

THE CONTRACT TRANSFORMATION IN LAND USE REGULATION

Daniel P. Selmi*

Throughout the last century, land use regulation evolved into a system in which local governments would examine significant land use projects on an individualized basis and then impose conditions tailored to mitigate the adverse effects of those projects. Informal negotiations between local governments and developers often preceded approval of the projects. However, formal contracts were avoided, largely because of constitutional concerns about “contracting away” the police power.

In recent years, however, this situation has fundamentally transformed. Local governments and developers now often negotiate and then enter formal contracts that establish the terms governing individual projects. Developers favor such contracts as a means of achieving economic certainty for their projects. In contrast, local governments view contracts as vehicles for securing public benefits that they could not directly require from developers.

This Article argues that the use of the contract model has important, unrecognized effects on fundamental public law norms that underlie the land use regulatory system. The Article identifies six such effects: reconfiguring the status relationship between developers and government; imposing constraints on government’s ability to respond both to new information and changed circumstances; circumventing constitutional restraints designed to prevent local government from leveraging its monopolistic land use authority; increasing the likelihood that local governments will not treat similarly situated applicants equally; interfering with the implementation of planning as a means of rationalizing government’s land use decisions; and weakening the democratic norms of public participation and transparency in government decisionmaking. The Article concludes that the transformation to a contract-based land use system is jeopardizing adherence to these fundamental norms, and that states should take steps to more closely align the use of contracts with these norms.

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* Professor of Law and Fritz B. Burns Chair in Real Property Law, Loyola Law School, Los Angeles. The author would like to thank William Abbott, Robert Brain, Brian Hull, Arnold Siegel, Ken Stahl, and Kathy Trisolini for their helpful comments, and Rick Hasen for his advice. He would also like to thank David Albertson and Jennifer Schulz for their research assistance.

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INTRODUCTION: THE TRANSITION TO THE CONTRACT MODEL

Since its inception in the early twentieth century, a principal feature of land use regulation has been its adaptability. Over almost a century, the forms of regulation used by local governments have steadily evolved from rigid zoning to case-by-case approvals reflecting the particular circumstances of individual developments. Additionally, the scope of land use controls has greatly expanded as concerns of government and societal conceptions of the public interest have changed. Most notably, land use regulation now reflects the twin goals of economic development and environmental protection.

Through most of this period, the evolution of land use regulation has occurred within the confines of traditional command-and-control regulation. The system has centered on a permitting process in which a party applies for a permit, goes through a public review process, and then receives a decision from the local government sitting in judgment on the application. Most approvals are subject to numerous conditions imposed by the government that the developer must meet.

At the same time, the traditional land use system reflected a variety of underlying principles or “norms.” They generally arose out of concerns such as the need to constrain the discretion exercised by local officials over land use

decisions, the need to ensure that local government treats applicants equally, and the need to democratize the procedures of land use decisionmaking. The principles were reflected in various aspects of the land use system, ranging from the relationship between public agencies and developers to substantive limitations on the actual land use decisions.

In recent years, however, the form of land use regulation has changed significantly to incorporate a contract model. Instead of the traditional, hierarchical permit process, land use approvals are now increasingly the subject of negotiations leading to binding contracts between local governments and development interests.¹ The contract is usually referred to as a development agreement.²

The transition to contract law raises important questions about whether the contract model can serve the norms inherent in traditional land use regulation. For example, an important norm of the regulatory system is that local governments must retain authority to respond to land use problems that may arise in

1. See David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 663 (2001) (“Formal agreements between landowners and local government respecting the use of land have increased substantially over the past twenty-five years.”); R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH L. REV. 955, 956 (2001) (“[D]evelopment agreements are increasingly being utilized.”); Theodore C. Taub, *Redevelopment, Development Agreements, and Protecting the Public in the Public/Private Partnership*, 2005 ALI-ABA LAND USE INST.: PLAN. REG. LITIG. EMINENT DOMAIN & COMPENSATION 773, 777 (“Development agreements are now an essential component of any preparation effort in advance of initiating many development projects.”); Steven P. Frank, Note, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227, 227 (2009) (“[D]irect negotiations between developers and local government are growing in prominence as a means of dispute resolution.”).

2. See Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), 22 URB. LAW. 23, 27 (1990) (“In a development agreement, the municipality promises to provide the desired zoning for the project and agrees to preserve the applicable land use regulations for a specific period. In exchange, the developer promises to restrict her use of the property and agrees to make contributions to the public infrastructure.”). The leading articles on development agreements include Callies & Tappendorf, *supra* note 1; Shelby D. Green, *Development Agreements: Bargained-For Zoning that Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383 (2004); and Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai‘i*, 27 U. HAW. L. REV. 17 (2004). See also DAVID L. CALLIES, DANIEL J. CURTIN JR. & JULIE A. TAPPENDORF, *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES* (2003).

Negotiations over annexations have also become increasingly common. See Julie A. Tappendorf, *Annexation Agreements*, 2006 ALI-ABA LAND USE INST.: PLAN. REG. LITIG. EMINENT DOMAIN & COMPENSATION 1369, 1371 (“[T]he annexation agreement applies to land about to be annexed to a municipality and a development agreement applies to land already part of a municipality.”).

the future. In a development agreement, however, the government usually agrees to forego some of its authority under the police power to impose later changes in a development. Additionally, a second norm of the system is the promotion of democratic values, such as ensuring the public's ability to participate in land use decisionmaking. Contracts, however, are the product of negotiations that the contract model views as private and bilateral rather than public and multiparty in nature.

The recent ascendancy of contract has occurred quietly, largely escaping both public attention and scholarly examination.³ Some state legislatures have enacted laws authorizing development agreements,⁴ but those laws were uncontroversial. They were largely intended to prevent claims that such contracts are ultra vires or violate the constitutional doctrine that municipalities cannot contract away the police power.⁵ The laws generally do not contain serious substantive constraints on the use of development agreements. Furthermore, the consensual nature of contract has meant that judicial review of land use contracts is far less likely to occur. Although the number of appellate decisions involving development agreements is gradually increasing, many of these do not involve either the right of the parties to enter such contracts or the substance of the actual agreement.⁶

3. The most comprehensive and insightful analysis is Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3 (2005) [hereinafter Camacho, *Installment One*]. Camacho concludes that as currently constituted, "bilateral negotiated land use regulation is of dubious legitimacy." *Id.* at 6. In the second installment of his article, Camacho suggests changes to the current negotiation model. Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment Two*, 24 STAN. ENVTL. L.J. 269 (2005) [hereinafter Camacho, *Installment Two*].

4. See ARIZ. REV. STAT. ANN. § 9-500.05 (2010); CAL. GOV'T CODE § 65864 (West 2010); COLO. REV. STAT. §§ 24-68-101 to -106 (2010); FLA. STAT. ANN. § 163.3220 (West 2010); HAW. REV. STAT. ANN. §§ 46-121 to -132 (LexisNexis 2010); LA. REV. STAT. ANN. § 33:4780.22 (2010); MD. CODE ANN., art. 28, § 7-121 (LexisNexis 2010); MD. CODE ANN., art. 66B, § 13.01; MINN. STAT. ANN. § 462.358 (West 2010); NEV. REV. STAT. ANN. § 278.0201 (LexisNexis 2010); N.J. STAT. ANN. § 40:55D-45.2 (West 2010); OR. REV. STAT. ANN. § 94.504 (West 2010); VA. CODE ANN. § 15.2-2303.1 (2010) (permitting agreements in one particular county for developments of more than one thousand acres); WASH. REV. CODE ANN. § 36.70B.170 (West 2010).

5. See Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1007 (1987) ("The statutes described [allowing development agreements] evidence a clear legislative intent to afford statutory authority for freeze provisions.").

6. See, e.g., *Bollech v. Charles Cnty.*, 166 F. Supp. 2d 443, 459 (D. Md. 2001) (discharging county from any obligations under a development agreement after the other party failed to perform); *Achen-Gardner, Inc. v. Superior Court*, 839 P.2d 1093, 1099-100 (Ariz. 1992) (holding that entering into a development agreement does not allow a municipality to alter the public nature of a project and the agreement must comply with applicable laws);

This Article examines the effect of contract on the norms that underlie the preexisting land use system. The Article concludes that the expanded use of contract is transformational, either displacing or weakening a number of important values that the land use system previously has served. Thus, use of contract is not merely traditional land use regulation in a different format. Instead, by its nature the contract model fundamentally alters the foundational principles of land use regulation.

The incorporation of private law mechanisms into public law decisionmaking is not unique to the land use field but relates to the so-called New Governance model of administrative law. New Governance refers to the use of a wide variety of innovative modes of public governance;⁷ it “evokes a decentralized image of decision making, one that depends on combinations of public and private actors linked by implicit or explicit agreements.”⁸ It emphasizes alternative approaches to governance advanced as a corrective to perceived problems with conventional forms of regulation.⁹

The movement to contract in land use regulation has certain features in common with the larger New Governance movement. First, as in New Gover-

Home Builders Ass'n v. City of Maricopa, 158 P.3d 869, 875 (Ariz. Ct. App. 2007) (holding that the legislature intended development agreements to run with the land); *Neighbors in Support of Appropriate Land Use v. Cnty. of Tuolumne*, 68 Cal. Rptr. 3d 882, 895-96 (Ct. App. 2007) (holding that entering into a development agreement cannot give the county authority it otherwise lacks); *Santa Margarita Area Residents Together v. San Luis Obispo Cnty. Bd. of Supervisors*, 100 Cal. Rptr. 2d 740, 745 (Ct. App. 2000) (holding that a development agreement conformed to the authorizing development agreement statute); *Citizens for Responsible Gov't v. City of Albany*, 66 Cal. Rptr. 2d 102, 116 (Ct. App. 1997) (holding that a development agreement was constitutional and subject to environmental review); *Midway Orchards v. Cnty. of Butte*, 269 Cal. Rptr. 796, 798 (Ct. App. 1990) (voiding a development agreement as inconsistent with the county's general plan); *Morgran Co. v. Orange Cnty.*, 818 So. 2d 640, 643 (Fla. Dist. Ct. App. 2002) (holding a development agreement void because a provision that the county would “support” the developer's rezoning application effectively contracted away its legislative power); *Fulton Greens Ltd. v. City of Alpharetta*, 612 S.E.2d 491, 494 (Ga. Ct. App. 2005) (holding that a development agreement unambiguously provided for compensation in the form of impact fee credits); *Sprenger, Grubb & Assocs. v. City of Hailey*, 903 P.2d 741, 746 (Idaho 1995) (finding that rezoning did not breach the development agreement because the agreement did not freeze regulation or promise permanent zoning); *Azalea Lakes P'ship v. Parish of St. Tammany*, 859 So. 2d 57, 62-63 (La. Ct. App. 2003) (holding that a parish could enter into development agreements with partnerships); *City of Virginia v. Northland Office Props. Ltd.*, 465 N.W.2d 424, 427 (Minn. Ct. App. 1991) (upholding the development agreement as unambiguous); *Japp v. Papio-Missouri River Natural Res. Dist.*, 733 N.W.2d 551, 556-57, 559 (Neb. 2007) (upholding statutory and constitutional authority to enter into a development agreement); *Giger v. City of Omaha*, 442 N.W.2d 182, 192 (Neb. 1989) (holding that a development agreement did not bargain away the city's police power).

7. Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 472-73 (2004).

8. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548 (2000).

9. See Karkkainen, *supra* note 7, at 496.

nance, the use of contract in land use emerged as an alternative to traditional command-and-control regulation¹⁰ and altered the previous hierarchical regulatory relationship between land developers and local governments. Second, the purpose of using contract under both New Governance and land use regulation is increased efficiency in regulation and more effective delivery of public services.¹¹ Third, in both situations, employing contract often involves negotiations leading to agreements in which regulators commit to forgo certain powers in return for developers' commitments to take steps not required by existing law.¹²

At the same time, however, the use of contract in land use differs from other features of the New Governance movement. Perhaps most importantly, while New Governance emphasizes multiparty, broad-based participation in a collaborative model,¹³ the negotiations for land use contracts have been almost exclusively bilateral rather than multiparty. Additionally, the New Governance model arose, at least in part, out of the traditional concern in administrative law over the legitimacy and effectiveness of actions by administrative agencies.¹⁴ By contrast, in one important respect land use regulation by local governments does not present the same problem of legitimacy, as the decisionmakers are directly elected, local public officials. Finally, formal contracts are rare in the regulatory setting¹⁵ but increasingly the norm in land use. In short, the move-

10. See Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 300 (“[N]ew governance’ . . . includes the use of policy tools that involve privatization of previously public work and devolution of responsibility from unitary bureaucracies . . .”).

11. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 466 (2004) (“The governance model promotes more efficient organization of public life, efficient use of public dollars, and effective delivery of governmental services.”).

12. See David A. Dana, *The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 36 (“[R]egulators contractually commit not to enforce some requirements that are formally applicable to the regulated entities in return for the regulated entities’ contractual commitments to take measures not required under existing formal law.”).

13. See Lobel, *supra* note 11, at 373 (“The new governance model . . . broadens the decision-making playing field by involving more actors in the various stages of the legal process.”); Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673, 673-74 (“[Governance] aims to ensure a broad range of public interest representation by encouraging transparency and participation through formal and informal means . . .”).

14. See Freeman, *supra* note 8, at 546 (“[A]dministrative law scholarship has organized itself largely around the need to defend the administrative state against accusations of illegitimacy, principally by emphasizing mechanisms that render agencies *indirectly* accountable to the electorate . . .”); Lobel, *supra* note 11, at 395 (“[A]n overarching justification for softer, flexible approaches to policy is that they increase the overall legitimacy of the system. Soft law is experienced by the different stakeholders in a polity as less oppressive than regulatory means and force.”).

15. See Freeman, *supra* note 8, at 636-37.

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ment to contract in land use regulation has certain features that distinguish it from New Governance, and thus bear independent analysis.

The Article begins by tracing the regulatory forces that led to the formal use of contract in land use regulation. It then identifies six governmental norms that underlie the modern land use system and examines how the use of the contract model comports with those norms. The analysis shows that use of contract challenges a number of the accepted governmental norms that have evolved to constrain and shape local government's exercise of its authority over land use. The Article concludes that the shift to a contract-based land use regime is transformational, marking an important turning point in the evolution of land use law. In doing so, the Article casts doubt on whether the implementation of the private law contract model can effectively serve the previously recognized public law underpinnings of land use regulation.

I. THE ASCENDANCY OF CONTRACT IN LAND USE REGULATION

For much of the twentieth century, the mechanisms of land use regulation did not include contract. Instead, they centered on a structured public process culminating in the approval of a development.¹⁶ Furthermore, the accepted understanding of the constitutional prohibition against bargaining away the police power inhibited the use of contract.¹⁷ That prohibition prevented local governments from agreeing to a form of land use regulation in exchange for consideration.

Experience with land use regulation, however, set in motion forces that led first to informal negotiation as a prelude to development approval and then, more recently, to the use of formal contract. In these contracts, developers agree to provide negotiated benefits to a municipality, such as increased infrastructure, that the city often could not require under its regulatory authority. In return, the city agrees to allow a specific development and to "vest" the developer's right to build against any future land use changes. Put broadly, the city obtains substantial physical benefits, while the developer receives certainty.

This Part of the Article outlines the historical development of bargaining in the land use system. Its purpose is threefold. First, the history highlights the increasingly broad goals served by the land use system. The difficulty in meeting

16. *See, e.g.,* *Neighbors for a Healthy Gold Fork v. Valley Cnty.*, 176 P.3d 126, 130 (Idaho 2007) ("At the conclusion of these hearings, the Board approved the application, subject to certain conditions . . ."); *Nestle Waters N. Am., Inc. v. Town of Fryeburg*, 967 A.2d 702, 706 (Me. 2009) ("After attaching numerous conditions to the permit, the Planning Board approved it . . .").

17. *See, e.g.,* *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 366 n.15 (Mass. 2003) ("Some forms of 'contract zoning' are 'suspect because of the concern that a municipality will contract away its police power to regulate on behalf of the public in return for contractual benefits offered by a landowner . . .'" (quoting *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002))).

those goals, in part, motivated the move to a contract regime. Second, those goals also establish the range of issues that are potentially the subject of bargaining in a contract-based regime of land use regulation.

Third, the use of informal bargaining in land use regulation suggests both that the turn to contract was seemingly inevitable and that the use of formal contract brings advantages that may justify its use. Finally, that same history also highlights the longstanding reluctance to link actual land use decisions to formal contract. At least some of that reluctance is founded on concerns that contract may impair values underlying the land use system. That impairment is the subject of Part II of this Article.

A. *The Evolution of the Contract Solution*

1. *The Village of Euclid era*

The origins of land use regulation in the early twentieth century were closely linked to the progressive movement in politics.¹⁸ Nominally, land use controls responded to an identified societal problem: the impacts of conflicting, adjacent land uses. This problem, of course, was the same one traditionally addressed by the common law doctrine of nuisance, which was long available to adjust land uses.¹⁹ Critically, however, the progressives viewed regulation as more than just a nuisance-prevention mechanism; they saw it as a comprehensive vehicle that could improve the efficiency of land use, thus buttressing economic development.²⁰

18. See Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 16 (2005) (“While courts in the early twentieth century were often skeptical of permitting the nascent progressive movement to regulate private conduct—the so-called *Lochner* era—land use was one of the first areas in which the courts stopped their second-guessing . . .” (footnote omitted)); David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 284 n.10 (2004) (“Consistent with the progressive movement principles underlying zoning adoption in the 1920s, this notion of having a board of experts, rather than politicians, making adjustments was a popular justification for board of adjustment variance power.” (citing Newman F. Baker, *The Zoning Board of Appeals*, 10 MINN. L. REV. 277, 280 (1926))).

19. See David A. Thomas, *The Property Law Aspects of Private Nuisance*, in 8 THOMPSON ON REAL PROPERTY § 67.03 (David A. Thomas ed., 2d Thomas ed. 2005) (“A private nuisance is the unreasonable conduct of one landowner in using the land that causes a substantial interference with another landowner’s use and enjoyment of land. Private nuisance liability is grounded on a very ancient concept of the common law and of the pre-Norman English Law, which teaches that one should not use one’s land so as to injure the property of another . . .”).

20. See Timothy Sandefur, *The “Backlash” So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709, 721 (“[T]he term ‘blight’ was first applied to neighborhoods during the Progressive era When a neighborhood failed to perform up to the standard required by the ‘needs of the public,’ it was up to the government

Confidence in accomplishing this efficiency goal was a hallmark of the Progressive Era, as was the means by which it would be achieved: the application of impartial expertise to the problem.²¹ Land use regulation was not seen as political; consequently, there was little or no role for the public in its workings. Rather, the promoters of land use regulation placed their faith in a process of study. The problem of conflicting land uses would be examined thoroughly, and intelligent solutions would present themselves.²² The local government decisionmakers would put politics aside and accept the expert solutions of public planners.

The United States Supreme Court upheld the constitutionality of zoning in the seminal decision *Village of Euclid v. Ambler Realty Co.*²³ The Court largely centered its holding on analogizing the operation of zoning to nuisance law. It also recognized the role of expertise in resolving societal problems.²⁴ It referred favorably to comprehensive reports prepared by experts,²⁵ presumably an early version of planning.

The influence of *Euclid* was profound.²⁶ Most importantly, the opinion upheld a regulatory regime that conferred substantial discretion on local governments. The unsuccessful plaintiff in *Euclid* claimed that if its property was open to industrial development, it would be worth \$10,000 per acre, but that the zoning ordinance reduced its value to \$2500 per acre.²⁷ From the local government's perspective, the holding in *Euclid* affirmed that the government's discretion in regulating land uses was broad.

to intervene and alter the economic situation to improve the neighborhood." (footnote omitted)).

