MOVING TOWARD THE BARGAINING TABLE: CONTRACT ZONING, DEVELOPMENT AGREEMENTS, AND THE THEORETICAL FOUNDATIONS OF GOVERNMENT LAND USE DEALS

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This Article is dedicated to Professor Eugene Gressman on the occasion of his retirement. A constitutional scholar who understands the need for justice in everyday settings, he has been a wonderful colleague and an inspiring friend. He will be sorely missed.

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Municipalities historically have exercised their formidable powers to regulate the use of land. Recently, public attention has focused on ways to reform traditional regulatory approaches, so that they mirror more closely the functioning of the market; bargaining, or land use dealing, has been used by the government to allocate development rights to private claimants. In this Article Professor Wegner explores "contingent zoning," development agreements, and the theoretical foundations of government land use deals, which implicate the interests of the municipality, developer, and citizen-property owner.

Professor Wegner analyzes whether land use deals implicate the municipality's police power authority or its contract powers. She addresses whether the procedures ensure fairness and efficiency of outcomes and how courts would resolve a dispute in the event of noncompliance by the government or a private party. Professor Wegner concludes by stressing the unique blending of contract and police power analyses that occurs in this context, a blend which may guide the development of appropriate standards and remedies.

I. INTRODUCTION

Market-oriented approaches to land use management have generated considerable interest among legal scholars in recent years. Proponents of deregulation urge local governments to limit sharply their intervention in the workings of real estate markets. These scholars prefer a variety of alternatives—reliance on

common-law nuisance doctrine and restrictive covenants,[1] adoption of a system of in-kind taxation of land development,[2] or the recognition of a private market in collective neighborhood property rights stemming from land use controls[3]—over the existing scheme of zoning regulation.

Others reason that local governments must continue to assume responsibility for land use control, but argue that traditional regulatory approaches should be reformed to mirror more closely the functioning of the market. A number of scholars and practitioners have probed the practical benefits attainable through use of bargaining as a means of resolving land use disputes;[4] they view the public role in establishing site-specific development controls and obligations as an exercise in mediating private disputes.[5] Recent legal scholarship has contributed significantly to this discussion by developing a jurisprudential basis for government land use "dealing," that is, mediation activity that allocates rights among competing private claimants.[6] The theoretical foundations for government land use deals, however, remain far from complete.

To describe the dynamic of government-citizen-developer decisionmaking as "dealing" raises a fundamental question concerning the character of such government activity: Does the activity remain wholly the exercise of police power authority, or does it somehow implicate the government's contracting power? This issue becomes particularly critical when private and governmental actors literally cut and memorialize a "deal" in the form of an agreement that plays an influential role in shaping a more traditional regulatory decision, such as the disposition of a rezoning proposal or permit request.

Adoption of a "dealing" methodology also raises questions concerning the continued need for standards that ensure fairness and efficiency of outcomes.

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1. *See* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

2. *See* Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981).

3. *See* R. NELSON, ZONING AND PROPERTY RIGHTS 173 *passim* (1977); Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979).

4. *See, e.g.*, J. KIRLIN & A. KIRLIN, PUBLIC CHOICES—PRIVATE RESOURCES 59-74 (California Tax Found. 1985) (discussing consequences of increased bargaining that reallocates responsibility for financing capital infrastructure); MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS (R. Levitt & J. Kirlin ed., Urb. Land Inst. and American Bar Ass'n 1985) (discussing negotiation techniques and strategies, and related issues); T. SULLIVAN, RESOLVING DEVELOPMENT DISPUTES THROUGH NEGOTIATIONS 25 (1984) (explaining hypothesis that "the results of ad hoc efforts to resolve development disputes encourage a wider use of negotiations either as a complement to the existing structures for resolving conflicts, or as an alternative path that citizens and government officials may find attractive for certain classes of disputes"); Butler & Myers, *Boomtime in Austin, Texas*, AM. PLAN. A., Autumn 1984, at 477-78; Kmiec, *The Role of the Planner in a Deregulated World*, LAND USE L. & ZONING DIG., June 1982, at 4.

5. *See, e.g.*, Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 891 (1983) (advocating adoption of "mediation" jurisprudence in which "dealing" is a natural part of dispute resolution process). Considerable interest also has focused on identifying strategies for negotiation of environmental disputes, and on developing generally applicable rules through the process of negotiation and mediation. *See, e.g.*, 1 C.F.R. § 305.82-4 (1986) (recommendation by Administrative Conference of the United States concerning regulatory negotiation); Susskind & McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985) (general discussion of negotiated rulemaking).

6. *See* Rose, *supra* note 5 (distinguishing between traditional plan jurisprudence and mediation jurisprudence that explains legitimacy of piecemeal changes in land use controls).

"Dealing" has a number of potential benefits. It allows for individualized decisions that take into account the unique features of a particular parcel or project and the availability of measures capable of mitigating adverse land use effects. A carefully tailored set of land use requirements based on a bargaining process may be fairer than traditional regulation: rather than simply treating roughly similar land equally, it takes into account specific characteristics and problems that justify variations from a potentially overbroad norm. Furthermore, the bargaining process may be more efficient because it facilitates cost-efficient outcomes and substitutes a potentially cheaper decisionmaking process that fosters prompt and amicable compromises while avoiding the costs attendant to protracted administrative and judicial appeals.[7]

Yet dealing is not without its perils. Unfair or inefficient outcomes may result from imbalances in power or skill that either distort the dealings of participating parties, or result in failures to consider the interests of affected nonparticipants.[8] In extreme cases involving government parties, power imbalance may result in the creation of "naked preferences," that is, the treatment of one group or person different from another solely because of a raw exercise of political power in the absence of a broader and more general justification or public value.[9] Such preferences may take various forms including preferences

7. For example, in many jurisdictions a developer's right to proceed with a project will not vest until the developer has been issued a building permit. *See* C. SIEMON, W. LARSON & D. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 26 (Urb. Land Inst. 1982). Prior to this point, however, a developer has incurred considerable expense such as cost of land acquisition, architectural fees, attorneys fees, and costs associated with preparing the land for development. If the developer subsequently is denied the building permit, these preliminary costs are lost unless the developer appeals the decision, and the appeals process, whether administration or judicial, is quite expensive. First, the developer will incur the actual out-of-pocket expense for attorneys fees associated with an appeal. Second, the delay will postpone the anticipated profits from the completed project. Third, not only are the total development profits delayed, but the developer must forego any interest that may have been earned by investing the money someplace other than on the preliminary aspects of a project. Because of these additional costs inherent in a delayed project, developers are reluctant to invest in a project until they can be certain that the project will be completed. *See* J. KIRLIN & A. KIRLIN, *supra* note 4, at 47-54.

8. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984). In an article attacking alternative dispute resolution, Professor Fiss has noted that disparities in revenues, which inhibit the poorer party's ability to gather and analyze the necessary data, disadvantage the poorer party during the bargaining process. *Id.* at 1076. Therefore, because of inadequate revenues, the poorer party is likely to settle for less than he or she could have obtained had the parties possessed equal bargaining power. *Id.*

Similarly, this power imbalance is evident in marital disputes, particularly during property settlements incident to divorce. Most states have adopted equitable distribution statutes through which marital property is divided equitably upon divorce. Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C.L. REV. 248, 248 (1983). Although the court may order marital property to be divided equally upon divorce, the parties can agree privately to divide the property unequally. L. WEITZMAN, THE DIVORCE REVOLUTION 75 (1985). The power imbalance is most evident when the husband controls a family owned business, *id.* at 100, a situation that prevails after the divorce in 81% of cases. *Id.* at 101. If the wife insists on receiving half the business, the husband with the business acumen can control the balance sheet and refuse to pay dividends. *Id.* at 100. If the wife negotiates a settlement not acceptable to the husband, he may threaten to quit work and appoint a receiver who will put the business up for sale. *Id.* If the key person leaves and opens a competing nearby business, it will be difficult to sell the existing business. *Id.* Thus, because the parties occupy unequal bargaining positions, even with an equitable distribution statute in force a wife may feel compelled to agree to her husband's settlement offer.

9. *See* Sunstein, *Naked Preferences and The Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

favorable to the government itself or the public as a whole (public abuse), or those favorable to individuals or a small segment of the community (private abuse). Decisionmakers and courts accordingly need standards as they seek either to avoid such perils at the outset, or to resolve legitimate challenges after the fact. At the same time, such standards may have to be shaped to ensure that the potential benefits associated with the dealing methodology can in fact be gained.

Finally, to ensure that dealing provides a truly fair and efficient system of dispute resolution, attention must focus not only on threshold issues of deal creation, but also on issues of noncompliance. Several distinct questions may arise in developing this important aspect of the theoretical framework governing governmental land use deals: Should identical rules apply notwithstanding the seriousness of noncompliance? Should certain instances of noncompliance be excused? What remedies should be afforded? Should noncompliance by government and private parties be treated the same in all respects? Resolution of these issues may be especially important to ensure fair outcomes consistent with the parties' expectations and to reduce uncertainty and attendant risk that may undercut the efficient operation of the real estate market.

This Article endeavors to bolster the theoretical foundations of government land use deals by addressing the three major issues just described: (1) how should public-private deals that may involve interrelated exercise of contracting and police powers be characterized?; (2) what standards should apply to ensure that such deals satisfy policy concerns by avoiding public and private abuse?; and (3) what rules and remedies should govern the event of subsequent noncompliance? The Article uses an overall two-part strategy. It initially considers whether a paradigm already exists to resolve issues of this sort. It then explores how specific answers have gradually emerged to address two distinct types of land use deals: one, the subject of two decades' judicial and scholarly interest; the other, newly developed and only beginning to make its mark.

The Article begins, in part II, by examining the theoretical framework that developed under the Contract Clause of the United States Constitution[10] as a means of resolving characterization, standards, and noncompliance issues involving the interplay of contract and police powers. It concludes that the precedent associated with this provision (1) recognizes the need for an individualized assessment of applicable context; (2) establishes rudimentary criteria for identifying deals in which the blend of contract and police powers is flawed fundamentally and thus subject to immediate invalidation; and (3) adopts rules affording government special prerogatives to take action in derogation of contractual obligations, but imposes stringent remedies if those prerogatives are exceeded.

The Article then turns, in parts III and IV, to focus more specifically on two types of government land use deals that in recent years have generated particular interest among courts, legislatures, and scholars. Each deal typically involves the development of particularized requirements concerning the type and

10. U.S. CONST. art. I, § 10, cl.1.

intensity of anticipated land use and contributions toward infrastructure costs, and in some or all cases each results from public-private bargaining. Part III discusses rezoning decisions that are commonly referred to as "contract" or "conditional" zoning, but which this Article describes as "contingent zoning" both for simplicity of reference and for substantive reasons described below.[11] Part IV considers "development agreements," which local governments and developers—particularly those seeking permits for large, multistage projects—undertake to establish use limitations, facility exactions, and the continued applicability of regulatory requirements over extended periods of time.

The Article demonstrates that a slightly different theoretical framework governs each of these types of land use deals. Part III concludes that contingent zoning exists in a theoretical context in which police power principles predominate, and explores how traditional and distinctive standards and remedies have gradually evolved to accommodate this type of government land use deal. Part IV explains that a blending of contract and police power analysis should transpire as courts consider development agreements, and sketches how that blend may influence and shape development of standards and remedies in this context as well.

II. LESSONS FROM THE CONTRACT CLAUSE

Analysis of the theoretical framework governing public-private land use deals should begin with a consideration of the Contract Clause of the United States Constitution, a provision which specifies that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[12] Over two centuries the Contract Clause has comprised a key arena in which tensions between contract obligations and police power needs have been explored, debated, and resolved in many different contexts. Exploration of this diverse body of law serves two important purposes. To the extent that government land use deals are regarded literally as contracts, it represents controlling constitutional precedent that significantly shapes the applicable theoretical framework. Even absent such literal interpretation, it provides an important model for examining relevant policy considerations and constructing a coherent set of doctrinal principles: the model provides helpful guidance in the development of an appropriate theoretical framework addressing issues germane to this discussion.

The discussion that follows attempts neither to restate all facets of the Contract Clause doctrine in a comprehensive fashion, nor to canvass the full range of scholarly views on this subject.[13] Instead, it focuses on themes that directly

11. *See infra* notes 120-35 and accompanying text.

12. U.S. CONST. art. I, § 10, cl. 1.

13. For comprehensive discussions of Contract Clause jurisprudence, see B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION (1938); Currie, *The Constitution in The Supreme Court: State and Congressional Powers, 1801-1835*, 49 U. CHI. L. REV. 887 (1982); Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703 (1984); Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512 (1944); Sunstein, *supra* note 9, at 1719-23; Note, *Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414 (1984); Note, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts*, 36 STAN. L. REV.

pertain to the characterization of public-private relationships, the development and application of standards, and the responses to noncompliance matters.

A. *Characterization of Public-Private Relationships*

A critical threshold question has been whether the relationship between parties and associated obligations should be characterized as contractual in nature so as to fall within the ambit of the Contract Clause. This question is more difficult to answer than may first appear. As defined most basically, a contract is an agreement in which a party agrees to do or not to do a certain thing.[14] Not all relationships that meet this definition have been afforded constitutional protection, however.

When they involve only private parties, a variety of financial, employment, and personal relationships have been viewed as contractual in nature.[15] Even in this realm some exceptions nonetheless may be noted. For example, although marriage involves a consensual relationship between two parties that arguably might fall within the definition just cited, it has not been so regarded for purposes of the Contract Clause.[16]

When the government is one of the participating parties, matters have grown even more complex. Early in the history of the Contract Clause, a distinct question arose whether relationships with the government, even those clearly contractual in nature, should fall within this provision.[17] This matter was laid to rest in early cases holding that government grants of land,[18] corporate[19] and railroad charters,[20] and bonds,[21] all involved contractual relationships, which come within the terms of that clause.

History has shown, however, that not all public-private relationships are

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1447 (1984) [hereinafter Note, *Takings Law and the Contract Clause*]; Note, *A Process-Oriented Approach to the Contract Clause*, 89 YALE L.J. 1623 (1980).

14. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197 (1819). The Contract Clause does not protect vested rights that do not derive from a contractual agreement. *See* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829).

15. *See, e.g.*, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 240-51 (1978) (contractual relationship between employer and employees was impaired by state legislation superimposing pension obligations beyond those that employer had voluntarily agreed to undertake); W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935) (rights under mortgage impaired by state's significant limitation on available remedies); Maniguault v. Springs, 199 U.S. 473, 480-87 (1905) (covenant to remove obstruction and to allow free ingress and egress over stream was not unjustifiably impaired by state effort to dam stream and reclaim swamp land); Sturges v. Crowninshield, 17 U.S. (4 Wheat) 122 (1819) (state legislation concerning insolvent debtors impermissibly impaired obligation under promissory note).

16. *See* Maynard v. Hill, 125 U.S. 190, 210 (1888).

17. This issue was settled in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810) (The words of the Constitution are "general and are applicable to contracts of every description.").

18. *See id.*

19. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (college's corporate charter was contract protected from governmental impairment).

20. *See* Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914) (railroad charter contained contractual provisions protected by Contract Clause, although regulatory provisions justified as exercises of police power would be sustained).

21. *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1976) (bondholders protected by Contract Clause when state action contravened bond covenant designed to provide security).

characterized so readily. The title, terminology, purpose, and historical context of legislation that defines public-private relationships may dictate whether such a relationship is contractual in character, and this analysis often results in close and, at times, unpersuasive judgment calls. For example, although many types of government franchises have been seen as contractual in nature, their characterization may depend on the type of business involved.[22] Even more divisions appear in cases involving public employment. Although appointment to public office does not give rise to a contractual relationship,[23] legislation naming certain individuals to perform specified tasks during a set term for a particular fee may in fact do so.[24] Similarly, cases involving tax exemptions have proved problematic. When clear exemptions have been included in other documents such as grants of land or corporate charters that are clearly contractual in nature, they also have fallen within the ambit of the Contract Clause.[25] A contrary result has been reached, however, in other cases involving general or special legislation: the Contract Clause would not apply when the public-private relationship develops as part and parcel of a broad government policy, such as an effort to regulate the economy;[26] when private expectations have been satisfied notwithstanding the exemption's repeal;[27] when little or no consideration has been afforded;[28] and when questions exist about the causal link between private reliance and public action.[29]

22. *Compare* City Ry. v. Citizens St. R.R. 166 U.S. 557 (1897) (street railway franchise is contract) *and* New Orleans Gas-Light Co. v. Louisiana Light & Heat-Producing Mfg. Co., 115 U.S. 650 (1885) (gaslight company franchise is contract) *with* Douglas v. Kentucky, 168 U.S. 488 (1897) (lottery franchise is gratuity or license, but not contract for purposes of Contract Clause).

23. *See* Butler v. Pennsylvania, 51 U.S. (10 How.) 402, 417 (1850) (appointment or election to public office gives rise to public agency, but not contract).

24. *Compare* Hall v. Wisconsin, 103 U.S. 5 (1880) (legislation appointing individuals to perform geologic survey duties is contract when statute referred to making written contract with individuals and stipulated salary and period of service) *with* Dodge v. Board of Educ., 302 U.S. 74 (1937) (statutory creation of annuities and retirement benefits for teachers did not give rise to contractual right protecting annuities from change when cases had treated such annuities as subject to alteration and no special significance could be attributed to choice of that term).

25. *See, e.g.*, Piqua State Bank v. Knoop, 57 U.S. 369 (1854) (express tax exemption included in bank charter gave rise to contractual rights protected under Contract Clause when exemption was designed to provide incentive for establishing such institutions in the public interest, and provisions concerning rate of interest the bank could charge, the time the charter would run, the liabilities of the company, the rate of taxation, and other privileges necessary to a successful banking operation had to be held constant to induce needed investment).

26. *See, e.g.*, Salt Co. v. East Saginaw, 80 U.S. 373 (1872) (tax exemption that was not included in charter, but was instead part of statutory provisions designed to create bounty for those who acted in public interest, created contractual rights only when acted on and could be repealed without giving rise to contractual impairment).

27. *See, e.g.*, Seton Hall College v. South Orange, 242 U.S. 100 (1916) (tax exemption could be repealed without impairment of contract when exemption was not part of original charter, no new burdens or promises were undertaken on basis of exemption, and evidence did not indicate that college would have acted differently without exemption).

28. *See* Rector of Christ Church v. County of Phil., 65 U.S. (24 How.) 300 (1860) (repeal of tax exemption upheld when legislature granted exemption on spontaneous basis, and purpose of exemption had been satisfied by repair of buildings during period of its applicability).

29. *See* Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379, 387 (1903) (repeal of tax exemption for railroads that had operated for 10 year period did not constitute impairment of contractual obligation in light of insufficient evidence that promise induced detrimental reliance because, although state and railroad each expected that exemption policy would lead to railroad construction, "the two things [were] not set against each other in terms of [a] bargain").

The Contract Clause therefore offers a first basic lesson: The characterization of public-private relationships may involve a subtle analysis of factors such as legislative language, circumstances surrounding government action including its purpose and effect, the parties' expectations including the consideration afforded, and causation-reliance links.[30] This lesson provides a framework for further analysis in the context of land use dealing.

B. *Development and Application of Standards*

Contract Clause cases also establish certain criteria that determine whether the blend of contract and police powers that infuses many public-private relationships is basically legitimate or fundamentally flawed. This facet of Contract Clause theory is often described as the "reserved powers" doctrine.[31] Although this body of precedent provides an important starting point in the development of standards that can discriminate between legitimate and illegitimate land use deals, several caveats provide initial perspective. Reserved powers doctrine cases isolate key criteria for consideration without developing bright-line standards. These standards focus on problematic blends of contract and police powers, without reaching the question whether additional independent contract- and/or police-power-based standards might apply. They also focus on how this doctrine applies to public-private relationships characterized as primarily contractual in nature, while leaving open the question whether relationships that are primarily regulatory in nature should be similarly constrained.

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30. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977) ("In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."); Wood v. Lovett, 313 U.S. 362, 368 (1941) (purpose and effect of legislation, rather than name or label, determines whether contract exists).

31. This Article uses the phrase "reserved powers doctrine" to refer to the rule that state and local governments lack the capacity, at the outset, to enter into contracts that convey away certain of their sovereign powers, including the police power. This definition is drawn from the Supreme Court's most recent formulation. *See, e.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), in which the Court stated as follows:

> When a State impairs the obligation of its own contract, the reserved-powers doctrine has a different basis. The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. . . . In deciding whether a State's contract was invalid *ab initio* under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the police power and the power of eminent domain were among those that could not be "contracted away," but the State could bind itself in the future exercise of the taxing and spending powers.

Id. at 23.

It is unfortunately the case that at times courts and commentators blur analyses by citing cases broadly and by using the phrase "reserved powers doctrine" to refer both to this rule of *initial incapacity* and to the principle that governments may continue to assert their police power prerogatives to justify actions in contravention of private or public contracts *at a later date. See, e.g.*, Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 436 (1934). One method of clarifying analysis is to use the phrase "reserved powers doctrine" rather literally to describe the rule that public or private grants or contracts implicitly reserve to the government important governmental powers such as the police power for future use, and to employ the phrase "inalienability doctrine" to refer to the initial incapacity rule just described. *See* Note, *Takings Law and the Contract Clause*, *supra* note 13, at 1452. Because the Supreme Court's recent usage fails to conform to this pattern, however, this Article uses the phrase "reserved powers doctrine" to refer to the rule of initial incapacity, and avoids use of that phrase in discussing reliance on the police power to justify subsequent government action in contravention of contractual obligations. *See infra* notes 64-92 and accompanying text.

The Supreme Court first promulgated the reserved powers doctrine in *Stone v. Mississippi*,[32] an 1880 case that involved the legislative grant of a twenty-five year charter to operate a statewide lottery, and the subsequent enactment of state constitutional and statutory provisions outlawing lottery operations. The Court concluded that the subsequent state action did not offend the Contract Clause because the state could not, at the outset, contract away its right to exercise its fundamentally inalienable police power.[33] In reaching this decision, the *Stone* Court struck several important themes: The state legislature lacked power to cede its police power because to do so would exceed its authority from the people;[34] not all expectations are entitled to protection, only those rooted in "property" rights rather than "governmental" rights;[35] the police power is quintessentially circumstance- and time-dependent; and, notwithstanding compromises possible of other government powers, prerogatives associated with the police power always must be observed.[36]

Several subsequent cases involving local government efforts at land use and transportation control followed *Stone*'s reserved powers doctrine. In the 1897 case of *Wabash R.R. v. Defiance*[37] the Supreme Court recognized that a city could require a railroad to modify road grades, notwithstanding an earlier ordinance authorizing incompatible bridge construction and related agreements to undertake sidewalk construction. The Court's rationale echoed that in *Stone*, for it observed that a city could not enter into an agreement to relinquish its right to improve streets without express legislative authorization;[38] private expectations must take into account that determining street characteristics constituted an inherently public function;[39] and the need to respond to growth and to

32. 101 U.S. 814 (1880). At times this doctrine has been traced to an earlier state court decision. *See* Brick Presbyterian Church v. New York, 5 Cow. 538, 540 (N.Y. 1826) (upholding city's right to prohibit land's use as cemetery, notwithstanding covenant of quiet enjoyment contained in earlier city lease of property).

33. *Stone*, 101 U.S. at 817-18.

34. *Id.* at 819 ("The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such a [lottery] business in their midst.").

35. *Id.* at 820 ("The contracts which the Constitution protects are those that relate to property rights, not governmental.").

36. *Id.* The *Stone* Court stated:

> The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away or sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances."

Id.

37. 167 U.S. 88 (1897).

38. *Id.* at 94. The Court stated:

> It is incredible, in view of the language of this ordinance, that the city could have intended, or the railroad company have expected, that the former thereby relinquished forever the right to improve or change the grade of these streets. If it were possible that a city could make such a contract at all, it could only be done by express authority of the legislature and in language that would admit to no other interpretation.

Id.

39. *Id.* The Court stated:

protect the public safety was of critical ongoing importance.[40] The Court also has invoked the reserved powers rule to invalidate the grant of a monopoly on slaughterhouse operations[41] and an abdication of regulatory authority over telephone rates.[42]

Significantly, however, the Court also established certain limits on the reserved powers doctrine's application. In an 1885 case the Court refused to use the inalienability argument to invalidate an exclusive utility franchise involving the provision of coal gas to the city of New Orleans.[43] The Court distinguished earlier cases which involved lottery and beer-production businesses that had nuisancelike characteristics,[44] and concluded that when an award of a monopoly served the public welfare by providing a needed incentive for private investment,[45] and when the public health and safety was not affected adversely,[46] the police power had not been compromised.

At least two lessons may be drawn from the reserved powers doctrine. First, the coalescence of certain factors suggests an incompatible blending of contract and police powers that may give a court grounds for invalidating a resulting relationship: the absence of reasonably clear government authority, marginal or unwarranted private expectations, and a strong, circumstance- and time-dependent public interest that has been affected adversely. At the same

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> The only contract as to time which could possibly be extracted from this ordinance would be that the railway company, on building the bridges and approaches, should be entitled to maintain them in perpetuity. The result would be that, if the city should, in the growth of its population, become thickly settled in the neighborhood of these bridges, they would stand forever in the way of any improvement of the streets. This proposition is clearly untenable.

Id.

40. *Id.* at 97-98. The Court noted:

> Indeed, the right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety and morals of its inhabitants.

Id.

41. *See* Butchers Union Slaughterhouse & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughterhouse Co., 111 U.S. 746 (1884) (upholding repeal of earlier grant of an exclusive right to operate slaughterhouses in New Orleans, when the legislature had no authority to limit the exercise of the police power insofor as it affects the public health and public morals).

42. *See* Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908) (upholding ordinance fixing telephone rates, notwithstanding franchise provision specifying higher rate of payment, when provision amounted to abandonment rather than exercise of regulatory authority, and no express legislative authority allowed contract setting rates for 50 year period).

43. New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885).

44. *Id.* at 665-69.

45. *Id.* at 670. The Court stated:

> In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work [of erecting and maintaining gas works]. . . . Without that grant, it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of the security in person, property, and business which comes from well-lighted streets.

Id.

46. *Id.* at 671 ("[t]he contract in this case . . . is not, in any legal sense, to the prejudice of the public health or the public safety"). When regulatory authority is retained, any action injurious to the public health, comfort, or safety may be prohibited. *Id.* at 672.

time, however, the criteria are notably ambiguous. In any given case it may be extremely difficult to judge and balance the clarity of authority, reasonableness of expectations, and inherent adverseness of effects on important public interests. Taken together, however, these lessons indicate that the question of fundamental incompatibility must be addressed thoughtfully and flexibly in the course of developing an appropriate theoretical framework to govern land use deals.

C. *Noncompliance Issues*

Contract Clause precedent suggests that special rules may be needed to address noncompliance issues that arise in connection with public-private deals. As described below, before a court finds a constitutional violation, it first must consider the level of governmental noncompliance as well as the government's special prerogative to assert its police powers contrary to a purportedly binding agreement. Once the court makes such a determination, however, stringent remedial measures are available. Although this facet of Contract Clause doctrine provides helpful insight into crucial noncompliance issues raised by public-private deals, it is important to remember that it focuses only on government, not private, noncompliance; it does not address the approach courts should take toward more simple breaches of agreements, the justifications that the parties may assert, and the appropriate remedies in such cases.

1. Threshold Level of Noncompliance: Rules About Impairment

The United States Constitution does not prohibit noncompliance with contracts; it only bars "impairment" of contractual obligations. This language has accordingly provided a vehicle for decisions requiring some threshold level of noncompliance before a constitutional violation occurs. Rules about impairment differ in several important respects depending on whether they pertain to private or public contracts. Although public contracts are of greatest relevance to land use deals, an understanding of rules governing private contracts provides a necessary preliminary perspective.

Any government action that adversely affects the obligations of contracting private parties arguably might constitute an "impairment" for constitutional purposes.[47] The courts have recognized, however, that such an interpretation would inappropriately stymie legitimate government action, which must, by its nature, incidentally affect preexisting contractual rights.[48] Accordingly, courts

47. That this is not the case is evident from judicial definitions of the term. *See* Home Bldg. and Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934) ("The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . ., and impairment . . . has been predicated upon laws which without destroying contracts derogates from substantial contractual rights.") (citations omitted).

48. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). The Court stated:

> The language of the Contract Clause appears unambiguously absolute. . . . The Clause is not, however, the Draconian provision that its words might seem to imply. As the Court has recognized, "literalism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection."

Id. at 240 (quoting W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1933)); *see* United States Trust

have developed several different approaches to distinguish, at the threshold, between generally legitimate government actions and questionable actions that necessitate more full-blown analysis.

Two general approaches are worthy of particular note. At an early stage in the doctrinal evolution of the Contract Clause, the Supreme Court adopted a categorical approach to distinguish between legitimate and more questionable government actions affecting private contracts. In a number of cases the Court held that certain government actions modifying or repealing contract remedies ("modifications"), such as changes in applicable statutes of limitation, did not constitute an impairment of contract obligations.[49] Although the Court has basically abandoned a flat obligation-remedy distinction, it retains a sensitivity that changes in remedy are somehow different.[50]

More recently, however, the Court has moved toward a more generic approach to distinguishing legitimate from more questionable modifications. In a number of cases involving private contracts the Court has appeared to differentiate between major and minor impairments: it has required that a "substantial" impairment exist before moving to the ultimate stage in its analysis.[51] Although the Court has not developed a clear rationale in these cases,[52] its approach assumes that the greatest risk in private contract cases is private abuse of govern-

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Co. v. New Jersey, 431 U.S. 1, 22 (1977) (if the law were "[o]therwise, one would be able to obtain immunity from state regulation by making private contractual agreements").

49. *See, e.g.*, McGahey v. Virginia, 135 U.S. 662 (1890) (state may shorten time for bringing action so long as reasonable time remains); Penniman's Case, 103 U.S. 714 (1881) (state may abolish imprisonment for debt).

50. *See United States Trust*, in which the Court stated:

> Although now largely an outdated formalism, the remedy/obligation distinction may be viewed as approximating the result of a more particularized inquiry into the legitimate expectations of the contracting parties. The parties may rely on the continued existence of adequate statutory remedies for enforcing their agreement, but they are unlikely to expect that state law will remain entirely static. Thus, a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement.

431 U.S. at 20 n.17

51. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411 (1983) ("threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship' "; regulation that restricts gains to reasonable expectations does not necessarily constitute a substantial impairment) (quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-45 (1978)). The *Allied Structural Steel* Court stated:

> The first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

Allied Structural Steel, 438 U.S. at 244-45.

