and later enacted) laws may be applied if necessary to rectify a condition "perilous" to residents' health and safety. HAW. REV. STAT. § 46-127(b) (1993); *see also* LA. REV. STAT. ANN. § 33:4780.24 (West 2002); MD. ANN. CODE art. 66B, § 13.01(i) (Supp. 1997); VA. CODE ANN. § 15.2-2303.1A (2003). The Louisiana statute also provides for modification or suspension of provisions of the development agreement where necessary to comply with subsequently enacted state and federal laws and regulations. LA. REV. STAT. ANN. § 33:4780.32; *see also* S.C. CODE ANN. § 6-31-130 (West 2004).

The California statute requires a municipality to review annual compliance with the agreement and authorizes it to terminate or modify the agreement upon a finding of noncompliance.[79] The Nevada statute requires review only once every two years.[80]

g. *Approval and adoption*

The mechanisms for obtaining approval vary. In Hawaii, the mayor is the designated negotiator, but the final agreement must be approved by the city council and then adopted by resolution.[81] In California, a development agreement must be approved by resolution or ordinance.[82] In several states, a public hearing must be held prior to adoption of the development agreement.[83] Whether a development agreement is considered a legislative or an administrative act affects the mechanism and procedure for approval. If it is a legislative act, a referendum may nullify the agreement.[84] In California, a developer's rights do not vest under a development agreement until the referendum period expires, and if other conforming enactments (for example, a general plan amendment or re-zoning) are necessary under the agreement, vesting is deferred until the referendum period expires on those as well.[85] In Hawaii, development agreements are administrative acts, precluding repeal by referendum.[86]

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[79] CAL. GOV'T CODE § 65865.1 (West 1997); *see also* FLA. STAT. ANN. § 161.0531(5) (requiring review every twelve months).

[80] NEV. REV. STAT. ANN. 278.0205 (West 1996). The Louisiana statute requires periodic review at least every twelve months, at which time the developer must demonstrate good faith compliance with the terms of the agreement or face termination or modification. LA. REV. STAT. ANN. § 33:4780.23 (West 2002); *see also* S.C. CODE ANN. § 6-31-90 (West 2004).

[81] HAW. REV. STAT. § 46-123-46.124 (1993); S.C. CODE ANN. § 6-31-30 (West 2004).

[82] CAL. GOV'T CODE § 65867.5 (West 1997); *see also* LA. REV. STAT. ANN. § 33:4780.28 (West 2002) (stating that after a public hearing, a development agreement must be approved by ordinance of the governing authority of the municipality).

[83] CAL. GOV'T CODE § 65867 (West 1997); FLA. STAT. ANN. § 163.3225 (West 2000) (requiring at least two public hearings); HAW. REV. STAT. § 46-128 (1993); LA. REV. STAT. ANN. § 33:4780.28 (West 2002); MD. ANN. CODE art. 66B, § 13.01(d) (Supp. 1998); OR. REV. STAT. § 94.508, .513 (2003); S.C. CODE ANN. § 6-31-50 (West 2002); WASH. REV. CODE ANN. § 36.70B.200 (West 2003).

[84] *See, e.g.*, COLO. REV. STAT. § 24-68-104(2) (2003). The Colorado statute provides that development agreements "shall be adopted as legislative acts subject to referendum." *Id.*

[85] Midway Orchards v. County of Butte, 269 Cal. Rptr. 796, 805 (Cal. Ct. App. 1990).

[86] HAW. REV. STAT. § 46-131 (1993).

h. *Effect of the agreement*

The statutes variously provide that the effect of the agreement is that the rules, regulations, and official policies governing permitted uses of the land are those in force at the time of execution of the agreement.[87] Under the Florida statute, subsequently enacted laws and policies are applicable only to the extent consistent with those previously in effect or necessary to protect health, safety, or welfare; that "are specifically anticipated and provided for by the development agreement"; where "[t]he local government demonstrates that substantial changes have occurred in the pertinent conditions, existing at the time of approval of the development agreement"; or the "development agreement [was] based upon substantially inaccurate information supplied by the developer."[88]

III. TWO ISSUES REGARDING CONTRACT AND CONDITIONAL ZONING: THE RESERVED POWERS DOCTRINE AND TRANSPARENCY

Two key problems are raised in connection with any agreement entered into between a municipality and a developer regarding the use of land. The first question concerns whether such an agreement is enforceable under the Contracts Clause of the Constitution, and whether such an agreement is void *ab initio* as violative of the reserved powers doctrine. The second question concerns the lack of transparency where conditions agreed upon and essential to the land use decision are not contained in the ordinance, but are implemented through private negotiations and agreements.

A. *The Contracts Clause and the Reserved Powers Doctrine*

The Contracts Clause of the United States Constitution provides in part that "[n]o state shall . . . pass any . . . [l]aw impairing the Obligation of Contracts."[89] However, it is well-settled that the Contracts Clause is not to be applied literally, that is, to forbid all impairments of contracts.[90] Early

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87 ARIZ. REV. STAT. ANN. § 9-500.05(B) (West 1996); CAL. GOV'T CODE § 65866 (West 1997); HAW. REV. STAT. ANN. § 46-127(b) (1993); LA. REV. STAT. ANN. § 33:4780.27 (West 2002) (except that subsequently enacted rules, regulations, and policies that do not conflict with those in effect at the time of the signing of the agreement may apply); MD. ANN. CODE art. 66B, § 13.01(j) (Supp. 1998); NEV. REV. STAT. ANN. 278.0201(2)(3) (Michie 2002); OR. REV. STAT. § 94.518 (2003); S.C. CODE ANN. § 6-31-80 (West 2004); VA. CODE ANN. § 15.2-2303.1(B) (Michie 2003); WASH. REV. CODE ANN. § 36.70B.180 (West 2003).

88 FLA. STAT. ANN. § 163.3233(a)-(e) (West 2000).

89 U.S. CONST. art. I, § 10, cl. 1.

90 Energy Reserves Group, Inc. v. Kan. Power & Light Co., 459 U.S. 400, 410 (1983); United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977).

courts realized that the Contracts Clause, if applied literally, "[w]ould become a [serious] threat to the sovereign responsibilities of state governments."[91] One solution was the development of the reserved powers doctrine that forbid the contracting away of certain sovereign powers.[92] The reserved powers doctrine holds that "the power of governing is a trust committed by the people to the government, no part of which can be granted away." [93] Sovereign powers over certain matters are inalienable because they may require continuing governmental supervision to address changing circumstances.[94] This means that the prohibitions against abridgement of contracts by state legislatures must yield to the interests of the state in the exercise of its police powers to safeguard and promote the public interest, safety, health, and welfare.[95] All rights granted from government are held subject to the police powers of the state.[96] An agreement between a developer and the municipality, in which the municipality purports to bargain away its reserved powers, therefore is void *ab initio* and not entitled to protection under the Contracts Clause.[97] Thus, the reserved powers doctrine is a limitation on the scope of the Contracts Clause.[98]

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91 United States v. Winstar Corp., 518 U.S. 839, 874 (1996).

92 *See generally* West River Bridge Co. v. Dix, 47 U.S. 507 (1848) (providing that states' contracts do not surrender eminent domain power).

93 Stone v. Mississippi, 101 U.S. 814, 820 (1879).

94 *See id.* at 819. The Court stated as follows:

> The supervision of both these subjects [public health and public morals] of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.

95 *See* Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 558 (1914); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934) (stating that "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order").

96 Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877); *see also* Exxon Corp. v. Eagerton, 462 U.S. 176, 190-91 (1983).

97 *See Beer Co.*, 97 U.S. at 33.

98 *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977); Pennsylvania Hosp. v. Philadelphia, 245 U.S. 20, 23 (1917); Griffith v. Connecticut, 218 U.S. 563, 571 (1910) (holding that the Contract Clause does not protect contracts that are prohibited by law or against public policy). In *Pennsylvania Hospital*, the Court held that

> the states cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental

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In determining whether a government has bargained away its powers, the Supreme Court has made a distinction between police powers on the one hand and taxing and spending powers on the other, with the reserved powers doctrine only covering the former.[99] "Such formalistic distinctions perhaps cannot be dispositive, but they contain an important element of truth."[100]

Even if no surrender of police powers initially occurs, but the state later seeks to abrogate a contract with a private party, the Contract Clause does not require a state to adhere to a contract if such abrogation is necessary in protection of the public interest.[101] In other words, any rights created by government contract "are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality."[102] This means that an agreement between a municipality and a landowner may be justifiedly impaired by the government and such impairment is not unconstitutional if it is "reasonable and necessary to serve an important public purpose."[103] Every contract made with a governmental entity is in some degree subject to the subsequent exercise of that government's police powers.[104]

Otherwise, the Contracts Clause of the Constitution may prevent a

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> authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.

Pennsylvania Hosp., 245 U.S. at 23.

[99] *See, e.g.*, *Stone*, 101 U.S. at 820; Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (holding that the reserved powers doctrine voids "only a contract which amounts to a city's 'surrender' or 'abnegation' of its *control* of a properly municipal function," and the annexation agreements were "just, reasonable, fair and equitable" even though some of the executory features might have extended beyond the terms of current legislative body members).

[100] *United States Trust Co.*, 431 U.S. at 24. "If a state could reduce its financial obligations whenever it wanted to spend the money for what is regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 26.

[101] *See id.* at 23.

[102] *Stone*, 101 U.S. at 820. *See generally* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663 (2001).

[103] *United States Trust Co.*, 431 U.S. at 25; *see also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 243 (1978). *See generally* Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

[104] *See Stone*, 101 U.S. at 820; Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877).

municipality from abrogating an agreement once entered into with a landowner. That is to say, if the municipality uses its legislative authority to impair an otherwise enforceable contract, it may incur liability to the landowner. An impairment of a contract addressable under the Constitution should be distinguished from a breach of contract under common law.[105] An impairment of contract occurs if a governmental entity acts in a way that makes performance of the contract illegal or impossible.[106] The illegality or impossibility provides a defense to the developer in a breach of contract action for damages or for other relief brought by the municipality, the non-government party now unable to fulfill its contractual obligation.[107] On the other hand, when the government merely refuses or omits to perform its contractual obligation, an adequate remedy in damages ordinarily exists, such that the government action is characterized as a breach of contract that does not rise to the level of a contractual impairment.[108]

The Court has indicated that state actions purporting to impair contracts are evaluated according to varying levels of scrutiny in determining whether the impairment, if established, rises to the level of an actionable unconstitutional impairment.[109] The level of scrutiny varies with the degree of impairment, being more strict where the impairment is more substantial.[110]

1. *Contract zoning as bargaining away of police powers*

"[C]ontract zoning [is] defined as a 'process by which a local government enters into an agreement with a developer whereby the

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105 E & E Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 677, 679 (7th Cir. 1980).

106 *Id.* at 679.

107 *Id.*

108 *Id.*

109 Energy Reserves Group v. Kan. Power & Light Co, 459 U.S. 400, 410 (1983).

110 *Id.*; United States Trust Co. v. New Jersey, 431 U.S. 1, 27 (1977); Rue-Ell Enters., Inc. v. City of Berkeley, 194 Cal. Rptr. 919, 923 (Cal. Ct. App. 1983). In *Rue-Ell Enterprises*, the court set out the following three-step analysis for determining whether a contract has been impaired: (1) whether the state law has substantially impaired the contractual relationship; (2) if substantially impaired, whether the impairment was justified by a significant public purpose behind the regulation, such as remedying a broad and general social or economic problem; and (3) if there is a legitimate public purpose, whether the adjustment of the rights and duties of the contracting parties was reasonable and appropriate to the public purpose justifying the law. *Id.* The California Supreme Court has also stated that any such modification must be reasonable, and, when resulting in disadvantage to a private-sector party, must be accompanied by comparable new advantages.

government extracts a performance or promise from a developer in exchange for [the government's] agreement to rezone the property.'"[111] It is said to violate the reserved powers doctrine because it involves a deal that creates binding reciprocal obligations between a private interest and a government entity.[112] It is defined as the *required* exercise of the zoning power pursuant to an express bilateral contract between the property owner and the zoning authority and an agreement to rezone that lacks a valid basis independent of the contract on which to justify the zoning amendment.[113] Thus, the problem with a deal arising under contract zoning is that it would bind the government to specific terms of the contract that may ultimately prevent it from carrying out its public duties, while conferring on private parties special rights different from other landowners within the same zone.[114]

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[111] McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002) (quoting 3 RATHKOPF, ZONING & PLANNING § 44:11 (Zeigler rev. ed. 2001)).

[112] *Id.*

[113] *See* Morin v. Foster, 380 N.E.2d 217 (N.Y. 1978); Almor Assoc. v. Town of Skaneateles, 647 N.Y.S.2d (N.Y. App. Div. 1996); Quigley v. City of Oswego, 419 N.Y.S.2d 27 (N.Y. App. Div. 1979); Carlino v. Whitpain Investors, 453 A.2d 1385 (Pa. 1982); Larkin v. City of Burlington, 772 A.2d 553 (Vt. 2001). *But see* ARIZ. REV. STAT. ANN. § 11-832 (West 1999) (authorizing contract zoning); ME. ZONING ORDINANCE § II(I)(1) (2004) (specifically authorizing "contract zoning" for zoning map changes "when the Town Council, exercising its sole and exclusive judgment . . . determines that it is appropriate to modify the zoning district regulations applicable to a parcel of land [to] allow reasonable uses of the land . . . which remain consistent with the Town['s] Comprehensive Plan"); R.I. GEN. LAWS § 45-24-53(h) (1990) (authorizing contract zoning); Crispin v. Town of Scarborough, 736 A.2d 241, 245-46 (Me. 1999) (upholding a contract zoning agreement under statute); Sweetman v. Town of Cumberland, 364 A.2d 1277, 1281 (R.I. 1976) (upholding the constitutionality of a statute authorizing conditional zoning by city council).

[114] *See, e.g.*, Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Chung v. Sarasota County, 686 So. 2d 1358 (Fla. Dist. Ct. App. 1996); Hedrich v. Village of Niles, 250 N.E.2d 791, 796 (Ill. 1969) (asserting that zoning ordinances should not be subject to bargaining or contract, and that when zoning is conditioned upon collateral agreements or other incentives supplied by a property owner, zoning officials are placed "in questionable position of bartering their legislative discretion for emoluments that had no bearing on the requested amendment"). Another form of zoning that is often challenged as illegal, although not under the reserved powers doctrine, is spot zoning. *See* Mayor of Rockville v. Rylyns Enters., 814 A.2d 469, 488 (Md. 2002); Galuska v. Racine County, No. 87-0151, 1988 WL 78384, *2 (Wis. Ct. App. May 25, 1988) (citing Cushman v. City of Racine, 159 N.W.2d 67, 69 (Wis. 1968)). Spot zoning involves the singling out of a small parcel of land for a use classification entirely different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners. *Mayor of Rockville*, 814

(*continued*)

"The process is suspect because of the concern that a municipality will contract away its police power to regulate land use on behalf of the public in return for contractual benefits offered by a landowner whose interest is principally served by the zoning action."[115] It is thus said to be "an *ultra vires* act bargaining away the police power, [since] [z]oning must be governed by the public interest and not by benefit to a particular landowner."[116]

A.2d at 488. In other words, spot zoning occurs when a single lot or area is granted privileges that are not granted or extended to other land in the vicinity in the same use district. *Id.* It is usually understood to be zoning "by which a small area situated in a larger zone is purportedly devoted to a use inconsistent with the use to which the larger area is restricted." State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 539 (Wis. 1970) (quoting Higbee v. Chicago, B. & Q. R. R., 292 N. W. 320 (Wis. 1940)). Spot zoning is invalid where some or all of the following factors are present: (1) a small parcel of land is singled out for special and privileged treatment; (2) the singling out is not in the public interest, but only for the benefit of the landowner; and (3) the action is not in accord with a comprehensive plan. *Mayor of Rockville*, 814 A.2d at 488; Howard v. Village of Elm Grove, 257 N.W.2d 850 (Wis. 1977); Rodgers v. Menomonee Falls, 201 N.W.2d 29 (Wis. 1972); *State ex rel. Zupancic*, 174 N.W.2d at 539 (citing Boerschinger v. Elkay Enters., Inc., 145 N.W.2d 108 (Wis. 1966)); *Cushman*, 159 N.W.2d at 69-70. However, spot zoning is not regarded as illegal per se, and courts do not consider rezoning in this way to be illegal spot zoning where it is in the public interest and not solely for the benefit of the developer. *Cushman*, 159 N.W.2d at 69. It is illegal only when a change exists that is otherwise than part of a "well-considered and comprehensive plan calculated to serve the general welfare of the community." Collard v. Inc. Village of Flower Hill, 421 N.E.2d 818, 821 (N.Y. 1981). Nonetheless, the attitudes of courts and commentators toward spot zoning have differed. Spot zoning has been characterized both as a necessary device to provide flexibility to comprehensive zoning ordinances, 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 9.17 (2d ed. 1976), and as "the very antithesis of planned zoning." 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 27.01 (1988). In any case, it is a form of rezoning and "should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning." *Howard*, 257 N.W.2d at 854 (quoting Buhler v. Racine County, 146 N.W.2d 403, 410 (1966) (Currie, C.J., concurring)).

[115] *McLean*, 778 N.E.2d at 1020 (citing Rando v. North Attleborough, 692 N.E.2d 544 (Mass. 1998)).

[116] Pima Gro Sys. v. Bd. of Supervisors, 52 Va. Cir. 241, 244 (Va. Cir. Ct. 2000) (citing 83 AM. JUR. 2D *Zoning and Planning* § 46) (emphasis added). In *Derrenger v. City of Billings*, 691 P.2d 1379 (Mont. 1984), landowner, Derrenger, purchased a parcel of land comprised of three tracts. *Id.* at 1380. One tract was zoned for single-family residences. *Id.* The remaining two tracts were zoned Agriculture Open Space. *Id.* Thereafter, the City of Billings and the landowner entered into a written agreement entitled "Waiver of Right to Protest Annexation and Agreement on Non-conforming Use." *Id.* The two tracts were

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In contrast to contract zoning, conditional zoning[117] is defined as rezoning subject to conditions, which are not applicable to other property in the same zone, where the municipality makes no promise to the landowner to rezone but does rezone upon the imposition of conditions, covenants, and restrictions on use of the rezoned land.[118] Under conditional zoning, the landowner covenants to perform certain conditions if the rezoning is granted.[119] Conditional zoning "allows municipalities

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annexed and rezoned R-96. *Id.* at 1381. Later, a subsequent owner of the tract proposed to build a multi-family residential unit on his property, all portions of which were then zoned R-96. *Id.* His plans were objected to, and he sued for construction on the meaning of the restriction on use in the annexation agreement. *Id.* The trial court found that the subject agreement was clear on its face and did not constitute contract zoning. *Id.* The appellate court reversed, holding the issue reduced to simplest terms was "whether 'residential purposes' [was] so clear on its face as to preclude multi-family residential purposes." *Id.* at 1382. The court thought not. *Id.*

> [T]here is a fact question about what was intended. The parties may have intended to assure additional future uses in return for agreeing to annexation. They may not have fully understood the limitations on contract zoning. Surely, they must have intended to receive some consideration for not protesting annexation. These questions should be resolved by the trier of fact.

Id. The dissent thought that the trial court's interpretation of the agreement to involve only conforming uses so as to avoid the contract zoning charge unsupported by a fair reading of the agreement. *Id.* at 1383 (Gulbrandson, J., dissenting). The dissent would have found contract zoning, stating that

> the parcel of land . . . located within the City of Billings and having been zoned [for single-family residence] long before the date of the agreement, but bearing a non-residential non-conforming use could not legally be the subject of an agreement whereby the City would agree to grant a residential multi-family use variance. Such an agreement, in my view, would constitute contract zoning.

Id. The dissent went on to state that "[a] contract made by the zoning authorities to zone or rezone for the benefit of a private landowner is illegal and *is denounced by the courts as 'contract zoning' and as an ultra vires bargaining away of the police power.*" *Id.* (emphasis in original). "The parties may have intended to assure additional future uses in return for agreeing to annexation," but in the dissent's view, "such an additional future residential use would constitute illegal contract zoning." *Id.*

117 This concept is discussed in depth *infra* at text accompanying notes 336 to 339.

118 *See* 2 YOUNG, *supra* note 15, § 9.20.

119 2 *id.*

and developers essentially to negotiate the terms of a development."[120] Under an agreement, the developer obtains the certainty that the development project will proceed, thus making financing easier to obtain, and tenants more likely to sign leases.[121] At the same time, the municipality is able to set definite conditions that govern the process of development, thus limiting the potential negative impacts from the development on neighboring land and the community.[122] Conditional zoning is said not to violate the reserved powers doctrine because the promise by the developer is unilateral and the municipality does not promise to rezone based on the developer's promises, but does so in the public interest.[123] Nevertheless, some have argued that

> [w]here the imposition of conditions on land development is desirable, it might better be done by uniform ordinances providing for special uses, special exceptions, and overlaid districts. . . . "Conditions imposed in such cases have a sounder legal basis because [they are transparent, where] guidelines for their imposition are spelled out in the ordinance."[124]

But, the process of conditional zoning at times seems almost indistinguishable from the process of "contract zoning," meaning negotiating a contract where there is an exchange of promises between a developer and the municipality.[125] The closeness of these devices in definition and application has led to murky and overlapping discussions in cases. Therefore, several theoretical questions arise such as the following: (1) is lawful conditional zoning the same as illegal contract zoning? (2) does conditional zoning extinguish or nullify the concept of contract zoning? (3) is the result that conditional zoning is illegal if contract zoning is illegal? Or the converse, (4) if conditional zoning is legal, then should contract zoning be legal?

2. *When an agreement between a municipality and a developer is subject to challenge*

By bargaining away the police powers, the courts cannot mean that the current legislature must refrain from entering into binding contracts or

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120 1 ROHAN, *supra* note 31, § 5.01[2].

121 1 *id.*

122 1 *id.*

123 1 *id.*

124 State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 539 (Wis. 1970) (quoting CUTLER, ZONING LAW AND PRACTICE IN WISCONSIN § 8, at 27 (1967)).

125 1 ROHAN, *supra* note 31, § 5.01[2].

other obligations whose terms extend beyond the terms of the current body. Such an interpretation would almost nullify the municipality's power to contract and its power to be sued if every time, when things looked different, it could claim that the act was outside its power.[126] What

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[126] In *Palisades Properties, Inc. v. Brunetti*, 207 A.2d 522 (N.J. 1965), a New Jersey court enforced an agreement against the municipality finding that such an obligation did not constitute a contracting away of the police power. *Id.* at 533. The landowners had an agreement with the borough that no building could be erected in the area exceeding 35 feet in order to preserve the beauty of the area. *Id.* at 531. The borough subsequently amended the zoning ordinance to allow the developer to construct a tower in excess of thirty-five feet. *Id.* The developer contended that the borough "[did] not have the power to restrict the use of privately owned property pursuant to an agreement with [the landowners] or to agree to insure the integrity of the skyline of the Palisades through its power of zoning. Such action, [the developer] argue[d], would be invalid as 'contract zoning.'" *Id.* at 532. The court agreed with the general proposition that "a municipality may not contract away its legislative or governmental powers." *Id.* at 533. However, the court ruled that a city has not only such rights as the legislature grants in express terms, but also "such other powers as 'arise by necessary or fair implication, or are incident to the powers expressly conferred, or are essential to the declared objects and purposes of the municipality.'" *Id.* Accordingly, the general proposition "is subject to the limitation that where a municipality has incurred an obligation which it has the power to incur it cannot escape that obligation by asserting that it is merely exercising the police power delegated to it. Such an exception is necessarily appended to every such municipal contract." *Id.* The court went on to hold that

> the municipality, by virtue of [the statute], had the express statutory power to execute the [earlier] contract imposing the restrictive covenants. The purpose of that agreement was not to restrict the municipality from further zoning. The sole objective was the imposition of restrictive covenants on specifically described parcels of land. From that contract flowed the same duty and obligation that would be incurred by individuals and private corporations under similar circumstances, i.e., the duty not to take any affirmative action which would destroy the fruits thereof. Under such circumstances, barring [the borough] from taking affirmative governmental or legislative action which would constitute a breach of its agreement is not to be regarded as the proscribed contracting away of such powers. [The borough] could not escape the obligations incurred by the [earlier] agreement under the guise of police power. [The landowners] and the Commission were therefore entitled to injunctive and declaratory relief against this "inequitable conduct"

because the borough "violated the implied covenant of good faith and fair dealing" in its agreement with the landowners when it amended the zoning ordinance. *Id.* at 532-33 (*continued*)

seems to be the meaning given to the phrase by the courts goes largely to the process of decision-making in the particular rezoning at issue. Did the municipality, through its zoning authority, arrive at the decision based upon its own assessment of what best serves the public health, safety, and welfare,[127] and did it provide the public an opportunity to participate in the zoning procedure before it acted to rezone?[128] Substantively, did the municipality purport to surrender all power to act in the future to protect the public health, safety, and welfare? Where the answer to the first question is in the affirmative and the second in the negative, an agreement between a municipality and a private landowner should be enforceable.

This means that not all agreements between the municipality and a developer amount to contract zoning. Instead, the courts have said that "contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract."[129] "In short, a 'meeting of the minds' must occur; [and] mutual assurances must be exchanged."[130] Thus, the central issue in many of these

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(citations omitted); *see also* Gladwyne Colony, Inc. v. Township of Lower Merion, 187 A.2d 549, 550 (Pa. 1963) (holding an agreement valid where the owner agreed to grant the town a right of way, an access road, and to convey a site if demanded by the city).

[127] *See* Alderman v. Chatham County, 366 S.E.2d 885, 890-91 (N.C. Ct. App. 1988) (holding that the rezoning in this case was accomplished as a direct consequence of the conditions regarding density of land use agreed to by the applicant, rather than as a valid exercise of the county's legislative discretion).

[128] *See State ex rel. Zupanic*, 174 N.W.2d at 537 (stating that "[c]ontract zoning is illegal not because of the result but because of the method").

[129] Chrismon v. Guilford County, 370 S.E.2d 579, 593 (1988) (distinguishing contract zoning from conditional zoning based upon whether there were bilateral or unilateral promises); *see also* Graham v. City of Raleigh, 284 S.E.2d 742, 746 (N.C. Ct. App. 1981) (holding that absence in the record of any representation by the developers as to their specific plans for development of the subject property meant there was no unlawful contract zoning involved in the adoption of the challenged ordinance).

[130] Hall v. City of Durham, 372 S.E.2d 564, 568 (N.C. 1988). In *Hall*, although the landowner made representations and offered assurances to the city council regarding the acreage to be deeded to a community association and a promise for the reversion of the land to its prior zoning class, in this case the landowner did not use land as represented. *Id.* No evidence demonstrated that the city council made assurances in return, no meeting of minds took place, and nothing demonstrated that the city council undertook to obligate itself in any way. *Id.* Therefore contract zoning did not exist. *Id.* However, the rezoning ordinance was invalid because in

> rezoning property from one general use district with fixed permitted uses to another general use district with fixed permitted uses, a city

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cases is whether bilateral negotiations took place between the landowner and the municipality resulting in an agreement that consisted of mutual covenants (that is, mutual promises with consideration running to one party from the other, as opposed to the unilateral imposition of conditions by the municipality).[131]

In accordance with this definition, in evaluating a charge of contract zoning, courts have undertaken the seemingly impossible task of distinguishing those agreements involving bilateral exchanges from those involving unilateral promises from the landowner. Courts look to see if governmental power has been used as a bargaining chip and if rezoning occurs not based on the merits of the zoning change request, nor on the public interest, but because a deal had been struck.[132] On the other hand, where a developer makes promises regarding the use of the land, but the municipality makes no reciprocating promises, the rezoning that follows is not regarded as contract zoning. If all that is alleged is that "a reciprocal understanding resulted in a tacit agreement" based upon the landowner's assurance to the zoning authorities that the property would be used only for a particular purpose, no contract zoning is found based upon the assumption that this was the use to which the property would be subjected under the rezoning.[133] Courts have explained that

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> council [was required to] determine that the property is suitable for all uses permitted in the new general use district, even where it has additional authority . . . to require any submitted site plan to conform therewith.

Id. at 572. The court further stated that "[r]ezoning on consideration of assurances that a particular tract or parcel [would] be developed in accordance with restricted approved plans [was] not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated." *Id.* at 571. In other words, a rezoning must be a true rezoning, with all lands open for use for all permitted uses in the new zone, but a rezoning should not be applied only to a particular parcel.