21. See, e.g., MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 17-33 (2008) (noting how the Progressive Era's faith in professional solutions led to the widespread use of zoning); Jamison E. Colburn, "Democratic Experimentalism": A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287, 356 (2004) (referring to "the rise of the theory of expertise throughout the Progressive era"); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 498 (2001) ("The same mindset infused government during the Progressive Era and encouraged a turn to centralized, bureaucratic expertise in formulating and implementing government policy.").

22. See Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2197-98 (2002) ("[O]ne theme that permeated [Progressive] reform efforts was a strong belief that the talents of experts drawn from the newly professionalized ranks—chiefly economists, political scientists, social workers, lawyers, and teachers—should be harnessed by governments at all levels . . .").

23. 272 U.S. 365 (1926).

24. See *id.* at 394-95.

25. *Id.* at 394 ("The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports.").

26. See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1272 (2008) (noting that *Euclid* remains a "cornerstone[] of the current law of municipal government in America").

27. 272 U.S. at 384.

In the decades after *Euclid*, however, the Court's rationale for affording discretion to local government proved incapable of establishing workable boundaries for the exercise of that discretion. Nuisance was unsuitable as a limit because zoning regulated land uses that did not always present potential nuisance-like conflicts. Furthermore, the application of impartial expertise to an individual land use situation did not lead to a single solution that the zoning would then embody. Instead, because many land use choices were possible within the Euclidean framework, choosing among them was inevitably a political exercise.

In short, *Euclid* approved a land use system in which local government possessed considerable discretion.²⁸ Soon, local governments devised new mechanisms that further expanded that discretion, and these mechanisms in part involved bargaining.

2. *The era of expanding flexibility*

The early zoning model left little room for bargaining with landowners over developments. The zoning ordinance would decide the basic land use, and implementation would flow automatically.²⁹ The zoning originators did envision some case-by-case consideration of land uses,³⁰ such as by issuing conditional use permits and variances.³¹ Those devices, however, were relegated to secondary roles in the overall scheme.

As experience with zoning techniques accumulated, two important effects began to emerge.³² First, because adoption of zoning was viewed as a legislative act, landowners displeased with the zoning on property could seek to change it by amending the zoning ordinance. Furthermore, the dynamics of a market economy ensured a constant pressure to alter the zoning where opportunities for greater profit appeared likely under alternative zoning.

28. See Haar & Wolf, *supra* note 22, at 2191 ("The *Euclid* majority in effect allowed this national experiment to continue, assuring itself that, because 'the validity of the legislative classification for zoning purposes [was] fairly debatable, the legislative judgment must be allowed to control.'" (alteration in original) (quoting *Euclid*, 272 U.S. at 388)).

29. See Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 733-34 (2007) ("The exercise of governmental discretion at the approval stage was not originally part of the 'Euclidean' approach to zoning, which relied upon static zoning maps and ordinances either to authorize as a matter of right or ban entirely certain types of land uses in certain identified areas.").

30. Cf. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (1926) (listing a number of considerations for a municipality to take into account when regulating land use).

31. See, e.g., *id.* § 7.

32. See PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, AM. BAR ASS'N, *LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW* 177 (2d ed. 2003) ("Dissatisfaction with the rigidity of the Euclidean zoning . . . led local governments to search for regulatory alternatives that would preserve the basic concept of zoning but add flexibility to the process.").

Second, experience brought to light the difficulties associated with prospectively setting forth appropriate land uses through a citywide zoning ordinance. The traditional property maxim that “all property is unique”³³ proved accurate, as anomalies in the overall zoning pattern appeared.³⁴ It gradually became clear that the supporters of Euclidean zoning had placed too much confidence in the ability of experts to plan in a manner that would require only minimal later adjustments. The result was a recognition that the zoning ordinance should be viewed as more flexible than originally envisioned, and amendments to zoning ordinances started to play a larger role in the zoning process.

The search for more flexibility resulted in the development of a technique known as the “floating zone.” Under this device, the text of a zoning ordinance defined a new zone, denominated a “floating zone,” but the zoning map did not specifically indicate the location of that zone. Instead, developers could apply to “land” the floating zone on particular properties.³⁵ Once this theoretical leap away from the static zoning map was accepted, an additional step was easier: expanding the floating zone into multiple uses. The so-called “planned unit development” (PUD)³⁶ would authorize mixed uses on a property.³⁷ In effect, the owner could design the zoning for the property by planning for various uses and then seek municipal approval for that plan.

Both of these new regulatory instruments presented a major conceptual hurdle for Euclidean theory. Under the original zoning model, the zoning ordinance and map identified the allowed uses at a specific geographic location. Under the floating zone and the PUD, however, the types of zones were created first; later, the zone was applied to a specific parcel of property through an amendment of the zoning map.³⁸ Opponents challenged the concepts, citing the

33. See 26 AM. JUR. 2D *Eminent Domain* § 277 (2004) (“[E]ach parcel of real property is unique.”).

34. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 186 (1928) (“The effect of the zoning is to separate from the west end of plaintiff in error’s tract a strip 100 feet in width.”).

35. See 3 EDWARD H. ZIEGLER ET AL., *RATHKOPF’S THE LAW OF ZONING AND PLANNING* § 45:1 (4th ed. 2010) (“Unlike traditional zoning by mapped districts, a floating zone establishes a use classification in the zoning ordinance when adopted by a legislative body but the classification is not delineated on the zoning map until after a rezoning process initiated by a property owner.”).

36. See 5 *id.* § 88:1 (“The best short definition is that a planned unit development is a zoning technique that encompasses a variety of residential uses, and ancillary commercial, and perhaps, industrial uses.”).

37. See *id.* (“PUD is the antithesis of the exclusive districting principle which is the mainstay of ‘Euclidean’ zoning. The latter approach divided a community into districts, and explicitly mandated segregated uses. PUD, on the other hand, is an instrument of land use control which . . . permits a mixture of land uses on the same tract (i.e. residential, commercial and industrial). It also enables municipalities to negotiate with the developer concerning proposed uses, bulk, density and set back zoning provisions” (quoting *Rudderow v. Twp. Comm.*, 297 A.2d 583, 585 (N.J. Super. Ct. App. Div. 1972))).

38. See *supra* note 35.

lack of uniformity in these new types of zoning, and they initially achieved some success.³⁹ Gradually, however, courts acceded to the municipal arguments in favor of their use,⁴⁰ and by the end of the 1950s, the concepts were generally accepted.

Critically, floating zones and PUDs were individualized mechanisms for regulating land use. The local government would decide the suitability of property for a floating zone or PUD at the behest of the owner.⁴¹ This decisionmaking structure was quite different from the concept of the original Euclidean model, where a city simultaneously decided both the zoning and its location.⁴² Moreover, because multiple possibilities exist for site-specific use of land, both techniques—particularly the PUD, which allows mixed uses—expanded the discretion available to local government decisionmakers.⁴³

Finally, and most importantly, in responding to an application for a PUD, the municipality would actively review the proposal. In doing so, the municipality was almost certain to suggest changes in the proposal or seek to place conditions on it. Critically, any discussion of changes to proposals would likely take the form of bargaining with the applicant.

3. *The era of multiple goals*

After World War II, the scale of land use approvals changed markedly. A variety of new goals emerged, giving added impetus to the concept of bargaining with a developer. The advent of the large-scale subdivision led to the passage of comprehensive subdivision laws that worked in tandem with other land use controls such as zoning.⁴⁴ The subdivisions were largely single use, a fea-

39. See Charles M. Haar & Barbara Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552 (1961) (discussing the early judicial response to floating zones).

40. See, e.g., *Rodgers v. Vill. of Tarrytown*, 96 N.E.2d 731, 733 (N.Y. 1951).

41. See Dwight H. Merriam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. 1, 20-21 (2001) (“With PUDs, developers not only have the opportunity to mix a broad range of land uses, but they may have broad discretion in deciding on the intensity of development and on dimensional standards. . . . In a community with a PUD ordinance, the developer of a PUD floating zone takes the narrative of the ordinance/regulations, which include siting criteria . . . and applies to rezone the land.”).

42. See Cecily T. Talbert, *Creating Flexible Zoning Tools for Successful Mixed Use Developments*, 2005 ALI-ABA LAND USE INST.: PLAN. REG. LITIG. EMINENT DOMAIN & COMPENSATION 1585, 1587 (“Traditional Euclidean zoning techniques . . . typically are inadequate to meet the unique and complex needs of mixed-use projects.”).

43. See, e.g., *Homart Dev. Co. v. Planning & Zoning Comm’n*, 600 A.2d 13, 17 (Conn. App. Ct. 1991) (“To conclude otherwise would undermine the flexibility inherent in the floating zone concept . . .”); Merriam, *supra* note 41, at 20 (“PUDs are flexible. The restrictions in the community’s zoning regulations need not apply to PUDs.”).

44. See JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 1:5 (2010).

ture often attributed to the influence of Euclidean zoning.⁴⁵ Nonetheless, as with PUDs, municipalities would scrutinize a subdivision proposal on an individual basis and then place conditions on its approval.

The regulatory enterprise of controlling land uses gradually increased in complexity, as suburbanization began to greatly change the landscape.⁴⁶ Then, in the mid- to late 1960s, the impacts of the postwar development boom became the subject of criticism. Part of this criticism centered on the destruction of open space, as suburbs rapidly consumed open land,⁴⁷ while other criticism focused on environmental degradation.⁴⁸ At the same time, complaints about the loss of historic buildings led to efforts at historic preservation.⁴⁹ Yet another set of critics argued that the type of housing being approved under the established land use system was discriminatory, even unconstitutional.⁵⁰ Each branch of criticism gave rise to political movements that sought to significantly change the land use system.⁵¹

In response, the system evolved to reflect a much more expansive set of goals. States amended land use statutes to add new goals relating to the environment, housing, open space, economic development, and aesthetics. In some states, new statutory requirements mandated that development approvals must be consistent with general or comprehensive plans.⁵² Judicial decisions, partic-

45. See Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637 (2006) (tracing the role of single-use Euclidean zoning in the development of large-scale subdivisions).

46. See Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 874 (2006) (“After World War II and the rapid suburbanization that followed, Euclidean zoning was put to the test as never before.”).