52. In *Allied Structural Steel* the Court appeared to cut the test from whole cloth. *See infra* note 54. The Court cited no earlier authority for this formulation; it merely footnoted to an earlier case that upheld state action in derogation of public contract rights when sufficient justification existed. *See Allied Structural Steel*, 438 U.S. at 244-45 & n.17. The later opinion in Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983), quoted briefly from *Allied Structural Steel* and referenced, without explanation, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (another key public contract case, but one in which a contract modification was overturned). *See Energy Reserves Group*, 459 U.S. at 411.

ment power;[53] that as a threshold matter, deference to government action is basically warranted and therefore presumed;[54] and that an initial screening process, which focuses on the adverse effects of government action on contract-based expectations, appropriately ensures that sufficiently strong prima facie proof of illegitimacy exists to overturn this presumption and to force the government to justify the legitimacy of its action.[55]

It is much more difficult to determine whether government action gives rise to a threshold level of impairment when public contracts are involved. In this context either private or public abuse of government power may occur, raising questions concerning the propriety of deference to government action.[56] Analysis is further complicated because the government is no longer a third party, which could impair but not breach the underlying agreement. Instead, to avoid characterizing every breach as a constitutional case, a distinction must be made between contract breach and government impairment.[57]

Not surprisingly, key differences have emerged in rules that govern the impairment stage of analysis involving public contracts. First, a categorical approach focusing on remedy likewise exists, but differs from the obligation-remedy distinction noted above. In the public contract context, rather than focusing on whether the impairment is severe or insignificant as a means of distinguishing between breach and impairment, courts have focused on the question of remedy.[58] When an adequate contract remedy exists, government action is defined as a routine breach.[59] This definition applies even when a government modification seeks to alter agreed-upon contract remedies, so long as an equally effective remedy still exists.[60]

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53. *See Allied Structral Steel*, 438 U.S. at 248-49 (discussing narrow focus of legislation).

54. *Id.* at 244. The Court noted as follows:

> [A]lthough the absolute language of the [Contract] Clause must leave room for the "essential attributes of sovereign power," . . . that power has limits *when* its exercise effects substantial modifications of private contracts. Despite the customary deference courts give to state laws directed to social and economic problems, "[l]egislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

Id. (emphasis added) (quoting *United States Trust*, 431 U.S. at 21-22).

55. *Id.* at 245 (severity of impairment measures height of hurdle legislation must clear; more careful examination of justification is required when severe impairment is shown).

56. *See* Sunstein, *supra* note 9, at 1723 (heightened scrutiny in public contracts cases may be justified when government motives are less trustworthy and there is a greater likelihood that no public value is being served).

57. *See* Hays v. Port of Seattle, 251 U.S. 233, 237 (1920) (distinguishing between statutes that have the effect of impairing public contractual obligations, and those that violate or repudiate contracts).

58. *See id.* (noting that an impairment may arise if the purpose or effect of legislation alters materially the scope of a contract, diminishes a party's compensation, or defeats his or her lien, but not if the contractual legislation recover damages on a breach of contract theory); E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 679 (7th Cir. 1980) ("The distinction [between a breach of a contract and impairment of the obligation of a contract] depends on the availability of a remedy in damages in response to the state's [or its subdivisions's] action.").

59. *See* Hays v. Port of Seattle, 251 U.S. 233, 237 (1920); E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 679 (7th Cir. 1980).

60. *See* Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 516 (1942) (state modification of remedies against bankrupt municipality upheld when new remedy was valuable substitute for "depreciated claim of little value").

Second, courts no longer make a distinction between major and minor impairments in most, if not all, public contract cases. The Supreme Court's decision in *United States Trust Co. v. New Jersey*[61] expressly rejected this distinction both in theory and practice, concluding that a change in covenants, which might have an adverse effect on the security of bondholders' investments, constituted a sufficient impairment to justify a full-blown analysis of the sort described below.[62] The Court observed that it could not give special deference to governmental action when a public contract, which implicated the government's self-interest, was involved.[63] It remains to be seen whether the Court has completely abandoned the distinction between major and minor impairments of public contracts, or whether, in the absence of core police power concerns, it will reject this approach only when public contracts involve the government's financial interest, as a narrow reading of its opinion might suggest.

A review of the impairment doctrine thus offers the following critical lesson: It may be appropriate or necessary in the interest of public policy to distinguish between types or levels of interference with private expectations that result in the event of government noncompliance with contractual obligations. Considerable difficulty, however, may accompany such distinctions, particularly when they concern public-private agreements.

2. Justification of Noncompliance: The Role of the Police Power

A major issue in Contract Clause litigation has been whether any justifications immunize government action in derogation of contract rights from constitutional challenge. Once again, it is useful to examine private contracts at the outset, because they provide an important benchmark for analysis of public contract doctrine in this area.

Early case law recognized that the government could legitimately impair private contracts when necessitated by its exercise of the police power.[64] The Supreme Court has repeatedly observed that private parties cannot deprive the government of this important power by entering into private contracts between themselves;[65] instead, all contracts contain an implicit condition that the state

61. 431 U.S. 1 (1977).

62. *Id.* at 17-21 (repeal of statutory covenant assuring bondholders that Port Authority revenues and reserves would be used only for certain stated purposes deemed impairment, even though security was not shown to have been jeopardized).

63. *United States Trust*, 431 U.S. at 26 ("complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake").

64. *See* Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914) (upholding city ordinance that restricted hours of railroad operation and imposed grading requirements when city could not contract away police power to protect public against nuisances); Manigault v. Springs, 199 U.S. 473 (1905) (upholding legislation authorizing construction of dam on creek in order to reclaim and thus increase value of lowlands, notwithstanding earlier private contract between riparian owners agreeing not to impair flow of creek); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (upholding local ordinances prohibiting operation of nuisancelike business within village limits, notwithstanding earlier state legislation authorizing operation of fertilizer plant within village limits, in absence of evidence that no other location for operation was available).

65. *See, e.g.*, Manigault v. Springs, 199 U.S. 473, 480 (1905) ("parties by entering into contracts may not estop the legislature from enacting laws intended for the public good").

may exercise its police power as necessary in the public interest.[66] At the same time, the Court has remained sensitive to the possibility that the police power can be subject to private abuse of the sort that inspired the Contract Clause's inclusion in the Constitution.[67] The cases consistently reflect the careful compromises needed in fashioning rules that take into account these competing concerns.

Two clusters of cases have set the standards for evaluating the legitimacy of police power exercises as they affect private contracts—those dating from the Depression era, and those decided in the last decade. *Home Building and Loan Association v. Blaisdell*[68] held that carefully crafted mortgage relief could withstand constitutional challenge if the legislation in question was "addressed to a legitimate end and the measures taken [were] reasonable and appropriate to that end."[69] More specifically, the Court concluded that in a time of widespread and severe economic emergency the provision of temporary debtor relief was a legitimate legislative end, and measures that provided for the continuing accrual of mortgage interest at an agreed-upon rate coupled with a temporary but limited suspension of foreclosure proceedings was a reasonable and appropriate means.[70] Subsequent cases indicated that the Court's willingness to accommodate police power exercises nevertheless had limits. The Court invalidated debtor relief legislation, which provided for a reduction in agreed-upon interest rates and long-term extension of mortgage redemption opportunities.[71] It also invalidated an overly broad measure exempting insurance and disability benefits from liability or seizure by judicial process.[72]

More recent cases have struck similar themes, but they have employed a somewhat more elaborate analysis. In *Allied Structural Steel Co. v. Spannaus*[73] the Court announced that it would assess government impairments using a "reasonable and necessary" standard, but would adopt a sliding scale approach in which more "substantial" impairments[74] would be required to withstand a "careful examination of the nature and purpose of the state legislation."[75] Using this standard the Court struck down legislation modifying pension vesting rules when the statute in question lacked a broad public purpose and instead effectively focused on only a very few employers;[76] employers had reasonably relied

66. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934) ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.").

67. *See, e.g.*, Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 412 (1983) ("The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.").

68. 290 U.S. 398 (1934).

69. *Id.* at 438.

70. *Id.* at 444-48.

71. *See* W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935).

72. *See* W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934).

73. 438 U.S. 234 (1978).

74. *Id.* at 245.

75. *Id.* at 247.

76. *Id.* at 248.

on existing rules in an area in which stabilility of financial arrangements was of critical importance;[77] and the required immediate implementation of the proposed changes resulted in a particularly severe impact on the employer's operations.[78]

The opposite result was reached in two subsequent cases in which the Court upheld state legislation that imposed ceilings on natural gas prices and that prohibited the pass-through of increased severance taxes at a time of consumer price adjustments resulting from federal deregulation.[79] In these cases the Court found a legitimate public purpose,[80] broad-based legislation applicable to a wide sector of the admittedly small number of companies in the industry,[81] and private sector expectations that should have taken into account the volatile nature of economic change in the industry and its pervasively regulated character.[82] In a 1987 decision the Supreme Court likewise rejected a Contract Clause challenge to Pennsylvania legislation which imposed liability for subsidence damage on coal mine operaters in derogation of contractural waivers of damage claims previously executed by owners of surface interests.[83]

Cases involving public contracts require government modifications of preexisting contracts under the police power to satisfy similarly stated but differently implemented standards. These differences result from efforts to avoid public rather than primarily private abuse. They also result from the related concern to fashion an approach that takes into account expectations tied to the government's critical role in the initial formulation of the underlying contract.

Two key cases illustrate this point. In *City of El Paso v. Simmons*[84] the Court reviewed and upheld legislative changes in the terms of land sale arrangements involving public domain lands in the state of Texas. The legislation sought to achieve a broad-based solution to a widespread problem of insecure

77. *Id.* at 246.

78. *Id.* at 249.

79. *See* Exxon Corp. v Eagerton, 462 U.S. 176 (1983) (ceilings on prices); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) (pass-through of severance taxes).

80. *See Exxon*, 462 U.S. at 191; *Energy Reserves Group*, 459 U.S. at 417.

81. *Exxon*, 462 U.S. at 191; *Energy Reserves Group*, 459 U.S. at 417 n.25.

82. *Exxon*, 462 U.S. at 194 n.14; *Energy Reserves Group*, 459 U.S. at 414-16.

83. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232 (1987). Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act prohibited coal mining that caused subsidence damage to pre-existing public buildings, dwellings, and cemetaries; and authorized a state agency to revoke an operator's mining permit if the removal of coal caused damage to a protected structure or area, and the operator had not within six months repaired the damage, satisfied any claim, or deposited the sum that repairs would cost as security. *Id.* at 1237-38. The Court inquired whether the Pennsylvania legislature had a "significant and legitimate public purpose," *id.* at 1252, and whether the legislature's "adjustment of 'the rights and responsibilities of contracting parties [was based] upon reasonable conditions and [was] of a character appropriate to the public purpose justifying [the legislaure's] adoption,' " *id.* at 1252-53 (quoting *Energy Reserves Group*, 459 U.S. at 412; *United States Trust*, 431 U.S. at 22). The Court concluded that Pennsylvania had a "strong public interest" in preventing harm to buildings and cemetaries, "the environmental effect of which transcends any private agreement between contracting parties." *Id.* at 1252. It also reasoned that deference was due to the judgment of the Pennsylvania legislature, and upheld the legislature's determination that not only guidelines and restrictions on mining practices, but also the imposition of liability, was needed to serve Pennsylvania's interest in the deterrence of environmental harm and restoration of the environment to its previous condition. *Id.* at 1253.

84. 379 U.S. 497 (1965).

land titles affecting substantial acreage throughout the state.[85] It resulted in a requirement that redemption for non-payment of interest occur within five years rather than at any time over an indefinite period, an incidental change that did not deprive buyers of all title and which ensured that the initial bargain did not involve an illusory promise of payment.[86] The Court reasoned that changed circumstances necessitated the legislation, because problematic instability of land titles had ensued in the several decades since the land sales originally occurred.[87]

More recently, in *United States Trust* the Court invalidated New Jersey's repeal of covenants; these covenants had limited the use of certain Port Authority revenues to provide security to bondholders. By repealing the covenants the State intended to divert those revenues to finance an improved system of public mass transportation.[88] In this case the Court again focused on legislative purpose, private expectations, and the reasonableness and necessity of the legislative modification. The Court concluded that the concern for mass transit was legitimate,[89] but that bondholders held strong private expectations that the agreed-upon security would be preserved.[90] Perhaps most important, the means employed to achieve the public end were neither reasonable nor necessary: the need for mass transit had been foreseeable at the outset of the agreement, and had changed only in degree not in kind;[91] the State could employ less drastic alternative measures that would require less extensive reductions in the security concerned, or it could adopt transportation measures that did not involve the covenants' repeal.[92]

In effect, then, the Court has recognized that at times government action in derogation of public contract rights may be justified, but only under circumstances that reflect an appropriate balance between the need to respond to police power concerns and the obligation to avoid public and private abuse of that power. Inquiry regarding the purpose of government action assures that a public purpose exists, not the private purpose of a narrow faction that seeks to employ the police power for selfish ends to the disadvantage of another small segment of the community. By scrutinizing closely the impact on private expectations, courts can conduct a reasoned analysis of the extent to which private property rights are implicated, and they can make an informed judgment concerning the fairness of any proposed accommodations between private property rights and the police power. Perhaps most significantly, the "reasonable and necessary" facet of the Court's analysis forces a government, which has entered into a contract, to demonstrate that a proposed modification represents an independent exercise of the police power dictated by changed circumstances and

85. *Id.* at 513.
86. *Id.* at 499.
87. *Id.* at 515-16.
88. *United States Trust*, 431 U.S. at 13-14.
89. *Id.* at 28.
90. *Id.* at 18-19.
91. *Id.* at 31-32.
92. *Id.* at 29-31.

unforeseen events; furthermore, the Court's analysis requires that public necessity dictated the government's decision, not the mere convenience of shifting an additional burden to a bargaining partner who may be an easy target for the imposition of public costs.

The role of police power justifications for noncompliance likewise offers useful lessons in developing a theoretical framework to govern public-private dealing. Public policy requires that government parties retain police power prerogatives for use notwithstanding binding contractual obligations. Careful assessment of the proposed exercise of that power is clearly needed, however, to ensure that governmental action results in an appropriate and nonabusive accommodation of public and private interests.

3. Remedies for Noncompliance

Finally, an issue arises regarding the remedies that may be available when a party does not comply with a public-private agreement. Because the Contract Clause prohibits action only by states or their subdivisions, precedent under this provision affects only the remedies that exist in the event of governmental noncompliance.[93] At the very least, therefore, different remedial schemes may apply to public and private parties.

Two major factors determine what remedies a court will award in the event of governmental noncompliance. First, the court must consider the nature of governmental noncompliance to determine whether the government party intended a simple breach of contract or whether, instead, it intended an outright repudiation of contractual obligations. If only a breach is involved, traditional compensatory relief in the form of a damages award remains available,[94] while more extreme remedies may be provided in the event of a repudiation and resulting impairment, as discussed below.[95] Government intent, however, may not be altogether clear. Legislation that directs a particular course of conduct which contravenes contractual obligations may give rise to a simple breach and resulting action for damages—for example, if a second public bridge is built in violation of an earlier agreement,[96] or if payments under an ongoing contractual obligation are legislatively curtailed.[97] On the other hand, legislation may render conduct illegal that was clearly permitted under a preexisting contract—for example, by invalidating a contract authorizing a public concert[98] or by lim-

93. *See supra* text accompanying note 12.

94. *See* Hays v. Port of Seattle, 251 U.S. 233 (1920) (state action abandoning waterway excavation project did not impair contractual obligations but left private contractor with suit for damages under breach of contract theory).

95. *See infra* notes 103-06 and accompanying text.

96. *See* Jackson Sawmill Co. v. United States, 580 F.2d 302 (8th Cir. 1978) (decision to construct second bridge did not constitute impairment of earlier contract pledging tolls of first bridge for use to repay bond obligations associated with expressway construction near first bridge), *cert. denied*, 439 U.S. 1070 (1979).

97. *See* St. Paul Gas Light Co. v. City of St. Paul, 181 U.S. 142 (1901) (decision by city to require company to remove gas lamps and to cease paying interest for unused gas lamps did not preclude damage action and thus did not impair contractual obligation).

98. *See* Contemporary Music Group, Inc. v. Chicago Park Dist., 57 Ill. App. 3d 182, 372

iting the type of refuse that might be deposited in a rented landfill.[99] By declaring such conduct illegal, the government party effectively creates a defense to a damages action for breach of contract, repudiating the contract to such a degree that contractual obligations are impaired.[100]

If governmental noncompliance amounts to repudiation and impairment, rather than a simple contract breach, a second factor—whether the impairment is justified—must be considered. If an adequate justification for the government's action does exist—for example, if governmental noncompliance is based on a well-founded concern for public safety— the aggrieved private party can rely on neither damages nor declaratory or injunctive relief.[101] On the other hand, if no justification exists to satisfy the "reasonable and necessary" test described above,[102] the court will invalidate the government's noncomplying action[103] and in effect require the government party to specifically perform its contractual agreement.[104] Such a harsh result may seem anomalous, because it effectively pressures the government to stick with an inefficient bargain when a similarly situated private party would not be required to do so.[105] Nonetheless, this approach parallels the type adopted with regard to government impairment of private contracts:[106] in the absence of a compensatory remedy, the court will invalidate the subsequent government action.

Even if a court invalidates the governmental action because it violates a public-private agreement, an additional alternative may be available to a government party intent upon pursuing its chosen course of action. The Supreme Court has clearly indicated that the power of eminent domain may be asserted, even when to do so conflicts with contractual obligations.[107] However, whether a government party may condemn contract rights in a given case occasionally raises difficult questions in its own right. Appropriate statutory authority must

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N.E.2d 982 (1978) (no damages action available when rock concert barred by valid exercise of police power).

99. *See* E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675 (7th Cir. 1980) (no damages action available when district action barred deposit of sewage sludge in landfill in exercise of police powers).

100. *See id.* at 680-81.

101. *See* Contemporary Music Group, Inc. v. Chicago Park Dist., 57 Ill. App. 3d 182, 372 N.E.2d 982 (1978) (public safety concern justified cancellation of concert permit during period of civil unrest).

102. *See supra* notes 84-92 and accompanying text.

103. *See United States Trust*, 431 U.S. at 32 (declaring that "the Contract Clause . . . prohibits the retroactive repeal of the [earlier] covenant").

104. *See* Note, *Takings Law and the Contract Clause*, *supra* note 13, at 1462-63 (*United States Trust* decision "mandates that government comply with the exact terms of public contract; grants public contract holders a constitutional right to specific performance; . . . [t]he [Contract Clause] does not authorize courts to award damages in lieu of requiring the state to adhere to the original terms of the contract").

105. Note, *Takings Law and the Contract Clause*, *supra* note 13, at 1463 (government forced to negotiate with many bondholders who may hold out for high payment, while party to private contract awarded damages set by the court).

106. *See, e.g.*, *Allied Structural Steel*, 438 U.S. at 250-51 (declaring that the Contract Clause "means that Minnesota could not constitutionally do what it tried to do in this case").

107. *See* West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532-33 (1848).

be available;[108] and problems may arise in valuing such rights in order to calculate the required just compensation.[109]

In sum, the Contract Clause offers several useful lessons concerning the remedies associated with public-private agreements. Rules may differ for public and private parties. At least when government parties are concerned, remedies are available to redress noncompliance that rises to the level of a constitutional violation—if the aggrieved party has no damages action for breach of contract, noncompliance is not well justified, and the government has not paid just compensation pursuant to the exercise of its power of eminent domain. With these and other lessons in mind, two specific types of public-private land use deals may be considered.

III. CONTINGENT ZONING

A variety of techniques have been developed in recent years in response to local governments' perceived need to tailor land use requirements more closely to the circumstances and characteristics of particular parcels and affected areas.[110] The need for such individualization is particularly great in the context of rezoning petitions that request zoning map amendments. Rezoning decisions are a chronic source of litigation, because deeply held expectations of neighborhood stability are often at war with deep-seated desires for handsome profits, against a backdrop of uncertain jurisprudence[111] and unpredictable judicial dispositions. Carefully constructed compromises that focus on the legitimate concerns of residents, developers, and local governments offer an appealing alternative.

Such compromises may take several forms and may be implemented in several different ways. Often it may be desirable to limit the types of use that may be made of particular property, notwithstanding the wider range of uses otherwise permissible in a given district: for example, residential neighbors may find a rezoning to commercial use more palatable if only certain types of uses are allowed.[112] Other requirements might mitigate adverse environmental effects by, for example, restricting building placement or specifying that a property owner utilize buffering and landscaping.[113] Alternatively, adverse effects on community infrastructure might be addressed by specifying that a property

108. *See* Kraft, Loikith & Petkanics, *Accommodating the Rights of Bondholders and State Public Purposes: Beyond* United States Trust, 55 TUL. L. REV. 735, 767 (1981).

109. *See id.* at 768-69.

110. Traditional techniques that may be used for this purpose include variances, special or conditional use permits, and zoning amendments. More recently developed flexibility devices include floating zones, tentative, qualified and overlay zones, and conditional and contract zoning. For a discussion of these techniques, see D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §§ 4.14, 5.5, 6.1 - 6.13 (2d ed. 1986).

111. *See* Rose, *supra* note 5, at 891.

112. *See, e.g.*, J-Marion Co. v. County of Sacramento, 76 Cal. App. 3d 517, 142 Cal. Rptr. 723 (1977) (agreement not to sell liquor); Carole Highlands Citizens Ass'n v. Board of County Comm'rs, 222 Md. 44, 158 A.2d 663 (1960) (agreement not to build gas station).

113. *See, e.g.*, Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960) (condition included provisions of fencing and shrubbery); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (agreement limited use and provided for fencing and buffer).

owner dedicate land, undertake construction, or contribute funds for road improvements or for other purposes.[114] These and other compromises might be incorporated in express or implied agreements between a developer and a local government,[115] in covenants between a developer and a neighborhood association,[116] or in rezoning ordinances passed by local legislative bodies.[117]

While compromises of this sort undoubtedly have avoided litigation in many cases, they have nonetheless given rise to numerous lawsuits, in nearly all the states,[118] and they have stimulated considerable scholarly interest.[119] This substantial body of precedent that has developed over the past twenty-five years provides a fruitful context for an initial in-depth exploration and consideration of the theoretical framework of government land use deals.

A. *Characterization*

Courts and commentators to date have employed several different terms and phrases to characterize the type of land use deal just described. A number of courts have referred to rezoning decisions tied to explicit or implied government-private agreements as "contract zoning."[120] Others have used the phrase

114. *See, e.g.*, Nolan v. City of Taylorville, 95 Ill. App. 3d 1099, 420 N.E.2d 1037 (1981) (conditions included street widening and improvement of water and sewer facilities); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (conditions included provision of access roads).

115. *See, e.g.*, Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (agreement between city and developer); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (implied agreement).

116. *See, e.g.*, Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (covenant between developer and neighbors with city as benefited party).

117. *See, e.g.*, Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977) (condition requiring repaving included in rezoning resolution).

118. *See* Kramer, *Contract Zoning—Old Myths and New Realities*, 34 LAND USE L. & ZONING DIG. 4 (1982) (reviewing cases on a jurisdiction by jurisdiction basis). Writing in 1982, the author cited 10 states as following a per se rule of validity or invalidity, although the majority of those states had some cases upholding and others invalidating contingent zoning given particular facts; the remaining states were described as "schizophrenic" (with cases viewed as inconsistent), or "muddy waters" states (with cases that had not "definitively" upheld conditional zoning), or were found not yet to have addressed the issue.

119. For general discussions of contract and conditional zoning, see 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.20 -.21 (2d ed. 1976); D. MANDELKER, LAND USE LAW 179-82 (1982); D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 448-51 (2d ed. 1985); N. WILLIAMS, AMERICAN LAND PLANNING LAW § 29.01 -.04 (1974); Frelich & Quinn, *Effectiveness of Flexible and Conditional Zoning Techniques—What They Can and What They Cannot Do For Our Cities*, INST. ON PLAN., ZONING, AND EMINENT DOMAIN 167 (1979); Kramer, *supra* note 118, at 4; Liebermann, *Contract and Conditional Zoning: A Judicial and Legislative Review*, 40 URBAN LAND 10 (1981); Rhodes, Lewis & Hauser, *Contract & Conditional Zoning: The Not So Dubious Distinction*, 56 FLA. BAR J. 263 (1982); Shapiro, *The Case for Conditional Zoning*, 41 TEMPLE L.Q. 267 (1968); Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L. REV. 897 (1965); Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972) [hereinafter Note, *A Tool for Zoning Flexibility*]; Note, *Concomitant Agreement Zoning: An Economic Analysis*, 1985 U. ILL. L. REV. 89 (1985) [hereinafter Note, *Concomitant Agreement*].

120. *See, e.g.*, Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971). The term "contract zoning" has been defined variously as including those situations in which the "property owner provides consideration to the local governing body in the form of an enforceable promise to do or not to do a certain thing in regard to his property in return for the zoning legislation which he seeks or an enforceable promise by the city for such legislation," Note, *A Tool for Zoning Flexibility*, *supra* note 119, at 831, or as "the undertaking of reciprocal obligations with respect to a zoning amendment by

"conditional zoning" as a means of characterizing decisions of this sort, commonly, but not universally, when no express agreement is present.[121] Some courts and commentators have avoided these two basic catch phrases; in an effort to recast a troublesome doctrinal mold, they have adopted modified descriptors by, for example, focusing on the use of "unilateral contracts"[122] or "concomitant" agreements.[123]

Care must be taken in evaluating this body of precedent to determine whether the terminology adopted was intended to characterize the land use control mechanisms in question for purposes of defining the applicable theoretical framework, or whether instead, it was adopted for purposes of describing the ultimate disposition of the case. An examination of the cases supports the latter view.[124] Early cases adopting the "contract zoning" terminology seemed intent to condemn the proposed arrangements on reserved powers as well as other grounds.[125] By characterizing such cases as ones that involve "contract zon-

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a property owner and the zoning authority," Note, *The Validity of Conditional Zoning: A Florida Perspective*, 31 U. FLA. L. REV. 968, 971-72 (1979) [hereinafter Note, *A Florida Perspective*].

121. *See, e.g.*, Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981). "Conditional zoning" has been defined as including "situation[s] in which a zoning ordinance is passed upon condition that a landowner perform a certain act prior to, simultaneously with, or after the passage of the zoning ordinance," Note, *A Tool for Zoning Flexibility*, *supra* note 119, at 831, or as those "in which the zoning authority obtains the property owner's commitment to subject the property to certain regulations as a prerequisite to approval of a rezoning petition," Note, *A Florida Perspective*, *supra* note 120, at 971.

122. *See also* D. MANDELKER, *supra* note 119, at 179-82 (distinguishing between invalid bilateral contracts and valid unilateral contracts); Note, *A Tool for Zoning Flexibility*, *supra* note 119, at 837-38 (distinguishing between contracts and unilateral contracts). The distinction between bilateral and unilateral agreements seems problematic on policy grounds, however, because even unilateral agreements can serve as an incentive to government action. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969). *Compare* Hartman v. Buckson, 467 A.2d 694 (Del. Ch. 1983) (bilateral contract invalid) *and* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (bilateral contract invalid) *with* Sylvania Elec. Products, Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118. (1962) (unilateral contract valid) *and* State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 29, 174 N.W.2d 533, 538 (1970) (upholding unilateral conditional zoning but stating that bilateral agreement between landowner and municipality would be invalid).

123. *See* State *ex rel.* Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967); Note, *Concomitant Agreement*, *supra* note 119, 89 *passim*.

124. *See* Kramer, *supra* note 118, at 4 (After reviewing numerous cases, the author concludes that "this contract-conditional zoning dichotomy is little more than a semantic game. In many cases, courts have labeled unilateral promises as contract zoning and bilateral promises as conditional zoning."); *see also* Scrutton v. City of Sacramento, 275 Cal. App. 2d 412, 419, 79 Cal. Rptr. 872, 878 (1969) (" 'contract zoning' has no legal significance and simply refers to a reclassification of land use in which the landowner agrees to perform conditions not imposed on other land in the same classification"); Cross v. Hall County, 238 Ga. 709, 712-13, 235 S.E.2d 379, 382-83 (1977) (stating that contract zoning is invalid, while conditional zoning is valid; noting that court should make decision on merits rather then merely apply label; then proceeding to find conditional zoning despite existence of oral agreement).

125. *See* Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956) (entering into private contract with property owner would result in contracting away police power); Baylis v. City of Baltimore, 219 Md. 164, 170, 148 A.2d 429, 433 (1959) (citing concern that "contract" would inhibit police power); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 393-94, 86 A.2d 127, 131 (1952) (local government may not curtail legislative power by bargain, or control exercise of such power by considerations that enter into the law of contracts); City of Knoxville v. Ambrister, 196 Tenn. 1, 7-8, 263 S.W.2d 528, 530 (1953) (agreement to provide parkland invalid as against public policy when designed to unduly control or affect exercise of legislative functions).

ing," later courts could use this broad phrase as a convenient epithet;[126] alternatively, they could give it a much narrower, literal application, to distinguish earlier precedent that involved express bilateral contracts and to allow other types of arrangements of the sort described above.[127] Courts deliberately chose the "conditional zoning" terminology, on the other hand, in contravention of the earlier designation as a means of describing rezoning arrangements perceived as legitimate.[128] In some instances, cases adopting this terminology included more fully developed explanations of the view that the imposition of conditions on rezoning approvals constituted an appropriate exercise of the police power, but they said little regarding the role or effect of related agreements on this theoretical universe.[129] In short, judicial precedent characterizing novel rezoning arrangements has tended to adopt labels that (1) suggest a relevant theoretical framework but serve primarily to describe ultimate outcomes, and (2) create an apparent dichotomy of classification, without adequately considering potential interrelationship or overlap.

More full-blown consideration of the characterization question, however, may assist in the development of an overall theoretical framework. The Contract Clause doctrine previously discussed provides a useful benchmark for this purpose;[130] it suggests that additional attention should focus on the legislative language, circumstances, and expectations associated with novel rezoning devices.

Turning first to rezoning arrangements that impose specially tailored requirements, but which do not involve express or implied agreements, it seems relatively clear that the public-private relationship is primarily, in the first instance, regulatory in nature. Rezoning decisions are authorized by state enabling legislation that contains regulatory rather than contractual language.[131]

126. *See* Hartman v. Buckson, 467 A.2d 694, 699 (Del. Ch. 1983); *see also* Carlino v. Whitpain Investors, 499 Pa. 498, 503-05, 453 A.2d 1385, 1387-88 (1982) (rejecting "contractually conditional" zoning based on reserve power concerns).

127. *See, e.g.*, Haas v. City of Mobile, 289 Ala. 16, 265 So. 2d 564 (1972) (no actual "contract" existed when condition was included in zoning ordinance); Housing Auth. of Melbourne v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App. 1967) (city did not contract to rezone, but agreed to make only zoning changes that were lawful); Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962) (separate agreement did not taint rezoning ordinance that contained conditions).

