Development Agreements: Bargained for Zoning That is Neither Illegal Contract or Conditional Zoning

by Shelby D. Green

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

The North American developer is no longer free to decide alone what development there should be. A myriad of land use regulations and standards, both state and federal, must be complied with. As more regulatory steps are required and as standards evolve, the process of development has become more lengthy and encumbered. A development may well involve obtaining scores of permits from almost as many agencies.5 Still, in large measure, the role of the developer remains dominant, beginning with the original concept and involving the assemblage of the materials, professionals and other participants, such as, lenders, investors,

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1 GEORGE LEFCOE, REAL ESTATE TRANSACTIONS 987 (1997).
3 LEFCOE, supra note 1, at 987.
4 Id.
community leaders, necessary for making the concept a reality. The developer may be the one to locate the site, determine its suitability, articulate the development, negotiate with governmental officials, and oversee implementation.

Environmental laws, both federal and state, requiring either protective or remedial measures in the case of sites contaminated with or exposed to hazardous wastes, may render a development project either prohibitively expensive or illegal. Property that once was an industrial site, or a defense installation, or even a farm may present such risks.

Since the landmark 1926 decision by the Supreme Court, *Village of Euclid v. Ambler Realty Co.*, where the constitutionality of municipal zoning regulations was upheld as incident to the police power when enacted pursuant to validly implemented land use plans that advance the legitimate public interest, all fifty states have enacted laws that enable (and many that require) municipalities to regulate land use through comprehensive land use plans. The result is that a landowner cannot simply choose to use land as he desires, but must obtain permission for a particular use from the local government to ensure that the desired use is consistent with the comprehensive plan. Thus, a landowner may be required to obtain a subdivision approval

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545, 578 (1978).


7272 U.S. 365 (1926)

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

9Ellickson & Been, Land Use Controls, Cases & Materials 87 (2d ed. 2000).

before dividing a given parcel for development or a building permit before initiating new construction.

The traditional zoning process consists of the adoption of a comprehensive plan and the issuance of local zoning ordinances pursuant to the plan. The adoption of local zoning ordinances is accomplished by a hearing and public participation. The standard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district, in accord with the comprehensive plan. Characteristic of the Euclidean zoning model is the seeming rigid division of the land into discrete areas each assigned a particular use, e.g., residential, heavy industry, agricultural. Early zoning theory anticipated that land use decisions would primarily occur through initial allocation of uses by the comprehensive plan and implementing ordinances, with only minor adjustments over time afforded by variances, special use permits and rezoning. However, nearly a century of zoning experience indicates a very different practice, such that current zoning practice little resembles the early notion of planned development. The result is that numerous different uses may be permissible within a particular district and the special-use process, frequently provide only very generalized standards for issuance of a permit. Rather than rigid adherence to the zoning map, the current bargaining model for zoning makes particularized decisions regarding the suitability of a proposed use and thus in effect administer land development on a case-by-case basis.

Even when the existing zoning permits a proposed project, the development project that is only proposed may vanish with unanticipated changes in political and market conditions or in

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11 P.J. Rohan, Zoning and Land Use Controls § 5.01; Ryan at 352.
12 P.J. Rohan, Zoning and Land Use Controls § 5.01; Ryan at 348.
the land use regulatory scheme. These kinds of changes are risks that are difficult to anticipate and control. In most jurisdictions, absent a vested right to develop, the local land use regulatory body retains the right to alter and apply to a proposed development, newly enacted zoning or other land use requirements at any time and until quite late in the development process, indeed even up to the commencement of construction. The possibility of such changes can make the development process appear ad hoc and precarious and reliance on the traditional zoning adjustments such as variances or special use permits under criteria that are less than concrete, does little to minimize the risks to a developer.

This article explores the new model of land use decisionmaking, that based upon bargaining with the landowner. The fact of a bargain raises the issue of whether such bargaining amounts to “contract” zoning based upon a bilateral contract between the municipality and the

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13 Ryan at 349.

14 See e.g., Avco Community Developers, Inc. v. South Coast Regional Comm’n, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976). There, under the authority of pertinent permits, the developer had undertaken studies for the development of the tract, proceeded to subdivide and grade it, completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract, and had spent more than $2 million and incurred liability of nearly $750,000 before being able to apply for a development permit from the Coastal Commission. The Coastal Commission refused to issue a development permit and no building permit could be issued until a development permit was obtained. The California Supreme Court ruled that the developer had acquired no vested rights entitling it to proceed with actual construction. The rationale was that by requiring a building permit as a prerequisite to obtaining a vested right to actually build, the court was preserving to localities regulatory flexibility in the development process to meet changing circumstances and needs. Otherwise, there would be a serious impairment of the government’s right to control land use policy. This decision was the impetus for the enactment of the California development agreement statute, discussed later. See also Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 86 Cal. App. 4th 534, 551, 103 Cal. Rptr.2d 447, 460 (2001)(upholding repeal of exemption for oil drilling effectively nullifying leases for exploration and development where all costs were “soft costs”, such as for engineering, consultants, lawyers). See generally 4 EDWARD H. ZEIGLER, JR. RATHKOPF’S, THE LAW OF ZONING AND PLANNING, Ch. 70. (2002). Depending upon the particular circumstances of the case, a governmental action that essentially destroys the landowner’s reasonable investment-backed expectations could result in a taking, compensable under the Fifth Amendment. For a discussion of regulatory takings, see Gregory M. Stein, Who Gets the Taking Claim? Changes in Land Use Law, Pre-Enactment Owners, an d Post Enactment Buyers, 61 Ohio St. L.J. 89 (2000); Steven J. Eagle, The Supreme Court’s Evolving Takings Jurisprudence: A First Look at Tahoe-Sierra, 16 Prob. & Prop. 5 (November/December 2002); John J. Delaney & Emily J. Vaias, Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims, 49 Wash. U. J. Urb. & Contemp. L. 27, 38 (1996).
landowner, which is largely held to be illegal, or a related form of bargaining, not involving an exchange of promises in the context of a bilateral agreement, i.e., “conditional zoning”. I go on in Part II to discuss the emergence of the development agreement, which involves a contract with a municipality and the developer under which the developer is assured that new zoning ordinances adopted after the date of the agreement will not apply to the developer. Part III discusses the reserved powers doctrine on the ability of governments to contract and the issue of transparency in making zoning decisions. Part IV considers in depth the murky concepts of contract and conditional rezoning and why they are looked on with such suspicion by the courts. I analyze significant rulings from the courts in the jurisdictions that most often considered the question. Part V considers contract zoning compared to conditional zoning. Part VI shows how conditional zoning once maligned have gained acceptance by the courts. Part VII discusses conditional use zoning device in North Carolina. Part VIII discusses concomitant agreements whereby a municipality has the power to enter into an agreement with a developer as to zoning in exchange for the developer’s promise to develop in certain way. Part IX considers whether development agreements can be upheld against a challenge that they amount to contract or conditional zoning and explains why they can be and should be encouraged. Part X offers some conclusions about the future of land use planning.

II. The Development Agreement as an Important Bargaining Device, Moving Away for Traditional Euclidian Zoning

In recent years, land use decisionmaking has shifted significantly from the planned toward the particularized, affording more ad hoc responses to individual development
proposals. In a fluid society, adherence to the rigid Euclidean model for zoning which consists 
of the division of land into zones, with identical uses within each zone, has been found to be 
inadequate for achieving a rational and effective land use plan, since it precludes the zoning 
authority from considering particular and perhaps beneficial uses for a parcel within the zone. 
Municipal land use bargaining is rapidly becoming “the universal language of land use 
planning,” as public and private parties to land use disputes adopt the bargaining model to 
obtain mutually agreeable solutions based on mutually beneficial exchange. Under the 
bargaining model, the emphasis is placed on flexibility and change through the use of 
variances, special use permits, rezoning, incentive and bonus zoning, conditional zoning 
and development agreements. Zoning determinations are made of actual uses based upon 
concrete proposals that allow municipalities to assess the potential impact of uses in a concrete 
situation. The model also provides municipalities with significant leverage over potential 
development in order to obtain concessions from developers.

As municipalities have sought more formal, more predictable forms of flexibility, such as
in development agreements, a growing number of states have enacted legislation authorizing
the making of land use through this device. “Development agreements” between developers
and municipal governments respond to the uncertainties inherent in the use of the minor
adjustment mechanisms found in Euclidean zoning and in vested rights. They are negotiated
agreements between a developer and the local government under which the local government
agrees to apply the land use rules, regulations and policies in effect on the date of the agreement,
in exchange for the developer’s promise to develop in a certain way.

A. The Benefits to the Developer and the Municipality. Under the development
agreement model of land use, the developer gains: a) certainty as to the governing regulations
for the development project; b) the ability to bargain for support and the coordination of
approvals; c) easier and less-costly financing because of the reduction of the risk of non-
approval; d) ability to negotiate the right to freeze regulations as to changes in the project; e)
predictability in scheduling the phases of the development; f) change in the dynamics of the
development process from confrontation to cooperation.

The municipality gains a) the facilitation of comprehensive planning and long-range

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21 In 1515-1519 Lakeview Boulevard Condominium Ass’n v. Apartment Sales Corp., 146 Wn.2d 194, 43
P.3d 1233, 1237 (2002), the Supreme Court of Washington ruled that “a local government and a property owner
may reach an arms-length, bargained-for agreement which may include waivers of liability for risks created by [a]
proposed use of property because of the shape, composition, location or other characteristic unique to the property
sought to be developed.” In that case, the city had contended that innovative land use instruments, such as
exculpatory covenants, should be encouraged because the Growth Management Act, (36.70A R.C.W.) was
channeling development onto more and more marginal lots; that property owners of land marginal for development
because of the composition, topography, location, or other characteristic of the property, should be free to propose
creative solutions, and accept the risks of development.

24 See generally, Knight and Schoettle, supra note 15; Daniel J. Curtin and Scott A. Edelstein, Development
Agreement Practice in California and Other States, 22 Stetson L. Rev. 761 (1993); Note, Development Agreements:
Contracting for Vested Rights, 28 B.C. Envt’l Aff. L. Rev. 719 (Summer 2001); Michael H. Crew, Development
planning goals; b) commitments for public facilities and off-site infrastructure; c) public benefits otherwise not obtainable under regulatory takings doctrine; d) avoidance of administrative and litigation costs and expenditures.

Development agreements thus offer both flexibility and certainty: flexibility to the local government by incorporating terms and conditions in the agreements that may be different from those expressed in the land use regulations, and certainty to the developer by setting the governing standards and rules for the duration of the development project. Recently, a California court of appeals ruled that the development agreement statute applied equally to the planning stage of development and not just to projects that have been approved for actual construction.26 Such a construction of the statute, the court said, was entirely consistent with the overall purposes of the statute to “encour[age] the creation of rights and obligations early in a project in order to promote public and private participation during planning, especially when the scope of the project requires a lengthy process of obtaining regulatory approvals.27

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27Id. at 228. In that case, the development agreement pertained to the planning of the development project that met the requirements of the statute, though the county had not approved an actual development, but had established the scope of the project and precise parameters for future construction, as well as a procedure to process project approvals. It also provided for a variety of improvements for public use which might not have been agreed to by the developer without corresponding commitments by the city as outlined in the agreement.” Id. at 229. It was nonetheless necessary for the court to construe the agreement as an approval of the project because it committed the parties to a definite course of action aimed at assuring construction of the project, provided certain contingencies were met. Id. at 229. “While further agreement and discretionary approvals were necessary, every approval or denial permitted by the Agreement was designed to advance the project in accordance with the standards for ... development adopted by the County in the ... Area Plan.” Id. at 229. The court pointed out that though the statute was limited to actual projects, it did not require deferral of development agreements until construction was ready to begin or require any particular stage of project approval as a prerequisite. “In fact, by permitting conditional development agreements when property is subject to future annexation, the statute expressly permitted local governments to freeze zoning and other land use regulation before a project was finalized.” Id. at 230, citing National Parks & Conservation Ass’n v. County of Riverside, 42 Cal. App. 4th 1521-22 (1996). In the court’s view, nothing limited the statute to development agreements which created “vested rights” to complete construction of a project according to completed plans. Id. at 230.
Though they are local in nature, development agreements usually are entered into pursuant to state enabling legislation. California was the first state to enact such legislation in 1980 and twelve states have followed. Development agreements are said to require enabling legislation because of their effect upon the powers of local governments, both conferring and limiting. Nonetheless, because development agreements potentially empower local officials to control land use in more effective ways than under the zoning ordinance, their use has been sanctioned even in states with no statutory enabling law, as an exercise of their auxiliary and implied powers under the zoning laws.

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


Municipality’s Authority to Act. The municipality may be required to first pass an

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29 See Giger v. City of Omaha, 232 Neb. 676, 442 N.W.2d 182 (Neb. 1989)(upholding development agreement against challenge that municipality bargained away its police powers. This case is discussed in detail infra at text accompanying notes ------ to ------. See generally R. Alan Haywood & David Hartman, Legal Basics for Development Agreements, 32 Tex. Tech. L. Rev. 955 (2001); Jennifer G. Brown, Concomitant Agreement
enabling ordinance or resolution establishing the details of development agreement procedures and the requirements that the executive branch of the governmental unit must follow.\textsuperscript{30}

\textbf{Goals.} Most statutes identify the purposes and goals of such agreements, e.g.,:

a) to bring increased “certainty” and “assurance” to the development process, which in turn will strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs of development,\textsuperscript{31}

b) to achieve “predictability,” and “public benefits,”\textsuperscript{32} including affordable housing, design standards, and off-site infrastructure,\textsuperscript{33}

c) for the “vesting of development rights” as solutions to the problems caused by the “lack of certainty” in the development process.\textsuperscript{34}

\textbf{Minimum Provisions.} The statutes typically require that a development agreement specify certain substantive terms, including:

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

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

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

\textsuperscript{30} ARIZ. REV. STAT. 9-500.05A; CAL. GOV’T CODE § 65865(c); HAW. REV. STAT. § 46-124; FLA. STAT. ANN. § 163-3223.

\textsuperscript{31} CAL. GOV’T CODE § 65864.

\textsuperscript{32} HAW. REV. STAT. § 46-121.

\textsuperscript{33} S.C. CODE ANN. § 6-31-10 (B)(4).

\textsuperscript{34} HAW. REV. STAT. § 46-121; S.C. CODE ANN.§ 6-31-10(B)(4); LA. REV. STAT. § 33-4780.21(1)

(“the lack of certainty in the approval of development can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic
d) conditions, terms, restrictions and requirements for public infrastructure;
e) the phasing or time of construction.  

Conformance with Comprehensive Plans. As a condition of enforceability, most statutes require development agreements to comply with local comprehensive plans.  

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

Amendment, Cancellations, Exceptions. As with any contract, amendments can be accomplished by mutual agreement. However, under all the statutes, despite the terms of the agreement, the municipality reserves the power to cancel it unilaterally when required to ensure public health, safety or welfare. The California statute requires a municipality to review cost to the public."

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35 CAL. GOV’T CODE § 65865.2; FLA. STAT. ANN. § 163.3227; HAW. REV. STAT. § 46-126; MD. ANN. CODE art. 66B § 13.01(f); NEV. REV. STAT. ANN. § 278.0201 (1); N.J. STAT. ANN § 40:55D-45.2(A); OR. REV. STAT § 94.504 (2); S.C. CODE ANN.§ 6-31-60. The Arizona statute provides that the development agreement may also specify such things as density and intensity of use, maximum height and size of proposed buildings. ARIZ. REV. STAT. § 9-500.05(G)(1)(c). The Louisiana statute provides that the statute shall specify such things. LA REV. STAT. § 33:4780.24. See also VA. CODE ANN. § 15.2-2303.1(B); OR. REV. STAT. § 94-518.

36 CAL. GOV’T CODE § 65867.5; HAW. REV. STAT. § 46-129; ARIZ. REV. STAT. § 9-500.05(B); NEV. REV. STAT. § 278.0203; REV. CODE WASH. § 36.70B.170(1); S.C. CODE ANN.§ 6-31-70; VA. CODE ANN. § 15.2-2303.1(B).

37 FL. STAT. ANN. § 163.3229; MD. ANN. CODE art. 66B § 13.01(g).

38 CAL. GOV’T CODE § 65865.2; FL. STAT. ANN. § 163.3229; HAW. REV. STAT. § 46-126; NEV. REV. STAT. § 278.0201.


40 See e.g., ARIZ. REV. STAT. § 9-500.05C; MD. ANN. CODE art. 66B § 13.01(h); OR. REV. STAT. § 94-522; LA. REV. STAT. § 33:4780.30; S.C. CODE ANN. § 6-31-100. But in Hawaii, if the county determines that a proposed amendment would “substantially alter” the original agreement, a public hearing must be held. HAW. REV. STAT. § 46-130.

41 See e.g., CAL. GOV’T CODE § 65865.3; HAW. REV. STAT. § 46-127. In Louisiana, this is so in the case of newly incorporated municipalities as to development agreements entered into prior to incorporation. LA. REV. STAT. § 33:4780.25. In Hawaii, the current (and later enacted) laws may be applied if necessary to
annually compliance with the agreement and authorizes it to terminate or modify the agreement upon a finding of noncompliance. The Nevada statute requires review only once every two years.

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

rectify a condition ‘perilous’ to residents’ health and safety. HAW. REV. STAT. § 46-127(b); see also VA. CODE ANN. 15.2-2303.1A; MD. ANN. CODE art. 66B § 13.01(i); LA. REV. STAT. § 33:4780.24. The Louisiana statute also provides for modification or suspension of provisions of the development agreement where necessary to comply with subsequently enacted state and federal laws and regulations. Id. at § 33:4780.32. See also ARIZ REV. STAT. § 9-500.05G(1)(a); S.C. CODE ANN. § 6-31-130).

42CAL. GOV’T CODE § 65865.1.

43NEV. REV. STAT. § 278-0205. The Louisiana statute requires periodic review at least every twelve months, at which time the developer must demonstrate good faith compliance with the terms of the agreement or face termination or modification. LA. REV. STAT. § 33:4780.23; S.C. CODE ANN. § 6-31-90.


45CAL. GOV’T CODE § 65867.5; LA. REV. STAT. § 33:4780.28 (after a public hearing a development agreement must be approved by ordinance of the governing authority of the municipality).

46HAW. REV. STAT. § 46-128; CAL. GOV’T CODE § 65867; LA. REV. STAT. § 33:4780.28; MD. ANN. CODE art. 66B § 13.01(d); OR. REV. STAT. § 94-508, 513; S.C. CODE ANN. § 6-31-50.

47The Colorado statute provides that development agreements shall be adopted as legislative acts subject to referendum. COLO. REV. STAT. § 24-68-104(2).

agreements are administrative acts, precluding repeal by referendum.49

**Effect of the Agreement.** The statutes variously provide that the effect of the agreement is that the rules, regulations and official policies governing permitted uses of the land are those in force at the time of execution of the agreement.50

**Effect of Contracts Clause.** The Contracts Clause of the Constitution may prevent a municipality from abrogating a development agreement once entered into with a developer.51 This means that if the municipality uses its legislative authority to impair an otherwise enforceable contract, it may incur liability to the developer.52 An impairment of contract addressable under the Constitution should be distinguished from a breach of contract under common law. An impairment of contract occurs if a government acts in a way that makes performance of the contract illegal or impossible.53 That illegality or impossibility provides a defense to the developer in a breach of contract action for damages or for other relief brought by the municipality, the non-government party now unable to fulfill its contractual obligation.54 On the other hand, when the government merely refuses or omits to perform its contractual obligation, an adequate remedy in damages ordinarily exists, such that the government action is

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49 HAW. REV. STAT. § 46-131. The Colorado statute provides that development agreements shall be adopted as legislative acts, subject to referendum. COLO. REV. STAT. § 24-68-104(2).

50 ARIZ. REV. STAT. § 9-500.05(B); CAL. GOVT. CODE § 65866; HAW. STAT. ANN. § 46-127 (b); LA. REV. STAT. § 33:4780.27 (except that subsequently enacted rules, regulations and policies that do not conflict with those in effect at the time of the signing of the agreement may apply); MD. ANN. CODE art. 66B § 13.01(j); NEV. REV. STAT. § 278-0201(2)(3); OR. REV. STAT. § 94.518; S.C. CODE ANN. § 6-31-80; VA. CODE ANN. § 15.2-2303.1(B).

51 U.S. Const., art. I, § 10, cl. 1.

52 The Contracts Clause provides in part: “no state shall ... pass any ... Law impairing the Obligation of Contracts.”

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

54 Id.
characterized as a breach of contract that does not rise to the level of a contractual impairment.\textsuperscript{55}

Even when there is an impairment of contract as just described, the Contracts Clause may yet offer no relief because the constitutional protections are not absolute. Every contract made with a governmental entity is in some degree subject to the exercise of that government’s police powers.\textsuperscript{56} This means that a development agreement may be justifiably impaired by the government and such impairment is not unconstitutional if it is “reasonable and necessary” to serve an important public purpose.\textsuperscript{57} The legislative act allegedly impairing the agreement, though, is subject to strict judicial scrutiny and requires a balancing of the government’s interest in the exercise of its police power against the degree of impairment of the private party’s contractual expectations arising from the terms of the development agreement and including a consideration of changed circumstances and unforeseen events since the agreement was entered into, and the alternatives available to the government.\textsuperscript{58}


Modern land use planning, fundamentally an exercise in bargaining, involving agreements between the landowner and the municipality and the imposition of conditions on the

\textsuperscript{55}Id.


\textsuperscript{57}United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977); Allied Structural Steel Co. v. Spannus, supra note 89; see generally, Griffith, Local Government Contracts: Escaping From the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277 (1990).

\textsuperscript{58}United States Trust Co. v. New Jersey, 431 U.S. at 28-32; Rue-Ell Enterprises, Inc. v. City of Berkeley, 147 Cal. App.3d 81, 87, 194 Cal. Rptr. 919 (1983) (setting out a three-step analysis for determining whether a contract has been impaired: 1) whether the state law has substantially impaired the contractual relationship; 2) if substantially impaired, whether the impairment was justified by a significant public purpose behind the regulation, such as remedying a broad and general social or economic problem; and 3) if there is a legitimate public purpose, whether the adjustment of the rights and duties of the contracting parties was reasonable and appropriate to the public purpose justifying the law. The California Supreme Court has also stated that any such modification must be
land in exchange of rezoning, may be challenged as unlawful under the reserved powers doctrine, that they amount to contract zoning, or conditional zoning, both of which are said to involve a question of the bargaining away of the municipality’s police power. The two key problems with invalid contract zoning involve municipalities’ relinquishment of its police powers and lack of transparency in the zoning scheme. There is lack of transparency where the conditions essential to the zoning decision are not contained in the ordinance, but are implemented through a private negotiations and agreements.