131 O'Dell v. Bd. of Comm'rs, 910 S.W.2d 438, 440-41 (Tenn. Ct. App. 1995) (holding that the proof showed no evidence of a bilateral agreement, the landowner followed the customary procedure in an attempt to have its property rezoned, no evidence of negotiations between the parties existed, and no quid pro quo, only unilateral conditions requiring that necessary improvements be made).

132 *Id.* at 441.

133 Dale v. Town of Columbus, 399 S.E.2d 350, 353 (N.C. Ct. App. 1991). There, a small tract was rezoned Highway Commercial from an R-2 Residential district. *Id.* at 352. The parcel faced a major highway to its south and across that road, the land was zoned Public Service. *Id.* At its southwest corner, the tract touched a Highway Commercial district and a city boundary. *Id.* Across that boundary was a county Highway Commercial district. *Id.*

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> [t]he illegal aspect of contract zoning occurs when a zoning authority binds itself to enact a zoning amendment and agrees not to alter the zoning change for a specified period of time. When a zoning authority takes such a step and curtails its independent legislative power, it has acted *ultra vires* and the rezoning is therefore a nullity.[134]

> The record [was] clear that the [planning] Board discussed the negative effects of highway traffic on any residential property along the road. The Board reviewed the commercial nature of the remainder of Highway 108 and the town's comprehensive plan of commercial development along the highway. It also discussed the possible benefits of increasing the town's tax base and providing more jobs through the establishment of more commercial enterprises.

Id. The appellate court found no showing of illegal contract zoning, which "properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract." *Id.* (quoting *Chrismon*, 370 S.E.2d at 593) (emphasis in original). Nothing indicated that the decision-making procedures were employed to cover up a hidden agreement between the landowner and the zoning authority. *Id.* at 353. *But see* Carole Highlands Citizens Ass'n, Inc. v. Bd. of County Comm'rs, 158 A.2d 663, 664-66 (Md. 1960) (striking down conditional use zoning, finding that impermissible influence need not be explicit where the record shows that the zoning action would not have taken place but for the understanding that an impermissible condition would be in operation).

[134] Dale, 399 S.E.2d at 353 (citations omitted).

> [The court] found no evidence of any reciprocal agreement made between the Board and the current owner, the applicant who filed for rezoning, or with anyone else concerning the property. The transcript [was] unequivocal that the Board understood that if the property was rezoned, the owner was not bound to operate an automobile dealership or any other specific establishment on the tract. The record [was] also clear that the board was advised of all the possible uses that could be made in a Highway Commercial district and of the possible uses if the property remained R-2 Residential. After comparing the two alternatives, the Board made the decision to rezone.

Id. The court then concluded as follows:

> Furthermore, all the proper rezoning procedures were followed in this case. Initially, the proposed change was referred to the Town Planning and Zoning Board, which endorsed the change. A public hearing was held, and at a separate public meeting, the Board unanimously adopted

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Short of such act, however, the rezoning of land should raise no contract zoning issue.[135] However, mere allegations of improper motive by the legislative body absent evidence of fraud or deceit are not sufficient to overturn an ordinance. Courts will not investigate the wisdom or motives of the legislative branch to invalidate zoning ordinances.[136]

3. *Per se illegality of agreements*

Some jurisdictions have declared agreements amounting to contract zoning invalid per se,[137] the reasoning being that the police "power may

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> the zoning change. There [was] no indication that the Board's decision was a foregone conclusion or that the decision-making procedures were a ploy to cover up a hidden agreement between the landowner and the zoning authority. Plaintiffs' argument that the Board's knowledge of the landowner's intended use may have influenced their decision [was] not sufficient to support an allegation that contract zoning occurred.

Id. (citations omitted).

[135] Alabama courts have also looked for a binding mutual agreement between the city and the developer before finding contract zoning. Bradley v. City of Trussville, 527 So. 2d 1303, 1306 (Ala. Civ. App. 1988). In *Bradley*, the city gave a right of way to the property owner through park land for a road to facilitate the development of newly annexed adjoining land, which the city rezoned. *Id.* at 1304. The court found no evidence of an agreement between the city and developer to rezone. *Id.* at 1306. Rather, the agreement was that if the Zoning and Planning Commission did not rezone the property to the classification sought and there appeared to be no assurance that it would, then the city would agree to de-annex the property. *Id.* Moreover, the court found the city did not abdicate its legislative responsibility with regard to annexing and rezoning of the property. *Id.* On the contrary, the evidence indicated that "the City was extensively involved in the development of the subdivision. There was apparently much negotiating between the City and the developer both as to the type of residential subdivision that would be built and the type of road that would be laid through the park." *Id.* Also, public hearings were held on the developer's petition to rezone. *Id.*; *see also* Bucholz v. City of Omaha, 120 N.W.2d 270, 276-77 (Neb. 1963) (upholding a zoning ordinance where it was enacted with protective covenants including a buffer zone between the proposed shopping center abutting the residential area, there was no evidence of a bargain or agreement between the developer and the city, the only representations made by the developer to the city were in the developer's rezoning application, the effect of the protective covenant was to give some further assurance to the city, and the representations of the applicant were made in good faith, giving the city greater control over development of the property rezoned).

[136] Rutland Envtl. Prot. Ass'n v. Kane County, 334 N.E.2d 215, 220 (Ill. App. Ct. 1975).

[137] In *Wilmington Sixth District Community Commission v. Pettinaro Enters.*, No. 8668, 1988 Del. Ch. LEXIS 142 (Del. Ch. Oct. 27, 1988), defendants sought to have a

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not be exerted to serve private interests merely, nor may the principle be subverted to that end."[138] Still, it is not at all clear from a reading of the cases when contract zoning occurs. Additionally, not all zoning actions

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former hospital site rezoned to permit residential development and use. *Id.* at *2. Defendants negotiated for the possible purchase of the site, which required rezoning. *Id.* An ordinance was subsequently introduced providing for the rezoning of the site for residential use. *Id.* at *3. "Shortly thereafter, defendants met with representatives of [the] Committee to assuage the expressed concerns over the possibility of the renting of the units erected on the site, the lack of adequate parking and the increased congestion which would follow in the neighborhood if the rezoning occurred." *Id.* Defendants assured the Committee and represented at a public hearing that all housing units would be offered for sale with no rentals, that ample parking would be provided, and that they would ask the seller to place restrictions in the deed of conveyance to that effect. *Id.* at *3-4. The application for rezoning received unanimous approval from the Planning Commission. *Id.* at *3. However, the deed did not contain any such restrictions, and the defendants changed their plans, deciding on three story townhouses establishing a lease payment arrangement whereby a prospective purchaser could lease a unit for a time. *Id.* at *5. Plaintiffs filed an action seeking specific performance of defendants' representations to the Council. *Id.* at *6. Defendants asserted the following two arguments: (1) that the representations made to the Council did not as a matter of law create an enforceable contract, the performance of which could be specifically enforced, because it would amount to contract zoning; and (2) that Plaintiff's claim was barred by the statute of limitations. *Id.* at *7. The court stated:

> Even assuming, arguendo, that the necessary prerequisites for a contract arose [by the defendant's representations to Council,] contracts between a municipality and a developer to rezone in accordance with mutual promises are apparently per se invalid in Delaware [as] the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the consideration which enter into the law of contracts.

Id. The court noted that "[t]his rule is contrary to the holdings of some other courts which have upheld contract zoning if reasonable, non-discriminating and serving the public welfare." *Id.* at *8. The court went on to distinguish contract zoning (involving a bilateral agreement) from conditional zoning (where the government does not agree to rezone but merely decides to impose conditions that would otherwise not be applicable to the land), but found the rezoning here was not conditional zoning because "the Council approved the ordinance without written conditions, and there were no recorded covenants, agreements, etc. which could show the existence of conditional zoning." *Id.* at *9-10; *see also* Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956); Baylis v. City of Baltimore, 148 A.2d 429 (Md. 1959) (considering an agreement that provided "in consideration of the rezoning, the owners would develop and maintain property as a funeral home only"); Allred v. City of Raleigh, 178 S.E.2d 432, 440-41 (N.C. 1971).

[138] *Wilmington Sixth Dist. Cmty. Comm.*, 1988 Del. Ch. LEXIS 142, at *7-8 (quoting Hartman v. Buckson, 467 A.2d 694, 699-700 (Del. Ch. 1983)).

decided by agreement with an affected landowner are unlawful, as the existence of an agreement per se does not invalidate related zoning actions.[139] Instead, in most jurisdictions, it is the nature of the agreement—whether the municipality promises to rezone without regard to the merits of the rezoning application and whether the rezoning serves the public interest—that determines whether an agreement amounts to contract zoning.[140] Where the evidence shows that the municipality entered into an agreement with a landowner, was involved in the development process, and refrained from simply acting to rezone at the request of the developer, a finding of contract zoning is not required.[141]

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[139] McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002).

[140] *Id.*

[141] *See* City of Orange Beach v. Peridio Pass Dev. Inc., 631 So. 2d 850, 854 (Ala. 1993). In that case, the developer proposed development of an island, which, at the time the developer purchased it, was outside the boundaries of any municipality. *Id.* at 852. The developer met with the mayor of the City of Orange Beach and discussed an annexation of the island to the city. *Id.* The developer wrote a letter to the city attorney requesting Planned Unit Development zoning to allow various types of development and mixed uses within the area. *Id.* "The city attorney amended the letter by adding a request for the least restrictive zoning and a statement that zoning would occur at the time of annexation." *Id.* at 852. The mayor and the developer "also discussed the idea that the annexation was conditional upon receiving the zoning." *Id.* at 852-53. The developer then submitted an annexation-zoning letter to the City of Orange Beach, which agreed to support the project. *Id.* at 853. The developer wrote the town council, stating that the development would occur in several phases and that the number of lots were reduced. *Id.* The town council then reaffirmed its approval of the project, and the city annexed the island. *Id.* The developer sold the island to Peridio Pass Development, Inc., which "began to plan its development in reliance upon receiving proper development zoning." *Id.* At a town council meeting, several members of the community began to express concerns for the impact on the coastal development. *Id.* "The council then voted to deny the developer's request for PUD zoning." *Id.* The developer brought a breach of contract action against the town. *Id.* In defense, among other things, the Town Council claimed that the implementation of "the agreement would amount to unlawful contract zoning by a municipality that is legislative in nature." *Id.* at 854. However, the court rejected that argument, stating that "an annexation and zoning agreement is permissible if the city does not abdicate its legislative responsibility and the city is extensively involved in the development of the property," as the evidence showed the city was here. *Id.* (citing Bradley v. City of Trussville, 527 So. 2d 1303 (Ala. Civ. App. 1988)); *see also* Bradley v. City of Trussville, 527 So. 2d 1303, 1306 (Ala. Civ. App. 1988) (involving a situation where "the city was extensively involved in the development of the subdivision and there was apparently much negotiating between the city and the developer both as to the type of residential subdivision that would be built and type of road that would be laid through the park"). *But see* Hale v. Osborn Coal Enters., Inc., *(continued)*

Some courts have specifically upheld contract zoning or have declined to declare it illegal under all circumstances.[142] In Alaska, contract zoning was soundly upheld in *City of Homer v. Campbell*.[143] The court found an interest in a zoning contract to be a property right, the deprivation of which is subject to due process.[144]

Indiana courts have declined to rule on the question of whether contract zoning is illegal. In *Prock v. Town of Danville*,[145] the court

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729 So. 2d 853, 855 (Ala. Civ. App. 1997) (considering a case where the city was involved in development only to the extent of obtaining promised payment from landowner in exchange for rezoning).

[142] *See, e.g.*, Murphy v. City of West Memphis, 101 S.W.3d 221 (Ark. 2003). In *Murphy*, a company wanted to sell fireworks within the city. *Id.* at 222-23. Another company was permitted to sell fireworks only because it was grandfathered into the city limits. *Id.* at 223. The company filed a federal action against the city. *Id.* At public hearings, the company agreed to dismiss the suit if the city voted in favor of an ordinance allowing the sale of fireworks from a specific location. *Id.* The city passed several zoning ordinances to allow this. *Id.* at 223-24. The ordinances were challenged as contract zoning. *Id.* at 224. The trial court determined that the only reason the city relented to the company's demands was to settle the suit. *Id.* But, such settlement could be upheld as long as the city went through a bona fide procedure in the zoning process. *Id.* The supreme court found that the trial court was correct in finding that the company and the city had not entered into any type of binding agreement to settle until the city council meeting, and the agreement was only finalized after the city council passed the challenged ordinance, not before. *Id.* at 226. The court otherwise found none of the circumstances that traditionally give rise to a finding of contract zoning. *Id.* Therefore, the question of the legality of contract zoning in the State of Arkansas was not an issue to be addressed by the court on that appeal. *Id.* The legality of contract zoning was otherwise an issue of first impression in the state, the court specifically noting that not all jurisdictions that had examined the issue had found contract zoning to be prohibited. *Id.*; *see also* Dacy v. Village of Ruidoso, 845 P.2d 793, 797 (N.M. 1992) (declining to adopt a per se rule).

[143] 719 P.2d 683, 685 (Alaska 1986) In *City of Homer*, the court found that the landowners had a proprietary interest in the business that was protected by due process when concurrent with a zoning amendment. *Id.* The landowners entered into a contract with the city enabling them to operate a fish processing plant, and later the city sought to terminate the contract. *Id.*

[144] *Id.* at 685.

[145] 655 N.E.2d 553 (Ind. Ct. App. 1995). There, the landowner requested that the town annex certain property the landowner owned and zone it for use as a landfill. *Id.* at 554. The town did annex the property and zoned it as requested. *Id.* Thereafter, the landowner and the town entered into an agreement that provided, among other things, that the landowner would

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declared that "Indiana courts have not yet addressed the issue of whether a contract for zoning is illegal. However, several courts in our sister states have considered the issue and, in general, they hold that contract zoning is illegal."[146] The *Prock* court went on to discuss *Dacy v. Village of Ruidoso*,[147] a case from the New Mexico Supreme Court.[148] *Dacy* defined contract zoning as "an agreement between a municipality and another party in which the municipality's consideration consists of either a promise to zone the property in a requested manner or the actual act of zoning the property in that manner."[149] However, the *Dacy* court refused to subscribe to a per se rule against contract zoning, but recognized that numerous courts had in fact declared contract zoning invalid per se because it is "an illegal bargaining away or abrogation of the police power."[150] The *Dacy* court explained further that a contract in which a municipality promises to zone property in a specified manner is illegal because in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures, including notice and a public hearing prior to passage and a right of citizens to be heard at the hearing.[151] "By making a promise to rezone before a zoning hearing occurs, a municipality denigrates the statutory process because it

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> 1) reserve space in its landfill to dispose of waste materials generated in the town for the next 26 years; 2) abide by various limitations on the operation of the landfill and permit inspections; 3) maintain roads to the front gate of the landfill; 4) cooperate in the development of plans for recreational facilities on the property; 5) pay the Town certain fees per ton of waste received at the landfill; and 6) make three annual payments of $50,000 to the [local chamber of commerce] to be used to promote economic development.

Id. at 554-55. In exchange for these promises, the town agreed "to actively support the use of the landfill and to support [the landowner]'s future attempts to secure permits for expanding the landfill" and also to provide municipal water and sewage services. *Id.* at 555.

146 *Id.* at 559 (citing Ford Leasing Dev. Corp. v. Bd. of County Comm'rs, 528 P.2d 237, 240 (Colo. 1974) (recognizing that the general rule in most states is that contract zoning is illegal as an *ultra vires* bargaining away of the police power); Hedrich v. Village of Niles, 250 N.E.2d 791, 795 (Ill. App. Ct. 1969) (holding that zoning ordinances should not be subject to bargaining or contract)).

147 845 P.2d at 796.

148 *Prock*, 655 N.E.2d at 559.

149 *Dacy*, 845 P.2d at 796.

150 *Id.* at 797; *see also* Hartman v. Buckson, 467 A.2d 694, 699-700 (Del. Ch. 1983); Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956).

151 *Dacy*, 845 P.2d at 797.

purports to commit itself to certain action before listening to the public's comments on that action."[152] However, in *Dacy,* the court pointed out that the analysis implies that one form of contract zoning is *legal*: a unilateral contract in which a party makes a promise in return for a municipality's *act* of rezoning.[153]

> In this situation, the municipality makes no promise and there is no enforceable contract until the municipality acts to rezone the property. Because the municipality does not commit itself to any specified action before the zoning hearing, it does not circumvent statutory procedures or compromise the rights of affected persons.[154]

The court pointed out that "[s]ome courts have nonetheless condemned this form of contract zoning on the ground that the contracting party's promise provides improper motivation for the municipality's rezoning action."[155] The court did not find this reasoning persuasive because "private interests are inherently involved in any zoning matter."[156] Moreover, if the zoning authority's action is improper, judicial review may correct potential misconduct occurring through unilateral contract zoning.[157] The *Dacy* court implied that the agreement that results after the zoning hearing would be enforceable against the city—that it is the accord before consideration of relevant factors that makes the agreement illegal.[158]

In *Prock*, the court failed to find contract zoning because the town did not promise to rezone the land in a certain way.[159] Instead, the agreement provided as follows:

> In consideration of the payment of the [fee], the Town agrees to actively support [the developer's proposed] operation [of a landfill] within the annexed area and [the developer's] attempts to secure all permits and approvals for [expanding] the area. Such support may include without limitation the submission of whatever reasonable documentation is required to establish the Town's need for the expansion of the [operation] upon receiving a request

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152 *Id.*

153 *Id.*

154 *Id.* at 797-98 (citations omitted).

155 *Id.* at 798.

156 *Id.*

157 *Id.*

158 *See id.*

159 Prock v. Town of Danville, 655 N.E.2d 553, 560 (Ill. App. Ct. 1995).

to do so from [the developer].[160]

The court pointed out that by the agreement, "the town was not contractually bound to zone the property in a particular way or to promise that, in the future, it would rezone the property to expand the landfill."[161] Further, the town did not promise to support the developer's efforts regardless of whether those efforts were in compliance with the town's statutory zoning procedures.[162] The court also noted that the agreement was signed after the property had been rezoned.[163] As such, no contract zoning could be found.[164] Because there was no contract, the court declined to express an opinion as to whether contract zoning was in fact illegal, thus resulting in invalidating the zoning ordinance.[165] It seems that in evaluating this bargained for agreement, the court drew a fine line between the agreement to support the developer's application in exchange for the payment of a fee and a contract with mutual promises and the city agreeing to rezone in exchange for a fee.[166] Clearly, the inducement for the rezoning was the anticipated agreement, which provided that it would be effective following recording of the ordinance.[167]

In a more recent Indiana opinion, the court again declined to take a position on the legality of contract zoning.[168] In *Ogden v. Premier Properties, U.S.A, Inc.*, the city council voted to adopt an ordinance that rezoned from residential to commercial certain property in order to construct a retail shopping facility.[169] The developer filed a petition to rezone four years earlier.[170] The Area Plan Commission recommended denial of the request to the city council, and the city council denied the zoning petition.[171] The developer filed another petition that was also denied, then another petition seeking to rezone the property.[172] The Area Plan Commission again recommended denial.[173] "Each rezoning petition

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160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* at 561.

165 *Id.*

166 *See id.* at 560-61.

167 *Id.*

168 Ogden v. Premier Props., USA, Inc., 755 N.E.2d 661 (Ind. Ct. App. 2001).

169 *Id.* at 664.

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.*

included a Use and Development Commitment,[174] which placed restrictions and requirements on the proposed development."[175] The city council considered the petition at a hearing at which the developer "introduced a document titled 'Covenant' that contained written commitments 'in addition to the covenants set forth in the Use and Development Commitment.'"[176] "The commitments were conditioned on the City Council approving the developer's zoning request and were binding on the developer for twenty years."[177] "The City Council voted in favor of the petition adopting the rezoning Ordinance which incorporated the [Use and Development Commitment]."[178]

The court rejected the contract zoning claim asserted by the neighbors.[179] The neighbors claimed that the city council and the developer entered into a contract for zoning because of the alleged agreements made by members of city council verbally and in a written covenant.[180] The court first pointed out that the fact that the developer met with city council members did not impeach the validity of the rezoning since the council acted "officially only though minutes and records at a duly organized meeting."[181] As such, alleged verbal promises outside a

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174 Under the zoning ordinance, a petition for rezoning was required to be referred to the Area Plan Commission (APC), which made recommendations to the city council for final action. *Id.* at 666. The APC could "permit or require a landowner to make a written commitment on the use or development (UDC) of the property that was subject to the rezoning." *Id.* If the rezoning is approved, "the UDC is attached to, incorporated by, and recorded with the ordinance, and the APC retain[s] the power to modify, enforce and terminate the UDC." *Id.* at 667. The court ruled that UDCs are properly considered in connection with a rezoning petition, and it was not a violation of the ordinance for the city council to consider commitments other than UDCs. *Id.* at 666. The court also rejected the claim that the ordinance was void because the city council considered the UDC before it had been reviewed by the APC in its final form as contemplated by the ordinance. *Id.* at 668. Instead, the city council had the power to reject the UDC as proposed or require amendment of the petition for rezoning and obtain another APC review before returning to the city council. *Id.*

175 *Id.* at 664.

176 *Id.* "The covenant was intended to accommodate the concerns of the adjoining landowners and the city council." *Id.* For instance, the developer promised to construct berms on two sides of the proposed facility, restrict hours of garbage disposal, maintain landscaping, construct improvements to the roads abutting the facility, including adding traffic lanes and turn lanes, and install a traffic light. *Id.*

177 *Id.* at 664-65.

178 *Id.* at 665.

179 *Id.* at 668.

180 *Id.*

181 *Id.* at 669.

meeting did not contractually bind the city council, but simply reflected the nature of the legislative process.[182] The court went on to show how the facts there were weaker than in *Prock*, where the town was a party to the agreement with the developer and agreed to support the developer in obtaining permits and approvals for the project.[183] Yet, the court in *Prock* failed to find contract zoning.[184] Here, the city council was not a party to the covenant, which did not bind the city council to zone the property in any particular way.[185] As in *Prock*, the rezoning was approved before the covenant became effective—that is, the agreement was signed after the ordinance was passed, hence the town council could not have contracted away its power to zone because the zoning was already completed before the agreement was executed.[186] Here, a provision in the covenant stated it would become effective five days after the passing of the ordinance.[187] The holding in this case can be criticized as evasive and superficial, that the order in which the act of rezoning and formal signing of an agreement to rezone occurs does not make a critical difference if the inducement and sole reason for the rezoning is the promise by the developer, and the rezoning contemplates the entering into the agreement. At the same time, it is hard to see what was wrong with the proposed covenants or why a decision to rezone should not be made on the basis of proposed uses. It should have been sufficient that a promise to rezone was made on the basis of the consideration of the public interest, that allowing the new use reflected the changing needs of the community, and that the landowner's proposed uses would be in harmony with prevailing conditions.

The Massachusetts courts have also rejected a per se treatment of all agreements between a municipality and a developer as illegal contract zoning.[188] Instead, what seems to matter is whether the rezoning serves the public interest and that the consideration offered by the developer was not extraneous to the property at issue.[189] In *McLean Hospital Corp. v. Town of Belmont*,[190] prior to rezoning, a hospital was situated on a single residence D zoning district as a non-conforming use.[191] Residential zoning districts bordered the locus on the northeast and northwest, and local

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182 *Id.*

183 *Id.* (citing Prock v. City of Danville, 655 N.E.2d 553, 560 (Ill. App. Ct. 1995)).

184 *Id.* (citing *Prock*, 655 N.E.2d at 560).

185 *Id.* at 670.

186 *Id.* at 669.

187 *Id.*

188 *See, e.g.*, Sylvania Elec. Prods., Inc. v. City of Newton, 183 N.E.2d 118 (Mass. 1962).

189 *Id.* at 122.

190 778 N.E.2d 1016 (Mass. App. Ct. 2002).

191 *Id.* at 1018.

business districts bordered the locus on the southeast.[192] The hospital presented a proposal that led to the parties entering into a memorandum of understanding of the proposal, which contemplated rezoning the entire site, together with commitments to benefit the town generally, but not exclusively.[193] These commitments included the following: (1) legal protection of significant historical features; (2) acquisition by the town of an interest in the site, including title to a major portion for open space and a cemetery; and (3) a tax exemption for that portion dedicated for hospital operations, traffic management, and commitments for recreational benefits.[194]

"Pursuant to the memorandum of understanding, the town embarked on a process leading to a comprehensive rezoning of the [area],"[195] the proposed rezoning being substantially similar to the memorandum of understanding.[196] The town planning board recommended that the amendment be approved.[197] After extended discussion, the amendment failed.[198] But on reconsideration of a revised proposal that reflected concerns expressed earlier, the proposal passed.[199] The hospital and the town then executed a memorandum of agreement incorporating the parties' various commitments to each other.[200] In considering a challenge to the rezoning, the court noted that the challengers "employ[ed] the label 'contract zoning' as an epithet that suggest[ed] that zoning action taken in connection with any agreement with an affected landowner is unlawful."[201] This was wrong as a general proposition.[202] The court explained that "[t]he existence of an agreement per se does not invalidate related zoning actions; it is the nature of the agreement and the character of the zoning action that determine the outcome."[203]

Attacks on zoning enactments as unlawful contract zoning had been

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192 *Id.*

193 *Id.*

194 *Id.* at n.5. The commitments included reducing the maximum square footage of the research and development subdistrict, the payment of $800,000 by the hospital to the town for traffic mitigation, payment by the town to the hospital of $1.5 million, and further amendments. *Id.* at 1019.

195 *Id.* at 1019.

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.* at 1020.

200 *Id.*

201 *Id.*

202 *See id.* at 1021.

203 *Id.* at 1020.

considered previously by the appellate courts in Massachusetts.[204] Each case involved an agreement between the municipality and the developer, but in each case the zoning action was upheld.[205] In the first such case, *Sylvania Electric Products, Inc. v. City of Newton*,[206] the agreement provided that if the city rezoned a potential parcel from a single residence district to a limited manufacturing district,[207] the landowner would restrict its uses of the parcel in certain ways and convey to the city an option to purchase a portion of the property.[208] The *McLean* court quoted the *Sylvania* court and stated that "[i]t was clear that the respective undertakings were contingent on each other or, as the court expressed it, 'the option proposal was a significant inducement of the zoning amendment and the amendment induced the giving of the option.'"[209] The *McLean* court went on to state that "[t]he mutual dependence of the parties' commitments did not by itself render the zoning aspect invalid."[210] Notwithstanding that local "officials let it be known that favorable rezoning depended in great likelihood on the adoption of the option restrictions," this was still true.[211] It also did not "infringe zoning principles that, in connection with a zoning amendment, land use was regulated otherwise than by the amendment" to the zoning ordinance.[212]

The court explained that the "'[z]oning regulations exist[ed] unaffected by, and [did] not affect, deed restrictions.' In other words, the zoning action, if otherwise valid, [stood] by itself and its legitimacy [was] not lessened because it was accompanied, and even encouraged, by ancillary agreements not involving consideration extraneous to the property being rezoned."[213]

> In *Sylvania*, the zoning decision that the locus, as restricted by the owner, should be a limited manufacturing district "was an appropriate and untainted exercise of the zoning power. What was done involved no action contrary to the best interest of the city and hence offensive

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204 *Id.*

205 *Id.*

206 183 N.E.2d 118 (Mass. 1962).

207 *Id.* at 119.

208 *Id.* at 120.

209 *McLean Hosp. Corp.*, 778 N.E.2d at 1020-21 (quoting *Sylvania Elec. Prods., Inc.*, 183 N.E.2d at 122).

210 *Id.* at 1021.

211 *Id.*

212 *Id.* (quoting *Sylvania Elec. Prods., Inc.*, 183 N.E.2d at 122).