128. *See* Church v. Town of Islip, 8 N.Y.2d 254, 259, 168 N.E.2d 680, 683, 203 N.Y.S.2d 866, 869 (1960) (rejecting argument that illegal contract zoning was employed when reasonable conditions were included, and stating that "[A]ll legislation 'by contract' is invalid .... But we deal here with actualities, not phrases.").

129. *See, e.g.*, Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 602, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (noting fears that contractual agreement outside rezoning ordinance may lack inherent zoning restrictions, but stating that such fears are warranted only when conditions are also not contained in rezoning ordinance).

130. *See supra* text accompanying notes 14-30.

131. *See* Standard Zoning Enabling Act §§ 1-3 (U.S. Dept. Commerce 1926), *reprinted in* AMER. LAW INST. MODEL LAND DEV. CODE, Tentative Draft. No. 1 at 210 (1968) [hereinafter Standard Zoning Enabling Act]. Section 1 provides:

> For the purpose of promoting health, safety, morals or the general welfare of the community the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the

The purpose and effect of such legislation and implementing ordinances is to provide local governing boards with the right to impose land use controls as needed in the public interest, even in the absence of property owners' agreements. Both public and private participants in rezoning decisions understand that zoning decisions are generally regulatory rather than contractual in nature,[132] and the imposition of specialized conditions, in and of itself, does not alter these expectations.

Rezoning arrangements that include express or implied agreements at first seem to present a much stronger case for characterization as contractual in nature. On further reflection, however, this impression fades. Such agreements still are adopted within the context of legislation that uses only, or primarily, regulatory language. Local governments entering into such arrangements cannot be presumed to intend to cede away regulatory authority; and private parties lack the power to elect independently to alter the character of their relationship with the government in question by deciding to enter into a cooperative agreement rather than to insist on the involuntary imposition of equivalent controls.[133] Nor do private parties have reason for contrary expectations. Concurrence in particularized land use controls is induced by regulatory authority that can and will be exercised in the event of nonconcurrence, not by independent government promises.[134] Moreover, rezoning agreements involve no exchange of consideration, so long as agreed requirements reasonably approximate those that might otherwise be legitimately imposed under the police power.[135] It accordingly follows that rezoning agreements should be viewed primarily as regulatory in nature.

This reasoning then leads to three key conclusions. First, all rezoning arrangements, with or without agreements, arise against a single backdrop provided by governing legislation, relevant circumstances, and the parties' expectations. Second, careful consideration suggests that all such arrangements are primarily regulatory in character, and the theoretical framework for their development and use should reflect that fact. Thus, this Article adopts the neu-

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density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.

Id. § 1, at 212-14. Section 2 provides that the local legislative body may divide the municipality into districts; that "it may regulate" within such districts; and that "[a]ll such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts." *Id.* § 2, at 214. Section 3 specifies that "regulations shall be made in accordance with a comprehensive plan" and with particular purposes in view. *Id.* § 3, at 214-15.

132. *See* Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 601, 421 N.E.2d 818, 821, 439 N.Y.S.2d 326, 329 (1981) ("Both conditional and unconditional zoning involve essentially the same legislative act."); *see also* Epstein, *supra* note 13, at 747 (stating that "zoning restrictions on land use, of course, may well impose heavy 'burdens' on the right of sale, but it is doubtful that such restrictions are reached by the contract clause which simply does not govern all aspects of social life in which factions can operate").

133. *Cf., e.g.*, Manigault v. Springs, 199 U.S. 473, 480 (1905) ("parties by entering into contracts may not estop the legislature from enacting laws intended for the public good").

134. *See* Arkenberg v. City of Topeka, 197 Kan. 731, 737, 421 P.2d 213, 218 (1966) (agreement to convey right of way did not render rezoning invalid as contract zoning, when governing body reasonably could have required right of way as a prerequiste to rezoning).

135. *See infra* note 175 and accompanying text.

tral term "contingent zoning" to describe all types of individualized rezoning arrangements, instead of the more traditional dichotomy "contract" and "conditional zoning" or the more recent references to "unilateral contracts" or "concomitant agreement zoning." A final conclusion follows from the first two: To the extent that contingent zoning arrangements run the gamut between involuntarily imposed conditions and bilateral agreements, all are potentially affected by the presence of a bargaining process. Thus, although governmental police power primarily shapes the theoretical framework governing such arrangements, it may also be appropriate to draw on contract principles or doctrine, or otherwise to modify the theoretical framework, to take this special feature into account.

B. *Standards*

Once the character of the public-private relationship involved in contingent zoning is made clear, it is possible to consider the circumstances in which such arrangements may be upheld as legitimate, and those in which they should be invalidated as inconsistent with doctrinal and policy considerations. This section explores the threshold question whether contingent zoning is per se invalid; it then discusses the more specific procedural and substantive standards being developed by the courts to distinguish more carefully between acceptable and unacceptable contingent arrangements.

1. Per Se Invalidity

A threshold question in the development of contingent zoning doctrine has been whether this device is flawed inherently as a problematic blend of contract and police powers. Courts addressing this question have taken into account the same sorts of considerations that have influenced the development of the reserved powers doctrine under the Contract Clause. Not surprisingly, conflicting views have emerged.

Several prominent early cases, which involved both express and unstated agreements, condemned the contingent zoning device as per se invalid. Specifically, these courts concluded that zoning legislation failed to provide clear authority for adoption of a contingent zoning strategy,[136] or that this strategy failed in various respects to conform to the literal terms of traditional zoning legislation.[137] Courts also focused on the effects of contingent zoning on private

136. *See* V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 395-96, 86 A.2d 127, 131-32 (1952) (condition requiring that parcel could be used only for particular industrial purposes invalid when approval of such use was granted by zoning board in action that was "wholly beyond" zoning statute).

137. Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (contract zoning held invalid, because it failed to satisfy uniformity requirement of zoning statute); Carole Highlands Citizens Ass'n v. Board of County Comm'rs, 222 Md. 44, 158 A.2d 663 (1960) (conditional zoning in which developer agreed to limit property use in return for rezoning held invalid as inconsistent with uniformity and comprehensive plan requirements of zoning statute); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959) (conditional zoning referencing agreement in which developer agreed to limit property use in return for rezoning held invalid as inconsistent with uniformity requirement); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 86 A.2d 127 (1952) (condition specifying that parcel could be used only for particular industrial purposes invalid when inconsistent with uniformity requirement of zoning statute); Midtown Properties, Inc. v. Madison, 68 N.J. Super. 197, 172

property expectations; they afforded particular attention to the effects of rezoning on the expectations of residents who preferred the status quo to new development, even when the zoning was carefully conditioned to buffer adverse effects on nearby property values.[138] The courts in these early cases likewise discussed the public interests they perceived as at stake. They often concluded that the public good would be affected adversely by deals that stemmed from private abuse of the police power, or that compromised sound legislative judgments through the irresistible temptation to grant or demand unwarranted concessions to procure special community benefits.[139] Finally, the need to preserve regulatory discretion in the future was cited as a basis for prophylactic decisions invalidating contingent zoning at the outset.[140]

Other courts, including many of the more recent cases, have upheld contingent zoning in the face of charges of per se invalidity. These courts have concluded that traditional zoning legislation provided ample authority,[141] and that

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A.2d 40 (agreement between township and developer that regulations would be frozen for period of seven years in return for contributions toward school and public safety facilities held invalid because agreement failed to comply with provisions concerning uniformity and procedural requirements set forth in zoning legislations), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (1963) (per curiam); *see supra* note 131 (text of zoning statute uniformity and comprehensive plan provisions).

138. *See* Hartnett v. Austin, 93 So. 2d 86, 89-90 (Fla. 1956) (invalidating contract zoning on grounds that, under such zoning, "[t]he residential owner would never know when he was protected against commercial encroachment," and that neighboring owners of residential property "relied on the existing zoning conditions when they bought their homes [and] had a right to a continuation of those conditions" absent changed circumstances).

139. *See* Hartman v. Buckson, 467 A.2d 694, 699-700 (Del. Ch. 1983) (compromise agreement favoring developer was ultra vires and invalid, because contract zoning runs risk that exercise of legislative power will be controlled or affected in way that favors private interests); Houston Petroleum Co. v. Automotive Prods. Credit Ass'n, 9 N.J. 122, 129, 87 A.2d 319, 322-23 (1952) (contract zoning was ultra vires and invalid as favoring private interests); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 395, 86 A.2d 127, 131 (1952) (conditional zoning was ultra vires and invalid as favoring private interests); Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 209, 172 A.2d 40, 47 (township lacked authority to require payment of money for school construction purposes), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (1963) (per curiam); Blades v. City of Raleigh, 280 N.C. 531, 549-51, 187 S.E.2d 35, 46 (1972) (rezoning decison was invalid when based on "special arrangements" with landowner, rather than "exercise of legislative power"); Allred v. City of Raleigh, 277 N.C. 530, 545, 178 S.E.2d 432, 441 (1971) (rezoning decision was invalid when based on "special arrangements with landowner" rather than "exercise of legislative power"); City of Knoxville v. Ambrister, 196 Tenn. 1, 7-8, 263 S.W.2d 528, 530 (1953) (contract zoning was invalid when grant of land was involved in exchange for rezoning, because contract made for purpose of affecting official conduct is ultra vires); Haymon v. City of Chattanooga, 513 S.W.2d 185, 187-88 (Tenn. Ct. App. 1973) (contract zoning affording greater density in return for maintenance of buffer zone was invalid and ultra vires).

140. *See* Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 206, 172 A.2d 40, 45 (contract agreeing to freeze regulatory requirements for seven year period was invalid as "an attempt to do by contract what can only be done by following statutory procedure," when township "surrendered [its] inherent power, right, and duty, to keep [its] zoning and planning ordinances mutable"), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (1963) (per curiam).

141. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 416, 79 Cal. Rptr. 872, 876-77 (1969) (authority to condition rezoning stems from state constitution's home rule provision conferring police power, rather than state statute, and statutory silence on this point is not a denial of such authority); City of Colo. Springs v. Smartt, 620 P.2d 1060, 1062 (Colo. 1980) (en banc) (authority to condition rezoning available under home rule provision); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 602, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (authority for conditional zoning available when not expressly forbidden even though not expressly provided); Church v. Town of Islip, 8 N.Y.2d 254, 259, 168 N.E.2d 680, 683, 203 N.Y.S.2d 866, 869 (1960) (when proper to zone without restrictions, proper to zone with reasonable conditions); Sweetman v. Town of Cumberland, 117 R.I. 134, 149-50, 364 A.2d 1277, 1288 (1976) (statutory authorization to

textual restrictions designed to guide the implementation of other types of zoning simply did not apply.[142] They have cast a different light on the nature of private expectations, assuming that the rezoning process itself shaped a rezoning proponent's expectations and that the inclusion of carefully tailored rezoning conditions and constraints advanced, not injured, neighbors' interests.[143] They have regarded the effort to develop specialized requirements designed to cushion the adverse impacts of land development as an appropriate means of harmonizing competing private interests,[144] and thus beneficial to the public interest. They have also concluded that the government's potential need to alter regulatory requirements in the future could be satisfied by permitting modification at a later date.[145]

Courts that reject the per se invalidity argument clearly have the better view. Ample statutory authority exists in the form of traditional zoning legislation that may be construed to support this novel regulatory device. The key question instead is whether such authority should be narrowly or broadly construed. Many states have traditionally opted for narrow construction of en-

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"impose such conditions on the use of land as [city council] deems necessary" includes authority to impose specific conditions on individual parcels).

142. *See* J-Marion Co. v. County of Sacramento, 76 Cal. App. 3d 517, 523, 142 Cal. Rptr. 723, 726 (1978) (uniformity clause refers to zoning regulations, not consensual agreements; only use conditions unilaterally imposed by legislature as condition, and not consented to or acquiesced in by owner or possessor of property, come within uniformity requirements); Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872, 877 (1969) (conditional zoning that does not affect property's use does not violate statutory objective regarding uniformity of use); Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 434, 183 N.E.2d 118, 122 (1962) (no violation of statutory uniformity and comprehensive plan requirements occurs when requirements do not mandate identity in all relevant respects); Treme v. St. Louis County, 609 S.W.2d 706, 712 (Mo. Ct. App. 1980) (uniformity requirement does not necessitate that all zones with the same number have exactly the same regulations and restrictions, and council may impose more stringent regulations on a given parcel so long as minimum restrictions within a district, once established, are uniform or universal); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 33, 174 N.W.2d 533, 539 (1970) ("uniformity provision does not require absolute unformity" between districts, but rather requires "uniformity within each district" in effect requiring "reasonable uniformity, not identical similarity"). *But see* Veseski v. Bristol Zoning Comm'n, 168 Conn. 358, 362 A.2d 538 (1975) (discussing legislative amendment that invalidated distinction which had been drawn in earlier case between uniformity concerning use and uniformity concerning building regulation).

143. *See* Warshaw v. City of Atlanta, 250 Ga. 535, 536, 299 S.E.2d 552, 553 (1983) (conditional zoning is valid when it serves to protect or benefit residents by ameliorating effect of zoning change); Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 434-35, 183 N.E.2d 118, 122 (1962) (residents and city benefited by conditions); Treme v. St. Louis County, 609 S.W.2d 706, 712 (Mo. Ct. App. 1980) (residents in no position to complain when conditions more stringent than usual conditions were imposed); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 600, 421 N.E.2d 818, 821, 439 N.Y.S.2d 326, 329 (1981) (conditional zoning may benefit the whole community, not just particular landowners); Church v. Town of Islip, 8 N.Y.2d 254, 259, 168 N.E.2d 680, 683, 203 N.Y.S. 2d 866, 869 (1960) (restrictions benefited residents when town could have rezoned without conditions).

144. *See* Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 434-35, 183 N.E.2d 118, 122 (1962) (conditions were not contrary to best interests of city and benefited residents); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 602, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (imposition of conditions justified if they provide flexibility, minimize deleterious effects, and harmonize uses in the public interest).

145. *See* Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 601, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (legislative body would not be precluded in future from reversing or altering conditions imposed); Gladwyne Colony, Inc. v. Lower Merion Township, 409 Pa. 441, 445-46, 187 A.2d 549, 551 (1963) (rezoning agreement does not bind future council members to enact legislation but only to honor contract).

abling legislation to ensure against unwarranted action by local governments,[146] but the present trend is toward a more expansive view of local government powers and a more generous interpretive view.[147] A growing number of state legislatures have confirmed the wisdom of the latter position by adopting legislation specifically authorizing contingent zoning in at least some circumstances.[148]

Neither does contingent zoning inappropriately interfere with private expectations. Courts have long recognized and generously protected private rights in land. Nonetheless, such rights have been limited to accommodate competing private interests, and for more than sixty years they have existed within a pervasive regulatory environment.[149] Contingent zoning merely promotes more fine-tuned accommodations, instead of all-or-nothing rezoning decisions, thereby fa-

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146. Courts in many states traditionally have relied on "Dillon's Rule," a nineteenth century formulation by a noted jurist and treatise writer. *See* 2 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 10.09 n.7 (3d ed. rev. 1979) (citing cases from 46 states). Briefly stated, Dillon's Rule indicates that "a local government can possess and exercise those powers granted in express words; those powers necessarily or fairly implied in or incident to the powers expressly granted; and those powers essential to the accomplishment of the declared objects and purposes." 3 C. SANDS & M. LIBONATI, LOCAL GOVERNMENT LAW § 13.05, at 13-21 (1982). Some state courts continue to apply this rule in a stringent fashion. *See, e.g.*, City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966); Early Estates, Inc. v. Housing Bd. of Review, 93 R.I. 227, 174 A.2d 117 (1961); Board of Supervisors v. Horne, 216 Va. 131, 215 S.E.2d 453 (1975).

147. This trend reflects a growing judicial understanding that local governments need expansive authority as they face novel problems that demand action, and an increase in the number of statutory and constitutional provisions modifying Dillon's Rule. *See, e.g.*, Liberati v. Bristol Bay Borough, 584 P.2d 1115 (Alaska 1978); Osborne v. State, 439 N.E.2d 677 (Ind. Ct. App. 1982); Tipco Corp. v. City of Billings, 197 Mont. 339, 642 P.2d 1074 (1982); State v. Hutchinson, 624 P.2d 1116 (Utah 1980); *supra* note 146 (defining "Dillon's Rule"); *see also* IOWA CONST. art. III, § 38A (municipal power not limited to "only those powers granted in express words"); MICH. CONST. art. VII, § 34 ("provisions of this constitution and law concerning counties [and] cities . . . shall be liberally construed"); N.J. CONST. art. IV, § 7.11 (municipal powers include the express powers plus those powers that are incident and necessary to the express powers).

Because of the difficulties local governments traditionally face when relying on specific state legislation as a source of power, many states have adopted constitutional and statutory "home rule" provisions designed to give local governments a broad, permanent source of authority. For a general discussion of home rule, see Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968). Professor Vanlandingham concludes that although 33 states have constitutional home rule provisions, home rule powers have been vigorously exercised only in about a dozen states. *Id.* at 277, 282. For a list of state constitutional and statutory provisions affording municipal or county home rule, see 1 C. SANDS & M. LIBONATI, *supra* note 146, § 4.02 nn. 2-3 (constitutional provisions); *id.* § 4.05 (statutory provisions); *see also* 2 E. MCQUILLIN, *supra* note 146, § 4.28 n.1 (citing secondary sources describing home rule in individual states). Some state courts have relied on home rule provisions to uphold local efforts to engage in contingent zoning. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 416, 79 Cal. Rptr. 872, 875-76 (1969); City of Colorado Springs v. Smartt, 620 P.2d 1060, 1062 (Colo. 1980) (en banc); *see also* Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals, 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974) (noting in passing that city was operating under home rule charter, but invalidating ordinance that included reversionary provision without discussion of significance of home rule status); City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288 (Tex. Civ. App. 1968) (noting that city was home rule city, and without further comment finding no evidence of contract to rezone, although noting that contract zoning would have been invalid).

148. *See* IND. CODE ANN. §§ 36-7-4-613 to -614 (Burns Supp. 1986); IOWA CODE ANN. § 358A.7 (West Supp. 1986); MINN. STAT. ANN. § 462-358, Subd. 2a (West Supp. 1986); R.I. GEN. LAWS § 45-24-4.1 (1980); VA. CODE § 15.1-491.2 (Supp. 1986). Several of these provisions are discussed at greater length below. *See infra* text accompanying notes 184-87.

149. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

cilitating compromises designed to approximate all interested parties' expectations.

Moreover, standards that safeguard private expectations have been developed to govern traditional types of rezoning decisions, and they are readily applied in contingent zoning cases as well.[150] Contingent zoning may likewise foster the important public interest in sensitive land use planning. Standards have been developed to ensure that traditional rezoning decisions are supported by justifications relating to overall community needs, including the need to modify applicable requirements due to changed circumstances.[151] The application of these standards to contingent zoning decisions goes some way to distinguish between those that benefit from those that harm the public interest. Specialized standards may also be designed to protect against an increased incidence of public or private abuse of the police power, which otherwise may arise as part of the bargaining process associated with contingent zoning.

2. Specific Standards

Courts rejecting the per se invalidity argument have developed procedural and substantive standards as a means of distinguishing between appropriate and inappropriate contingent zoning arrangements. When possible, these standards reflect those standards traditionally evident in analogous legal contexts; however, novel modifications or additions have been employed as needed to address the contingent zoning context.

a. Procedural Standards

Contingent zoning is employed within a well-defined procedural context. Statutes and ordinances establish detailed procedures, which rezoning decisions generally must follow. They require notice and an opportunity for a hearing,[152]

150. *See infra* notes 167-71 and accompanying text.

151. *See infra* note 168 and accompanying text.

152. *See* Standard Zoning Enabling Act, *supra* note 131, § 4. This provision states that:

> The legislative body of such municipality shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed. However, no such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the time and place of such hearing shall be published in an official paper, or a paper of general circulation in such municipality.

Id.; *see also id.* § 5 (provision governing changes and amendments). The courts have stated flatly that statutory procedures must be followed in connection with rezoning decisions. *See* County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975); Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (1960), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (1963) (per curiam). Notice and hearing may also be required pursuant to constitutional due process mandates. *See* City of Homer v. Campbell, 719 P.2d 683 (Alaska 1986) (landowner's interest in contract zoning is sufficient to trigger constitutional due process requirements necessitating clear notice and opportunity for hearing before finding of violation that would trigger right to rescission). *But see* Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 435, 183 N.E.2d 118, 122-23 (1962) (notice and hearing not required when restrictions voluntarily imposed by affected landowner prior to consideration of proposed rezoning).

and special super-majority voting requirements may apply.[153] An additional check may also come into play: in those states that regard rezoning decisions as legislative in nature, the state statutes or constitution may create power referendum rights that would apply to such decisions.[154]

Courts reviewing contingent zoning arrangements have insisted that applicable statutory procedural requirements be followed in connection with this specialized form of rezoning as well. In particular, courts have invalidated agreements to modify land use requirements or related obligations that conflict with the terms of applicable ordinance provisions, on the ground that the government failed to follow the appropriate amendment process.[155] In several cases courts have also struck down rezoning arrangements that provide for reversion to an earlier zoning classification in the event of noncompliance with the agreement or ordinance terms, because such schemes fail to follow statutory procedures that govern the reversion rezoning.[156] Reversions triggered by transfer of property or lapse of time before project completion have been especially problematic.[157]

Along with these traditional requirements, the courts gradually have adopted what seem to be common-law criteria designed to guarantee the integrity of the contingent zoning process. Outcomes in many cases have been influenced significantly by factors that bear on the independence of the legislative body's judgment in reaching a contingent zoning decision. Thus, the character of express or implicit promises between the local government and the property owner often proves significant. It is much more likely that a unilateral promise, which the landowner makes contingent, of course, on the rezoning's becoming effective, would pass legal muster, than a bilateral promise in which the local government also agrees to take action, most probably to rezone.[158] At times courts have invalidated bilateral agreements outright;[159] they may also preserve

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153. *See* Standard Zoning Enabling Act, *supra* note 131, at § 5. This provision states:

> Such [zoning] regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed. In case, however, of a protest against such change, signed by the owners of 20 per cent or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending [so many] feet therefrom, or of those directly opposite thereto extending [so many] feet from the street frontage of such opposite lots, such amendment shall not become effective except by a favorable vote of three-fourths of all the members of the legislative body of such municipality. The provisions of the previous section relative to public hearings and official notice shall apply equally to all changes or amendments.

154. *See infra* notes 306-24 and accompanying text.

155. *See* County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975) (per curiam); Suski v. Mayor & Comm'rs, 132 N.J. Super. 158, 333 A.2d 25 (1975) (per curiam).

156. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals, 40 Ohio App. 2d 432, 320 N.E.2d 685 (1974). *But see* Colwell v. Howard County, 31 Md. App. 8, 354 A.2d 210 (1976) (permitting reversion feature when generally applicable); Konkel v. Common Council, 68 Wis. 2d 574, 229 N.W.2d 606 (1975) (reserving question).

157. *See* Lewis v. City of Jackson, 184 So. 2d 384, 388 (Miss. 1966) (suggesting, in dicta, that condition limiting time period for which zoning would be valid prior to reversion would undercut legitimacy of contingent rezoning); Mechem v. City of Santa Fe, 96 N.M. 668, 634 P.2d 690 (1981) (invalidating special use permit limited in duration to particular party's time of ownership).

158. *See* cases cited *infra* note 159.

159. *See* Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956) (en banc) (criticizing bilateral contract);

the agreement but reinterpret the local government's pledge more narrowly, for example, by requiring only that rezoning be considered or that, once granted, it be subject to later change.[160]

The character of the mechanism by which obligations are imposed on the landowner has likewise played a role in a number of decisions, because that character has a bearing on the independence of the governing body's decision-making. Courts have upheld both the imposition of conditions as part of the legislative process in the absence of evidence of any landowner-government agreement,[161] and obligations undertaken by the landowner as part of an agreement with private parties, such as neighboring property owners, or with government bodies other than the legislative board;[162] in such cases a court may feel reasonably confident that the local government is exercising its independent legislative judgment. When an agreement does exist between the local government and the landowner, a stronger legal posture will exist if negotiation of that agreement has been clearly separated from the handling of the rezoning request.[163] If the agreement and rezoning request are clearly related, the agreement should be executed prior to the disposition of the rezoning proposal: prior execution avoids the inference that the governing board has not reached a final disposition at the time of its action, but that instead, through private influence, the parties will reach a resolution at a later time.[164] Even more fatal, in the view of one state's courts, is a governing board's assumption that restrictive conditions in the form of limitations on types of use will be observed based on the applicant landowner's representations and nothing more, for naive reliance of this sort suggests that independent judgment and care has been, or may be, compromised.[165]

State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 30, 174 N.W.2d 533, 538 (1970) (upholding unilateral conditional zoning but stating, in dicta, that a bilateral agreement between a landowner and a municipality would be invalid). *But see* State *ex rel.* Myhre v. City of Spokane, 7 Wash. 2d 207, 422 P.2d 790 (1967) (upholding bilateral agreement).

160. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 418, 79 Cal. Rptr. 872, 878 (1969) (stating, in dicta, that zoning, as an exercise of police power, is subject to future change); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 601, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (stating, in dicta, that a municipality would not be precluded from later changing zoning in contravention of conditions imposed by contingent zoning); State *ex rel.* Myhre v. City of Spokane, 7 Wash. 2d 207, 422 P.2d 790 (1967) (construing government agreement as simply one to consider vacating streets).

161. *See* Haas v. City of Mobile, 289 Ala. 16, 265 So. 2d 564 (1972); Broward County v. Griffey, 366 So. 2d 869 (Fla. Dist. Ct. App. 1979), *cert. denied*, 385 So. 2d 757 (Fla. 1980).

162. *See* City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967) (permitting agreement between developer and city officials so long as the city officials were not the ones with authority to approve rezoning); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (upholding agreement between developer and other private parties, when city was also beneficiary); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (upholding agreement between developer and other private parties, when city was also a beneficiary).

163. *See* City of Marietta v. Traton Corp., 253 Ga. 64, 316 S.E.2d 461 (1984); Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962).

164. *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (en banc) (invalidating contingent zoning when tied to agreement to be executed at a later date).

165. *See* Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971).

b. Substantive Standards

Courts have also required that contingent zoning arrangements satisfy both traditional and more novel substantive standards. In lawsuits brought by neighboring property owners,[166] the courts typically have reviewed the local government's basic decision to rezone. They have used standards employed in other types of rezoning litigation, including litigation that challenges rezoning of individual parcels as "spot zoning." To date, courts have inquired whether contingent rezoning is consistent with a jurisdiction's comprehensive plan,[167] whether it is warranted in light of changed circumstances,[168] and whether other substantive factors relevant to legitimate land use decisions weigh in favor of the proposed rezoning.[169] The more procedurally-oriented standards adopted to govern rezoning decisions in other jurisdictions might also conceivably be employed.[170] It appears, in any event, that the more numerous and qualifying the conditions required to insure the achievement of sound public policy, the more skeptical a court is likely to be in evaluating the resulting arrangement.[171]

Courts have developed additional standards that focus on the particular conditions or obligations incorporated into a contingent zoning arrangement. In decisions to date, the courts have indicated that such conditions or obligations may be imposed only as a means of addressing public needs that result from development proposed in conjunction with the requested rezoning.[172] Need

166. The courts generally have concluded that property owners with nearby land have standing to raise such challenges. *See* Hartnett v. Austin, 93 So. 2d 86, 90 (Fla. 1956) (en banc) (neighbors have standing and an important interest in uniformity of zoning scheme); City of Marietta v. Traton Corp., 253 Ga. 64, 316 S.E.2d 461 (1984) (nearby developer has standing when substantial damage is suffered); Sylvania Elec. Prods., Inc. v. City of Newton, 344 Mass. 428, 436-37, 183 N.E.2d 118, 123 (1962) (assuming neighbors have standing, although noting that it is somewhat anomalous for them to challenge conditions designed for their benefit).

167. *See* King's Mill Homeowner's Ass'n v. City of Westminster, 192 Colo. 306, 557 P.2d 1186 (1976) (en banc); Herr v. City of St. Petersburg, 114 So. 2d 171 (Fla. 1959); Goffinet v. County of Christian, 65 Ill. 2d 40, 357 N.E.2d 442 (1976); Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1966); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

168. *See* King's Mill Homeowner's Ass'n v. City of Westminster, 192 Colo. 306, 557 P.2d 1186 (1976) (en banc); Cloverleaf Mall v. Conerly, 387 So. 2d 736 (Miss. 1980); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966).

169. *See* Nolan v. City of Taylorville, 95 Ill. App. 3d 1099, 420 N.E.2d 1037 (1981) (factors generally considered in determining legality of rezoning decision to be applied); Ziemer v. County of Peoria, 33 Ill. App. 3d 612, 338 N.E.2d 145 (1975) (special circumstances such as fuel shortage needed to justify contingent zoning); Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1966) (factors generally considered in determining legality of rezoning decision to be applied); Pierson Trapp Co. v. Peak, 340 S.W.2d 456 (Ky. 1960) (allowing only one type of use, rather than reasonable general classification, was problematic); Houston Petroleum Co. v. Automative Prod. Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952) (anticompetitive restriction invalidated); Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976) (failure to develop land under prior zoning classification opened way for reclassification); State *ex rel.* Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967) (study demonstrating need for shopping center helped justify reclassification for that purpose); State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (factors generally considered in determining legality of rezoning decision to be applied).

170. *See* Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

171. *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (en banc); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966).

172. *See, e.g.*, Haas v. City of Mobile, 289 Ala. 16, 265 So. 2d 564 (1972) (conditions may be imposed to alleviate traffic problems caused by development); Scrutton v. County of Sacramento,

may be measured in terms of adverse land use effects that require mitigation, or it may be based on demands for public services that must be addressed.[173] Benefit to the affected landowner will not suffice as an alternative justification.[174]

Perhaps not surprisingly, the cases appear to reflect subtly different approaches to the evaluation of need and the requisite relationship between need and conditions or obligations imposed. A few courts have emphasized the importance of ensuring that conditions require steps that eliminate the adverse effects of a rezoning decision, no more and no less, thereby eliminating any opportunity of undue favoritism or overreaching.[175] Putting such a standard into practice, however, is far from easy.