47. See Liam A. McCann, Note, *TEA-21: Paving Over Efforts to Stem Urban Sprawl and Reduce America’s Dependence on the Automobile*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 857, 868 n.80 (1999) (“The first large-scale suburbs were the Levittowns that sprang up immediately after the war outside New York City. The trend quickly spread south and west.” (citation omitted)).

48. See ARTHUR C. NELSON ET AL., *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* 1 (1995) (“Many growth management techniques have been developed as a direct response to the problems and processes associated with urban sprawl.”).

49. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 107-08 (1978).

50. See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 716-18 (N.J. 1975).

51. See, e.g., Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 3 (1998) (“[E]mpirical evidence shows that environmental justice advocates are beginning to move from reactive strategies . . . to proactive planning and participation in policymaking. In this new land use planning model of environmental justice, residents of minority and low-income neighborhoods identify . . . their visions of the public good.”).

52. See JOSEPH F. DiMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* 1 (1980); Joseph F. DiMento, *Taking the Planning Offensive: Implementing the Consistency Doctrine*, 7 ZONING & PLAN. L. REP. 41, 46 (1984).

ularly seminal decisions on housing, also compelled greater municipal consideration of whether land use decisions were excluding the poor,⁵³ while federal laws both prohibited discrimination⁵⁴ and promoted economically mixed housing.⁵⁵ The environmental themes also continued into the following decades, most recently taking the form of land use policies designed to result in sustainable development.⁵⁶

One consequence of this broadened structure for land use decisions was an inescapable conflict among goals. For example, producing more low and moderate income housing often means approving denser development, because higher densities lower the cost of individual units. Density increases, however, might conflict with the goals of protecting certain environmental amenities on properties or preserving the small-town “feel” of an area.

For the most part, the system did not establish methods or principles for resolving these conflicts. Consequently, an important outcome of these changes was to further enlarge the discretion of local government decisionmakers, as they could now cite an expanded group of goals to justify land use decisions. Furthermore, in response to these goals and the political constituencies supporting them, local elected officials tended to look for a compromise serving several goals even though that compromise might greatly change the developer’s proposal. This process of compromise inevitably led to negotiations with developers about changes in their proposed projects.

4. *The era of fiscal limitations*

Largely coinciding with the expansion of goals was another development that further complicated meeting the new goals. Through the 1950s and 1960s, municipalities generally assumed that a new development would generate sufficient municipal revenue to pay for the infrastructure and public services that the development needed. Then, in the mid- to late 1960s, critics challenged this assumption.⁵⁷ Municipalities began to worry that new development would con-

53. See, e.g., *S. Burlington Cnty. NAACP*, 336 A.2d 713; *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105 (Pa. 1977).

54. See Fair Housing Act of 1968 § 810, 42 U.S.C. § 3610(a) (2006).

55. See Housing and Community Development Act of 1974 § 201, 42 U.S.C. § 1437f (creating the famous “Section 8” program offering direct subsidies to improve local income housing).

56. See John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 8 (2006) (“During the last decade, local governments have adopted numerous innovative land use laws that achieve sustainable development.”).

57. Cf. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 206 (2006) (“Attitudes regarding the desirability of community growth have changed significantly in the post-World War II period. Where once growth would be heralded as evidence of the health and the desirability of the community, now the approval of new single and multi-family developments is

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stitute a net fiscal drain on cities, leaving existing residents to pick up the deficit in municipal services.⁵⁸ Some studies seemed to validate this concern.⁵⁹ Politically, this possibility posed a vexing problem for elected officials, whose political opponents could charge them with using the taxes from existing (i.e., voting) residents to pay for services needed by new (i.e., as yet nonvoting) ones.

Intensifying this trend in some states was the so-called property tax rebellion of the late 1970s.⁶⁰ As home prices increased substantially during the 1970s, the property taxes paid by homeowners likewise went up. For a while, cities gratefully accepted the increased revenue, but homeowners in a number of states then rebelled. They forced changes in the law which essentially froze property taxes for current homeowners, allowing only small increases each year.⁶¹ In other states, the political reach of the rebellion made it very difficult to raise any tax.

Given these political constraints, local elected officials increasingly looked to new development to provide infrastructure and public services.⁶² Pursuant to state statutes, municipal governments had long charged new developments for certain infrastructure improvements. For example, new developments were expected to dedicate the land for the streets that would serve for new developments,⁶³ to fund schools,⁶⁴ and to install utility infrastructure. These expecta-

met with skepticism and concern about the deterioration of the locality's financial well-being and its general quality of life.").

58. See Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253, 264 (2002) ("[L]ocal governments have become more skeptical about the fiscal benefits of new growth and more attentive to the costs of providing the new infrastructure—highways, water supply, wastewater treatment and removal, and schools—that new development frequently requires.").

59. See JAMES E. FRANK, URBAN LAND INST., *THE COSTS OF ALTERNATIVE DEVELOPMENT PATTERNS: A REVIEW OF THE LITERATURE* 5 (1989); Ira Michael Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1119 (1964) ("In spite of their differences, most of these communities have the common problem of providing necessary capital facilities and service levels for newcomers without imposing extraordinary revenue burdens on present residents.").

60. See Briffault, *supra* note 58, at 263 (discussing fiscal pressures on local governments caused by tax revolts, such as California's Proposition 13 in 1978 and Massachusetts's Proposition 2½ in 1980).

61. See Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 110 (2001) ("California . . . led the way in the local property tax reform movement when it enacted Proposition 13 in 1978.").

62. See Rosenberg, *supra* note 57, at 181 ("American local government law and civic culture has increasingly privatized development costs that had previously been carried as general societal expenses.").

63. See *id.* at 199 (explaining that during the early twentieth century statutes reserved road locations and sometimes required land developers to dedicate land to the local government for a range of purposes).

tions rested on a fair-sounding principle: a new development should finance the additional infrastructure needed to serve that development.⁶⁵

But this principle could be extended into previously untapped areas. New development caused incremental impacts on a wide variety of municipal services and facilities: libraries, police and fire departments, parks and open space, social services, recreation services, etc. Furthermore, the expansion of land use goals supported the idea that developers should be responsible for a much wider variety of infrastructure needs.

As fees and dedications of land imposed on new developments grew,⁶⁶ developers began to protest. In response, legislative constraints on the municipal power to impose these mandates began to appear. In some states, new statutes cabined the local authority by requiring dedications of property or imposing exactions on developers.⁶⁷ The Supreme Court also waded into this area with two important decisions that overturned mandated dedications of land: *Nollan v. California Coastal Commission*⁶⁸ and *Dolan v. City of Tigard*.⁶⁹ These decisions required a rational nexus between a land use dedication and the impact caused by the development, as well as “rough proportionality” between the dedication and the impact. Additionally, by placing the burden on the municipality to justify dedications,⁷⁰ *Dolan* compelled municipalities to compile a more complete record when imposing them.

The two opinions also had a kind of “in terrorem” effect, sending a message that municipalities were overreaching in the imposition of dedications. In particular, Justice Scalia’s opinion in *Nollan* spoke of the dedication at issue in

64. See *Herron v. Mayor of Annapolis*, 388 F. Supp. 2d 565, 567-68 (D. Md. 2005) (adjudicating disputes over school fees); *Candid Enters. v. Grossmont Union High Sch. Dist.*, 705 P.2d 876, 878-79 (Cal. 1985) (same).

65. See Rosenberg, *supra* note 57, at 189 (“[L]ocalities have re-characterized municipal costs as various forms of user charges and direct benefit assessments. At the same time, they have shifted an increasing range of building-related expenses to land developers by imposing a wide array of land use exactions.”).

66. See *id.* at 207 (noting that as of 2000, 59.4% of cities with populations in excess of 25,000 and 39% of metropolitan area counties employed impact fees (citing U.S. GENERAL ACCOUNTING OFFICE, LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 43, 62 (2000), available at <http://www.gao.gov/archive/2000/rc00178.pdf>)); see also Douglas T. Kendall & James E. Ryan, “Paying” for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan* and *Dolan*, 81 VA. L. REV. 1801, 1802 (1995) (“Given that few municipalities have a surfeit of funds to devote to land-use regulation, it is not surprising that the use of exactions has become increasingly popular.”).

67. See Fenster, *supra* note 29, at 760 (“State legislation has thereby become the most significant mechanism for controlling local discretion to impose exactions.”).

68. 483 U.S. 825 (1987).

69. 512 U.S. 374 (1994).

70. See *id.* at 395 (“[O]n the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.”).

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terms of “extortion.”⁷¹ That kind of language spoke powerfully to some local officials, suggesting that the Court would continue to look unfavorably on local power to impose requirements on developers.

The difficulties involved in actually complying with *Nollan* and *Dolan* have been debated. Some argue that the two decisions merely create procedural hurdles that municipalities can readily overcome.⁷² Others see the difficulties as more serious, decrying the resurrection of *Lochnerian* judicial activism by the Supreme Court.⁷³ Moreover, the reach of the *Nollan-Dolan* doctrine remains unclear, as the Court has yet to decide whether the doctrine applies to monetary exactions.⁷⁴

Whatever their full reach, the decisions posed obstacles for municipalities attempting both to pass on the costs of infrastructure and services to new developments and to achieve an expanded set of land use goals. Consequently, municipalities were open to ideas that might allow them to bypass the constraints of *Nollan* and *Dolan*. A bargained-for agreement with a developer appeared to provide such a solution.

B. *The Vesting Controversy and the Transition to Formal Contract*

As this summary demonstrates, several developments in the evolution of land use regulation led municipalities to bargain with developers seeking project approvals. Concerns about the constitutional prohibition against “contracting away the police power,” however, meant that the negotiations only reached informal agreements rather than actual written contracts. Furthermore, those agreements remained subject to the full public hearing process, and there

71. *Nollan*, 483 U.S. at 837 (“[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981))).

72. See Robert H. Freilich & David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning: The Takings Equation After Dolan v. City of Tigard*, 27 URB. LAW. 187, 213 (1995) (“[T]he City of Tigard now has two clear options to avoid a taking: (1) deny the permit altogether . . . or (2) develop a ‘rough proportionality’ between the dedication required of her property and the burden imposed by the new hardware store. Municipalities similarly situated that choose the latter option will benefit from basic planning techniques.”).