213 *Id.* (quoting *Sylvania Elec. Prods., Inc.*, 183 N.E.2d at 122).

to general public policy."[214]

The other Massachusetts appellate case, *Rando v. North Attleborough*,[215] held the same.[216] In *Rando*, a developer sought to have land in a residential district rezoned to a commercial district.[217] To induce the rezoning, the developer made various promises relating to the subject property and the area, "including a 'no build' buffer zone, traffic improvements, mitigation payments, and a commitment not to seek tax abatements with respect to the rezoned land for five years."[218] "The plaintiffs argued that the town had bargained away its police powers in return for the promised benefits."[219] Comparing the objection to that in the *Sylvania* case, the *Rando* court upheld the trial court's finding that the town meetings had not been improperly influenced to act against the town's best interests and instead on behalf of the developer.[220]

> In addition, the [*Rando*] court agreed that the benefits promised by the developer did not constitute "extraneous consideration," stating, "We do not think a payment that is promised by the developer rather than required by the municipality and that is reasonably intended to meet public needs arising out of the proposed development can be viewed as an 'extraneous influence' upon a zoning decision."[221]

Under this definition, the zoning authority was found not to have entered into a bilateral contract with a landowner because of the following: (1) the landowner's application for rezoning detailed various conditions to be placed on the proposed rezoned property, including undisturbed buffers (these promises were unilateral, and no promises were made by the zoning authority); and (2) the zoning authority imposed a 100 foot buffer on a parcel and made no promise associated with this provision and the landowner made no promise in return.[222] Viewing the "whole record," no evidence supported that a transaction occurred in which either side

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214 *Id.* (quoting 183 N.E.2d at 122).

215 692 N.E.2d 544 (Mass. App. Ct. 1998).

216 *McLean*, 778 N.E.2d at 1021.

217 *Id.* (citing Rando v. Town of N. Attleborough, 692 N.E.2d 544, 546 (Mass. App. Ct. 1998)).

218 *Id.* (citing *Rando*, 692 N.E.2d at 546).

219 *Id.* (citing *Rando*, 692 N.E.2d at 546).

220 *Id.* (quoting *Rando*, 692 N.E.2d at 549-50).

221 *Id.* (citing *Rando*, 692 N.E.2d at 548).

222 *See id.*

undertook to obligate itself in any way.[223] No meeting of the minds took place, and no reciprocal assurances were made.[224] The court continued,

> Thus, challenges to zoning enactments on the basis that they are products of contract zoning provoke two questions: (1) was the action "contrary to the best interest of the city and hence offensive to general public policy;" and (2) did it involve extraneous consideration "which could impeach the enacting vote as a decision solely in respect of rezoning the locus?"[225]

Rando seems much more narrow and strict in its treatment of agreements between municipalities and landowners than *Sylania*. In *Sylvania*, the court upheld an arrangement involving mutual commitments, which the court found were contingent upon each other, and the rezoning was in the public interest.[226] In contrast, the *Rando* court took pains to show only unilateral promises by the landowner, seemingly suggesting that zoning involving a bilateral agreement would be invalid in Massachusetts.[227] However, the two questions identified as pertinent in contract zoning challenges said nothing about bilateral promises. Rather, they focused solely on the benefit to the municipality and the connection between the promises forming the basis for the zoning and the property. Additionally, it is difficult to view the landowner's promises as being unrelated to the anticipated rezoning. The *McLean* court relied on both *Sylvania* and *Rando* to uphold what could hardly be regarded as anything but a bilateral agreement.[228] This reliance on both cases, therefore, makes the resolution of the issue unclear.[229] *McLean* simply found the

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223 *Id.* at 1023.

224 *See id.*

225 *Id.* at 1021.

226 Sylvania Elec. Prods., Inc. v. City of Newton, 183 N.E.2d 118, 123 (Mass. 1962).

227 *See* Rando v. Town of N. Attleborough, 692 N.E.2d 544, 548 (Mass. App. Ct. 1998).

228 *See McLean Hosp. Corp.*, 778 N.E.2d at 1021.

229 The *McLean* court went on to state that

> [i]n determining whether the rezoning challenged here satisfied the criteria of *Sylvania* and *Rando*, we apply the standard that a party attacking a zoning amendment has a heavy burden, one requiring that he "prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare."

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challengers failed to demonstrate that the interests of the town were not served by the rezoning.[230] "Indeed, while McLean's interests [were] obviously enhanced, a factor that [did] not discredit the zoning action, . . . the benefits that flowed to the town from the agreement [were] obvious."[231] The town was confronted with a situation in which the landowner had the right to "develop the unused portion of its property into single family residences and had an immediate economic incentive to do so."[232] Under the agreement, the landowner surrendered this right, a concession of clear benefit to the town, on the conditions that the land be rezoned, that the town pay McLean $1.5 million, and that the town help McLean receive tax relief that similar institutions enjoy.[233] In return,

> the town received not only the elimination of the potential for an undesired residential development of the locus, an accomplishment that by itself would appear to satisfy the requirement that the zoning be for a public purpose, but also open space; a cemetery; protection for significant historical features; commitments with respect to affordable housing and recreational benefits; and a traffic management agreement.[234]

The landowner's commitments were substantially related to the general welfare, and the town meeting therefore could lawfully act to rezone based upon them.[235] No evidence indicated that the developer improperly influenced the town meeting to decide in favor of the developer rather than in the town's best interests.[236] Moreover, "[t]he consideration flowing to the town under the agreement [was] not 'extraneous' in the sense used in *Sylvania* and *Rando* (as, for example, a request to give land

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Id. at 1022 (quoting Johnson v. Edgarton, 680 N.E.2d 37, 40 (Mass. App. Ct. 1997)). The challenger "must demonstrate that the validity of the enactment 'is not even fairly debatable.'" *Id.* (quoting Crall v. Leominster, 284 N.E.2d 610, 615 (Mass. 1972)). "If the validity of the zoning action is fairly debatable, local judgment on the subject should be sustained." *Id.* (quoting National Amusements, Inc. v. Boston, 560 N.E.2d 138, 140 (Mass. App. Ct. 1990)).

230 *Id.* at 1022.

231 *Id.* (citations omitted).

232 *Id.* at 1022.

233 *Id.*

234 *Id.*

235 *Id.* (citing Sylvania Elec. Prods, Inc. v. City of Newton, 183 N.E.2d 118, 122 (Mass. 1962)).

236 *Id.* (citing Rando v. Town of N. Attleborough, 692 N.E.2d 544, 549 (Mass. App. Ct. 1997)).

for a park elsewhere in the city) which could impeach the enacting vote as a decision solely in respect of rezoning the locus."[237] Instead, "each element of such consideration was reasonably related to the [property] being rezoned."[238] The court explained:

> We believe it too narrow to require that, in order not to be labeled excessive, consideration must directly "mitigate" some deleterious effect of the development authorized by the rezoning (although such consideration would obviously be permissible). Rather, it is adequate that the consideration bear some identifiable relationship to the locus so that there can be assurance that the town's legislative body did not act for reasons irrelevant to the zoning of the site at issue. This requirement was satisfied here.[239]

Therefore, it seemed that the crucial point made by the court in determining the validity of the rezoning made in connection with an agreement was that the town benefited from the developer's promises and that those promises related to the parcel at issue.

At the end of the opinion, the court did state that the "rezoning [was not] a product of a bilateral contract that bound the town to rezone solely in consideration of the promises of the landowner,"[240] and at the same time it recognized that the rezoning was conditioned on the developer's promises.[241] It pointed out that the rezoning was not a term of a contract, but was a "condition that had to be fulfilled before a separate agreement became enforceable."[242] The court attempted to distinguish this from a bilateral contract between the developer and the municipality by stating that in the case before it, "the municipality [made] no promise and there [was] no enforceable contract until the municipality act[ed] to rezone the property."[243] This attempted distinction seems disingenuous and belied by the terms of the agreement. Arguably, an agreement between the parties existed, as the developer's promises clearly induced the rezoning, and these promises would only be fulfilled upon rezoning. The court might

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237 *Id.* (quotations omitted) (citing *Sylvania*, 183 N.E.2d at 122).

238 *Id.*

239 *Id.*

240 *Id.* at 1023.

241 *Id.*

242 *Id.*

243 *Id.* The court also ruled that "[t]he rezoning having been adopted for a valid public purpose in relation to an area that is discrete in its geography, contours, and size, it is not spot zoning." *Id.*

well have upheld the rezoning based upon its concluding remarks that it saw

> nothing in the Zoning Act, . . . or in other applicable legal principles that prohibite[d] a municipality from negotiating with a private landholder to bring about the receipt of benefits for desirable public purposes once otherwise valid zoning has taken place, assuming that those benefits have some reasonable relationship to the site covered by the zoning.[244]

Indeed, as the court recognized, "such arrangements are consistent with good government in general and with effective land use planning in particular."[245] They do not involve a surrender of police powers.[246] The court's suggestion that a bilateral contract binding the town to rezone solely in consideration of the promises of the landowner and that benefit the city would be illegal, but that the city can negotiate and extract promises from a landowner and based upon these promises decide to rezone so long as the rezoning benefits the city,[247] makes too fine a distinction. Yet, it seems to reflect the approach taken by courts inclined to uphold rezoning where the developer has made significant concessions of benefit to the parcel at issue and surroundings.[248] In this vein, courts

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244 *Id.*

245 *Id.*

246 *Id.*

247 In *Paul v. City of Manhattan*, 511 P.2d 244 (Kan. 1973), restrictive covenants placed on the property in connection with rezoning did not amount to contract zoning because they "were not *prerequisites* to the zoning, nor . . . a controlling factor in the court's decision. They were merely considered as they might bear on population density—a key issue raised by plaintiffs." *Id.* at 251. Further, "rezoning would conform to the master land use plan even if the covenants were ignored." *Id.* In *Arkenberg v. City of Topeka*, 421 P.2d 213 (Kan. 1966), in connection with an application by the developer for a rezoning, the developer "expressed its willingness to convey to the city an easement for parking purposes consisting of a ten foot strip of land." *Id.* at 216. Rezoning was approved. *Id.* The plaintiffs alleged contract zoning. *Id.* The court held contrary to the case cited by plaintiffs, *Hudson Oil Co. v. City of Wichita*, 396 P.2d 271 (Kan. 1964), stating that "[o]bviously the effect of any agreement respecting the right-of-way would be to alleviate the traffic condition. If it were in fact made by the governing body as a prerequisite to rezoning, which does not affirmatively appear, that would be a reasonable requirement." *Arkenberg*, 421 P.2d at 218.

248 *See* Carlino v. Whitpain Investors, 415 A.2d 461, 464 n.2 (Pa. Commw. Ct. 1980). In *Carlino*, the court stated that "where the 'contract' would consist of special limitations affecting the zoning amendment in respects which the landowner accept[ed] in

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have held that the fact that the city stands to benefit from the rezoning, by itself, does not make an agreement contract zoning.[249]

What seems a departure from the qualified conclusion in *McLean* is *Durand v. IDC Bellingham, LLC*,[250] where the court focused its analysis of the contract zoning challenge on the relationship the rezoning bore to the consideration received,[251] finding what can only be regarded as a most tenuous relationship between the consideration received and the use of the parcel at issue sufficient to avoid the contracting away of governmental powers challenge.[252] There, the Massachusetts high court upheld a rezoning where the developer offered to make an $8 million gift for the construction of a new high school if its rezoning application was permitted, allowing it to build and operate a power plant on the site.[253] The town held

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order to have the amendment enacted," such "contract zoning" is a valid exercise of the police power. *Id.*

[249] *See* City of Springfield *ex rel.* Burton v. City of Springfield, No. 00 CA 14, 2000 Ohio App. LEXIS 2721, at *8 (Ohio Ct. App. June 23, 2000). In this case,

> the city agreed to bear the cost of construction with the understanding that, if the zoning was changed to allow for residential or commercial development of the abutting property, the developer would contribute to the cost of the road in proportion to the manner and extent to which the property was developed. Neither the [original] [a]greement nor [s]ide [agreement], which supplemented it, required the city to zone the property in any particular way. As the trial court pointed out, the fact that a city st[ood] to benefit from a zoning decision d[id] not disqualify the city from enacting zoning regulations and [could not] be considered as illegally controlling the course of legislative decision making.

Id. at *7.

[250] 793 N.E.2d 359 (Mass. 2003).

[251] *See id.* at 365-66.

[252] *See id.* at 368.

[253] *Id.* at 361-62. After the town began to examine ways to increase it property tax base, it appointed an economic development task force to study the issue. *Id.* at 361. The task force prepared a report, identifying a parcel of land that abutted land already zoned for industrial use as a candidate for rezoning from agriculture and suburban to industrial use. *Id.*

> Subsequently, at the . . . town meeting, a zoning article proposing the rezoning fell eight votes short of the required two-thirds majority. Thereafter, IDC, which owned a power plant in the town, began discussions with town officials about the possibility of rezoning the [site] so that a second plant might ultimately be built on it. These discussions included the subject of what public benefits and financial

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an open town meeting at which the proposed rezoning was introduced.[254] IDC made a presentation at the meeting and reiterated its offer of an $8 million gift.[255] "The planning board and finance committee both recommended passage of the zoning article. There was some discussion of the zoning aspects of the proposal, as well as discussion regarding the offered gift."[256] The ordinance passed by more than the two-thirds vote required.[257] Thereafter, IDC submitted applications for five special permits, which were granted.[258] Landowners located near the site filed suit against IDC, the town, the town zoning, board of appeals, and the property owners, arguing *inter alia* that the rezoning constituted illegal "contract zoning" or "spot zoning."[259] The trial court viewed the $8 million gift as "extraneous consideration" since no attempt was made to show that the developer offered it to mitigate the impact of the project.[260] As such, it was "offensive to public policy."[261] The trial court ruled that the offer made was sufficient to nullify the rezoning vote, even "without the necessity of finding that voting town meeting members were influenced by it."[262] The Supreme Judicial Court of Massachusetts reversed.[263] The court stated that

> [t]he enactment of a zoning bylaw by the voters at a town meeting is not only the exercise of an independent police

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> inducements IDC might offer the town with regard to the proposed [power] plant. The town administrator told IDC that the town was facing an $8 million shortfall in its plans to construct a much needed new high school. Shortly thereafter, the president of IDC publicly announced that IDC would make an $8 million gift to the town if IDC (1) decided to build the plant; (2) obtained the financing and permits necessary to build the plant; and (3) operated the plant successfully for one year. The offer was made to generate support for the plant and became [public] knowledge in the town.

Id. at 361-62.

254 *Id.* at 361-62.

255 *Id.*

256 *Id.* at 362.

257 *Id.*

258 *Id.*

259 *Id.* at 362-63.

260 *Id.* at 363.

261 *Id.*

262 *Id.*

263 *Id.* at 363-64. The court began with a discussion of the source of the municipality power to enact local ordinances—the Home Rule Amendment to the Constitution. *Id.* at 364. The zoning power enabled municipalities to enact zoning ordinances or bylaws as an exercise of their "independent police powers." *Id.*

> power; it is also a legislative act, carrying a strong presumption of validity. It will not normally be undone unless the plaintiff can demonstrate "by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety . . . or general welfare."[264]

This "analysis is not affected by consideration of the various possible motives that may have inspired the legislative action."[265] The court explained that "contract zoning" involves "a promise by [the] municipality to rezone a property either before the vote to rezone has been taken or before the required [statutory] process has been undertaken."[266] The court ruled that the trial court found no such advance agreement occurred here, since despite IDC's offer of $8 million, the voters of the town meeting were not bound to approve the zoning change.[267] Because the town followed the statutory procedures, the rezoning was not illegal under state law on that basis.[268]

The court noted that the trial judge found that absent the $8 million offer, the rezoning was substantively valid, meaning not arbitrary nor unreasonable, and was "substantially related to the public health, safety, or general welfare of the town."[269] In other words, the adoption of the rezoning even without the offer of $8 million served a public purpose.[270] Here, the site "abutted land zoned for industrial use; a town-appointed task force . . . had recommended its rezoning after studying the town's tax base and the need for economic development; and a previous rezoning attempt . . . barely failed to get the necessary two-thirds [vote required]."[271]

Therefore, the enactment of the rezoning was not violative of state law or constitutional provisions, as the $8 million was not "extraneous consideration."[272] Instead, the court concluded that a voluntary offer of public benefits is not, standing alone, an adequate ground on which to set aside an otherwise valid legislative act.[273] In general, the court found "no

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264 *Id.* (quoting Johnson v. Edgartown, 680 N.E.2d 37, 40 (Mass. 1997)) (citations omitted).

265 *Id.*

266 *Id.* at 365.

267 *Id.* at 366.

268 *Id.*

269 *Id.* at 368.

270 *Id.*

271 *Id.* (footnote omitted).

272 *Id.*

273 *Id.* The Supreme Judicial Court ruled that the trial court's reliance on *Sylvania* to this effect was misplaced. *Id.* at 368. "Th[at] opinion cit[ed] no supporting authority for

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reason to invalidate a legislative act on the basis of an 'extraneous consideration,' because [courts] defer to legislative findings and choices without regard to motive."[274] The court saw "no reason to make an exception for legislative acts that are in the nature of zoning enactments."[275] It found "no persuasive authority for the proposition that an otherwise valid zoning enactment is invalid if it is any way prompted or encouraged by a public benefit voluntarily offered."[276] The offer of a

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the proposition that the presence of an 'extraneous consideration' at the time of the vote on a zoning amendment would invalidate the vote, but the language has since been given added life in two cases decided by the Appeals Court." *Id.* at 368-69 (citing McLean Hosp. Corp. v. Belmont, 778 N.E.2d 1016 (Mass. 2002) (holding that a promise of the landowner to surrender its right to develop an unused part of the property and provide open space, a cemetery, protection for significant historical features, commitments with respect to affordable housing and recreational benefits, and a traffic management agreement were not extraneous consideration, but were reasonably related to the locus being rezoned); Rando v. Town of N. Attleborough, 692 N.E.2d 544, 548 (Mass. App. Ct. 1998) (holding that where payment that was "promised by the developer rather than required by the municipality and that [wa]s reasonably intended to meet public needs arising out of the proposed development [could not] be viewed as an 'extraneous influence' upon a zoning decision")). The *Durand* court also noted a change in attitude among the courts on the concept of contract zoning, with recent courts confining its meaning to a situation involving reciprocal promises between a municipality and a landowner. *Id.* at 367. In their definition, the courts do not include rezoning made on conditions designed to limit use of land or other forms of mitigation for the adverse impacts of its development, as this is a commonly accepted tool of modern land use planning. *Id.* In any event, the court cautioned, "A court examining a zoning arrangement should not affix a formalistic label to it, but rather should engage in the substantive inquiry [to ascertain] whether the zoning action [wa]s consistent with . . . law and constitutional requirements, and otherwise satisfies the criteria for a valid exercise of police power." *Id.* at 367 n.17.

274 *Id.* at 369.

275 *Id.*

276 *Id.* The dissent found that "the town meeting improperly agreed to exercise its power to rezone land in exchange for a promise to pay money. The exercise of that power to approve the requested zoning change was a condition precedent to the promise of IDC . . . to pay money under its agreement with the town." *Id.* at 370 (Spina, J., concurring in part, dissenting in part). Additionally, the dissent found that this was not "a decision solely in respect of rezoning the locus. [Instead, t]he parties struck a bargain: the payment of money in return for a zoning change." *Id.* at 370-71 (citations omitted). This was a sale of the police power because nothing in the record "legitimize[d] the $8 million offer as 'intended to mitigate the impact of the development upon the town,' or as 'reasonably intended to meet public needs arising out of the proposed development.'" *Id.* at 371 (quoting *Rando*, 692 N.E.2d at 548). The consideration was extraneous and unrelated to any aspect of the development. *Id.* at 371.

benefit in exchange for the exercise of the municipality's zoning power seems to fall at the heart of the contract zoning prohibition, if the prohibition exists for that sake alone. But if the prohibition exists in order to require the zoning authority to show that a rezoning is otherwise in the public interest, then the fact that a municipality achieves a benefit while otherwise faithfully carrying out its responsibilities should not be of great concern, particularly if the municipality could have rezoned without the benefit offered.[277] However, if the presumption of the validity of the enactment of the legislation is applied as the court did here,[278] then the concern that the public interest considerations may be given short shrift with the lure of $8 million will not be tested by judicial review.

B. *Lack of Transparency Where Zoning Bypasses the Statutory Procedures*

Contract zoning has been held to be objectionable because such an agreement by the zoning authority bypasses the notice and public hearing procedures required for enacting a zoning ordinance.[279] This lack of transparency occurs even if the municipality informs the public at the time of the rezoning that the land at issue will be governed by separate rules. Others who come later to examine the ordinance to try to understand the general plan for the community will not fully understand how the plan is designed since the plan itself will not reflect all of the considerations that went into the rezoning decision. Similarly, if the zoning authority board has already contracted to support the landowners' request for rezoning before public hearing, "hearings regarding the issue of rezoning would then be a 'pro forma exercise since the [board would have] already obligated itself to a decision.'"[280] If the agreement is expressly

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[277] *But see* Treme v. St. Louis County, 609 S.W.2d 706 (Mo. Ct. App. 1980). There, the court declared invalid as an instance of contract zoning an ordinance where the consideration was extraneous to the land at issue. "The 'contract zoning' charge aros[e] from the requirement of [the ordinance] that the developer improve [the road] next to the property and widen a one-lane bridge on [the road] near, but not adjacent to, the property." *Id.* at 716. The court explained that "[w]here the offer made or the exaction demanded for the rezoning bears no reasonable relationship to the activities of the developer the action of the county or municipality in rezoning the property in exchange for such offer or exaction," amounts to a "contracting away of the police power, which is forbidden." *Id.* at 717.

[278] *See Durand*, 793 N.E.2d at 364.

[279] *See* Morgran Co. v. Orange County, 818 So. 2d 640, 643 (Fla. Dist. Ct. App. 2002).

[280] *Id.* at 643 (quoting Chung v. Sarasota County, 686 So. 2d 1358, 1360 (Fla. Dist. Ct. App. 1996)). The city had not expressly or irrevocably committed itself to rezone the area. *See id.* at 641-42. Nonetheless, the court concluded that since the decision to rezone

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conditioned upon approval by the public at a hearing, then there seems to be no good reason for not allowing the municipality to work out the terms of the rezoning and future uses in advance, as is contemplated under a development agreement. Of course, the zoning authority begins the hearing process with a contractual obligation to obtain public approval, but it is free to be persuaded otherwise at the hearing.

The question of bypassing the notice and public hearing procedures has also arisen in the context of settlement of litigation brought by a developer challenging the municipality's denial of an application for a proposed land use.[281] The Florida courts have found such agreements the equivalent of invalid contract zoning where, under the settlement

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was contingent on the filing of restrictive covenants by the developer, a bargaining away of police power had occurred. *Id.* at 643.

[281] *See* Warner Co. v. Sutton, 644 A.2d 656 (N.J. Super. Ct. App. Div. 1994). There, the landowner owned approximately 3,000 acres of land adjoining the Manumuskin Watershed in Maurice River Township, which for many years was used for mining of sand as a legal nonconforming use. *Id.* at 658. The city then rezoned the land to a classification in which mining was not permitted. *Id.* The landowner's application for a renewal of its license to continue its mining activity was granted in part and tabled in part. *Id.* The landowner sued seeking to invalidate the ordinance, alleging spot zoning and a taking of property. *Id.* The parties reached a tentative settlement of the suit. *Id.* "Under the proposed agreement, the Township recognized [Landowner's] mining nonconforming use status, and that it applied essentially to [Landowner's] entire tract." *Id.* Landowner abandoned its challenge to the rezoning and its damage claim, "and in turn was given a conditional right to construct a planned residential village on the tract." *Id.* The court found that the consent order caused the municipality to surrender its legislative function and took away the public's right to be heard. *Id.* at 660. The consent order, therefore, amounted to contract zoning, and it frustrated the public's right to be heard on rezoning. *Id.* "In other words, the municipality's exercise of its police power to serve the common good and general welfare of all its citizens 'may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.'" *Id.* at 659 (quoting V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952)). *But see* Murphy v. City of W. Memphis, 101 S.W.3d 221 (Ark. 2003) (failing to address the contract zoning issue where the settlement agreement involving rezoning was not finalized until a council meeting was held, and all procedures for passage of an ordinance, including notice to the public and opportunity to be heard, were followed); Toll Bros., Inc. v. Township of W. Windsor, 756 A.2d 1056, 1065 (N.J. Super. Ct. App. Div. 2000) (holding that consent orders and judgments are not necessarily a form of contract zoning provided certain procedures are followed to ensure that the interests of low and moderate income households are adequately protected); Livingston Builders, Inc. v. Township of Livingston, 707 A.2d 186, 192 (N.J. Super. Ct. App. Div. 1998) (approving a settlement against a charge of illegal contract zoning where the order was expressly conditioned on the city adopting an ordinance through established procedures).

agreement, the municipality binds itself before satisfying the public notice and hearing requirements.[282] This could not be allowed, for the carefully structured provisions for public notice and public hearings, which in many cases required consideration of staff or planning commission recommendations, would be stripped of all meaning and purpose if the decision-making body had previously bound itself to reach a specified result.[283]

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[282] *Chung*, 686 So. 2d at 1360.

[283] *See id.* at 1359. In *Chung*, the landowner filed a petition with the county to rezone eleven acres. *Id.* After the county commissioner denied the rezoning petition, the landowner took legal action. *Id.* Subsequently, the landowner and the county entered into a settlement agreement that obligated the county to rezone the landowner's property, subject to numerous stipulations and conditions. *Id.* "Based on the settlement, the trial court entered a stipulated final judgment and retained jurisdiction over its enforcement." *Id.* An adjacent landowner intervened, and the trial court vacated the stipulated final judgment. *Id.* On appeal, the adjacent landowner argued that the settlement amounted to contract zoning. *Id.* In agreeing with the adjacent landowner, the court explained that "[c]ontract zoning refers to an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government's rezoning or enforceable promise to rezone." *Id.* (citing James D. Lawlor, Annotation, *Validity, Construction, and Effect of Agreement to Rezone, or Amendment to Zoning Ordinance, Creating Special Restrictions or Conditions Not Applicable to Other Property Similarly Zoned*, 70 A.L.R.3d 125, 131 (1976)). The court explained that "[o]ne of the reasons contract zoning is generally rejected is because 'the legislative power to enact and amend zoning regulations requires due process, notice, and hearings.'" *Id.* (quoting Terry Lewis et al., *Spot Zoning, Contract Zoning, & Conditional Zoning*, *in* 2 FLORIDA ENVIRONMENTAL & LAND USE LAW 9-1, 9-13 (James J. Brown ed., 2d ed., 1994)).

> Assuming that the developer and municipality bargain for a rezoning ordinance that is fairly debatable and non-discriminatory, contract zoning is nevertheless illegal when they enter into a bilateral agreement involving reciprocal obligations. By binding itself to enact the requested ordinance (or not to amend the existing ordinance), the municipality bypasses the hearing phase of the legislative process.

Id. at 1359-60 (citing Roy P. Cookston & Burt Bruton, *Zoning Law*, 35 U. MIAMI L. REV. 581, 589 n.34 (1981)); *see also* P.C.B. P'ship v. City of Largo, 549 So. 2d 738, 741 (Fla. Dist. Ct. App. 1989).

In *Chung*, it can be argued that the court did not prohibit settlement agreements per se, but implied that the agreements may be upheld if the local government conforms to the due process, notice and hearing requirements. *Id.* However, the Second and Fourth Districts of Florida have come to mixed decisions when confronted with the issue of contract zoning in the context of settlement agreements. *Compare P.C.B. P'ship*, 549 So. 2d at 741, *with* Molina v. Tradewinds Dev. Corp., 526 So. 2d 695, 696 (Fla. Dist. Ct. App. 1988). In *(continued)*

The Maryland courts have taken a similar position on rezoning arising out of settlement agreements, specifically against agreements whereby the city agrees to rezone upon the landowner's agreement to conditions to be imposed on the land.[284]

C. *Agreements that Destroy the Uniformity that Is Required in Each District*

"The rezoning of a parcel of property by a municipality based in any way upon an offer or agreement by an owner of property" is said to be illegal to the extent that it "is inconsistent with, and disruptive of, a comprehensive plan."[285] One court stated: "If local government could

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P.C.B. Partnership, the Second District ruled that contract zoning resulted from a settlement of litigation, and the settlement agreement was unenforceable because it restricts the city's decision-making responsibility and eliminates the city's ability to exercise its police power. *P.C.B. P'ship*, 549 So. 2d at 741. Conversely, the Fourth District in *Molina* upheld a rezoning settlement agreement and ordered the city to comply with the agreed terms. *Molina*, 526 So. 2d at 696.