Some courts have adopted a reasonably relaxed test that mirrors the reasonable relationship standard used in the context of subdivision exactions: "conditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use."[176] Other cases have relied on a rather undifferentiated reasonableness standard.[177] However, the test adopted seems to make little difference in the result. At least one court, purportedly applying a relaxed standard, authorized only conditions that directly relate to needs arising from a proposed rezoning; it rejected a requirement that road improvements be undertaken when only a small parcel of land was to be rezoned for shopping center use in conjunction with

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275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) (conditions valid if reasonably conceived to fulfill public needs stemming from landowner's proposed use); King's Mill Homeowners Ass'n v. City of Westminster, 192 Colo. 306, 557 P.2d 1186 (1976) (conditions may be imposed to meet increasing needs caused by population expansion); Treme v. St. Louis County, 609 S.W.2d 706 (Mo. Ct. App. 1980) (when development increases needs of county or municipality, costs of meeting needs may be passed to developer).

173. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 419, 79 Cal. Rptr. 872, 879-80 (1969).

174. *Id.* at 420, 79 Cal. Rptr. at 880.

175. *See* Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977) (conditions may be upheld when imposed pursuant to police power for protection of neighbors or to ameliorate the effects of zoning change, but not when zoning board is motivated to allow the change by the conditions offered or proposed); Hedrich v. Village of Niles, 112 Ill. App. 2d 68, 250 N.E.2d 791 (1969) (impermissible to enter into agreements for emoluments that had no bearing on the merits of the requested zoning amendments); Treme v. St. Louis County, 609 S.W.2d 706 (Mo. Ct. App. 1980) (offer or exaction appropriate to meet development-related needs, but not if there is no reasonable relationship to activities of developer); City of Redmond v. Kezner, 10 Wash. App. 332, 517 P.2d 625 (1973) (discussing interpretation of earlier decision as permitting agreements to neutralize any expected negative impact on property usage, but not to seek collateral benefit from property owner).

176. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 419, 79 Cal. Rptr. 872, 879 (1969) (citing test applied in Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949), discussed *infra* text accompanying notes 344-45); King's Mill Homeowners Ass'n v. City of Westminster, 192 Colo. 306, 311-12, 557 P.2d 1186, 1191 (1976) (citing *Ayres* and voicing its agreement with the California appellate courts).

177. *See* Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1966) (upholding right-of-way dedication requirement); Hudson Oil Co. v. City of Wichita, 193 Kan. 623, 396 P.2d 271 (1964) (upholding right-of-way dedication requirement); State *ex rel* Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972) (invalidating road improvement requirements when need not created by subdivision); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981) (upholding use restrictions, parking requirements, and landscaping requirements); State *ex rel.* Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967) (upholding requirement of contribution to cover cost of street improvements).

land in an area already zoned for commercial purposes.[178] Another court, applying a simple reasonableness standard, held that the local government could require road improvements by the developer when directly necessitated by a new shopping center, even if the immediate need in part reflected an earlier, unmet demand for improved transportation facilities.[179]

Other considerations may also influence the courts' assessment of reasonableness. Courts may be less sympathetic to challenges by residents for whose benefit conditions are included, or to landowners who have proposed or consented to requirements ultimately imposed.[180] There is also some evidence that mitigating requirements such as those addressed to landscaping and design will be rather easily allowed, while obligations to provide public services or to contribute funds to the public treasury will be questioned more closely on public policy grounds.[181]

The reasonableness standard has the virtue of considerable flexibility. It provides an opportunity to protect against public abuse that otherwise may creep into the bargaining process, by incorporating analogous exactions standards[182] and allowing for close inspection of government demands. It likewise permits courts to guard against private abuse by considering all relevant circumstances, perhaps the only possible alternative in a setting in which by their very nature uniform standards cannot apply.[183]

The reasonableness standard, however, also has the vice of uncertainty: the very open-endedness of such a standard renders its application far from clear. Legislatures in at least some jurisdictions have accordingly imposed more spe-

178. *See* Transamerica Title Ins. Co. v. City of Tucson, 23 Ariz. App. 385, 388, 533 P.2d 693, 696 (1975) (citing and agreeing with Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) and Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949), but refusing to require street improvements under these circumstances despite government's contention that any rezoning necessarily triggered potential increases in traffic flow).

179. *See* Treme v. St. Louis County, 609 S.W.2d 706, 717 (Mo. Ct. App. 1980); *see also* City of Redmond v. Kezner, 10 Wash. App. 332, 517 P.2d 625 (1973) (upholding plan and agreement for comprehensive system of street improvements in area to be rezoned commercial).

180. *See* Cross v. Hall County, 238 Ga. 709, 713 & n.2, 235 S.E.2d 379, 383 & n.2 (1977) (stating that the determination of the validity of the conditions will vary depending on who challenges them: when neighbors who challenge conditions are also benefited, their challenge may be unsuccessful; but when owner of affected land has proposed or consented to conditions, he or she may be estopped to object).

181. *See* Andres v. Village of Flossmoor, 15 Ill. App. 3d 655, 662, 304 N.E.2d 700, 705 (1973) (invalidating cash contribution requirement); Hedrick v. Village of Niles, 112 Ill. App. 2d 68, 76-77, 250 N.E.2d 791, 795 (1969) (invalidating cash contribution requirement); Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 209-10, 172 A.2d 40, 47 (invalidating cash contribution requirement for schools when public should bear cost of public education), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (1963) (per curiam).

182. For a discussion of standards governing exactions in the form of facilities or fees, see *infra* notes 341-57 and accompanying text.

183. An aggrieved property owner, of course, may mount an equal protection challenge, but the challenge should fail unless a local government limits the opportunity to seek contingent instead of traditional rezoning rather than making it available to all interested landowners. *See* County of Ada v. Walter, 96 Idaho 630, 633, 533 P.2d 1199, 1202 (1975) (Bakes, J., concurring) (selective application of zoning ordinance may result in equal protection violation); Sweetman v. Town of Cumberland, 117 R.I. 134, 150-52, 364 A.2d 1277, 1288-89 (1976) (rejecting equal protection challenge to contingent zoning arrangement that potentially imposed different obligations on different property owners). Courts that believe uniformity of regulation should be required usually have found contingent zoning invalid per se. *See supra* note 137.

cific requirements reflecting their own judgments concerning the best way to avoid potential abuse.

Virginia has adopted legislation that allows "proffer zoning"[184] as part of a rezoning ordinance or map amendment. A number of conditions, however, must be observed: the developer must voluntarily offer to allow imposition of conditions; terms must be in writing and made part of the rezoning; rezoning must give rise to the need for conditions; the conditions must be reasonably related to rezoning; no cash contributions to the county or municipality are allowed; no mandatory dedication of real or personal property can be made, except to the extent permitted by subdivision legislation (allowing right-of-way dedications for internal streets, ingress and egress, and public access streets); no payment or construction of off-site improvements other than as authorized by subdivision legislation is permitted; no conditions can be proffered that are unrelated to the physical development or operation of the property; and all conditions must be in conformity with the community's comprehensive plan.[185] Recent Iowa legislation likewise limits contingent zoning to circumstances in which it is proposed by the landowner.[186] Minnesota has adopted similar legislation that authorizes municipalities to condition approval of subdivisions on compliance with requirements reasonably related to the provisions of applicable regulations, and to execute development contracts embodying the terms and conditions of approval.[187] In these states' view, the need to protect against public abuse of the bargaining process is apparently of utmost concern, perhaps because traditional judicial standards developed to forestall spot zoning provide some measure of protection against instances of private abuse.

In summary, although a few jurisdictions have found contingent zoning invalid per se, a growing number have analyzed the legitimacy of this device on a case-by-case basis. Courts have upheld contingent zoning when traditional procedural requirements have been satisfied, the government decisionmaking body has employed its independent judgment, rezoning decisions are justified under generally applicable standards, and conditions or requirements are deemed reasonable under the circumstances at hand. Courts that find contingent zoning arrangements invalid typically have struck down both a local government's rezoning decision—reintroducing whatever restrictions had previously applied—and any related concomitant agreements or conditions.[188] Occasionally, however, courts have invalidated conditions while upholding the basic zoning decision; or, alternatively, they have expressed doubts about the validity of contingent zoning while leaving a condition or other obligation intact.[189]

184. *See* VA. CODE ANN. § 15.1-491.2 (Supp. 1986).

185. *Id.*

186. *See* IOWA CODE ANN. § 358A.7 (West Supp. 1986).

187. *See* MINN. STAT. ANN. § 462.358, Subd. 2a (West Supp. 1986).

188. *See, e.g.*, Haymon v. City of Chattanooga, 513 S.W.2d 185 (Tenn. Ct. App. 1973); *see also* Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 602-03, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (dicta stating that proper remedy is invalidation and return to earlier zoning).

189. *See* Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930) (city estopped from changing zoning in violation of agreement to rezone); Borough of Point Pleasant Beach

C. *Noncompliance*

Contingent zoning arrangements impose many requirements that either necessitate immediate, one-time compliance, or create ongoing obligations deemed problematic from the outset. Accordingly, their validity has commonly been challenged under the theories just described as part of an appeal from the original disposition of a rezoning petition, rather than as part of litigation addressing subsequent noncompliance. In those few cases that have considered questions relating to noncompliance, however, the courts have generally varied very little from traditional police power doctrine.

When a property owner alleges noncompliance by the government, none of the harsh rules requiring government compliance with contractual obligations have been applied. Courts have adopted several different strategies for achieving this result. They have avoided the issue by observing that a government's own self interest in a given case should lead to its willing compliance;[190] by narrowly interpreting the facts at hand to find no public-private agreement;[191] or by narrowly construing the agreement in question.[192] Courts have also stated, in dicta, that a government promise to refrain from rezoning particular parcels for a period stretching into the future is either invalid at the outset or unenforceable at a later date.[193] Furthermore, they have recognized limited remedies in the form of rescission and restitution, rather than compelling government compliance.[194]

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v. J. C. Williams Co., 57 N.J. 147, 270 A.2d 275 (1970) (per curiam) (applying estoppel approach to require property owner to comply with condition and refusing to reach question of validity of billboard restrictions on the merits); Carlino v. Whitpain Investors, 499 Pa. 498, 453 A.2d 1385 (1982) (although city had permitted shopping center to be constructed, neighbors could not enforce restriction on construction of access road); City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953) (although city had rezoned, it could not enforce developer's obligation to convey parkland).

190. *See* Herr v. City of St. Petersburg, 114 So. 2d 171 (Fla. 1959) (observing that city cannot bind future councils regarding promise to rezone, but finding no reason to invalidate contract at outset when contract consistent with municipal purpose to revitalize downtown area); Gladwyne Colony, Inc. v. Township of Lower Merion, 409 Pa. 441, 187 A.2d 549 (1963) (observing that city could not bind future council to enact legislation, but could agree to current rezoning and provision of infrastructure in return for parkland needed by city).

191. *See* City of Farmers Branch v. Hawnco, Inc. 435 S.W.2d 288 (Tex. Civ. App. 1968) (finding no evidence of contract not to rezone for period of years); *see also* Broward County v. Griffey, 366 So. 2d 869 (Fla. Dist. Ct. App. 1979) (finding no express contract and noting that in any event dedication requirements could have been imposed pursuant to the police power), *cert. denied*, 385 So. 2d 757 (Fla. 1980).

192. *See* State *ex rel.* Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967) (construing government agreement as simply one to consider vacating streets).

193. *See* Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 418, 79 Cal. Rptr. 872, 878-79 (1969) (stating, in dicta, that zoning, as an exercise of the police power, is subject to future change); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 601, 421 N.E.2d 818, 822, 439 N.Y.S.2d 326, 330 (1981) (stating, in dicta, that a municipality would not be precluded from later changing zoning in contravention of conditions imposed by contingent zoning); City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 290-91 (Tex. Civ. App. 1968) (holding that there was no evidence of contract not to rezone parcel for period of years and stating, in dicta, that such an agreement would be invalid as a surrender of city's police power).

194. *See* Funger v. Mayor and Council of Somerset, 249 Md. 311, 239 A.2d 748 (1968) (requiring return of land donated to town on understanding that town would support rezoning, when, in fact, town failed to support rezoning); *see also* City of Redmond v. Kezner, 10 Wash. App. 332, 341, 517 P.2d 625, 633 (1973) (stating, in dicta, that city should go slowly in varying from agreement to rezone in exchange for dedication of street right-of-way, and observing that significant departures by the city might require the city to pay for interests taken).

Rules concerning vested rights, however, apparently would continue to apply.[195]

A similar pattern emerges in cases concerning noncompliance by landowners. Noncompliance with requirements imposed by ordinance may be addressed through standard enforcement proceedings and applicable remedies.[196] Courts have often invalidated special contingent zoning provisions that authorize automatic reversion in zoning classification in the event of noncompliance, absent compliance with governing procedural requirements.[197]

The courts' tendency to hew more closely to traditional doctrine when the landowner or local government does not comply contrasts sharply with their willingness to adopt more novel standards designed to govern dealing that results in the initial formulation and terms of contingent zoning arrangements. This approach might be explained in terms of relevant expectations: landowners should not and cannot reasonably expect that local governments will refrain from future rezoning under appropriate circumstances; similarly, governments should not and cannot expect that they can accomplish future rezonings without full-scale review. An equally plausible hypothesis, however, is that accommodations to facilitate a bargaining dynamic will be made only to the extent warranted in the public interest. In the context of contingent zoning, the formulation of individualized requirements and obligations may be significantly advanced by a process of individualized dealing, but no comparable need exists to vary rules concerning noncompliance and remedial norms. Whether this same approach justifiably applies to land use deals of other types will be explored in more detail below.[198]

IV. DEVELOPMENT AGREEMENTS

Although contingent zoning primarily provides individualized answers to problems of incompatible uses and overstrained public facilities that arise in conjunction with rezoning decisions, deals and dealing methodology can be used to resolve a variety of other land use issues. For example, development agreements have been used to facilitate agricultural land preservation,[199] to compensate for lost tax revenues,[200] to foster community redevelopment,[201] and to bolster avail-

195. *See* Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930) (city estopped from changing zoning when building permit had already been issued).

196. *See* Standard Zoning Enabling Act, *supra* note 131, § 8 (authorizing adoption of regulations concerning enforcement, stating that violations give rise to civil penalties or may be declared misdemeanors punishable by fine or imprisonment, and authorizing municipal actions to prevent or abate unlawful use of land or structures).

197. *See supra* notes 156-57 and accompanying text.

198. *See infra* notes 383-445 and accompanying text.

199. *See* Delucchi v. County of Santa Cruz, 179 Cal. App. 3d 814, 818, 225 Cal. Rptr. 43, 45 (land conservation contract between landowner and local government was designed to preserve land in coastal zone for agricultural and compatible uses, but allowed local government some discretion in revising agricultural preserve zone), *appeal dismissed*, 107 S. Ct. 46 (1986).

200. *See* J. KIRLIN & A. KIRLIN, *supra* note 4, at 31-32 (describing agreement between city of Santa Monica, California, general partners, and department stores, in which private parties agreed to make payments to city in amount equal to tax increment lost under proposition 13, until bonds were amortized, in return for city's pursuit of jeopardized shopping center project and agreement to provide parking to employees working in completed project).

201. J. KIRLIN & A. KIRLIN, *supra* note 4, at 33-34 (describing agreement between developer of

able low and moderate income housing supplies.[202] This part of the Article focuses on one particular type of development agreement—that which includes not only land use conditions and exaction obligations, but which also provides for municipal services and a regulatory freeze.[203] It accordingly wrestles with some especially thorny theoretical issues, while providing an overall framework helpful in assessing the viability of a variety of other types of development agreements.

A. *Characterization*

The very phrase "development agreements" suggests that contract principles heavily influence the theoretical framework governing this device, including its initial characterization. This premise can best be evaluated with an eye to relevant statutes and analogous precedent, because little case law has directly assessed the legality of development agreements. The states of California, Hawaii, Nevada, and Florida have led the way in developing detailed legislation that authorizes the use of development agreements, although other states have also experimented with related annexation agreements.[204] A brief summary of

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regional shopping mall and city of Fairfield, California, in which city acquired land as part of redevelopment project, and made needed site improvements, in return for sale of land to developer at profit which allowed acquisition of additional land and receipt of proportion of profits).

202. J. KIRLIN & A. KIRLIN, *supra* note 4, at 34-35 (describing agreement between Orange County, California, and developer of large residential project, in which developer agreed to provide extensive infrastructure and agreed to construct substantial number of affordable housing units, in return for county's action to increase allowable project density).

203. Such agreements typically go further than contingent zoning arrangements and embody deals that fall outside the bounds of traditional police power requirements, both insofar as landowners agree to contribute more extensive exactions, and insofar as local governments make various concessions in return. *Compare supra* notes 166-89 and accompanying text (describing standards applicable to contingent zoning arrangements) *with infra* notes 325-82 and accompanying text (describing standards applicable to development agreements).

For general discussions of development agreements in the United States, see Stone & Sierra, *Case Law on Public/Private Written Agreements* 99 in MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS (R. Levitt & J. Kirlin ed. 1985); League of California Cities, *Development Agreements* (1980 & 1985 addendum); Callies, *Statutory Development Agreements: A Solution to Land Development Problems* (unpublished manuscript on file at U.N.C. Law Review office) (1986)) [hereinafter Callies, *Statutory Development Agreements*]; Fulton, *Building and Bargaining in California*, 4 CAL. LAW. 36 (1984); Hagman, *Development Agreements*, 1982 ZONING AND PLAN. L. 173 [hereinafter Hagman, *Development Agreements*]; Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44 (1981); Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENVTL. L. 451 (1986); Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29 (1981); Sigg, *California's Development Agreement Statute*, 15 SW. U.L. REV. 695 (1985); Silvern, *Negotiating the Public Interest—California's Development Agreement Statute*, 37 LAND USE L. & ZONING DIG. 3 (1985); *see also* Callies, *Developers' Agreements and Planning Gain*, 17 URB. LAW. 599 (1985) (discussing statutory framework for development agreements); Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U.L. REV. 549 (1979) (discussing proposed development agreement statute) [hereinafter Hagman, *Multi-Land Use Permits*].

204. Such agreements resemble development agreements, but they apply only to developments that involve annexation.

Illinois has enacted groundbreaking legislation authorizing local governments to enter into annexation agreements. *See* ILL. ANN. STAT. ch. 24, para. 11-15.1 to -15.1-5 (Smith-Hurd 1986). Under Illinois law annexation agreements lasting for up to 20 years may include provisions for the following: Annexation to the affected municipality; freezing of zoning, building, housing, and related restrictions; limitation of increases in fees; contributions of either land or monies; granting of

development agreement legislation provides a necessary backdrop for the following discussion.

California's development agreement statute[205] includes an extensive statement of purpose that cites a variety of justifications for its enactment, such as the desire to increase certainty in the development process, to spur investment and keep housing costs low, to improve planning, and to facilitate financing of public facilities.[206] It establishes certain procedural requirements, obligating cities and counties that enter into agreements to establish procedures for considering agreements on request, to hold public hearings, and to approve agreements by ordinance.[207]

The California statute likewise sets substantive parameters to govern the coverage of development agreements. Only agreements that comply with applicable government plans may be approved.[208] Agreements must specify their duration, maximum building height and size, and reservation or dedication requirements.[209] They also may contain conditions or terms concerning subsequent discretionary government action, commencement and completion dates, applicant financing of necessary public facilities, and subsequent reimbursement over time.[210] The California statute further requires government participants to

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utility franchises; and other matters not inconsistent with law. *Id.* ch. 24, para. 11-15.2. The statute also specifies that notice and public hearing must be provided, that successors of owners of record and successor government authorities will be bound, and that municipalities taking action in conflict with an agreement will be considered in breach. *Id.* para. 11-15.1-2 & 11-15.1-4.

In Illinois and elsewhere, annexation agreements have been used to formalize public-private understandings concerning a number of subjects. *See, e.g.*, Geralnes B. V. v. City of Greenwood Village, 583 F. Supp. 830 (D. Colo. 1984) (zoning); M. J. Brock & Sons, Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975) (zoning); City of Shelbyville v. Shelbyville Restorium, Inc., 96 Ill. 2d 457, 451 N.E.2d 874 (1983) (street installation); Meegan v. Village of Tinley Park, 52 Ill. 2d 354, 288 N.E.2d 423 (1972) (zoning); Clark v. Marian Park, Inc., 80 Ill. App. 3d 1010, 400 N.E.2d 661 (1980) (tax status); Union Nat'l Bank v. Village of Glenwood, 38 Ill. App. 3d 469, 348 N.E.2d 226 (1976) (zoning); Beshore v. Town of Bel Air, 237 Md. 398, 206 A.2d 678 (1965) (zoning); City of Sand Springs v. Colliver, 434 P.2d 186 (Okla. 1967) (zoning); Miller v. City of Port Angeles, 38 Wash. App. 904, 691 P.2d 229 (1984) (street installation), *cert. denied*, 103 Wash. 2d 1024 (1985); *cf.* Housing Auth. of Melbourne v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App. 1967) (cooperative agreement between city and housing authority concerning zoning).

205. CAL. GOV'T CODE §§ 65864 to 65869.5 (West 1983 & Supp. 1987). For a general discussion of the California statute, see secondary sources cited *supra* note 203.

206. CAL. GOV'T CODE § 65864 (West Supp. 1987).

207. *Id.* § 65865 (establish procedures); § 65867 (hold public hearings); § 65867.5 (West 1983) (approve by ordinance).

208. *Id.* § 65867.5.

209. *Id.* § 65865.2 (West Supp. 1987).

210. *Id.* Provisions concerning applicant financing of public facilities warrant special comment. In 1984, specific language was added to the California statute to address this issue. The section reciting legislative findings and declarations was amended to state, "The lack of public facilities, including, but not limited to, streets . . . is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities." *Id.* § 65864(c) (West Supp. 1987). The section addressing the contents of development agreements was amended to state that a development agreement "may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time." *Id.* § 65865.2. These amendments have raised unresolved questions whether requirements of this sort can be added only if local governments themselves reimburse developers over time for constructing such infrastructure, or whether reimbursement by other, subsequent developers is contemplated. *See* Sigg, *supra* note 203, at 706-07.

review the status of covered developments every twelve months, and authorizes them to modify or terminate an agreement if a developer is not in good faith compliance with applicable requirements.[211]

The statute, however, also protects developers' interests in freezing regulatory requirements in the form they existed at the time an agreement was adopted. Key provisions of the statute state that development agreements shall be enforceable notwithstanding subsequent changes in applicable plans, zoning, or subdivision or building regulations, subject to the prerogative of participating governments to apply nonconflicting rules, regulations, or policies, and to provide otherwise in the agreement itself.[212] Nonetheless, state and federal legislation is specifically said to apply, and the appropriate authorities must approve development plans for land subject to coastal controls.[213]

After some years of consideration, in 1985 Hawaii passed a development agreement statute that differs in certain respects from the California model.[214] Like the California statute, the Hawaii statute includes numerous legislative findings concerning problems that result from challenges to land use regulation, the need for certainty, and anticipated public benefits.[215] The Hawaii legislation requires a public hearing prior to entry into an agreement,[216] but unlike the California statute, the Hawaii statute describes agreements as "administrative acts," seemingly to reduce the risk of their being overturned by referendum.[217] It authorizes counties to enter into agreements that their county executives administer,[218] but also provides that any other federal, state, or local agency may be included as a party if the agreement so specifies.[219] The statute requires that provisions contained in agreements comply with the county's general plan as of the date of adoption.[220] Agreements must describe the affected land, permitted uses—including density and intensity of use, and maximum building height and size—reservation and dedication of land if required by statute or public policy, and termination date, which the parties may extend by mutual agreement.[221] Agreements may provide for commencement and completion dates, and for "any other matter not inconsistent with this chapter."[222]

The Hawaii statute requires periodic review, and developers must receive notice and an opportunity to cure in the event of breach; but after appropriate

211. CAL. GOV'T CODE § 65865.1 (West 1983).

212. *Id.* §§ 65865.4, 65866.

213. *Id.* §§ 65869.5, 65869.

214. *See* Act of April 30, 1985, Act 48, §§ 1-2, 1985 Haw. Sess. Laws 78, 78-82. For a discussion of proposals preceeding the statute that finally was adopted, see Comment, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173 (1985).

215. Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 78-79 (findings and purpose).

216. *Id.*

217. *Compare id.* (development agreement is administrative act) *with* CAL. GOV'T CODE § 65867.5 (West 1983) (development agreement is legislative act and subject to referendum).

218. Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 79-80.

219. *Id.* at 80-81 (development agreement).

220. *Id.* at 81 (county general plan and development plan).

221. *Id.* at 80-81 (development agreement).

222. *Id.* (development agreement).

findings, the county may unilaterally modify or terminate the agreement.[223] The statute further states that laws in effect at the time of the agreement shall control, but creates a significant exception, which the California statute does not expressly include: Hawaii's statute provides that subsequent laws may apply if a need exists to alleviate a condition "perilous" to residents' health or safety.[224]

In 1985 Nevada likewise adopted development agreement legislation.[225] The Nevada statute is the most limited of the state provisions described in this Article. The Nevada statute specifies that local ordinances must set procedures for adoption of development agreements.[226] It authorizes local governments to enter into development agreements that comply with the relevant masterplan, and that specify the land covered, the duration of the agreement, project density, height and size parameters, and any dedication requirements.[227] Unless the agreement provides otherwise, regulations concerning permitted uses, densities, design standards, improvements, and construction are those in effect at the time it was made.[228] Subsequent action by the governing body may not prevent the development of the land as provided in the agreement.[229] The local government must undertake a periodic review for compliance only every twenty-four months.[230] Cancellation or amendment of the agreement may proceed based on mutual consent,[231] except that the agreement may be unilaterally terminated following notice, in the event of noncompliance.[232]

Florida development agreement legislation, adopted in 1986,[233] includes many similar features, but also several novel ones. Like the California and Hawaii legislation, the Florida statute includes legislative findings,[234] establishes procedural requirements concerning notice and hearing,[235] and provides authority to enter into development agreements consistent with comprehensive plans.[236] The statute describes the content of such agreements,[237] requires a compliance review every twelve months,[238] and provides that parties may make amendments by mutual consent[239] or to conform to changes in state or federal law.[240]

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223. *Id.* at 80 (periodic review).
224. *Id.* at 81 (enforceability and applicability).
225. Act of June 12, 1985, ch. 647, §§ 1-9, 1985 Nev. Stat. 2113, 2113-17.
226. *Id.* § 2(1), 1985 Nev. Stat. 2113, 2114.
227. *Id.* § 3(1), 1985 Nev. Stat. 2113, 2114 (consistency with master plan required); *id.* § 2(1), 1985 Nev. Stat. 2113, 2114 (contents specified).
228. *Id.* § 2(2), 1985 Nev. Stat. 2113, 2114.
229. *Id.* § 2(3), 1985 Nev. Stat. 2113, 2114.
230. *Id.* § 4(1), 1985 Nev. Stat. 2113, 2114.
231. *Id.*
232. *Id.*
233. Act of July 1, 1986, ch. 86-191, §§ 19-31, 1986 Fla. Laws 1404, 1446-51 (codified at FLA. STAT. ANN. § 163.3220-43 (West Supp. 1987)).
234. FLA. STAT. ANN. § 163.220(1)-(4) (West Supp. 1987)).
235. *Id.* § 163.3225.
236. *Id.* §§ 163.3233, 163.3231.
237. *Id.* § 163.3227.
238. *Id.* § 163.3235.
239. *Id.* § 163.3237.
240. *Id.* § 163.3241.

In a number of respects, the Florida statute goes beyond its California and Hawaii counterparts. It includes a detailed definition of "developments" that may be covered by agreements.[241] It requires that agreements address several additional matters, including the allocation of responsibility for and timing of the provision of public facilities,[242] and the restrictions and requirements that the government determines are necessary for public health, safety, and welfare.[243] The statute limits the duration of development agreements to five years.[244] Furthermore, it specifically identifies a number of situations in which subsequent government actions may unilaterally modify agreements. These include situations in which modification is expressly declared to be "essential" to the public health, safety, or welfare, or substantial changes have occurred in conditions since the time the agreement was approved, or the agreement was based on substantially inaccurate information supplied by the developer.[245] Finally, parties to the agreement or other "aggrieved persons" are authorized to seek injunctive relief to enforce or challenge the provisions of a development agreement.[246]

A strong case can be made for the proposition that development agreements undertaken pursuant to these statutory provisions give rise to rights properly characterized as contractual in nature. To date, writers have simply assumed this proposition.[247] An examination of relevant language, circumstances, and expectations, as suggested by the earlier Contract Clause discussion, arguably confirms their view. In contrast to the statutes governing contingent zoning, development agreement statutes include repeated, explicit references to "agreements" as the principal vehicle for achieving statutory objectives.[248] Analogous precedent under the Illinois annexation statute treats resulting agreements as contractual in nature for purposes of the Contract Clause.[249]

The circumstances surrounding adoption of development agreements, including their purpose and effect, suggest a similar conclusion. Statutory purposes include a desire to increase certainty concerning the rights of developers—an objective that is satisfied only by the recognition of protected property or contract rights—and to facilitate the production of needed public infrastructure and other benefits—arguably above and beyond that which a local government

241. *Id.* § 163.3221(3)(a)-(b).

242. *Id.* § 163.3227(d).

243. *Id.* § 163.3227(h).

244. *Id.* § 163.3229.

245. *Id.* § 163.3233(2).

246. *Id.* § 163.3243.

247. *See* League of California Cities, *supra* note 203, at 2-4; Hagman, *Development Agreements*, *supra* note 203, at 191-93; Holliman, *supra* note 203, at 49-58; Kessler, *supra* note 203, at 464-69; Kramer, *supra* note 203, at 31-37; Sigg, *supra* note 203, at 720-22; Silvern, *supra* note 203, at 6.

248. *See, e.g.*, CAL. GOV'T CODE § 65865 (West Supp. 1987) (authorization to enter into "development agreements"); FLA. STAT. ANN. § 163.3161 (West Supp. 1987) (title of legislation to be the "Florida Local Government Development Agreement Act"); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 79-80 (general authorization for "development agreements"); Act of June 12, 1985, ch. 647, § 2, 1985 Nev. Stat. 2113, 2114 (authorization to enter into agreements concerning the development of land).

249. *See* Meegan v. Village of Finley Park, 52 Ill. 2d 354, 288 N.E.2d 423 (1972).

could exact under the police power.[250] The effect of pertinent legislation, at least in California, has been to induce developers of large office or mixed use projects to provide substantial and unusual public benefits including contributions to arts and social services funds, large park areas, day care centers, and affordable housing units.[251] Although these contributions and concomitant regulatory freezes occur in what is plainly a regulatory context, they may well represent the exchange of unusual special consideration sufficient to lend a unique contractual dimension to what otherwise would be a relationship best characterized as regulatory in nature.