A. The Reserved Powers Doctrine as a limitation on Bargaining

The reserved powers doctrine holds that the power of governing is a trust committed by the people to the government, no part of which can be granted away.\(^{59}\) It is a limitation on the scope of the Contracts Clause, meaning that any rights created by government contract are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.\(^{60}\) All rights granted from government are held subject to the police power of the State.”\(^{61}\) Thus, application of the reserved powers doctrine requires a determination of the state’s power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. While a municipality’s retention of the right to abrogate a contract implicates the Contract Clause, that

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clause does not require a state to adhere to a contract that surrenders an essential attribute of its sovereignty.\(^{62}\) In deciding whether a state’s contract was invalid \textit{ab initio} under the reserved powers doctrine, earlier decisions relied on a distinction among 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.\(^{63}\) Such formalistic distinctions perhaps cannot be dispositive, but they contain an important element of truth.’’\(^{64}\)

“Contract zoning”\(^{65}\) involves a deal that creates an impermissible reciprocity of obligation between a private interest and a government entity. It is defined as the \textit{required} exercise of the zoning power pursuant to an express bilateral contract between the property owner and the zoning authority and an agreement to rezone that lacks a valid basis independent of the contract on which to justify the zoning amendment.\(^{66}\) Thus, the problem with a deal arising under contract zoning is that it would bind the government to specific terms of the contract that may ultimately prevent it from carrying out its public duties, while conferring on private parties the special rights different from other landowners within the same zone. This practice has long been disapproved in most jurisdictions where the issued has come up.\(^{67}\)

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\begin{itemize}
\item \textsuperscript{62} \textit{United States Trust v. New Jersey}, 431 U.S. at 23.
\item \textsuperscript{63} \textit{Stone v. Mississippi}, 101 U.S. at 820.
\item \textsuperscript{64} \textit{United States Trust v. New Jersey}, 431 U.S. at 23-34. (“If a state could reduce its financial obligations whenever it wanted to spend the money for what is regarded as an important public purpose, the Contract Clause would provide no protection at all.” \textit{Id.} at 25-26.
\item \textsuperscript{65} This concept is discussed in depth, infra at text accompanying notes ---- to -----
\item \textsuperscript{67} See e.g., \textit{Hartnett v. Austin}, 93 So.2d 86 (Fla. 1956); \textit{Chung v. Sarasota County}, 686 So.2d 1358 (Fla. 2d DCA 1996). Another form of zoning that is often challenged as illegal, although not under the reserved powers
\end{itemize}
In contrast, conditional zoning\textsuperscript{68} is defined as rezoning subject to conditions which are not applicable to other property in the same zone, where the municipality makes no promise to the landowner to rezone, but does rezone upon the imposition of conditions, covenants and restrictions on use of the rezoned land. Under conditional zoning, the landowner covenants to perform certain conditions if the rezoning is granted. Conditional zoning allows municipalities and developers essentially to negotiate the terms of a development. The developer obtains the certainty that the development project will proceed, thus making financing easier to obtain, and tenants more ready to sign leases.\textsuperscript{69} At the same time, the municipality is able to set definite conditions that govern the process of development, thus limiting the potential negative impacts.

\textsuperscript{68} This concept is discussed in depth, infra at text accompanying notes ---- to ---- --.

\textsuperscript{69} Rohan at § 5.01[2].
from the development on neighboring land and the community. Nevertheless, some have argued that where the imposition of conditions on land development is desirable, it might better be done by uniform ordinances providing for special uses, special exceptions and overlaid districts. “Conditions imposed in such cases . . . have a sounder legal basis because guidelines for their imposition are spelled out in the ordinance.” But, the process of conditional zoning at times seems almost indistinguishable from the process of negotiating a contract, meaning “contract zoning” where there is an exchange of promises between developer and the municipality. The closeness of these devices in definition and application has led to murky and overlapping discussions in the cases. Several theoretical questions therefore arise: 1) is lawful conditional zoning the same as illegal contract zoning? 2) does conditional zoning extinguish or nullify the concept of contract zoning? 3) is the result that conditional zoning is illegal if contract zoning is illegal? or the converse: if conditional zoning is legal, then so should contract zoning?

1. When an Agreement Between a Municipality and a Developer is Subject to Challenge as Such

As stated, “contract zoning is defined as a ‘process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from a developer in exchange for the government’s agreement to rezone the property.’” “The process is suspect because of the concern that a municipality will contract away its police power

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70 Id. at .
71 State ex.rel Zupanic v. Schimenz, 46 Wis. 2d 22, 33 (Wis. 1970), citing Cutler, Zoning Law and Practice in Wisconsin, p. 27, sec. 8.
72 Id. at 33.
73 Rohan, at -- § 5.01[2].
74 McLean Hospital Corporation v. Town of Belmont, 56 Mass. App. Ct. 540, 545, 778 N.E. 2d 1016, 1020
to regulate on behalf of the public in return for contractual benefits offered by a landowner whose interest is principally served by the zoning action.” It is thus said to be an *ultra vires* act bargaining away the police power, since zoning must be governed by the public interest and not by benefit to a particular landowner.” However, by bargaining away the police powers, the courts cannot mean that the current legislature may not enter into binding contracts or other obligations whose terms extend beyond the terms of the current body. Such an interpretation would almost nullify the municipality’s power to contract and its power to be sued, if every time when things looked different, it could claim that the act was outside its power. What seems to

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76 Pima Gro Sys. v. Board of Supervisors, 52 Va. Cir. 241 (Va. Cir. Ct. 2000), citing 83 Am. Jur. 2d, Zoning and Planning, § 46. In Derrenger v. Billings, 213 Mont. 469 (Mont. 1984), landowner Derrenger purchased a parcel of land comprised of three tracts. One tract was zoned for single-family residences. The remaining two tracts were zoned Agriculture Open Space. Thereafter, the City of Billings and the landowner entered into a written agreement entitled “Waiver of Right to Protest Annexation and Agreement on Non-conforming Use.” The two tracts were annexed and rezoned R-96. Later, a subsequent owner of the tract, proposed to build a multi-family residential unit on his property, all portions of which were then zoned R-96. His plans were objected to and he sued for construction on the meaning of the restriction on use in the annexation agreement. The trial court found that the subject agreement was clear on its face and did not constitute contract zoning. The appellate court reversed, holding the issue reduced to simplest terms was whether “residential purposes” was so clear on its face as to preclude multi-family residential purposes. The court thought not.” *Id.* at 473. “[T]here is a fact question about what was intended. The parties may have intended to assure additional future uses in return for agreeing to annexation. They may not have fully understood the limitations on contract zoning. Surely, they must have intended to receive some consideration for not protesting annexation. *Id.* at 474. The dissenting opinion by Justice Gulbrandson would have found contract zoning, stating, “[t]he parcel of land located within the City of Billings and having been zoned for single-family residence long before the date of the agreement, but bearing a non-residential non-conforming use could not legally be the subject of an agreement whereby the City would agree to grant a residential multi-family use variance. Such an agreement, in my view, would constitute contract zoning.” *Id.* at 475-76. The Justice went on to state, “[a] contract made by the zoning authorities to zone or rezone for the benefit of a private landowner is illegal and *is denounced by the courts as ‘contract zoning’ and as an ultra vires bargaining away of the police power.” The parties may have intended to assure additional future uses in return for agreeing to annexation, but in his view, “such an additional future residential use would constitute illegal contract zoning.” *Id.*

77 A New Jersey court in Palisades Properties, Inc. v. Brunetti, 44 N.J. 117 (N.J. 1965), enforced an agreement against the municipality finding such an obligation did not constitute a contracting away of the police power. The landowners had an agreement with the borough that no building could be erected in the area exceeding 35 feet in order to preserve the beauty of the area. The borough subsequently amended the zoning ordinance to allow the developer to construct a tower in excess of 35 feet. The developer contended that the borough did not have the power to restrict the use of privately owned property pursuant to an agreement with landowners or to agree
be the meaning given to the phrase by the courts goes largely to the process of decisionmaking in
the particular rezoning at issue. Did the municipality, through its zoning authority, arrive at the
decision based upon its own assessment of what best serves the public health, safety and
welfare78 and provided the public an opportunity to participate in the zoning procedure before it
acted to rezone?79 Substantively, did the municipality purport to surrender all power to act in the
to insure the integrity of the skyline of the Palisades through its power of zoning. Such action, the developer argued,
would be invalid as “contract zoning.” The court agreed with the general proposition that a municipality may not
contract away its legislative or governmental powers. However, the court ruled a municipality possesses not only
such rights as are granted to it in express terms by the Legislature, but as well such other powers as “arise by
necessary or fair implication, or are incident to the powers expressly conferred, or are essential to the declared
objects and purposes of the municipality.” Accordingly, the general proposition is subject to the limitation that
where a municipality has incurred an obligation which it has the power to incur it cannot escape that obligation by
asserting that it is merely exercising the police power delegated to it. Such an exception is necessarily appended to
every such municipal contract. Id at 133. The court went on to hold that the “the municipality, by virtue of the
statute, had the express statutory power to execute the earlier contract imposing the restrictive covenants. The
purpose of that agreement was not to restrict the municipality from further zoning. The sole objective was the
imposition of restrictive covenants on specifically described parcels of land. From that contract flowed the same
duty and obligation that would be incurred by individuals and private corporations under similar circumstances, i.e.,
the duty not to take any affirmative action which would destroy the fruits thereof. N.J.S.A. 40:60-26; N.J.S.A.
40:60-51.2. Under such circumstances, barring the borough from taking affirmative governmental or legislative
action which would constitute a breach of its agreement is not to be regarded as the proscribed contracting away of
such powers. The borough could not escape the obligations incurred by the earlier agreement under the guise of
police power. The landowners and the Commission were therefore entitled to injunctive and declaratory relief
against this “inequitable conduct” because “the borough violated the implied covenant of good faith and fair dealing
in its agreement with the [landowners] when it amended the zoning ordinance.” Id. at 134-35.

78 See Alderman v. Chatham County, 89 N.C. App. 610 (N.C. Ct. App. 1988)(The rezoning here was
accomplished as a direct consequence of the conditions regarding density of land use agreed to by the applicant
rather than as a valid exercise of the county’s legislative discretion).

79 Deland v. Town of Berkeley Heights, 2003 N.J.Super LEXIS 184; see also Warner Co. v. Sutton, 274
the Manumuskin Watershed in Maurice River Township, which for many years was used for mining of sand as a legal
nonconforming use. Then the city rezoned the land to a classification in which mining was not permitted. The
landowner’s application for a renewal of its license to continue its mining activity was in part granted and in part
tabled. The landowner sued seeking to invalidate the ordinance, alleging spot zoning and a taking of property. The
parties reached a tentative settlement of the suit. Under the proposed agreement, the Township recognized
Landowner’s mining nonconforming use status, and that it applied essentially to Landowner’s entire tract.
Landowner abandoned its challenge to the rezoning and its damage claim, and in turn was given a conditional right
to construct a planned residential village on the tract. The court found that the consent order caused the municipality
to surrender its legislative function, and took away the public’s right to be heard. The court held that the consent
order amounted to contract zoning, and that it frustrated the public’s right to be heard on rezoning. In other words,
the municipality’s exercise of its police power to serve the common good and general welfare of all its citizens “may
not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of
contracts.” See also State ex. rel. Zupanic v. Schimenz, 46 Wis. 2d at 33 (“contract zoning is illegal not because of

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future to protect the public health, safety and welfare? Where the answer to the first question is in the affirmative and the second in the negative, an agreement between a municipality and a private landowner should be enforceable.

But, not all agreements between the municipality and a developer amount to contract zoning. Instead, the courts have said that “contract zoning,” connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a bilateral contract.”80 “In short, a ‘meeting of the minds’ must occur; [and] mutual assurances must be exchanged.”81 Thus, the central issue in many of these cases is whether or not there were bilateral negotiations between the landowner and the city resulting in an agreement, which consisted of mutual covenants; that is, mutual promises with consideration running to both parties from the other as opposed to the unilateral imposition of conditions by the municipality which conditions were for the benefit of the general public as opposed to the landowner as an individual.82

In accordance with this definition in evaluating a charge of contract zoning, courts have undertaken the seemingly impossible task of distinguishing those agreements involving bilateral exchanges from those involving unilateral promises from the landowner. Courts look to see if there has been the use of governmental power as a bargaining chip and where rezoning occurs

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80 Chrismon v. Guilford County, 332 N.C. 611 (1988); Graham v. Raleigh, 55 N.C. App. 107, 112-13 (N.C. Ct. App. 1981)(Absence in the record of any representation by the developer as to their specific plans for development of the subject property, meant there was no unlawful contract zoning involved in the adoption of the challenged ordinance.)


82 O’Dell v. Board of Comm’rs of Johnson City, 910 S.W.2d 436 (Tenn. Ct. App. 1995)(The proof showed no evidence of a bilateral agreement, the landowner followed the customary procedure in an attempt to have its property rezoned, there is no evidence of negotiations between the parties, and no quid pro quo, only unilateral conditions requiring that necessary improvements be made).
not based on the merits of the zoning change request, nor because it is in the public interest, but because a deal had been struck.\textsuperscript{83} On the other hand, where a developer makes promises regarding the use of the land, but the city council makes no reciprocating promises, the rezoning that follows is not be regarded as contract zoning. If all that is alleged is that “a reciprocal understanding resulted in a tacit agreement” based upon the landowner’s assurance to the zoning authorities that the property would be used only for a particular purpose and that any activity of the zoning authority, no contract zoning is found based upon the assumption that this was the use to which the property would be subjected to the rezoning.\textsuperscript{84} Courts have explained that “[t]he illegal aspect of contract zoning occurs when a zoning authority binds itself to enact a zoning amendment and agrees not to alter the zoning change for a specified period of time.”\textsuperscript{85} When a zoning authority takes such a step and curtails its independent legislative power, it has acted \textit{ultra vires} and the rezoning is therefore a nullity.\textsuperscript{86} Short of such act, however, the rezoning of

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\item \textsuperscript{83}Id. at--.
\item \textsuperscript{84}Dale \textit{v. Columbus}, 101 N.C. App. 335 (N.C. Ct. App. 1991). There, a small tract was rezoned Highway Commercial from an R-2 Residential district. The parcel faced a major highway to its south and across that road, the land was zoned Public Service. At its southwest corner, the tract touched a Highway Commercial district and a city boundary. Across that boundary was a county Highway Commercial district. The record was clear that the planning board discussed the negative effects of highway traffic on any residential property along the road. The board reviewed the commercial nature of the remainder of the and the town’s comprehensive plan of commercial development along the highway. It also discussed the possible benefits of increasing the town’s tax base and providing more jobs through the establishment of more commercial enterprises. The appellate court ruled that there was no showing of illegal contract zoning which “properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a \textit{bilateral} contract.” \textit{Id.} at 338, \textit{citing Chrismon v. Guilford County}, 322 N.C. at 635, 370 S.E.2d at 593; \textit{see Allred v. City of Raleigh}, 277 N.C. 530, 178 S.E.2d 432, and \textit{Blades}, 280 N.C. 531, 187 S.E.2d 35.
\item \textsuperscript{85}Id. at 338, \textit{citing Chrismon v. Guilford County}, 322 N.C. at 635, 370 S.E.2d at 593 (citing Shapiro, The Case for Conditional Zoning, 41 Temp. L.Q. 267, 269 (1968).
\item \textsuperscript{86}Id. The court found no evidence of any reciprocal agreement made between the board and the current owner, the applicant who filed for rezoning, or with anyone else concerning the property. The transcript was unequivocal that the board understood that if the property was rezoned, the owner was not bound to operate an automobile dealership or any other specific establishment on the tract. The record was also clear that the board was advised of all the possible uses that could be made in a Highway Commercial district and of the possible uses if the property remained R-2 Residential. After comparing the two alternatives, the board made the decision to rezone.” Dale \textit{v. Columbus}, 101 N.C. App. at 339-40. The court then concluded, “[f]urthermore, all the proper rezoning
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land raises no contract zoning issue. 87

2. Some Courts Rejecting Per Se Illegality of Agreements

Most jurisdictions have declared agreements amounting to contract zoning invalid per se. 88 The reasoning being that “the police power may not be exerted to serve private interests

procedures were followed in this case. Initially, the proposed change was referred to the Town Planning and Zoning Board, which endorsed the change. A public hearing was held, and at a separate public meeting, the board unanimously adopted the zoning change. There was no indication that the Board’s decision was a foregone conclusion or that the decision-making procedures were a ploy to cover up a hidden agreement between the landowner and the zoning authority. Plaintiffs’ argument that the board’s knowledge of the landowner’s intended use may have influenced their decision was not sufficient to support an allegation that contract zoning occurred. Id., citing Chrismon v. Guilford County, 322 N.C. at 636, 370 S.E.2d at 593.

The Alabama courts have also looked for a “binding mutual agreement between the city and the developer before finding contract zoning. In Bradley v. City of Trussville, 527 So.2d 1303 (Ct.Civ.App. 1988). The city gave a right of way to the property owner through park land for a road to facilitate the development of newly annexed adjoining land, which the city rezoned. The court found no evidence of an agreement between the city and developer to rezone. Rather, the agreement was that if the Zoning and Planning Commission did not rezone the property to the classification sought, and there appeared to be no assurance that it would then, the city would agree to de-annex the property. Id. at 1306. Moreover, the court found the city did not abdicate its legislative responsibility with regard to annexing and rezoning of the property. On the contrary, the evidence indicated the city was extensively involved in the development of the subdivision. There was much negotiation between the city the developer both as to the type of residential subdivision that would be built and type of road that would be laid through the park. And, public hearings were held on the developer’s petition to rezone. Id. at 1306.

88 In Wilmington Sixth District Community Committee v. Pettinaro Enterprises, 1988 Del. Ch. LEXIS 142 defendants sought to have rezoned a former hospital site to permit residential development and use. Defendants negotiated for the possible purchase of the site, which required rezoning. There was introduced an ordinance providing for the rezoning of the site for residential use. Shortly thereafter, defendants met with representatives of the Committee to assuage the expressed concerns over the possibility of the renting of the units erected on the site, the lack of adequate parking and the increased congestion which would follow in the neighborhood if the rezoning occurred. Defendants assured the Committee and represented at a public hearing that all housing units would be offered for sale with no rentals and that ample parking would be provided and that they would ask the seller to place restrictions in the deed of conveyance to that effect. The application for rezoning received unanimous approval from the Planning Commission. However, the deed did not contain any such restriction and defendants changed their plans deciding on 3 story townhouses, establishing a lease payment arrangement whereby a prospective purchaser could lease a unit for a time. Plaintiffs filed an action seeking specific performance of defendant’s representations to the Council. Defendants asserted two arguments that the representations made to the Council did not as a matter of law create an enforceable contract, the performance of which could be specifically enforced because it would amount to contract zoning. The court stated: “even assuming arguendo that the necessary prerequisites for a contract arose by the defendant’s representations to Council, contracts between a municipality and a developer to rezone in accordance with mutual promises are apparently per se invalid in Delaware,” as the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the consideration which enter into the law of contracts. The court noted that this rule is contrary to the holdings of some other courts which have upheld contract zoning if reasonable, non-discriminating and serving the public welfare. Id. at *8. The court went on to distinguish contract zoning (involving a bilateral agreement) from conditional zoning (where the government does not agree to rezone but merely decides to impose conditions which would otherwise not be applicable to the land), but found the rezoning here was not conditional zoning because the council approved the
merely, nor may the principle be subverted to that end.” Further, the rezoning of a parcel of property by a municipality based in any way upon an offer or agreement by an owner of property is said to be illegal to the extent that it is inconsistent with, and disruptive of, a comprehensive plan.”

One court stated: “[i]f local government could change its zoning laws by private agreements with individual landowners, a hodgepodge of regulations would develop, the legislative process would be usurped, and the public good would be compromised.” Still, as stated, it is not at all clear from a reading of the cases when contract zoning occurs and not all zoning actions taken in connection with an agreement with an affected landowner is unlawful, that is, the existence of an agreement per se does not invalidate related zoning actions. Instead, in most jurisdictions, it is the nature of the agreement and the character of the zoning action that determines the outcome. Some courts have specifically upheld contract zoning or have declined to declare it illegal under all circumstances. In Alaska, contract zoning has been...
soundly upheld. *City of Homer & City Council v. Campbell*,\(^94\) finding contract zoning a property right, the deprivation of which is subject to due process.\(^95\) In *State ex rel. Myhre v. City of Spokane*,\(^96\) the court took the view that “a zoning ordinance and a concomitant agreement should be declared invalid only if it can be shown there was no valid reason for a change and that they are clearly arbitrary and unreasonable, and have no substantial relation to public health, safety, morals and general welfare, or if the city is using the concomitant agreement for bargaining and sale to the highest bidder or solely for the benefit of private speculators.”\(^97\)

The courts of Indiana have declined to rule on the question whether contract zoning is illegal. In *Prock v. Town of Danville*,\(^98\) the court declared “Indiana courts have not yet addressed the issue whether a contract for zoning is illegal. However, the court noted, several courts in its sister states have considered the issue and, in general, they hold that contract zoning is illegal.”\(^99\)

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\(^94\) 719 P.2d 683 (Alas. 1986).
\(^95\) *Id.*, citing *Seward Chapel, Inc. v. Seward*, 655 P.2d 1293, 1297 (Alas. 1982).
\(^96\) 70 Wash. 2d 207, 216, 422 Pac. 2d 790, 796 (1967)(The court found that the concomitant agreement was not ultra vires because: (1) the city's requirement that it be reimbursed for costs related to condemnation proceedings for property needed for right-of-ways was within the city's legislative authority; and (2) the agreement only granted the development company its statutory right to file a petition to vacate certain streets, but did not oblige the city to grant such a petition.
\(^97\) *Id.; see also Hudson Oil Co. of Missouri v. City of Wichita*, 193 Kan. 623, 396 P. 2d 271 (1964).
\(^99\) *Id. at 559, citing Ford Leasing Development Corp. v. Bd. of County Comm’rs*, 186 Colo418, 528 P.2d 237, 240 (1974)(recognizing that the general rule in most states is that contract zoning is illegal as an *ultra vires*)
The court went on to discuss *Dacy v. Village of Ruidoso*,\(^{100}\) from the New Mexico Supreme Court. That case defined contract zoning as “an agreement between a municipality and another party in which the municipality’s consideration consists of either a promise to zone the property in a requested manner or the actual act of zoning the property in that manner...” However, the *Dacy* court refused to subscribe to a *per se* rule against contract zoning, but recognized that numerous courts had in fact declared contract zoning invalid *per se*, because it is an illegal bargaining away or abrogation of the police power.\(^{101}\) The *Dacy* court explained further that a contract in which a municipality promises to zone property in a specified manner is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures, including notice and a public hearing prior to passage and a right of citizens to be heard at the hearing. By making a promise to rezone before a rezoning hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public’s comments on that action.\(^{102}\) However, in *Dacy*,\(^{103}\) the supreme court pointed out that analysis implies that one form of contract zoning is legal: a unilateral contract in which a party makes a promise in return for a municipality’s *act* of rezoning. In this situation, the municipality makes no promise and there is no enforceable contract until the municipality acts to rezone the property. Because the municipality does not commit itself to any specified action before the zoning hearing, it does not

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\(^{100}\)114 N.M. 699, 845 P.2d 793, 796 (N.M. 1992).