[284] *See, e.g.*, Attman/Glazer P.B. Co. v. Mayor of Annapolis, 552 A.2d 1277 (Md. 1989). In *Attman*, a developer sought rezoning of two parcels that had been acquired and assembled by the city for an urban renewal project. *Id.* at 1278. Originally, one parcel was zoned neighborhood commercial and business use and the other for residential use. The developer proposed the construction of a commercial office building. *Id.* The developer's initial request was granted, and the aldermen amended the urban renewal plan to change the designation of the two parcels to commercial use. *Id.* at 1279. "The resolution also permitted the erection of a professional office building, on the condition that the owner of the building provide 252 parking spaces, [which] could be located on-site or on other property within 500 feet of the building." *Id.* By resolution, a conditional use for the proposed building was approved. *Id.* Disagreements later developed regarding the number of parking spaces to the point that the city denied the developer a use permit for the building. *See id.* at 1279-80. The developer sued and the parties reached a settlement agreement, although there was serious disagreement between the parties as to the terms of their settlement. *Id.* at 1280-81. The court of appeals ruled that if, as the developer contended, the agreement was intended to require the city council to grant an amended conditional use on the conditions specified, the agreement was invalid. *Id.* at 1282. The mayor and aldermen could not bind themselves acting in the capacity as zoning authority to future zoning or conditional use decisions. *Id.* at 1282. The court did not reach a decision as to whether the conditions agreed upon were themselves legally permissible, but noted that the prohibitions against contracting away the exercise of zoning power applies whether the conditions are valid or invalid. *Id.* at 1284.

[285] Hale v. Osborn Coal Enters., Inc, 729 So. 2d 853, 855 (Ala. Civ. App. 1997) (holding that there was invalid contract zoning where the landowner entered into an agreement with the city whereby the city would annex the property and rezone additional parcels in return for the landowner's promise to pay $.15 per ton of coal mined in the town

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change its zoning laws by private agreements with individual landowners, a hodgepodge of regulations would develop, the legislative process would be usurped, and the public good would be compromised."[286] Thus, agreements that would result in the destruction of the uniformity required by Euclidean zoning have been struck down as a form of contract zoning.[287] The Florida Supreme Court in *Hartnett v. Austin*[288] took this position. There, because landowner wanted to buy land and build a shopping center, the landowner asked the city to rezone the land for commercial use.[289] The city refused to make the change unless the landowner agreed to certain conditions, including building a wall, maintaining a forty-foot setback, landscaping the setback, protecting neighbors against glare and disturbance, and paying for additional police protection.[290] The action was held invalid, and the court stated that "[i]f each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse."[291]

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limits); *see also* Willis v. Union County, 335 S.E.2d 76, 77 (N.C. Ct. App. 1985). In *Willis*, the court held as follows:

> To avoid contract zoning, all the areas in each class must be subject to the same restrictions. If the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan, this is contract zoning and is illegal; [evidence in this case showed] that at meetings regarding the rezoning petition, defendants' attorney . . . referred to specific plans, including drawings and rental rates for a proposed apartment building to be constructed on the property. There is also evidence that [the attorney] made representations at the various hearings to the effect that there should be no concern about mobile homes on the property after rezoning because the defendants were willing to put restrictions in the deeds prohibiting mobile homes.

Id. at 77. *But see* Riverschase Homeowners Protective Ass'n., Inc. v. City of Hoover, 531 So. 2d 645 (Ala. 1988) (holding there was no contract zoning).

286 Pima Gro Sys., Inc. v. King George County Bd. of Supervisors, 52 Va. Cir. 241, 244 (Va. Cir. Ct. 2000) (finding that the county did not just agree to rezone, an act which of itself is generally illegal as "contract zoning"; rather, the county actually agreed to allow an activity that was prohibited to all others under the zoning ordinance, and this was beyond the county's powers).

287 *Attman/Glazer P.B. Co.*, 552 A.2d at 1282-83.

288 93 So. 2d 86 (Fla. 1956).

289 *Id.* at 87.

290 *Id.* at 89.

291 *Id.*

Early on in Illinois, contracts between a city and a developer regarding zoning were similarly condemned on this basis, among others.[292] In *Cederberg v. City of Rockford*, the city rezoned two lots from residential to local business.[293] In rezoning, the landowner was required to execute a restrictive covenant, which was recorded as a condition to the passage of the zoning committee's report recommending rezoning.[294] The covenant provided that notwithstanding the rezoning and business classification (which by the city's ordinance, permitted forty-four types of local businesses), twenty-six enumerated uses would not be allowed on the lots in question.[295] The parties agreed that the covenant was void because it was a type of contract zoning.[296] Thus, "[t]he precise question left for review [was] what effect, if any, the restrictive covenant bore upon the validity of the ordinance rezoning the property from a residential to a local business district."[297] The court agreed with the trial judge and the parties that the restrictive covenant was an invalid attempt by the city to control the use of the land.[298] Among the reasons emerging from the cases establishing this rule against such zoning practices were the following:

> [T]hat by entering into agreement with the property owner, the zoning authority might use the zoning power to further private interests in violation of public policy; that such rezoning was a deviation from a basic zoning plan resulting in non-uniform application of the zoning law and inconsistencies within a zoning classification; that when the actual zoning requirements in force are determined by reference to evidence extrinsic to the zoning ordinance, that zoning law is rendered vague.[299]

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[292] *See, e.g.*, Cederberg v. City of Rockford, 291 N.E.2d 249, 251 (Ill. Ct. App. 1972). *But see* Goffinet v. County of Christian, 333 N.E.2d 731, 738 (Ill. App. Ct. 1975) (expressing acceptance of conditional zoning).

[293] *Cederberg*, 291 N.E.2d at 250.

[294] *Id.*

[295] *Id.*

[296] *Id.* at 251.

[297] *Id.*

[298] *Id.* (citing Houston Petroleum Co. v. Auto. Prod. C. Ass'n, 87 A.2d 319 (N.J. 1952); Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956)).

[299] *Id.* The zoning ordinance also failed in the absence of evidence that it was necessary or that it was granted only after a consideration of the appropriate use of the land within the total zoning scheme of the community. *Id.* at 252. The court struck down the ordinance, stating that no evidence demonstrated that the city gave any consideration to the statutory standards of public health, safety, comfort, morals, or welfare, and that the effect

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However, imposing differing conditions on property in the same land use category is not wholly arbitrary. Rezoning upon conditions or promises limiting use recognizes that the particular characteristics of particular parcels may differ sufficiently so that different uses make sense. Some parcels that have particular uses may have greater or lesser impact on surrounding properties. Also, use classifications may have occurred at different times when the concerns of the municipality were different.[300] Indeed, uniformity for that sake alone may be arbitrary and inconsistent with good governance.

D. *When the Municipality Is not a Party to the Agreement, Contract Zoning Has not Been Found*

When the zoning authority is not a party to an agreement between the town and the developer, and the zoning authority acts to rezone in accordance with the public hearing requirements, courts have not found contract zoning, even when it appears that the zoning authority was motivated to rezone by the agreement.[301] Thus, under one court's

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of the enactment taken together with the covenant was to create a classification not set forth in the general zoning ordinance. *Id.*

[300] *See* Pressman v. City of Baltimore, 160 A.2d 379, 382-83 (Md. 1960) Giger v. City of Omaha, 442 N.W.2d 182, 190 (Neb. 1989); Nicholson v. Tourtellotte, 293 A.2d 909, 911 (R.I. 1972).

[301] *See, e.g.*, Funger v. Mayor of Somerset, 239 A.2d 748, 757 (Md. 1968). In *Funger*, the developer and the town entered into an agreement whereby the town would recommend rezoning to the county council if the developer dedicated two acres to a scenic and conservation easement, limited the development of sixteen acres for a period of twenty years to the use currently permitted in the rezoned classification and to the density currently permitted for eighteen acres, and gave the town twelve acres of the tract for park land. *Id.* The area was rezoned by the county council following the hearing. *Id.* at 752. The ordinance was held valid and not contract zoning. *Id.* at 757. Moreover, in *State ex rel. Zupancic v. Schimenz*, 174 N.W.2d 533, 537, 540 (Wis. 1970), neighboring landowners and a developer had an agreement made enforceable by the city by injunction. *Id.* at 536. The court held that such an agreement was valid where the agreement did not directly involve the city, though a contract between the city and landowner to zone or rezone would be illegal and the ordinance void. In *City of Greenbelt v. Bresler*, 236 A.2d 1 (Md. 1967), the court held that an agreement between a landowner and a governmental body of an organization not having formal zoning authority does not amount to contract zoning. *Id.* at 4. The city agreed to recommend rezoning in return for a developer's agreement to limit development density of the land as rezoned and promise to donate several acres to the city for use as a park. *Id.* at 2-3. When the developer later reneged, the court held that the agreement was enforceable against owner. *Id.* at 6; *see also* Pressman v. City of Baltimore, 160 A.2d 379, 386 (Md. 1960) (upholding rezoning ordinance where there was no evidence that the city council was actually influenced in passing the ordinance by the existence of the

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conception,

> when a city itself makes an agreement with a landowner to rezone the contract is invalid; this is contract zoning. However, when the agreement is made by [persons other than the municipal arm of government with ultimate zoning authority] to conform the property in a way or manner which makes it acceptable for the requested rezoning and the [municipality] is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid.[302]

If the concern is about the influence of a promise by the developer in connection with a zoning request, that the party entering into the agreement is not the ultimate zoning authority, but plays an important role in the zoning process, should make little difference if the prohibitions against contract zoning are to be consistently applied. Surely, a recommendation by a planning board, even if based upon an agreement with the landowner, will have significant influence on the legislative body ultimately enacting the zoning ordinance. As such, the distinction may not be a valid one.

E. *Special Types of Zoning Resist Challenge as Contract Zoning*

Special types of zoning may require pre-zoning contact, negotiations, and bargains between the developer and the municipality toward the adoption of a development plan, and such contacts and bargains may not be regarded as contract zoning. In *Rutland Environmental Protection Association v. Kane County*,[303] the county rezoned the property from a farming district to a community unit district (CUD), allowing the developer to build an amusement park.[304] The adjoining landowners

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agreement between the landowner and city planning commission, and there was no authority in the state enabling act authorizing the planning commission to condition approval as such); People's Counsel for Baltimore County v. Beachwood I Ltd. P'ship, 670 A.2d 484, 507 (Md. Ct. Spec. App. 1995) (holding that a contract zoning charge was not established absent evidence of a deal with the county council, the body with authority to rezone, as opposed to the planning board); Ass'n to Protect Anderson Creek v. City of Bremerton, No. 20878-4-II 1998, Wash. App. LEXIS 166, at *17 (Wash. App. Feb. 6, 1998) (finding no contract zoning existed when the city administrator agreed to apply and agreed to support rezoning of property, but the city administrator did not have the power to rezone, only the city council did).

302 *State ex rel. Zupancic*, 174 N.W.2d at 538.

303 334 N.E.2d 215 (Ill. App. Ct. 1975).

304 *Id.* at 217. Under the ordinance,

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complained that "the requirements under the CUD zoning classification were changed from planned arrangements of residential uses and attendant commercial and industrial uses to allow for the proposed park."[305] The court found that CUD "is a method of land use control designed to supplement existing master plans and zoning ordinances."[306] It does this by permitting the combining of different land uses on the same tract.[307] It "is intended to apply to specific property and [is] meant to facilitate the development of an environmentally sound and functional unit."[308] CUD zoning enjoys the advantage of flexibility over traditional Euclidean zoning, which divides communities into districts and rezones segregated uses.[309] Because negotiations are necessary so that the overall aims of CUD zoning may be accomplished, and because the regulatory ordinance mandates conferences, the defendants' conduct in meeting beforehand with the developer did not contribute to contract zoning.[310]

Agreements in connection with floating zones, as well as the community unit district in *Rutland*, a type of planned unit development (PUD),[311] have withstood the contract zoning charge.[312] Their effect is

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> an applicant for CUD zoning must, at in informal conference, submit to the plat officer a sketch plan describing existing conditions of the site and of the proposed development. After the preapplication conference, the plat committee reviews the proposal. Recommendations made by the plat officer or committee during the initial review may be incorporated into the development plan. After approval in the initial proposal by the plat committee, a detailed development plan is prepared which must include certain specified information, and this plan is then reviewed by the plat officer and committee with approval contingent upon the plan meeting specified criteria. Regulations require that a developer's final plan contain approved provisions for such items as streets, utility easements, water distribution, lighting and landscaping. It is only after the plat committee has approved the development plan that the applicant may first petition for CUD zoning.

Id. at 219.

305 *Id.* at 217.

306 *Id.* at 219.

307 *Id.*

308 *Id.*

309 *Id.* (citing Rudderow v. Township Comm. of the Tp. of Mt. Laurel, 297 A.2d 583 (N.J. Super. Ct. App. Div. 1972)).

310 *Id.*

311 "[T]he floating zone involves a predetermined set of criteria, established in the zoning code, but not yet affixed to any specific property." Roy P. Cookson & Bart Bruton, *Zoning Law*, 35 U. MIAMI L. REV. 581, 594 (1981). Before the zoning authority "'settle[s] *(continued)*

similar "in that the local government may require performance of certain conditions and impose restrictions before approving the developer's plan," but uses are determined based on the particular circumstances of the area.[313] Unlike most districts created [under the general] zoning ordinance, a floating zone has no fixed location within the community.[314] It is usually attached to a particular tract of land through rezoning of the land by petition of the landowner.[315] It may contain any use permitted in the particular district by the specific ordinance creating it, or it may restrict uses to be permitted on the tract based on a determination of conflicts with adjoining existing or potential uses, when required for a greater degree of control over the manner and development to protect the general welfare.[316] A floating zone, therefore, is, by definition, conditional[317] and rezoning to a floating zone cannot, by its very nature, be bound upon precise and inflexible standards for each plot of ground because each plot of ground is different and the environment in which it lies is different.[318] "So long as

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the floating zone on a particular tract, the developer must comply with the conditions, density, setback, height, and other specified requirements." *Id.* A minimum size for the proposed zone may be required, and conditions of the Euclidean zoning type are usually imposed by the ordinance. *Id.* A PUD is similar to a floating zone. *Id.* It is a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of land. *Id.* The ordinance authorizing the PUD will usually define the rights and objectives only in general terms, leaving the specifics to the development by the developer. *Id.*; *see also* MANDELKER, *supra* note 19, §§ 6.60, 6.61, 9.01, 9.24.

312 *See* Cookson & Bruton, *supra* note 311, at 593-94.

313 *Id.* at 593; *see also* Wegner, *supra* note 40, at 983-85.

314 Treme v. St. Louis County, 609 S.W.2d 706, 710 (Mo. Ct. App. 1980).

315 *Id.*

316 *Id.* at 711.

317 In *Treme*, the court rejected the claim that a floating zone was an instance of contract zoning, finding that municipalities need a certain degree of "flexibility in determining whether particular types of uses should be allowed within the environs of an area zoned for some other use where the newly allowed use can be made compatible with the existing uses." *Id.* at 712. The commercial district here satisfied these requirements. *Id.*

318 *See id.* In *Treme*,

> there [were] certain mandatory requirements for uses within the new zone which the Council [was] not free to expand. The regulations limit[ed] the uses, established minimum performance standards and sign regulations. The council [could] impose greater restrictions and [was] required to prescribe height restrictions, lot area and yard requirements, and off-street parking and loading requirements.

(*continued*)

the legislative [decision] is not arbitrary, capricious or unreasonable, landowners . . . have no cause to object because the determination made under the general standards of the ordinance produce different results on different tracts of land."[319]

In *Old Canton Hills Homeowners Ass'n v. Mayor of Jackson*,[320] a developer filed a zoning application requesting the city to rezone approximately 21 acres out of a 150-acre parcel of land from a single-family residential and general commercial classification to a restricted commercial and limited commercial classification.[321] Plaintiffs opposed this rezoning application, and the developer withdrew the application, but then refiled seeking to develop the same area as a PUD.[322] The Planning Board approved the proposed PUD and recommended that the Jackson City Council approve the application so long as a housing component was added.[323] Following the required notifications, the Planning Board

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> Plaintiffs [had no right to] complain that the Council [might] exercise its legislative judgment to impose more stringent requirements [on a commercial district] than it [did] in another.

Id. The court further found "no objection to the fact that the ordinance [did] not spell out in detail the standards upon which a determination to rezone to [commercial] is to be made. The section [did] provide for general standards which [were] to be considered by the legislative body." *Id.*

[319] *Id.* at 713. Though the ordinance did authorize spot zoning, it was not invalid on that ground. *Id.* The court pointed out that any zoning ordinance that allows for amendment allows spot zoning. *Id.* Spot zoning may be invalid or valid. *Id.*

> If it is an arbitrary and unreasonable devotion of the small area to a use inconsistent with the uses to which the rest of the district is restricted and made for the sole benefit of the private interests of the owner, it is invalid. On the other hand, if the zoning of the small parcel is in accord and in harmony with the comprehensive plan and is done for the public good—that is, to serve one or more of the purposes of the enabling statute, and so bears a substantial relationship to the public health, safety, morals and general welfare, it is valid.

Id. Nor was the zoning otherwise unconstitutional because of ample evidence of reasonableness, it served the general welfare, did not adversely affect the public roads and the value of nearby property, and did not deviate from the comprehensive plan. *Id.* at 713-15.

[320] 749 So. 2d 54 (Miss. 1999).

[321] *Id.* at 56.

[322] *Id.*

[323] *Id.*

considered the developer's application, but failed to reach a consensus.[324] The developer then filed an amendment increasing the size of the proposed PUD from twenty-one to fifty acres.[325] The Site Plan Review Committee approved the proposed PUD, but the developer was obligated to meet twenty-three requirements.[326] After a hearing, the city council unanimously approved the application, contingent upon those requirements.[327] These included the following: a pedestrian circulation plan; that the revised site plan comply with all requirements of the PUD district provision of the zoning ordinance; that the functional aspects of the project did not negatively impact surrounding land uses of the area's infrastructure capacity; that the covenants previously submitted by the developer be incorporated as much as possible into the final covenants; and that the final covenants be approved by the city council. [328] Plaintiffs challenged the rezoning on the ground *inter alia* that it amounted to contract zoning, which was illegal.[329] The court pointed out that

> [a]mple statutory authority exist[ed] in the form of traditional zoning legislation that [could] be construed to support this novel regulatory device. The key question was whether such authority should be narrowly or broadly construed. Many states have traditionally opted for narrow construction of enabling legislation to ensure against unwarranted action by local governments, but the present trend is toward a more expansive view of local government powers and a more generous interpretive view.[330]

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324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.* at 56-57.

329 *Id.* at 57.

330 *Id.* at 58. The court chose to rely on the decision from the New Mexico Supreme Court, *Dacy v. Village of Ruidoso*, 845 P.2d 793, 796 (N.M. 1992), for the proposition that "contract zoning was only illegal in cases in which a municipality committed itself to rezone property in such a manner as to circumvent the notice and hearing process or to compromise the rights of affected persons." *Old Canton Hills Homeowners Ass'n*, 749 So. 2d at 58. The court noted that *Dacy* raised serious doubt as to whether the agreement in the present case constituted contract zoning at all. *Id.* The court then quoted the *Dacy* court, stating that "[c]onditional zoning is not contract zoning at all, because it does not involve a promise by either party. Rather, conditional zoning describes the situation in which a

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Under the more generous interpretive view, it is "[t]he absence of an enforceable promise by either party [that] distinguishes conditional zoning from contract zoning."[331] Here, the conditions set forth by the site plan committee and adopted by the city council were the sort of conditions inherent to any PUD, fully consistent with the goals and purposes of the PUD land planning device.[332] Given the nature of a planned unit development, a district containing "a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of land."[333] In sum, far from constituting a "contracting away" of the city's police power, the contingent zoning/PUD constituted an effective tool for the development of the property in a manner that satisfied the concerns of the residents living closest to the property.[334]

In *Campion v. Board of Alderman of New Haven*,[335] the court upheld conditions imposed on approval of a Planned Development District because they created a new zone, such that uniformity of regulations was not at issue.[336]

IV. CONTRACT ZONING COMPARED TO CONDITIONAL ZONING

In contrast to contract zoning, which usually requires the showing of a bilateral contract, conditional zoning is analogous to a unilateral contract. The local government does not promise to rezone, but, either voluntarily or through negotiation, the developer agrees to conditions that are otherwise not required in the proposed zone.[337] This type of zoning does not represent the same relinquishment of police power authority as contract zoning because the agreement occurs as part of a regulation that flows from comments made during the hearing process. Here, the deal is not complete until after the municipality has heard concerns both of landowners seeking to rezone and of the neighbors, and until the municipality has tried to arrive at a workable compromise. In addition, the deal is transparent in that the conditions that form the agreement are

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municipality rezones on condition that a landowner perform a certain act prior to, simultaneously with, or after the rezoning." *Id.*

331 *Old Canton Hills Homeowners Ass'n*, 749 So. 2d at 58 (quoting *Dacy*, 845 P.2d at 796).

332 *Id.* at 59.

333 *Id.*

334 *Id.* at 63.

335 No. CV020462505S, 2003 Conn. Super. LEXIS 874 (Conn. Super. Ct. Mar. 21, 2003).

336 *Id.* at *19-20.

337 *See* Wilmington Sixth Dist. Cmty. Comm. v. Pettinaro Enter., No. 8668, 1988 Del. Ch. LEXIS 142, at *9 (Del. Ch. Oct. 27, 1988).

explicitly set forth in the zoning amendment so that every one who subsequently reviews the zoning amendment will have a clear and accurate understanding of the uses to which the land can be put and the reasons the municipality decided to allow those uses. The conditions can be made a part of the zoning text or can be evidenced by the recording of an enforceable covenant binding the developer and his assignees to the negotiated condition.[338]

The unilateral/bilateral distinction has often been overlooked by the courts, and much of the confusion in the cases can be attributed to the failure of courts to properly define the two concepts.[339]

> [C]onditional zoning properly understood involves only an adopted zoning ordinance which provides either: (1) The rezoning becomes effective immediately with an automatic repealer if specified conditions are not met within a set time limit, or (2) the zoning becomes effective only upon the conditions being met within the time

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[338] *See id.* at *10. The court noted that "some courts had found contract zoning unenforceable per se, while other[s] have enforced contract zoning if reasonable, non-discriminatory and serving the public welfare." *Id.* at *8. Other courts have recognized a slight difference between contract zoning and conditional zoning, prohibiting the former and permitting the latter. *Id.* at *8-9 (citing 6 POWELL ON REAL PROPERTY § 871.4 (1988); State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533 (Wis. 1970); Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960); 2 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING 3d § 9.20 (3d ed. 1986)); *see also* Haas v. City of Mobile, 265 So. 2d 564 (Ala. 1972). In *Haas*, an ordinance rezoning an area provided that

> no lot or parcel of land hereinabove described shall be used for any use allowed in [the rezoned district] until all the conditions set forth below have been complied with: subject to a reservation of the right of way for [a parkway] and a second means of ingress and egress to the proposed [parkway] be provided.

Haas, 265 So. 2d at 566. A challenge to the rezoning was made on the basis that such a collateral agreement or deed to be executed between the city and he property owner constituted contract zoning. *Id.* The challenge was rejected because, as the court pointed out, zoning based upon an offer or agreement would be invalid, but it "is well-established that a zoning ordinance may place upon a property owner reasonable restrictions and requirements in the use of the zoned property and this court has expressly approved such restrictions and requirements." *Id.*

[339] *See* City of Knoxville v. Ambrister, 263 S.W.2d 528, 530-31 (Tenn. 1953) (treating a unilateral promise by a developer without a reciprocal promise by the city as if it were a clear unequivocal bilateral contract controlling the discretion of the local government, making rezoning invalid per se).

limit.[340]

The early attitude of the courts was to ignore this distinction and declare both contract and conditional zoning to be invalid per se.[341] The reasons conditional rezoning did not fare well are myriad, including that despite the apparent unilateral structure, conditional rezoning introduced an element of contract—the imposition of conditions on the land subject to rezoning being a quid pro quo for rezoning, although no express contract with the zoning authorities could be proven, given the close connection between the recording of restrictions at or soon after the rezoning. Conditional rezoning was also struck down because it constituted an abrupt departure from the comprehensive plan contemplated in zoning.[342]

> Other faults assigned by courts in their disapproval of conditional rezoning are that the zoning authority might use the zoning power to further private interests in violation of public policy, that the zoning authority might improperly try to control the use of the land . . . and that it furnishe[d] an avenue for corruption of officials.[343]

Others viewed the rezoning of a particular parcel of land, upon conditions not imposed by the zoning ordinance, as prima facie evidence of "spot zoning"[344] where it singles out one parcel for non-uniform and non-comprehensive treatment in its most maleficent aspect, as not in accordance with a comprehensive plan and as beyond the power of the municipality.[345] This view is premised on the notion that legislative bodies

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340 *State ex rel. Zupancic*, 174 N.W.2d at 538.

341 *See* Cederberg v. City of Rockford, 291 N.E.2d 249, 251-52 (Ill. Ct. App. 1972); Hedrich v. Village of Niles, 250 N.E.2d 791, 795-96 (Ill. Ct. App. 1969). *But see* Goffinet v. County of Christian, 333 N.E. 2d 731, 736 (Ill. Ct. App. 1975) (holding that conditional zoning may be upheld in some instances). In *Goffinet*, the proposed use was a plant to manufacture synthetic natural gas that would serve an area where a fuel shortage existed. *Id.* at 732. Such use would fill a genuine public need and would unquestionably serve the public health, safety, and welfare. *Id.* at 736.

342 Treadway v. City of Rockford, 192 N.E.2d 351, 356 (Ill. 1963).

343 *Goffinet*, 333 N.E.2d at 736.

344 *See supra* note 114 for a discussion of spot zoning.

345 Ziegler, *supra* note 45, §41.4; *see also* Blades v. City of Raleigh, 187 S.E.2d 35, 45 (N.C. 1972); Allred v. City of Raleigh, 178 S.E.2d 432, 440-41 (N.C. 1971); Appeal of Cleaver, 24 Pa. D & C 2d 483, 492 (1961) (holding that rezoning upon limitations on the use of the rezoned land is invalid because it resulted in the devotion of a comparatively small area to a use inconsistent with the uses to which surrounding property was used and was made for the sole benefit of the private interests of the landowner); Oury v. Greany, 267 A.2d 700, 702 (R.I. 1970) (finding invalid rezoning upon the condition that the rezoned

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must rezone in accordance with a comprehensive plan, and Euclidean zoning requires that in amending the ordinance to confer upon a particular parcel a district designation, it may not curtail or limit the uses and structures placed or to be placed upon the rezoned lands differently from those permitted upon other lands in the same district. Consequently, "where there has been a concatinated [sic] rezoning and filing of a declaration of restrictions, the early view . . . was that both the zoning amendment and the restrictive covenant were invalid."[346]

The early Maryland court decisions showed a disfavor of conditional zoning, equal to that with contract zoning, although not clearly

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property be used exclusively for a particular business use because it was not consistent with the comprehensive plan, but instead was an accommodation to the landowner, made without regard for the public health, safety, and welfare).

[346] State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 538 (Wis. 1970) (citing 3 RATHKOPF, *supra* note 345, at 74-9); *see also* Templeton v. County Council of Prince George's County, 321 A.2d 778 (Md. Ct. Spec. App. 1974). The court addressed the contention that "conditional zoning might have been utilized in this case . . . in the sense that the District Council might have considered a grant of the requested reclassification, subject to a reversion to residential use on the discontinuation of the roofing business by the appellant." *Id.* at 783. The court held that even if it were, it was quite apparent that the appellant "proceeded upon a distorted construction of conditional zoning generally and as contained in Chapter 471, Laws of 1968." *Id.*

> The latter provides that the District Council for Prince George's County in approving any local map amendment, may give consideration to and "adopt such reasonable requirements, safeguards and conditions, as may in its opinion be necessary either to protect surrounding properties . . . or which would further enhance the coordinated harmonious and systematic development of the Regional District."

Id.

> The novel suggestion that a zoning reclassification to commercial might be made by the District Council subject to a reversion to residential obviously is not supported by this statutory authority for conditional zoning, nor by general law. Conditional zoning is a device employed to bring some flexibility to an otherwise rigid system of control. The conditions generally imposed are those designed to protect adjacent land from the loss of use value which might occur if the newly authorized use were permitted without restraint of any kind. Reversion of the reclassification to residential use when, and if, appellant should discontinue her roofing business is patently no such restraint.