73. See Norman Williams & Holly Ernst, *And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 635, 672 (1989) (explaining that takings cases, including *Nollan*, suggest a “return to the *Lochner* tradition, perhaps mildly modified”); Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court’s Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 463 (1988) (discussing *First English’s* and *Nollan’s Lochnerian* recurrence).

74. See J. David Breemer, *The Evolution of the “Essential Nexus”*: *How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 397-98 (2002) (“A monetary exaction can be used to force a landowner to shoulder a disproportionate share of a public burden just as easily as a demand for a dedication of real property . . .”).

were no guarantees that the agreement would survive that process intact. It took events relating to an entirely different issue, the question of vested rights, to ultimately lead to a full-fledged bargaining regime for land use decisions.

The vested rights doctrine establishes a point in the regulatory process after which government cannot interfere with a development without effecting a constitutional taking of property rights.⁷⁵ State courts had long grappled with the vesting issue, adopting a range of rules as to when a development right vests.⁷⁶ However, a 1976 California Supreme Court decision focused national attention on the issue by adopting a very late vesting point for a long-term, multistage development.⁷⁷ The effect of that decision was to offer no vested rights protection to large investments in long-term projects;⁷⁸ local governments could adopt last minute changes in land use policy that might make those projects uneconomic. From the standpoint of developers in late-vesting states, particularly those developers with multistage projects, the need seemed urgent to find a solution providing greater certainty to their investments.

One possibility was to establish an early vesting date by statute.⁷⁹ An alternative solution, however, was consensual in nature. The local government and the developer could agree on an earlier vesting date and enforce it by contract.⁸⁰

As shown above, bargaining had played an informal role in the land use process. An application for a development would generate discussions with city staff, and perhaps even with third-party citizens' groups, about the shape of the development. These discussions might result in an informal consensus among the parties that would be politically important when the development proposal came before the elected officials. However, the negotiations occurred within the traditional regulatory process rather than as a prelude to a formal contract.

75. See BLACK'S LAW DICTIONARY 1324 (7th ed. 1999) (defining a vested right as "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent").

76. See Theodore C. Taub, *Vesting of Property Rights*, 1999 ALI-ABA INVERSE CONDEMNATION & RELATED GOV'T LIAB. 131 (surveying various state rules); Karen L. Crocker, Note, *Vested Rights and Zoning: Avoiding All-or-Nothing Results*, 43 B.C. L. REV. 935, 938 (2002) (discussing three versions of state rules for determining vested rights).

77. *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546, 550 (Cal. 1976) ("[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.").

78. In *Avco*, the landowner had no vested right to develop even though the company spent \$2,082,070 and incurred liabilities of \$740,468 in developing the tract. *Id.* at 549.

79. See, e.g., PA. CONS. STAT. ANN. § 10508(4)(ii) (West 2010) (stipulating that approval of a preliminary plat vests a right to complete the approved development within five years).

80. See John J. Delaney, *The Development Agreement: An Evolving Vehicle for Avoiding Vapid Vesting Vapors*, 2006 ALI-ABA LAND USE INST.: PLAN. REG. LITIG. EMINENT DOMAIN & COMPENSATION 1211, 1213 ("Avco led to the enactment of the nation's first development agreements legislation a few years later.").

Equally important, the doctrine prohibiting contracts that “bargained away” the police power seemed to constitute a barrier to the use of contract.⁸¹

Now, while that latter concern was still present,⁸² it receded in importance for a couple of reasons. First, legislation authorizing development agreements gave parties some comfort that the use of such agreements did not transgress constitutional boundaries.⁸³ Additionally, the parties to contracts began to realize that, as a practical matter, few of them were challenged in court.

Most important, though, was the fact that the use of contract met both the municipality’s and the developer’s interests.⁸⁴ A contract could provide a developer with regulatory certainty by establishing the contractual equivalent of a vested right.⁸⁵ The contract would set forth the infrastructure improvements and fees that the local government would require and then lock those in place in

81. See Haywood & Hartman, *supra* note 1, at 975 (“If . . . the development agreement contains a provision that the property will be zoned in a particular way . . . , the validity of that provision could be subject to a challenge on the theory that it is a form of invalid ‘contract zoning’ Such contract zoning is invalid because a city may not legally contract away its police power or its legislative power, and it cannot contract away its power to make future zoning decisions.”); see, e.g., *Stone v. Mississippi*, 101 U.S. 814, 817-18 (1880) (“All agree that the legislature cannot bargain away the police power of a State. . . . [N]o legislature can curtail the power of its successors to make such laws as they may deem proper”).

82. See Kupchak, Kugle & Thomas, *supra* note 2, at 60 (“At best, development agreements ‘freeze’ current land use regulations or practices . . . , but do not permit [government] to enter into executory provisions for future government agreement, or to change existing zoning.”).

83. See ARIZ. REV. STAT. ANN. § 9-500.05 (2010); CAL. GOV’T CODE § 65864 (West 2010); COLO. REV. STAT. §§ 24-68-101 to -106 (2010); FLA. STAT. ANN. § 163.3220 (West 2010); HAW. REV. STAT. ANN. §§ 46-121 to -132 (LexisNexis 2010); LA. REV. STAT. ANN. § 33:4780.22 (2010); MD. CODE ANN. art. 28, § 7-121 (LexisNexis 2010); MD. CODE ANN. art. 66B, § 13.01; MINN. STAT. ANN. § 462.358 (West 2010); NEV. REV. STAT. ANN. § 278.0201 (LexisNexis 2010); N.J. STAT. ANN. § 40:55D-45.2 (West 2010); OR. REV. STAT. ANN. § 94.504 (West 2010); VA. CODE ANN. § 15.2-2303.1 (2010) (limited to developments of more than one thousand acres); WASH. REV. CODE ANN. § 36.70B.170 (West 2010).

84. See Julie A. Tappendorf & Daniel A. McTyre, *Vested Rights and Development Agreements Update*, 2009 ALI-ABA LAND USE INST.: PLAN. REG. LITIG. EMINENT DOMAIN & COMPENSATION 725, 732 (“[D]eveloper[s] and local government face two difficult problems in the land development approval process. First, local governments are unable to exact dedications of land or fees of the ‘impact’ or ‘in-lieu’ variety without establishing a clear connection or nexus between the proposed development and the dedication or fee. Second, the developer is unable to ‘vest’ or guarantee a right to proceed with a project until that project is commenced. The development agreement offers a solution to both”).

85. See *Neighbors in Support of Appropriate Land Use v. Cnty. of Tuolumne*, 68 Cal. Rptr. 3d 882, 894 (Ct. App. 2007) (“It is often said that the main purpose of a development agreement is to . . . give the developer assurance that the project will not be blocked by future regulatory changes.”); Ngai Pindell, *Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements*, 42 WAKE FOREST L. REV. 419, 443 n.146 (2007) (“Most development agreements provide certainty to developers by detailing a developer’s ability to rely on existing land use regulations over the course of a project’s construction.”).

return for the local government's agreement to refrain from additional regulation. By doing so, the contract would remove much of the uncertainty over the development's ultimate cost, a crucially important benefit to the developer.⁸⁶

Furthermore, contracts promised other benefits to developers. They could bargain for the types of improvements that would add the most value to the development itself, rather than be saddled with whatever requirements the municipality might unilaterally impose.⁸⁷ Finally, the remedy in the event of a breach of that agreement also provided certainty. A developer's suit for damages for breach of contract against the local government seemed far preferable to an uncertain takings claim.

From the municipality's standpoint, local government's attraction to contract stems largely from a reaction to the Supreme Court's decisions in *Nollan* and *Dolan*.⁸⁸ In the bargaining, the municipality could ask the developer to shoulder the cost of providing pressing infrastructure improvements, or to build them.⁸⁹ Most importantly, the constitutional limits on the imposition of conditions on a development arguably would not constrain the city. For example, a developer might agree to provide infrastructure improvements that the Supreme Court's decisions in *Nollan* and *Dolan* would not allow—say, a new library building far beyond the need generated by the developer's own project. While the city could not require such a building as a condition of approval, since it would violate the “rough proportionality” test of *Dolan*, by signing the contract the developer would voluntarily waive any objections based on *Nollan* or *Dolan*.⁹⁰

86. See, e.g., Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 125 (1993) (arguing that development agreements “serve as additional security in the real estate financing process by eliminating the uncertainty and risk posed by an unstable land use regulatory scheme”).

87. See Haywood & Hartman, *supra* note 1, at 955-56 (“[I]ssues [for development agreements concerning lands to be annexed] may include one or more of the following: allocation of responsibility for the construction of water, wastewater, and road and drainage infrastructure (and often the sharing of those infrastructure costs); payment of impact fees and other charges related to the development; dedication of parkland, open space, drainage, conservation and/or greenbelt areas; subdivision and platting, often in phases over an extended period of time; annexation; intensity of development, land uses, and zoning; provisions for city services such as fire protection, emergency medical services, and trash collection; and a myriad of other issues depending on the individual concerns of the city or the specific development.”).

88. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (holding that an exaction and the projected impact of a proposed project must be roughly proportional); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (requiring an “essential nexus” between a legitimate state interest and permit conditions).

89. See Wegner, *supra* note 5, at 999-1000 (noting that development agreements may provide infrastructure “arguably above and beyond that which a local government could exact under the police power”).

90. See Daniel J. Curtin, Jr. & Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. ENVTL. AFF. L. REV. 325, 340 (2005) (noting that local

In short, contract seemed ideally suited to meet the needs of both municipalities and developers, and its use dramatically increased. The subject matter of the negotiations soon widened far beyond a narrowly tailored response to the vesting issue. Development contracts proved so attractive that their use became routine even for small developments, not just large, multiyear projects, and negotiations lengthened as the parties' contracts addressed a wider variety of issues.⁹¹ The transition to an era of contract was soon in full force in a considerable number of states, with nary a dissenting voice. However, the ease of the transition masked its true significance, for employing a contract model challenges fundamental values underlying the preexisting land use system.