\(^{101}\)Id. citing *Dacy* at 797, in turn citing *V.F. Zahodiakin Eng’g Corp. v. Zoning Bd of Adjustment*, 8 N.J.386, 86 A.2d 127, 131(1952); *Hartnett v. Austin*, 93 So.2d 86, 89 (Fla. 1956).

\(^{102}\)Id. at --.

\(^{103}\)114 N.M. 699, 845 P.2d 793 (N.M. 1992).
circumvent statutory procedures or compromise the rights of affected persons. The court pointed out that some have nonetheless condemned this form of contract zoning on the ground that the contracting party’s promise provides improper motivation for the municipality’s rezoning action. The court did not find this reasoning persuasive, since private interests are inherently involved in any zoning matter. Moreover, any potential misconduct that might occur through unilateral contract zoning may be corrected through judicial review if the action of the zoning authority is improper. The Dacy court implied that the agreement that results after the zoning hearing would be enforceable against the city; that it is the agreement before consideration of relevant factors that makes the agreement illegal.

In Prock, there was no contract zoning because there was no promise by the town that it would zone the property in any particular way. Rather, the agreement provided: “In consideration of the payment of the [fee], the town agrees to actively support [the developer’s proposed] operation within the [annexed area] and [the developer’s] attempts to secure all permits and approvals for [expanding] the area. Such support may include without limitation the submission of whatever reasonable documentation [was] required to establish the town’s need for the expansion of the [operation] upon receiving a request to do so from [the developer].” The court pointed out, by the agreement, the town was not contractually bound to zone the property in a particular way or promised that in the future it would rezone the property to expand the landfill. Further, the town did not promise to support the developer’s efforts regardless of

104 at *12-13.
105 at *13-14.
106 Id. at *14.
whether those effects were in compliance with the town’s statutory zoning procedures. Because there was no contract zoning, the court declined to express any opinion as to whether such contracts are in fact illegal and may result in rendering a zoning ordinance void. It seems though that in evaluating this bargained for agreement, the court drew a fine line between the agreement to support the developer’s application in exchange for the payment of a fee and a contract with mutual promises, the city agreeing to rezone in exchange for a fee.

In a more recent Indiana opinion, the court again declined to take a position on the legality of contract zoning. In *Ogden v. Premier Properties, U.S.A., Inc.*, the city council voted to adopt an ordinance which rezoned from residential to commercial certain property. The developer filed a petition to rezone four years earlier to construct a retail shopping facility. The Area Plan Commission recommended denial of the request to the City Council and the City Council denied the zoning petition. The developer filed another petition which was also denied, then another petition seeking to rezone the property. The Area Plan Commission recommended denial. Each rezoning petition included a use and development commitment, which placed restrictions and requirements on the proposed development. The city council considered the petition at a hearing at which the developer introduced a document titled “covenant” that contained written commitments “in addition to the covenants set forth in the use and development commitment.” The commitments were conditioned on the city council approving the developer’s zoning request and were binding on the developer for twenty years.

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107 *Id.* at *14.
109 The covenant was intended to accommodate the concerns of the adjoining landowners and the city council. For instance, the developer promised to construct berms on two sides of the proposed facility, restrict hours
The city council voted in favor of the petition adopting the rezoning ordinance which incorporated the use and development commitment.

The court rejected the contract zoning claim asserted by the neighbors. The facts there were weaker than in *Prock* where the town was a party to the agreement with the developer and agreed to support the developer in obtaining permits and approvals for the project. Yet, the court in *Prock* failed to find contract zoning. Here, the city council was not a party to the covenant, which did not bind the city council to zone the property in any particular way. As in *Prock*, the rezoning was approved before the covenant became effective, that is, the agreement was signed after the ordinance was passed, hence the town council could not have contracted away its power to zone because the zoning was already completed before the agreement was executed. Here, a provision in the covenant stated it would become effective five days after the passing of the ordinance. Consequently, the court held, the city council could not have bargained away its power to zone by virtue of the covenant.\footnote{The holding in this case can be criticized on the basis that the order in which the act of rezoning and formal signing of an agreement to rezone occurs does not make a critical difference, if the inducement for the rezoning is the promise by the developer and the rezoning contemplates the entering into the agreement.}

The Massachusetts courts have also rejected a *per se* treatment of all agreements between a municipality and a developer as illegal contract zoning. Instead, what seems to matter is whether the rezoning serves the public interest and that the consideration offered by the developer was not extraneous to the property at issue. In *McLean Hospital v. Town of* Id. of garbage disposal, maintain landscaping, construct improvements to the roads abutting the facility, including adding traffic lanes and turn lanes, and install a traffic light. Id.
Belmont, prior to rezoning, a hospital was situated on a “single residence D” zoning district, as a non-conforming use. It bordered on the northeast and northwest by residential zoning districts and in the southeast by local business districts. The hospital presented a proposal which led to the hospital and town entering into a memorandum of understanding of the proposal which contemplated rezoning the entire site, together with commitments generally, but not exclusively of benefit to the town (including legal protection of significant historical features, acquisition by the town of an interest in the site, including title to a major portion for open space and a cemetery), tax exemption for that portion dedicated for hospital operations, traffic management, and commitments for recreational benefits.

Pursuant to the memorandum of understanding, the town embarked on a process leading to comprehensive rezoning of the area; the proposed rezoning being substantially similar to the memorandum of understanding. The town planning board recommended approval of the amendment. After extended discussion, the amendment failed. But on reconsideration of a revised proposal that reflected concerns expressed earlier, the proposal passed. The hospital and the town then executed a memorandum of agreement incorporating the parties various commitments to each other. In considering a challenge to the rezoning, the court noted that the challengers employed the label “contract zoning” as an epithet that suggested that zoning

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110 Id. at 669.
112 The commitments included reducing the maximum square footage of the research and development subdistrict; the payment of $800,000 by the hospital to the town for traffic mitigation, payment by the town to the hospital of $1.5 million, and further amendments. Id. at 542, n.5.
113 Id. at 542.
114 Id. at 543.
115 Id. at 544.
116 Id. at 544.
action taken in connection with any agreement with an affected landowner is unlawful. This was
wrong as a general proposition.\(^{117}\) The court explained, the existence of an agreement \emph{per se}
does not invalidate related zoning actions; it is the nature of the agreement and the character of
the zoning action that determine the outcome.\(^{118}\) Attacks on zoning enactments as unlawful
contract zoning had been considered previously by the appellate courts in Massachusetts. Each
case featured an agreement between the municipality and the developer; in neither case did the
court invalidate the zoning action. In the first such case, \emph{Sylvania Elec. Prod. Inc. v. Newton},\(^{119}\)
the landowner agreed that should the city rezone a potential parcel from a single residence
district to a limited manufacturing district, it would restrict its uses of the parcel in various ways
and convey to the city an option to purchase a portion of the property. It was clear that the
respective undertakings were contingent on each other or, as the court expressed it, “the option
proposal was a significant inducement of the zoning amendment and the amendment induced the
giving of the option.”\(^ {120}\) The \emph{Sylvania} court went on to state, “the mutual dependence of the
parties’ commitments did not by itself render the zoning aspect invalid.”\(^ {121}\) This was true, said the
court, notwithstanding that local “officials let it be known that favorable rezoning depended in
great likelihood on the adoption of the option restrictions.”\(^ {122}\) Nor did it “infringe zoning
principles that, in connection with a zoning amendment, land use [was] regulated otherwise than
by the amendment.”\(^ {123}\)

\(^{117}\) \emph{Id.} at 545.
\(^{118}\) \emph{Id.}
\(^{120}\) 56 Mass. App. at 545, \emph{citing} 344 Mass. 428, 433.
\(^{121}\) \emph{Id.} at 546, \emph{citing} 344 Mass. at 434.
\(^{122}\) \emph{Id.} at 545-46, \emph{citing} 344 Mass. at 436.
\(^ {123}\) \emph{Id.} at 546, \emph{citing} 344 Mass. at 436.
The court explained, the “zoning regulations . . . exist[ed] unaffected by, and did not affect, deed restrictions.”\textsuperscript{124} In other words, the zoning action, if otherwise valid, stood by itself and its legitimacy was not lessened because it was accompanied, and even encouraged, by ancillary agreements not involving consideration extraneous to the property being rezoned.\textsuperscript{125} In \textit{Sylvania}, the zoning decision that the locus, as restricted by the owner, should be a limited manufacturing district “was an appropriate and untainted exercise of the zoning power. What was done involved no action contrary to the best interest of the city and hence offensive to general public policy.”\textsuperscript{126}

The other Massachusetts appellate case, \textit{Rando v. North Attleborough},\textsuperscript{127} was to the same effect. There, a developer sought a rezoning of land from a residential district to a commercial district.\textsuperscript{128} As an inducement to the town, the developer offered various accommodations, including a ‘no build’ buffer zone, traffic improvements, mitigation payments, and a commitment not to seek tax abatements with respect to the rezoned land for five years.\textsuperscript{129} The plaintiffs argued that the town had bargained away its police powers in return for the promised benefits.\textsuperscript{130} Likening the objection to that in the \textit{Sylvania} case, the \textit{Rando} court held warranted the finding of the trial judge that the town meetings had not been “‘improperly influenced to act on behalf of the developer rather than in the best interests of the town.’”\textsuperscript{131} In addition, the \textit{Rando} court agreed that the benefits promised by the developer did not constitute “‘extraneous

\textsuperscript{124}Id. at 546, citing 344 Mass. at 434.
\textsuperscript{125}Id. at 546, citing 344 Mass. at 434.
\textsuperscript{126}Id. at 546, citing 344 Mass. at 434.
\textsuperscript{128}Id. at 546, citing 44 Mass. App. Ct. at 604.
\textsuperscript{129}Id. at 546, citing 44 Mass. App. Ct. at 605.
\textsuperscript{130}Id. at 546, citing 44 Mass. App. Ct. at 607.
consideration,’” stating, “[w]e do not think a payment that is promised by the developer rather than required by the municipality and that is reasonably intended to meet public needs arising out of the proposed development can be viewed as an ‘extraneous influence’ upon a zoning decision.” Under this definition, the zoning authority was found not to have entered into a bilateral contract with a landowner because: 1) the landowner’s application for rezoning detailed various conditions to be placed on the proposed rezoned property, including undisturbed buffers, (these promises being unilateral and no promises were made by the zoning authority; 2) the zoning authority imposed a 100 foot buffer on a parcel and made no promise associated with this provision and the landowner made no promise in return. “Viewing the ‘whole record,’ there was no evidence that a transaction occurred in which either side undertook to obligate itself in any way. No meeting of the minds took place and no reciprocal assurances were made. The court continued, “[t]hus, challenges to zoning enactments on the basis that they are products of contract zoning provoke two questions: (1) was the action “contrary to the best interest of the city and hence offensive to general public policy;” and (2) did it involve extraneous consideration “which could impeach the enacting vote as a decision solely in respect of rezoning the locus?”

Rando seems much more narrow and strict in its treatment of agreements between municipalities and landowners, than Sylvania. In Sylvania, the court upheld an arrangement involving mutual commitments, contingent upon each other, where the landowner’s proposal was the main inducement for the rezoning, essentially on the ground that the rezoning was

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131 Id. at 546, citing 44 Mass. App. Ct. at 610-11.
132 Id. at 546, citing 44 Mass. App. Ct. at 609.
otherwise in the public interest, although not required. In contrast, in *Rando*, the court took pains to show only unilateral promises by the landowner, seemingly suggesting that contract zoning involving a bilateral agreement would be invalid in Massachusetts. Yet the *McLean* court relied on both *Sylvania* and *Rando* to uphold what could hardly be regarded as anything but a bilateral agreement. The *McLean* court’s reliance upon both cases, therefore makes the resolution of the issue unclear.\(^{135}\) *McLean* simply found the challengers failed to demonstrate that the interests of the town were not served by the rezoning. Indeed, while *McLean*’s interests were obviously enhanced, a factor that did not discredit the zoning action, the benefits that flowed to the town from the agreement were obvious.\(^{136}\) The town faced a situation in which *McLean* could develop the unused portion of its property into single family residences and had an immediate economic incentive to do so.\(^{137}\) *McLean* agreed to surrender this right, a concession of clear benefit to the town, on condition that the locus be rezoned; that *McLean* receive from the town a payment of $1,500,000; and that the town cooperate in an effort to obtain for *McLean* tax relief that was ordinarily enjoyed by institutions of similar character.\(^{138}\) The town received not only the elimination of the potential for an undesired residential development of the locus, an accomplishment that by itself would appear to satisfy the requirement that the zoning be for a

\(^{133}\) *Kerik v. Busick*, 145 N.C. App. 222 (2001). [This court quoting the two above].


\(^{135}\) The *McLean* court went on to state that, “[i]n determining whether the rezoning challenged here satisfied the criteria of *Sylvania* and *Rando*, we apply the standard that a party attacking a zoning amendment has a heavy burden, one requiring that he ‘‘prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare.’’ *Id.* at 547 (citations omitted). *Id.* at 547 (citations omitted). The challenger must demonstrate that the validity of the enactment ‘‘is not even fairly debatable.’’* *Id.* at 547 (citations omitted). If the validity of the zoning action is fairly debatable, local judgment on the subject should be sustained. *Id.* at 547 (citations omitted).

\(^{136}\) *Id.* at 547-48.

\(^{137}\) *Id.* at 548.

\(^{138}\) *Id.* at 548.
public purpose, but also open space; a cemetery; protection for significant historical features; commitments with respect to affordable housing and recreational benefits; and a traffic management agreement. The town meeting could lawfully conclude that the rezoning, given these commitments by the landowner, was substantially related to the general welfare. It was not improperly influenced to act on behalf of the developer rather than in the best interests of the town. The consideration flowing to the town under the agreement was not “extraneous” in the sense used in *Sylvania* and *Rando*, (as, for example, a request to give land for a park elsewhere in the city or to the general fund), which could impeach the enacting vote as a decision solely in respect of rezoning the locus. Rather, each element of such consideration was reasonably related to the locus being rezoned. The court explained “[w]e believe it too narrow to require that, in order not to be labeled extraneous, consideration must directly ‘mitigate’ some deleterious effect of the development authorized by the rezoning (although such consideration would obviously be permissible). Rather, it is adequate that the consideration bear some identifiable relationship to the locus so that there can be assurance that the town’s legislative body did not act for reasons irrelevant to the zoning of the site at issue.” This requirement was satisfied here. It seemed therefore that the crucial point was that the town benefit from the developer’s promises and that those promises relate to the parcel at issue.

In the end of the opinion, the court did state that the “rezoning was not a product of a bilateral contract that bound the town to rezone solely in consideration of the promises of the

139 *Id.* at 548.
140 *Id.* at 548 citing *Sylvania*, 344 Mass. at 434.
142 *Id.* at 548 citing *Rando*, 44 Mass. App.Ct. at 609.
143 *Id.* at 548 citing *Sylvania*, 344 Mass. at 434.
landowner,” at the same time recognizing that the rezoning was conditioned on the developer’s promises. It pointed out that the rezoning was not a term of a contract, but was a condition that had to be fulfilled before a separate agreement became enforceable. The court attempted to distinguish this from a bilateral contract between the developer and the municipality by stating that in the case before it, “the municipality made no promise and there was no enforceable contract until the municipality acted to rezone the property.” This distinction seems disingenuous and belied by the terms of the agreement. There seems very much of an agreement between the parties as the developer’s promises clearly induced the rezoning, and these promises would only be fulfilled upon rezoning. The court could have just upheld the rezoning based upon its concluding remarks that it saw nothing in the zoning act, or in other applicable legal principles that prohibited a municipality from negotiating with a private landholder to bring about the receipt of benefits for desirable public purposes once otherwise valid zoning has taken place, assuming that those benefits have some reasonable relationship to the site governed by the zoning. Indeed, as the court recognized such arrangements are consistent with good government in general and with effective land use planning in particular.

The court’s suggestion that a bilateral contract that bound the town to rezone solely in consideration of the promises of the landowner would be illegal, but that the city can negotiate and extract promises from a landowner and based upon these promises decide to rezone, so long

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144 Id. at 547-48.
145 Id. at 548-49.
146 Id. at 549.
147 Id. at 549. The court also ruled that “[t]he rezoning having been adopted for a valid public purpose in relation to an area that is discrete in its geography, contours, and size, it is not spot zoning. Id.
148 G. L. c. 40A, §§ 1 et seq.
149 Id. at 549.
as the rezoning benefits the city, makes too fine a distinction. Yet it seems to reflect the
approach taken by courts inclined to uphold rezoning where the developer has made significant
concessions of benefit to the parcel at issue and surroundings. In this vein, courts have held
that that the city stands to benefit from the rezoning, by itself, does not make an agreement
contract zoning.

What seems a departure from the qualified conclusion in McLean is Durand v. IDC
Bellingham, LLC, where the court focused it analysis of the contract zoning challenge on the
relationship the rezoning, finding what can only be regarded as a most tenuous relationship

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150 Id. at 549.
151 In Paul v. City of Manhattan, a restrictive covenant did not amount to contract zoning because it was not
a prerequisite to the zoning, nor a controlling factor in the court’s decision. They were merely considered as they
might bear on population density—a key issue raised by plaintiffs. Further, rezoning would conform to the master
land use plan even if the covenants were ignored. In Arkenberg v. City of Topeka, Kansas, 197 Kan. 731, 421 P.2d 213 (1966), in connection with an application by the developer for a rezoning, the developer expressed willingness
to convey to the city an easement for parking purposes consisting of a ten foot strip of land. Rezoning was
approved. The plaintiffs alleged contract zoning. The court held that it had held contrary to the case cited by
plaintiff, Hudson Oil Co. v. City of Wichita, 193 Kan. 623, 396 P.2d 271 (1964) stating “obviously the effect of any
agreement respecting the right of way would be to alleviate the traffic condition. If it were in fact made by the
governing body as a prerequisite to rezoning, which does not affirmatively appear, that would be a reasonable
requirement. Id. at 736, 421 P.2d 218. See also Bucholz v. Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (upholding rezoning ordinance where enacted with protective covenants including a buffer zone between the
proposed shopping center abutting the residential area where there was no evidence of a bargain or agreement
between the developer and the city, only representations made by the developer to the city in their rezoning
application; the effect of the protective covenant was to give some further assurance to the city that the adjoining
landowners that the representations of the applicant were made in good faith, giving the city greater control over
development of the property rezoned).
the landowner accepts in order to have the amendment enacted, have held such “contract zoning” found to be a valid
exercise of the police power).
2000) (The city agreed to bear the cost of construction with the understanding that, if the zoning was changed to
allow for residential or commercial development of the abutting property, the developer would contribute to the cost
of the road in proportion to the manner and extent to which the property was developed. Neither the original
agreement nor side agreement, which supplemented it, required the city to zone the property in any particular way;
the fact that a city stood to benefit from a zoning decision did not disqualify the city from enacting zoning
regulations and “could not be considered as illegally controlling the course of legislative decision making”).
between the consideration received and the parcel at issue sufficient to avoid the contracting away of governmental powers challenge. There, the Massachusetts high court upheld a rezoning where the developer offered to make an $8 million gift for the construction of a new high school if its rezoning was permitted and a power plant built and operated on the site. The town held an open town meeting at which the proposed rezoning was introduced. IDC made a presentation at the meeting and reiterated its offer of an $8 million gift. The planning board and finance committee both recommended passage of the zoning article. There was some discussion of the zoning aspects of the proposal, as well as discussion regarding the offered gift. The ordinance passed by more than the two-thirds vote required. Thereafter, IDC submitted an application for five special permits, which were granted. Landowners located near the site filed suit against IDC, the town and the town zoning board of appeals, arguing inter alia that the rezoning constituted illegal “contract zoning” or “spot zoning”. The trial court viewed the $8 million gift as extraneous consideration since no attempt was made to show it was offered to mitigate the impact of the project. As such, it was offensive to public policy. The trial court ruled that the offer made was sufficient to nullify the rezoning vote, even without the necessity of finding that

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155 Id. at 47. Previously, the town had begun to examine ways to increase its property tax base and an economic development task force was appointed to study the issue. The task force prepared a report, identifying a parcel of land which abutted land already zoned for industrial use, as a candidate for rezoning from agriculture and suburban to industrial use. Subsequently, at the town meeting, a zoning article proposing the rezoning fell eight votes short of the required two-thirds majority. Thereafter, IDC, which owned a power plant in the town, began discussions with town officials about the possibility of rezoning the site so that a second plant might ultimately be built on it. These discussions included the subject of what public benefits and financial inducements IDC might offer the town with regard to the proposed power plant. The town administrator told IDC that the town was facing an $8 million shortfall in its plans to construct a much-needed new high school. Shortly thereafter, the president of IDC publicly announced that IDC would make an $8 million gift to the town if IDC decided to build the plant; obtained the financing and permits necessary to build the plant and operated the plant successfully for one year. The offer was made to generate support for the plant and became public knowledge in the town. Id. at 47.
voting town meeting members were influenced by it.\textsuperscript{156} The Supreme Judicial Court of Massachusetts reversed.\textsuperscript{157} “The enactment of a zoning bylaw by the voters at town meeting is not only the exercise of an independent police power; it is also a legislative act, …carrying a strong presumption of validity.”\textsuperscript{158} It will not normally be undone unless the plaintiff can demonstrate “‘by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, … or general welfare.’”\textsuperscript{159} The court explained, this analysis is not affected by consideration of the various possible motives that may have inspired the legislative action.\textsuperscript{160} The court explained, contract zoning involves a promise by the municipality to rezone a property either before the vote to rezone has been taken or before the required statutory process has been undertaken. The court ruled that the trial court found no such advance agreement occurred here, since despite IDC’s offer of $8 million, the voters of the town meeting were not bound to approve the zoning change. Because the town followed the statutory procedures, the rezoning was not illegal under state law on that basis.