Id. (citation omitted).

distinguishing the two. In *Rodriguez v. Prince George's County*,[347] the court pointed out that the "early view of most courts was that conditional (or, as it is sometimes called, 'contract') zoning was unlawful per se."[348] The three reasons for this are

> that rezoning based on offers or agreements with the owners disrupts the basic plan, and thus is subversive of public policy reflected in the overall legislation, that the resulting "contract" is nugatory because a municipality is not able to make agreements which inhibit its police powers, and that restrictions in a particular zone should not be left to extrinsic evidence.[349]

Recently, the Maryland Court of Appeals, in *Mayor of Rockville v. Rylyns Enterprises*,[350] struck down a zoning ordinance passed in connection with an annexation agreement as an instance of impermissible conditional zoning.[351] While the court held that not all conditional zoning

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347 558 A.2d 742 (Md. Ct. Spec. App. 1989).

348 *Id.* at 749.

349 *Id.* at 749 (quoting Baylis v. City of Baltimore, 148 A.2d 429, 433 (Md. 1959)). "[C]ovenants coupled with the site plan attached, if adopted as a basis for the requested reclassification, [would produce] a form of conditional zoning." *Id.* at 750 (quoting Montgomery County v. Nat'l Capital Realty Corp., 297 A.2d 675, 680 (Md. 1972)). So too, an amendment to the basic plan, where the applicant "was offering a deal to the District Council: in order to induce the Council to approve its application for reclassification, the applicant [agreeing] in advance to exclude from the scope of the approval certain uses expressly permitted in the approved zone," is a form of conditional zoning and invalid. *Id.*; *see also Montgomery County*, 297A.2d at 680 (finding invalid rezoning conditioned upon a landowner's offer to subject land to restrictions on use, as impermissible conditional zoning); Carole Highlands Citizens Ass'n v. Bd. of County Comm'rs., 158 A.2d 663, 665-66 (Md. 1960) (finding invalid rezoning of land from single family residential purposes to commercial, subject to an agreement by the landowner limiting the use of the land, whether or not a binding contract was involved, where the rezoning created a novel classification not authorized by the general plan).

350 814 A.2d 469 (Md. 2002).

351 *Id.* at 503. There, the owners of certain property located in the county, abutting the city, petitioned the city for annexation of the property into the city. *Id.* at 473. At the time of the petition, the property was zoned I-2 (Heavy Industrial), and this was the zone recommended and adopted in the county's master plan. *Id.* The petition requested a rezoning to I-1 (Service Industrial), "consistent with the zoning in adjacent properties located within the City's boundaries." *Id.* On the property, the owners intended to erect and operate a gasoline service station. *Id.* However, the "I-2 zone did not allow gasoline service stations under any circumstances." *Id.* Following the public hearing before the

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was invalid,[352] zoning that conditions the rezoning on the landowner's agreement not to use the land in ways otherwise permitted by the existing zoning is impermissible because the language of the enabling legislation was intended to allow local governments "to fashion supplementary conditions in the placement of a given property in a Euclidean zone, not in derogation of the uses allowed in that zone."[353] This meant that only conditions relating to the design of buildings, construction, landscaping, or other improvements, and alterations, but not those relating to otherwise permissible uses, may be subject to conditions in zoning.[354] Otherwise, such conditions on uses would violate the requirement of uniformity within classes or development in a district.[355] The court explained that the reason such a narrow reading of the statute was called for related to the Euclidean zoning concept.[356] Conditional zoning, resulting in a limitation of otherwise permissible uses, would violate the mandated uniformity requirement.[357] The foreclosing, by limitations pertaining only to the subject property, of all of the otherwise permitted commercial uses, other than the one expressly permitted in the rezoning ordinance (in this case,

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county planning board and consideration by the city council, the city council adopted a resolution disapproving the request for rezoning, citing concerns about the appropriateness of the use. *Id.* at 474. Several months later, the city council was asked to reexamine the rezoning request. *Id.* The city council concluded that it would support the rezoning from I-2 to I-1, "provided the city restrict the retail use of the site." *Id.* The city council resolved to rezone the property on the condition that the "city prohibits the retail use of the site, except for a gasoline service station." *Id.* At the time, the "I-1 zone allow[ed] approximately 100 permitted uses and 18 additional uses with the grant of a special exception." *Id.* at 474 n.1. Commercial retail uses, including antique shops, garden supplies, paint and wallpaper, photographic supply, and pet grooming activities were included in these enumerations. *Id.* Rylyns challenged the annexation and rezoning on the grounds that it constituted improper conditional and spot zoning. *Id.* at 475. Rylyns also challenged the rezoning on the ground that the annexation statute prohibits an annexing authority for five years from rezoning annexed property to uses different from that applying in the pre-annexation jurisdiction without the express approval of the county planning authorities of the pre-annexation jurisdiction. *Id.* The court agreed with Rylyns, finding that such a construction of the annexation was necessary to preserve the integrity of the master plan adopted by the jurisdiction having planning authority immediately prior to annexation. *Id.* at 492.

352 *Id.* at 500.

353 *Id.* at 501.

354 *Id.* at 502 (citing Bd. of County Comm'rs v. H. Manny Holtz, Inc., 501 A.2d 489, 492 (Md. Ct. Spec. App. 1985)).

355 *Id.*

356 *Id.* at 503 n.29.

357 *Id.* at 502.

operating a gasoline service station) allowed by special exception in the I-1 zone, amounted to impermissible conditional zoning.[358] The result of the agreement to limit permissible uses was "a distinct mini-district that undermined uniformity."[359]

In a highly critical dissent, one justice argued that the majority misread the statute authorizing conditional zoning when it found that the only conditional zoning authorized by the statute were those that did not relate to uses of the subject property.[360] The dissent stated that it was difficult to perceive how limiting a use, so long as the uses to which the property is limited are uses otherwise permitted in the district, affects the uniformity of a district.[361] Indeed, all the prior cases on conditional zoning involved instances in which the conditions related to use limitations.[362] Those cases prompted the legislature to adopt enabling legislation allowing for conditional zoning.[363] In addition, the legislative history contained clear indication that it was intended to provide municipalities with flexibility in achieving desirable means of minimizing the adverse effects of zoning change, while at the same time avoiding the constitutional pitfalls of contract zoning, permitting orderly development using controls similar to those in subdivision regulations.[364]

The dissent's points are well-taken. The majority placed undue importance on uniformity for uniformity's sake. Considering the theory of Euclidean zoning is to protect landowners from the externalities of neighboring land uses, uniformity should refer to the outer limits of uses while not requiring all uses that are permitted. One could argue that such limitations serve this purpose where uses are limited within a zone by conditional rezoning.

Some courts have considered arguments that conditional zoning was *ultra vires* as no such authority could be found under the state zoning

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358 *Id.* at 503.

359 *Id.* at 504 (quoting Carole Highlands Citizens Ass'n, Inc. v. Bd. of County Comm'rs, 158 A.2d 663, 664-66 (Md. 1960)). The court also found impermissible contract zoning when, as part of the annexation agreement, the municipality agreed to rezone in a certain way. *Id.* at 505. The court cautioned, though, that its holding should not preclude annexation agreements normally involving certain executory accords, for which the parties have bargained, governing the anticipated annexation, including the zoning to be assigned, so long as the agreements relative to the anticipatory zoning action do not violate other legal requirements, such as the prohibition on conditional zoning. *Id.* at 507 n.34.

360 *Id.* at 511 (Cathell, J., dissenting).

361 *Id.*

362 *Id.*

363 *Id.*

364 *Id.* at 520-21.

enabling act.[365] Other courts have rejected the *ultra vires* argument, finding implied authority to rezone with conditions on the basis that the procedure was within the spirit of the enabling act,[366] because silence of an enabling act on the question of conditional zoning does not necessarily imply a legislative decision to prohibit it.[367]

The modern trend is in favor of upholding conditional zoning.[368] Generally, such conditions will be upheld when they are imposed pursuant to the police power for the protection or benefit of neighbors to ameliorate the effects of the zoning change. Yet, the confusion in the cases continues. Many cases presenting the issue of conditional zoning have been characterized by their challengers as involving contract zoning and struck down on that basis.[369] Other courts make an effort to distinguish the two,

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[365] *See, e.g.*, Hartman v. Buckson, 467 A.2d 694 (Del. Ch. 1983) (holding that the city bargained away part of its zoning power by enacting a new ordinance to benefit a private citizen even though in furtherance of a compromise to avoid threat of suit); Cederberg v. City of Rockford, 291 N.E.2d 249 (Ill. App. Ct. 1972) (confusing the bargaining away argument with the *ultra vires* argument, concluding that since the bargain was primarily for private benefit, it was not an act on behalf of the general welfare and therefore *ultra vires*).

[366] *See, e.g.*, Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960) (rejecting the *ultra vires* argument, finding implied authority to rezone with conditions as within the spirit of the enabling act).

[367] *See, e.g.*, Scrutton v. County of Sacramento, 79 Cal. Rptr. 872 (Cal. Ct. App. 1969); Sylvania Elec. Prods., Inc. v. City of Newton, 183 N.E.2d 118, 123 (Mass. 1962); Palisades Props., Inc. v. Brunetti, 207 A.2d 522 (N.J. 1965); Collard v. Inc. Village of Flower Hill, 421 N.E.2d 818 (N.Y. 1981).

[368] *See* Old Canton Hills Homeowners Ass'n v. Mayor of Jackson, 749 So. 2d 54, 59-60 (Miss. 1999) (stating that "contingency zoning [is] an effective tool for the development of the . . . property in a manner which satisfied the concerns of the residents living closest to the property"); Chrismon v. Guilford County, 370 S.E.2d 579, 596 (N.C. 1988) (approving the practice as long as the local zoning authority acted reasonably and in the public interest); Konkel v. Common Council, 229 N.W.2d 606, 609 (Wis. 1975) (upholding a rezoning ordinance designed to take effect upon the fulfillment of certain conditions and for the reversion of the prior zoning status if the conditions were not satisfied).

[369] *See, e.g.*, Baker v. Chartiers Township Zoning Hearing Bd., 677 A.2d 1274, 1279 (Pa. Commw. Ct. 1996) (holding contract zoning "is a form of unlawful spot zoning where rezoning is permitted based on regulations and conditions devised by agreement between the municipality and the landowner"); Knight v. Lynn Township Zoning Hearing Bd., 568 A.2d 1372, 1376 (Pa. Commw. Ct. 1990) (same); Baylis v. City of Baltimore, 148 A.2d 429, 431, 433 (Md. 1959) (holding rezoning invalid as inhibiting the municipality's exercise of police power where the rezoning was made conditional upon the execution of an agreement between landowner and city, set out in the ordinance in the form for recording as

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upholding rezonings involving only the imposition of conditions.[370]

Decisions from Connecticut courts have responded by reference to

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a covenant running with the land, providing that in consideration for rezoning, the owner would use property only as funeral home, provide adequate facilities for ingress and egress, and off-street parking, and not object to or oppose the reversion of the property to the former zoning if its use as funeral home ceased); Rodriguez v. Prince George's County, 558 A.2d 742, 750 (Md. Ct. Spec. App. 1989) (finding zoning invalid, citing disruptions of uniformity and the weakening of police powers when a developer agreed not to use the property in certain ways that would otherwise have been permitted in the zone, and finding no practical difference between the proposed agreement to omit certain uses in exchange for approval and any other conditional zoning). In *King's Mill Homeowners Ass'n v. City of Westminster*, 557 P.2d 1186 (Colo. 1976), the court responded to a challenge of contract zoning, largely with a discussion of conditional zoning, finding no contract zoning in the case. *Id.* at 1191. The court held that rezoning contingent upon the landowner's fulfillment of certain conditions does not amount to *contract* zoning. *Id. Cram v. Town of Geneva*, 593 N.Y.S.2d 651 (N.Y. App. Div. 1993), is an example of a case confusing contract zoning with conditional zoning, although upholding the rezoning. There, the town enacted an ordinance to rezone a certain property from residential to business. *Id.* at 652. In enacting the ordinance, the town board imposed certain conditions limiting the use of the property. *Id.* The residents argued that the ordinance was invalid contract zoning and that the town failed to take a hard look at the environmental impact of the proposed change as required by the state environmental law. *Id.* at 653. The trial court dismissed the action, and the residents appealed. *Id.* at 652. The court held that, "[i]n appropriate circumstances, a change in zoning may be subject to reasonable conditions and restrictions related to and incidental to the use of the property and designed to minimize any adverse impact in the surrounding area." *Id.* at 652 (citing St. Onge v. Donovan, 522 N.E.2d 1019, 1022-23 (N.Y. 1988); Dexter v. Town Bd. of Gates, 324 N.E.2d 870 (N.Y. 1975)). The conditions and restrictions imposed by the ordinance "were related to the use of the property, were reasonably calculated to minimize any adverse impact on the surrounding residential area and provide no basis to annul the determination of the Town Board." *Id.* Accordingly, the court rejected petitioners' contentions that the enactment of the ordinance was unlawful *contract* zoning and was contrary to the town law. *Id.*

[370] *See, e.g.*, Kerik v. Davidson County, 551 S.E.2d 186 (N.C. Ct. App. 2001) (finding that only unilateral promises made by the landowner and none made by the zoning authority meant conditional zoning, not contract zoning); Cross v. Hall County, 235 S.E.2d 379 (Ga. 1977). The *Cross* court distinguished conditional zoning from contract zoning. *Id.* at 382. Here, rezoning conditioned on road improvements was conditional zoning rather than contract zoning. *Id.* at 383. At the hearing before the commissioners on the rezoning application, several neighboring landowners who opposed the rezoning mentioned that the road leading to the quarry needed paving. *Id.* The president of the zoning applicant offered to resurface the road. *Id.* The rezoning application was approved provided that the zoning applicant would agree to resurface the road. *Id.* The paving condition was an attempt by the board to ameliorate the effects of the zoning change. *Id.* at 383.

contract zoning only when conditions are involved. Such courts have characterized zoning plans imposing conditions as illegal contract zoning and otherwise found zoning ordinances made with conditions on the landowner to be invalid. In *Bartsch v. Planning & Zoning Commission of Trumbull*[371] an attempt by the planning and zoning commission to attach conditions running with the land that restrict the use of a particular parcel to a medical office building was held to be an attempt at contract zoning violating the uniformity provision of the statute because the restriction did not apply to other properties within the zoning district.[372]

Relying on *Bartsch*, in *Kaufman v. City of Danbury Zoning Commission*,[373] the court addressed both contract zoning and conditional zoning, holding that Connecticut did not recognize either.[374] There, the landowner applied for authority to build affordable housing and in that connection, requested a rezoning change to permit more than one lot per acre in the area.[375] The application was denied.[376] Among other objections, the city claimed that the landowner's application did not contain a system to guarantee that the affordable housing would in fact be developed and remain restricted for that purpose, and that it was without power to devise a system of guarantee on its own initiative because Connecticut law did not recognize conditional or contract zoning.[377] The court recognized the general prohibition against such zoning on the basis that it operates to destroy the uniformity requirement for each district—resulting in improper discrimination among owners.[378] However, the court also recognized an important exception to the general prohibitions where the specific conditions on a rezoning imposed are reasonable and are for the general community benefit, rather than for the benefit of a single landowner.[379] The court found that "[t]he conditions that would be appropriate to supply assurance that the development proposed would in fact be constructed with the statutory housing component could easily fulfill both prongs of the test if designed properly."[380] Thus, despite the

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371 506 A.2d 1093 (Conn. App. Ct. 1986).

372 *Id.* at 1096.

373 No. CV9 0507929 S, 1993 Conn. Super. LEXIS 2039 (Conn. Super. Ct. Aug. 13, 1993).

374 *Id.* at *13.

375 *Id.* at *1.

376 *Id.*

377 *Id.* at *3.

378 *Id.* at *13-14.

379 *Id.* at *14-15.

380 *Id.* at *15. As to reasonableness, the court noted the Connecticut statute on inclusionary zoning, which authorizes municipalities to adopt zoning regulations to encourage the development of affordable housing and to impose conditions toward this end, *(continued)*

statement by the court that Connecticut did not recognize conditional zoning, the holding in this case seems to establish the opposite proposition. Indeed, the bases for the exception seem to be the only circumstances in which conditional zoning should be upheld.

However, the Florida Supreme Court in *Hartnett v. Austin*[381] took a more categorical attitude on agreements made in connection with a rezoning by treating a rezoning on conditions as an instance of contract zoning.[382] There, the municipality agreed to rezone land to permit the development of a shopping center upon certain conditions. In finding the ordinance invalid, the court ruled that the city had no authority to enter into a private contract with the landowner.[383]

An Illinois court, in *Cederberg v. City of Rockford*,[384] followed the reasoning in the Florida case.[385] In that case, the court held invalid the rezoning of certain lots from residential to local business coincidentally conditioned upon the execution of a restrictive covenant providing that the property only be used for offices, finding such agreement to be a form of contract zoning, making the agreement void.[386] The effect of the ordinance "was to create a classification not set forth in the general zoning ordinances."[387] Similarly, in *Andres v. Village of Flossmoor*,[388] the court struck down an ordinance rezoning land upon the landowner's fulfillment of certain conditions, finding the ordinance to have resulted from a deal,

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id., as well as authority under other statutes permitting density bonuses for the creation of affordable housing and the creation of a Community Development Agency, and also providing authority for imposing conditions to assure the objectives were met, *id.* at *22. On the second prong, the court found that such a condition would not only promote benefit in the community, but the region, indeed, the entire state. *Id.*

381 93 So.2d 86 (Fla. 1956).

382 *Id.* at 89.

383 *Id.* at 87-88.

384 291 N.E.2d 249 (Ill. App. Ct. 1973).

385 *See id.* at 250, 252.

386 *Id.* at 251-52.

387 *Id.* at 252.

388 304 N.E.2d 700 (Ill. App. Ct. 1973). In *Andres*, the city enacted an ordinance rezoning land based on special ad hoc restrictions and limitations that were not imposed on other land in the same district. *Id.* at 701-03. The restrictions included limitations on the use of a single story attached two-family dwelling, whereas multiple family dwellings were generally permitted. *Id.* The restrictions also required construction according to the building designs and representations made in their owner-developer's promotional brochure, fencing, screening and general landscaping subject to future approval by the village, payment of $18,000 to the village for general village purposes. *Id.* The restrictions further provided that any violation of the conditions would result in automatic revocation of the zoning granted. *Id.*

which introduced an element of contract.[389] *Andres* relied on a previous decision from the Illinois Supreme Court, *Treadway v. City of Rockford*,[390] for the reasons why, "absent general statutory authorization and standards, the making of individualized zoning deals by local municipalities, apart from the provisions they are willing to adopt as general zoning regulations, is an invalid abuse of the zoning power."[391] That is, even when a zoning ordinance is reasonable and not arbitrary and bears a reasonable relationship to the public health, safety, and welfare, it is yet invalid if subject to bargaining or contract.[392] In *Andres*, the court explained that

> [i]n accepting . . . donations and entering into or approving these agreements the trustees of the Village undoubtedly did what they believed was best for the whole community, but it places them in the questionable position of bartering their legislative discretion for emoluments that had no bearing on the merits of the requested amendment.[393]

The *Andres* court also expressed the concerns articulated in a Florida Supreme Court decision, *Hartnett v. Austin*,[394] that

> [i]f each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse. The zoning classifications of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity.[395]

If the city could legislate by contract, "each citizen would be governed by an individual rule based upon the best deal he could make with the

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389 *Id.* at 703; *see also* Shibata v. City of Naperville, 273 N.E.2d 690, 693 (Ill. App. Ct. 1971) (invalidating as contract zoning an ordinance made on the condition that the landowner execute and file a declaration of restrictions as to the use of the property).

390 192 N.E.2d 351 (Ill. 1963).

391 *Andres*, 304 N.E.2d at 703 (citing Allred v. City of Raleigh, 178 S.E.2d 432, 440-41 (N.C. 1971); Oury v. Greany, 267 A.2d 700, 702 (R.I. 1970); Baylis v. City of Baltimore, 148 A.2d 429, 433 (Md. 1959); City of Knoxville v. Ambrister, 263 S.W.2d 528, 531 (Tenn. 1953); Lewis v. City of Jackson, 184 So. 2d 384, 388 (Miss. 1966)).

392 Hedrich v. Village of Niles, 250 N.E.2d 791, 795-96 (Ill. App. Ct. 1969).

393 *Andres*, 304 N.E.2d at 703 (quoting *Hedrich*, 250 N.E.2d at 796).

394 93 So. 2d 86 (Fla. 1956).

395 *Andres*, 304 N.E.2d at 704 (quoting *Hartnett*, 93 So. 2d at 89).

governing body."[396] Further, *Andres* relied on *Baylis v. City of Baltimore*,[397] which held that special conditions imposed on rezoning amendments are invalid for the chief reasons that

> rezoning based on offers or agreements with owners disrupts the basic plan, and thus is subversive of the public policy reflected in the overall legislation, that the resulting "contract" is nugatory because a municipality is not able to make agreements which inhibit its police powers, and that restrictions in a particular zone should not be left to extrinsic evidence.[398]

In *Andres*, the court ruled that the rezoning ordinance, which conditioned its effectiveness on subsequent execution by the village and the owner of a contract containing all the ad hoc limitations and requirements of the ordinance, also exhibited an inherent defect that invalidated the ordinance.[399] In sum, the ordinance was "the very model of invalid conditional zoning, falling squarely within the general policy considerations that strongly support the *Treadway* rule invalidating such ad hoc conditional rezoning amendments."[400]

The zoning ordinances in the Florida and Illinois cases, if the definition of contract zoning was faithfully applied, would not be struck down on that basis since they did not involve bilateral agreements. This may point out that the attempted distinction between contract zoning and conditional zoning based on the existence of a bilateral as opposed to a unilateral agreement may be too simplistic and yield unpredictable results from the courts. Instead, courts would do well to eliminate the false distinction and consider the substantive effects of the municipality's

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396 *Id.*

397 148 A.2d 429 (Md. 1959).

398 *Andres*, 304 N.E.2d at 704 (quoting *Baylis*, 148 A.2d at 433).

399 *Id.* at 706. The court agreed with the trial court that the restrictive covenant was an invalid attempt by the city to control the use of the land. *Id.* at 705. The ad hoc restrictions were not and could not purport to be based on any conceivable lawful zoning powers of the village in enacting requirements for all similarly zoned property. *Id.* The requirement that landscaping be subject to "future approval by the village authorities, without any standard as to what that approval must be based on [was] an unlawfully vague provision. To require the payment of a lump sum of money without any basis set forth or discernable for arriving at that sum [was] unlawful." *Id.* (citations omitted). The reverter provision was "a patently unlawful use of the zoning power which ordain[ed] a change in zoning without any of the procedural steps or substantive considerations necessary thereto." *Id.* at 705-06 (citing Lewis v. City of Jackson, 184 So. 2d 384, 388 (Miss. 1966)).

400 *Id.* at 706.

wielding of its police power. In *Andres*, the holding is questionable on public policy grounds since the court found the ordinance by all indications was reasonable, not arbitrary, and it bore a rational relationship to the public interest, health, and welfare.[401] Therefore, it should have been upheld, as the zoning enabling acts require nothing more.

The Maryland Court of Appeals, in *People's Counsel for Baltimore County v. Beachwood Ltd. Partnership*,[402] distinguished contract from conditional zoning,[403] though declaring the rezoning invalid on other grounds.[404] There, the board of appeals voted to grant the developer's petition to reclassify the property, but with the condition that it finance an off-site improvement.[405] Opposed to the condition, the developer argued that the reclassification was the result of contract zoning and that the office of planning and zoning sought to use the comprehensive zoning as a means to pressure it into financing an off-site traffic improvement.[406] Though the court failed to find evidentiary support for this allegation, it did discuss the concept of contract zoning.[407] The court pointed out that

> one reason the allusions to contract zoning in the case had such a phantom-like quality is that neither the case law, here or abroad, nor the academic commentary seems to have a firm grip on exactly what was meant by the term "contract zoning" or by its doctrinal doppelganger, "conditional zoning." In the broadest of senses, both involve some sort of understanding between the governmental unit and the developer, whereby the doing of certain acts by the developer will result in favorable rezoning treatment by the governmental unit. Beyond that, the definitions begin to blur.[408]

While "[s]ome academic authorities treat contract zoning as the more generic phenomenon," with conditional zoning as a special instance

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401 *Id.* at 703.

402 670 A.2d 484 (Md. Ct. Spec. App. 1995).

403 *Id.* at 504-05.

404 *Id.* at 502. The court held the evidence insufficient to justify a rezoning on the ground of mistake in the original zoning, and the finding of change in circumstances was not clear and detailed as required by the zoning act. *Id.*

405 *Id.* at 489, 503.

406 *Id.* at 503.

407 *Id.* at 504-08.

408 *Id.* at 504 (emphasis omitted).

thereof,[409] others do just the opposite.[410] Yet, others treat the two as closely-related but distinct phenomena, with "contract zoning" being illegal and conditional zoning slowly emerging into general acceptance.[411] The court explained that Maryland cases had treated "'contract zoning' narrowly as a situation wherein the developer . . . enters into an express and legally binding contract with the ultimate zoning authority."[412] Part of the reason for the illegality is that "the governmental unit may not bargain away its future use of the police power."[413] The court distinguished those cases in which a developer makes agreements with a governmental unit that lacks ultimate decision-making authority on the rezoning.[414] Thus, when the city council was not bound by the recommendations of the planning commission in which the commission sought to impose conditions that it was not authorized to exact and that were therefore invalid, and in which the council did not undertake or attempt to incorporate the invalid conditions in its rezoning ordinance and did not even refer to them, no issue of contract zoning arose.[415] In *Peoples Counsel for Baltimore County*, there was no evidence of any agreement with the developer or that any changes to the comprehensive zoning was in

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409 *Id.* (citing DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 94 (1975)).

410 *Id.* (citing 2 ANDERSON, *supra* note 338, §§ 9.20-9.21 (3d ed. 1986)).

411 *Id.* (citing ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 29A.03 (1975)).

412 *Id.* at 505. The court went on to discuss *Baylis v. City of Baltimore*, 148 A.2d 429 (Md. 1959), a case in which the city granted a rezoning conditioned on a binding agreement by the property owner to use the benefit of the reclassification only for the purpose of building a funeral home. *Peoples Counsel for Baltimore County*, 670 A.2d at 505; *Baylis*, 148 A.2d at 431. The *Baylis* court held that the ordinance was invalid because the final form of the ordinance made the reclassification conditional upon the execution of an agreement, set out in the ordinance, between the owners and the city, and the recording of such agreement upon the property owners, their successors, heirs, and assigns. *Baylis*, 148 A.2d at 431. *But see Pressman v. City of Baltimore*, 160 A.2d 379 (Md. 1960), where, in contrast to *Baylis*, the owner entered into a formal and undisputed agreement with the city planning commission, which recommended that the rezoning be approved. *Id.* at 384-85. The court there declined to hold that the agreement constituted illegal contract zoning, restricting the application of the ban on contract zoning to those instances where the legislative body itself, as opposed to some other governmental agency, is party to the illegal contract. *Id.* at 386.

413 *People's Counsel for Baltimore County*, 670 A.2d at 505.

414 *Id.* at 506.

415 *Id.*

any way related to past or future commitments by the developer.[416]

V. CONDITIONAL ZONING SPECIFICALLY HELD VALID

In recent decisions, despite the blurring of lines, courts have approved conditional zoning where they find that under such zoning, without legally committing itself to rezone, the municipality bargains for a landowner's promise to take remedial action to minimize the adverse effects of the proposed development or limit the proposed use in some way as a condition of approval so as to protect adjoining landowners, and it is in the public interest.[417] Most courts rely on the public interest benefits as reasons for upholding conditional zoning agreements.[418] Additionally, it

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[416] *Id.*; *see also* Attman/Glazer P.B. Co. v. Mayor of Annapolis, 552 A.2d 1277, 1283 (Md. 1989). In *Attman/Glazer*, the court held that the policy prohibiting a municipality from contracting away its zoning power applies to special exceptions, variances, and conditional uses, meaning that the zoning authority must exercise independent judgment in deciding requests. *Id.* at 1283. The court noted that

> [c]onditional zoning, once roundly condemned, appears to be in the ascendancy [and] [i]n Maryland, the concept has evolved indirectly through the use of various zoning devices such as planned developments, and has found [some] favor with the state legislature, [in Article 66B, 4.01(b), which] permit[s] a county or municipal corporation to impose certain conditions at the time of zoning or rezoning land, under certain circumstances.

Id. at 1283 n.8.

[417] *See* Ryan, *supra* note 27, at 356.