Before adopting this view, however, an alternative perspective should be considered. A respectable case can be made for the proposition that development agreements quite simply constitute a novel packaging of regulatory requirements, one that implicates very little contract doctrine. From this viewpoint the use of the language "development agreement" in statutes and ordinances creates a convenient term of art, without necessarily giving rise to doctrinal implications. Just as occurred in the contingent zoning context, in which agreements form but one facet of an all-encompassing regulatory context, development agreements embody detailed requirements that a local government might otherwise impose through an ordinary permit scheme, as discussed above.[252]

It is also possible to describe the purpose and effect of development agreements in regulatory rather than in exclusively contract-related terms. A major purpose of the California and Hawaii statutes was to establish an alternative method—one more favorable to developers—for resolving disputes that concern the vesting of rights to pursue large-scale, long-term, multiphased development projects.[253] In the past courts have addressed such disputes with analysis that focuses on the obligation of an affected government to stay its hand in applying revised regulatory provisions; courts have relied on either equitable grounds or common-law doctrine that significantly resembles constitutional "taking" doctrine.[254] While other states continue to develop generic approaches to the vested rights issue,[255] those adopting development agreement statutes have adopted an

250. *See, e.g.*, CAL. GOV'T CODE § 65864 (West Supp. 1987). Professor Fulton cites a recent lower court decision limiting the breadth of exactions that may be imposed on developers to provide for day care centers and other unconventional public goods, but notes that the court refused to broaden its injunction to prohibit these same exactions when negotiated as part of a development agreement. Fulton, *supra* note 203, at 100 (discussing United Bd. of Carpenters and Joiners v. City of Santa Monica (L.A. Super. Ct. WEC 069227) (1981)).

251. *See* Silvern, *supra* note 203, at 6-8.

252. *See supra* notes 209, 221, 227, 236 and accompanying text.

253. In each case legislation was adopted in response to state supreme court decisions that had applied harsh late vesting rules to developers caught in mid-project changes of regulatory requirements. *See, e.g.*, Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed and cert. denied*, 429 U.S. 1083 (1977); County of Kauai v. Pacific Standard Life Ins. Co., 65 Hawaii 318, 653 P.2d 766 (1982), *appeal dismissed*, 460 U.S. 1077 (1983).

254. *See* C. SIEMON, W. LARSON & D. PORTER, *supra* note 7, at 12-47 (discussing vested rights and equitable estoppel doctrine); *infra* notes 358-61 and accompanying text.

255. Some states have chosen to address the vested rights question directly, without authorizing development agreements. For example, the Idaho statute specifies:

individualized approach to settling this important question. Although the language of "agreement" has been used in statutes and ordinances, the basic governmental decision establishes a set period of consistent regulation. The effect of such agreements thus really differs only in degree, not in kind, from more traditional regulatory approaches, such as those that provide for the amortization of nonconforming uses, as discussed below.[256]

Development agreements can also be seen as regulatory in character when viewed from the government's perspective. From that viewpoint, development agreements have a close kinship with bonus or incentive zoning mechanisms touted in an earlier decade.[257] Instead of affording additional density in return for parks, plazas, or affordable housing units, development agreements guarantee consistent regulation in return for special contributions to the public good in a variety of unusual forms.[258] In so doing, governments avoid the risk of setting dimensional or density requirements at an unreasonably stringent level to stimulate developer interest, one of the major risks of incentive zoning.[259] Instead, governments simply afford a period of protection from regulatory change that is commensurate with additional developer investment. Viewed from this perspective, just because the development agreement embodies regulatory freezes and exceptional developer contributions that benefit the public—an apparent ex-

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> If a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing comprehensive plan and zoning ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification change.

IDAHO CODE § 67-6511(d) (1986 Supp.); *see also* CAL. GOV'T CODE § 65961 (West Supp. 1987) (establishing five year regulatory freeze following approval or conditional approval of tentative map for subdivision of single- or multi-family residential units, or upon recordation of parcel map for which no tentative map was required); N.J. REV. STAT. § 40:55D-49 (West Supp. 1986) (preliminary approval for major subdivision or site plan confers rights for three year period; for subdivisions or site plan for an area of fifty acres or more, rights may be conferred for a longer period upon approval by the planning board, taking into account the number of dwelling units and nonresidential floor area permissible, economic conditions, and comprehensiveness of development).

256. *See infra* notes 362-64 and accompanying text.

257. For general discussions of bonus or incentive zoning, see 2 R. ANDERSON, *supra* note 119, § 9.23; 2 P. ROHAN, ZONING AND LAND USE CONTROLS § 8.01 -.03 (1986); Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint?*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES (Marcus & Groves ed. 1970); Costonis, *The Chicago Plan: Incentive Zoning and the Presentation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Law and Aesthetics: A Critique and a Reformulation of the Dilemmas*, 80 MICH. L. REV. 355, 363 (1982); Note, *Bonus or Incentive Zoning—Legal Implications*, 21 SYRACUSE L. REV. 895 (1970).

Recent scholarship has focused on the use of such techniques to encourage the development of affordable housing. *See* Burton, *California Legislature Prohibits Exclusionary Zoning, Mandates Fair Share: Inclusionary Housing Programs a Likely Response*, 9 SAN FERN. V.L. REV. 19 (1981); Comment, *Zoning New York City to Provide Low and Moderate Income Housing—Can Commercial Developers Be Made to Help?*, 12 FORDHAM URB. L.J. 491 (1984).

258. *See, e.g.*, Fulton, *supra* note 203, at 37 (describing agreement to allow developer to construct hotel addition six stories higher than four stories allowed under ordinance, in return for developer's agreement to provide city with beachfront tram, traffic improvements, preferential job hiring and training for local residents, and yearly number of room vouchers for battered women and other people in need).

259. *See* Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 376 A.2d 483 (1977) (density bonus provisions did not set floor so low as to result in coercion, confiscation, or regulatory taking), *cert. denied sub nom.*, Funger v. Montgomery County, 460 U.S. 1067 (1978).

change of consideration—it does not necessarily follow that all aspects of contract doctrine apply; instead, this approach may be viewed as creating special incentives or special protection available to all who qualify for bonus awards in a primarily regulatory setting.[260]

This description of development agreements as primarily regulatory in character may require some rethinking of existing case law. A Maryland case, *Mayor and City Council of Baltimore v. Crane*,[261] warrants particularly close examination. *Crane* concerned a city ordinance that provided developers with an opportunity to donate a portion of developable land to the city in exchange for an offsetting increase in density on the remainder of their tracts. The developer in question transferred land that the city needed for road purposes, and he was advised that as a result he could increase density on the rest of his parcel. The city later undertook a comprehensive rezoning of the area, and claimed that the developer would no longer be entitled to the added density when he began steps to proceed with development.[262] The Maryland Supreme Court held for the developer, stating that he had acquired rights which the city could not extinguish so easily. More specifically, the court held that the bonus scheme did not constitute contract zoning, and that the developer had not acquired a "vested right" to develop in the usual sense.[263] Nevertheless, the developer had acquired "vested contractual rights" and the city was equitably estopped from denying the developer the right to proceed as proposed.[264]

The *Crane* court's conclusion seems to be a sound one in light of the expectations of the parties and the equities concerned. Nevertheless, its characterization of the developer's interest as "contractual" is arguably imprecise. Writing in 1976, the court may have been drawn to this description as the best one available. In hindsight, however, the interest might better be described as a modified type of transferable development right, an interest created by local government pursuant to its regulatory powers and conferred as a vested right in a private party under circumstances established by ordinance.[265] An alternative charac-

260. Such an approach has been explicitly adopted in some jurisdictions. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 40A, § 9 (West 1985) (authorizing local governments to grant permits allowing increases in permissible density on condition that applicants provide extra open space, low or moderate income housing, traffic or pedestrian improvements, or other amenities).

261. 277 Md. 198, 352 A.2d 786 (1976); *see also* Salt Co. v. East Saginaw, 80 U.S. (13 Wall.) 373 (1871) (incentive scheme to encourage salt manufacture could be repealed; only when manufacturer had in fact produced salt sufficient to trigger bounty were rights protected under the Contract Clause).

262. *Crane*, 277 Md. at 203-05, 352 A.2d at 788-89.

263. *Id.* at 206, 352 A.2d at 789-90.

264. *Id.* at 206, 352 A.2d at 790. In reaching its conclusion that "vested contractual rights" had been created, the *Crane* court relied heavily on Ward v. City of New Rochelle, 20 Misc. 2d 122, 197 N.Y.S.2d 64 (N.Y. Sup. Ct.), *aff'd without opinion*, 8 N.Y.2d 895, 168 N.E.2d 821, 204 N.Y.S.2d 144 (1960). *Id.* at 208-09, 352 A.2d 791-92. *Ward* involved a landowner's transfer of land to a school district in exchange for a promise that the reduced area would be subdivided with 10,000 acre lots. The planning board recommended larger lots once the parcel had been conveyed to the school district. The *Ward* court held that the landowner had acquired a "vested right," *Ward*, 20 Misc. 2d at 128, 197 N.Y.S.2d at 70-71, but did not describe that right as contractual in nature.

265. Transferable development rights (TDRs) often entail more complex transfers of rights to owners of separate parcels, as described in the following excerpt:

TDR programs are premised on the notion that development rights in land are themselves

terization in no way requires a diminution in the level of protection afforded the rights in question;[266] it does, however, clarify the perspective from which other characteristics of rights created by development agreements should be viewed and described.

Careful analysis thus indicates that development agreements may legitimately be seen as both contractual and regulatory in character. If this is indeed true, two parallel lines of precedent and related theoretical constructs may eventually emerge in litigation involving this land use device, much as has occurred in the contingent zoning context. A better, alternative approach would assume, at the outset, that development agreements possess a dual or hybrid character, and that standards and rules concerning noncompliance should be formulated with that character in mind.

B. *Standards*

1. Per Se Invalidity

Before turning to a discussion of the specific procedural and substantive standards that govern the use of development agreements, it is first necessary to consider a more fundamental question: whether such agreements are fundamentally so flawed as to be invalid per se. Particular attention must focus on two features of such agreements: provisions that purport to guarantee public services, and those that agree to a regulatory freeze. The first of these features is the one most fully addressed by analogous case law; the second is generally regarded as most problematic but most important to development interests. Other typical provisions concerning rezoning and attendant conditions, and exactions for the public benefit, are discussed at more length elsewhere in this Article.[267]

> distinct property entities and, as such, are freely separated from conventional rights of ownership. . . .
>
> Transfer of the TDRs allows an owner of a sending parcel to transfer inchoate development capacity to a receiving parcel while retaining ownership and reduced development in the original sending parcel. . . . In sum, the TDR arrangement postulates that the sending parcel is restricted from further development and thus preserved for public benefit, the sending parcel owner is compensated for the restrictions imposed on his land by sale of the TDRs to another landowner, and the receiving parcel is then entitled to develop up to a designated increased density.

Delaney, Kominers & Gordon, *TDR Redux: A Second Generation of Practical Legal Concerns*, 15 URB. LAW. 593, 595-96 (1983). The TDR concept achieved particular prominence following its approval by the Supreme Court in 1978 as a device to encourage historic preservation. *See* Pennsylvania Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

266. For example, the *Crane* court suggested in passing that, "where a municipal corporation had made an offer by ordinance which has been accepted and acted upon by another, a contract may arise, the obligation of which is constitutionally protected against impairment." *Crane*, 277 Md. at 207, 352 A.2d at 791 (citing 5 E. MCQUILLIN, *supra* note 146, § 19.39, at 499 (1969)). It is, of course, true that interests in land that possess hybrid characteristics as conveyance and contract have been accorded protection under the Contract Clause. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 887 (1810) (conveyance of land created interest protected by Contract Clause); Wa Wa Yanda, Inc. v. Dickerson, 18 A.D.2d 251, 239 N.Y.S.2d 473 (1963) (lease is interest protected by Contract Clause). To say that such interests have certain characteristics that entitle them to this level of protection is not to say, however, that they are solely or even primarily contractual in character.

267. *See supra* notes 110-98 and accompanying text.

As was true with contingent zoning, a significant body of authority involving public-private agreements finds certain such agreements invalid per se. Many courts adopting this view have focused on the arguably problematic blend of contract and police powers that characterizes particular agreements. In contrast to the contingent zoning cases, and cases under the Contract Clause, these courts have stopped short of a full-blown consideration of statutory authority, the parties' expectations, and governmental interests; instead they have relied on traditional, but flawed, distinctions between governmental and proprietary functions as a means of resolving this initial question.

"Governmental" functions and powers have been defined as those conferred on a municipal corporation "as a local agency of prescribed and limited jurisdiction to be employed in administering the affairs of the state and promoting the public welfare generally," particularly when the powers in question were conferred for a public purpose and the public good.[268] "[P]roprietary functions and powers are those relating to the accomplishment of private corporate purposes in which the public is only indirectly concerned, and as to which the municipal corporation is regarded as a legal individual."[269] Courts have used such abstract definitions to distinguish between permissible and impermissible behavior in a variety of contexts, for example, with regard to the right to compensation for municipal property taken by the state, state control of municipal activity, and the cost of relocation of utility lines.[270] Perhaps the dichotomy's best known use has been as a means of determining local government liability in tort; traditionally, local governments have been held liable for conduct undertaken in their proprietary capacity, but not for conduct undertaken in their governmental capacity.[271] Its application in that context has been widely criticized because it produces decisions that lack rational bases, are irreconcilably in conflict, and are confused.[272] As a result, alternative methods have been widely adopted as means for resolving this issue.[273]

Courts typically have upheld government contracts with private parties that

268. 2 E. MCQUILLIN, *supra* note 146, § 10.05.

269. 2 E. MCQUILLIN, *supra* note 146, § 10.05.

270. *See* People *ex rel.* Sanitary Dist. v. Schlaeger, 391 Ill. 314, 63 N.E.2d 382 (1945) (cost of election of sanitary district commissioners incurred for governmental, rather than local corporate purposes); Proprietors of Mount Hope Cemetary v. City of Boston, 158 Mass. 509, 33 N.E. 695 (1893) (right to compensation when municipal property is condemned by the state); City of New York v. New York Tel. Co., 278 N.Y. 9, 14 N.E.2d 831 (1938) (city acting in proprietary capacity was required to bear cost of relocating telephone lines when relocation needed to accommodate subway entrances); Parr, *State Condemnation of Municipally Owned Property: The Governmental-Proprietary Distinction*, 11 SYRACUSE L. REV. 27 (1959). *See generally* D. MANDELKER, D. NETSCH & P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 161-62, 438-40 (2d ed. 1983) (discussing uses of governmental-proprietary distinction).

271. *See* 18 E. MCQUILLIN, *supra* note 146, § 53.23 -.59 (3d ed. 1984); Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250 (1937).

272. *See* K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.07, at 460 (1958); D. MANDELKER, D. NETSCH & P. SALSICH, *supra* note 270, at 432; Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 VA. L. REV. 910 (1936), *reprinted in* 53 U. CIN. L. REV. 469 (1984).

273. *See* Cook, *Postscript: Tracing the Governmental-Proprietary Test*, 53 U. CIN. L. REV. 561 (1984).

involve the provision of certain public services, so long as the government action is undertaken in a proprietary capacity; but they have overturned such contracts when the actions are undertaken in a governmental capacity. This distinction has led to surprising and troubling results in jurisdictions that follow this approach. For example, courts have upheld the provision of water pursuant to long-term contracts because of the traditional involvement of private concerns in this activity and the resulting classification of water provision as a proprietary function.[274] Some courts have reached the opposite result in cases involving agreements to provide or maintain roads or related improvements, a function traditionally characterized as governmental in nature.[275] Even assuming that such classifications may make sense in such settings, the difficulties inherent in this dichotomy have been evident when other examples are considered. Thus, courts upholding "proprietary" water contracts have struck down long-term agreements for the provision of "governmental" sewer services,[276] or they have distinguished between agreements to furnish water—permitted as action in a proprietary capacity—and those that set rates in such contracts—prohibited as the exercise of a governmental function.[277] As happens in other areas in which the proprietary/governmental dichotomy has been used, such decisions may be criticized as arbitrary and inconsistent, and insufficiently sensitive to the full range of policy considerations that should shape the analysis.

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274. *See, e.g.*, City of Colorado Springs v. Colorado City, 42 Colo. 75, 88, 94 P. 316, 319 (1908) (upholding agreement to provide neighboring city and its inhabitants with water); City of Big Spring v. Board of Control, 404 S.W.2d 810, 813 (Tex. Civ. App. 1966) (upholding agreement to supply water to nearby state hospital); *see also* 13 E. MCQUILLIN, *supra* note 146, § 37.03 (3d ed. 1971) ("obtaining for the city and its inhabitants electricity or a water supply has been said to involve merely the exercise of the proprietary or business powers of the municipality, and not governmental functions").

275. *See* Wabash R.R. v. Defiance, 167 U.S. 88, 97-98 (1897) (municipality could not relinquish legislative power to regulate streets by entering into contract authorizing railroad company to build bridges); State v. Minnesota Transfer Ry. 80 Minn. 108, 114-15, 83 N.W. 32, 35 (1900) (invalidating contract between railroad company and municipality in which municipality agreed to maintain railroad bridge on permanent basis, when railroad had common-law duty to keep bridge in repair so as to ensure safe passage on affected streets, and stating that later city council acting with regard to a governmental function could not be bound to refrain from requiring railroad to undertake needed repairs). *But see* Barbour Asphalt Co. v. Louisville, 123 Ky. 687, 97 S.W. 31 (1906) (municipality could enter into 10 year contract with private contractor to provide needed street repairs, even though laying out of streets constitutes governmental function).

276. *Compare* City of Big Spring v. Board of Control, 404 S.W.2d 810 (Tex. Civ. App. 1966) (upholding long-term contract to provide water as action in proprietary capacity) *with* City of Farmers Branch v. Addison, 694 S.W.2d 94 (Tex. Ct. App. 1985) (agreement to provide sanitary sewer services to part of nearby city invalid when operation and maintenance of sewer system was a governmental function that could not be abdicated, and city was deemed to have surrendered part of its control of system by entering into agreement that did not specify quantity of sewage to be accepted or number, time, and place of connections) *and* Fidelity Land & Trust Co. v. City of W. Univ. Place, 496 S.W.2d 116 (Tex. Ct. App. 1973) (agreement to provide sewage disposal service at rate equal to that charged city residents in return for deeding of sewer easement invalid in light of fact operation of sewer system was governmental function and loss of control over operation of system might result).

277. *See* City of Warm Springs v. Bulloch, 212 Ga. 149, 91 S.E.2d 13 (1956) (invalidating city contract to supply water in return for petitioner's agreement to lease city his spring for 99-year term, when fixing of rates was legislative power). *But see* Reed v. City of Anoka, 85 Minn. 294, 88 N.W. 981 (1902) (city contract to receive water from private provider for 31-year period at fixed rate upheld when provision of water was proprietary function and long-term fixed rate contract was needed to justify private investment in capital facilities).

Perhaps not surprisingly, in view of these serious flaws, other courts have adopted a case-by-case rather than a categorical approach that treats certain types of government contracts as invalid per se. These courts have tended to focus on one or more of the factors evident in Contract Clause analysis: the existence of adequate authority, the parties' expectations, and the governmental interest involved.

Thus, courts have treated the existence of statutory authority as an important factor in upholding annexation agreements that cover a variety of subjects ranging from zoning to tax exemptions.[278] State statutory authority has also proved significant in upholding a cooperative agreement that required a city to vacate streets in order to facilitate development of low rent housing in keeping with the state's interest, notwithstanding that courts traditionally have regarded control of city streets as a governmental function.[279] Cases have also very carefully considered and defined the parties' expectations. For example, courts have upheld service provision agreements that are reasonable, fair, and equitable,[280] and they have held that agreements may not be readily challenged based on foreseeable changes in circumstances.[281]

Finally, several courts have engaged in much more discerning analysis of the governmental interest implicated by public-private agreements. For example, an annexation agreement in which a municipality agreed to provide sewage services, was upheld by one court in the interest of the public safety, rather than finding that the municipality surrendered its police power or abrogated its duty to provide such services.[282] A similar theme emerges in case law upholding a cooperative housing agreement entered into in furtherance of a city's police power interests.[283] A key distinction often is whether the agreement is beneficial or adverse to the public interest.[284] Courts have also looked more closely at

278. *See* Clark v. Marian Park, Inc., 80 Ill. App. 3d 1010, 400 N.E.2d 661 (1980) (authority existed to address tax-exempt status in annexation agreement); Union Nat'l Bank v. Village of Glenwood, 38 Ill. App. 3d 469, 348 N.E.2d 226 (1976) (zoning is proper subject of annexation agreement).

279. *See* Housing Auth. v. City of Los Angeles, 38 Cal. 2d 853, 868, 243 P.2d 515, 523, *cert. denied*, 344 U.S. 836 (1952).

280. *See* Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976); Carruth v. City of Madera, 233 Cal. App. 2d 688, 43 Cal. Rptr. 855 (1965).

281. *See* Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976) (annexation agreement promising to allow sewage connections bound city, even though problems with city sewage plant had developed); Carruth v. City of Madera, 233 Cal. App. 2d 688, 43 Cal. Rptr. 855 (1965) (annexation agreement promising to provide water and sewer mains and other needed facilities upheld notwithstanding changes during 13-year period).

282. *See* Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 734, 130 Cal. Rptr. 196, 202 (1976) (annexation agreement represented control over annexation process and sewer operation, rather than surrender of legislative power).

283. *See* Cuyahoga Metro. Hous. Auth. v. City of Cleveland, 342 F. Supp. 250 (D. Ohio 1972) (cooperative agreement to provide housing upheld and city required to undertake specific performance), *aff'd*, 474 F.2d 1102 (1973); Housing Auth. v. City of Los Angeles, 38 Cal. 2d 853, 868, 243 P.2d 515, 523 (cooperative agreement is performance of governmental function), *cert. denied*, 344 U.S. 836 (1952).

284. *See* Plant Food Co. v. City of Charlotte, 214 N.C. 518, 520, 199 S.E. 712, 713-14 (1938) (upholding contract agreeing to have plaintiff remove sludge from city sewage plant, and stating that "[w]here governmental powers [involving health and protection of inhabitants] are not involved *or disadvantageously affected* the right to make contracts, otherwise unobjectionable to the law, is one

whether a municipality has preserved the necessary discretion to assert its police power, rather than assuming that contracts involving the exercise of proprietary functions serve its interests or that those undertaken in a governmental capacity injure them.[285] Courts have also carefully assessed the governmental interest in cases that have distinguished between annexation agreements to rezone at or near the time of annexation, those that involve commitments for a set or limited period of time, and those that would require action to be taken or foregone at a much later or indeterminate date.[286] In sum, a significant body of case law recognizes that sensitive analysis on a case-by-case basis best serves critical policy concerns, rather than the categorical application of a rule of per se invalidity.

With this precedent in mind, it is possible to return to the difficult question whether regulatory freeze provisions included in many development agreements can be upheld in at least some instances. The statutes described above evidence a clear legislative intent to afford statutory authority for freeze provisions.[287] Absent such authority, the legality of such freezes is much more in doubt.[288] The parties' expectations likewise support the recognition of the legitimacy of certain regulatory freezes. Development agreement legislation has authorized such freezes precisely because the common law vested rights and equitable estoppel doctrines had arguably failed to consider private development expectations adequately, particularly those that arose in connection with complex multistage projects.[289] When the legislature has authorized a new strategy for establishing expectations, and the public and private parties have solidified such expectations in an individual case through appropriate public hearings, these expectations appear to be well and firmly fixed, at least absent materially changed circumstances that implicate significant health and safety concerns or other statutory exceptions.[290] Government interests may also be well served by regulatory freezes in appropriate cases. Adoption of appropriate specific substantive standards can ensure that beneficial rather than adverse effects will result. The need to preserve essential police power prerogatives is better served by insistence on preservation of suitable discretion, rather than by the outmoded

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of the most important incidents of municipal government") (emphasis added); Town of Lovell v. Menhall, 386 P.2d 109, 115 (Wyo. 1963) (agreement by majority of court that contract for parking meters, admittedly governmental in nature, valid when "fair and beneficial" to the public interest, or "just, fair, and reasonable when prompted by the necessities or advantages of the situation," notwithstanding disagreement on application of test).

285. *See* Plant Food Co. v. City of Charlotte, 214 N.C. 518, 520-21, 199 S.E. 712, 714 (1938) (applying test requiring determination whether contract compromises government discretion, rather than traditional governmental/proprietary function dichotomy, after observing that line between functions "is none too sharply drawn, and is subject to a change of front as society advances and conceptions of the functions of government are modified under its insistent demands").

286. *See* Geralnes B. V. v. City of Greenwood Village, 583 F. Supp. 830, 839-40 (D. Colo. 1984) (upholding annexation agreement that contemplated rezoning during a limited period of time, after discussion of authority concerning annexation agreements promising to rezone at the outset, and agreements never to rezone).

287. *See supra* notes 205-46 and accompanying text.

288. *See* Delucchi v. County of Santa Cruz, 179 Cal. App. 3d 814, 823, 225 Cal. Rptr. 43, 49 (stating that agricultural land preservation agreement could not include agreement not to rezone in absence of specific statutory authority), *appeal dismissed*, 107 S. Ct. 46 (1986).

289. *See supra* note 253.

290. *See supra* text accompanying notes 224 & 245 (discussing Hawaii and Florida legislation).

and insensitive dichotomy between governmental and proprietary activities. Similarily, the need to exercise the police power at a later time can be protected adequately by developing standards that limit the duration of regulatory freezes, or by permitting government noncompliance with agreements under special circumstances as described below. In short, ample reason exists to reject a rule of per se invalidity for regulatory freezes, and to adopt sound substantive standards as proposed in the following section.

2. Specific Standards

As was true with regard to contingent zoning, specific procedural and substantive standards can play an important role in protecting against public and private abuse of development agreements. Although development agreement standards bear certain similarities to standards governing contingent zoning, important differences distinguish the two contexts.

a. Procedural Standards

Two major procedural issues have emerged in recent discussions of development agreements: (1) what procedural standards govern adoption of such agreements; and (2) to what extent may citizens use initiative and referendum procedures to prevent their implementation? Although procedural standards applicable to development agreements are fairly clear, more uncertainty surrounds the availability of referendum and initiative procedures.

i. *Procedural Standards Governing Adoption of Development Agreements*

Procedural standards applicable to development agreements are relatively straightforward. Adoption of a development agreement is a distinct undertaking with its own requirements, in addition to specific requirements and standards also applicable to related rezoning or permit issuance decisions.[291]

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291. *See* CAL. GOV'T CODE § 65866 (West 1983) (unless otherwise provided by development agreement, rules, regulations, and official policies to be those in effect at time of execution; development agreement shall not prevent local government from denying or conditionally approving any subsequent development agreement on the basis of existing or new but consistent rules); FLA. STAT. ANN. § 163.3233(1) (West Supp. 1987) (local government's laws and policies in effect at time of agreement shall govern development of land); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 81 (laws, ordinances, resolutions, rules, and policies governing permitted uses of land subject to development agreement shall be those made applicable and in force at time of execution); Act of June 12, 1985, ch. 647, § 2(2), 1985 Nev. Stat. 2113, 2114 (unless agreement otherwise provides, ordinances, resolutions, or regulations applicable to land to be those in effect at time development agreement executed); *see also* League of California Cities, *supra* note 203, at 1.12 (1980) ("drafters of [§ 65866 of] the [California] statute did not intend that the development agreement would be utilized to exempt people from ordinary requirements that now exist," although a development agreement ordinance could amend prior ordinance provisions except those reflecting limitations imposed by state law).

Even in the absence of state statutory provisions requiring separate handling of discretionary permit applications, it is advisable to ensure that all discretionary approvals required for a development have been granted before the execution of a development agreement, or to specify in the development agreement that all future land use entitlements not yet granted must be obtained in accordance with all applicable state and local regulations. This approach weakens any possible reserved powers doctrine challenge that might be mounted against the agreement. *See* Stone & Sierra, *supra* note 203, at 104. *But see* Holliman, *supra* note 203, at 61 (stating that development agreement

Although development agreement statutes currently in effect provide a basic procedural framework, local ordinances and subsequent case law provide important additional guidance. Each of these statutes contemplates that affected landowners will be afforded notice and an opportunity for hearing prior to adoption of a particular development agreement.[292] This requirement ensures that procedural due process obligations will be satisfied.[293] In addition, statutory provisions require that development agreements be recorded to afford record notice to property owners who are likely to be affected at a later date.[294]

It is less clear what other procedural standards must be followed. California's and Florida's statutes initially stated that governing procedures may be established by local ordinance.[295] Hawaii's statute requires such procedures, and California's statute was subsequently amended to state that procedures must be established on request.[296] Even when the statute does not mandate such procedures, jurisdictions that elect to adopt development agreements should seriously consider enacting ordinances that specify relevant procedures both to strengthen their stance in the event of litigation, and to establish an efficient administrative scheme. In particular, adoption of ordinance provisions clearly indicating that development agreements may be available to all who satisfy generally applicable requirements may blunt equal protection challenges alleging that only certain favored landowners have been afforded such opportunities,[297] and may facilitate arguments that stringent Contract Clause protections should not apply.[298]

Helpful guidance concerning the nature of local procedural requirements is provided by the model ordinance developed by the League of California Cities.[299] This model ordinance describes eligibility requirements; review procedures; notice obligations; standards for review, findings, and decision; recordation requirements; procedures for periodic review; and requirements re-

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may occur concurrently with or incorporate discretionary approvals, without making clear whether administrative incorporation or actual approval is envisioned).

292. *See* CAL. GOV'T CODE § 65867 (West 1983); FLA. STAT. ANN. § 163.3225 (West Supp. 1987); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 81; Act of June 12, 1985, ch. 647, § 2, 1985 Nev. Stat. 2114, 2114 (procedures to be specified by ordinance).

293. *See supra* note 152 (discussing procedural requirements for contingent zoning).

294. *See* CAL. GOV'T CODE § 65868.5 (West 1983); FLA. STAT. ANN. § 163.3239 (West Supp. 1987); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 82; Act of June 12, 1985, ch. 647, § 5, 1985 Nev. Stat. 2114, 2115.

295. *See* CAL. GOV'T CODE § 65865 (West. 1983); FLA. STAT. ANN. § 163.3223 (West Supp. 1987).

296. *See* CAL. GOV'T CODE § 65865(c) (West. Supp. 1987); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 79-80.

297. *Cf.* County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975) (Bakes, J., concurring) (selective application of zoning ordinance may result in equal protection violation if not based on standards fixed by ordinance).

298. *See supra* note 26; *cf.* Mayor and City Council of Baltimore v. Crane, 277 Md. 198, 206-07, 352 A.2d 786, 789-90 (1976) (open-ended ordinance provisions including offer of density bonus did not amount to contract zoning, but did create "vested contractual interest" that might be constitutionally protected against impairments, but was in any event protected under equitable estoppel doctrine). Professor Callies does not believe, however, that additional procedures are needed. *See* Callies, *Statutory Development Agreements*, *supra* note 203, at 26-27.