The court noted that the trial judge found the $8 million offer substantively valid, meaning not arbitrary nor unreasonable, and was substantially related to the public health, safety, or general welfare of the town. In other words, its adoption served a public purpose. Here, the site abutted land zoned for industrial use; a town-appointed task force had recommended its rezoning after studying the town’s tax base and the need for economic development and a

\textsuperscript{156} Id. at 49-50.
\textsuperscript{157} The court began with a discussion of the source of the municipality power to enact local ordinances, i.e, the Home Rule Amendment to the Constitution. The zoning power enabled municipalities to enact zoning ordinances or bylaws as an exercise of their “independent police powers.”\textit{Id.} at 51.
\textsuperscript{158} \textit{Id.} at 51.
\textsuperscript{159} Id. at 51. [citations omitted].
\textsuperscript{160} Id. at 51. [citations omitted].
previous rezoning attempt barely failed the two-thirds vote required. Therefore, the enactment of
the rezoning was not violative of state law or constitutional provisions as the $8 million was not
extraneous consideration. Instead, the court concluded that a voluntary offer of public benefits is
not, standing alone an adequate ground on which to set aside an otherwise valid legislative act.161
In general, the court found no reason to invalidate a legislative act on the basis of an “extraneous
consideration” because courts defer to legislative findings and choices without regard to motive.
And, the court saw no reason to make an exception for legislative acts that are in the nature of
zoning enactments, and found no persuasive authority for the proposition that an otherwise valid
zoning enactment is invalid if it is any way prompted or encouraged by a public benefit
voluntarily offered.162 The offer of a benefit in exchange for the exercise of the municipality’s
zoning power seems to fall at the heart of the contract zoning prohibition, if the prohibition exists
for that sake alone. But if it exists to impose a showing that the rezoning act is otherwise in the
public interest, then the fact that a municipality achieves a benefit while otherwise faithfully
carrying out its responsibilities then what was upheld should not be of great concern, particularly

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161 The Supreme Judicial Court ruled that the trial court’s reliance on *Sylvania* to this effect was misplaced. That opinion cited no supporting authority for the proposition that the presence of an “extraneous consideration” at the time of the vote on a zoning amendment would invalidate the vote, but the language has since been given added life in two cases decided by the Appeals Court, *McLean Hosp. Corp. v. Belmont*, 56 Mass. App. Ct. 540, 546-547 (2002), discussed supra, where the court held that the promise of the landowner to surrender its right to develop an unused part of the property and provided open space; a cemetery; protection for significant historical features; commitments with respect to affordable housing and recreational benefits; and a traffic management agreement were not extraneous consideration, but as reasonably related to the locus being rezoned); *Rando v. North Attleborough*, 44 Mass. App. Ct. 603, 608-09 (1998)(payment that is promised by the developer rather than required by the municipality and that is reasonably intended to meet public needs arising out of the proposed development can not be viewed as an ‘extraneous influence’ upon a zoning decision.”).

162 *Id.* at 57. The dissent found that the town meeting improperly agreed to exercise its power to rezone land in exchange for a promise to pay money; the exercise of that power to approve the requested zoning change was a condition precedent to the promise of IDC to pay money under its agreement with the town; that this was not a decision solely in respect of rezoning the site; the parties struck a bargain: the payment of money in return for a zoning change. This was a sale of the police power because nothing in the record legitimized the $8 million offer as
if the municipality could have rezoned without the benefit offered. Although, there is the concern that the public interest considerations may be given short shrift with the lure of $8 million dollars, but that can be tested by judicial review.  

B. Lack of Transparency Where Zoning Bypasses the Statutory Procedures

Contract zoning has been held to be objectionable where it bypasses the notice and public hearing procedures required for enacting a zoning ordinance. The lack of transparency occurs even if the municipality informs the public at the time of the rezoning that the land at issue will be governed by separate rules, because others who come later to examine the ordinance to try to understand the general plan for the community will not understand fully how the plan is intended to mitigate the impact of the development upon the town, or as reasonably intended to meet public needs arising out of the proposed development.

But see Treme v. St. Louis County, 609 S.W.2d 706 (Ct. App. Mo. E.D. 1980). There, the court, in its in-depth discussion of contract zoning stated, declared invalid as an instance of contract zoning, an ordinance where the consideration was extraneous to the land at issue. There, “[t]he ‘contract zoning’ charge arose from the requirement of the ordinance that the developer improve the road next to the property and widen a one-lane bridge on the road near, but not adjacent to, the property.” Id. at 716. The court explained that where the offer made or the exaction demanded for the rezoning bears no reasonable relationship to the activities of the developer the action of the county or municipality in rezoning the property in exchange for such offer or exaction, amounts to a contracting away of the police power, which is forbidden. Id. at 715. The court addressed the case of State ex rel Noland v. St. Louis County, which dealt with this problem in the context of subdivision legislation. “The test to be applied there was: that there must be some ‘reasonable relationship’ between the proposed activity of the landowner and the exaction of government. Id. at 716-17, citing Art. XI, Sec. 3, Mo. Const.; see also Kansas City Power and Light Co. v. Midland Realty Co., 338 Mo. 1141, 93 S.W.2d 954 (1936), aff’d, Midland Realty Co. v. Kansas City Power and Light Co., 300 U.S. 109, reh. den. 300 U.S. 687, (1937). Whether or not the conditions imposed are within or outside the area of the subdivision would be immaterial so long as they met such a standard. Id. The court stated that it is not clear what distinction the State ex. rel. Noland court was drawing between zoning and subdivision cases and doubted that the court meant that in zoning the relationship could be unreasonable. Because there were no cases in Missouri involving zoning conditioned upon a particular performance, the court may have been distinguishing zoning and subdivision control for that reason.” Id. The court went on to discuss City of Bellefontaine Neighbors v. J. J. Kelley R & B Co., 460 S.W.2d 298 (Mo. App. 1970), in which that court upheld the validity of a road improvement promise by the subdivision developer as a condition to development of the subdivision. There the court “recognized that such power could arise from a zoning or street development plan, and in that case the city had acted under a provision of its zoning ordinance.” The test applied in State ex rel Noland v. St. Louis County, has been applied in other jurisdictions, including State ex rel Myhre v. City of Spokane, 70 Wash.2d 207, 422 P.2d 790 (1967); City of...
designed because the plan itself will not reflect all of the considerations which went into the rezoning decision. Similarly, if the planning board has already contracted to support the landowners’ request for rezoning before public hearing, it had invalidly contracted away its discretionary legislative power as the final decisionmaking authority. Hearings regarding the issue of rezoning would then be a pro forma exercise since the County has already obligated itself to a decision. The court concluded that the county’s agreement to “support and expeditiously process” landowner rezoning application can be viewed as a form of contract zoning.

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*Knoxville v. Ambrister*, 196 Tenn. 1, 263 S.W.2d 528 (1953). *Id.* at 717, citing Home Builders Association of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832 (Mo. banc 1977).”

*Morgran Company, Inc. v. Orange County*, 818 So. 2d 640 (Fla. 2002).

*Id.* at 644. The city had not expressly or irrevocably committed itself to rezone the area. Nonetheless, the court concluded that since the decision to rezone was contingent on the filing of restrictive covenants by the developer a bargaining away of police power had occurred. at 89.

*Id.* The question of bypassing the notice and public hearing procedures has also arisen in the context of settlement of litigation brought by a developer challenging the municipality’s denial of an application for a proposed land use. *Chung v. Sarasota County*, 686 S.2d 1358 (Fla. 2d Dist.Ct. App.(1996). There, the landowner filed a petition with the county to rezone eleven acres. After rezoning petition was denied by the county commissioner, landowner took legal action. Then the landowner and the county entered into a settlement agreement which obligated the county to rezone the landowner’s property, subject to numerous stipulations and conditions. Based upon the settlement, the trial court entered a stipulated final judgment and retained jurisdiction over its enforcement. An adjacent landowner intervened and the trial court vacated the stipulated final judgment. On appeal, the adjacent landowner argued the settlement amounted to contract zoning. In agreeing with the adjacent landowner, the court explained that “contract zoning refers to an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government’s rezoning or an enforceable promise to rezone.” The court explained that “one of the reasons contract zoning is generally rejected is because ‘the legislative power to enact and amend zoning regulations requires due process, notice, and hearings.'” “Assuming that the developer and municipality bargain for a rezoning ordinance that is fairly debatable and non-discriminatory, contract zoning is nevertheless illegal when they enter into a bilateral agreement involving reciprocal obligations. By binding itself to enact the requested ordinance (or not to amend the existing ordinance), the municipality bypasses the hearing phase of the legislative process.” Here, under the settlement agreement, the county bound itself before satisfying the public notice and hearing requirements. This could not be allowed for the carefully structured provisions for public notice, public hearings, and in many cases, required consideration of staff or planning commission recommendations, would be stripped of all meaning and purpose if the decisionmaking body had previously bound itself to reach a specified result. *Id.* citing D. Lawlor, Annotation, Validity, Construction, & Effect of Agreement to Rezone or Amendment to Zoning Ordinance, Creating Special Restrictions or Conditions not Applicable to Other Property Similarly Zoned, 70 A.L.R.3d 125, 131 (1976); P.C.B. Partnership v. City of Largo, 549 So.2d 738 (Fla 2d D.C.A. 1989); see also Terry Lewis, et. al., *Spot Zoning, Contract Zoning, & Conditional Zoning*, in 2 Florida Environmental & Land Use Law 9-1, 9-13 (James J. Brown, ed.2d 1994); Roy P. Cookston & Burt Bruton, *Zoning Law*, 35 U.Miami L. Rev.
The Maryland courts have taken a similar position on rezoning arising out of settlement agreements, specifically and against agreements whereby the city agrees to rezone upon the landowner’s agreement to conditions to be imposed on the land.\textsuperscript{167}

\textsuperscript{167}In \textit{Attman/Glazer P.B. Company v. Mayor & Alderman of Annapolis}, Id. at 680, 552 A.2d at 1280, a developer sought rezoning of two parcels that had been acquired and assembled by the city for an urban renewal project. Originally, one parcel was zoned neighborhood commercial and business use and the other for residential use. The developer proposed the construction of a commercial office building. The developer’s initial request was granted and the aldermen amended the urban renewal plan to change the designation of the two parcels to commercial use. The resolution also permitted the erection of a professional office building, on the condition that the owner of the building provide 252 parking spaces, which could be located on-site or on other property within 500 feet of the building. By resolution, a conditional use for the proposed building was approved. Disagreements later developed as to the number of parking spaces to the point that the city denied the developer a use permit for the building. The developer sued and the parties reached a settlement agreement, although there was serious disagreement between the parties as to the terms of their settlement. The court of appeals ruled that if, as the developer contended, the agreement was intended to require the city council to grant an amended conditional use on the conditions specified, the agreement was invalid. Id. at 684, 552 A.2d at 1282. The court stated that these closely related functions often grouped generically under the broad topic of zoning, involve the exercise of the power of land use regulation that was delegated to the city by the Maryland Code. Just as zoning authority is required to follow procedures mandated by statute, and to exercise its unconstrained independent judgment in deciding matters of reclassification, so too must the appropriate authority whether the zoning authority or a duly authorized board of
C. Other Substantive Objections to Contract Zoning: Agreements that Destroy the Uniformity That is Required in Each District

Agreements which would result in the destruction of the uniformity that is required by Euclidean zoning have been struck down as a form of contract zoning. That was the position taken by the Florida Supreme Court in Hartnett v. Austin. There, the landowner wanted to buy land and build a shopping center, it asked the city to rezone the land for commercial use. The city refused to make the change unless the landowner agreed to certain conditions, including building a wall, maintaining a 4' setback, landscaped the setback; protected neighbors against glare and disturbance; and paid for additional police protection. The action was held invalid, the court stating, “if each parcel or property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse.”

In Illinois, early on, contracts between a city and a developer regarding zoning were similarly condemned on this basis among others. In Cederberg v. City of Rockford, the city rezoned two lots from residential to local business. In rezoning, the landowner was required to execute a restrictive covenant, which was recorded, as a condition to the passage of the zoning committee’s report recommending rezoning. The covenant provided that notwithstanding the rezoning and business classification (which by the City’s ordinance, permitted forty-four types of local businesses) twenty-six enumerated uses, would not be allowed on the lots in question.
Both parties agreed that the covenant was a type of contract zoning, and as such void. The question left for review was what effect, if any, the restrictive covenant bore on the validity of the ordinance rezoning the property from residential to local business district. The court agreed with the trial judge and the parties that the restrictive covenant was an invalid attempt by the city to control the use of the land. The parties’ briefs cited three cases as authority for this conclusion. Each case condemned the practice of regulating zoning through agreements or contracts between zoning authorities and property owners. While no single basis for the rule against such zoning practices emerged from the cases cited, among the courts, the reasons were that by entering into agreement with the property owner, the zoning authority might use the zoning power to further private interests in violation of public policy; that such rezoning is a deviation from a basic zoning plan resulting in non-uniform application of the zoning law and inconsistencies within a zoning classification; that when the actual zoning requirements in force are determined by reference to evidence extrinsic to the zoning ordinance, that zoning law is rendered vague.

Where the evidence shows that the city enters into an agreement with a landowner and is

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171 8 Ill.App. 3d 984, 291 N.E.2d 249 (1972); But see Goffinet v. County of Christian, 32 Ill. App. 3d 108, discussed infra at text accompanying notes ----, expressing acceptance of conditional zoning.
172 Id. 986, 291 N.E.2d at 251, citing Houston Petroleum Co. v. Automotive Prod. C. Ass’n, 9 N.J. 122, 87 A.2d 319 (1952); Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956).
173 8 Ill.App.3d at 986, 291 N.E. 2d at 251. Noting that the exact problem presented by the case had never been decided in Illinois, the court discussed a similar case, Hedrich v. Village of Niles, 112 Ill. App. 2d 68, 77 (1969), which established the rule that zoning ordinances should not be subject to bargaining or contract, that when zoning is conditioned upon collateral agreements or other incentives supplied by a property owner, zoning officials are placed “in questionable position of bartering their legislative discretion for emoluments that had no bearing on the requested amendments.” The zoning ordinance also failed in the absence of evidence that it was necessary or that it was granted only after a consideration of the appropriate use of the land within the total zoning scheme of the community or that the city gave any consideration to the statutory standards of public health, safety, comfort, morals or welfare, and the effect of the enactment taken together with the covenant, was to create a classification not set forth in the general zoning ordinance. Id. at 986.
involved in the development process and has not simply acted to rezone at the request of the developer, a finding of contract zoning is not required.\textsuperscript{174}

\textbf{D. Where the Municipality is Not a Party to the Agreement

Contract Zoning has not been Found}

Where the zoning authority is not a party to an agreement between the town and the developer, and the zoning authority acts to rezone in accordance with the public hearing requirements, contract zoning has not been found, even where it appears that the zoning authority was motivated to rezone by the agreement.\textsuperscript{175} Thus, under one court’s conception, when a city itself makes an agreement with a landowner to rezone the contract is invalid; this is contract

\textsuperscript{174} In \textit{City of Orange Beach v. Peridio Pass Development Inc}, 631 So. 2d 850 (Ala. 1993)(the developer proposed development of an island which at the time it was purchased by the developer was outside the boundaries of any municipality. Developer met with the Mayor of the City of Orange Beach and discussed an annexation of the island to the city. The Developer wrote a letter to the city attorney requesting Planned Unit Development Zoning, which would allow various types of development and mixed use within the area. The City Attorney amended the letter by adding a request for the least restrictive zoning and a statement that zoning would occur at the time of annexation. The Mayor and the developer also discussed the idea that the annexation was conditional upon receiving the zoning. The Developer then submitted an annexation-zoning letter to the City of Orange Beach, which agreed to support the project. The Developer wrote the Town Council stating that the development would occur in several phases and reduced number of lots. The Town Council then reconfirmed its approval of the project. The City annexed the island. The Developer sold the island to Peridio Pass Development, Inc. which began to plan its development in reliance upon receiving proper development zoning. At a town council meeting, several members of the community began to express concerns for the impact on the coastal development. The council voted to deny the Developer's request for PUD zoning. The Developer brought a breach of contract action against the Town. In defense, among other things, the Town Council claimed that the implementation of the agreement would amount to unlawful contract zoning by a municipality that is legislative in nature. However, the court rejected that argument, stating that an annexation and zoning agreement is permissible if the city does not abdicate its legislative responsibility and the city is extensively involved in the development of the property, as the evidence showed the city was here.

\textsuperscript{175} In \textit{Funger v. Mayor and Council of the Town of Somerset}, 249 Md. 311, 328, 239 A.2d 748, 758 (1968)(an agreement between developer and the town whereby the town would recommend to the county council rezoning and the developer to subject two acres to a scenic and conservation easement, limit the development of 16 acres for a period of twenty years to the use currently permitted in the rezoned classification and to the density currently permitted for 18 acres and to give the town 12 acres of the tract for park land. The area was rezoned by the county council following the hearing. The ordinance was held valid and not contract zoning. \textit{See also State ex.rel. Zupanic v. Schimenz}, 46 Wis. 2d 22, 174 N.W.2d 533 (1970)(agreement between neighboring landowners and developer made enforceable by the city by injunction, held valid where the agreement did not directly involve the city, but noting that a contract between the city and landowner to zone or rezone would be illegal, and the ordinance void); \textit{But see Pressman v. Baltimore}, 222 Md.330, 160 A.2d 379 (1960)(invalidating an ordinance adopted by the
zoning. However, when the agreement is made by others than the city to conform the property in a way or manner which makes it acceptable for the requested rezoning and the city is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid.176

E. Special Types of Zoning Resist Challenge as Contract Zoning

Special types of zoning may require pre-zoning contact, negotiations and bargains between the developer and the city toward the adoption of a development plan, and such contacts and bargains may not be regarded as contract zoning. In *Rutland Environmental Protection Ass’n v. Kane County*,177 the county rezoned the property from farming to a *community unit district*, (“CUD”) allowing the developer to build an amusement park.178

The court found that CUD is a method of land use control designed to supplement existing master plans and zoning ordinances. It permits combining different land uses on the same tract, is intended to apply to specific property and is meant to facilitate the development of an environmentally sound and functional unit. Flexibility is the advantage which CUD zoning enjoys over traditional Euclidean zoning which divides a community into districts and rezones segregated uses. Since the overall aims of CUD zoning cannot be accomplished without

176 *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 28 (Wis. 1970).
178 *Id*. at 86, 334 N.E.2d at 220. Under, an applicant for zoning must, at in informal conference, submit to the plat officer a sketch plan describing existing conditions of the site and of the proposed development. After the pre-application conference, the plat committee reviews the proposal. Recommendations made by the plat officer or committee during the initial review may be incorporated into the development plan. After approval in the initial proposal by the plat committee, a detailed development plan is prepared which must include certain specified information, and this plan is then reviewed by the plat officer’s and committee with approval contingent upon the plan meeting specified criteria. Regulations require that a developer’s final plan contain approved provisions for such items as streets, utility easements, water distribution, lighting and landscaping. It is only after the plat
negotiations and because conferences are indeed mandated by the regulatory ordinance, the conduct of the defendants in meeting beforehand with the developer could not be read as constituting contract zoning.\textsuperscript{179}

Similarly, agreements in connection with floating zones and planned unit developments ("PUD"),\textsuperscript{180} two innovative devices that have also withstood the contract zoning charge. Their effect is similar, in that the local government may require performance of certain conditions and impose restrictions before approving the developer’s plan.\textsuperscript{181} A floating zone is by definition committee has approved the development plan that the applicant may first petition for CUD zoning.\textsuperscript{179}

\textsuperscript{179}Id.

\textsuperscript{180}The floating zone involves a predetermined set of criteria established in the zoning code, but not yet affixed to any specific property. Before the zoning authority “settles” the floating zone on a particular tract, the developer must comply with the conditions, density, setback, height, and other specified requirements. A minimum size for the proposed zone may be required and the ordinance usually imposes conditions of the traditional Euclidean zoning type. A planned unit development resembles a floating zone. It is a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of land. The ordinance authorizing the PUD will usually define the rights and objectives only in general terms, leaving the specifics to the development by the developer. Roy P. Cookson and Burt Bruton, Zoning Law, 35 U. Miami L. Rev. 581, 593-94 (1981); DANIEL MANDELKER, LAND USE LAW §§ 6.60; 6.61; 9.01, 9.24.