[418] *See, e.g.*, Scrutton v. County of Sacramento, 79 Cal. Rptr. 872 (Cal. Ct. App. 1969). The court held that the county had the power to impose conditions even though the statute was silent and that the "power to impose conditions on rezoning further[ed] the well-being of landowners generally, promot[ed] community development and served the general welfare." *Id.* at 877. The court further stated that similar to other changes in land use, though a landowner may be benefited by the rezoning of an individual parcel, the rezoning may also "generate augmented demands for public services or create deleterious effects in the neighborhood." *Id.* Moreover, "[r]easonably conceived conditions harmonize the landowner's need with the public's interest." *Id.* The court, therefore, rejected the contract zoning charge. *Id.* at 878; *see also* J-Marion Co., Inc. v. County of Sacramento, 142 Cal. Rptr. 723 (1977). In *J-Marion Co., Inc.*, the court upheld rezoning upon conditions, finding the practice of imposing conditions justified as an appropriate exercise of local police power. *Id.* at 725. The court pointed out the adherence to the "[s]o-called 'Euclidean' zoning divides the community into homogenous land use zones." *Id.* Homogenous land use zones prevent the imposition of conditions on particular uses of property, but "[i]ndividual parcels may often be allowed [as] a justified escape from this rigid grouping without detriment to zoning objectives." *Id.* at 725. The court pointed out that "California

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seems logical to conclude that imposition of conditions results from the consideration of public interest concerns. To the extent that it involves promises from the landowner without a reciprocal promise by the municipality, conditional zoning enables the municipality to retain and satisfy its police power responsibility to see that the zoning change is consistent with the public health, safety, and welfare, and amounts to the exercise of the built-in flexibility in the zoning enabling acts. "The virtue of allowing private agreements to underlie zoning is the flexibility and control of the development given to a municipality to meet the ever-increasing demands for rezoning in a rapidly changing area."[419]

Later Illinois courts have taken differing positions on the legality of conditional zoning. In *Goffinet v. County of Christian*,[420] the court departed from the views expressed in the earlier Illinois decisions, including *Andres v. Village of Flossmoor*,[421] which was decided two years earlier and rejected per se invalidity of conditional zoning.[422] The challenged action there was a zoning ordinance to rezone 236 acres of

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elucidations of the local police power recognize that other kinds of application for change in regulated land use may be granted subject to the landowner's compliance with reasonable conditions," and the power to impose conditions on rezoning furthers the well-being of landowners generally, promotes community development, and serves the general welfare. *Id.* "The same police power which supports the imposition of reasonable conditions upon other kinds of changes in land use sustains the power of California counties to engage in 'conditional rezoning.'" *Id.*

[419] State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 537 (Wis. 1970); *see also* Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960); Hudson Oil Co. v. City of Wichita, 396 P.2d 271, 274 (Kan. 1964) (upholding an agreement granting rezoning only upon the landowner's agreement to dedicate a ten-foot strip along the highway for an access road, apparently to conform to the city's comprehensive plan for the remainder of the street footage); Arkenberg v. City of Topeka, 421 P.2d 213, 215 (Kan. 1966) (rejecting a contract zoning argument and upholding a zoning ordinance adopted on a landowner's promise to convey a right of way to the city along one of the streets upon which the property fronted); Transamerica Title Ins. Co. v. City of Tuscon, 533 P.2d 693, 695 (Ariz. Ct. App. 1975) (stating its agreement with other courts, including California, that have upheld conditional zoning, as an exercise of the police power); Glendon Civic Ass'n v. Borough of Glendon, 572 A.2d 852, 855 (Pa. Commw. Ct. 1990) (stating that "from our review of the record it is clear that, by enacting [the ordinance], the Borough specifically designated the site for which the conditional use was authorized. The Borough controlled the use by imposing requirements in [the ordinance] and the Agreement to prevent the facility from becoming noxious or offensive by reason of dust, odor, smoke, gas, vibration or noise"); 3 ZIEGLER, *supra* note 45, § 44:18.

[420] 333 N.E.2d 731 (Ill. 1975).

[421] 304 N.E.2d 700, 706 (Ill. 1973).

[422] *Goffinet*, 333 N.E.2d at 735.

farmland in a rural section of the county from agricultural to heavy industrial in order to permit the landowner to construct a plant where synthetic gas would be produced.[423] The ordinance was adopted pursuant to a plan prepared by a consulting firm.[424] The challengers, owners of land adjoining the subject property, argued that the ordinance was invalid "for the reason that it contain[ed] unauthorized restrictions and hence constitut[ed] conditional rezoning and also because [it] constitut[ed] 'spot zoning.'"[425]

The court pointed out that "there [was] a suitable and proper place for utilization of the process [as] some conditional rezoning may be in the public good, subservient to a comprehensive plan in the best interest of the public health, safety, and welfare and enacted in recognition of changing circumstances."[426] In the court's view, "[n]ot all conditional rezoning is onerous, destructive or an abandonment of the power of the zoning agency nor does it stem from improper motives."[427] Instead, "[u]nder the proper circumstances conditional rezoning can be a flexible land use technique of considerable utility and may constitute a valuable tool in the hands of a

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423 *Id.* at 732.

424 *Id.*

425 *Id.* The disputed ordinance contained four articles. *Id.* The first, essentially found that the best interest of the county would be served by permitting the rezoning and variance requested. *Id.* at 733. The second limited the use of the premises to "only allow the storage of naptha, petroleum products, similar hydrocarbon products, and the processing of the same into pipeline quality gas suitable for distribution, utility, and industrial purposes." *Id.* The ordinance also limited the height of structures, required compliance with local, state, and federal air, water, noise, sewage pollution, and on handling, processing, and storage of the products, and provided for reversion of the previous zoning if the property was not used for gasification plant facilities as proposed. *Id.* at 733-34.

426 *Id.* at 736. The court noted that "the legal status of so-called 'contract zoning' appear[ed] not to have been decided" in Illinois, although there was dicta in *Treadway v. City of Rockford*, 182 N.E.2d 219 (Ill. 1962) and *Hedrich v. Village of Niles*, 250 N.E.2d 791 (Ill. App. Ct. 1969), both indicating disapproval of such ordinances. *Goffinet*, 333 N.E.2d at 735. The court distinguished *Cederberg* and *Andres*, the former finding that the "City gave no consideration to the statutory standards of public health, safety, comfort, morals, and welfare," and the latter involving a requirement that the developer enter into a contract that could be recorded and constituted a covenant running with the land, both "quite properly" finding the ordinance invalid. *Id.* (emphasis omitted). The court held that *Treadway* did not "compel the conclusion that any and every conditional rezoning ordinance . . . will be invalid." *Id.* Instead, without doubt, there is a suitable and proper place for the utilization of the process of conditional rezoning, that it may be in the interests of the public health, safety, and welfare and enacted in recognition of changing circumstances. *Id.* at 736.

427 *Goffinet*, 333 N.E.2d at 736.

zoning authority in the proper exercise of their police power."[428] The court approved the rezoning ordinance.[429] The conditions permitted the land to be used "to accomplish a good for the general public but yet preserve the integrity of the comprehensive plan. The ordinance evidence[d] a real concern for the public health, safety, and welfare—[indeed] that appear[ed] to be the rationale for the enactment."[430] Such benefits should not be denied because the use of the particular tract is restricted unlike other areas similarly zoned.[431] The comprehensive plan already contemplated that there would eventually be industrial development in the vicinity and under it, the county held the power, authority, and duty to control special uses under the zoning classification with the use intended there.[432] "The benefits received from the rezoning ordinance [t]here far outweigh[ed] any evil that might be said to flow from conditional rezoning, *per se*."[433] In sum, the conditions were

> not onerous to the property owner or incompatible with the comprehensive plan, . . . [did] not constitute an abandonment of the zoning power, [were] not contractual in nature, or limited in their terms and they [did] not constitute an attempt upon the part of the zoning authority to control the use of the land. . . .[434]

Moreover, the court stated that the ordinance was not enacted as a result of negotiation of improper conduct by the zoning authority, but instead was enacted in good faith, and the conditions imposed had a reasonable and direct relationship to the purpose for which the rezoning was granted.[435]

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428 *Id.*

429 *Id.* at 738. It was adopted on the basis of the detailed findings showing

> a genuine need for the product to be produced by the plant, [which] would unquestionably serve the public health, safety and welfare. The conditions imposed [took] advantage of the unique situation presented by the near confluence of pipelines which [made] the particular location highly advantageous for the gas processing plant location.

Id. at 736.

430 *Id.*

431 *Id.*

432 *Id.*

433 *Id.*

434 *Id.* at 737.

435 *Id.* Nor was the rezoning ordinance invalid as spot zoning under the five tests for spot zoning. *Id.* To arrive at this conclusion, the court considered the following questions: whether the requirements of the comprehensive plan are met by the ordinance; the

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However, in *Ziemer v. County of Peoria*,[436] the Illinois Appellate Court reintroduced a degree of uncertainty on the legality of conditional zoning. There, the plaintiff sought invalidation of a zoning ordinance reclassifying farmland to agricultural B-3 to permit the landowner to build and operate a dance hall-tavern on the premises.[437] Plaintiff alleged the rezoning as the product of unlawful contract and conditional zoning.[438] Upon defendant's petition for rezoning, the zoning board of appeals recommended approval,

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particular use for the spot; whether there are changes in conditions in the zoning district; where the spot is located; and whether a hardship was created by any individual. *Id.* The shift toward industry was recognized in the comprehensive plan for the county. *Id.* The comprehensive plan "emphasize[d] the shift from agricultural to industry and the desirability of industry for economic growth and for keeping young people in the community." *Id.* Though location of the tract on the fringe between two zones might have more strongly supported rezoning than a tract not on the fringe, this did not preclude the validity of rezoning a tract not on the fringe. *Id.* at 737-38. "[I]n making this determination the condition of the entire region and anticipation of future needs [is to] be considered." *Id.* at 738 (citing Duffcon Concrete Prods. Inc. v. Borough of Cresskill, 64 A.2d 347 (N.J. 1949)). There was no particular hardship on any individual. *Id.* The rezoning ordinance at issue was not out of harmony with the comprehensive planning for the good of the community. *Id.*; *see also* Thornber v. Village of North Barrington, 747 N.E.2d 513 (Ill. App. Ct. 2001). The *Thornber* court stated that "conditional zoning is not invalid *per se*." *Thornber*, 747 N.E.2d at 522 (citing Goffinet v. County of Christian, 357 N.E.2d 442 (Ill. 1976)). Rather, the focus must be on the application of the traditional zoning factors laid out in an earlier Illinois Supreme court opinion. *Id.* Applying those factors to the ordinance, the court found the trial court's finding was not against the manifest weight of the evidence; the test is whether the ordinance is consistent with the comprehensive plan for use of property in the locality. *Id.* The change here impacted all property zoned residential, not just the site at issue. *Id.* at 523. Rezoning is unlawful when the change violates a zoning pattern that is homogenous, compact, and uniform. *Id.*; *see also* Lurie v. Village of Skokie, 380 N.E.2d 1120 (Ill. App. Ct. 1978). In *Lurie*, the challenged ordinance permitted the sale of certain municipal property to a developer for the construction of low-income housing for the elderly. *Id.* at 1122. Negotiations and discussions between the town and the developer occurred before the ordinance was passed after a sales contract was entered into, but the sale was offered to public bid, thereby rendering the contract zoning issue moot. *Id.* at 1127. The court, in upholding the ordinance, pointed out the developer's proposal, which was ultimately accepted, was developed over the course of those meetings. *Id.* at 1128. Though that the developer's proposal was not submitted for deliberation prior to the board's public meeting, the town's open meeting law was not violated because village officials had an opportunity to express their needed and desired requirements for the project. *Id.*

436 338 N.E.2d 145 (Ill. App. Ct. 1975).

437 *Id.* at 146.

438 *Id.*

subject to certain conditions, including that defendant dedicate to the county land to provide access to a county highway,[439] restrict the use of the land for a dance hall and public entertainment,[440] and waive and prohibit all other uses in the district.[441] In striking down the rezoning, the court discussed prior cases ruling on the validity of conditional zoning, including *Goffinet*, which had upheld conditional rezoning.[442] The court noted the value of conditional rezoning as a flexible zoning tool.[443] The court, however, pointed out that the *Goffinet* decision rested upon special circumstances in which the proposed use would benefit the public.[444] In this case, however, no such special circumstances were established, and the record was devoid of evidence showing that the public interest, health, safety, or welfare was considered at the time of the rezoning.[445] Moreover, it was clear that the covenants restricting the defendant's land were related in time to the rezoning and contained a recital that it was executed in consideration of the zoning board's approval.[446] Therefore, the plaintiff made out a prima facie case that the rezoning was done in exchange for the landowner's restrictive covenant and was therefore invalid and the rezoning amendment void.[447]

While it seems clear that after *Ziemer*, contract zoning is invalid, it is also the case now that conditional zoning, despite its declared benefits, will be upheld only in the circumstances when it appears the public interest is benefited or protected by the conditions. But this requirement seems to be a defining criterion for conditional zoning, such that the decision need not be viewed as significant retrenchment by the Illinois courts.

In *Benton v. Chattanooga*,[448] the Tennessee Court of Appeals found

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439 *Id.*

440 *Id.* at 146-47.

441 *Id.* at 147.

442 *Id.* at 148.

443 *Id.*

444 *Id.*

445 *Id.*

446 *Id.*

447 *Id.* at 149.

448 No. 808, 1988 Tenn. App. LEXIS 454 (Tenn. Ct. App. July 20, 1988). There, the plaintiff-appellant, Irene Benton, and the defendant were owners of property in the City of Chattanooga. *Id.* at *1.

> Each of the properties [was] adjacent to Bonny Oaks Drive and they [were] separated by a jointly used roadway. At the time [defendant] acquired its property in 1985 both tracts of land were zoned R-1 Residential. Soon after [defendant] acquired its property it filed a

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the use of conditional zoning not to be an abrogation of police power, but an exercise of it.[449] The court pointed out that it is the use of governmental

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request with the Chattanooga Planning Commission to rezone its property from R-1 Residential to C-2 Commercial.

Id. at *1-2. The Planning Commission recommended the rezoning, and thereafter the Board of Commissioners for the city passed an ordinance to amend the earlier ordinance to rezone the defendant's property from R-1 to C-2. *Id.* at *2. However, the rezoning was subject to certain conditions. *Id.* At trial, the chancellor held that it was not necessary to pass on the constitutionality of the zoning ordinance to make a proper determination of the case. *Id.* at *3. Resolving all of the other issues in the defendant's favor, he upheld the ordinance as being valid. *Id.* The plaintiff filed a motion to alter or amend the judgment, but the motion was overruled. *Id.* She appealed, arguing, among other things, that the alleged rezoning was impermissible contract zoning. *Id.* at *3-4. On appeal, the court determined it not necessary to rule on the constitutional issue of whether contract zoning is violative of the Constitution of Tennessee, since there was no contract zoning. *Id.* at *9. "The general law, as the Court has noted, authorizes conditional zoning which was what was done in this case." *Id.* at *5.

[449] *Id.* at *7-8. The court, citing *Haymon v. City of Chattanooga*, 513 S.W.2d 185, 188 n.1 (Tenn. Ct. App. 1973), stated the following: "Nothing in this opinion is to be construed as holding that a planning commission without a covenant cannot prescribe reasonable conditions for the benefit of the general public." *Id.* at *7. The court distinguished the cases on which the appellant relied, including *City of Knoxville v. Ambrister*, 263 S.W.2d 528 (Tenn. 1953) and *Haymon v. City of Chattanooga*, 513 S.W.2d 185 (Tenn. Ct. App. 1973). *Id.* at *6-7. The *Ambrister* case arose when the City of Knoxville sought to enforce an agreement it made with a land developer. *Ambrister*, 263 S.W.2d at 528. The city rezoned single dwelling residential property so a multiple dwelling unit could be built. *Id.* at 530. In consideration for the rezoning, the property owner promised to dedicate part of the rezoned land to the city sometime in the future. *Id.* The dedicated property was to be used as a public park. *Id.* at 529. However, the property owner reneged on his promise to dedicate. *Id.* at 530. The city filed suit to enforce the agreement. *Id.* at 528. The supreme court held this was an example of contract zoning and could not be enforced. *Id.* at 531. In *Haymon*, the property owners agreed to execute a 25-year covenant to run with the land to maintain a 200-foot buffer zone of vacant property between their apartment buildings and adjoining land, which was given in exchange for rezoning. *Haymon*, 513 S.W.2d at 186. The court of appeals said this amounted to contract zoning, which was contrary to public policy and illegal in Tennessee. *Id.* at 185. It stated,

> The same rule with respect to the validity of contracts to influence zoning seems to prevail in numerous other jurisdictions, the consensus being that contracts entered into in consideration of concessions made favoring the applicant are frowned upon as being against public policy [because] zoning is an instrument of public authority to be used only for the common welfare of all the people.

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power as a bargaining chip that earlier cases criticized as the unsavory aspect of contract zoning.[450] "When a government negotiates in this manner it agrees to limit its right and duty to act on behalf of the public."[451] "Rezoning is approved, not based upon the merits of the zone change request nor because it is in the public interest, but because a deal has been struck."[452] On the other hand, the court stated that

> the mere unilateral imposition of conditions for public benefit is quite different. In contract zoning the government entity sacrifices its authority. In conditional zoning it exercises it. By imposing conditions under which [defendant's] property could be rezoned, Chattanooga did not bargain away its authority, but rather exercised it for public safety reasons.[453]

The court went on to conclude that the conditions in the ordinance required that before the property was rezoned, safer access to it had to be provided.[454] The court stated that "[t]he proof show[ed] no evidence of a bilateral agreement. [Defendant] followed customary procedure in an attempt to have its property rezoned. There [was] no evidence of

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Id. at 188. In *Benton*, however, the court found no agreement by the city to rezone. *Benton*, 1998 Tenn. App. LEXIS 454, at *9.

450 *Benton*, 1998 Tenn. App. LEXIS, at *7.

451 *Id.*

452 *Id.*

453 *Id.* at *7-8. The Zoning Administrator for the Regional Planning Commission, testified that the defendant's proposed use was appropriate. *Id.* at *8. However, "a blanket approval without conditions was not. Problems posing a threat to public safety needed to be rectified before the property could be put to commercial use." *Id.* The court further noted the testimony of the Tennessee Department of Transportation Regional Traffic Engineer, who asserted that the existing access drive was in fact dangerous, irrespective of the zoning, and a professional engineer from the private sector, agreed with that testimony. *Id.*

> The existing drive [was] located amidst an interchange area. It directly [crossed] an exit ramp from a busy highway before connecting into Bonny Oaks Drive, the public road from which Appellant [ingressed] and [egressed] her property. This [posed] a danger because vehicles from two different roads converge onto Bonny Oaks Drive at the same point. There [were] visibility or "sight distance" problems. Commercial traffic would only augment those problems.

Id.

454 *Id.* at *8-9.

negotiations between the parties [and] there [was] no *quid pro quo*. There [were] only unilateral conditions requiring that necessary improvements be made."[455] Despite the appeal of this purported distinction, the question remains whether the developer would have offered the conditions absent the real prospect of a rezoning by the municipality. If not, then the arrangement fails to differ substantially from what is viewed as contract zoning.[456]

The Massachusetts courts also have found conditional zoning valid, departing from the views expressed by the Connecticut and Maryland courts. In *Town of Randolph v. Town of Stoughton*,[457] the court stated that

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[455] *Id.* at *9.

[456] *Id.* at *8-9. The Tennessee Code authorized the city to engage in conditional zoning. *Id.* at *9. The court never reached the constitutionality of the provision because conditional zoning is consistent with Tennessee law. *Id.*; *see also* Copeland v. City of Chattanooga, 866 S.W.2d 565, 570 (Tenn. Ct. App. 1993). In *Copeland*, the court held that the appellee's conditional zoning was a proper exercise of government police power. *Copeland*, 866 S.W.2d at 570. The testimony revealed that the development of appellants' property would create a problem remedied by the exaction. *Id.* Moreover, although the videotapes of the two city counsel meetings revealed a concern by some members that the city might need the property in the future and therefore be required to purchase it, the overwhelming evidence supported a finding that it was this particular development that would create a problem remedied by the construction of an acceleration/deceleration lane. *Id.*

[457] No. 97-0197, 1997 Mass. Super. LEXIS 410 (Mass. Super. June 23, 1997). There, defendant (the Trust), the owner of two parcels of land in the Stoughton Technology Center in the Town of Stoughton, undertook a project to construct and operate a cinema in the "Center." *Id.* at *6.

> The Land owned by the Trust was located in an "Industrial" zoning district in which the proposed cinema project was a prohibited use. [T]he Stoughton Planning Board convened a public hearing to consider an amendment to the Zoning Map rezoning the Land to a "Highway Business" zoning district in which a cinema would be permissible.

Id. The town voted to enact the amendment. *Id.* Thereafter, the Trust applied to the Stoughton Zoning Board of Appeals (ZBA) for a 13.5-foot variance from the 30-foot height restriction imposed on all buildings in the "Highway Business" zoning district. *Id.* "The ZBA found that in view of conditions and circumstances uniquely affecting the Land, the Trust was entitled to the requested height variance, but conditioned the variance on, among other things, the construction of a pedestrian overpass across Technology Center Drive," a four-lane street separating the proposed cinema building from the cinema parking lot. *Id.* at *7. Thereafter, the Town of Randolph filed the present action against the Town of Stoughton, the ZBA, the Planning Board, and the Trust, alleging that the rezoning of the

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"'[c]ontract zoning' is the term given to acts of rezoning granted on the express condition that owners impose certain restrictions on their land in order to obtain the desired rezoning."[458] An example of invalid contract zoning would be if the town had conditioned the rezoning of the locus based on a landowner's dedication of land for public use elsewhere in the town.[459]

> However, [here, the plaintiff's] allegation that the town rezoned the Land from "Industrial" to "Business Highway" on the condition that the [landowner] build a movie theater there, conferring tax benefits on the town, simply [did] not constitute the type of extraneous consideration unrelated to the locus necessary to establish contract zoning. The proposed use of the particular land [was] intimately related to the locus and [would] always be a relevant area of concern for zoning authorities so that the imposition of conditions on the proposed use of the locus cannot be considered "extraneous."[460]

Land from "Industrial" to "Business Highway" was invalid either as spot zoning or contract zoning. *Id.* at *7-8. The Massachusetts Code provided that "any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted." *Id.* at *32-33 (quoting MASS. GEN. LAWS ch. 40A, § 4 (1994)). The court construed this provision as prohibiting "'spot zoning,' defined as a legislative change to existing zoning restrictions which arbitrarily and unreasonably singles out one parcel of land for treatment differently from that accorded surrounding parcels in the same district indistinguishable in character." *Id.* at *33. Randolph's allegation of unconstitutional contract zoning "[failed] to state a cognizable claim because it [did] not allege that the rezoning of the Land was conditioned on extraneous considerations." *Id.* at *36. The court held that

> although Randolph [was] an abutter to the rezoned parcel at issue, Randolph clearly [did] not own property in the same zoning district or even within the same municipality as the Trust's land, and thus had no standing under [the code], which requires uniformity *within* each zoning district of a city or town and to a lesser extent, uniformity among districts within a single city or town.

Id. at *34.

458 *Id.* at *36.

459 *Id.*

460 *Id.* at *37; *see also* Scrutton v. County of Sacramento, 79 Cal. Rptr. 872 (Cal. Ct. App. 1969) (upholding conditional zoning where public interest served); Konkel v. Common Council, 299 N.W.2d 606 (Wis. 1975) (upholding rezoning ordinance contingent

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In a well-articulated justification for conditional zoning, the New York Court of Appeals upheld such an ordinance in *Collard v. Inc. Village of Flower Hill*.[461] The Court of Appeals began its discussion of the issues by

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on landowner's fulfilling certain conditions when the ordinance was otherwise not arbitrary or capricious).

[461] 421 N.E.2d 818 (N.Y. 1981). In *Collard*, in 1976, the earlier owners of the subject premises and appellants' predecessors in title applied to the village board of trustees to rezone the property from a General Municipal and Public Purposes District to a Business District. *Id.* at 819. That year, the village board granted the rezoning application, subject to various conditions. *Id.* Previously, the subject premises, then vacant, had been zoned for single-family dwellings with a minimum lot size of 7,500 square feet. *Id.* n.1. The court stated that

> [i]n that year the then owners applied to the village board to rezone a portion of the property and place it in the General Municipal and Public Purposes District so that a private sanitarium might be constructed. Concurrently with that application a declaration of covenants restricting the use of the property to a sanitarium was recorded in the county clerk's office. The village board then granted the rezoning application, but limited the property's use to the purposes set forth in the declaration of covenants.

Id. n.1. Subsequently, appellants' predecessors in title entered into the contemplated declaration of covenants, which was recorded some twelve years later. *Id.* at 820. Consistent with the board's resolution, that declaration provided that "no building or structure situated on the Subject Premises on the date of this Declaration of Covenants will be altered, extended, rebuilt, renovated or enlarged without the prior consent of the Board of Trustees of the Village." *Id.* "The 1976 rezoning application, which as conditionally granted [was] the subject of this suit, was made because the private sanitarium had fallen into disuse and it was asserted that without rezoning the property could neither be sold nor leased." *Id.* at 819 n.1.

> Appellants, after acquiring title, made application [two years later] to the village board for approval to enlarge and extend the existing structure on the premises. Without any reason being given that application was denied. Appellants then commenced this action to have the board's determination declared arbitrary, capricious, unreasonable, and unconstitutional and sought by way of ultimate relief an order directing the board to issue the necessary building permits.

Id. at 820. The appellants contended that the conditions imposed amounted to invalid spot zoning and conditional zoning. *Id.* at 821. Claiming that the board's denial of the application was beyond review as to reasonableness, respondent moved to dismiss the complaint. *Id.* at 820. That motion was denied, that court "equating appellants' allegation that the board's action was arbitrary and capricious with an allegation that such action was

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stating that

> [p]rior to our decision in *Church v Town of Islip*, in which we upheld rezoning of property subject to reasonable conditions, conditional rezoning had been almost uniformly condemned by courts of all jurisdictions—a position to which a majority of States appear to continue to adhere. Since *Church*, however, the practice of conditional zoning has [achieved] widespread [acceptance] in this State, as well as having gained popularity in other jurisdictions.[462]

The court pointed out that "[p]robably the principal objection to conditional rezoning is that it constitutes illegal spot zoning, thus violating the legislative mandate requiring that there be a comprehensive plan for, and that all conditions be uniform within, a given zoning district."[463] The court explained that when courts have considered the issue, "the assumptions have been made that conditional zoning benefits particular landowners rather than the community as a whole and that it undermines the foundation upon which comprehensive zoning depends by destroying uniformity within use districts."[464] However, these unexamined assumptions must be questioned. First, the court said, it is a downward change to a less restrictive zoning classification that benefits the property rezoned and not the opposite imposition of greater restrictions on land use.[465] Indeed, the imposition of limiting conditions benefits surrounding properties, but "normally adversely affects the premises on which the conditions are imposed."[466] Second, the court ruled that the mere fact that only a single parcel is involved or benefited does not render the zoning invalid per se.[467] Instead,

> the real test for spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community. Such a determination, in turn, depends on the

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lacking in good faith and fair dealing—an allegation which it found raised triable issues of fact." *Id.* The appellate court reversed and dismissed the complaint, "holding that the allegation of arbitrary and capricious action by the board was not the equivalent of an allegation that the board breached an implied covenant of good faith and fair dealing." *Id.*

462 *Id.* at 820 (citations omitted).

463 *Id.* at 821.

464 *Id.*

465 *Id.*

466 *Id.*

467 *Id.*

> reasonableness of the rezoning in relation to neighboring uses—an inquiry required regardless of whether the change in zone is conditional in form. Third, if it is initially proper to change a zoning classification without the imposition of restrictive conditions notwithstanding that such change may depart from uniformity, then no reason exists why accomplishing that change subject to condition should automatically be classified as impermissible spot zoning.[468]

The court continued by stating that

> [b]oth conditional and unconditional rezoning involve essentially the same legislative act—an amendment of the zoning ordinance. The standards for judging the validity of conditional rezoning are no different from [those] used to judge whether unconditional rezoning is illegal. It stands that [if] modification to a less restrictive zoning classification is warranted, then a fortiori conditions imposed by a [zoning authority] to minimize conflicts among districts should not in and of themselves violate any prohibition against spot zoning.[469]

Nor should a conditional zoning ordinance be struck down on the basis of public policy, that is, that municipal governments lack "the power to make contracts that control or limit them in the exercise of their legislative powers and duties."[470] Just as "permitting citizens to be governed by the best bargain they can strike with a local legislature would not be consonant with notions of good government, absent proof of a contract purporting to bind the local legislature in advance to exercise its zoning authority in a bargained-for manner," so also would "a rule [having] the effect of forbidding a municipality from trying to protect landowners in the vicinity of a zoning change by imposing protective conditions."[471]

> The imposition of conditions on property sought to be rezoned may not be classified as a prospective commitment on the part of the municipality to zone as requested if the conditions are met; nor would the

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468 *Id.* (citation omitted).