II. THE EFFECTS OF CONTRACT ON GOVERNMENTAL NORMS

As the discussion in Part I showed, the transition to contract appeared both natural and logical. Previously, the evolution of regulatory mechanisms in land use law had led local governments and development interests to negotiate and reach informal understandings. Viewed in this light, formal land use contracts might seem to be traditional regulation in just another format.⁹² If so, the consequences of using this type of contract would appear minimal.

Such a conclusion, however, greatly undervalues the consequences of the transition to contract. Contract law is a private law regime designed to promote efficient market transactions, while the law of land use regulation largely reflects principles associated with public law. Transitioning to contract law raises important questions about whether the contract model can serve those principles. The movement to land use contracts has occurred without a serious examination of these questions.

To explore the effect of contract on land use regulation, the analysis below first identifies six norms that underlie the public law functions of local land use regulation. These norms reflect a conception of the appropriate relationship between local government and the developer, and they address both the manner in which the local government may exercise discretion and the role that the public

governments use development agreements "to obtain benefits for the public which ordinarily could not be obtained using the normal land use process"); *id.* at 344 (noting that a contractual promise "cannot result in a 'taking' because the promise is entered into voluntarily" (quoting *Leroy Land Dev. v. Tahoe Reg'l Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991))).

91. See Donald L. Connors & Sarah Chapin Columbia, *Development Agreements: Affording Public Gain and Private Certainty in the Modern Development Regulatory Process*, 1988 ALI-ABA LAND USE INST.: PLAN. REG. LITIG. EMINENT DOMAIN & COMPENSATION 1083, 1091 (citing a study concluding that six years after the passage of California's development agreement legislation, "over 30% of all local governments, from very large to very small" were using development agreements for a wide range of projects).

92. See Wegner, *supra* note 5, at 1001 (suggesting that, in resolving when development rights vest, "[t]he effect of such [development] agreements thus really differs only in degree, not in kind, from more traditional regulatory approaches").

is to play in the land use process. The Article then examines how the use of contract affects adherence to those norms.

A. *The Relational Norm*

1. *The hierarchy of the permit system*

The use of contract situates local government in a new relationship with both the regulated development interests and the public. As a construct of public law, the traditional land use system possessed a vertical, hierarchical structure. This structure placed the developer in a dependent position vis-à-vis local government. The foundational premise was that developers would have to apply for and obtain permission from local government, in the form of a permit,⁹³ for most major land use developments.⁹⁴ Without the requisite permission from local government, the development could not occur. The government, in turn, possessed broad power to reject the application or, if the application was approved, to place numerous conditions on it.

The scope of this hierarchical power and its far-reaching economic consequences caused the land use system to develop procedures designed to counterbalance the dependent status of developers. To some extent, the procedures tried to promote a form of neutrality on the part of government officials in making decisions, at least for quasi-adjudicatory decisions.⁹⁵ The procedures also emphasized planning as a means of structuring the government's exercise of discretion. These land use procedures were intended to objectify land use decisions to some degree and thereby channel the pure exercise of government discretion. Still, in the end, the local government would make a "yes" or "no" decision on a developer's application, and the developer would have no prior assurances of that decision's outcome.

93. See Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 454 (2007) (noting the land use system's "pervasive use of discretionary land use permits, such as conditional use permits, subdivision maps, and site plan reviews").

94. For example, the American Planning Association's "Growing Smart" project proposed a "Unified Development Permit Review Process" for land use decisions. See AM. PLANNING ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE § 10-201, at 10-24 (Stuart Meck ed., 2002 ed. 2002), available at <http://www.planning.org/growingsmart/guidebook>.

95. See Kenneth G. Silliman, *Risk Management for Land Use Regulations: A Proposed Model*, 49 CLEV. ST. L. REV. 591, 603 (2001) (noting that due process requires that "the decision-maker must be an impartial one and she must reach her decision according to articulable standards").

2. *Relational mutuality and its consequences*

The contract model alters the previous relationship, with the developer and government taking on new roles. The parties' choice to formally negotiate a contract implies a significant change in the hierarchical relationship. Presumably, they would not negotiate unless each had something to offer the other.⁹⁶ Unlike the hierarchical relationship, under the contract model local government and the developer each need the other to achieve their goals. By negotiating, the parties both assume and exhibit a mutuality of interests.⁹⁷

Thus, the shift to bargaining signals at least a partial abandonment of the hierarchical relationship that underlay the traditional land use system. By entering into negotiations, the government assumes a new status vis-à-vis developers that has some notion of mutuality of interests associated with it, or perhaps even a type of quasi-equality.⁹⁸ By negotiating, the local government has become a formal participant in the process intended to decide land uses, not merely the overseer of that decisionmaking process.⁹⁹ The developer still needs to secure the approval of the local government, but its ability to offer public improvements greatly improves the likelihood of receiving that approval.

This relational shift has important effects. To begin with, when local government agrees to negotiate a development agreement, it signals its expectation

96. See Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 334 ("In negotiation, a party's power is a relational matter and arises from the negotiating parties' dependence on one another to obtain something they want in order to satisfy their respective needs from that particular relationship. A's power depends on B's need of A to get something B wants and on A's need of B to get something A wants." (footnote omitted)).

97. See William Fulton, *Building and Bargaining in California*, CAL. LAW., Dec. 1984, at 36, 41 ("We wanted something developed there . . . but we wanted something beneficial to the city. It's no different from two large corporations getting together. We're just a municipal corporation." (quoting an elected local government official's comments on a completed development agreement)). Interestingly, the progressive movement, which gave rise to Euclidian zoning, also emphasized making local governments "efficient" in the same way that corporations are. See Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 837 (1999) ("[T]he general philosophy of the progressive movement . . . believed that scientific management could be applied . . . and improve the efficiency and effectiveness of American institutions.").

98. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 902 ("Much of contract law . . . presupposes that 'a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality.'" (quoting Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943))).

99. This idea has been at the core of a chief criticism of the use of negotiated rulemaking in the regulatory context, the claim that the agency is reduced "to the level of a mere participant." William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1376 (1997).

that the parties can locate grounds of mutual understanding.¹⁰⁰ Negotiating even small agreements can be very resource intensive for a local government, involving the limited time of both the staff members doing the actual work and of the elected officials who will at least informally monitor negotiations.¹⁰¹ The government's decision to commit these resources signals that it expects a positive outcome from their use.

Accordingly, by entering into the negotiations, the local government's choice implies a willingness to compromise by making the types of tradeoffs necessary to reach an understanding with the developer. The parties approach the problem of the proposed development as they would settle a commercial dispute; they seek the most efficient solution. Indeed, as the negotiation costs mount, the likelihood of even further compromise to secure an agreement—and to avoid the waste associated with a failed negotiation—increases.

Moreover, the new relationship may be a lengthy one. Many commercial contracts call for one-time exchanges, after which the parties have completed the execution of the contract and are free to work out any future arrangements as they wish. In contrast, a good number of land use contracts tend to be longer-term. As discussed above,¹⁰² development agreements originated principally because some large developments build out over a term of years, and state vesting rules could put them in jeopardy. The long-term nature of the development means that, by contracting, government is committing itself to a lengthy and perhaps complex relationship with the developer.¹⁰³ In this relationship, the parties have a mutual incentive to compromise on disputes as they arise during the contractual period. Longer contracts may ameliorate the kind of more aggressive behavior that has been associated with short-term agreements.¹⁰⁴

100. See ROGER FISHER ET AL., *GETTING TO YES* 71 (2d ed. 1991) (“[T]here almost always exists the possibility of joint gain.”).

101. See John L. Levett & Seth D. Hulkower, *Bidding and Negotiating for Power from Qualifying Facilities in Massachusetts*, PUB. UTILS. FORTNIGHTLY, Mar. 30, 1989, at 19, 25 (“The most frequent criticism of negotiation was that the contracting process is time-consuming.”).

102. See *supra* text accompanying note 78.

103. In this sense, the land use contracts exhibit one feature of the so-called “relational” school of contract: the existence of continuing relationships during which modifications are made and assented to. See Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569 (“Obligations [in the relational view] grow out of the commitment that [the parties] have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate.”).

104. See Goodpaster, *supra* note 96, at 326. Goodpaster discusses the idea of hard or “competitive” bargaining but notes that “[a] more complex version of this strategy focuses on long-term gain.” The latter version “requires some effort to maintain or further a relationship and usually moderates the competitive, often aggressive, behavior that jeopardizes relationships and possibilities of long-term gain.” *Id.*

The new contractual relationship connects the local government and the developer in yet another way. The government's incentive to enter land use contracts largely reflects its need to finance infrastructure that cannot be publicly funded. In effect, the contract is an admission by the government that it cannot afford to fund the public services that the public has come to expect. The centrality of the infrastructure question to the contract thus highlights an important aspect of the new relationship between the government and the developer: both are involved in what amounts to a mutual enterprise of providing public services, and the development need not even cause the need for all those services.

At the same time, the adversarial nature of the bargaining that lies at the center of the contract model ensures that the relationship between the local government and the developer is not totally cooperative, at least during the negotiation process. Bargaining discards both the government neutrality implicit in the public regulatory model and at least some conceptions of fairness that underlie that model. Parties who negotiate contracts are not neutral; they are necessarily biased in favor of their positions.¹⁰⁵ The goal of a negotiating party is to secure the highest possible value while giving up the least.¹⁰⁶ If, during the contract's implementation, it becomes evident that one party has bested the other in that negotiation, the losing party cannot easily escape the bargain that it struck.¹⁰⁷ The law will intervene to remedy contractual unfairness only in extreme cases.¹⁰⁸

In sum, the contract model greatly alters the relationship between local government and developers, particularly during the negotiating stage. The parties now operate on a relationship of mutual underlying interest, rather than one of hierarchical power. They are common participants. But within that mutuali-

105. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1501 (1998) ("These parties may tend to see things in the light most favorable to them; while people care about fairness, their assessments of fairness are distorted by their own self-interest. This is a form of bounded rationality—specifically, a judgment error; people's perceptions are distorted by self-serving bias. This form of bias can help to explain the frequency of failed negotiations.").