\textsuperscript{181}In Old Canton Hills Homeowners Ass’n v. Mayor and City Council of the City of Jackson, Mississippi, 749 So. 2d 54 (Miss. 1999), a developer filed a zoning application requesting the city to rezone approximately 21 acres out of a 150 acre parcel of land known as the Avery property from a single-family residential and general commercial classification to a restricted commercial and limited commercial classification. Plaintiffs opposed this rezoning application and the developer withdrew the application, then refiled seeking to develop the same area as a PUD. The planning board approved the proposed PUD and recommended that the application be approved by the Jackson City Council, contingent upon the addition of a housing component. Following the required notifications, the planning board considered the developer’s application, but failed to reach consensus. The developer then filed an amendment increasing the size of the proposed PUD from 21 to 50 acres. The city’s site plan review committee approved the site plan for the PUD contingent upon the completion of 23 requirements. After a hearing, the city council unanimously approved the application, contingent upon the 23 requirements, \textit{Id.} at 56, which included a pedestrian circulation plan, that the revised site plan comply with all requirements of a PUD district of the zoning ordinance; that the functional aspects of the project not negatively impact surrounding land uses of the area’s infrastructure capacity; that the covenants previously submitted by the developer be incorporated as much as possible into the final covenants and that the final covenants be approved by the city council. \textit{Id.} at 56-57. Plaintiffs challenged the rezoning on the ground \textit{inter alia} that it amounted to contract zoning which is illegal. The court pointed out that “[a]n ample statutory authority exists in the form of traditional zoning legislation that may be construed to support this novel regulatory device. The key question is whether such authority should be narrowly or broadly construed. Many states have traditionally opted for narrow construction of enabling legislation to ensure against unwarranted action by local governments, but the present trend is toward a more expansive view of local government powers and a more generous interpretive view. \textit{Id. see also} Judith Welch Wagner, \textit{Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government

\textsuperscript{179}Id.
conditional. Rezoning to a floating zone, cannot, by its vary nature, be bound upon precise and inflexible standards for each plot of ground is different and the environment in which it lies is different. So long as the legislative decision is not arbitrary, capricious or unreasonable, landowners like plaintiffs have no cause to object because the determination made under the general standard of the ordinance produces different results on different tracts of land.

*Land Use Deals, 65 N.C. L. Rev. 957, 983-985 (1987).* The court chose to rely on the decision from the New Mexico, *Dacy v. Village of Ruidoso,* 114 N.M. 699, 845 P.2d 793, 796 (N.M. 1992), for proposition that “contract zoning was only illegal in cases in which a municipality committed itself to rezone property in such a manner as to circumvent the notice and hearing process or to compromise the rights of affected persons.” *Id.* The court noted that *Dacy* raised serious doubt as to whether the agreement in the present case constituted contract zoning at all, that court noting that: “[c]onditional zoning is not contract zoning at all, because it does not involve a promise by either party. Rather, conditional zoning describes the situation in which a municipality rezones on condition that a landowner perform a certain act prior to, simultaneously with, or after the rezoning. ... The absence of an enforceable promise by either party distinguishes conditional zoning from contract zoning,” *Id.,* citing 845 P.2d at 796, since the conditions set forth by the site plan committee and adopted by the city council were the sort of conditions inherent to any PUD, fully consistent with the goals and purposes of the PUD land planning device. *Id.* at 59. A planned unit development is a district in which a planned mix of residential, commercial, and even industrial uses is sanctioned subject to restrictions calculated to achieve compatible and efficient use of land. In sum, far from constituting a “contracting away” of the city’s police power, the contingent zoning/PUD constituted an effective tool for the development of the property in a manner which satisfied the concerns of the residents living closest to the property. *Id.* at 63.

182 In *Treme v. St. Louis County,* 609 S.W.2d 706 (Ct. App. Mo. E.D. 1980), the court rejected the claim that a floating zone was an instance of contract zoning, finding that municipalities need a certain degree of flexibility in determining whether particular types of uses should be allowed within the environs of an area zoned for some other use where the newly allowed use can be made compatible with the existing uses. The commercial district here satisfied these requirements. *Id.* at 712.

183 There are certain mandatory requirements for uses within the new zone which the Council was not free to expand. The regulations limited the uses, established minimum performance standards and sign regulation. The council could impose greater restrictions and was required to prescribe height restrictions, lot area and yard requirement and off-street parking and loading requirements. Plaintiffs had no right to complain that the Council might exercise its legislative judgment to impose more stringent requirements on commercial district than it does in another. The court further found no objection to the fact that the ordinance did not spell out in detail the standards upon which a determination to rezone to commercial is to be made. The section did provide for general standards which were to be considered by the legislative body. *Id.* at 712.

184 *Id.* at 712. Though the ordinance did authorize spot zoning, it was not invalid on that ground, the court pointing out that any zoning ordinance which allows for amendment allows spot zoning. Spot zoning may be invalid or valid. If it is an arbitrary and unreasonable devotion to the small area to a use inconsistent with the uses to which the rest of the district is restricted and made for the sole benefit of the private interests of the owner, it is invalid. On the other hand, if zoning a small parcel is in accord and in harmony with the comprehensive plan and is done for the public good – is to serve one or more of the public health, safety, morals and general welfare, it is valid. Nor was the zoning otherwise unconstitutional because there was ample evidence of reasonableness, it served the general welfare and did not adversely affect the public roads and the value of nearby property, or deviate from the comprehensive plan. *Id.* at 713-715,
Campion v. Bd. of Alderman of City of New Haven,\textsuperscript{185} conditions imposed on approval of Planned Development District, were upheld because they created a new zone, such that uniformity of regulations was not at issue. Some courts have also ruled that conditions placed on the granting of a special exception are different than agreements made in connection with a rezoning. The court so held in Brandywine Enterprises Inc. v. County Council for Prince George’s County, Md,\textsuperscript{186} where the court pointed out the case did not involve an agreement to rezone, but merely the placement of conditions upon a special exception use. The granting of a special exception use subject to certain conditions is an appropriate exercise of, rather than, an abdication of, a local government’s police powers.\textsuperscript{187}

\textbf{IV. Contract Zoning Compared to Conditional Zoning}

In contrast to contract zoning which usually requires the showing of a bilateral contract, conditional zoning is analogous to a unilateral contract, the local government does not promise to rezone, but either voluntarily or through negotiation, the developer agrees to conditions that are otherwise not required in the proposed zone.\textsuperscript{188} This type of zoning does not represent the same relinquishment of police power authority as contract zoning, because the agreement occurs as part of a regulation that flows from comments made during the hearing process. Here, the deal is not complete until after the municipality has heard concerns of both landowners seeking to rezone and the neighbors and has tried to arrive at a workable compromise. In addition, the deal is transparent in that the conditions that form the agreement are explicitly set forth in the zoning amendment so that every one who subsequently reviews the zoning amendment in the

\textsuperscript{185}2003 Conn. Super. LEXIS 874.
\textsuperscript{186}117 Md. App. 525, 700 A. 2d 1216 (1997).
community will have a clear and accurate understanding of the uses to which the land can be put and the reasons the municipality decided to allow those uses. The conditions can be made a part of the zoning text or be evidenced by the recording of an enforceable covenant binding the developer and his assignees to the negotiated condition.\textsuperscript{189} The unilateral/bilateral distinction has often been overlooked by the courts and much of the confusion in the cases can attributed to the failure of courts to properly define the two concepts.\textsuperscript{190} Conditional zoning properly understood involves only an adopted zoning ordinance which provides either: (1) the rezoning becomes effective immediately with an automatic repealer if specified conditions are not met within a set time limit, or (2) the zoning becomes effective only upon the conditions being met within the

\textsuperscript{187}Id. at 536, 700 A.2d at 1221.
\textsuperscript{188}Id. at --.
\textsuperscript{189}Id at ------; see also Wilmington Sixth District Community Committee v. Pettinaro Enterprises, 1988 Del Ch. Lexis 142 (May 25, 1988), where the court noted that some courts had found contract zoning unenforceable \textit{per se}, while others have enforced contract zoning if reasonable, non-discriminatory and serving the public welfare. Still other courts, while prohibiting contract zoning, have recognized a subtle difference between contract zoning and conditional zoning, upholding the latter. \textit{Id.} at 8-9, citing 6 Powell on Real Property §871.4 (1988); State ex rel. Zupanic v. Schimenz, Wis Supr. 174 N.W.2d 533 (1970); Church v. Town of Islip, N.Y. App., 168 N.E.2d 680 (1960); 2 Anderson, American Law of Zoning 3d § 9.20 (1986). “Contract zoning is usually distinguished from conditional zoning by a finding that in contract zoning, there is a bilateral agreement committing the zoning authority to a legally binding promise while in conditional zoning the zoning authority does not legally bind itself to rezone. For example, in contract zoning, the zoning authority agrees to rezone and the developer agrees to conditions which would otherwise not be applicable to his land. \textit{Id.} at --, citing Kramer, “Contract Zoning-Old Myths and New Realities,” 34 Land Use Law & Zoning Digest 4. In conditional zoning, however, the local government does not agree to rezone but merely decides to impose conditions that would not have been adopted if there had not been an application for rezoning. In conditional zoning, therefore, there is no binding obligations on the zoning authority to rezone the land even if the developer consents to the conditions proposed. \textit{Id.} at at *9-10; see also Haas v. City of Mobile, 289 Ala. 16, 265 So. 2d 564 (Ala. 1972), where an ordinance rezoning an area provided that “no lot or parcel of land hereinabove described shall be used for any use allowed in [the rezoned district] until all the conditions set forth below have been complied with: subject to a reservation of the right of way for [a parkway] and a second means of ingress and egress to the proposed [parkway] be provided. A challenge to the rezoning was made on the basis that such a collateral agreement or deed to be executed between the city and the property owner constituted contract zoning. The challenge was rejected, the court pointing out that zoning based upon and offer or agreement would be invalid, but it is well-established that a zoning ordinance may place upon a property owner reasonable restrictions and requirements in the use of the zoned property and this court had expressly approved such restrictions and requirements.

\textsuperscript{190}See City of Knoxville v. Ambrister, 196 Tenn., 263 S.W.2d 528 (1953)(treating unilateral promise by developer without reciprocal promise of the city as if there were a clear unequivocal bilateral contract controlling the discretion of the local government, making rezoning invalid per se).
time limit.\textsuperscript{191}

The early attitude of the courts was to ignore the distinction and declare both contract and conditional zoning to be invalid \textit{per se}.\textsuperscript{192} The reasons conditional rezoning did not fare well are myriad, including that despite the apparent unilateral structure, they introduced an element of contract, i.e, the imposition of conditions on the land the subject of rezoning being \textit{a quid pro quo} for rezoning, although no express contract with the zoning authorities could be proved, given the close connection between the recording of restrictions at or soon after the rezoning and because they constituted an abrupt departure from the comprehensive plan contemplated in zoning.\textsuperscript{193} Other faults assigned by courts in their disapproval of conditional rezoning were that the zoning authority might use the zoning power to further private interests in violation of public policy, that the zoning authority might improperly try to control the use of the land, that the zoning authority might surrender its governmental powers and function or inhibit the exercise of its police or legislative powers and that it furnishes an avenue for corruption of officials.\textsuperscript{194} Other courts view the rezoning of a particular parcel of land upon conditions not imposed by the zoning ordinance generally in the particular district into which the land has been rezoned as ‘prima facie evidence of ‘spot zoning’ in its most maleficent aspect, as not in accordance with a


\textsuperscript{192}\textit{See Hedrich v. Niles}, 112 Ill. App. 2d 68, 250 N.E.2d 791 (1969); \textit{Cederberg v. Rockford}, 8 Ill. App.3d 984, 291 N.E.2d 249 (1972); \textit{but see Geffinet v. County of Christian}, 333 N.E. 2d at 736 (conditional zoning not invalid in every instance. There, the proposed use was a plant to manufacture synthetic natural gas and would serve an area where a fuel shortage existed; such use would fill a genuine public need and would unquestionably serve the public health, safety and welfare).

\textsuperscript{193}\textit{Treadway v. City of Rockford}, 28 Ill. 2d 370, 371, 192 N.E.2d 351.

\textsuperscript{194}\textit{Id}. at 1095, 333 N.E.2d at 736.
comprehensive plan and as beyond the power of the municipality.” This view is premised on the notion that legislative bodies must rezone in accordance with a comprehensive plan, and Euclidean zoning requires that in amending the ordinance so as to confer upon a particular parcel a particular district designation, it may not curtail or limit the uses and structures placed or to be placed upon the lands so rezoned differently from those permitted upon other lands in the same district. Consequently, “where there has been a concatenated rezoning and filing of a declaration of restrictions, the early view (where the question has been litigated) was that both the zoning amendment and the restrictive covenant were invalid.”

The early Maryland court decisions showed a disfavor with conditional zoning, equal to that with contract zoning, although not clearly distinguishing the two. In *Rodriguez v. Prince George’s County, Maryland*, the court pointed that the “early view of most courts was that

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196 Id. at 31, citing 3 Rathkopf; see also Templeton v. County Council of Prince George’s County, 21 Md. App. 636 (Ct. of Special Appeals of Md. 1974)(The court addressed the contention that conditional zoning might have been utilized in this case - in the sense that the District Council might have considered a grant of the requested reclassification, subject to a reversion to residential use on the discontinuation of the roofing business by the appellant. The court held that even if it were, it was quite apparent that appellant proceeded upon a distorted construction of conditional zoning generally and as contained in Chapter 471, Laws of 1968. The latter provides that the District Council for Prince George’s County in approving any local map amendment, may give consideration to and “adopt such reasonable requirements, safeguards and conditions, as may in its opinion be necessary either to protect surrounding properties . . . or which would further enhance the coordinated harmonious and systematic development of the Regional District.” Id. The novel suggestion that a zoning reclassification to commercial might be made by the District Council subject to a reversion to residential obviously is not supported by this statutory authority for conditional zoning, nor by general law. Id. Conditional zoning is a device employed to bring some flexibility to an otherwise rigid system of control. Id. at 645-46, citing Anderson, *American Law of Zoning*, § 8.20. The conditions generally imposed are those designed to protect adjacent land from the loss of use value which might occur if the newly authorized use were permitted without restraint of any kind. Reversion of the reclassification to residential use when, and if, appellant should discontinue her roofing business is patently no such restraint. Id. at 646.
197 Mayor & Council of Rockville v. Rylens Enterprises, 372 Md.514 (2002)(striking down ordinance as conditional zoning although the dissent found such zoning to be valid).
conditional zoning (or as it is sometimes called ‘contract’) zoning was unlawful per se, for three reasons: “that rezoning based on offers or agreements with the owners disrupts the basic plan, and this is subversive of public policy reflected in the overall legislation; that the resulting ‘contract’ is nugatory because a municipality is not able to make agreements which inhibit its police powers; and that restrictions in a particular zone should not be left to extrinsic evidence.”

Courts have also objected to conditional zoning as applied, i.e., that it constituted spot zoning by singling out one parcel for non-uniform and non-comprehensive treatment or that the conditions were not reasonably or causally related to the requested zoning or rezoning petition, some courts have considered arguments that conditional zoning was ultra vires, that no such authority could be found under the state zoning enabling act, where all zoning authority is found. In rejecting the ultra vires argument courts have found implied authority to rezone

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199Id. at 552, 558 A.2d at 749, citing Baylis v.City of Baltimore, 219 Md. 164, 170, 148 A.2d 429 (1959).
200Id. at 552, 558 A.2d at 749. Covenants coupled with the site plan attached, if adopted as a basis for the requested reclassification, would produce a form of conditional zoning. So too, an amendment to the basic plan, where the applicant “was offering a deal to the district council in order to induce the council to approve its application for reclassification, the applicant agreeing in advance to exclude from the scope of the approval certain uses expressly permitted in the approved zone” is a form of conditional zoning and invalid. Id. at 553, 558 A.2d at 750; see also Carole Highlands Citizens Ass’n v. Board of County Comrs., 222 Md. 44, 158 A.2d 663(1960)(finding invalid rezoning land from single family residential purposes to commercial, subject to an agreement by the landowner limiting the use of the land, whether or not a binding contract was involved, where the rezoning created a novel classification not authorized by the general plan); Montgomery County v. National Capital Realty Corp., 267 Md. 364, 297A.2d 675 (1972)(finding invalid rezoning conditioned upon landowner’s offer to subject land to restrictions on use, as impermissible conditional zoning).
201Rohan at ---; Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1974); See Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); see also Appeal of Cleaver, 24 Pa. D & C 2d, 11 Chester Co. 236 (1961)(rezoning upon limitations on the use of the rezoned land invalid because it resulted in the devolution of a comparatively small area to a use inconsistent with the uses to which surrounding property was used, and made for the sole benefit of the private interests of the landowner); Ouryv. Grany, 107 R.I. 427, 267 A.2d 700(1970)(finding invalid rezoning upon condition that rezoned property be used exclusively for a particular business use, as not consistent with the comprehensive plan, but an accommodation to the landowner, made without regard for the public health, safety, and welfare).
202Cederberg v. Rockford, 8 Ill. App. 3d 984 (1972)(confusing the bargaining away argument with the ultra vires argument, concluding that since the bargain is primarily for private benefit, it is not an act on behalf of the
with conditions on the basis that the procedure was within the spirit of the enabling act\textsuperscript{203} and that silence of an enabling act on the question of conditional zoning does not necessarily imply a legislative decision to prohibit it.\textsuperscript{204}

A. Agreement v. Motivation

The modern trend is in favor of upholding conditional zoning.\textsuperscript{205} Generally, such conditions will be upheld when they are imposed pursuant to the police power for the protection or benefit of neighbors to ameliorate the effects of the zoning change. Yet, the confusion in the cases continue. Many cases presenting the issue of conditional zoning have been characterized by their challengers as involving contract zoning and struck down on that basis.\textsuperscript{206} Other courts
make an effort to distinguish the two, upholding rezonings involving only the imposition of conditions.\textsuperscript{207}

Decisions from the Connecticut courts have responded by reference to contract zoning when only conditions are involved and have characterized as illegal contract zoning and otherwise finding a zoning ordinance made with conditions on the landowner to be invalid. In \textit{Bartsch v. Planning \\& Zoning Comm’n},\textsuperscript{208} an attempt by planning and zoning commission to attach conditions running with the land, restricting the use of a particular parcel to a medical office building was held to be an attempt at contract zoning and violative of the uniformity provision of the statute because the restriction did not apply to other properties within the zoning

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\textsuperscript{207}See e.g., In People’s Counsel for Baltimore County \textit{v.} Beachwood Ltd Partnership 107 Md. App. 627, 670 A.2d 484 (1995)(reclassification of property); Gillespie \textit{v.} Stow, 65 Ohio App. 3d 601 (Ohio Ct. App. 1989)(that contract zoning is not proper.; a municipality may impose conditions but may not bargain away its legislative power); Cross \textit{v.} Hall County 238 Ga. 709 (Ga. 1977) (the court distinguished conditional zoning from contract zoning. Here, rezoning conditioned on road improvements is conditional zoning rather than contract zoning. At the hearing before the commissioners on the rezoning application, several neighboring landowners who opposed the rezoning mentioned that the road leading to the quarry needed paving. The president of the zoning applicant offered to resurface the road. The rezoning application was approved provided that the zoning applicant would agree to resurface the road. The paving condition was an attempt by the board to ameliorate the effects of the zoning change) \textit{Id.} at 383. In \textit{King’s Mill Homeowners Assn. v. City of Westminster}, 192 Colo.305, 557 P.2d 1186 (1976), the court responded to a challenge of contract zoning, largely with a discussion of conditional zoning, finding no contract zoning in the case; rezoning contingent upon the landowner’s fulfillment of certain conditions does not amount to contract zoning.
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\textsuperscript{208}6 Conn. App. at 690.
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district.

In Kaufman v. City of Danbury Zoning Comm’n\textsuperscript{209} the court addressed both contract zoning or conditional zoning, holding that Connecticut did not recognize either. The court explained that there was no statutory provision that allows zoning commissions to condition a zoning change either in its formal resolution of approval or on the form of amendments to the zoning regulation. According to the court, neither may the zoning authority enter into a binding contract with a developer to assure the completion of the conditions of approval.\textsuperscript{210} This is based on the statutory requirement that all such regulations be uniform for each class or kind of building, structure, or use of land throughout each district. The cases conclude that to permit a zoning authority to enact or contract for special conditions to assure fulfillment of its goals with respect to a particular piece of property would promote the very type of mischief which the statute was enacted to prevent, namely that there would be no improper discrimination employed by the commission but rather that all owners of the same class and in the same district be treated alike.\textsuperscript{211} The court concluded “...[A] zoning commission cannot be allowed to create binding agreements on the use of land thereby limiting its successors ability to make changes in the future.”\textsuperscript{212}

Connecticut courts, though have treated conditions on use placed in connection with an application for a variance, differently than those sought to be placed in connection with a rezoning request. In Stryker v. Zoning Board of Appeals, the court upheld the imposition of

\textsuperscript{209}1993 Conn. Super. LEXIS 2039.  
\textsuperscript{210}Id. at ---, citing Bartsch at 6 Conn. App. 686.  
\textsuperscript{211}Id. at ---, citing Bartsch at 689.  
\textsuperscript{212}Id. at ----. The same rationale applies for spot zoning. Both are condemned because the actual purpose of the zoning action is to benefit a single property owner rather than the community at large. Id.
conditions on an application for a variance, distinguishing *Bartsch*. The court pointed out that a variance was not rezoning and did not present a use inconsistent with the zone. But, this does not follow, since by definition a variance involves a use different from that for which the land is zoned. The court’s response to this point is that the rationale for permitting conditions to be attached to variances is to make variances more in harmony with the purpose of the zoning regulations. Still, a variance necessarily means lack of uniformity and different treatment for different owners.

In *Hartnett v. Austin*, the municipality agreed to rezone land to permit the development of a shopping center upon certain conditions. In finding the ordinance invalid, the court ruled that the city had no authority to enter into a private contract with the landowner. In *Cederberg v. Rockford*, the court held invalid the rezoning of certain lots from residential to local business coincidentally and conditioned upon the execution of a restrictive covenant on the use of the property to offices, finding such agreement to be a form of contract zoning, making the agreement void. Similarly in *Andres v. Flossmor*, the court struck down an ordinance rezoning land upon landowner’s fulfillment of certain conditions, finding the ordinance to have resulted from a deal, which introduced an element of contract.

These cases, if the definition of contract zoning was faithfully applied would not be

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214 93 So.2d 86 (Fla. 1956).
215 Id. at ____.
216 8 Ill. App. 3d 984(1972).
217 Id. at ----.
219 Id. at ----; see also Shibata v. Naperville, 1 Ill.App. 3d 402 (1971)(invalidating as contract zoning ordinance made on condition that landowner execute and file a declaration of restrictions as to the use of the property).
struck down on that basis since they do not involve bilateral agreements. This may point out that
the attempted distinction between contract zoning and conditional zoning based on the existence
of a bilateral as opposed to a unilateral agreement may too simplistic and yield unpredictable
results from the courts. Instead, courts would do well to eliminate the false distinction and
consider the particular acts of the municipality in wielding its police power.