469 *Id.*

470 *Id.*; *see also* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (striking down rezoning ordinance based upon landowners agreeing to conditions); Baylis v. City of Baltimore, 148 A.2d 429 (Md. 1959) (same).

471 *Collard*, 421 N.E.2d at 821.

> municipality necessarily be precluded on this account from later reversing or altering its decision.[472]

The court concluded as follows:

> Conditional rezoning is a means of achieving some degree of flexibility in land-use control by minimizing the potentially deleterious effect of a zoning change on neighboring properties; reasonably conceived conditions harmonize the landowner's need for rezoning with the public interest and certainly fall within the spirit of the enabling legislation.[473]

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[472] *Id.* at 822 (citing Grimpel Assoc. v. Cohalan, 361 N.E.2d 1022 (N.Y. 1977)). Further, the court found that

> [w]hile it is accurate to say there exists no explicit authorization that a legislative body may attach conditions to zoning amendments, neither is there any language which expressly forbids a local legislature to do so. Statutory silence is not necessarily a denial of the authority to engage in such a practice. Where in the face of nonaddress in the enabling legislation there exists independent justification for the practice as an appropriate exercise of municipal power, that power will be implied.

Id. (citation omitted).

[473] *Id.* (citation omitted) (citing Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960)). The court then stated that

> [o]ne final concern of those reluctant to uphold the practice is that resort to conditional rezoning carries with it no inherent restrictions apart from the restrictive agreement itself. This fear, however, is justifiable only if conditional rezoning is considered a contractual relationship between municipality and private party, outside the scope of the zoning power—a view to which we do not subscribe. When conditions are incorporated in an amending ordinance, the result is as much a "zoning regulation" as an ordinance, adopted without conditions. Just as the scope of all zoning regulation is limited by the police power, and thus local legislative bodies must act reasonably and in the best interests of public safety, welfare and convenience, the scope of permissible conditions must of necessity be similarly limited. If, upon proper proof, the conditions imposed are found unreasonable, the rezoning amendment as well as the required conditions would have to be nullified, with the affected property reverting to the pre-amendment zoning classification.

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Id. (citations omitted) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); New York Inst. of Tech. v. LeBoutillier, 305 N.E.2d 754, 757 (N.Y. 1973); Concordia Collegiate Inst. v. Miller, 93 N.E.2d 632, 636 (N.Y. 1950)). The court then discussed appellant's argument by stating that it

> [p]roceed[ed] along two paths: first, that as a matter of construction the added prescription [that the town not act arbitrarily] should be read into the provision; second, that because of limitations associated with the exercise of municipal zoning power the village board would have been required to include such a prescription.

Id. at 823. The court found this argument to be without merit. *Id.*

> Appellants' construction argument must fail. The terminology employed in the declaration is explicit. The concept that appellants would invoke is not obscure and language to give it effect was readily available had it been the intention of the parties to include this added stipulation. Appellants point to no canon of construction in the law of real property or of contracts which would call for judicial insertion of the missing clause. Where language has been chosen containing no inherent ambiguity or uncertainty, courts are properly hesitant, under the guise of judicial construction, to imply additional requirements to relieve a party from asserted disadvantage flowing from the terms actually used. The second path either leads nowhere or else goes too far. If it is appellants' assertion that the village board was legally required to insist on inclusion of the desired prescription, there is no authority in the court to reform the zoning enactment of 1976 retroactively to impose the omitted clause. Whether the village board at that time would have enacted a different resolution in the form now desired by appellants is open only to speculation; the certainty is that they did not then take such legislative action. On the other hand, acceptance of appellants' proposition would produce as the other possible consequence the conclusion that the 1976 enactment was illegal, throwing appellants unhappily back to the pre-1976 zoning of their premises, a destination which they assuredly wished to sidestep.

Id. (citations omitted). The court concluded that it agreed with the Appellate Division's finding

> that the allegation of the complaint that the village board in denying appellants' application acted in an arbitrary and capricious manner is not an allegation that the board acted in bad faith or its equivalent. For the reasons stated, the Board of Trustees of the Incorporated Village of Flower Hill may not now be compelled to issue its consent to the proposed enlargement and extension of the existing structure on the

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The *Collard* decision perhaps is not as far-reaching as it might seem at first. First, the court seems to place great significance on the fact that the conditions operated to restrict uses of the land otherwise permitted, not to allow different uses as a true rezoning would produce. Second, that the standards for judging the validity of conditional rezoning are no different than the standards used to judge whether unconditional rezoning is illegal suggests that the rezoning takes place in the abstract without regard to the petitioning landowner's intended uses, which is not the case because of the conditions imposed. As a criticism of this reasoning, does not the imposition of conditions suggest that the municipality would have refrained from rezoning absent the landowner's agreement to the conditions? This seems like an inducement to rezone, yet not one that should be condemned when the conditions serve the public interest.[474]

> premises or in the alternative give an acceptable reason for failing to do so. Accordingly, the order of the Appellate Division [was] affirmed . . . .

Id.

[474] *See* Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960). In *Church*, the town board acted unanimously to rezone a corner lot that was an irregular strip. *Id.* at 681. The board's consent to the rezoning was granted under the following conditions: the building could not be more than 25% of the area; an anchor post fence, or equal, six feet high, was to be erected five feet within the boundary line of the property; live shrubbery had to be planted; and these requirements had to occur before carrying on any retail business on the property. *Id.* The court explained that "zoning being a legislative act, (not a variance) is entitled to the strongest possible presumption of validity and must stand if there [is] any factual basis therefore." *Id.* at 682. The court rejected the argument that this was contract zoning; all of the appellants' arguments "revolve[d] about the idea that this [was] illegal as 'contract zoning' because the Town Board, as a condition for rezoning, required the owners to . . . record restrictive covenants as to maximum area to be occupied by [the] buildings and as to a fence and shrubbery." *Id.* at 683. The court reasoned that "[s]urely these conditions were intended to be and are for the benefit of the neighbors. Since the Town Board could have, presumably, zoned this . . . corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation." *Id.* The court explained that "what 'contract zoning' means is unclear and there is really no New York law on the subject. All legislation 'by contract' is invalid in the sense that a Legislature cannot bargain away or sell it powers." *Id.* But, the court would "deal here with actualities and not phrases." *Id.*

> To meet increasing needs of [the county's] own population explosion, and at the same time to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the [t]own . . . imposes conditions. There [was] nothing unconstitutional about it. Incidentally, the record [did] not show any

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> agreement in the sense that the owners made an offer accepted by the board.

Id.; *see also In re* Rosedale Ave., 243 N.Y.S.2d 814 (N.Y. Sup. Ct. 1963). In *In re Rosedale Avenue*, the city sought and acquired title to five parcels of real estate for street widening purposes. *Id.* at 815. The property owners disagreed with the city as to how much they should be compensated for the taking of their property. *Id.* at 817. The only significant issue involved a determination of damages for the parcel of real estate that was occupied by a bowling alley, which was a nonconforming use to the residential zoning of the property. *Id.*

> The claimant contend[ed] that the agreement of April 18, 1956, waiving enhancement of value of the strip taken by reason of the zoning change for retail use [was] not binding [because, among other things,] if the waiver was a condition imposed by the Board of Estimate such condition would be illegal as constituting so-called "contract zoning."

Id. The court rejected plaintiff's argument holding that "[e]ven assuming that the Board of Estimate had imposed the waiver agreement as a condition for the change, it does not necessarily follow that such condition was not validly imposed in the best interests of the citizens of the City of New York." *Id.* (citing *Church*, 168 N.E.2d 680; Point Lookout Civic Ass'n v. Town of Hempstead, 200 N.Y.S.2d 925 (N.Y. Sup. Ct. 1960), *aff'd*, 207 N.Y.S.2d 121 (N.Y. App. Div. 1960), *aff'd*, 176 N.E.2d 203 (N.Y. 1961)). *But see* Levine v. Town of Oyster Bay, 272 N.Y.S.2d 171 (N.Y. App. Div. 1966). In *Levine* the court distinguished *Church v. Town of Islip*. *Id.* at 173. There, after a public hearing, the town voted to adopt a resolution amending the building zone ordinance changing a landowner's approximately fourteen acres from residential to industrial. *Id.*

> One of the four conditions attached to this amendment was that the grade of the affected piece . . . be reduced to that of [the road] on which it fronted. The existing grade [was] 15 to 18 feet higher than the road and [would] require the removal of approximately 267,000 cubic yards of earth.

Id. Homeowners with adjacent residences or residences near the rezoned parcel challenged the rezoning. *Id.* "The . . . amendment was struck down . . . on the ground that the condition concerning the grade was *in futuro*." *Id.* The court stated that *Church*

> teaches that conditions *per se* do not void zoning amendments. However, in this case, the condition was proposed by the applicants for the downzoning and was adopted *in toto* by the [t]own [b]oard. [The] rezoned parcel [was] the first industrial intrusion in the area and it seriously upse[t] the use balance that had been advised and maintained with respect to the zoning on each side of [the road].

(*continued*)

Perhaps the court should have explained that carrying out the public interest requires rezoning in response to market, demographic, and technological changes affecting land use, and that a municipality can responsibly adhere to land use policy as identified in comprehensive plans and at the same time allow for changes in land use through rezoning with conditions.

Id. In sum, the rezoning appeared "not made for the general welfare of the Town but for the personal benefit of [the landowner], who petitioned for precisely the change and conditions that were adopted." *Id.* This constituted spot or contract zoning. *Id.* However, this case can be criticized for finding contract zoning without finding a reciprocal promise by the town to rezone. Instead, the better basis for striking down the rezoning should have been on its merits as not reflecting concern for the public interest. *See* Hiscox v. Levine, 216 N.Y.S.2d 801 (N.Y. Sup. Ct. 1961). In *Hiscox*, the court distinguished *Church* on the facts. There, the town authorized the respondent planning board to make reasonable changes in zoning regulations, but it required the maintenance of the average population density and strict conformance with Town Law § 281. *Id.* at 804. The developer offered land for a park in exchange for a variance to develop the rest of the property. *Id.* at 803. The court noted that "[i]n support of their positions both sides place some reliance on *Church v. Town of Islip*," but explained that in that case "the Town Board granted a change of zoning from residence to business on condition that the owner comply with stated requirements. As against an argument that the [b]oard engaged in 'contract zoning,' the [c]ourt upheld the change." *Id.* at 807 (citation omitted). In *Hiscox*, the court stated that

> [c]ontrary to the respondents' belief, the *Church* case does not support their positions. In the first place, the action . . . reviewed was legislative action by the Town Board, not administrative action. In the second place, the [*Church* c]ourt specifically noted that the conditions "were intended to be and are for the benefit of the neighbors" and that the Town Board "could have, presumably, zoned this Bay Shore Road corner for business without any restriction." The respondents [in *Hiscox* could not] make either claim. Except for the conclusion that the plans "appropriately and adequately safeguard the use of adjoining lands" there [was] not one shred of evidence to show benefit or even regard for the neighbors. Nor have respondents argued that all the lands zoned "A" could have been zoned "B" by the board absent the park element.

Id. (citation omitted). The court concluded that "[t]here [could] be no doubt that the Board's sole motivation was the lure of a large park, the dedication of which was not imposed by the Board as a condition, but offered by the developers as the price for rezoning." *Id.*

In *Holmes v. Planning Board of New Castle*,[475] the court held in a lengthy opinion that

> [c]onditions imposed as an incident of approval in a developmental permit control system are a major weapon in a planner's arsenal. Conditions allow flexibility and fairness in land use and development control decisions, and provide the ability to deal with problems such as traffic congestion, something barely contemplated under zoning schemes . . . . The most common utilizations of conditions in land use and development decisions occur in nondiscretionary determinations which are made subject to conditions publicly specified in advance, e.g., special permits, or discretionary determinations subject to stipulated conditions, e.g., variances or site plan approval.[476]

The court then held that "[i]n New York, the use of reasonable conditions as a land control device has been long upheld."[477]

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[475] 433 N.Y.S.2d 587 (N.Y. App. Div. 1980). In *Holmes*, the court upheld the town's power under the enabling act to approve site plans conditionally to mitigate, among other things, traffic congestion. *Id.* at 599.

[476] *Id.* at 596 (citations omitted) (citing Fonoroff & Terrill, *Controlling Traffic Through Zoning*, 21 SYRACUSE L. REV. 857 (1970); Freilich & Quinn, *Effectiveness of Flexible and Conditional Zoning Techniques—What They Can not Do for Our Cities*, 1979 INST. ON PLAN. ZONING & EMINENT DOMAIN 167, 193)).

[477] *Id.* (citing Matter of Reed v. Bd. of Standards & Appeals, 174 N.E. 301 (N.Y. Ct. App. 1931); Church v. Town of Islip, 168 N.E.2d 680 (N.Y. Ct. App. 1960)). The *Holmes* court went on to reject the petitioners' claim that the condition that they consent to an easement as a requisite for the approval of the site plan imposed on them was unreasonable because it was arbitrary. *Id.* Petitioners argued "that the condition must be stricken because it was not 'directly related to and incidental to the proposed use' of their property." *Id.* The test for determining whether such a requirement is invalid is derived from the fundamental rule regarding the exercise of police power—"that there is some evil extant or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to that purpose." *Id.* at 596-97 (quoting Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585, 589 (N.Y. 1971)). The court went on to state, "The petitioners contend that no condition may be imposed which alleviates public needs other than those which are 'uniquely and specifically attributable' to the development proposed in their application." *Id.* at 597. The corollary to this rule is "that the benefit deriving from a condition must accrue to the development rather than the public as a whole." *Id.* The court then proceeded to state that

(*continued*)

VI. CONDITIONAL USE DISTRICT ZONING IN NORTH CAROLINA UPHELD AS NOT INVOLVING CONTRACT ZONING

In North Carolina, there is a land use device called "conditional use district zoning."[478] With this device, the landowner requests a rezoning to a conditional use district and a conditional use permit.[479] After rezoning to a conditional use district, the local government must issue a conditional use permit before any desired use will be permitted.[480] Conditions are placed in the permit, not in the zoning ordinance, thereby on its face avoiding a claim of conditional zoning.[481] "Conditional use district zoning" differs from contract zoning in that the former features merely a unilateral promise from the landowner regarding future use. No bilateral contract binds the zoning authority. At the same time, "conditional use district zoning" allows the local government to consider proposed land use when evaluating a zoning application.[482] As originally conceived, "conditional use district zoning" consisted of two steps: (1) a legislative process to consider the rezoning request, and (2) a quasi-judicial proceeding to determine whether a permit is appropriate under the circumstances presented by the application.[483] A lower court held that without the second step, the zoning decision would be based on the

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> [t]hese criteria posed great difficulties for municipal authorities confronted by small residential subdivisions which could not contribute properly sized recreational facilities but whose presence still generated need, by industrial subdivisions which caused environmental needs not within the category of assessment soluble problems, and by the inability to equate the cost of the exaction with the benefit to or need created by the development being accessed. As a result of these difficulties, another approach was generated—the Rational Nexus Test.

Id. at 598 (citations omitted). This test draws support "from the police power in allowing conditions based on future oriented planning. Thus, a subdivider can 'be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision.'" *Id.* (quoting Longbridge Builders v. Planning Bd. of Princeton, 245 A.2d 336, 337 (N.J. 1968)). "The rational nexus test relieves the highly constricting uniqueness factor and allows some incidental benefit to the general public." *Id.* Here, the condition had a rational nexus in that it was imposed to alleviate traffic congestion posed by the development. *Id.* at 599.

478 CHARLOTTE, N.C., CODE OF ORDINANCES §§ 6.201-6.208 (2000).

479 *Id.* § 6.202.

480 *Id.*

481 *See id.* § 6.205.

482 *See id.* § 6.204.

483 *See id.*

proposed use of the property—a classic illustration of illegal contract zoning.[484]

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[484] *See* Massey v. City of Charlotte, No. 99-CVS-18764, 2000 WL 33915844 (N.C. Super. Apr. 17, 2000), *rev'd*, 550 S.E.2d 838 (N.C. Ct. App. 2001). However, the North Carolina Legislature amended the zoning laws to authorize conditional zoning in Mecklenburg County until 2001, thus providing for parallel rules, one set for Mecklenburg County and another for the rest of the state. *See* 1999 N.C. Sess. Law. 2000-77. In most of the state, local governments employ a legislative process to make zoning decisions and may not consider a specific use in making that zoning decision. *See id.* Once the rezoning has occurred, the municipality then holds a quasi-judicial hearing to issue a conditional use permit for the specific use. *See id.* § 1(d). Within the county, local governments have the temporary statutory authority to approve a rezoning using a single-step, a purely legislative process, subject to a deferential judicial review, and may consider the tract's proposed used in making the zoning decision. *See id.* § 1(e). That is, the new law could be viewed as authorizing conditional zoning and contract zoning in the county because it enabled a rezoning based upon a petition including a site plan and supporting information that specified actual use or uses intended for the property and the rules, regulations, and conditions that, in addition to predetermined ordinance requirements, would govern the development and use of the property. *Id.* § 1(b). But, conditional zoning decisions must be made in consideration of the comprehensive plan, strategic plan, district plan, area plan, and other policy documents. *Id.* § 1(c); *see also* Stephen C. Keadey, Recent Developments, *Into the Danger Zone:* Massey v. City of Charlotte *and the Fate of Conditional Zoning in North Carolina*, 79 N.C. L. REV. 1155 (2001). *But see* Massey v. City of Charlotte, 550 S.E.2d 838 (N.C. Ct. App. 2001). In *Massey*, the court overruled the trial court's conclusions that the courts and the legislature have limited such approval of conditional use district zoning to systems that utilize a two step process—a legislative rezoning decision followed by a quasi-judicial determination of whether to issue a conditional use permit. *Id.* at 844. The court found that the ordinance on conditional use permits allowed an applicant to apply separately for rezoning and a conditional use permit, but that the ordinance allowed for both to be approved or disapproved in a single public hearing held before the Board of Commissioners. *Id.* at 843. The court further held that the Board was within its powers to create a special use district that would not require a special use permit, and that the absence of a second quasi-judicial step did not render the rezoning decision contract zoning when the city made no promise to the landowner regarding the rezoning, but instead the landowner only promises to limit uses to those in application. *Id.* at 845.

> Developers championed Charlotte's rezoning procedure because it had the capacity to expedite growth. By condensing the process to one step, foregoing the potentially time-consuming quasi-judicial requirements, developers could receive the zoning decision and conditional use permit quickly. The additional step required by *Massey* constitute[ed], to some developers, an "additional procedural hurdle" that merely slow[ed] and complicat[ed] the process.

(*continued*)

The North Carolina Supreme Court in *Chrismon v. Guilford County*[485] dealt with concept and the question of whether it constitutes illegal

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Keadey, *supra*, at 1171.

[485] 370 S.E.2d 579 (N.C. 1988). In *Chrismon*,

> beginning in 1980, [landowner] moved some portion of his business operation from the 3.18-acre tract north of Gun Shop Road to the 5.06-acre tract south of Gun Shop Road, directly adjacent to plaintiffs' lot. Subsequently, [landowner] constructed some new buildings on this larger tract, erected several grain bins, and generally enlarged his operation. Concerned by the increased noise, dust, and traffic caused by [landowner's] expansion, plaintiffs filed a complaint with the Guilford County Inspections Department. The Inspections Department subsequently notified [landowner] by letter dated 22 July 1982, that the expansion of the agricultural chemical operation to the larger tract adjacent to plaintiffs' lot constituted an impermissible expansion of a nonconforming use. The same letter informed [landowner] further that, though his activity was impermissible under the ordinance, . . . he could request a rezoning of the property. Shortly thereafter, [landowner] applied to have both of the tracts in question . . . rezoned from A-1 to "Conditional Use Industrial District" ("CU-M-2"). He also applied for a conditional use permit, specifying in the application that he would use the property as it was then being used and listing those improvements he would like to make in the next five years. Under the CU-M-2 classification, [landowner's] agricultural chemical operation would become a permitted use upon the issuance of the conditional use permit. The Guilford County Planning Board met . . . and voted to approve the recommendation of the Planning Division that the property be rezoned consistent with [landowner's] request.

Id. at 581-82 (emphasis omitted). The trial court affirmed the validity of the rezoning in question. *Id.* at 582. The court of appeals reversed, holding, first, that the rezoning in question constituted illegal "spot zoning" and, second, that it also constituted illegal "contract zoning." *Id.* The court of appeals found that

> [t]he rezoning was accomplished upon the assurance that [landowner] would submit an application for a conditional use permit specifying that he would use the property only in a certain manner. The Court of Appeals concluded that, in essence, the rezoning here was accomplished through a bargain between the applicant and the Board rather than through a proper and valid exercise of [the c]ounty's legislative discretion. According to the Court of Appeals, this activity constituted illegal "contract zoning" and was therefore void.

Id.

contract zoning or permissible conditional zoning. While the court recognized that contract zoning and conditional zoning were "two very different concepts," it did not recognize the distinction between conditional use district zoning and conditional zoning. The latter had therefore not been held valid in North Carolina.[486] In *Chrismon*, the court conflated the two, setting up a regime in the state that was ad hoc, with "local governments employing a wide variety of conditional use district zoning procedures."[487]

The court held "that the rezoning at issue—namely, the rezoning of [landowner's] two tracts of land from A-1 [permitting the storage and sale of grain, but not agricultural chemicals] to CU-M-2 [permitting the storage and sale of agricultural chemicals]—was, in truth, valid conditional use zoning and *not* illegal contract zoning."[488] The court continued by stating, "Illegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a *bilateral* contract."[489] A city council enters into an agreement with the landowner and then rezones the property; the agreement includes not merely a promise by the owner of the property to restrict uses on the land, but the city council binds itself to enact the zoning amendment.[490] The court noted that most courts would conclude that by this agreement to curtail its legislative power, the city council has acted *ultra vires*.[491] Such contract zoning is illegal and the rezoning a nullity.[492] "[C]ontract zoning of this type is objectionable primarily because it represents an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions."[493] As the court indicated,

> valid conditional use zoning, on the other hand, is an entirely different matter. Conditional use zoning . . . is an outgrowth of the need for a compromise between the interests of the developer who is seeking appropriate rezoning for his tract and the community on the one hand and the interests of the neighboring landowners who will suffer if the most intensive use permitted by the new

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486 *See id.* at 593.

487 Keadey, *supra* note 484, at 1166-67.

488 *Chrismon*, 370 S.E.2d at 593.

489 *Id.* (citing Ronald M. Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968); DANIEL R. MANDELKER, LAND USE LAW § 6.59 (1st ed. 1982)).

490 *Id.*

491 *Id.*

492 *Id.* (citing Shapiro, *supra* note 489, at 269).

493 *Id.* (citing Wegner, *supra* note 40).

classification is instituted.[494]

One commentator has described the mechanics of conditional use zoning as follows:

> An orthodox conditional zoning situation occurs when a zoning authority, *without committing its own power*, secures a property owner's agreement to subject his tract to certain restrictions as a prerequisite to rezoning. These restrictions may require that the rezoned property be limited to just one of the uses permitted in the new classification; or particular physical improvements and maintenance requirements may be imposed.[495]

In the court's view, therefore

> the principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner's intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a

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[494] *Id.* The court found support for this conclusion in the general statutes that explicitly enabled local governments to employ conditional use zoning. *Id.* at 585. The statute expressly empowered local governments to divide their territorial jurisdictions into districts. *Id.* Within these districts, a county may regulate and restrict, among other things, the uses of buildings or land, and such districts may include special use districts or conditional use districts. *Id.* (quoting N.C. GEN. STAT. § 153A-342 (1987)). Although that statute was not in effect at the time the facts arose here, the court found the predecessor statute, while not specifically mentioning conditional use zoning, provided support since the statute did provide that local governments could divide up the area into districts. *Id.* at 585-86. It was on this basis Guilford County enacted the zoning ordinance at issue, and the absence of reference to conditional zoning alone was not an indication of lack of authority. *Id.*

[495] *Id.* at 593-94 (emphasis in original) (quoting Shapiro, *supra* note 489, at 270-71).

zoning amendment.[496]

Here, the record revealed no evidence of a bilateral contract.[497] Instead, the facts showed that upon learning of the landowner's uses of the land, the Gilford County Inspections Department advised him of his options, including petitioning for a rezoning, but not guaranteeing the rezoning.[498] It was the landowner who subsequently initiated the rezoning by a petition for rezoning and application for conditional use district permit, in which he described his proposed uses and made unilateral promises in this connection.[499] In acting on the landowner's petition and application, the Board held public hearings and acted independently, having regard for the impact of the new uses on the surrounding land.[500] The Board heard from scores of neighboring landowners in support of the application.[501]

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496 *Id.* at 594. "The Court of Appeals, in its opinion in this case, determined that 'the rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion.'" *Id.* (quoting Chrismon v. Guilford County, 354 S.E.2d 309, 314 (N.C. Ct. App. 1987)). "In so doing, it concluded, in essence, that the zoning authority here—namely, the Guilford County Board of Commissioners—entered into a bilateral agreement, thereby abandoning its proper role as an independent decision-maker and rendering this rezoning action void as illegal contract zoning." *Id.* The majority thought the appellate court did not fully grasp the subtle differences between contract zoning and conditional use zoning. *Id.* at 593.

497 *Id.* at 594.

498 *Id.*

499 *Id.*

500 *Id.* at 595.

501 *Id.* The court also ruled that the rezoning was not invalid spot zoning, noting that not all instances of spot zoning are invalid. *Id.* at 588. Rather, the determination requires a consideration of a number of factors, including the degree of public benefit created by the zoning action and the similarity of the proposed use of the tracts under the new conditional use zones to uses in the surrounding preexisting zone. *Id.* at 589. That the landowner is benefited by the rezoning does not automatically cast the rezoning as an instance of spot zoning. *Id.* at 589-90. Rather, the effect on the whole community is the most significant issue. *Id.* at 590. Here, while the landowner did reap the benefit of the rezoning, by being "able to carry on an otherwise illegal storage and sale of agricultural chemicals," *id.*, it was beyond question that the neighboring landowners had also benefited by being able to purchase those chemicals. *See id.* And, the proposed use did not differ substantially from the uses already present in the surrounding areas. *Id.* at 591. The landowner could continue with the very activities conducted under the pre-zoning as a conforming use (the storage and sale of grain), but was essentially restricted to the very activities (the storage and sale of agricultural chemicals) in which he was then engaged. No "parcel" was "wrenched" out of a uniform and drastically distinct area. *Id.*

The court cautioned that although it was expressly recognizing conditional use zoning, this land use device, to be valid, must be determined to be "reasonable, neither arbitrary, nor unduly discriminatory, and in the public interest."[502] However, "it is not necessary that property rezoned to a conditional use district be available for all of the uses allowed in the corresponding general use district," since the principle advantage of conditional zoning is the allowance of suitable uses, at the same time not allowing uses that are more clearly inconsistent with ongoing uses under the predecessor zone.[503]

In a forceful dissent, one justice pointed out that the effect of the decision was to overrule two prior decisions that reached the opposite result on the same facts,[504] *Blades v. City of Raleigh*,[505] and *Allred v. City of Raleigh*.[506] The dissent explained, "[I]n an attempt to distinguish *Blades* and *Allred* from this case the majority goes to some length in explaining the difference between what it says is valid conditional use zoning and illegal contract zoning."[507] The dissent further criticized the majority opinion, asserting that the majority's definitions of conditional use zoning and contract zoning are not in accordance with the *Blades* and *Allred* opinions.[508]

> The facts in each of those two cases were that a landowner petitioned the City of Raleigh for a change in the zoning ordinance. In each case the landowner submitted plans for the buildings he would construct if the change was made. The City Council in each case rezoned the property as requested by the landowner. This Court in each case held this was illegal contract zoning. There was no more evidence in either case that there was a bilateral contract or any reciprocal promises than there is in this case. There was no more evidence in those cases than there is in this case that the zoning board abandoned its independent decision making authority. In my opinion *Blades* and *Allred* are indistinguishable from this case. I believe that prior to today the rule was that if a person requested a

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502 *Id.* at 586.