299. *See* League of California Cities, *supra* note 203, at 3.6-3.12.

lating to amendment, cancellation, modification, and termination of a development agreement.[300] Of particular importance is the requirement that specific findings be made on a variety of issues in the course of review.[301] This requirement strengthens the local government's position in the event of judicial review; it may also help immunize the local government's decision from challenge by citizen initiatives or referenda as discussed below.[302]

Whether additional procedural requirements may be imposed as a matter of common law remains to be seen. The need for independent governmental judgment, arguably recognized by the contingent zoning cases,[303] probably should not arise in conjunction with development agreements. The independent judgment rule is designed to ensure that substantive zoning decisions are not influenced improperly by private abuse. Adoption of appropriate procedural and substantive standards governing development agreements themselves should obviate the need for any such common-law rule. Courts may also appreciate that less need exists for such a judicial tool when legislation has expressly authorized use of such agreements, when no history of past abuse prevails such as that which arises in the context of rezoning decisions,[304] and when local government staff can negotiate relevant agreements and present them to the governing body for independent review.[305]

ii. *Availability of Referendum and Initiative Procedures*

A number of jurisdictions have long-standing referendum and initiative provisions incorporated into state constitutions, statutes, or local charters.[306] In recent years many states have considered the availability of such procedures as means for citizen challenge of government action or inaction involving land use

300. *See* League of California Cities, *supra* note 203, at 3.6-3.12.

301. *See* League of California Cities, *supra* note 203, at 3.9 (planning commission to prepare recommendation including determination whether development agreement is consistent with applicable plans, is compatible with uses in the given zoning district, is in conformity with the public welfare and good land use practice; whether the agreement will be detrimental to the health, safety, and general welfare; and whether the agreement will adversely affect orderly development of property or the preservation of property values); *see also* FLA. STAT. ANN. § 163.3227 (West Supp. 1987) (specifying that development agreement must include, among other things, descriptions of public facilities required; permits needed; and findings concerning requirements necessary in the interest of public health, safety, or welfare, and consistency with applicable comprehensive plans and land development ordinances).

302. *See infra* notes 306-24 and accompanying text.

303. *See supra* notes 152-65 and accompanying text.

304. *See An Analysis of Zoning Reforms: Minimizing the Incentive for Corruption*, in NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUST. 1-13 (1979); *Corruption in Land Use and Building Regulation*, in NAT'L INST. OF LAW ENFORCEMENT & CRIM. JUST. 724 (1979).

305. *See supra* note 162.

306. *See* Rosenberg, *Referendum Zoning: Legal Doctrine and Practices*, 53 U. CIN. L. REV. 381, 383-88 (1983). As of 1978, 39 states allowed statutory referenda, and 23 permitted state legislation by initiative. *Id.* at 387. Local government referenda were provided for in 39 states. *Id.* at 388. The first statewide statutory initiatives and referenda were provided for by constitutional amendment in South Dakota in 1898. *Id.* at 387. *See generally* J. BARNETT, REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY 69-70 (D. Butler & A. Ranney ed. 1978) (comprehensive discussion of referendums).

decisionmaking.[307] It is helpful to review the approach taken in recent zoning decisions before turning to an analysis of the availability of these tools to challenge proposed development agreements.

Prior to 1975 a few states had determined that referendum and initiative provisions were applicable to local land use decisionmaking.[308] However, a growing number of courts had concluded that the particularized provisions of state zoning statutes were intended to govern land use decisionmaking to the exclusion of alternative decisionmaking processes. These courts reasoned, for example, that town officials rather than the town as a corporate entity were authorized to rezone, or that referendum and initiative procedures were inconsistent with the requirement that zoning be conducted in accordance with a comprehensive plan or with procedural standards set forth in zoning enabling legislation.[309] Other courts concluded that compliance with referendum and initiative procedures would violate constitutional due process principles, either because of the potential for abuse and uninformed decisionmaking associated with referenda relating to individual parcels of land, or because of the inadequacy of notice and hearing opportunities inherent in the initiative process.[310]

In 1976 the United States Supreme Court decided an important case regarding the character of land use decisions; the Court held that the referendum provision of the Ohio Constitution reserved legislative power in the people, that rezoning had been found to be as a matter of state law a legislative activity, and

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307. *See* Rosenberg, *supra* note 306; Comment, *Legal Trends in Zoning Referenda and Initiatives*, 37 LAND USE L. & ZONING DIG. 3, 3-4 (1985).

308. *See, e.g.*, Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972) (declining to enjoin referendum); City of Ft. Collins v. Dooney, 178 Colo. 25, 496 P.2d 316 (1972) (referendum applied to rezoning decision, in light of language of city charter); Russell v. Linton, 52 Ohio App. 228, 115 N.E.2d 429 (1953) (upholding initiative); Allison v. Washington County, 24 Or. App. 571, 548 P.2d 188 (1976) (initiative available in zoning matters).

309. *See, e.g.*, City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968) (initiative concerning rezoning not permitted when inconsistent with state statutory notice requirement); O'Meara v. City of Norwich, 167 Conn. 579, 356 A.2d 906 (1975) (referendum not permitted when power to rezone is vested in zoning commission, not in electorate); Toiman v. Eagle Thrifty Drugs and Markets, Inc. 89 Nev. 533, 538-39, 516 P.2d 1234, 1237 (1973) (referendum inconsistent with notice and hearing requirements); Elkind v. City of New Rochelle, 5 Misc. 2d 296, 163 N.Y.S.2d 870 (1957) (referendum on rezoning decision not permissible when it could result in erosion of comprehensive plan), *aff'd*, 5 N.Y.2d 836, 155 N.E.2d 404, 181 N.Y.S.2d 509 (1958); Hancock v. Rouse, 437 S.W.2d 1 (Tex. Ct. App. 1969) (initiative and referendum not available when inconsistent with statutory requirements concerning study and planning, and when statutory notice and hearing requirements could not be met); *see also* Lince v. City of Bremerton, 25 Wash. App. 309, 607 P.2d 329 (1980) (rezoning decision not subject to initiative and referendum when zoning power vested in city council and decisions by voters might not result in informed and intelligent choice or be consistent with planning requirements).

310. *See, e.g.*, Andover Dev. Corp. v. City of New Smyrna Beach, 328 So. 2d 231 (Fla. Dist. Ct. App. 1976) (referendum violates constitutional due process requirements when notice and hearing not provided); Forest City Enters., Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975) (use of referendum may lead to arbitrary and unreasonable decisions by the public and therefore conflicts with constitutional due process requirements), *rev'd*, 426 U.S. 668 (1976); *see also* Gumprecht v. City of Coeur d'Alene, 104 Idaho 615, 661 P.2d 1214 (1983) (use of initiative violates procedural due process). Use of the initiative process in conjunction with rezoning decisions is likely to be more problematic than use of a referendum: notice and hearing is absent prior to an initiative but not prior to a referendum; and an initiative might change zoning while a referendum returns zoning to its prior state. *See* Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972).

that a referendum concerning rezoning could proceed because legislative action need not comply with traditional due process notice and hearing requirements.[311] In the last ten years judicial discussion has accordingly focused on whether particular types of land use decisions should be characterized as legislative—so as to fall within the terms of referendum and initiative provisions and avoid potential due process pitfalls—or as administrative or adjudicatory—so as to fall outside such terms and trigger constitutional due process concerns.[312] It is clear that the adoption of a comprehensive zoning ordinance serves a legislative function because it raises broad, general questions of public policy.[313] It is also clear that decisions to grant or deny special or conditional use permits are adjudicatory, because general standards must be applied to the facts of an individual case.[314] More disagreement exists as to whether the decision to rezone small parcels or a small number of parcels is legislative or adjudicatory,[315] and whether such decisions should turn on the character or magnitude of the policy issues raised.[316] Even assuming that referendum or initiative provisions apply to particular types of land use decisions, it remains unclear to what extent decisions reached by such public decisionmaking processes can be overturned as arbitrary and capricious,[317] and to what extent monetary relief may be awarded against

311. City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976); *see also* San Diego Bldg. Contractors Ass'n v. City Council, 13 Cal. 3d 205, 529 P. 2d 570, 118 Cal. Rptr. 146 (1974) (en banc) (initiative does not violate due process requirements), *appeal dismissed*, 427 U.S. 901 (1976).

312. *See* Comment, *supra* note 307, at 3.

313. *See* O'Loane v. O'Rourke, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283 (1965) (adoption of comprehensive, general plan is legislative in character and therefore subject to referendum). *But see* DeBottari v. Norco City Council, 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790 (1985) (upholding decision of council not to submit rezoning decision to referendum when state statute required conformity with general plan); State *ex rel.* Wahlmann v. Reim, 445 S.W.2d 336 (Mo. 1969) (referendum available regarding comprehensive zoning ordinance).

314. *See* Wiltshire v. Superior Court, 172 Cal. App. 3d 296, 218 Cal. Rptr. 199 (1985) (initiative not available to challenge issuance of special use permit, which requires exercise of adjudicatory rather than legislative powers); *see also* Horn v. County of Ventura, 24 Cal. 3d 605, 613, 596 P.2d 1134, 1140, 156 Cal. Rptr. 718, 722 (1979) (approval of tentative subdivision map was adjudicative and could not be resolved through initiative process); Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977) (approval of planned unit development is adjudicatory).

315. *Compare* cases in which courts have held that a zoning amendment is legislative even though a small number of parcels or small parcel was involved, *see, e.g.*, Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980); Yanz v. City of Avarda, 638 P.2d 297 (Colo. 1981) (en banc); Chynoweth v. City of Hancock, 107 Mich. App. 360, 309 N.W.2d 606 (1981); *with* Leonard v. City of Bothell, 87 Wash. 2d 847, 557 P. 2d 1306 (1976) (en banc), in which the court held that the rezoning of a single parcel was not legislative, and thus was not subject to referendum.

316. *See, e.g.*, Pardee Constr. Co. v. City of Camarillo, 37 Cal. 3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984) (growth control measure applicable to all developers could be adopted by initiative); Wheelright v. County of Marin, 2 Cal. 3d 448, 467 P.2d 537, 85 Cal. Rptr. 809 (holding that referendum was available with regard to decision on detailed development plan and road for planned community when decision required more than giving effect to previously declared legislative policy, and concerned roadways, a matter of sufficient public interest to weigh scales in favor of characterization as legislative matter subject to referendum), *cert. denied and appeal dismissed*, 400 U.S. 807 (1970); Committee of Seven Thousand v. City of Irvine, 185 Cal. App. 3d 253, 221 Cal. Rptr. 616 (1985) (initiative and referendum available with regard to matter of state-wide concern such as adoption of impact fees to fund major roads), *rev. granted*, No. 32181 (Cal. Apr. 17, 1986).

317. *See, e.g.*, Innkeepers Motor Lodge v. City of New Smyrna Beach, 460 So. 2d 379 (Fla. Dist. Ct. App. 1984) (referendum decreasing allowable density invalidated as arbitrary when no study had been done demonstrating need for density cap, and no variance procedure was available).

the governing jurisdiction in such a case.[318]

Applying this developing body of law in the context of development agreements can prove either more or less problematic, in view of the possibility that the applicability of initiative and referendum procedures to development agreements has been specifically considered by state legislatures. The Hawaii development agreement statute specifically declares that adoption of a development agreement is an adjudicatory action that is not, therefore, subject to referendum.[319] Although adoption occurs when a legislative body enacts an ordinance, a good case can be made for this position. The state legislature's judgment on the matter is clear. Any development agreement addresses a single parcel or small number of parcels, and it involves a factual determination concerning the types of uses, the exactions and related requirements, and the length of time during which regulatory provisions will apply. Rezoning raises major policy questions that will be considered independently in a distinct rezoning decision. The inclusion of procedural requirements relating to notice and hearing opportunities and factfinding reinforces the view that adoption of a development agreement entails adjudicatory action.

The California statute, on the other hand, declares that adoption of a development agreement is a legislative action subject to referendum.[320] This provision was purportedly intended to provide an added check against abuse of development agreements by lame duck city councils. Various arguments support this position. The legislature's judgment should be afforded some weight. That judgment may reflect a considered opinion that development agreements typically cover major, significant projects, which generally raise policy questions best described as legislative in nature. Decisions to waive otherwise generally applicable legislative requirements by agreement to a regulatory freeze typically found in development agreements is quite similar to "legislative" rezoning decisions that amend an underlying "legislative" ordinance or zoning map.[321] Nonetheless, the power to characterize development agreements as a matter of

318. *See* Wheeler v. City of Pleasant Grove, 746 F.2d 1437 (11th Cir. 1984) (awarding damages when referendum had resulted in taking of property; remanding for calculation of damage amount). *But see* Comment, *supra* note 307, at 4 (questioning whether damages should be assessed against municipality when voters overturn decision).

319. Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 82. The Hawaii Legislature may have had a particular interest in avoiding referendum elections that pertain to development agreements. A major vested rights case, which helped stimulate interest in development agreement legislation, involved a voter referendum that repealed resort zoning for a developer's property after the developer had spent substantial time and money on a resort hotel project. *See* County of Kauai v. Pacific Standard Life Ins. Co., 65 Hawaii 318, 653 P.2d 766 (1982), *appeal dismissed*, 460 U.S. 1077 (1983). Two years later a second referendum again changed zoning regulations to allow the project to proceed, after the developer had funneled $50,000 through a citizens' group supporting the project. *See* Comment, *supra* note 307, at 4.

320. *See* CAL. GOV'T CODE § 65867.5 (West 1983). This provision was apparently included to prevent lame duck city councils from enacting development agreements opposed by the public. *See* Hagman, *Development Agreements*, *supra* note 203, at 185.

321. *Cf.* Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980) (zoning amendment is legislative action because initial adoption of zoning regulations was legislative); Yanz v. City of Arvada, 638 P.2d 297 (Colo. 1981) (en banc) (when initial adoption of zoning regulations is deemed legislative then zoning amendments will be deemed legislative acts).

California law is a matter ultimately for judicial determination,[322] and the countervailing arguments described above[323] are relatively strong. Most commentators accordingly have concluded that the availability of referendum and initiative procedures in California remains at best unclear and at worst in considerable doubt.[324]

b. Substantive Standards

As was true of procedural standards, state legislation provides the relevant starting point for determining the substantive standards that govern use of development agreements. Zoning enabling legislation or local ordinances may include standards that control related decisions to rezone or issue permits authorizing the use of land subject to a development agreement.[325] Development agreement legislation specifies that development agreements likewise must conform to underlying land use plans and policies,[326] much as common-law doctrine concerning contingent zoning required consistency with the local government's comprehensive plan.[327] Just as was true for contingent zoning, additional careful thought must be given to the substantive standards needed to ensure that individual facets of an agreement avoid the pitfalls of possible public or private abuse. The development of substantive standards to govern development agreement provisions is more complex than was the case for contingent zoning, however, for the reasons detailed below.

i. *Analytical Framework*

Development agreements tend to be even more multifaceted than contin-

322. *See* Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 216, 591 P.2d 1, 12, 152 Cal. Rptr. 903, 914 (1979) (en banc).

323. *See supra* text following note 319.

324. *See* Callies, *Statutory Development Agreements*, *supra* note 203, at 22 (question remains in California whether the legislature can declare action to be legislative if it is not legislative anyway); Hagman, *Development Agreements*, *supra* note 203, at 184-85 (citing arguments on both sides of question); Holliman, *supra* note 203, at 60-63 (stating that actions incorporated in development agreement include those with both adjudicatory and legislative characteristics, and suggesting that "dominant concern" test may be applied resulting in adjudicatory classification notwithstanding legislative declaration to the contrary); Kessler, *supra* note 203, at 470-71 (it is uncertain which label should and will be put on development agreements, and how different agreements may be classified in light of their individual terms).

Several of the commentators just cited assume or contend that precedent concerning the legislative or adjudicatory character of government action determines both the availability of referendum and initiative provisions and the nature of judicial review to be applied. *See, e.g.*, Stone & Sierra, *supra* note 203, at 111-12. Courts do not unanimously agree with this proposition. *See, e.g.*, Yanz v. City of Arvada, 638 P. 2d 297, 304 (Colo. 1981) (en banc) (distinguishing between determination of legislative or adjudicatory character for these diverse purposes).

325. *See supra* note 291.

326. *See* CAL. GOV'T CODE § 65866 (West 1983) (unless otherwise provided in development agreement, rules, regulations, and official policies in force at time of execution to govern); FLA. STAT. ANN. § 163.3231 (West Supp. 1987) (development agreement and development to be consistent with comprehensive plan and development regulations); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 81 (no development agreement may be entered into unless county legislative body finds that proposed agreement is consistent with county's general plan and any applicable development plan); Act of June 12, 1985, ch. 647, § 3(1), 1985 Nev. Stat. 2113, 2114 (approval of development agreement only permitted if consistent with masterplan).

327. *See supra* note 167 and accompanying text.

gent zoning arrangements. They may include not only promises by a developer to abide by certain land use conditions or to make specified infrastructure contributions, but also commitments by a government agency to provide public services and to freeze regulatory requirements. Moreover, each of these multiple promises may itself involve a combination of obligatory and optional aspects—that is, aspects that embody obligations of government agencies and private parties that would exist even in the absence of a development agreement, as well as aspects that reflect a commitment to undertake additional actions that would not be required under such circumstances.[328]

Not surprisingly, therefore, a multifaceted, multidimensional approach to developing and applying substantive standards appears necessary. As a first step, individual promises or facets of the agreement must be considered in isolation to determine to what extent obligatory and optional aspects have been included. In making this determination, standards that traditionally govern the obligatory provision of public services, imposition of conditions and exaction requirements, and protection of vested rights outside the development agreement context may be employed. It is then possible to turn to a second stage of analysis, which focuses on the optional aspects of the agreement individually and in combination. At this stage, once it is evident to what extent the agreement varies from the traditional obligatory norm, subtly different standards drawn from contract and regulatory incentive doctrine may be employed to determine whether public or private abuse has affected this distinctive dimension of the development agreement.

Before turning to a more in-depth examination of relevant standards, a brief example may illustrate this basic analytic framework. A turn-of-the-century Illinois decision involving an agreement between the city of Chicago and a midwestern railroad company provides a case in point.[329] The city and the railroad company had entered into a compromise agreement in which the railroad undertook to construct streets and other needed improvements; in return the city released its claims for reimbursement of certain damage awards rendered against the railroad. Subsequently, the city sought to require the railroad to perform additional work, including the removal of viaducts and the elevation of railroad tracks.[330] The railroad sued.

The Illinois Supreme Court adopted an analytical strategy similar to that suggested in this Article. It first inquired whether the city could have required the railroad to perform its initial street improvement work in the absence of the compromise agreement.[331] The court concluded that the railroad could not have been so required because the city's police power would not stretch so far,

328. Optional aspects may include isolated promises that are unrelated to other development agreement promises, or incremental alterations in the requirements that would otherwise exist—for example, increases in allowable density, contributions to public infrastructure, or available public services.

329. City of Chicago v. Pittsburg, C., C. & St. L. Ry., 244 Ill. 220, 91 N.E. 422 (1910).

330. *Id.* at 222-23, 91 N.E. at 423-24.

331. *Id.* at 226, 91 N.E. at 425.

and no ordinance required such work.[332] Accordingly, any work over and above what the city could have required of the railroad was undertaken in return for the release of its claims; this exchange represented a binding contract cemented by an exchange of adequate consideration.[333] The court finally observed that the city had not demonstrated that additional protective measures were needed in the interest of public safety, while reserving the question whether conditions involving different railroads in different areas of the city might require a contrary result.[334]

ii. *Standards Defining Obligatory Aspects*

With this basic framework in mind, it is next possible to consider in more detail the substantive standards traditionally used to define obligations of local governments and private parties with respect to the major development agreement provisions of interest in this Article—those relating to the provision of public services, to land use conditions, to exactions, and to regulatory freezes.

Development agreements may address the availability and content of terms under which a municipality will provide public services such as water and sewer. Specific statutes typically regulate this area in the individual states,[335] but a few generalizations may be made. At least within municipal limits, municipalities must extend services on a nondiscriminatory basis, as must private providers of utility services.[336] Municipalities traditionally have considerable discretion in determining how new service areas will be defined.[337] In some states adequate service must be provided within a certain period following annexation.[338] Rules

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332. *Id.* at 227-28, 91 N.E. at 425.

333. *Id.* at 228, 91 N.E. at 425-26.

334. *Id.* at 228-29, 91 N.E. at 426. For a detailed discussion of the extent to which local governments may impose more stringent obligations notwithstanding a commitment to observe a regulatory freeze, see *infra* notes 397-427.

335. *See* 12 E. McQUILLIN, *supra* note 146, § 35.09 (1986) ("[c]onstitutions, statutes or charter provisions often . . . authorize municipal ownership of water works"); *id.* § 35.09.05 (location of water system dependent on authorization); 11 E. McQUILLIN, *supra* note 146, § 31.10a (1983) (power to construct and maintain sewers usually conferred by charter or statute but municipality must comply with state legislation when state has entered field).

336. *See* 12 E. McQUILLIN, *supra* note 146, § 35.35f (1983) (municipality obliged to comply with regulatory laws forbidding discrimination in water service and rates, just as is true for private utility companies); 11 E. McQUILLIN, *supra* note 146, § 31.17 (1983) (when municipality holds self out as sole provider of sewer service it will be treated as public utility and permitted to deny service only for utility-related reasons such as lack of capacity).

337. 12 E. McQUILLIN, *supra* note 146, § 35.27 (1983) (when municipality owns water or light plant or other public utility, the extension of services is within the sound discretion of the authorities, unless such discretion is limited by statute); *id.* § 35.35e ("[I]n determining whether to extend its existing water service, a municipality exercises its discretionary powers, which are not subject to review by the courts in the absence of bad faith"; however, the municipality must fairly and reasonably exercise its discretion in light of the extent of the need and economic considerations.); 11 E. McQUILLIN, *supra* note 146, § 31.17 (1983) (municipality has wide discretion in connection with the decision to supply sewerage, including discretion regarding date of construction, nature, capacity, location, number, and cost).

338. *See, e.g.*, N.C. GEN. STAT. §§ 160A-47, 160A-49 (Supp. 1985) (to proceed with involuntary annexation, municipality must develop plan for extension of water and sewer service; failure to comply with plan may result in court order to do so, or abatement of taxes for property owners in annexed area).

and user charges must likewise have a rational basis.[339]

Conditions concerning use of land, availability of mitigating measures, and other similar matters are also frequently included in development agreements. As the discussion on contingent zoning previously noted, only "reasonable" conditions may be imposed without a permit or rezoning applicant's consent.[340] Judgments regarding reasonableness may vary from jurisdiction to jurisdiction.

Exactions of property, infrastructure, or fees play a particularly important role in development agreements.[341] Statutes and case law in virtually all jurisdictions have developed specialized tests of the "reasonableness" of exactions.[342] The traditional scholarly wisdom is that three different variations on the theme of reasonableness exist.[343]

The least stringent test, attributable to an early California decision, demands only that a "rational relationship" exist between the project in question and the requirement imposed.[344] Under this test dedication of a street right-of-way may be required simply because a proposed development in some way contributes to the need for a road.[345] At the other extreme, the most stringent "specifically and uniquely attributable" test permits exactions only when they exclusively and directly relate to the project in question.[346] This test has been used in a few states primarily to shield developers from demands for schools and

339. 12 E. MCQUILLIN, *supra* note 146, § 35.37 - 35.37a (1983) (municipality may set charges, but rates must be just, uniform, and nondiscriminatory, and will be upheld if founded on a rational basis); 11 E. MCQUILLIN, *supra* note 146, § 31.30a (1983) (charges for connecting to "municipal sewers must be reasonable, not arbitrary, uniform and nondiscriminatory").

340. *See supra* notes 176-83 and accompanying text.

341. *See* Silvern, *supra* note 203, at 7-8 (summarizing development agreements entered into by City of Santa Monica, California; public benefits include affordable housing rental units, park areas, day care center, arts and social services fees, street improvements, and contributions for shuttle bus service, civic center, and parking facilities).

342. For useful general discussions of the legality of subdivision exactions, see D. MANDELKER, *supra* note 119, at 267-72; D. MANDELKER & R. CUNNINGHAM, *supra* note 119, at 512-26; Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381 (1985) [hereinafter Bosselman & Stroud, *Mandatory Tithes*]; Bosselman & Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527 (1985) [hereinafter Bosselman & Stroud, *Pariah to Paragon*]; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Johnston, *Constitutionality of Subdivision Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967); Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U.J. URB. & CONTEMP. L. 269 (1983).

343. Many commentators have suggested that three different approaches exist: (1) reasonable relationship, (2) uniquely and specifically attributable, and (3) rational nexus tests. *See, e.g.*, Gougelman, *Impact Fees: National Perspectives to Florida Practice: A Review of Mandatory Land Dedications and Impact Fees That Affect Land Developments*, 4 NOVA L.J. 137 (1980); Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415 (1981). Other commentators have focused primarily on the rational nexus approach, which has achieved dominance in this area. *See* Bosselman & Stroud, *Mandatory Tithes*, *supra* note 342, at 397.

344. *See* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 37, 207 P.2d 1, 5 (1949) (en banc). Some scholars have described *Ayres* as adopting a rational nexus approach. *See* D. MANDELKER, *supra* note 119, at 269.

345. Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 38, 207 P.2d 1, 5 (1949).

346. *See* Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (parkland and school site dedication requirements).

parklands, and related in lieu fees.[347] The vast majority of jurisdictions adopt the intermediate "rational nexus" test,[348] a test that also commands widespread support among commentators.[349] Some jurisdictions treat this standard as requiring a reasonable relationship between an exaction and the burden created by a development.[350] Others require that, in addition, a second nexus exist between the exaction and resulting benefit to the development.[351] Even in those jurisdictions articulating comparable standards, variation exists regarding whether and to what extent off-site exactions can be required, and what type of proof must establish that a required nexus exists.[352]

347. *See* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 27 Conn. Supp. 74, 230 A.2d 45 (1967) (park dedication requirements); Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (park and school site dedication requirements); Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. App.) (road widening), *cert. denied*, 259 La. 770, 252 So. 2d 667 (1971); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (recreation land dedication requirements).

348. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979), *rev'd on other grounds and remanded*, 614 P.2d 1257 (Utah 1980); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

349. *See generally* Bosselman & Stroud, *Mandatory Tithes*, *supra* note 342, at 397-404 (discussing application of rational nexus test).

350. *See, e.g.*, Lampton v. Pinaire, 610 S.W.2d 915 (Ky. Ct. App. 1980).

351. *See, e.g.*, Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 823, 379 A.2d 200, 204 (1977).

352. When reviewing road dedication requirements, courts have traditionally accepted requirements relating to internal subdivision roads, at least when necessitated by development-related needs rather than general public needs. *See, e.g.*, Los Angeles County v. Margulis, 6 Cal. App. 2d 57, 44 P. 2d 608 (1935) (improvement of dedicated roads required); Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928) (road improvements and dedication required); City of Bellefontaine Neighbors v. J. J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970) (road improvements required); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952) (access improvements required); Township of Hampden v. Tenny, 32 Pa. Commw. 301, 379 A.2d 635 (1977) (road improvements required). *But see* Schwing v. City of Baton Rouge, 249 So. 2d 304 (La. Ct. App. 1971) (requirement of 50 foot on-site right of way constitutes an unconstitutional taking); Howard County v. JJM, Inc., 301 Md. 256, 482 A.2d 908 (1984) (requirement of right of way for state highway failed to satisfy rational nexus test). Courts are divided concerning the legitimacy of requiring improvements to roads adjacent to subdivision developments. *Compare* Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (en banc) (requiring dedication of right of way) *and* Lampton v. Pinaire, 610 S.W.2d 915 (Ky. Ct. App. 1980) (approving street dedication requirement in principle, but remanding for determination whether anticipated future traffic burden necessitated dedication of added right of way along existing abutting street) *with* 181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 336 A.2d 501 (insufficient nexus between widening of adjacent road and anticipated traffic demand generated by subdivision), *modified on other grounds*, 140 N.J. Super. 247, 356 A.2d 34 (1976); Coates v. Planning Bd., 58 N.Y.2d 800, 445 N.E.2d 642, 459 N.Y.S.2d 259 (1983) (mem.) (no nexus found). Questions arise especially when statutes fail to authorize requirements of this sort, or when local governments attempt to require developers to make improvements whose length or design capacity exceeds subdivision needs. *Compare* Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977), in which the court upheld the requirement that off-site access roads be improved to extent of developer's proportionate share, with cases in which the courts found no authority under subdivision control statute for requirement that off-site roads be improved, *see, e.g.*, Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 413 Mich. 505, 322 N.W.2d 702 (1982); Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984); Hylton Enterprises v. Board of Supervisors, 220 Va. 435, 258 S.E.2d 577 (1979). Demands for more distant road improvements are even more problematic, because the more distant the improvement, the more nonsubdivision residents are likely to be served, thus undercutting the claimed relationship to subdivision needs and benefits.

In many instances the strictness of the test will appear less from the court's characterizing

Recently, doctrine governing exactions has been expanded to address the use of "impact fees."[353] To protect against government overreaching in this context, jurisdictions universally require that any fee be reasonably related both to the burden created by and the benefit to be afforded to a development project.[354] Accordingly, jurisdictions imposing such fees must demonstrate that they have undertaken adequate studies to show that particular burdens result

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language than from its approach to the test's application. Courts vary in their willingness to accept legislative judgments and to assume that the required relationship between exactions and subdivision needs and benefits exist. *Compare* Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 824, 379 A.2d 200, 205 (1977) (court to consider factors such as maintenance standards, subdivision frontage, projected traffic increase, character and development of neighborhood, and number or residences using roads, to determine appropriate allocation of costs for road improvements) *and* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 807 (Tex. 1984) (court to consider size of lots, economic impact of subdivision, and amount of open land consumed in determining need for and benefit from parkland) *with* Call v. City of W. Jordan, 606 P.2d 217, 221 (Utah 1979) (upholding park fee predicated upon dedication of flat proportion of subdivision), *rev'd on other grounds and remanded*, 614 P.2d 1257 (Utah 1980) (opportunity to rebut determination of need and benefit) *and* Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 617-18, 137 N.W.2d 442, 447 (1965) (evidence of park use generally attributable to new subdivisions was sufficient).