106. This is particularly true in short-term contracts. See Goodpaster, *supra* note 96, at 326 ("The competitive negotiator tends to define success . . . [as] getting as much as possible for himself: the cheapest price, the most profit, the least cost, the best terms and so on.").

107. See Mark Gould, *Law and Philosophy: Some Consequences for the Law Deriving from the Sociological Reconstruction of Philosophical Theory*, 17 CARDOZO L. REV. 1239, 1305 n.201 (1996) ("[F]or classical contract theory the fairness of a contract, the equivalence of value, was generally not required, so long as there was no abuse of bargaining power.").

108. See, e.g., *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 88 (4th Cir. 2005) (stating that for a contract to be unconscionable and therefore unenforceable, "[t]he weaker party cannot simply rely on inequities inherent in the bargaining process, but must identify the existence of unfair terms in the contract"); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (noting that the principle underlying the doctrine of unconscionability "is one of preventing oppression and unfair surprise and not of disturbing allocation of risks because of superior bargaining power").

ty, the parties will compete to obtain the best of the bargain. This competitive dynamic will replace those procedural notions of governmental fairness that tempered the traditional hierarchical relationship between government and developers.

B. *The Responsiveness Norm*

1. *Adaptability to changed circumstances*

The police power embodies the foundational concept that government must be able to adapt to changed circumstances if necessary to protect the public health, safety, and welfare.¹⁰⁹ While all government in a democracy is supposed to be “responsive,” local government is the closest to the citizens that it represents. Largely by highlighting its responsiveness to local conditions, local government has retained almost full authority over land use and repelled suggestions that state or regional government is more suited to make important land use decisions.

The norm of responsiveness is constitutionally reflected in the long-standing doctrine that a government may not contract away its police power¹¹⁰ or engage in “contract zoning.”¹¹¹ Underlying this doctrine is the concept that government cannot, through an agreement with a developer, tie its hands from acting in the future. Instead, it must retain the power to respond to its citizens’ needs as they arise.¹¹²

Other land use doctrines also reflect the norm of responsiveness. For example, courts are reluctant to estop local government from applying zoning ordinances even where the government has actively misled individuals into erro-

109. See Lynda J. Oswald, *Property Rights Legislation and the Police Power*, 37 AM. BUS. L.J. 527, 550 (2000) (“[The police power] is considered an inherent attribute of sovereignty and an indispensable tool by which the state can promote public health, safety, welfare, or morals.”).

110. See Tappendorf, *supra* note 2, at 1372 (“The prohibition against bargaining away the police power finds its source in the ‘reserved power doctrine.’ Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures.”).

111. See, e.g., *J.C. Vereen & Sons, Inc. v. City of Miami*, 397 So. 2d 979, 983 (Fla. Dist. Ct. App. 1981) (“A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions . . . when such an agreement results in a contracting away of police powers.”).

112. See Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467, 481 (1999) (“One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days.” (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting))).

neous conclusions about that zoning.¹¹³ The decisions on estoppel emphasize that the public interest in the zoning categorization must prevail even though a land occupier has suffered significant detriment from a misrepresentation.¹¹⁴ Additionally, the expansion of land use goals under the police power has reinforced the notion of prophylactic governmental responsiveness.¹¹⁵ Local government can now regulate to preserve historic buildings, to protect aesthetics, and to affirmatively promote economic development, areas viewed as outside the scope of the police power for much of the twentieth century.

A core component of the norm of responsiveness is the idea that local government must be able to address new or changed situations. The paradigmatic example is the flexibility to respond to an emergency, such as a natural disaster, but the concept also includes responding to new information.¹¹⁶ For example, new environmental information can become known that strongly suggests the need for changes in government land use policies.¹¹⁷

Even more broadly, the norm of responsiveness might preserve the public's right to change policy simply because the political conception of the public interest has altered. This situation can occur when a local electorate votes to reject one set of political policies, as promoted by a certain group of elected public officials, and embark in a different direction.¹¹⁸ This type of change has become more frequent during the era of multiple goals. Because a local gov-

113. 4 ZIEGLER ET AL., *supra* note 35, § 65:31 (“Courts are in almost complete agreement that no estoppel against the enforcement of an ordinance can be invoked against a municipality when the claim is based upon a municipal officer’s ultra vires act.”). See generally Michael Cameron Pitou, *Equitable Estoppel: Its Genesis, Development and Application in Government Contracting*, 19 PUB. CONT. L.J. 606, 615 (1990) (“[I]t is commonly accepted that the government cannot be estopped on the same terms as any private person.”).

114. See 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 50.03(4)(b) (2010) (observing that courts weigh the public interest in the zoning ordinance against the harm suffered by the property owner, and where overriding the ordinance “would result in the nullification of a strong rule of public policy adopted for the general welfare,” the zoning ordinance will be upheld).

115. See generally 1 ZIEGLER ET AL., *supra* note 35, § 1:2 (tracing the expansion of the police power in the land use context).

116. See Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 889 (2007) (“Local flexibility in this arena is undoubtedly a good thing. Zoning ordinances are often amended because of genuine changes in the character of a community, technological changes, or shifts in local priorities.”).

117. See Dana, *supra* note 12, at 57 (“Environmental problems are exceedingly complex and dynamic, and our scientific understandings of those phenomenon [sic] are radically incomplete and only slowly developing. For these reasons, any regime of environmental regulation must leave ample room for the correction and supplementation of what once were (or seemed to be) adequate regulatory responses.”).

118. See, e.g., 216 Sutter Bay Assocs. v. Cnty. of Sutter, 68 Cal. Rptr. 2d 492 (Ct. App. 1997) (outgoing supervisorial board tried to lock in development approvals through contracts before new supervisors took office).

ernment cannot meet all the goals, it must decide on a mix of policies that will favor some goals over others.¹¹⁹

There is, of course, a downside to this type of responsiveness: the local governmental officials may enact an ill-considered change. Accusations of such actions are inherent in the oft-repeated claim that politicians are known for engaging in short-term thinking narrowly focused on the need for reelection.¹²⁰ Still, on balance, the need for responsiveness at the local government level outweighs that concern, as other actions, particularly engaging in planning, can help alleviate short-term thinking.

2. *Contractual limitations on responsiveness*

The use of contracts to make land use decisions challenges the norm of government responsiveness. A land use contract restricts the government's police power in the sense that it commits the government to certain promises, either to take action or to refrain from taking action.¹²¹ Both types of promises can narrow the government's options in responding to new situations; indeed, from the developer's standpoint, that limitation is one of the contract's principal benefits.¹²²

Of course, one might argue that, by signing a contract, the government has not foregone its ability to respond in the future but has only committed to pay damages if it breaches the contract. Nothing prevents the local government from paying those damages if it must respond to changed circumstances. This rationale is similar to the argument that liability under the Fifth Amendment's Takings Clause does not prevent the government from regulating but merely requires just compensation for takings.¹²³

119. See Ann O'M. Bowman & Michael A. Pagano, *Imagining Cityscapes: The Politics of Urban Development*, LAND LINES, Mar. 1996, at 1, 4-5 (defining "four city types based on levels of economic stress and political activism to promote development," namely, "survivalist cities," "market cities," "[e]xpansionist cities," and "[m]aintenance cities").

120. See, e.g., Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1514 (1999) ("The prospect of intertemporal resource misallocations is heightened by the tendency of politicians to take a short term perspective.").

121. See DAVID J. LARSEN, INST. FOR LOCAL SELF GOV'T, DEVELOPMENT AGREEMENT MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS 20-21 (2002) ("A development agreement can limit the public agency's ability to respond to a changing regulatory environment, precisely because it locks in the regulatory requirements in effect at the time the agreement is approved.").

122. Ironically, use of contracts to prevent government responsiveness in one sense represents a return to the inflexibility apparent in original Euclidean zoning.

123. Cf. Vicki Been, "Exit" as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 497 (1991) ("The fifth amendment does not prohibit the government from taking an individual's property Instead, it guarantees that the government will pay just compensation for any property it takes."); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 515 (1998)

The argument, however, overlooks the reality that local governments in the twenty-first century have very limited financial resources. Indeed, these resource limitations are a principal reason why the use of contract has become so attractive to local governments. So, if a government must decide whether to breach the contract and pay damages, or not to respond to a new issue, it will likely undertake a cost-benefit analysis and decide whether the cost in damages is worth the benefits.¹²⁴ Often the government will decide that it cannot afford the cost of breaching or amending the contract, and in those cases the contract in actuality will have constrained the government's ability to respond.¹²⁵

Inevitably, then, a wider use of contract affects the norm of governmental responsiveness. The doctrine that prohibits contracting away the police power literally holds that "a municipality is not able to make agreements which inhibit its police powers."¹²⁶ Many development agreements in actuality accomplish precisely that result; however, to date the response has been to finesse the issue.¹²⁷ For many years local governments avoided the problem by not documenting negotiated solutions in the form of contracts in which the government's approval provided explicit consideration.¹²⁸ But that solution is no longer viable in the age of contract, where the point is to embody the agreement *in a contract*.

Some argue that courts should not apply the doctrinal prohibition against contracting away the police power whenever the legislature has directly autho-

(noting that the Takings Clause "does not prevent . . . takings, but rather requires that the government provide 'just compensation' when takings occur").

124. See KENNETH S. ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 178 (1986) ("The theory [of efficient breach] holds that awarding damages for breach of contract promotes efficiency by encouraging promisors to breach when breach would produce net gains even after the payment of damages to the promisee.").

125. See Dana, *supra* note 12, at 57 ("Because contractarian regulation arguably may not be altered in many cases without the payment of compensation to regulated entities, financially strapped governments may forego revisions or supplementation of contractarian regulation even where it has come to be understood as inadequate . . ." (footnote omitted)).

126. Baylis v. City of Balt., 148 A.2d 429, 433 (Md. 1959); see also Carlino v. Whip-pain Investors, 453 A.2d 1385, 1388 (Pa. 1982) ("[I]ndividuals cannot, by contract, abridge police powers which protect the general welfare and public interest.").