503 *Id.* at 587. *But see* Hall v. City of Durham, 372 S.E.2d 564, 569 (N.C. 1988) (holding that only zoning changes from a general use district to a conditional use district allow the limitation on uses within the zone).

504 *Chrismon*, 370 S.E.2d at 597 (Webb, J., dissenting).

505 187 S.E.2d 35 (N.C. 1972).

506 178 S.E.2d 432 (N.C. 1971).

507 *Chrismon*, 370 S.E.2d at 597 (Webb, J., dissenting).

508 *Id.*

> zoning change and submitted plans of the type building he would construct if the change were granted, and the zoning authority made the change based on the promise to construct such a building, that would be contract zoning. We have held contrary to this and in doing so have overruled *Blades* and *Allred*. I vote to affirm the Court of Appeals.[509]

Justice Webb's comparison of the cases points out the impossibility of meaningfully distinguishing a bilateral agreement from a unilateral one when it is plain that the agreed to conditions formed the basis for the rezoning. Yet, it is not clear why rezoning based upon a consideration of the petitioner's application could not also be in the public interest or why rezoning absent consideration of petitioner's application is not opposed to the public interest. Perhaps the better view is not to condemn agreements per se, but only those that show an abandonment of considerations of the public interest. The illogic behind the prohibition on contract zoning is that by precluding any consideration of the landowner's intended uses of the land, the zoning board must make a rezoning decision that may seem arbitrary and uninformed.[510] It is not the case that just because the landowner is benefited, the rezoning should be invalid because it does not also serve the public interest.[511] The power to rezone exists in order for the municipality to make necessary adjustments to its original assignment of districts as the community evolves and as demographics and industry changes.[512] Adherence to Euclidean zoning in the face of such changes leads to inefficient land use and unjustifiable burdens on land ownership.

VII. CONCOMITANT AGREEMENTS WITHSTANDING A CHARGE OF CONTRACT ZONING

In the State of Washington, there is the concept of zoning with concomitant agreements.[513] The enactment of a zoning amendment occurs concurrently with the entering into of an agreement between the developer

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509 *Id.* at 597.

510 Before the *Chrismon* decision, the North Carolina legislature enacted a law enabling a city council in exercise of the zoning power to require a "development plan showing the proposed development of property be submitted with any request for rezoning of such property" and authorizing the city council to consider such development plan in its deliberations, and enabling the city council to require that any site plans subsequently submitted be in conformity with any approved development plan. 1975 N.C. SESS. LAWS, ch. 671, § 92.

511 *Chrismon*, 370 S.E.2d at 590.

512 *See id.* at 583.

513 *See, e.g.*, State *ex rel.* Myhre v. City of Spokane, 422 P.2d 790 (Wash. 1967).

and the city, the agreement imposing on the developer requirements in addition to those otherwise contained in the zoning ordinance.[514] In *Chrobuck v. Shohomish County*,[515] the court upheld such an agreement, finding that

> [t]he indicia of the validity of such agreements include [whether] [t]he performance called for is directly related to public needs which may be expected to result from the proposed usage of the [subject] property; the [f]ulfillment of these needs is an appropriate function of the contracting governmental body; [p]erformance will [place the burdens of those needs] directly on the party whose property gives rise to them; and [t]he agreement involves no purported relinquishment of any discretionary zoning power by the governing body.[516]

"[C]oncomitant agreement[s] provid[e] a source of flexibility by allowing an intermediate use permit, between absolute denial and complete approval of a petition."[517] In other words, a

> zoning ordinance and a concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for a [zoning] change and that they are clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, and general welfare, or if the city is using the concomitant agreement for bargaining and sale to the highest bidder or solely for

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514 *See, e.g., id.* at 794. In *State ex rel. Myhre*, the city plan commission and the landowner entered into an agreement that provided for the rezoning of land and included plans for development, including the deeding over to the city of certain land as necessary for street widening for the area, as well as the construction of "sidewalks, drainage, pavement, channelization and street lighting on certain designated streets." *Id.* at 794-95. The agreement also contemplated the city condemning land necessary for the traffic safety measures, with the landowner paying the cost of such condemnation. *Id.* at 795. The agreement was forwarded to the city council with a recommendation for rezoning with a provision that "[i]f after consideration of the Commission's report, the City Council *finds* such amendment is of public necessity, benefits the general welfare of the Community, or constitutes good zoning practices, it may then so amend the ordinance." *Id.* at 794 (emphasis in original).

515 480 P.2d 489 (Wash. 1971).

516 *Id.* at 507.

517 *Id.*

> the benefit of private speculators.[518]

The court explained that its power to review the validity of zoning accompanied by concomitant agreements was limited to invalidating an ordinance only if no reason for the change was present or the agreement was in fact for the primary or sole benefit of the developer.[519] The facts here showed ample benefits to the city, including fulfilling a need for more business zoned land and providing for the mitigation of possible adverse effects from development.[520]

In *City of Redmond v. Kezner*,[521] "the concomitant agreement contain[ed] no express promise by the city to rezone."[522] Instead, the agreement was conditioned upon the city rezoning.[523] The court pointed out, however, that the distinction for purposes of the question of validity was unimportant.[524] "If there is no promise to rezone, there is no promise to relinquish legislative power."[525] But even "[i]f the city ha[d] made the promises claimed, they [would not be] illegal under the *Mhyre* rationale in which the city promised to rezone."[526]

In Maine, the zoning enabling act permits a municipality to enter into a contract zoning agreement with a landowner for the rezoning of land that

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[518] *State ex rel Myhre*, 422 P.2d at 796. The court found that the concomitant agreement was not *ultra vires* for the following reasons: (1) the city's requirement that it be reimbursed for costs related to condemnation proceedings for property needed for right-of-ways was within the city's legislative authority, *id.* at 795-96; and (2) the agreement only granted the development company its statutory right to file a petition to vacate certain streets, but did not oblige the city to grant such a petition, *id.* at 797.

[519] *Id.* at 796.

[520] *Id.* at 793.

[521] 517 P.2d 625 (Wash. Ct. App. 1973). There, the case involved a "street system agreement" that constituted a concomitant agreement with the rezoning of properties. *Id.* at 627. The trial court found that

> [t]he rezoning . . . furnished the consideration for the undertakings of the property owners in the . . . [a]greement . . . . The city fully performed its part of the agreement by the rezoning of the . . . properties . . . and had the right to require the performance by the property owners to deed and dedicate the necessary street rights-of-way when requested to do so by the city.

Id. at 628.

[522] *Id.* at 630.

[523] *Id.* at 628.

[524] *Id.* at 630.

[525] *Id.*

[526] *Id.*

may contain conditions for final approval.[527] Under a town's contract zoning provisions, the planning board is required to conduct a public hearing on a developer's proposed contract zoning agreement and to provide notice of this hearing to the public and the neighboring landowners.[528] The Pennsylvania courts have held that rezoning that is otherwise valid concomitant with agreements between a developer and the municipality concerning the use of the land is not invalid merely because of the existence of an agreement.[529]

VIII. THE QUESTIONS EARLIER POSED

Given the confusion and overlapping nature of the concepts of contract zoning and conditional zoning, the response to the questions earlier posed is to say that a fine and superficial distinction exists between the two. The difference in large measure is semantical. Conditional zoning is upheld when even though there is no express promise by the municipality to rezone, but based upon conditions agreed to by the developer, the municipality does rezone to allow the proposed development based on those conditions.[530] As such, there seems no good reason to outlaw contract zoning when the promise to rezone is based on express similar promises by the developer, the promise is otherwise in the public interest, the consideration offered and received pertains to the property at issue, and the zoning authority exercises its independent judgment in acting on the zoning application. That is, a contractual promise is made but is subject to public comment before the contract becomes final seems not to offend any of the rules regarding the public trust under which the zoning power exists, any more than rezoning based on conditions suggested by or to the zoning authority. It is an unwarranted assumption that merely because the

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527 *See* ME. REV. STAT. ANN. tit. 30-A, § 4404(9) (West 2003).

528 Tit. 30-A, § 4352(8); *see also* Crispin v. Town of Scarborough, 736 A.2d 241 (Me. 1999). The Town of Scarborough's contract zoning ordinance provided the following:

> "Contract zoning . . . is authorized for zoning map changes when the Town Council, exercising its sole and exclusive judgment, . . . determines that it is appropriate to change the zoning district classification of a parcel of land [to] allow reasonable uses of the land . . . which remain consistent with the Town of Scarborough's Comprehensive Plan."

Id. at 246 (emphasis omitted) (alteration in original).

529 *See, e.g.*, Gladwyne Colony, Inc. v. Township of Lower Merion, 187 A.2d 549 (Pa. 1963) (holding an agreement valid where the owner agreed to grant the town a right of way, an access road, and to convey a site if demanded by the city).

530 *See supra* Part V.

municipality has promised to rezone that it does so without regard to the public interest.

IX. WHY DEVELOPMENT AGREEMENTS ARE NEITHER CONTRACT NOR CONDITIONAL ZONING

As the cases state, contract zoning refers to an agreement between a municipality and a developer whereby the developer offers consideration often, but not necessarily extraneous to the property for zoning ad hoc.[531] As a general proposition, ad hoc zoning agreements are invalid to the extent that a municipality promises to re-zone land by bypassing the notice and hearing requirements of the legislative process, or makes a decision to rezone before public hearing, or agrees to rezone in exchange for some benefit having nothing to do with the rezoning.[532] Ad hoc zoning may also be invalid when it conflicts with the municipality's comprehensive plan in a way that results in the discriminatory treatment of persons and projects or when the rezoning does not further the public interest, safety, or welfare.[533] However, the mere act of rezoning is not contract zoning, and it is a different issue if the zoning regulations and comprehensive plan specifically contemplate rezoning affecting a specific parcel with the imposition of conditions. In fact, the cases upholding conditional zoning hold that rezoning in this fashion, that is, with conditions attached that limit the use of the rezoned land in a way designed to minimize adverse impact on the surrounding area, furthers the municipality's interest in achieving desirable and beneficial land use.[534] In the same sense, development agreements should not be regarded as a form of ad hoc zoning since they contemplate the developer's compliance with the existing zoning scheme (although they may involve variances, exceptions, and rezoning) and are approved by public hearing. They are nonetheless subject to challenge if the decision to freeze the applicable zoning rules and regulations to those existing at the time of execution of the agreement is, based on offers or agreements that inhibit the municipality's police powers, the municipality promising in the resulting ordinance not to apply new zoning restrictions to the development.[535] Courts have recognized the

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[531] *See, e.g.*, McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020-21 (Mass. App. Ct. 2002).

[532] *See* 4 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, THE LAW OF ZONING AND PLANNING, § 71:4, at 71-8 (2003).

[533] *See* 4 *id.* § 44:16.

[534] *See, e.g.*, Goffinet v. County of Christian, 333 N.E.2d 731, 736-37 (Ill. App. Ct. 1975); Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 368-69 (Mass. 2003); Cram v. Town of Geneva, 593 N.Y.S.2d 651, 652 (N.Y. App. Div. 1993).

[535] *See* Pima Gro Sys., Inc. v. King George County Bd. of Supervisors, 52 Va. Cir. 241, 244 (Va. Cir. Ct. 2000) (voiding an agreement under which the county agreed to allow

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need for land-use agreements between developers and municipalities to assure stability in permitting large projects. Thus, the trend has been to allow such agreements unless they constitute an abandonment of the municipality's zoning authority.[536] In fact, as described earlier, "several states have codified the process for entering into development agreements."[537]

> While these statutes generally authorize local governments to assure developers that zoning regulations in effect at the time of an agreement will remain in effect until the project is completed, they also require provisions in the agreements that pertain to the duration of the agreement and the conditions upon which the agreement may be terminated,[538]

that is, to protect the health, safety, or welfare of the public.[539] However, the extent to which a local government may validly restrict or limit its future use of the police power by freezing the zoning under statutorily authorized development agreements is an issue that has been resolved by a few courts.[540]

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activity that was prohibited to all others and illegal under a valid zoning ordinance because it was beyond the county's power and was a surrender of police power); Delucchi v. County of Santa Cruz, 225 Cal. Rptr. 43, 49 (Cal. Ct. App. 1986) (finding that an agreement between a landowner and the county to preserve agricultural land, interpreted to prevent application of future land use restriction, would be illegal contract zoning); Miller v. City of Port Angeles, 691 P.2d 229, 235 (Wash. Ct. App. 1985) (finding an agreement between the city and a developer to limit the city's power to impose a condition on a development in order to further the health, safety, and welfare of the community was a surrender of police powers and therefore invalid and unenforceable); 3 ZIEGLER, *supra* note 45, § 44.10.

536 *See, e.g.*, Larkin v. City of Burlington, 772 A.2d 553, 557 (Vt. 2001); Giger v. City of Omaha, 442 N.W.2d 182, 190-91 (Neb. 1989).

537 *Larkin*, 772 A.2d at 557.

538 *Id.*

539 *Giger*, 442 N.W.2d at 189.

540 In *Morgran Co. v. Orange County*, 818 So. 2d 640, 643 (Fla. 2002), the court acknowledged that "[d]evelopment agreements are expressly permitted by the Florida Statutes." *Id.* Development agreements are defined as a "contract between a [local government] and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits." *Id.* (alteration in original) (quoting Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719 (2001)). The court further stated that "Florida law permits local governments to impose 'conditions,

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If development agreements are distinguished from contract zoning by the absence of any commitment on the part of the municipality to act in accordance with the developer's wishes, making them a form of conditional zoning, then they may be of little benefit to the developer when the municipality promises nothing in return.[541] Yet, as a form of conditional zoning, they would be upheld, it seems, in the majority of jurisdictions.[542] On the other hand, a binding promise by the municipality, made before rezoning, to act in a certain way would be regarded as illegal contract zoning.[543] But this would be the case only if the municipality has by-passed the public hearing procedures because the public interest is not served, it is disruptive of the comprehensive plan, and the municipality has surrendered its power to rezone if the public interest so requires. Development agreements authorized by statute, by their terms, meet all these provisos. They specifically reserve some governmental control over the project, such as by provisions that specify the duration and grounds for unilateral termination in order to protect the public interest, health, and welfare. By statute, they must be consistent with the comprehensive plan, and they are approved through public hearing.[544]

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terms, and restrictions' as part of these agreements, where necessary for the public health, safety or welfare of its citizens." *Id.* at 643. But, the problem in that case was the city's agreement to support rezoning as part of that development agreement beforehand, rather than after hearings on the agreement. *See id.* at 644. The court did not otherwise distinguish development agreements where the city agrees to freeze existing regulations from contract zoning in which the city agrees to rezone based on a developer's promises. *See id.* The difference is a subtle one since bilateral promises are precisely at the heart of development agreements, although the municipality reserves some residual power to act should the public health, safety, and welfare require it, thereby avoiding the bargaining away police powers charge.

541 *See* Schwartz, *supra* note 540, at 728.

542 *Id.*

543 *Id.*

544 Larkin v. City of Burlington, 772 A.2d 553, 558 (Vt. 2001) (deciding the case on another ground, that plaintiff who purchased the original developer's rights in a foreclosure sale did not acquire rights under a development agreement with the city); *see also* Bollech v. Charles County, 166 F. Supp. 2d 443, 454 (D. Md. 2001) (finding that the county did not illegally abdicate its police powers by entering into an agreement where the agreement itself stated that the development would be subject to any changes in state or federal law, and that it did not require absolute deference to the existing zoning); De Paolo v. Town of Ithaca, 694 N.Y.S.2d 235, 239 (N.Y. App. Div. 1999) (finding an "agreement" by a developer to grant the town a 99-year license to use certain property as a park, conditioned upon landowner's receipt of all approvals for a development project, did not present a situation of legislating "pursuant to the terms of a contract," nor one in which town agreed "in exchange for a predetermined [consideration for] expedited and favorable

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In fact, development agreements, not authorized by special legislation have been specifically upheld[545] as involving not contract, but conditional zoning. In *Giger v. City of Omaha*,[546] the developer applied to the city for a rezoning of property to permit the construction of a mixed-used development consisting of retail, office, and residential buildings.[547] As part of the application process, the developer submitted several development plans, the final plan including the construction of a public park.[548] In a new procedure, the developer and the city entered into four agreements that incorporated the plan.[549] The four agreements were collectively known as the "development agreement" and were submitted to the city for approval.[550] The city passed an ordinance approving the "development agreement," incorporating it as part of the ordinance and passed five separate ordinances rezoning the property.[551] Clearly, the agreements formed the basis of the city's decision to rezone—the parties had worked out the terms of the rezoning before it occurred. The agreement could be interpreted as a promise by the city to rezone based upon the agreed upon conditions.[552]

The challengers contended that rezoning by agreement was illegal contract zoning and was therefore invalid per se, that it was an *ultra vires* act, and that it fostered the "appearance of evil."[553] The court found that

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determination, as would be illegal," but instead was only an agreement that furthered the town's longstanding objective stated in the comprehensive plan of ensuring public use and enjoyment of the donated land); Stephens v. City of Vista, 994 F.2d 650 (9th Cir. 1993) (finding no bargaining away of police power where city could exercise discretion over the site development process).

545 *See, e.g*, Save Our Springs Alliance v. City of Austin, 149 S.W.3d 674 (Tex. App. 2004) (upholding development agreement entered into pursuant to a statute as a validly enacted amendment to the zoning ordinance, entitling the developer to rely on that change in requesting a development permit).

546 442 N.W.2d 182 (Neb. 1989).

547 *Id.* at 187.

548 *Id.* at 187-88.

549 *Id.* at 188.

550 *Id.*

551 *Id.*

552 Neighboring property owners challenged the rezoning on the ground, *inter alia*, that the city acted in an arbitrary, capricious, and unreasonable manner in adopting the rezoning ordinance. *Id.* "Specifically, the [challengers] allege[d] that the city entered into a development agreement with [the developer], adopted a rezoning ordinance which incorporated that agreement, and rezoned the . . . property pursuant to that agreement," and that the city rezoned the property "without giving adequate consideration to the risk of flood created by the project." *Id.*

553 *Id.* at 189.

distinction between contract zoning and conditional zoning academic because its scope of review was "limited to determining whether the conditions imposed by the city for rezoning were reasonably related to the interest of public health, safety, morals, and the general welfare."[554] "Accordingly, the city should be permitted to condition rezoning ordinances on the adoption of an agreement between the developer and the city, or any other means assuring the developer builds the project as represented."[555] Otherwise, "the city would be stripped of the power to act for the benefit of the general welfare."[556] At the risk of confusion, but for the sake of convenience, the court referred to this zoning arrangement as conditional zoning.[557] Citing a treatise, the court explained that the purpose of conditional rezoning is to "minimize the negative externalities caused by land development which otherwise benefits the community."[558] Under this device, "[t]he developer [might] agree to restrict development of its property, make certain improvements, dedicate a portion of land to the municipality, or make payments to the government" in mitigation of the negative impacts.[559]

The court pointed out that "[c]onditional rezoning is valuable as a planning tool because it permits a municipality greater flexibility in balancing developing demands against fiscal and environmental concerns."[560] It "provides a municipality with flexibility [in meeting] specific rezoning requests while preserving the integrity of adjacent property,"[561] and in extracting improvements that bare zoning ordinances do not provide. For example, an agreement contemplating rezoning could

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554 *Id.* The court gave "great deference to the city's determination of which laws should be enacted for the welfare of the people." *Id.* at 190.

> Therefore, when the city considers a request for rezoning based upon a plan or representation by the developer, it is presumed that the city grant[ed] the request after making the determination that the plan as represented [was] in the interest of the public health, safety, morals, and the general welfare

and the developer was not permitted to develop the property in a manner inconsistent with the plan or representation on which the rezoning was based, despite the fact that inconsistent uses may be permissible under the new zoning classification. *Id.*

555 *Id.*

556 *Id.*

557 *See id.*

558 *Id.* at 189 (quoting 2 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 27.05 at 27-46 (rev. ed 1989)).

559 *Id.* at 190.

560 *Id.*

561 *Id.*

contain provisions designed to mitigate the harshness of commercial or industrial rezoning on neighboring residential property by requiring a buffer zone.[562] In this way, "conditional rezoning allows a municipality to maintain greater control over the development process"[563] and is a device that "allows the city flexibility . . . and gives the city a remedy to enforce the developer's plans and representations."[564]

However, the court cautioned, "Conditional rezoning is a legislative function and therefore must be within the proper exercise of the police power, [i.e,] must be reasonably related to the interest of public health, safety, morals, and the general welfare."[565] Here, the development agreement could not be construed as bargaining away the city's police power where it was established that the agreement provided more restrictive ceilings and development regulations than the current underlying zoning regulation.[566] The evidence clearly showed "that the city's police powers [were] not abridged in any manner and that the agreement [was] expressly subject to the remedies available to the city under the Omaha Municipal Code."[567] Further, the court found that "the agreement actually enhance[d] the city's regulatory control over the development rather than limit[ed] it."[568]

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562 *Id.*

563 *Id.*

564 *Id.* "Theoretically, if the rezoning ordinance adopts the plan, as in this case, the city could institute legal proceedings if the developer builds a project inconsistent with the plans without resorting to rezoning the property." *Id.* For these reasons, the court held conditional rezoning to be valid. *Id.*

565 *Id.* at 190-91.

566 *Id.* at 192. For instance, part of the development where office buildings would be located had been rezoned to a new district. *Id.* Absent the agreement, the developer would be free to erect any number of buildings without limitation as to square footage. *Id.* But, under the agreement and the rezoning, the developer was limited to three office buildings and a total of 390,000 square feet of office space. *Id.*

567 *Id.*

568 *Id.* at 192. The court also rejected the argument that the city engaged in an *ultra vires* act because there was no statutory enabling act permitting conditional zoning. *Id.* at 189-90. In addition to these powers granted by the express words, the city also has those powers necessarily or fairly implied in or incident to the powers expressly granted, as well as those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. *Id.* at 193. Here, the legislature had given the city broad powers to regulate land use, without specifying what regulations the city was permitted to use, coupled with a grant of power to implement, amend, supplement, change, modify, and repeal these regulations, along with the implied grant of power to enact all necessary zoning regulation including conditional zoning, as long as those regulations are within the proper exercise of the police power. *Id.* The final contention made by the challengers was that the

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The court took great pains to avoid any finding of a restriction on the government's exercise of its police powers by the agreement, as opposed to a broadening of such powers.[569] This seems to minimize the benefits of a development agreement, except to the extent that the developer knows beforehand what rules will apply.

In *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*,[570] a California appellate court expressly rejected a challenge to development agreements authorized by statute on the ground that such agreements amounted to illegal contract zoning.[571] The court ruled that a zoning freeze was not a surrender or abnegation of political power, but that it in fact advanced the public interest since the project was still required to be developed in accordance with the county's general plan, and the agreement did not permit construction until the county had approved detailed building plans.[572] The agreement also retained the county's discretionary authority in the future and, in any event, the zoning freeze was only for a period of five years, rather than for an unlimited duration.[573]

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city fostered "an appearance of evil" by engaging in conditional zoning, and that it could result in the corruption of officials—that officials would concentrate more on what they could extract from the developer than on proper rezoning criteria. *Id.* The court found the argument lacking in merit. *Id.* "[N]o evidence of graft or corruption" was present in the case, and the mere "appearance of evil" was an insufficient basis for striking down an ordinance. *Id.* The regulation, by imposing restrictions not generally applicable to other property within the district, also failed to violate the uniformity requirement of the zoning laws. *Id.* at 194. The court pointed out that the uniformity requirement did not preclude different uses within the same district so long as they are reasonable and based on the public policy to be served. *Id.* In fact, the court thought that allowing reasonable classifications within a district was a good rule, especially in view of the broad delegation of authority given by the legislature to the city in making zoning regulations. *Id.* Accordingly, the uniformity requirement did not prohibit reasonable classification within districts. *Id.* Here, there was no evidence that the city acted unreasonably. *Id.* at 195. Nor was the zoning ordinance an example of spot zoning. *Id.* at 197. The challengers failed to prove by clear and convincing evidence that the rezoning ordinance was violative of the comprehensive plan as might establish illegal spot zoning, since the evidence was in conflict as to the range of uses then in existence in the district. *Id.*

569 *Id.* at 192.

570 100 Cal. Rptr. 2d 740 (Cal. Ct. App. 2000).

571 *Id.* at 745.

572 *Id.* at 748.

573 *Id.*; *see also* Warner Co. v. Sutton, 644 A.2d 656, 660 n.2 (N.J. Super. Ct. App. Div. 1994). In *Warner*, the court distinguished a development agreement from the proscriptions against contract zoning and held that, "[u]nlike 'contract zoning,' there is no legal impediment to a development agreement between a municipality and a property owner

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X. CONCLUSION

Development agreements are a form of land use bargaining, consistent with modern land use planning, which is fundamentally an exercise in bargaining. Yet, they should not be regarded as a form of contract zoning for the following reasons: (1) while development agreements do involve an agreement, the city does not bargain away its legislative discretion to the extent that it reserves the power unilaterally to terminate the agreement if required by the public safety, health, or welfare; (2) while development agreements may involve an agreement in advance of rezoning, the agreements become final only after a public hearing; (3) development agreements do not involve extraneous considerations since the promises

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which provides for rezoning of certain tracts to accommodate a particular residential plan." *Warner*, 644 A.2d at 660 n.2. In this case, all negotiations and decisions with respect to the rezoning amendments were taken at public meetings of the governing body and all statutory requirements relating to the amendment to the master plan and adoption of amending ordinances were properly followed. *Id.*; *see also* WILLIAM M. COX, NEW JERSEY ZONING AND LAND USE ADMINISTRATION § 34-8.2, at 522-23 (1994); Terminal Enters., Inc. v. Jersey City, 258 A.2d 361 (N.J. 1969). *Terminal Enterprises, Inc.* dealt with a challenge to the adoption of an ordinance and resolution by the city and county board, whereby the city and the county entered into certain agreements with the Port Authority Trans-Hudson Corporation (PATH) relating to the construction and operation of a proposed Transportation Center in the Journal Square area and to entrance improvements at the Grove-Henderson Street Station. *Id.* at 363. Appellants, individuals and the board of trade, challenged the agreement claiming that the agreements with PATH were invalid for several reasons, including that the defendants had invalidly obligated themselves to legislate and zone in the future concerning public streets, building codes, and bus and taxi operations; that the defendants had unlawfully delegated power to PATH, and that the agreements were invalid on their face since their fulfillment by PATH was optional. *Id.* at 365. The court affirmed the lower court. *Id.* at 367. It stated that "[i]nitially, it should be noted that the officers of a municipal corporation may limit by contract their own police powers as well as those of their successors where the agreement is authorized by statute." *Id.* at 366. The court then held that "[t]here can be no doubt that PATH has statutory authority to construct and operate a Transportation Center at Journal Square. To aid PATH in achieving this objective, we think it clear that the Legislature authorized the City and County to relinquish some of their police powers." *Id.* (citations omitted). The court went on to state that "the Legislature has given the City and County broad powers to cooperate with PATH in the construction and operation of the Transportation Center so long as resulting agreements contain 'reasonable terms.'" *Id.* "We think that the terms of the agreements relating to bus operations and public streets are fully within the legislative contemplation." *Id.* "Since these various guarantees which the City and County gave PATH were authorized by the statutes, plaintiffs' reliance on cases which prohibit contract zoning and prevent binding the hands of successors is misplaced." *Id.*

made by the developer pertain only to subject property; (4) development agreements are a valuable land use device, enabling the city to achieve benefits and to mitigate the effects of the rezoning; and (5) development agreements must be consistent with the comprehensive plan. They should also not be considered simply as a form of conditional zoning under which the municipality imposes restrictions on land use rather than permitting different uses proposed for development, and where the municipality is free to rezone at any time during the development. Some binding obligation on the municipality is necessary if development agreements are to have their intended benefit. However, a binding obligation having been fully considered in compliance with the public notice and hearing process, and undertaken in the public interest, should be upheld as not running afoul of the basic principle prohibiting the contracting away of police powers. Rather, the obligation should be regarded as an exercise of those powers.

Development agreements both fit within and advance existing land use planning by encouraging development through security to developers of the progression of the development project without fear of subsequent zoning changes. At the same time, municipalities retain control over the project and may negotiate for other public benefits. The fact of an agreement should not act as an impediment to the use of development agreements any more than conditioning rezoning on promises made by the developer.