Later Illinois courts have taken differing positions on the legality of conditional zoning,

than that in *Andres v. Village of Flossmor*. Andres relied on a previous decision from the
Illinois Supreme Court, *Treadway v. City of Rockford*, for the reasons why absent general
statutory authorization and standards, the making of individualized zoning deals by local
municipalities apart from the provisions they are willing to adopt as general zoning regulations is
an invalid abuse of the zoning power. That is, even where a zoning ordinance is reasonable
and not arbitrary and bears a reasonable relationship to the public health, safety and welfare, they
are yet invalid if subject to bargaining or contract. In *Andres*, the court explained that “in
accepting … donations and entering into or approving the[] agreements the trustees of the village
undoubtedly did what they believed was best for the whole community, but it placed them in the
questionable position of bartering their legislative discretion for emoluments that had no bearing
on the merits of the requested amendment.”

The court also expressed the concerns articulated in a Florida Supreme Court decision,

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221 28 Ill. 2d 370, 371, 192 N.E.2d 351.
222 Id., citing Allred v. City of Raleigh, 277 N.C. 530, 545-46 (197-), 178 S.E.2d 432, 440-41, Oury V.
433 (1959); City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528, 531 (1953); Lewis v. City of Jackson, 184
So.2d 384, 388 (1966).
223 Id. at 659, 704.
*Hartnett v. Austin*, 224 that if each parcel of property were zoned on the basis of variables that could enter into private contracts, then the whole scheme and objective of community planning and zoning would collapse. The zoning classification of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity. If the city could legislate by contract, each citizen would be governed by an individual rule based upon the best deal he could make with the governing body. 225 The court also relied on *Baylis v. City of Baltimore*, 226 which held that special conditions imposed on rezoning amendments are invalid for the chief reasons that rezoning based on offers of agreements with owners disrupts the basic plan and thus is subversive of the public policy reflected in the overall legislation, that the resulting contract is nugatory because a municipality is not able to make agreements which inhibit its police powers and restrictions in a particular zone should not be left to extrinsic evidence. 227 In *Andres*, the court ruled that the rezoning ordinance there which conditioned its effectiveness on subsequent execution by the village and the owner of a contract containing all the *ad hoc* limitations and requirements of the ordinance, also exhibited an inherent defect which invalidated the ordinance, without more. 228 In sum, the ordinance was the very model of invalid conditional zoning, falling squarely within the general policy considerations which

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224 93 So. 2d 86, 89 (Fla. 1956).
225 15 Ill. App.3d at 658, quoting 93 So.2d at 89.
227 15 Ill. App.3d at 658, quoting 219 Md. at ---, 148 A.2d at ---.
228 The court agreed with the trial court that the restrictive covenant was an invalid attempt by the city to control the use of the land. The *ad hoc* restrictions were not and could not purport to be based on any conceivable lawful zoning powers of the village in enacting requirements for all similarly zoned property. The requirement that landscaping be subject to future approval by the village authorities without any standard as to what that approval must be based on was an unlawfully vague provision. To require the payment of a lump sum of money without any basis set forth or discernable for arriving at that sum was unlawful. The reverter provision was a patently unlawful use of the zoning power which ordained that a change in zoning without any of the procedural steps or substantive considerations necessary thereto. *Id.* at 658.
strongly support the rule invalidating such ad hoc conditions in zoning amendments.\(^{229}\)

The Maryland Court of Appeals, \textit{People’s Counsel for Baltimore County v. Beachwood Ltd Partnership},\(^{230}\) distinguished contract from conditional zoning, upholding the ordinance challenged. The board of appeals voted to grant the developer’s petition to reclassify the property, but with the condition that it finance an off-site improvement.\(^{231}\) Opposed to the condition, the developer argued that the reclassification was the result of contract zoning, that the office of planning and zoning sought to use the comprehensive zoning as a means to pressure it into financing an off-site traffic improvement. Though the court failed to find evidentiary support for this allegation, it did discuss the concept of contract zoning. The court pointed out that “one reason the allusions to contract zoning in the case had such a ‘phantom-like’ quality is that neither the case law, here or abroad, nor the academic community seemed to have a firm grip on exactly what was meant by the term ‘contract zoning’” or by its doctrinal doppelganger,

\(^{229}\)Id. at 658. \textit{See also Scrutton v. County of Sacramento}, 275 Cal. App.2d 412, 418, 79 Cal. Rptr. 872, 877 (1969)( holding that the county had the power to impose conditions even though the statute was silent and that the power to impose conditions on rezoning furthered the well-being of landowners generally, promoted community development and served the general welfare.\(^{229}\) Like other changes in land use, the rezoning of an individual parcel may benefit the landowner but generate augmented demands for public services or create deleterious effects in the neighborhood. Reasonably conceived conditions harmonize the landowner’s need with the public’s interest and rejecting the contract zoning charge); \textit{J-Marion Company, Inc. v. County of Sacramento}, 76 Cal.App.3d 517, 521, 142 Cal. Rptr. 723, 725 (1977). There the court upheld rezoning upon conditions, finding the practice of imposing conditions justified as an appropriate exercise of local police power, pointing out the adherence to “[t]he so-called ‘Euclidean’ zoning [that] divides the community into homogenous land use zones” that prevents the imposition of conditions on particular uses of property; but individual parcels may often be allowed as a justified escape from this rigid grouping without detriment to zoning objectives. The court pointed out that California elucidations of the local police power recognize that other kinds of application for change in regulated land use may be granted subject to the landowner’s compliance with reasonable conditions; the power to impose conditions on rezoning furthers the well-being of landowners generally, promotes community development and serves the general welfare. The same police power which supports the imposition of reasonable conditions upon other kinds of changes in land use sustains the power of California counties to engage in ‘conditional rezoning.’ \(\ldots\)


\(^{231}\)Id. at 636, 670 A.2d at 489.
‘conditional zoning.’ 232 In the broadest of senses, both involve some sort of understanding between the governmental unit and the developer, whereby the doing of certain acts by the developer will result in favorable rezoning treatment by the governmental unit. Beyond that, the definitions begin to blur. 233 Some academic authorities treat “contract zoning” as the more generic phenomenon, with “conditional zoning” as a special instance thereof and others do just the opposite. Yet, others treat the two as closely-related but distinct phenomena, with “contract zoning” being illegal and conditional zoning slowly emerging into general acceptance. The Maryland cases have treated “contract zoning” narrowly as a situation whereon the developer enters into an express and legally binding contract with the ultimate zoning authority. 234 Part of the reason for the illegality is that the governmental unit may not bargain away its future use of the police power. The court distinguished those cases where a developer makes agreements with a governmental unit which lacks ultimate decisionmaking authority on the rezoning. 235 Thus, where the city council was not bound by the recommendations of the planning commission, in which the commission sought to impose conditions that it was not authorized to exact and that were therefore invalid, and in which the council did not undertake or attempt to incorporate the invalid conditions in its rezoning ordinance and did not even refer to them, no issue of contract

232 Id. at 668, 670 A.2d at 504.
233 Id. at 668, 670 A.2d at 504.
234 Id. at 669, 670 A.2d at 505; discussing Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959), where the city granted a rezoning conditioned on a binding agreement by the property owner to use the benefit of the reclassification only for the purpose of building a funeral home; the final form of the ordinance made the reclassification conditional upon the execution of an agreement, set out in the ordinance, between the owners and the city, and the recording of such agreement upon the property owners, their successors, heirs and assigns, held to be invalid. But see Pressman v. City of Baltimore, 222 Md. 330, 160 A.2d 379 (1960), where in contrast to Baylis, the owner entered into a formal and undisputed agreement with the city planning commission, which recommended that the rezoning be approved. The court there declined to hold the agreement constituted illegal contract zoning, restricting the application of the ban on contract zoning to those instances wherein the legislative body itself, as opposed to some other governmental agency, is party to the illegal contract.
zoning arose.\textsuperscript{236} In any case, there was no evidence of any agreement with the developer or to the comprehensive zoning was in anyway related to any past or future commitment by the developer.\textsuperscript{237} The rezoning was upheld.

V. Conditional Zoning Specifically Held Valid

In recent decisions, despite the blurring of lines, courts have approved conditional zoning agreements where they find that under them, without legally committing itself to rezoned, the municipality bargains for a landowner’s promise to take remedial action to minimize the adverse effects of the proposed development or limit the proposed use in some way as a condition of approval so as to protect adjoining landowners, and in the public interest.\textsuperscript{238} Most courts rely on the public interest benefits resulting as reasons for upholding conditional zoning agreements. To the extent that it involves promises from the landowner, without a reciprocal promise by the municipality, conditional zoning enables the municipality to retain and satisfy its police power responsibility to see that the zoning change is consistent with the public health, safety and welfare, and amounts to the exercise of the built-in flexibility in the zoning enabling acts. “The virtue of allowing private agreements to underlie zoning is the flexibility and control of the development given to a municipality to meet the ever-increasing demands for rezoning in a

\textsuperscript{235}\textit{Id.} at 673, 670 A.2d at 506.

\textsuperscript{236}\textit{Id.} at 671, 670 A.2d at 506.

\textsuperscript{237}\textit{Id.}; see also \textit{Attman/Glazer P.B. Co. v. Mayor and Alderman of Annapolis}, 314 Md. 675, 685, 552 A.2d 1277, 1283 (1989)(The court held that the policy that prohibits a municipality from contracting away its zoning power applies to special exceptions, variances and conditional uses, meaning that the zoning authority must exercise independent judgment in deciding requests. The court noted that conditional zoning, once roundly condemned, appears to be in the ascendency and in Maryland, the concept had evolved indirectly through the use of various zoning devices such as planned developments, and had found some favor with the state legislature, in Article 66B, 4.01(b), which permits a county or municipal corporation to impose certain conditions at the time of zoning or rezoning land, under certain circumstances).

\textsuperscript{238}Ryan at ----.
rapidly changing area.\textsuperscript{239}

In \textit{Gofinnet v. County of Christian},\textsuperscript{240} the court departed from the views expressed in earlier Illinois decisions,\textsuperscript{241} rejecting \textit{per se} invalidity of conditional zoning. The challenged action was a zoning ordinance to rezone 236 acres of farmland in a rural section of the county from agricultural to heavy industrial. The ordinance was adopted pursuant to a plan prepared by a consulting firm. The challengers, owners of land adjoining the property argued that the ordinance was invalid for the reason that it contained unauthorized restrictions and hence constituted conditional rezoning and also because it constituted spot zoning.\textsuperscript{242}

The court pointed out that there was a suitable and proper place for utilization of the process as some conditional rezoning may be in the public good, subservient to a comprehensive plan in the best interest of the public health, safety, and welfare and enacted in recognition of 

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\item\textsuperscript{239} \textit{State ex rel. Zupancic v. Schimenz}, 46 Wis. 2d 22, 28 (Wis. 1970); \textit{See Church v. Town of Islip} 8 N.Y. 2d 254 (1960); \textit{Hudson Oil Co. v. Wichita}, 193 Kan. 623, 396 P.2d 271 (1964)(granting rezoning only upon landowner’s agreement to dedicate a 10-foot strip along the highway for an access road, apparently to conform to the city’s comprehensive plan for the remainder of the street footage, upheld); \textit{Arkenberg v. Topeka}, 197 Kan. 731, 421 P.2d 213 (1966)(zoning ordinance adopted on landowner’s promise to convey a right of way to the city along one of the streets upon which the property fronted, upheld; contract zoning argument rejected); \textit{Transamerica Title Ins. Co.}, 23 Ariz. App. 385, 533P.2d 693(1975)(stating its agreement with other courts, including California, that have upheld conditional zoning, as an exercise of the police power); \textit{Glendon Civic Ass'n v. Glendon}, 132 Pa. Commw. 307, 11-12 (Pa. Commw. Ct. 1990)(“[F]rom our review of the record it is clear that, by enacting the ordinance, the Borough specifically designated the site for which the conditional use was authorized; the Borough controlled the use by imposing requirements in the ordinance and the Agreement to prevent the facility from becoming noxious or offensive by reason of dust, odor, smoke, gas, vibration or noise); \textit{see also} 2 RATHKOPF, The Law of Zoning and Planning §§27.55[4][5] (1988).
\item\textsuperscript{240} 30 Ill.App.3d 108, 333 N.E.2d 731 (1975).
\item\textsuperscript{241} \textit{Andreas v. Flossmor}, \textit{supra} text at note -----(decided two years earlier).
\item\textsuperscript{242} The disputed ordinance contained four articles; the first essentially finding that the best interest of the county would be served by permitting the rezoning and variance requested; the second limiting the use of the premises to only allow the storage of naphtha, petroleum products, similar hydrocarbon products, and the processing of the same into pipeline quality gas suitable for distribution, utility, and industrial purposes; limiting the height of structures; requiring compliance with local, state and federal air, water, noise, sewage pollution and on handling, processing, and storage of the products; providing for reversion of the previous zoning if the property is not used for gasification plant facilities as proposed. \textit{Id}. 
\end{itemize}
changing circumstances.\textsuperscript{243} In the court’s view, not all conditional rezoning is onerous, destructive or an abandonment of the power of the zoning agency, nor does it stem from improper motives.\textsuperscript{244} Instead, under proper circumstances conditional rezoning can be a flexible land-use technique of considerable utility and may constitute a valuable tool in the hands of a zoning authority in the proper exercise of their police power.\textsuperscript{245} The court approved the rezoning ordinance.\textsuperscript{246} The conditions permitted the land to be used to accomplish a good for the general public, yet, preserve the integrity of the comprehensive plan. The ordinance evidenced a real concern for public health, safety and welfare; indeed that appeared to be the rationale for the enactment. Such benefits should not be denied because of the use of the particular tract is restricted unlike other areas similarly zoned. The comprehensive plan already contemplated that there would eventually be industrial development in the vicinity and under the comprehensive plan, the county held the power, authority and duty to control special uses under the zoning classification with the use intended there. The benefits received from the rezoning ordinance there far outweighed any evil that might be said to flow from conditional rezoning \textit{per se}. The conditions were not onerous to the property owner or incompatible with the comprehensive plan, did not constitute an abandonment of the zoning power, were not contractual in nature, or limited in their terms and did not constitute an attempt upon the part of the zoning authority to control the use of the land. The ordinance appeared to have been enacted in good faith and not as a

\textsuperscript{243}Id.
\textsuperscript{244}Id. at 1095, 333 N.E.2d at 736.
\textsuperscript{245}Id.
\textsuperscript{246}It was adopted on the basis of the detailed findings showing a genuine need for the products to be produced by the plant, which would unquestionably serve the public health, safety and welfare. The conditions imposed took advantage of the unique situation presented by the near confluence of pipelines which made the particular location highly advantageous for the gas processing plant location.
result of negotiations or improper conduct by officials of the zoning authority and the conditions imposed had a reasonable and direct relationship to the purpose for which the zoning was granted.247

In Benton v. Chattanooga,248 the court found the use of conditional zoning not an

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247Id., at 1096, 736. Nor was the rezoning ordinance invalid as spot zoning under the five tests for spot zoning: in addition to the size of the tract involved include the questions whether the requirements of the comprehensive plan are met by the ordinance; the particular use for the spot; whether there are changes in conditions in the zoning district; where the spot is located; whether a hardship was created by any individual. The shift toward industry was recognized in the comprehensive plan for the county. The comprehensive plan emphasized the shift from agricultural to industry and the desirability of industry for economic growth and for keeping young people in the community. Though location of the tract on the fringe between two zones might have more strongly supported a rezoning a tract not on the fringe. In making this determination, the conditions of the entire region and anticipation of future needs is to be considered. There was no particular hardship on any individual. Id. at 1097, 737. The rezoning ordinance at issue was not out of harmony with the comprehensive planning for the good of the community. Id. at 1098, 738. See also Thornber v. Village of North Barrington, 321 Ill. App.3d 318, 747 N.E.2d 513 (2001) (The appellate court stating that “conditional zoning is not invalid per se”. Rather, the focus must be on the application of the traditional zoning factors in an earlier Illinois Supreme court opinion. Applying those factors to the ordinance, the court found the trial court’s finding was not against the manifest weight of the evidence; the test is whether the ordinance is consistent with comprehensive plan for use of property in the locality. The change here impacted all property zoned residential, not just the village hall site. Nor was the rezoning an instance of spot zoning, which is a change in zoning applied to a small area. It is unlawful when the change violates a zoning pattern that is homogenous, compact and uniform. at 328, 523. See also Notan v. City of Taylorville, 95 Ill. App. 3d 1099, 1103, 420 N.E.2d 1037, 1039 (conditional zoning not invalid per se, but suspect and subject to special scrutiny. Conditions that are general and relate to satisfying existing statutes and regulations of environmental protection agencies are permissible, but conditions placed in the rezoning ordinance introducing elements of contract, which have no place in the legislative process is an abuse of the zoning authority); see also Lurie v. Village of Skokie, 64 Ill. App. 3d 217, 380 N.E. 2d 1120, 1127 (1978). In Lurie, the challenged ordinance permitted sale of certain municipal property to a developer for the construction of low-income housing for the elderly. Negotiations and discussions between the town and the developer occurred before the ordinance was passed after a sales contract was entered into, but the sale was offered to public bid. The court, in upholding the ordinance, pointed out the developer’s proposal was developed over the course of those meetings, which gave the village officials an opportunity to express their need and desired requirements for the project and the developer’s proposal was not submitted for deliberation prior to the board’s public meeting.

2481988 Tenn. App. LEXIS 454 (Tenn. Ct. App. 1988). There, the Plaintiff-Appellant, Irene Benton, and the Defendant, were owners of property in the City of Chattanooga. Each of the properties was adjacent to Bonny Oaks Drive and they were separated by a jointly used roadway. At the time defendant acquired its property in 1985 both tracts of land were zoned R-1 Residential. Soon after defendant acquired its property it filed a request with the Chattanooga Planning Commission to rezone its property from R-1 Residential to C-2 Commercial. The Planning Commission recommended the rezoning and thereafter, the Board of Commissioners for the city passed an ordinance to amend earlier ordinance, to rezone the defendant’s property from R-1 to C-2. However, the rezoning was subject to certain conditions. Upon the trial of the case the chancellor held it was not necessary to pass on the constitutionality of the zoning ordinance to make a proper determination of the case. He resolved each of the other issues in favor of the Defendants and found the ordinance was valid. The Plaintiff filed a motion to alter or amend the judgment, which was overruled, and she appealed, arguing among other things that the alleged rezoning was impermissible contract zoning. On appeal, the court ruled determined it not necessary to rule on the constitutional
abrogation of police power, but an exercise of it. 249 In a footnote to the decision, the court also stated: Nothing in this opinion is to be construed as holding that a planning commission without a covenant cannot prescribe reasonable conditions for the benefit of the general public.250 It is the use of governmental power as a bargaining chip that earlier cases criticized as the unsavory aspect of contract zoning. When a government negotiates in this manner it agrees to limit its right and duty to act on behalf of the public. “Rezoning is approved, not based upon the merits of the zone change request nor because it is in the public interest, but because a deal has been struck.”251 On the other hand, the court stated, that the mere unilateral imposition of conditions for public benefit is quite different. In contract zoning the government entity sacrifices its authority. In conditional zoning, it exercises it. By imposing conditions under which defendant’s property could be rezoned, Chattanooga did not bargain away its authority, but rather exercised it for public safety reasons.252 The court went on to conclude, the conditions in the ordinance issue that contract zoning is violative of the Constitution of Tennessee, since there is no contract zoning. The general law, as the Court has noted, authorizes conditional zoning which was what was done in this case.  

249Id. at 4-5. The court distinguished the cases on which the appellant relied, *City of Knoxville v. Ambrister* 196 Tenn. 1, 263 S.W.2d 528 (1953) and *Haymon v. City of Chattanooga*, 513 S.W.2d 185 (Tenn.App. 1973). The Ambrister case arose when the City of Knoxville sought to enforce an agreement it made with a land developer. The city rezoned single dwelling residential property so a multiple dwelling unit could be built. In consideration for the rezoning, the property owner promised to dedicate part of the rezoned land to the city sometime in the future. The dedicated property was to be used as a public park. The property owner reneged on his promise to dedicate. The city filed suit to enforce the agreement. The supreme court held this was an example of contract zoning and could not be enforced.” 196 Tenn. at 5-6. In Haymon, the property owners agreed to execute a 25-year covenant to run with the land to maintain a 200-foot buffer zone of vacant property between their apartment buildings and adjoining land, which was given in exchange for rezoning. The court of appeals said this amounted to contract zoning which was contrary to public policy and illegal in Tennessee. It stated: “[t]he same rule with respect to the validity of contracts to influence zoning seems to prevail in numerous other jurisdictions, the consensus being that contracts entered into in consideration of concessions made favoring the applicant are frowned upon as against public policy [because] zoning is an instrument of public authority to be used only for the common welfare of all the people.” Id. at 188. 

250 at 188, n.1. 

251 at 6-7. 