353. Impact fees, or development fees, are charges that local governments levy "against new development . . . to generate revenue for capital funding necessitated by the new development." Juergensmeyer & Blake, *supra* note 343, at 417. For useful general discussions of the legality of impact fees, see D. MANDELKER, *supra* note 119, at 272-73; D. MANDELKER & R. CUNNINGHAM, *supra* note 119, at 526-32; T. SNYDER & M. STEGMAN, PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE (1986); Bosselman & Stroud, *Pariah to Paragon*, *supra* note 342, at 475-89; Connelly, *Road Impact Fees Upheld in Noncharter County*, 58 FLA. B.J. 54 (1984); Currier, *Legal and Practical Problems Associated with Drafting Impact Fee Ordinances*, INST. ON PLAN., ZONING & EMINENT DOMAIN 273 (1984); Gougelman, *supra* note 343, 137 *passim*; Jacobsen & Redding, *Impact Taxes: Making Development Pay Its Way*, 55 N.C.L. REV. 407 (1977); Note, *Development Fees: Standards to Determine Their Reasonableness*, 1982 UTAH L. REV. 549.

354. The preeminent legal issue that runs throughout the case law is whether a given impact fee ordinance represents a legitimate exercise of the police power, properly imposing obligations on certain members of the private sector to offset public burdens resulting from private activities, or, conversely, whether the ordinance instead constitutes an illegal tax arbitrarily imposed on the few for the benefit of the many. The rational nexus test continues to be the principal tool for resolving this dilemma. *See, e.g.*, Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (applying burden/benefit rational nexus test to park and drainage fees, but remanding so that developer could submit evidence on applicability under specific facts), *rev'd on other grounds and remanded*, 614 P.2d 1257 (Utah 1980). *But see* McLain Western # 1 v. County of San Diego, 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983) (applying very lax test to uphold interim school facilities fees to adult recreational and retirement complex, which included only three children).

That test has been applied with growing sophistication, however, especially in Florida, the state with the most extensive experience in the area of impact fees. In an early Florida case the court negated a Broward County impact fee ordinance on the ground that an ordinance designed to enable the county to fund system-wide road improvements failed to satisfy the traditional rational nexus test. *See* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. Dist. Ct. App. 1975) (road impact fee failed to satisfy rational nexus text). Subsequently, the Florida Supreme Court approved the concept of water and sewer impact fees, while finding correctable flaws in the underlying local ordinance. *See* Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). The court articulated a three-part test that elaborates the traditional need-benefit rational nexus analysis: Impact fees may be imposed when (1) new development requires that the present system of public facilities be expanded; (2) fees imposed are no more than what the local government unit would incur in accommodating the new users of a facilities system; and (3) fees are expressly earmarked for the proposal for which they were changed. *Id.* at 317-20. Subsequently, Florida appellate courts have upheld impact fees levied for park and recreation system improvements, Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983), and for road system improvements, Home Builders and Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), when the *Dunedin* standards were found to have been satisfied.

from given developments,[355] and they must earmark and spend resulting funds for the benefit of the property charged.[356] A few impact fee cases have also demonstrated a much greater interest in equity issues when the imposition of fees falls heavily on newcomers without an appropriate contribution to infrastructure costs by longtime taxpayers.[357]

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355. The process of determining need is a complex one. It must take into account the level of facilities that otherwise are required to satisfy local needs, so that a given developer is charged only for costs of expansion. *See* Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). A second step is to calculate the need for facilities that is properly attributable to the development in question. Despite the tendency of courts in earlier dedication cases to conclude that residential subdivisions do not create a need for comparatively distant offsite road improvements, *see supra* note 352, to date the impact fee case law has not followed that trend. Instead, at least in Florida, the courts have accepted the view that such need can be created, and that concurrent public need for and use of road facilities does not negate private obligations stemming from demonstrable private need. *See* Home Builders and Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

The debate has accordingly progressed to the question of how need should be measured. Criteria clearly and directly linked to need, such as anticipated vehicle trips per residential unit in a given geographical area, have been approved for this purpose. *Id.* Courts have rejected more sloppy approximations of need, such as intensity of land use, measured by comparing residential lot and floor area, without demonstrating the relationship between intensity and traffic generations in a given area. *See* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. Dist. Ct. App. 1975).

Experimentation continues with the development of more complex need formulas and measurement strategies, including formulas based on number of trips generated by particular types of land use, and computer simulations of anticipated traffic patterns. *See* American Planning Association, ZONING NEWS 3 (Oct. 1985) (describing Los Angeles traffic impact fees based on trip generation rates associated with various types of uses); American Planning Association, ZONING NEWS 3 (July 1985) (describing Orange County, California ordinance based on computer simulations). Whatever formula is used, however, local governments should be prepared to demonstrate the basis for their need calculations. *See* Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903 (Utah 1981). They also should allow developers to submit their own studies or similar evidence that may refute government calculations in a given case. *Id.*; Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983).

356. The earmarking requirement is a multifacted one that bears both on the administrative handling of funds and on their expenditure. The cases make clear that, as an administrative matter, fees must be reserved for use in the area charged rather than treated interchangeably with general revenues; however, it has not always been apparent whether a separate fund must be maintained for accounting purposes to achieve this end. *Compare* Lafferty v. Payson City, 642 P.2d 376 (Utah 1982) (impact fee illegal tax when deposited in general fund) *and* Amherst Builders Ass'n v. City of Amherst, 61 Ohio St. 2d 345, 402 N.E.2d 1181 (1980) (sewer tap-in charge must be segregated into separate fund) *with* Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (parkland and flood control fees deposited in general fund effectively held in trust for purposes for which collected), *rev'd on other grounds and remanded*, 614 P.2d 1257 (Utah 1980), *and* City of Arvada v. City and County of Denver, 663 P.2d 611, 615 (Colo. 1983) (en banc) (water system fees permissible when "obviously intended for use in connection with . . . water system"). Courts have also imposed reasonably rigorous requirements concerning the expenditure of fees. Improvements must be made within a geographical area near the development charged, Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App. 1983) (fee system invalidated when no clear restrictions on use of fees), a standard that can be met either by using a zone system, *see* Home Builders and Contractors Ass'n v. Board of County Comm's, 446 So. 2d 140 (Fla. Dist. Ct. App. 1984), or by otherwise demonstrating that funded facilities are located within a specified radius, *see* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied*, 440 So. 2d 352 (Fla. 1983).

It is also important that funds be expended within a reasonably short period of time, perhaps five to six years, to ensure that benefit is in fact received. *See* City of Fayetteville v. IBI, Inc., 280 Ark. 484, 659 S.W.2d 505 (1983) (park fee invalidated when no clear plan developed specifying when park developments would occur); Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. Dist. Ct. App. 1975) (invalidating road fee absent specifics on where or when funds would be expended); WASH. REV. CODE ANN. § 82.02.202 (Supp. 1987) (in lieu fee to be expended or repaid within five years).

357. Early cases tended to brush this issue aside quite readily, assuming that all that was involved was a change in the rules of the game that required newcomers after a certain date to comply

It is also likely that development agreements will include regulatory freezes. Two pockets of established precedent are most relevant in assessing the obligatory character of such provisions. Courts traditionally have used the vested rights and equitable estoppel doctrines to distinguish between circumstances in which a development can proceed under preexisting regulations—in effect freezing those regulations in place—and circumstances in which changed regulations may apply.[358] In effect, therefore, the closely entwined vested rights and equitable estoppel doctrines define the point at which a regulatory freeze must begin. Courts commonly recognize vested rights when a developer demonstrates substantial reliance, in good faith, on affirmative acts attributable to the regulating government.[359] Some jurisdictions have applied this rule in more stringent, and others in more lenient, ways.[360] Although recent development agreement statutes have afforded local governments the option to begin regulatory freezes at an earlier point, they do not appear to have mandated such action, nor have the statutes freed local governments to decline to recognize vested rights established

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with a different payment scheme. *See* Ivy Steel and Wire Co. v. City of Jacksonville, 401 F. Supp. 701 (M.D. Fla. 1975) (no equal protection violation when water pollution control charge imposed only on those connecting to city sewer system after a set date); City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983) (en banc) (upholding sewer connection fee imposed only on new users); Winney v. Board of Comm'rs, 174 Ind. App. 624, 369 N.E.2d 661 (1977) (sewer tap-in fees may vary over time); Hayes v. City of Albany, 7 Or. App. 277, 490 P.2d 1018 (1971) (upholding sewer connection fee when proceeds used for development and maintenance of sewer system used by both old and new users.)

More recently, however, spurred by influential legal scholarship, the Utah courts have required that the following wide range of factors be taken into account in developing an impact fee scheme for funding of sewer, water, and park facilities: The manner of financing existing capital facilities; "the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities"; the relative extent to which newly developed properties are entitled to a credit because the municipality has required the developer to provide common facilities that have been financed through general taxation or other means in other parts of the municipality; and the time-price element "inherent in fair comparisons of amounts paid at different times." Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 904 (Utah 1981); *see, e.g.*, Ellickson, *supra* note 342, at 454; Heyman & Gilhool, *supra* note 342, at 1142.

358. For a general discussion of the vested rights doctrine, see C. SIEMON, W. LARSEN & D. PORTER, *supra* note 7; Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 623 (1978); Hagman, *Multi-Use Land Permits*, *supra* note 203; Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis The Abortions of Public Whimsy*, 7 ENV'TL L. 519 (1977).

359. The vested rights rule has been defined as follows: "If a property owner has in good faith reliance upon an act of government performed substantial work and incurred substantial liabilities, he acquires a vested right to complete construction in accordance with the terms of the governmental act." *See* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 7, at 13 (citing Billings v. California Coastal Comm'n, 103 Cal. App. 3d 729, 163 Cal. Rptr. 288 (1980)). The doctrine of equitable estoppel

> provides that a court can stop (estop) a municipality from changing its regulations as they apply to a particular parcel of land: . . . when a property owner (1) in good faith, (2) upon some act or omission of the government, (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired.

Id. (citing Shamrock Dev. Co. v. City of Concord, 656 F.2d 1380 (9th Cir. 1981)). Siemon, Larson, and Porter conclude that these two rules or standards are the same for all practical purposes, except in unusual cases. *Id.*

360. *See* Hagman, *Multi-Use Land Permits*, *supra* note 203, at 547-76 (comparing California's "late, hard-vesting" rule embodied in Avco Community Developers, Inc. v. South Coastal Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386, (1976), with prodeveloper, anti-environmental rules found in 20 states ranging from Arizona to Illinois to New York).

under preexisting doctrine.[361]

A related question, of course, is how long regulatory freezes must remain in effect. Two analogies are possible. Traditional nonconforming use doctrine recognizes that the protection afforded such uses need not continue if forces of nature destroy the relevant structures, or if the owner's action removes them from use.[362] Perhaps more to the point, case law concerning amortization of nonconforming uses in many states allows their termination, without compensation, after a "reasonable" period.[363] Reasonableness is judged, for these purposes, in terms of the adverse effect of termination on the property owner's expectations—including the level and return on investment, and the life expectancy and condition of improvements—and the social harm that results from continued use—taking into account the type of use and effect on the surrounding neighborhood.[364] Recent statutes in some jurisdictions, however, have recognized the limited utility of nonconforming use doctrine for purposes of defining the extent of protection new developments receive from regulatory change. Thus, for example, New Jersey has set a flat three year period from the time of site plan approval as the earliest date on which changed regulatory provisions can take effect.[365]

It is therefore evident that while a reasonableness standard runs throughout these several distinct contexts, it means subtly different things in each. It is also important to bear in mind that case law which, for fear of public abuse of the police power, establishes that governments may not impose certain excessive requirements, does not necessarily indicate that no less stringent requirement may be imposed for fear of laying groundwork for charges of private abuse. The courts have traditionally recognized that legislatures have considerable leeway in determining what is reasonable; the Supreme Court's decision in *Village of Euclid v. Ambler Realty*[366] amply illustrates that point.

Certain guidelines, however, may prove helpful. Case law concerning the reserved powers doctrine and contingent zoning suggests that individual obligatory provisions should, at a minimum, result in no adverse impact on the public

361. *See* FLA. STAT. ANN. § 163.3233(3) (West Supp. 1987) (prescribing which local laws and policies govern a development agreement, and stating that "[t]this section does not abrogate any rights that may vest pursuant to common law").

362. *See* Moffatt v. City of Forrest, 234 Ark. 12, 350 S.W.2d 327 (1961) (upholding ordinance provision specifying that nonconforming building could not be rebuilt if 60% destroyed); Attorney Gen. v. Johnson, 355 S.W.2d 305 (Ky. 1962) (nonconforming status lost when permitted use had ceased voluntarily for five-year period).

363. *See, e.g.*, Mayor & Council of New Castle v. Rollins Outdoor Advertising, Inc., 475 A.2d 355, 358-59 (Del. 1984) (citing numerous cases from 13 jurisdictions upholding amortization schemes and cases from 6 jurisdictions striking down such schemes).

364. *See, e.g.*, Modjeska Sign Studios, Inc. v. Berle, 43 N.Y.2d 468, 476-79, 373 N.E.2d 255, 260-61, 402 N.Y.S.2d 359, 365-66 (1977), *appeal dismissed*, 439 U.S. 809 (1978); Harbison v. City of Buffalo, 4 N.Y.2d 553, 563, 152 N.E.2d 42, 47, 176 N.Y.S.2d 598, 605 (1958).

365. *See* N.J. STAT. ANN. § 40:55D-49, -52 (West 1986); *see also* 53 PA. STAT. ANN. § 10508(4) (Purdon Supp. 1986) (rights vested for five-year period once preliminary or final approval of plat has been obtained).

366. 272 U.S. 365, 388-89 (1926) (discussing need for legislative discretion in determining what uses should be permitted in particular zoning districts).

interest.[367] What that means in practice depends heavily on the facts when issues such as height, density, or infrastructure exactions arise. Rules of thumb may more readily be applied to determine whether public service commitments or regulatory freeze provisions are of unreasonably long duration, so as to violate the government's obligation to set appropriate limits on their length.

In these contexts a key issue is whether the government in question has considered the appropriate range of possible durations, taking into account relevant factors. Factors likely to affect the appropriate length of service commitments include the typical length of commitments in the community, the remaining capacity of existing public facilities, and the anticipated time needed for the proposed development to come on line. Factors likely to affect the appropriate length of regulatory freezes include the range of durations recognized in the area or the country, and the frequency of administrative review,[368] the anticipated start-up time, the level of investment, recognized market characteristics, and past experience regarding type and frequency of regulatory change.

iii. *Standards Governing Optional Aspects*

Once a determination has been made regarding the extent to which obligatory aspects may be incorporated into a development agreement, it will be apparent that any additional obligations or opportunities included must be optional in nature. Although a reasonableness test likewise provides the key substantive standard governing provisions of this type, it is important to recognize that a somewhat different application of that standard is required in this context.

The inclusion of optional provisions can be regarded either as the exercise of a local government's contract powers, or as the provision of regulatory incentives through expanded use of the police powers. Contract doctrine provides government with rudimentary protection against private abuse. The annexation cases discussed above indicate that courts will uphold a government contract if it " 'appears to have been fair, just, and reasonable at the time of its execution, and prompted by the necessities of the situation or in its nature advantageous to the municipality at the time it was entered into' "[369]—in short, if it had a proper purpose, and was reasonably calculated to achieve that end. A similar standard would govern government contracts entered into in a proprietary capacity. Courts have used the common-law unconscionability doctrine to overturn con-

367. *See supra* notes 31-46, 172-81 and accompanying text.

368. The Florida statute specifies that development agreements may not run for more than five years unless formally renewed following notice and hearing. *See* FLA. STAT. ANN. § 163.3229 (West Supp. 1987). The League of California Cities recommends no more than a three-year period. League of California Cities, *supra* note 203, at 1.4. The Illinois annexation statute permits annexation agreements of up to 20 years duration. *See* ILL. STAT. ANN. ch. 24, par. 11-15.1-1 (Smith-Hurd Supp. 1986). Provisions for yearly or bi-yearly administrative review contained in development agreement statutes are designed to allow local officials to determine continuing compliance with applicable requirements, thereby strengthening the argument that there is ongoing assertion of regulatory authority rather than a contracting away of the police power.

369. *See* Carruth v. City of Madera, 233 Cal. App. 2d 688, 693, 43 Cal. Rptr. 855, 860 (1965) (quoting Denio v. City of Huntington Beach, 22 Cal. 2d 580, 590, 140 P.2d 392, 397 (1943)).

tracts that are unfair and unreasonable, at least in extreme cases also involving questionable negotiation processes.[370] Section 2-302 of the Uniform Commercial Code embodies a similar standard.[371] Contract case law much less frequently addresses the problem of public abuse, because it assumes a contractor with the government has the freedom to contract or to walk away from a proposed deal. However, when coercion may exist to force a private party to go forward with a government contract—for example, when provision of public utility services is involved—a similar reasonableness standard is employed.[372] The traditional common-law unconscionability doctrine similarly protects either contracting party against abuse by the other.[373]

Police power analysis leads to a similar conclusion. A government decision to afford a bonus or incentive as part of its regulatory scheme must satisfy due process requirements.[374] Thus, the incentive scheme must have a legitimate purpose. It cannot result in unjustified confiscation—public abuse—or in unwarranted give aways—private abuse—but must seek to gain an appropriate public advantage or remedy a public necessity. The incentive arrangement also must reasonably relate to the purpose at hand. Although little litigation to date has involved zoning bonuses and incentives, local governments' practice has been to ensure that at least some opportunity or benefit is provided developers in exchange for each burden or obligation assumed. Within broad parameters, an effort has been made to ensure that a reasonable relationship exists between such opportunities and obligations, for example by allowing added height in return for open space afforded, thereby effecting a trade-off in building contours and

370. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979). That section provides that "[i]f a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable . . . result." The comments indicate that a determination of unconscionability depends on the contract's setting, purpose, and effect, and is made in light of public policy. *Id.* comment (a). A bargain traditionally has been found to be unconscionable if it was " 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.' " *Id.* comment (b) (quoting Hume v. United States, 132 U.S. 406 (1889)). Weaknesses in the values exchanged have a bearing on this determination. *Id.* comments (c), (d). For a general discussion of unconscionability, see Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982).

371. Uniform Commercial Code § 2-302 (1978) provides that:

> (1) If a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, . . . or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) Parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect. . . .

To prove unconscionability it is necessary not only that the terms of the contract be onerous, oppressive or one-sided, but also that the terms bear no reasonable relationship to business risks. Central Ohio Co-operative Milk Producers, Inc. v. Rowland, 29 Ohio App. 2d 236, 238, 281 N.E.2d 42, 44 (1972).

372. *See supra* notes 335-39 and accompanying text.

373. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (making no distinction between contracting parties other than that the weak party invokes the unconscionability doctrine to rectify oppressive conduct by the stronger).

374. *See* Note, *Bonus or Incentive Zoning—Legal Implications*, 21 SYRACUSE L. REV. 895, 898-99 (1970). The standard substantive due process test is that stated in Lawton v. Steele, 152 U.S. 133 (1894): does government action (1) seek to achieve a legitimate governmental purpose, (2) use means rationally related to that end, and (3) avoid arbitrary or unreasonable effects. *Id.* at 137.

mass.[375] Trade-offs have also been made by allowing additional residential density in return for inclusion of affordable housing units, thereby allowing a developer to maintain a comparable profit margin.[376] If adequate trade-offs are provided, a takings challenge should not succeed.[377] Bonus, incentive, or transferable development rights may also raise equal protection issues. The test remains the same, however, requiring only that, once demonstrated, differences in treatment have a rational basis.[378]

In effect, therefore, optional development agreement provisions must satisfy a comparable reasonableness standard, whether contract or police power doctrine controls. Attention may, therefore, turn to the application of the test to two typical fact patterns, assuming that the inclusion of contested provisions as part of a development agreement does not waive the right subsequently to pursue a judicial challenge.[379]

A local government might first consider requesting a developer to include a child care center as part of a mixed use residential/commercial development, and a commitment to build such a center and dedicate it to the town might be incorporated in the development agreement. The first question, for purposes of this Article's proposed analysis, would focus on whether construction and dedication of a center is obligatory or optional in nature. Arguably, the center responds to a development-related need for child care facilities to service residents and assist employees, and easy access to day care provides a measurable benefit to those associated with the new development. Whether a particular jurisdiction's courts would accept this argument is likely to depend on the language of applicable statutes and the courts' tendency to apply the rational nexus test in a strict or lenient fashion.[380]

Assuming, however, that construction and dedication of a day care center could not be required by the local government, this facet of the development agreement would be viewed as optional in character. A legitimate public purpose underlies the local government's desire to provide for the training and care of young children and the peace of mind of their employed parents. Because an

375. *See* 2 P. ROHAN, *supra* note 257, §§ 8.01[4], 8.03[2][b].

376. 2 P. ROHAN, *supra* note 257, § 8.03[2][b]; *see also supra* note 257 (listing authority discussing bonus or incentive zoning).

377. *See* Pennsylvania Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (no taking when reasonable use remained and transferable development rights had been afforded).

378. *Cf.* Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 721-23, 376 A.2d 483, 501-03 (1977) (density bonus upheld against challenge that it violated statutory uniformity requirement when bonus scheme favoring large parcels was rationally based and had not been shown to be implemented unequally), *cert. denied sub nom.* Funger v. Montgomery County, 434 U.S. 1067 (1978).

379. The case law is mixed on this point. *Compare* Ridgemont Dev. Co. v. City of E. Detroit, 358 Mich. 387, 393-94, 100 N.W.2d 301, 304-05 (1960) (developer entitled to reconveyance of lots deeded to city during approval process when original conveyance was made under duress) *and* Divan Builders, Inc. v. Planning Bd., 66 N.J. 582, 603-04, 334 A. 2d 30, 41 (1975) (excessive payments recoverable) *with* Northwest Land & Inv., Inc. v. City of Bellingham, 31 Wash. App. 742, 744-45, 644 P.2d 740, 741 (1982) (damage action by developer alleging that excessive exaction requirements had been imposed was barred by developer's failure to pursue judicial remedy in timely fashion).

380. *See supra* notes 341-57 and accompanying text (describing alternative approaches to defining and applying standards).

additional burden or obligation is imposed, the development agreement would need to provide for at least some special benefit or opportunity; for example, the agreement could authorize increased height or density of residential or commercial structures, or an extended regulatory freeze. It is possible to show a relationship between burden and benefit, or between obligation and opportunity, by demonstrating that the added cost of including the day care facility constituted a factor in determining what offsetting height or density or length of freeze to provide.

A local government might also consider requiring that the developer make a substantial cash payment as one of the elements in a given development agreement. Particular care is needed to ensure that neither public nor private abuse characterizes such a transaction, because the potential exists for extortion by the government or payoffs by private individuals seeking special favors.

The first step, once again, is to determine whether such a payment is obligatory or optional. Certain cash payments, in the form of in lieu fees or impact fee requirements, may constitute legitimate obligations if imposed pursuant to an adequately authorized and supported local ordinance.[381] Absent such a situation, however, the hypothesized cash payment is probably optional in character. Whether it constitutes a legitimate development agreement provision depends very much on the facts. The government's purpose may be to raise additional revenue. If the ultimate objective is simply to generate additional general revenue funds to decrease the overall community tax burden, a court may well regard the payment as having an improper purpose of taxation:[382] such payments raise the spectre of private purchase of public influence, even if some corresponding but unrelated benefit—such as added density or an extended regulatory freeze—accrues to the developer. On the other hand, the municipality may ask a developer to contribute more than could otherwise be required toward the costs of producing long-needed public infrastructure, such as a major sewer extension or roadway construction, that the local government believes should be in place before the development is permitted to proceed. In this context, a legitimate public purpose would seem to exist: the agreement provides required infrastructure. As long as the developer's funds are earmarked for prompt use in connection with improvements that will serve his or her project, an opportunity is provided to balance the obligation undertaken, and a reasonable relationship between the two can be shown to exist.

381. *Cf., e.g.*, City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (in lieu fee is tax that requires specific statutory authority); Home Builders' Ass'n v. Riddel, 109 Ariz. 404, 510 P.2d 376 (1973) (no authority for parks and recreation facility tax ordinance absent express enabling legislation); Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971) (no authority under subdivision control statute for per lot fee when fee not expressly authorized); Hillis Homes, Inc. v. Snohomish County, 97 Wash. 2d 804, 650 P.2d 193 (1982) (no authority for parks, schools, and fire protection fee absent express enabling legislation) (superseded by WASH. REV. CODE § 82.02.020 (Supp. 1987)); *see also supra* note 355 (discussing need for adequate support).

382. *Cf., e.g.*, Building Indus. Ass'n v. City of Oxnard, 198 Cal. Rptr. 63 (Cal. Dist. Ct. App. 1984) (striking down growth requirement capital fee on new development, to be used for public improvements that benefit new developments, because fee deemed a discrimintory tax that was insufficiently related to new developments); *see also supra* note 181 (citing cases that exercise more probing scrutiny when cash payments are involved).

In sum, as appeared in the contingent zoning context, the key substantive standard that governs development agreements embodies a reasonableness test. A more elaborate analytical process, however, must guide the use of that standard in the context of development agreements.

C. *Noncompliance*

Noncompliance issues can arise with regard to each of the several different aspects of a typical development agreement. Because rather distinctive analysis and remedies may apply with regard to each specific aspect, this part of the Article first examines questions that concern landowner noncompliance with conditions and exaction requirements, before turning to problems that arise when a local government fails to provide promised services or to observe a regulatory freeze.

1. Landowner Noncompliance with Conditions and Exaction Requirements

Development agreements often include conditions and exaction requirements that significantly affect the design and cost of a project. As a result, they generally are framed in a clear and specific fashion at the outset, so as to leave relatively few questions of interpretation for resolution at a later date.[383] It therefore, is often reasonably self-evident whether a developer has or has not complied with such requirements.

Development agreement statutes clearly address the problem of developer noncompliance. Periodic administrative review of project progress is generally required, so that developer noncompliance becomes immediately evident.[384] So long as it complies with applicable procedures, the government may terminate a development agreement if it demonstrates developer noncompliance.[385]

Development agreements often include additional language specifying when nonperformance is excused, and what remedies may be available. Typically, they excuse noncompliance only when acts of God intervene or the state gover-

383. *See, e.g.*, League of California Cities, *supra* note 203, at 3.17-3.33 (standard form of development agreement and development agreement plan checklist identifying numerous specific issues to be addressed in plan accompaning development agreement).

384. *See* CAL. GOV'T CODE § 65865.1 (West 1983) (requiring periodic review every 12 months to determine if developer has "demonstrate[d] good faith compliance with the terms of the [development] agreement"); FLA. STAT. ANN. § 163.3235 (West Supp. 1987) (requiring periodic review every 12 months to determine if developer has "demonstrate[d] good faith compliance with the terms of the [development] agreement"); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 80 (requiring development agreement to include provisions specifying that review will occur on a set periodic basis); Act of June 12, 1985, ch. 647, § 4(1), 1985 Nev. Stat. 2113, 2115 (requiring review every 24 months to determine compliance).

385. *See* CAL. GOV'T CODE § 65865.1 (West 1983) (agreement may be revoked on finding of noncompliance, based on "substantial evidence"); FLA. STAT. ANN. § 163.3235 (West Supp. 1987) (revocation based on "substantial competent evidence"); Act of April 30, 1985, Act 48, § 1, 1985 Hawaii Sess. Laws 78, 80 (revocation after determination that there has been "material breach" of agreement, notice, reasonable time for cure, and opportunity for rebuttal of findings or consent to amendment of agreement); Act of June 12, 1985, ch. 647, §§ 4(1)-(2), 1985 Nev. Stat. 2112, 2114 (cancellation permitted after publication of notice of intention).

nor declares an emergency.[386] Nonperformance is generally not excused because of failure by a third person, or adoption of a law or other governmental activity making performance by the applicant unprofitable or more difficult or expensive.[387]

Specified remedies typically include recourse to security devices (both with regard to obligatory and optional conditions and exactions),[388] and reliance on applicable enforcement measures established by local ordinance—such as denial of occupancy permits or revocation of special use permits, when a developer has failed to comply with obligatory provisions included both in a development agreement and in a relevant development permit.[389] Damages generally may not be awarded against government agencies if they terminate a development agreement for noncompliance.[390]

2. Government Failure to Provide Promised Services

Although case law has addressed the consequences of government failure to provide promised services in the context of annexation agreements, precedent concerning this issue has yet to address development agreements themselves. Courts typically have considered municipal promises to provide water and sewer services as a matter of contract law. When they resolve affirmatively the threshold question whether a municipality may enter into such contracts without running afoul of the reserved powers doctrine, courts experience little difficulty in finding that a breach has occurred.[391] At times local governments have endeavored to defend their noncompliance in light of unforeseeable changed circumstances.[392] Such arguments have been unsuccessful, however, when the local

386. *See* League of California Cities, *supra* note 203, at 3.25 (standard form of development agreement).

387. League of California Cities, *supra* note 203, at 3.25.

388. League of California Cities, *supra* note 203, at 3.34 (recommending that requirements under separate regulatory legislation and those imposed solely by virtue of development agreement be identified separately; that security devices used in connection with regulatory requirements be included by reference in the development agreement, and that if a need exists for security to guarantee performance of obligations specified only under the development agreement, similar but separate performance security devices be used); *id.* at 3.35-3.43 (sample agreement, surety bonds, and irrevocable instrument of credit). For a definitive discussion of subdivision improvement requirements and guarantees, see Shultz & Kelley, *Subdivision Improvement Requirements and Guarantees: A Primer*, 28 WASH. U.J. URB. & CONTEMP. L. 3 (1985).

389. League of California Cities, *supra* note 203, at 3.23 (incorporating rules, regulations, and official policies at the time of execution of agreement); *see also id.* at 3.25 (stating that all other remedies at law or in equity which are not otherwise provided for in the agreement or in the city's regulations governing development agreements are available to the parties to pursue in the event a breach occurs).

390. League of California Cities, *supra* note 203, at 3.25; *see also* FLA. STAT. ANN. § 163.3243 (West Supp. 1987) (providing only for injunctive relief to challenge compliance with agreement). For a discussion of remedies for government noncompliance, see *infra* notes 391-445 and accompanying text. Damages have been awarded however, when a developer does not comply with an annexation agreement. *See* City of Shelbyville v. Shelbyville Restorium, Inc., 96 Ill. 2d 457, 451 N.E.2d 874 (1983).

391. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976) (city breached annexation agreement to provide sewerage service); Carruth v. City of Madera, 233 Cal. App. 2d 688, 43 Cal. Rptr. 855 (1965) (city breached annexation agreement to provide public services).