252 The Zoning Administrator for the Regional Planning Commission, testified that the use proposed for defendant’s property was appropriate; however, a blanket approval without conditions was not. Problems posing a threat to public safety needed to be rectified before the property could be put to commercial use. The Regional
require that before the property is rezoned, safer access to it had to be provided. The proof showed no evidence of a bilateral agreement. Defendant followed customary procedure in an attempt to have its property rezoned. There was no evidence of negotiations between the parties and there was no quid pro quo. There were only unilateral conditions requiring that necessary improvements be made. The court held that the chancellor properly construed the facts to involve only conditional zoning. Despite the appeal of this purported distinction, the question remains whether the developer would have offered the condition absent the real prospect of a rezoning by the municipality. If not, then the arrangement does not differ substantially from what is viewed as contract zoning.\textsuperscript{253}

The Massachusetts courts also have found conditional zoning valid, departing from the views expressed by the Connecticut and Maryland courts. In \textit{Town of Randolph v. Town of Stoughton},\textsuperscript{254} the court stated that “[c]ontract zoning” is the term given to acts of rezoning

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\item Traffic Engineer with the Tennessee Department of Transportation, testified to the dangerousness of the existing access drive, irrespective of the zoning. A professional engineer from the private sector, corroborated that testimony. The existing drive was located amidst an interchange area. It directly crossed an exit ramp from a busy highway before connecting into Bonny Oaks Drive, the public road from which Appellant ingressed and egressed her property. This posed a danger because vehicles from two different roads converge onto Bonny Oaks Drive at the same point. There were visibility or ‘sight distance’ problems. Commercial traffic would only augment those problems.” \textit{Id.} at 7-8.
\item \textit{Id.} at 8-9; The Tennessee Code authorizes the city to engage in conditional zoning. Since conditional zoning is consistent with Tennessee law, the constitutionality of the provision was not required to be reached in this case. \textit{Id.} See also \textit{Copeland v. City of Chattanooga ex rel. its Board of Comm’rs}, 866 S.W.2d 565 (Tenn. ----)(the conditional zoning by Appellee was a proper exercise of government police power, where the testimony revealed that the development of Appellants’ property would create a problem remedied by the exaction and although the videotapes of the two city counsel meetings revealed a concern by some members that the City might need the property in the future and, therefore, be required to purchase it, the overwhelming evidence supports a finding that it is this particular development that will create a problem remedied by the construction of an acceleration/deceleration lane).
\item 1997 Mass. Super. LEXIS 410. There, defendant (the Trust), the owner of two parcels of land in the Stoughton Technology Center in the Town of Stoughton, undertook a project to construct and operate a cinema, in the “Center.” The land owned by the Trust was located in an “Industrial” zoning district in which the proposed cinema project was a prohibited use. The Stoughton Planning Board convened a public hearing to consider an amendment to the Zoning Map rezoning the Land to a “Highway Business” zoning district in which a cinema would be permissible. The Town voted to enact the Zoning Map amendment. Thereafter, the Trust applied to the
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granted on the express condition that owners impose certain restrictions on their land in order to obtain the desired rezoning. An example of invalid contract zoning would be if the Town had conditioned the rezoning of the locus on a landowner’s dedication of land for public use elsewhere in the town.\textsuperscript{255} However, here, the plaintiff’s allegation that the town rezoned the land from “Industrial” to “Business Highway” on the condition that the landowner build a movie theater there, conferring tax benefits on the town, simply did not constitute the type of extraneous consideration unrelated to the locus necessary to establish contract zoning.\textsuperscript{256} The proposed use of the particular land was intimately related to a locus and would always be a relevant area of concern for zoning authorities so that the imposition of conditions on the proposed use of a locus cannot be considered “extraneous.”\textsuperscript{257}

In a well-articulated justification for conditional zoning, the New York Court of Appeals

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Stoughton Zoning Board of Appeals (ZBA) for a 13.5-foot variance from the 30-foot height restriction imposed on all buildings in the “Highway Business” zoning district. The ZBA found that in view of conditions and circumstances uniquely affecting the Land, the Trust was entitled to the requested height variance, but conditioned the variance on, among other things, the construction of a pedestrian overpass across Technology Center Drive, a four-lane street separating the proposed cinema building from the cinema parking lot. Thereafter, the Town of Randolph filed the present action against the Town of Stoughton, the ZBA, the Planning Board and the Trust, alleging that the rezoning of the Land from “Industrial” to “Business Highway” was invalid either as spot zoning or contract zoning. The Massachusetts Code provided that “any zoning ordinance or by-law which divides cities and towns into districts shall be uniform within the district for each class or kind of structures or uses permitted.” G.L. 40A, 4 (1994). The court construed this provision as prohibiting “spot zoning,” defined as a legislative change to existing zoning restrictions which arbitrarily and unreasonably singles out one parcel of land for treatment differently from that accorded surrounding parcels in the same district indistinguishable in character. Randolph’s allegation of unconstitutional contract zoning failed to state a cognizable claim because it did not allege that the rezoning of the land was conditioned on extraneous considerations. \textit{Id.} at *36. The court held that although Randolph was an abutter to the rezoned parcel at issue, Randolph clearly did not own property in the same zoning district or even within the same municipality as the Trust’s land, and thus had no standing under the code, which requires uniformity \textit{within} each zoning district of a city or town and to a lesser extent, uniformity among districts within a single city or town. \textit{Id} at *34.

\textsuperscript{255}\textit{Id.} at *37
\textsuperscript{256}\textit{Id.} at *36-37
\textsuperscript{257}\textit{Id.} at 37; see also Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) \textit{supra} note ; Konkel v. Common Council, Delafield, 68 Wis.2d 574 (1975)(upholding re-zoning ordinance contingent of landowner’s fulfilling certain conditions, where the ordinance was otherwise not arbitrary or capricious).

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upheld such an ordinance, in Collard v. Flower Hill.\(^{258}\) The Court of Appeals began its discussion of the issues by stating that, “[p]rior to our decision in Church v Town of Islip,\(^{259}\) in which we upheld rezoning of property subject to reasonable conditions, conditional rezoning had been almost uniformly condemned by courts of all jurisdictions a position to which a majority of States appear to continue to adhere. Since Church, however, the practice of conditional zoning has become increasingly widespread in this State, as well as having gained popularity in other jurisdictions.”\(^{260}\) The court pointed out that “[p]robably the principal objection to conditional rezoning is that it constitutes illegal spot zoning, thus violating the legislative mandate requiring that there be a comprehensive plan for, and that all conditions be uniform within a given zoning

\(^{258}\) 52 N.Y.2d 594 (N.Y. 1981). There, the earlier owners of the subject premises and appellants’ predecessors in title, applied to the village board of trustees to rezone the property from a General Municipal and Public Purposes District to a Business District. That year the village board granted the rezoning application, subject to various conditions. Previously, the subject premises, then vacant, had been zoned for single-family dwellings with a minimum lot size of 7,500 square feet. In that year the then owners applied to the village board to rezone a portion of the property and place it in the General Municipal and Public Purposes District so that a private sanitarium might be constructed. Concurrently with that application a declaration of covenants restricting the use of the property to a sanitarium was recorded in the county clerk’s office. The village board then granted the rezoning application, but limited the property’s use to the purposes set forth in the declaration of covenants. The later rezoning application, which as conditionally granted was the subject of this suit, was made because the private sanitarium had fallen into disuse and it was asserted that without rezoning the property could neither be sold nor leased. Subsequently, appellants’ predecessors in title entered into the contemplated declaration of covenants which was recorded some twelve years later. Consistent with the board’s resolution, that declaration provided that “[n]o building or structure situated on the Subject Premises on the date of this Declaration of Covenants will be altered, extended, rebuilt, renovated or enlarged without the prior consent of the Board of Trustees of the Village.”

Appellants, after acquiring title, made application two years later to the village board for approval to enlarge and extend the existing structure on the premises. Without any reason being given, that application was denied. Appellants then commenced this action to have the board’s determination declared arbitrary, capricious, unreasonable, and unconstitutional and sought by way of ultimate relief an order directing the board to issue the necessary building permits. The appellants contended that the conditions imposed amounted to invalid spot zoning and conditional zoning. Asserting that the board’s denial of the application was beyond review as to reasonableness, respondent moved to dismiss the complaint for failure to state a cause of action. That motion was denied, that court equating appellants’ allegation that the board’s action was arbitrary and capricious with an allegation that such action was lacking in good faith and fair dealing, an allegation which it found raised triable issues of fact. The appellate court reversed and dismissed the complaint, holding that the allegation of arbitrary and capricious action by the board was not the equivalent of an allegation that the board breached an implied covenant of good faith and fair dealing.

\(^{259}\) 8 NY2d 254 (1960).

\(^{260}\) 52 N.Y.2d at 599 [citations omitted].
district. The court explained when courts have considered the issue the assumptions have been made that conditional zoning benefits particular landowners rather than the community as a whole and that it undermines the foundation upon which comprehensive zoning depends by destroying uniformity within use districts. But, such unexamined assumptions are questionable. First, the court said, it is a downward change to a less restrictive zoning classification that benefits the property rezoned and not the opposite imposition of greater restrictions on land use. Indeed, imposing limiting conditions, while benefiting surrounding properties, normally adversely affects the premises on which the conditions are imposed. Second, the court ruled, zoning is not invalid per se merely because only a single parcel is involved or benefited, the real test for spot zoning is whether the change is other than part of a well-considered and comprehensive plan calculated to serve the general welfare of the community.261 Such a determination, in turn, depends on the reasonableness of the rezoning in relation to neighboring uses, an inquiry required regardless of whether the change in zone is conditional in form. Third, the court stated, if it is initially proper to change a zoning classification without the imposition of restrictive conditions notwithstanding that such change may depart from uniformity, then no reason exists why accomplishing that change subject to condition should automatically be classified as impermissible spot zoning.262 The court continued, “[b]oth conditional and unconditional rezoning involve essentially the same legislative act, an amendment of the zoning ordinance. The standards for judging the validity of conditional rezoning are no different from the standards used to judge whether unconditional rezoning is illegal. If modification to a less

261 Id. at ---, citing Rodgers v Village of Tarrytown, 302 NY 115 (1950).
262 Id. at 600-01.
restrictive zoning classification is warranted, then a fortiori conditions imposed by a local legislature to minimize conflicts among districts should not in and of themselves violate any prohibition against spot zoning.”

Additionally, the court found, because no municipal government has the power to make contracts that control or limit it in the exercise of its legislative powers and duties, restrictive agreements made by a municipality in conjunction with a rezoning are sometimes said to violate public policy. While permitting citizens to be governed by the best bargain they can strike with a local legislature would not be consonant with notions of good government, absent proof of a contract purporting to bind the local legislature in advance to exercise its zoning authority in a bargained-for manner, a rule which would have the effect of forbidding a municipality from trying to protect landowners in the vicinity of a zoning change by imposing protective conditions based on the assertion that that body is bargaining away its discretion, would not be in the best interests of the public. The imposition of conditions on property sought to be rezoned may not be classified as a prospective commitment on the part of the municipality to zone as requested if the conditions are met; nor would the municipality necessarily be precluded on this account from later reversing or altering its decision.

The court concluded, conditional rezoning is a means of achieving some degree of

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263 *Id.* at 601.
264 *Id.* at ---, citing see, e.g., *Hartnett v Austin*, 93 So 2d 86 (Fla); *Baylis v City of Baltimore*, 219 Md 164, *Ziemer v County of Peoria*, 33 Ill App 3d 612 (III. App. 1975)
265 *Id.*; cf. *Matter of Grimpel Assoc. v. Cohalan*, 41 NY2d 431 (1977). Further, the court found, while it is accurate to say there exists no explicit authorization that a legislative body may attach conditions to zoning amendments, *Id.* citing e.g., Village Law, § 7-700 et seq., neither is there any language which expressly forbids a local legislature to do so. *Id.*; *Baylis v City of Baltimore*, 219 Md 164, 148 A.2d 429 (Md. Ct. App. 1959). Statutory silence is not necessarily a denial of the authority to engage in such a practice. Where in the face of nonaddress in the enabling legislation there exists independent justification for the practice as an appropriate exercise of municipal power, that power will be implied. *Id.* at 602.
flexibility in land-use control by minimizing the potentially deleterious effect of a zoning change on neighboring properties; reasonably conceived conditions harmonize the landowner’s need for rezoning with the public interest and certainly fall within the spirit of the enabling legislation. The Collard decision should not be regarded as far reaching as it first seems. First, the court seems to place great significance on the fact the conditions operated to restrict uses of the land otherwise not permitted, not to allow different uses. Second, to the extent that the standards...
for judging the validity of conditional rezoning are no different from the standards used to judge whether unconditional rezoning is illegal, the municipality concedes nothing in its decision to rezone, but obtains a benefit for surrounding properties. Third, the court pointed out that the municipality was not bound by the rezoning but was in fact free to rezone the rezoned property as it saw fit and at the same time free to insist upon adherence to the conditions as was the case here. As a criticism of the reasoning, does not the imposition of conditions suggest that the municipality would not have rezoned absent the landowner’s agreement to the conditions? This seems like an inducement to rezone, yet not one that should be condemned where the conditions serve the public interest.\footnote{See also Church v. Islip, 8 N.Y. 254 (1960). There, the town board acted unanimously to rezone a corner lot, an irregular strip. The Board’s consent to the rezoning was conditioned on the building not being more than 25% of the areas; the anchor post fence, equal, six feet high, was to be erected five feet within the boundary line of the property; live shrubbery to be planted; and the above being put into effect before carrying on any retail business on the property. Zoning being a legislative act, (not a variance) is entitled to the strongest possible presumption of validity and must stand if there is any factual basis therefor, the court rejected the argument that the this was contract zoning; all the appellants arguments revolved about the idea that this was illegal contract zoning because the town board, as a condition, for rezoning required the owners to record restrictive covenants as to maximum area to be occupied by the buildings and as a fence and shrubbery. The court reasoned, “[s]urely these conditions were intended to be and are for the benefit of the neighbors. Since the town board could have, presumably, zoned this corner for business without any restrictions, the court held “we fail to see how reasonable conditions invalidate the legislation.” The court explained, what “contract zoning” means is unclear and there are no New York law on the subject. All legislation by “contract” is invalid in the sense that a legislature cannot bargain away or sell it powers. But the court would deal here with actualities and not phrases. To meet increasing needs of the county’s own population explosion, and at the same time to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the Town imposes conditions, there was nothing unconstitutional about it. Incidentally, the record did not show any agreement in the sense that the owners made an offer accepted by the board. \textit{Id. at ---}; \textit{see also In re City of New York}, 40 Misc. 2d 1076 (N.Y. Sup. Ct. 1963), the City sought and acquired title to five parcels of real estate for street widening purposes. The property owners disagreed with the City as to how much they should be compensated for the taking of their property by the City. The only significant issue involved a determination of damages for the parcel of real estate that was occupied by a bowling alley, which was a nonconforming use to the residential zoning of the property. The claimant contended that the agreement of April 18, 1956, waiving enhancement of value of the strip taken by reason of the zoning change for retail use is not binding for the reason, among other things that if the waiver was a condition imposed by the Board of Estimate such condition would be illegal as constituting so-called “contract zoning”. The court rejected plaintiff’s argument holding that even assuming that the Board of Estimates had imposed the waiver agreement as a condition for the change, it does not necessarily follow that such condition was not validly imposed in the best interests of the citizens of the City of New York. \textit{Id. at 1079}, \textit{citing} (Church v. Town of Islip, 8 N Y 2d 254; Point Lookout Civic Assn. v. Town of Hempstead, 22 Misc 2d 757, affd 12 A D 2d 505, affd 9 N Y 2d 961); \textit{But see Levine v. Town of Oyster}.
Relying on Collard, in Holmes v. Planning Bd. of New Castle, the court held in a lengthy opinion, that, “[c]onditions imposed as an incident of approval in a developmental permit control system are a major weapon in a planner’s arsenal. Conditions allow flexibility and fairness in land use and development control decisions, and provide the ability to deal with problems such as traffic congestion, something barely contemplated under zoning schemes.

The most common utilisations of conditions in land use and development decisions occur in nondiscretionary determinations which are made subject to conditions publicly specified in
advance, e.g., special permits, or discretionary determinations subject to stipulated conditions, e.g., variances or site plan approval [citations omitted].

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

VI. Conditional Use District Zoning in North Carolina
Upheld as Not Involving Contract Zoning

In North Carolina, there is a land use device called “conditional use district zoning.” Under this device, the landowner requests a rezoning to a conditional use district. Under this scheme, a landowner must request a rezoning to a conditional use district and the local government must issue a conditional use permit before any desired use will be permitted.

Conditions are placed in the permit, not in the zoning ordinance, thereby on its face, avoiding the claim of conditional zoning. The “conditional use district zoning” differs from contract zoning in that the former features merely a unilateral promise from the landowner regarding future use.

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269 Id. at 14. [citation omitted]
270 Id. at 14-15.
271 Id. at 15, citing Matter of Reed v Board of Standards & Appeals of City of N. Y., 255 NY 126); Church v Town of Islip, 8 NY2d 254 (1960). The Holmes court went on to reject the petitioners claim that the condition that they consent to an easement as a requisite for the approval of the site plan imposed on them was unreasonable because it was arbitrary. Petitioners argued that the condition must be stricken because it was not ‘directly related to and incidental to the proposed use’ of their property. The test for determining whether such a requirement is invalid is derived from the fundamental rule regarding the exercise of police power, i.e., “that there is some evil extant or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to that purpose.” Id. The court went on to state, “[t]he petitioners contend that no condition may be imposed which alleviates public needs other than those which are “uniquely and specifically attributable” to the development proposed in their application. The corollary to this rule is that the benefit deriving from a condition must accrue to the development rather than the public as a whole. These criteria posed great difficulties for municipal authorities confronted by small residential subdivisions which could not contribute properly sized recreational facilities but whose presence still generated need, by industrial subdivisions which caused environmental needs not within the category of assessment soluble problems, and by the inability to equate the cost of the exaction with the benefit to or need created by the development being accessed. As a result of these difficulties, another approach was generated, the “rational nexus test”. This test draws support from the police power in allowing conditions based on future oriented planning. Thus, a subdivider can “be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision” The rational nexus test relieves the highly constricting uniqueness factor and allows some incidental benefit to the general public. Id. at 18-19. Here, the condition was imposed to alleviate traffic congestion posed by the development. Id.
There is no bilateral contract binding the zoning authority. At the same time, the “conditional use district zoning” allows the local government to consider proposed land use when evaluating a zoning application.272 As originally conceived, conditional use district zoning consisted of two steps: 1) a legislative process to consider the rezoning request, and 2) a quasi-judicial proceeding to determine whether a permit is appropriate under the circumstances presented by the application. It was held the without the second step, the zoning decision would be based on the proposed use of the property -- a classic illustration of illegal contract zoning.273

The North Carolina Supreme Court dealt with the concept and the question whether it constitutes illegal contract zoning in *Chrismon v. Guilford County.*274 The court stated that it was

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273 *Massey v. City of Charlotte*, 2000 N.C. Ct. 4 (April 17, 2000). However, the North Carolina Legislature amended the zoning laws to authorize conditional zoning in Mecklenburg County until 2001, thus providing for parallel rules, one set for Mecklenburg County and another for the rest of the state. In most of the state, local governments employ a legislative process to make zoning decisions and may not consider a specific use in making that zoning decision. Once the rezoning has occurred, the municipality then holds a quasi-judicial hearing to issue a conditional use permit for the specific use. Within the county, local governments had the temporary statutory authority to approve a rezoning using a single-step, purely legislative process, subject to a deferential judicial review and may consider the tract’s proposed used in making the zoning decision. That is, the new law can be viewed as authorizing conditional zoning and contract zoning in the county. *See* Stepen C. Keadey, “Into the Danger Zone: Massey v. City of Charlotte and the Fate of Conditional Zoning in North Carolina”, 79 N.C. L. Rev. 1155 (2001); *But see Massey v. City of Charlotte*, 145 N.C. App. 345 (N.C. Ct. App. 2001)(overruling trial court’s conclusions that the courts and the legislature have limited such approval of conditional use district zoning to systems which utilize a two step process - a legislative rezoning decision followed by a quasi-judicial determination of whether to issue a conditional use permit, finding that the ordinance on conditional use permits allows an applicant to apply separately for rezoning and a conditional use permit, but that the ordinance allowed for both to be approved or disapproved in a single public hearing held before the Board of Commissioners, and that Board was within its powers to create a special use district that would not require a special use permit).
274 322 N.C. 611 (N.C. 1988). There, beginning in 1980, landowner moved some portion of his business operation from the 3.18-acre tract north of Gun Shop Road to the 5.06-acre tract south of Gun Shop Road, directly adjacent to plaintiffs’ lot. Subsequently, landowner constructed some new buildings on this larger tract, erected several grain bins, and generally enlarged his operation. Concerned by the increased noise, dust, and traffic caused by landowner’s expansion, plaintiffs filed a complaint with the Guilford County Inspections Department. The Inspections Department subsequently notified landowner by letter dated that the expansion of the agricultural chemical operation to the larger tract adjacent to plaintiffs’ lot constituted an impermissible expansion of a nonconforming use. The same letter informed landowner further that, though his activity was impermissible under the ordinance, he could request a rezoning of the property. Shortly thereafter, landowner applied to have both of the tracts in question rezoned from A-1 to “Conditional Use Industrial District” (hereinafter CU-M-2). He also applied for a conditional use permit, specifying in the application that he would use the property as it was then being used.
necessary to consider two very different concepts -- namely, valid conditional use zoning and illegal contract zoning. In fact, said the court, the two concepts are not to be considered synonymous. The court held that the rezoning at issue in this case -- namely, the rezoning of [landowner’s] two tracts of land from A-1 to CU-M-2 -- was, in truth, valid conditional use zoning and not illegal contract zoning. The court continued, “[i]llegal contract zoning properly connotes a transaction wherein both the landowner who is seeking a certain zoning action and the zoning authority itself undertake reciprocal obligations in the context of a bilateral contract. The court stated that most courts would conclude that by agreeing to curtail its legislative power, the Council acted ultra vires. Such contract zoning is illegal and the rezoning is therefore a nullity. Contract zoning of this type is objectionable primarily because it represents an abandonment on the part of the zoning authority of its duty to exercise independent judgment in making zoning decisions. As the court had indicated, valid conditional use zoning, on the other hand, is an entirely different matter. Conditional use zoning is an outgrowth of the need for a compromise between the interests of the developer who is seeking appropriate

and listing those improvements he would like to make in the next five years. Under the CU-M-2 classification, landowner’s agricultural chemical operation would become a permitted use upon the issuance of the conditional use permit. The Guilford County Planning Board met and voted to approve the recommendation of the Planning Division that the property be rezoned consistent with landowner’s request. The trial court affirmed the validity of the rezoning in question. The Court of Appeals reversed, holding, first, that the rezoning in question constituted illegal “spot zoning” and, second, that it also constituted illegal “contract zoning.” The Court of Appeals found that the rezoning was accomplished upon the assurance that landowner would submit an application for a conditional use permit specifying that he would use the property only in a certain manner. The Court of Appeals concluded that, in essence, the rezoning here was accomplished through a bargain between the applicant and the Board rather than through a proper and valid exercise of the county’s legislative discretion. According to the Court of Appeals, this activity constituted illegal “contract zoning” and was therefore void.

275 Id. at 634-35.
278 Id. at ——, citing generally Wegner, Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Governmental Land Use Deals, 65 N.C.L. Rev. 957
re zoning for his tract and the community on the one hand and the interests of the neighboring landowners who will suffer if the most intensive use permitted by the new classification is instituted.279 One commentator has described its mechanics as follows: An orthodox conditional zoning situation occurs when a zoning authority, without committing its own power, secures a property owner’s agreement to subject his tract to certain restrictions as a prerequisite to rezoning. These restrictions may require that the rezoned property be limited to just one of the uses permitted in the new classification; or particular physical improvements and maintenance requirements may be imposed.280 In the court’s view, therefore,

The principal differences between valid conditional use zoning and illegal contract zoning are related and are essentially two in number. First, valid conditional use zoning features merely a unilateral promise from the landowner to the local zoning authority as to the landowner’s intended use of the land in question, while illegal contract zoning anticipates a bilateral contract in which the landowner and the zoning authority make reciprocal promises. Second, in the context of conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment.281

279Id. at 636.
280Id. at 635-36, citing Shapiro, The Case For Conditional Zoning, 41 Temp. L.Q. 267, 270-71 (1968) (emphasis added).” Id. at 635-36.
281 The Court of Appeals, in its opinion in this case, determined that “[t]he rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county’s legislative discretion.” In so doing, it concluded, in essence, that the zoning authority here -- namely, the Guilford County Board of Commissioners -- entered into a bilateral agreement, thereby abandoning its proper role as an independent decision-maker and rendering this rezoning action void as illegal contract zoning. Chrismon v. Guilford County, 85 N.C. App. 211, 219, 354 S.E. 2d 309, 314. Justice Webb dissented by stating, “[i]t appears to me the majority has overruled Blades v. City of Raleigh, 280 N.C. 531, 187 S.E. 2d 35 (1972) and Allred v. City of Raleigh, 277 N.C. 530, 178 S.E. 2d 432 (1971). In an attempt to distinguish Blades and Allred from this case the majority
VII. Concomitant Agreements Withstanding a Charge of Contract Zoning

In the state of Washington, there is the concept of zoning with concomitant agreements. The enactment of the zoning amendment occurs concurrently with the entering into of an agreement between the developer and the city; the agreement imposing on the developer requirements in addition to those otherwise contained in the zoning ordinance. In State ex. rel. Myhre v. City of Spokane, the court upheld such an agreement, finding that the indicia of the validity of such agreements include whether the performance called for is directly related to

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282 State ex. rel. Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790, 794 (Wash. 1967)(upholding such an agreement, finding it not contract zoning, not treated as a bilateral contract. Instead, these are mechanisms designed to prevent the negative effects of certain types of development. As such, a valid and permissible exercise of police power. Court explained that its power to review the validity of zoning accompanied by concomitant agreements was limited to invalidating an ordinance only if there was no reason for the change or the agreement was in fact for the primary or sole benefit of the developer. The concomitant agreement required the owners of reclassified property to pay $75,000 toward the construction costs of certain streets which would be needed because of the development of a shopping center in the rezoned area; “[w]hen the city requires that the cost of such safety measures be borne by the company, it is not bargaining away its regulatory police power but, rather, determining that the cost should be borne by the person who created the necessity for the expenditure of such funds, instead of the city). 422 P. 2d at 796. See also Redmond v. Kezner, 10 Wash. App. 332, 517 P.2d 625 (1973)(court held valid an agreement between property owners and developer which imposed conditions and a dedication of land held concomitant, but the rezoning valid where the agreement was designed to neutralize any negative impact from development and not one seeking to extract some collateral benefit from the property owner).
public needs which may be expected to result from the proposed usage of the property to be rezoned; the fulfillment of these needs is an appropriate function of the contracting governmental body; performance will mitigate the burden in meeting those resulting needs by placing it more directly on the party whose property use will give rise to them; the agreement involves no purported relinquishment by the governing body of its discretionary zoning power. 284

Concomitant agreements provide a source of flexibility by allowing an intermediate use permit, between absolute denial and complete approval of a petition. 285 In other words, a “contract to rezone” or concomitant agreement, is invalid only if it can be shown that there was no valid reason for a zoning change and the authorities are using the contract for bargaining and sale to the highest bidder or solely for the benefit of private speculators. 286 In *City of Redmond v. Kezner*,287 the concomitant agreement contained no express promise by the city to rezone. Instead, the agreement was conditioned upon the city rezoning. The court pointed out though, that the distinction was unimportant. “If there is no promise to rezone, there is no promise to relinquish legislative power. … If the city ha[d] made the promises claimed, they [would] not illegal under the *Myhre*, in which the city promised to rezone.” 288

In Maine, the zoning enabling act permits a municipality to enter into a contract zoning agreement with a landowner for the rezoning of land which may contain conditions for final

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283 70 Wash.2d 207, 422 P.2d 790. 
286 *Id.* 
288 *City of Redmond v. Kezner*, 10 Wash. App. 332, 340, 517 P.2d 625 (1973). Where the city agreed to apply for and the administration agreed to support the rezoning of property, there is not a promise or guarantee that the rezone would be granted for the property because the administration does not have the power to rezone; it is the City council’s authority. *Id.*
approval.\footnote{See 30-A M.R.S.A. § 4404(9).} Under a town’s contract zoning provisions, the planning board is required to conduct a public hearing on a developer’s proposed contract zoning agreement and to provide notice of this hearing to the public and the neighboring landowners.\footnote{See 30-A M.R.S.A. § 4352 (8). \textit{See also Crispin v. Town of Scarborough}, 1999 Me 112, 736 A.2d 241 (1999). The town’s contract zoning ordinance there provided: “contract zoning ... is authorized for zoning map changes when the town council, exercising its sole and exclusive judgment, ... determines that it is appropriate to change the zoning district classification of a parcel of land to allow reasonable uses of land ... which remain consistent with the Town’s ... comprehensive plan.”} The Pennsylvania courts have held that rezoning which is otherwise valid concomitant with agreements between a developer and the municipality concerning the use of the land, is not invalid merely because of the existence of an agreement.\footnote{\textit{Gladwyne Colony, Inc. v. Lower Merion}, 409 Pa. 441, 187 A.2d 549 (1963)(owner agreed to grant the approval).}

\section*{VIII. The Questions Earlier Posed}

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

IX. Why Development Agreements are Not Contract or Conditional Zoning

As the cases state, contract zoning refers to an agreement between a municipality and a developer whereby the developer offers consideration often but not necessarily extraneous to the property for zoning, *ad hoc*. As a general proposition, *ad hoc* zoning agreements are invalid to the extent that a municipality promises to re-zone land by bypassing the notice and hearing requirements of the legislative process, or makes a decision to rezone before public hearing, or agrees to rezone in exchange for some benefit having nothing to do with the rezoning. *Ad hoc* zoning may also be invalid where it conflicts with the municipality’s comprehensive plan in a way that results in the discriminatory treatment of persons and projects or where the rezoning does not further the public interest, safety, or welfare. But, the mere act of re-zoning is not contract zoning and it is a different issue if the zoning regulations and comprehensive plan specifically contemplate rezoning affecting a specific parcel with the imposition of conditions. In fact, the cases upholding conditional zoning, hold that rezoning in this fashion, that is, with conditions attached that limit the use of the rezoned land in a way designed to minimize adverse impact on the surrounding area, furthers the municipality’s interest in achieving desirable and beneficial land use.292 In the same sense, development agreements should not be regarded as a form of *ad hoc* zoning since they contemplate the developer’s compliance with the existing

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292 *Cram v. Town of Geneva*, 190 A.D.2d 1028 (4th Dept. 1993). A further discussion of the powers of
zoning scheme (although they may involve variances and exceptions) and are approved by public hearing. They are nonetheless subject to challenge if the decision to freeze the zoning is based on offers or agreements that inhibit the municipality’s police powers, the municipality promising in the resulting ordinance not to apply new zoning restrictions to the development.\textsuperscript{293} Courts have recognized the need for land-use agreements between developers and municipalities to assure stability in permitting large projects. Thus, the trend has been to allow such agreements unless they constitute a usurpation of the municipality’s zoning authority.\textsuperscript{294} In fact, as described earlier, several states have codified the process for entering into development agreements.\textsuperscript{295} While these statutes generally authorize local governments to assure developers that zoning regulations in effect at the time of an agreement will remain in effect until the project is completed, they also require provisions in the agreements that pertain to the duration of the agreement and the conditions upon which the agreement may be terminated, that is to protect the health, safety or welfare of the public.\textsuperscript{296} The extent to which a local government may validly restrict or limit its future use of the police power by freezing the zoning under statutorily authorized development agreements is an issue that has been resolved by a few courts.\textsuperscript{297}

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local governments in New York to re-zone on a site-by-site basis, although with conditions, appears \textit{supra}, at 31-37. \textsuperscript{293}A. Rathkopf & D. Rathkopf, The Law of Zoning and Planning § 29A.03[1][b], [f], at 27, 33-34 (1990).


\textsuperscript{295}\textit{Id.}, citing See Rathkopf & Rathkopf, supra, § 29A.03[1][a], [c], at 22-23, 30. Id. § 29A.03[1][g][i], at 34-35.

\textsuperscript{296}\textit{Id. citing Rathkopf} at 35 n.50.

\textsuperscript{297}In \textit{Morgran Company, Inc. v. Orange County}, 818 So.2d 640 (Fla. 2002), the Court also acknowledged that development agreements are expressly permitted by the Florida Statutes. Development agreements are defined as a “contract between a [local government] and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits. Florida Law permits local governments to impose “conditions, terms, and restrictions” as part of these agreements, where necessary for the public health, safety or welfare of its citizens. But, the problem in that case was the city’s agreement to support rezoning as part of that development agreement, beforehand, rather than after hearings on the

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If development agreements are distinguished from contract zoning by the absence of any commitment on the part of the municipality to act in accordance with the developer’s wishes, making them a form of conditional zoning, then they may be of little benefit to the developer where the municipality promises nothing in return. Yet, as a form of conditional rezoning, they would be upheld, it seems, in the majority of jurisdictions. On the other hand, a binding promise by the municipality made before rezoning to act in a certain way, would be regarded as illegal contract zoning. But this would be the case only if the municipality has by-passed the public hearing procedures, the public interest is not served, it is disruptive of the comprehensive plan and the municipality has surrendered its power to rezone if the public interest so requires.

Development agreements authorized by statute, by their terms, meet all these provisos. They specifically reserve some governmental control over the project, such as by provisions that specify the duration and grounds for unilateral termination in order to protect the public interest, health and welfare. By statute, they must be consistent with the comprehensive plan, and they are approved through public hearing.\textsuperscript{298}

\textsuperscript{298}Larkin, 172 Vt. at 568, 772 A.2d at 558(deciding the case on another ground that plaintiff who purchased the original developer’s rights in a foreclosure sale did not acquire rights under a development agreement with the city); see also Bollech v. Charles County, Maryland, 166 F. Supp.2d 443 (D. Md. 2001) (where agreement itself stated that development would be subject to any changes in state or federal law and that it did not require absolute deference to the existing zoning, the county did not illegally abdicate its police powers by entering into the agreement); DePaolo v. Town of Ithaca, 258 A.D.2d 68 (3d Dept. 1999)(“agreement” by developer to grant town a 99 year license to use certain property as a park, conditioned upon landowner’s receipt of all approvals for a development project, did not present a situation of “legislating pursuant to the terms of a contract”, nor one in which town agreed “in exchange for a predetermined consideration for expedited and favorable determination, as would be illegal, but instead was only an agreement that furthered the town’s longstanding objective stated in the comprehensive plan, of ensuring public use and enjoyment of the donated land); Stephens v. City of Vista, 994 F.2d 650 (9th Cir. 1993)(no bargaining away of police power where city could exercise discretion over the site.
In fact, development agreements, not authorized by special legislation have been specifically upheld as not involving contract, but conditional zoning. In *Giger v. City of Omaha*, the developer applied to the city for a rezoning of property to permit the construction of a mixed-used development consisting of retail, office and residential buildings. As part of the application process, the developer submitted several development plans, the final plan including the construction of a public park. In a new procedure, the developer and the city entered into four agreements which incorporated the plan. The four agreements were collectively known as the “development agreement” and were submitted to the city for approval. The city passed an ordinance approving the “development agreement,” incorporating it as part of the ordinance and passed five separate ordinances rezoning the property. Clearly, the agreements formed the basis of the city’s decision to rezone, i.e., the parties had worked out the terms of the rezoning before it occurred. The agreement could be interpreted as a promise by the city to rezone based upon the agreed upon conditions.

The challengers contended that rezoning by agreement was illegal contract zoning and was therefore invalid *per se*, as an *ultra vires* act, and fostered the “appearance of evil.” The court found that distinction between contract zoning and conditional zoning academic because its scope of review was limited to determining whether the conditions imposed by the city for

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300 Neighboring property owners challenged the rezoning on the ground, *inter alia*, the city acted in an arbitrary, capricious, and unreasonable manner in adopting the rezoning ordinance. Specifically, the challengers alleged that the city entered into a development agreement with the developer, adopted a rezoning ordinance which incorporated that agreement, and rezoned the property pursuant to that agreement and that the city rezoned the property without giving adequate consideration to the risk of flood created by the project.
rezoning were reasonably related to the interest of public health, safety, morals, and the general welfare.\textsuperscript{302} Accordingly, the city should be permitted to condition rezoning ordinances on the adoption of an agreement between the developer and the city, or any other means assuring the developer builds the project as represented. Otherwise, the city would be stripped of the power to act for the benefit of the general welfare.\textsuperscript{303} At the risk of confusion, but for the sake of convenience, the court referred to this zoning arrangement as conditional zoning. Quoting a treatise, the court explained that the purpose of conditional rezoning is to minimize that negative externalities caused by land development which otherwise benefits the community.\textsuperscript{304} In this way, the developer might agree to restrict development of its property, make certain improvements, dedicate a portion on of land to the municipality, or make payments to the government.\textsuperscript{305}

The court pointed out that conditional zoning is valuable as a planning tool because it permits municipality greater flexibility in balancing developing demands against fiscal and environmental concerns. It provides a municipality with flexibility to meet specific rezoning requests while preserving the integrity of adjacent property. For example, the agreement could mitigate the harshness of commercial or industrial rezoning on neighboring residential property.

\textsuperscript{301}Id. at 681-82, 442 N.W.2d at 189.
\textsuperscript{302}Id. at 682, 442 N.W.2d at 189. The court gave great deference to the city’s determination of which laws should be enacted for the welfare of the people. Therefore, when the city considers a request for rezoning based upon a plan or representation by the developer, it is presumed that the city granted the request after making the determination that the plan as represented was in the interest of the public health, safety, morals, and the general welfare and the developer was not permitted to develop the property in a manner inconsistent with the plan or representation in which the rezoning was based, despite the fact that inconsistent uses may be permissible under the new zoning classification.\textsuperscript{Id. at 683, 442 N.W.2d at 189.
\textsuperscript{303}Id. at 683, 442 N.W.2d at 189.
\textsuperscript{304}Id. at 683, 442 N.W.2d at 189, citing 2 A. Rathkopf and D. Rathkopf, Rathkopf’s the Law of Zoning & Planning §27.05at 27-45 (rev.ed, 1989).
\textsuperscript{305}Id at 684. 442 N.W.2d at 189.
by requiring a buffer on the zone boundaries. Finally, conditional zoning allows a municipality to maintain greater control over the development process.\footnote{Id. at 684, citing 2 A. Rathkopf and D. Rathkopf, Rathkopf's the Law of Zoning & Planning §27.05 at 27-45 (rev.ed, 1989).} In sum, conditional zoning is a device that allows the city flexibility to extract improvements that bare zoning ordinances do not provide, grants greater means of control over the development of the city, and gives the city a remedy to enforce the developer’s plans and representations.\footnote{Theoretically, if the rezoning ordinance adopts the plan, as in this case, the city could institute legal proceedings if the developer builds a project inconsistent with the plans without resorting to rezoning the property. For these reasons, the court held conditional rezoning to be valid. \textit{Id.} at 685, 442 N.W.2d 190.}

However, the court cautioned, conditional rezoning is a legislative function and therefore must be with the proper exercise of the police power, i.e, must be reasonably related to the interest of public health, safety, morals, and the general welfare.\footnote{Id. at 685, 442 N.W.2d 190.} Here, the development agreement could not be construed as bargaining away the city’s police power where it was established that the agreement provided more restrictive ceilings and development regulations than the current underlying zoning regulation.\footnote{Id. at 690, 442 N.W.2d 193.} The evidence clearly showed that the city’s police powers were not abridged in any manner and that “the agreement was expressly subject to the remedies available to the city under the Omaha Municipal Code. Further, the court found that “the agreement actually enhanced the city’s regulatory control over the development rather than limiting it.”\footnote{Id. at 688, 442 N.W.2d 191.}
The court took great pains to avoid any finding of a restriction on the government’s exercise of its police powers by the agreement, as opposed to a broadening of such powers. This seems to minimize the benefits of a development agreement, except to the extent that the developer knows beforehand the range of permitted uses. But what if the city decided to rezone again. Could it have agreed not to apply the rezoning to the project? That is not clear from Giger.

In *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors*, a California appellate court expressly rejected a challenge to development agreements authorized by statute on the ground that such agreements amounted to illegal contract zoning. It ruled that a zoning freeze was not a surrender or abnegation of political power, but that it in fact advanced the public interest, since the project was still required to be developed in accordance with the county’s general plan and the agreement did not permit construction until the county had approved detailed building plans. The agreement also retained the county’s discretionary authority in the future and in any event, the zoning freeze was only for necessary zoning regulation including conditional zoning, as long as those regulations are within the proper exercise of the police power. *Id.* at 690, 442 N.W.2d at 193. The final contention made by the challengers was that the city fostered “an appearance of evil” by engaging in conditional zoning that it could result in the corruption of officials; that officials will concentrate more on what they can extract from the developer than on proper rezoning criteria. The court found the argument lacking in merit. There was no evidence of graft or corruption in the case and the mere appearance of evil is insufficient basis for striking down an ordinance. *Id.* The regulation, by imposing restrictions not generally applicable to other property within the district also did not violate the uniformity requirement of the zoning laws, the court pointing out that the uniformity requirement did not preclude different uses within the same district so long as it is reasonable and based on the public policy to be served. In fact, the court thought allowing reasonable classifications within a district was a good rule, especially in view of the broad delegation of authority given by the legislature to the city in making zoning regulations. Accordingly, the uniformity requirement did not prohibit reasonable classification with a director. Here, there was no evidence that the city acted unreasonably. *Id.* at --. Nor, was the zoning ordinance an example of spot zoning. The challengers failed to prove by clear and convincing evidence that the rezoning ordinance was illegal spot zoning and therefore violative of the comprehensive plan. *Id.* at --, citing Hagmen, Urban Planning & Development Control Law, at 93, at 1969.

*311* 84 Cal. App. 4th at 233.
a period of five years, not unlimited.312

X. Conclusion

Development agreements are a form of land use bargaining, consistent with modern land use planning, which is fundamentally an exercise in bargaining. Yet, they should not be regarded as a form of contract zoning for these reasons: 1) while they involve an agreement, the city does not bargain away its legislative discretion to the extent that they reserve the power unilaterally to terminate the agreement if required by the public safety, health or welfare; 2) they do not involve an agreement in advance of rezoning, since the agreements become final only after public hearing; 3) they do not involve extraneous considerations, since the promises made by the developer pertain only to subject property; 4) they are a valuable

312Id. at 233; see also Warner Co. v. Sutton, 274 N.J. Super. 464, 644 A.2d 656 (Super. N.J. App. Div. 1994) where the court distinguished a development agreement from these proscriptions, against contract zoning, holding that, “[u]nlike ‘contract zoning,’ there is no legal impediment to a development agreement between a municipality and a property owner which provides for rezoning of certain tracts to accommodate a particular residential plan, where all negotiations and decision with respect to the rezoning amendments were taken at public meetings of the governing body and all statutory requirements relating to the amendment to the master plan and adoption of amending ordinances were properly followed.” Id. at 471; 479-80; 644 A.2d at 660; see also William M. Cox, Zoning and Land Use Administration, § 34-8.2 at 522-23 (1994). See further Terminal Enterprises, Inc. v. Jersey City, 54 N.J. 568 (N.J. 1969)(challenge to adoption of an ordinance and resolution by the City and County Board, whereby the City and the County entered into certain agreements with the Port Authority Trans-Hudson Corporation (PATH) relating to the construction and operation of a proposed Transportation Center in the Journal Square area and to entrance improvements at the Grove-Henderson Street Station. Appellants, individual and board of trade, challenged the agreement claiming that the agreements with PATH were invalid for several reasons, including that the defendants have invalidly obligated themselves to legislate and zone in the future concerning public streets, building codes, and bus and taxi operations; that the defendants have unlawfully delegated power to PATH; that the agreements were invalid on their face since their fulfillment by PATH was optional. The court affirmed the lower court. It stated that “[i]nitially, it should be noted that the officers of a municipal corporation may limit by contract their own police powers as well as those of their successors where the agreement is authorized by statute.” Id. at 575. The court then held that, “[t]here can be no doubt that PATH has statutory authority to construct and operate a Transportation Center at Journal Square. N.J.S.A. 32:1-35.52; N.J.S.A. 32:1-35.51. To aid PATH in achieving this objective, we think it clear that the Legislature authorized the City and County to relinquish some of their police powers.” Id. The court went on to state, “the Legislature has given the City and County broad powers to cooperate with PATH in the construction and operation of the Transportation Center so long as resulting agreements contain ‘reasonable terms.’” Id. at 576. “We think that the terms of the agreements relating to bus operations and public streets are fully within the legislative contemplation. Since these various guarantees which the City and County gave PATH were authorized by the statutes, plaintiffs’ reliance on cases which prohibit contract
land use device, enabling the city to achieve benefits and to mitigate the effects of the
rezoning; and 5) they must be consistent with the comprehensive plan. They should also not
be considered simply as a form of conditional zoning under which the municipality imposes
restrictions on land use rather than permitting different uses proposed for development and
the municipality is free to rezone at any time. Some binding obligation on the municipality is
necessary if development agreements are to have their intended benefit. But a binding
obligation having been fully considered and undergone the public notice and hearing process
and undertaken in the public interest should be upheld as not running afoul of the basic
principle prohibiting the contracting away of police powers. Indeed, they should be regarded
as an exercise of it.

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