392. *See Morrison Homes*, 58 Cal. App. 3d at 735, 130 Cal. Rptr. at 202 (cease and desist order

government simply failed to anticipate or address community needs.[393]

Either common law or the parties' earlier agreement generally determine the available remedies. Annexation agreement case law has indicated that both actual and consequential damages may be levied against a noncomplying municipality.[394] Development agreement statutes which specify only that injunctive relief may be available perhaps limit such monetary awards in some states.[395] The parties may also have specified that certain unusual remedies should be available in the event of municipal noncompliance, and at least in some circumstances courts will enforce the availability of such novel relief.[396]

3. Government Noncompliance with Regulatory Freeze Provisions

Considerable scholarly attention[397] has focused on the obligation of governing bodies to observe regulatory freeze provisions included in development agreements. The issue has recently arisen in litigation concerning development agreements designed to encourage agricultural land preservation.[398] As discussed below, governmental noncompliance with such provisions raises questions involving the constitutional taking and impairment of contract doctrines, as well as common-law contract law. Under each of these lines of analysis,

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by regional water quality control board requiring city not to make additional connections to inadequate sewage treatment plant, claimed by city to be "materially changed circumstances" which would excuse compliance with annexation agreement promise to provide sewerage services); *Carruth*, 233 Cal. App. 2d at 693, 43 Cal. Rptr. at 860-61 (city's decision to change earlier annexation policy to provide water and sewerage mains pursuant to annexation agreements urged by city as grounds that would excuse compliance with previously executed annexation agreement).

393. *See Morrison Homes*, 58 Cal. App. 3d at 735, 130 Cal. Rptr. at 202 (rejecting argument and observing that "onset of materially changed conditions is not a ground for voiding a municipal contract which was valid when made, nor is the contracting city's failure to have foreseen them"); *Carruth*, 233 Cal. App. 2d at 693, 43 Cal. Rptr. at 860-61 (changed circumstances no defense).

394. *See Morrison Homes*, 58 Cal. App. 3d at 729 n.5, 733, 130 Cal. Rtpr. at 201 n.5, 205 (affirming and modifying judgment to require city to repair and improve sewage facilities and sewage treatment plant, and to pay daily monetary damages on a per diem or per-sewer-connection basis); *Carruth*, 233 Cal. App. 2d at 674-76, 43 Cal. Rptr. at 863-65 (ordering city to reimburse developer for sum paid for facilities, and affording city option to install agreed-upon facilities or to pay damages to the amount that it would cost to install such facilities). *See generally* 10 E. MCQUILLIN, *supra* note 146, § 29.123 (Rev. 3d ed. 1981) (all remedies available to contracting parties are available to the parties to a contract of a municipal corporation). *But cf.* Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980) (declining to reimburse developer for cost of street construction that city had agreed to undertake but had failed to perform when initial agreement was held invalid). *Rockingham Square* may have been called into question by the subsequent decision in Lewis v. City of Washington, 309 N.C. 818, 310 S.E.2d 610 (1983) (reversing without opinion court of appeals' decision declining to reimburse rental fee paid under invalid lease).

395. *See* FLA. STAT. ANN. § 163.3243 (West Supp. 1987) (authorizing injunctive relief only).

396. *Cf.* Geralnes B. V. v. City of Greenwood Village, 583 F. Supp. 830 (D. Colo. 1984) (upholding validity annexation agreement requiring disconnection from annexing city in event of noncompliance with government's promises to provide public services and to perform other actions).

397. *See* Stone & Sierra, *supra* note 203, at 102-11; League of California Cities, *supra* note 203, at 2.1-2.6; Hagman, *Development Agreements*, *supra* note 203, at 189-91; Holliman, *supra* note 203, at 49-58; Kessler, *supra* note 203, at 31-45, Sigg, *supra* note 203, at 712-22.

398. *See* Delucchi v. County of Santa Cruz, 179 Cal. App. 3d 814, 823, 225 Cal. Rptr. 43, 49 (stating that in absence of statutory authority, "wholesale freeze of zoning" for 10 year period would be invalid, and narrowly interpreting agricultural land preservation agreement to avoid such an outcome), *appeal dismissed*, 107 S. Ct. 46 (1986).

courts will excuse governmental noncompliance only when it serves essential public interests, such as the interest in public safety.

a. Taking

A determination of whether government regulation results in a "taking" in violation of the fifth[399] and fourteenth,[400] amendments involves negotiation of the difficult shoals created by the United States Supreme Court in this area.[401] Recent case law indicates that an "ad hoc" balancing of a number of factors must be attempted, while keeping a very close eye on the relevant facts.[402] Three major factors appear to be of particular importance: the property interest involved, the effect of the government action on that interest, and the character of the government action.[403] Each of these factors will be examined in turn.

The Court has stated that the relevant property interest is defined in terms of a property owner's "distinct, investment-backed expectations."[404] Thus, it is particularly important to examine the precise extent to which the language of a development agreement states that the government party must stay its hand. Government parties may limit the extent to which they agree to abide by regulatory freezes.[405] Even in the absence of express language reserving government

399. U.S. CONST. amend V.

400. U.S. CONST. amend XIV.

401. *See, e.g.*, Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561-62 (1984) (describing the taking issue as "[b]y far the most intractable constitutional property issue," one that numerous theorists have addressed without agreeing on a proper disposition).

402. *See* Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (Court has not used "set formula," but has engaged in "essentially ad hoc . . . inquiries" that depend "largely upon the particular circumstances [in the] case").

403. *Id.* at 124-28 (several factors have had special significance, including (1) the "economic impact of the regulation on the claimant and, particularly, [(2)] the extent to which the regulation has interfered with investment-backed expectations," and (3) the character of the interference by government, including whether it involves a "physical invasion," a "public program adjusting the benefits and burdens of economic life to promote the common good," or an acquisition "of resources to permit or facilitate uniquely public functions"); *see also* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 1242 (1987) ("land use regulation can effect a taking if it 'does not substantially advance state interests, . . . or denies an owner economically viable use of land' " (quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

404. *Keystone Bituminous Coal*, 107 S. Ct. at 1249-51 (upholding Pennsylvania Bituminous Mine Subsidence and Land Conservation Act against facial taking challenge based on existence of property interest in coal in place and interest in support estate); *see Penn Central*, 438 U.S. at 125. Ruckelshaus v. Monsanto Co., 104 S. Ct. 1862 (1984) provides a more full-blown exploration of this concept. In *Ruckelshaus* the Court concluded that a " 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need,' " and must take into account government representations concerning the confidential, or nonconfidential use to be made of trade secrets. *Id.* at 2875-76 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)). The Court held that no taking of Monsanto's trade secret property rights had occurred with regard to test data submitted in order to register pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act prior to 1972 or after 1978 amendments to that legislation, *id.* at 2875-76, but that a taking might or might not have occurred with respect to data submitted from 1972-1978, depending on compensation afforded pursuant to negotiation or arbitration. *Id.* at 2877-79.

405. *See* CAL. GOV'T CODE § 65866 (West 1983) (rules, regulations, and policies in effect on date of execution control "unless otherwise provided"); FLA. STAT. ANN. § 163.3233 (West Supp. 1987) (laws and policies in effect at time of execution of development agreement to govern except that subsequently adopted laws and policies may apply, among other circumstances, when "[t]hey are specifically anticipated and provided for in the development agreement"); Act of April 30, 1985,

discretion, courts may interpret such agreements narrowly to avoid constitutional questions such as those involving the reserved powers doctrine. Thus, for example, courts may conclude that a promise to freeze "use" requirements does not limit government discretion to change applicable densities.[406] Context and circumstances also have a significant bearing on the legitimacy of private expectations. In *Kaiser Aetna v. United States*[407] the Supreme Court made clear that when government representations concerning the conditions associated with the issuance of a development permit led a developer to make substantial investments in the project in question, distinct investment-based expectations were created, and could not be infringed by subsequent changes in government policy.

The effect of proposed regulatory provisions must also be considered. As a general rule, the key question is whether the property owner retains reasonable use of the property, or a reasonable return on the property owner's investment remains, notwithstanding the impact of the challenged regulation.[408] "Reasonable" use or return, however, can be rather minimal—for example, the retention of a right to personal use of artifacts initially intended for sale, or the continued existence of sharply reduced property value.[409] Under certain circumstances, however, even a minimal adverse impact may give rise to a taking—for example, when an extremely small physical occupation results from government regula-

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Act 48, § 1, 1985 Haw. Sess. Laws 78, 81 (laws, ordinances, resolutions, rules, and policies to be those in effect at time of execution and any subsequent change shall be void "to the extent that it changes any law, ordinance, resolution, rule, or policy which any party to the agreement has agreed to maintain in force as written at the time of execution"); Act of June 12, 1985, ch. 647, § 2(2), 1985 Nev. Stat. 2113, 2114 ("[u]nless the agreement otherwise provides," applicable ordinances, resolutions or regulations are those in effect at the time agreement is made).

406. *See* Delucchi v. County of Santa Cruz, 179 Cal. App. 814, 821-22, 225 Cal. Rptr. 43, 48 (concluding that agricultural land preservation agreement, which provided that the "county agrees not to authorize any uses other than those permitted by the County Zoning Ordinance in the Agricultural Preserve (A-P) Zone, during the term of this contract," did not preclude the county from reducing allowable residential density from 1 unit per 10 acres to 1 unit per 40 acres), *appeal dismissed*, 107 S. Ct. 46 (1986).

407. 444 U.S. 164 (1979). In *Kaiser Aetna* the owner and lessee of an area adjacent to a large fish pond converted the pond into a marina after the Army Corps of Engineers had advised that development permits need not be obtained. Subsequently, the Corps took the position that authorization was needed to make additional improvements on the marina, and that the owner could not deny public access to the pond from a connected navigable bay. *Id.* at 167-68. The Court held that the government's subsequent efforts to create a right of public access constituted a taking, based on a number of factors, including the character of the pond (considered private property under Hawaiian law), the "expectancies" created, the significance of the right to exclude, and the actual physical invasion that would result from public access. *Id.* at 179-80.

408. *See* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 107 S. Ct. 1232, 1249-51 (1987) (statute limiting right to mine coal when mining would cause subsidence damage upheld in view of fact that obligation to retain a small percntage of coal in place did not materially affect reasonable investment backed expectations in either coal in place or support estate); Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978) (past decisions "reject the proposition that diminution in property value, standing alone, can establish a 'taking' " and indicate that "the 'taking' issue . . . is resolved by focusing on the uses the regulations permit").

409. *See* Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (after commenting that loss of future profits has traditionally been viewed as less compelling than other property-related interests, upholding Eagle Protection Act against taking challenge when no right to sell artifacts was retained, but an opportunity to exhibit for an admissions charge might exist); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in property value resulting from zoning regulations did not constitute a taking).

tion of tenant access to cable television.[410] Thus, courts must assess both the extent and the nature of private injury to determine whether an unconstitutional taking has occurred.

Furthermore, the character of government action must also be considered. Certain types of government action typically result in legitimate exercises of the police power rather than takings. These include government action to protect the public from nuisance-like land uses,[411] efforts to arbitrate between conflicting private interests,[412] or to provide reciprocal advantages to various landowners.[413] Certain other types of action generally result in judicial determinations that a regulatory taking has occurred, however. The most evident among these are physical occupations, for which the Court has adopted a virtual per se taking rule.[414] The Court has disavowed analysis which suggests that the existence of incidental government benefit is a sufficient basis for concluding that a regulatory taking has occurred;[415] nevertheless, the existence of particularly strong and tangible government or public benefit of the sort usually gained through exercise of the power of eminent domain, in the absence of additional justifications, may tip the balance in favor of a judicial finding of regulatory taking.[416]

Applying this analysis to the question at hand, it is evident that there are some circumstances in which governmental noncompliance with a regulatory freeze provision will, and others in which it will not, give rise to an unconstitutional taking. Private expectations are likely to be raised by inclusion of an unqualified commitment to a regulatory freeze as part of a development agreement. The more investment the developer makes in reliance on those expectations, the greater the adverse effect when the government fails to comply, and the harder it will be for the government to sustain subsequent regulatory action in violation of such a provision.

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410. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (regulation permitting cable television company uncompensated access to apartment buildings constituted a taking when primary physical invasion involved laying cable across apartment roof).

411. *See, e.g., Keystone Bituminous Coal*, 107 S. Ct. at 1242-48 (upholding state statute limiting right to mine coal under circumstances that cause subsidence damage in view of public interest in conserving surface land areas, protection of public safety, enhancement of tax value, and preservation of surface water drainage and public water supplies); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding requirement that use of brickyard be discontinued in light of adverse effects on nearby residential areas).

412. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (upholding state requirement that ornamental cedar trees be cut down because they produced cedar rust fatal to nearby apple trees).

413. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980) (five acre zoning upheld against taking challenge in light of reciprocity of benefits); Pennsylvania Cent. Transp. Co. v. New York City, 438 U.S. 104, 135-36 (1978) (explaining that all landowners receive some reciprocal benefit from historic preservation regulation scheme).

414. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (applying per se taking rule when regulation designed to permit physical invasion by cable television cable).

415. *See* Pennsylvania Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978) (rejecting claim that benefit which derives from historic preservation legislation is comparable to appropriation of property rights resulting from airplane overflights).

416. *Compare* Agins v. City of Tiburon, 447 U.S. 255 (1980) (upholding five acre zoning scheme designed to encourage open-space uses) *with* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting) (taking may result from local government's continued zoning of parcel for low density, nonprofitable, open-space uses, after failure to pass bond issue to acquire property).

A government party, however, may violate a regulatory freeze provision in at least some circumstances. In many instances the government agrees to a regulatory freeze in return for substantial contributions to community infrastructure that it might not otherwise obtain through exercise of its police power. When the government nonetheless effects regulatory changes, the possibility exists that it has simply welshed on the deal, in effect forcing the landowner in question to contribute interests in land or other discrete and tangible public benefits. These contributed benefits may go even further than what might have resulted from an exercise of the government's power of eminent domain. Only in the event of an emergency or other unforeseeable situation beyond the control of the government, or in the event of a particularly pressing public interest such as one involving the public safety—rather than merely the public welfare—does a strong inference exist that other forces were at work justifying the government's action. Otherwise stated, only in very compelling circumstances such as these does the government interest outweigh a significant adverse effect on a property owner's distinct investment-backed expectations.[417] Legislative judgments in Hawaii and Florida enforce this view, because development agreement statutes in these jurisdictions ensure that local governments never promise to observe regulatory freezes regarding key issues under such circumstances.[418]

Assuming that a regulatory taking has occurred, the traditional remedy has been to invalidate the government action and afford declaratory or injunctive relief.[419] Whether compensatory relief should also be available, at least for the period between the initial taking and the date of judicial invalidation, has proved a much more thorny issue, one which the Supreme Court, on a number of occasions, has addressed but has not resolved.[420] Lower courts, however, have awarded interim damages when some evidence demonstrates bad faith or the use

417. Development agreement statutes recognize that expectations are fixed most clearly as to certain issues such as land use, intensities, or densities, and therefore prohibit changes that conflict with development agreement provisions in these areas, rather than prohibiting all changes in regulations. *Compare* CAL. GOV'T CODE § 65866 (West 1983) (specifying that regulations concerning land use, density design, improvement, and construction standards and specifications remain in force unless otherwise agreed) *with* FLA. STAT. ANN. § 163.3233 (2)(a) (West Supp. 1987) (specifying that subsequently adopted laws and policies may not be applied if they would conflict with the agreement or would prevent development of land uses, intensities, or densities provided therein).

418. *See* FLA. STAT. ANN. § 163.3233 (2)(e) (West Supp. 1987)) (subsequently adopted laws and policies may be applied if "[t]hey are essential to the public health, safety, or welfare and expressly state that they shall apply to a development that is subject to a development agreement"); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 81 (subsequently adopted laws, rules, and policies of general applicability may be applied "if the government body finds it necessary to impose the requirements because a failure to do so would place the residents of the subdivision or of the immediate community, or both, in a condition perilous to the residents' health or safety, or both").

419. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (invalidating law prohibiting coal company from extracting coal so as to cause subsidence).

420. *See* MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986) (declining to resolve question when unclear whether final and authoritative determination concerning application of regulations had been made); Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985) (declining to resolve question in absence of final decision by state courts and administrative agencies); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (declining to resolve question in absence of final decision by state courts); Agins v. City of Tiburon, 447 U.S. 255 (1980) (declining to resolve issue in absence of taking). The Court again will try in its 1986-87 term to resolve the issue. *See* First English Evangelical Lutheran Church v. County of Los Angeles, No. 85-119, *prob. juris. noted*, 54 U.S.L.W. 3859 (June 1986).

of regulations to mask abuse of the power of eminent domain.[421] It may be particularly appropriate to grant interim compensatory relief in cases involving development agreements in light of the government party's awareness of developer reliance on a regulatory freeze provision, and the likelihood that, on the merits, the government action would have been found to mask a strategy for acquisition of property or other public benefits that had not or could not have been acquired through the exercise of the power of eminent domain.[422]

The government, of course, retains the option to proceed with its proposed action in contravention of a regulatory freeze provision, so long as it elects to exercise its power of eminent domain.[423] Assuming the government can demonstrate a public purpose, a key question concerns the measure of "just compensation" it must afford. An analogy might be made to the scheme used to value transferable development rights (TDRs). TDRs are designed to mitigate the adverse effects of government preservation schemes on affected landowners by affording a regulated landowner the right to sell certain development rights that otherwise would have been associated with his or her property for use in developing another parcel.[424] It is generally agreed that valuation of TDRs presents a difficult analytic and practical task.[425] Condemnation of development rights previously protected by a regulatory freeze should be both easier and more difficult—easier, because compensation should be based in part on expenses already incurred in reliance on the regulatory freeze; more difficult, because of the unique attributes of individual projects and their potential value. In the event

421. *See, e.g.*, Osborn v. City of Cedar Rapids, 324 N.W.2d 471 (Iowa 1982) (awarding compensation for temporary taking after city had initiated and dropped four condemnation suits to acquire land, then offered to consider rezoning in return for land's dedication); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981) (awarding compensation for temporary taking after city denied application for subdivision approval and then zoned tract for conservation purposes to acquire de facto conservation easement); Suess Builders Co. v. City of Beaverton, 294 Or. 254, 656 P.2d 306 (1982) (awarding compensation for temporary taking after city designated parcel as parkland and told owner that no other use would be considered nor would eminent domain proceedings be commenced); City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) (awarding compensation after scenic easement requested but not procured, and three permit applications had been denied); Zinn v. State, 112 Wis.2d 417, 334 N.W.2d 67 (1983) (awarding compensation for temporary taking after 200 acres of dry land were declared held in public trust and subject to public entry, although that land had been erroneously designated as falling below high water mark).

422. *See also* Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981) (when city revoked building permit following public referendum, court enjoined city action and remanded for determination of damages pursuant to claim under 42 U.S.C. § 1983 (1982)), *cert. denied*, 456 U.S. 973 (1982); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. May, 1981) (awarding damages in suit under 42 U.S.C. § 1983 (1982) alleging that city had delayed zoning decision to maintain depressed market value of land and rights-of-way, when city council agreed to limited rezoning of area near freeway, mayor declined to sign agreement, and city later repealed ordinance providing for new freeway), *cert. denied*, 455 U.S. 907 (1982). *See generally* Madsen & DeMeo, *Private Property Rights and Local Government Land Use Control; 42 U.S.C. § 1983 as a Remedy Against Unconstitutional Deprivations of Property*, 1 J. LAND USE & ENVT'L L. 427 (1986) (discussing availability of damages in cases alleging regulatory takings and impairment of vested rights).

423. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922) (assuming that although statute restraining coal companies from causing subsidence constituted invalid regulatory taking, eminent domain power might be used).

424. *See supra* note 265.

425. *See* Conrad & Merriam, *Compensation in TDR Programs: Grand Central Terminal and the Search for the Holy Grail*, 56 U. DET. J. URB. L. 1, 14-24 (1978) (presenting economic theory for compensation in TDR programs); Merriam, *Making TDR Work*, 56 N.C.L. REV. 77, 115-125 (1978) (discussing economics of TDR).

that a market exists for assignment of development rights under development agreements,[426] this problem of valuation may prove less troublesome. Alternative approaches to valuation such as adoption of an insurance-based approach might also be explored.[427]

b. Breach of Contract

Assuming that a development agreement constitutes a form of contract, two additional questions arise. First, courts may view governmental noncompliance with a regulatory freeze as a breach of contract for which the common law provides redress. An initial issue again pertains to contract interpretation, as discussed above.[428] Assuming a breach can be shown, a second key question is that of remedy. As a general rule, parties to municipal contracts can seek restitution, out-of-pocket and consequential damages, as well as specific performance in exceptional circumstances.[429] Particular circumstances in a given case, however, may modify this rule. At times, legislative action that results in a breach of public contract may be intended to preserve some, but not all, remedies.[430] Legislative actions that further the police power generally override earlier contract obligations, however, so that neither injunctive nor damage relief would be available.[431] Government agencies and property owners should address the issue of remedy for this type of breach as they prepare a development agreement, because the existence of an alternative remedy will obviate the constitutional contract impairment issue discussed below.[432] Liquidated damages or other similar remedial provisions do not appear to be in common use, however, and they may conflict with some states' development agreement legislation.[433]

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426. Each of the existing development agreement statutes specifically contemplates assignment of rights. *See* CAL. GOV'T CODE § 65868.5 (West 1983) (burdens and benefits of agreement to run to successors in interest); FLA. STAT. ANN. § 163.3237 (West Supp. 1987) (amendment or cancellation of agreement permitted by mutual consent of parties or their successors in interest); Act of April 30, 1985, Act 48, § 1, 1985 Haw. Sess. Laws 78, 81 (development agreement enforceable by parties or their successors in interest); Act of June 12, 1985, ch. 647, § 4(1), 1985 Nev. Stat. 2113, 2114 (agreement may be modified or canceled by mutual consent of parties or successors in interest).

427. For a provocative discussion of compensation for takings using insurance as a model, see Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 582-599 (1984).

428. *See* Delucchi v. County of Santa Cruz, 179 Cal. App. 3d 814, 225 Cal. Rptr. 43 (agricultural preservation agreement), *cert. denied*, 107 S. Ct. 46 (1986).

429. *See* 6 E. MCQUILLIN, *supra* note 146, § 29.123 (3d ed. 1984).

430. *See supra* notes 96-99 and accompanying text (discussing precedent under Contract Clause).

431. *See* E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 682 (7th Cir. 1980); *see also* 6 E. MCQUILLIN, *supra* note 146, § 24.06 (3d ed. 1984) (municipality exercising police power is free from any liability for compensation for resulting private losses; damages are not recoverable and the law presumes party is compensated by sharing in advantages arising from such beneficial regulation).

432. The League of California Cities' Development Agreement Manual seems to finesse this issue by stating in its standard form agreement that "[a]ll other remedies at law or in equity which are not otherwise provided for in the agreement or in the city's regulations governing development agreements are available to the parties to pursue in the event there is a breach." League of California Cities, *supra* note 203, at 3.25. For a discussion of the role of alternative remedies in precluding claims of unconstitutional contract impairment, see *supra* notes 58-60 and accompanying text.

433. *See* FLA. STAT. ANN. § 163.3243 (West Supp. 1987) ("[a]ny party, any aggrieved or adversely affected person . . . or the state land planning agency may file an action *for injunctive relief*

c. Impairment of Contract

Impairment of contract issues present a major concern for government agencies that elect not to comply with a development agreement's regulatory freeze provisions.[434] Constitutional problems of this sort may in fact exist, at least in those instances in which a taking is likely to be found.

Noncompliance with a regulatory freeze may give rise to an impairment if a contract breach would otherwise exist and no common-law or agreed-upon remedy can be shown. The limited case law addressing analogous situations assumes this to be the case.[435] As previously discussed, a de minimis rule probably does not apply, and in any event substantial interference with the landowner's expectations in violation of the terms of the agreement is likely to occur.[436]

The critical question, therefore, is whether the government can justify its noncompliance. Looking first to precedent on the impairment of private contracts, it is evident that justifications are not readily accepted. The Supreme Court has allowed considerable flexibility in the use of the government's police power in ways that interfere with private contract-based expectations.[437] Yet case law concerning the adoption of zoning regulations in contradiction of restrictive covenants makes clear that courts are disinclined to allow contradictory ordinances to control.[438] Although at times courts appear to interpret legislative intent to avoid reaching the constitutional question, traditional zoning concerns may not justify the impairment of private contracts that would result from overriding such private restrictions.[439]

. . .) (emphasis added). It is unclear whether this language was intended to preclude alternative remedies.

434. For discussion of this issue by major commentators, see sources cited *supra* note 397.

435. *Cf.* Cuyahoga Metro. Hous. Auth. v. City of Cleveland, 342 F. Supp. 250 (N.D. Ohio 1972) (purported cancellation of cooperative agreement authorizing construction of low income housing constituted impairment of contract when it was impossible to make housing authority whole by payment of money damages and equities strongly favored housing authority in light of its potential loss of federal funds and resulting loss to public of present and future housing opportunities), *aff'd sub nom.* Cuyahoga Metro. Hous. Auth. v. Harmody, 474 F.2d 1102 (6th Cir. 1973); Contemporary Music Group, Inc. v. Chicago Park Dist., 57 Ill. App. 3d 182, 372 N.E.2d 982 (1978) (revocation of concert permit upheld despite impairment of contract when justified by police power considerations); Mayor and City Council of Baltimore v. Crane, 277 Md. 198, 352 A.2d 786 (1976) (assuming that application of revised zoning controls to preclude landowner from utilizing increased density, which had been permitted under prior ordinance in return for dedication of right-of-way, would constitute impairment of contract).

436. *See supra* notes 48-63 and accompanying text.

437. *See supra* notes 68-83 and accompanying text.

438. *See, e.g.*, McDonald v. Emporia-Lyon County Joint Bd. of Zoning App., 10 Kan. App. 2d 235, 697 P.2d 69 (1985) (restrictive private covenants control notwithstanding less restrictive zoning); Hammons v. Parish of East Baton Rouge, 461 So. 2d 1225 (La. Ct. App. 1984) (restrictive covenants control); Rofe v. Robinson, 126 Mich. App. 151, 336 N.W.2d 778 (1983) (restrictive covenants control). *But see* House v. James, 232 Ga. 443, 207 S.E.2d 201 (1974) (state statute limiting effective duration of restrictive covenants when municipal zoning requirements have been adopted upheld under state constitution, but without serious consideration of question of impairment of contractual obligations under federal constitution).

439. *See* Wilkman v. Banks, 124 Cal. App. 2d 451, 269 P.2d 33 (1954) (refusing to assume that zoning ordinance permitting use in contravention of restrictive covenants was intended to impair obligations under such private contracts).

Judicial review of noncompliance with commitments to a regulatory freeze is likely to be at least as stringent as that applied with regard to private contracts. In any event, the evident self-interest of government parties in gaining private contributions to public needs may well result in relatively careful review under the Supreme Court's "reasonable and necessary" justification discussed above.[440] The limited case law suggests that routine land use regulations do not meet this standard.[441] Other courts have held that unforeseeable or changed circumstances do not relieve government agencies of the obligation to provide promised services, at least when failure to do so is their own fault.[442] Courts, however, may distinguish such cases from situations in which health or safety hazards requiring land use controls arose as the result of private action. At least one case has approved regulatory changes that adversely affected expectations of a private party who had entered a public contract in connection with an urban renewal project.[443] Thus, it appears that when regulatory changes offer the only alternative means of achieving an important public objective, the necessity test would be satisfied.

In the event that governmental noncompliance results in an unconstitutional impairment of contract, courts would use traditional injunctive relief to remedy injury resulting from the government's action.[444] The arguments raised with regard to interim damages in connection with unconstitutional takings could well be applied in this situation as well, although case law has, to date, awarded interim damages only pursuant to a contract breach theory.[445] As dis-

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440. *See supra* notes 73-95 and accompanying text.

441. *See* Mayor and City Council of Baltimore v. Crane, 277 Md. 198, 352 A.2d 786 (1976) (amendment to zoning ordinance could not limit rights of property owner to exercise previously granted density bonus); Wa Wa Yanda, Inc. v. Dickerson, 18 A.D.2d 251, 239 N.Y.S.2d 473 (1963) (amendment to town zoning ordinance prohibiting sale of gasoline would impair lease of property for that purpose when lease had been granted by town in its proprietary capacity).

442. *See supra* notes 391-96 and accompanying text (discussing annexation cases); *see also* Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976) (finding that no changed circumstances existed to justify downzoning of property for which building permit had been issued, but reserving question whether showing of new peril to health, safety, morals, or welfare between time of grant of building permit and change of zoning would justify rezoning). The Florida development agreement statute specifically authorizes application of subsequently enacted laws and policies in the event of "substantial changes" in "pertinent conditions," however. FLA. STAT. ANN. § 163.3233 (2)(d) (West Supp. 1987).

443. *See* Beacon Syracuse Assoc. v. City of Syracuse, 560 F. Supp. 188 (N.D.N.Y. 1983) (rezoning of nearby portions of downtown commercial district to office uses was justified as necessary and reasonable means of furthering interest in urban renewal, notwithstanding landowner's earlier contract with state redevelopment agency in which it had promised that he could develop his property as part of shopping mall). The courts have also upheld ordinances that required immediate termination of ongoing nonconforming uses exhibiting nuisance-like characteristics. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (upholding zoning ordinance severely restricting operation of quarry); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (upholding prohibition of ongoing operation of brickyard in residential area). Although these cases involved regulatory taking rather than contract impairment claims, it seems doubtful that contractual rights would be entitled to greater protection than vested property rights.

444. *See supra* notes 101-106 and accompanying text.

445. See *supra* note 394 and cases cited thereunder (allowing damage awards for breach of contract to provide water and sewerage services). Professor Hagman has also suggested, however, that interim damages should be awarded in connection with violations of the Contract Clause as well as for regulatory takings. *See* Hagman, *Development Agreements*, *supra* note 203, at 190-91.

cussed above, the option to exercise the power of eminent domain, of course, also exists.

V. CONCLUSION

Public-private dealmaking as a means of fashioning land use controls continues to have its critics who rightly fear that untrammeled use of such an approach may lead to public or private abuse of government power.[446] This Article has argued that the development of appropriate theoretical constructs can protect against these perils while resulting in a more flexible, equitable, and efficient approach to this critical social problem. It has urged that a thorough understanding of the interplay of contract and police power principles must inform such theoretical constructs. It has suggested that doctrine developed in connection with the United States Constitution's Contract Clause provides a useful model that teaches important lessons concerning the characterization of deals, the design of standards, and the responses to noncompliance in the land use context. The Article has drawn from two subtly different but somewhat similar examples of public-private land use deals—contingent zoning and development agreements—to illustrate how an appropriate balance can be established between private expectations and the public interest. Whether the substantial potential implicit in the dealmaking model can be brought to fruition with the aid of this or other theoretical models remains to be seen.

446. *See* R. ELLICKSON & A. TARLOCK, LAND-USE CONTROLS: CASES AND MATERIALS 236-38, 244-47 (1981) (observing that land use dealmaking may benefit the community, neighbors, local officials, and landowners or their agents, but in ways that result in corruption and inefficiency).