127. See, e.g., Old Canton Hills Homeowners Ass'n v. Mayor of Jackson, 749 So. 2d 54, 58 (Miss. 1999) ("We agree that in most situations contract zoning is illegal. However, we do not subscribe to a per se rule against all forms of contract zoning . . ." (quoting Dacy v. Vill. of Ruidoso, 845 P.2d 793, 796 (N.M. 1992))); Giger v. City of Omaha, 442 N.W.2d 182, 190-92 (Neb. 1989) (finding a development agreement and conditional zoning did not violate the police power); see also Howard N. Ellman, *Land Use*, 10 ANN. COM. REAL EST. INST. 1023, 1047 (2008) ("[T]he courts uphold development agreements as an expression of considered legislative policy and employ whatever verbal formula they can contrive to prop up that conclusion.").

128. See Green, *supra* note 2, at 404 ("[Contract zoning] is defined as the *required* exercise of the zoning power pursuant to an express bilateral contract between the property owner and the zoning authority . . .").

rized the use of land use contracts.¹²⁹ Thus, if a statute authorizes development agreements, that authorization should somehow override the constitutional prohibition.¹³⁰ However, it is doubtful, to say the least, that a statute can somehow abrogate a constitutional limitation.

Alternatively, some commentators suggest interpreting the “contracting away the police power” doctrine as outlawing only contracts of longer duration.¹³¹ For several reasons, this idea has merit and could point the way toward a more consistent doctrinal solution to the conflict between contract and the norm of responsiveness.¹³² To begin with, local government has never possessed unfettered authority to respond to changed situations. The constitutional law of land use regulation has long recognized that governments *can* restrict their ability to respond in the future. The vested rights doctrine, in particular, impairs the government’s ability to change its mind after approving a development, and that doctrine is well settled.¹³³

Furthermore, the length of any development agreement correlates at least generally with the severity of the effect on governmental responsiveness. An agreement in effect for twenty years has quite different effects on government responsiveness than one lasting five years.¹³⁴ While a five-year contract might hinder the government’s ability to respond to immediate problems, the longer contract has the potential for a much greater impact on responsiveness. For example, it would significantly affect the government’s ability to change land use

129. See, e.g., Callies & Tappendorf, *supra* note 1, at 676 (“What informed commentary there has been on the various statutes appears to agree that, especially if there is supporting state legislation, courts should have little difficulty in supporting development agreements and annexation agreements against any reserved powers/bargaining away the police power argument.”); see also Frank, *supra* note 1, at 242 (“Theoretically, the statutory basis of development agreements provides some protection against the constitutional problems associated with contract and conditional zoning.”).

130. See David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 385-86 (2007) (“It is unlikely that courts will fall back on the reserved powers clause to invalidate development agreements passed pursuant to state statute, especially if the agreements have a fixed termination date that is not decades away.”).

131. See, e.g., Tappendorf, *supra* note 2, at 1372 (“[A]n analysis of the cases indicates that what the courts have generally struck down is the bargaining away forever of legislative powers, or at least for a very long time.”).

132. See Hadfield, *supra* note 112, at 469 (“The important tensions between the role of government as contractor and the role of government as legislator demand, however, a more nuanced treatment of the nature of contractual obligation.”).

133. See, e.g., *Cnty. of Kauai v. Pac. Standard Life Ins. Co.*, 653 P.2d 766, 772 (Haw. 1982) (“[V]ested rights [focus] upon whether the owner acquired real property rights which cannot be taken away by government regulation.” (quoting *Allen v. City of Honolulu*, 571 P.2d 328, 329 (Haw. 1977))).

134. See *Santa Margarita Area Residents Together v. San Luis Obispo Cnty. Bd. of Supervisors*, 100 Cal. Rptr. 2d 740, 748 (Ct. App. 2000) (upholding a five-year freeze but implying that such a freeze cannot be of unlimited duration).

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policies either because new information has arisen or because the electorate's political goals have changed.

In addition to the contract's length, the particular substantive provisions of a land use contract also determine the contract's impact on the norm of responsiveness, as some provisions have much greater impacts on governmental responsiveness than others. Consider an agreement that freezes the fees that the developer must pay for each unit of a project. If circumstances change significantly—say it becomes clear that the local sewage system needs immediate upgrading—the contract may prohibit the city from charging higher rates to that development.¹³⁵ Here, the impairment of the government's ability to respond is more significant than the impact of other provisions such as, for example, the city's commitment to rapidly process the developer's permit applications during the life of the contract.

This analysis suggests that resolving the conflict between the norm of responsiveness and the use of contract requires consideration of both the length of the contract and the substantive provision involved. Some state statutes have partially attempted to implement such an approach by including provisions that address, albeit vaguely, when government may respond to a new situation even though a contract binds it.¹³⁶ These are a step in the right direction, since crafting the proper balance is quintessentially a legislative choice. To date, however, the need to address the right balance has largely remained unexamined.

135. Perhaps the city could argue impracticability of performance. The Restatement defines this doctrine as follows:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). The event, however, must concern a "basic assumption" of the parties, a difficult test to meet in the circumstances of a development agreement that necessarily addresses the infrastructure needed for a development.

136. Florida, for example, has the following statute:

A local government may apply subsequently adopted laws and policies to a development that is subject to a development agreement only if the local government has held a public hearing and determined:

- (a) They are not in conflict with the laws and policies governing the development agreement and do not prevent development of the land uses, intensities, or densities in the development agreement;
- (b) They are essential to the public health, safety or welfare, and expressly state that they shall apply to a development that is subject to a development agreement;
- (c) They are specifically anticipated and provided for in the development agreement;
- (d) The local government demonstrates that substantial changes have occurred in pertinent conditions existing at the time of approval of the development agreement; or
- (e) The development agreement is based on substantially inaccurate information supplied by the developer.

FLA. STAT. ANN. § 163.3233(2) (West 2010).

C. *The Restraint Norm*

1. *The avoidance of overreaching*

A third norm relates to governmental behavior directed at project applicants. The norm can be termed the restraint against overreaching.

The concern about overreaching arises from the vast discretion that local governments exercise over land use. Regulation of land use is unique in that local governments “frequently both make the laws and carry them out,”¹³⁷ and commentators have long been concerned with potential overreaching by those governments.¹³⁸ The concern over misuse includes the possibility that a local government might exercise its land use authority for purely political purposes. More commonly, however, the misuse is likely to take the form of excessive conditions imposed on applicants.¹³⁹ In a contractual context, the local government’s monopoly over the permitting power translates into negotiating power,¹⁴⁰ and the potential for misusing that power is obvious.¹⁴¹

The doctrine of unconstitutional conditions has operated as a restraint on the government’s right to impose conditions on a permit.¹⁴² Under that doc-

137. Briffault, *supra* note 58, at 260.

138. See Larry A. DiMatteo, *Equity’s Modification of Contract: An Analysis of the Twentieth Century’s Equitable Reformation of Contract Law*, 33 NEW ENG. L. REV. 265, 330 (1999) (“If the system of exchange possesses characteristics of concentrated market power, inside information, and contracts of adhesion, then judicially and statutorily created rules are needed to help level the contractual playing field.”).

139. See Carlson & Pollak, *supra* note 61, at 128 (“[M]onopoly power provides municipalities with opportunities to extract ‘market distorting exactions’ from developers.”); Eliza Hall, Note, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 950 (2007) (“[A] common trigger for takings lawsuits in the U.S. is the placing of uniquely onerous conditions on construction permits . . .”). *But see* Been, *supra* note 123, at 509 (noting developers may have the ability to go to other jurisdictions, thus reducing the municipality’s power); Serkin, *supra* note 116, at 904 (“[Development agreements may result in] a very bad deal for the public. . . . The conditions are . . . ripe for the kind of special interest group pressure described by public choice theorists.”).

140. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 169 (2005) (“Characteristics commonly associated with bargaining power in the negotiation context often include status-based characteristics such as monopoly . . .”).

141. See Stephen G. Gilles, *Selective Funding of Education: An Epsteinian Analysis*, 19 QUINNIPIAC L. REV. 745, 755-56 (2000) (“[G]overnment monopoly poses great dangers of abuse because—unlike private monopolists—government can outlaw entry by new competitors. . . . Government monopoly power . . . may involve the exclusive right to *regulate* [an activity] . . .”).

142. See, e.g., Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988) (“[E]ven if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (“The doctrine of unconstitutional conditions holds that government may not grant a

trine, “the government may not require a person to give up a constitutional right . . . [such as] the right to receive just compensation . . . in exchange for a discretionary benefit . . . [that] has little or no relationship to the property.”¹⁴³ In the land use context, the Supreme Court has applied the doctrine in two important decisions discussed above¹⁴⁴: *Nollan v. California Coastal Commission*¹⁴⁵ and *Dolan v. City of Tigard*.¹⁴⁶

In *Nollan*, the Court considered a condition imposed by the California Coastal Commission that required the dedication of an access easement across oceanfront land as a condition to receiving the right to build. The Court held that an “essential nexus” must exist between conditions placed on the project and the impacts caused by that project.¹⁴⁷ Because the easement condition was unrelated to those impacts, the Court found a taking. The *Dolan* decision advanced the analysis one step further. There, as part of the conditions imposed on the approval of a new commercial hardware store, a city had required the landowner to dedicate both property adjacent to a nearby creek and a bicycle path. The Court held that the conditions must be “roughly proportional” to the impacts caused by the development.¹⁴⁸

Both opinions rest upon the need for restraint on governmental overreaching in the land use context. The majority opinion in *Nollan*, authored by Justice Scalia, described the concern about overreaching in terms of a possible “leveraging of the police power” by local government.¹⁴⁹ Justice Scalia condemned the misuse of conditions, stating that such misuse can amount to “an out-and-out plan of extortion.”¹⁵⁰ And the Court in *Dolan* emphasized that a finding that “the bicycle pathway system ‘could offset some of the traffic demand’ is a far cry from a finding that the . . . system will, or is likely to, offset some of the traffic demand.”¹⁵¹

The effect of the *Nollan* and *Dolan* holdings is controversial. Some commentators see them as improper judicial second-guessing of legislative judgments that prevents local governments from creatively solving land use prob-

benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”).

143. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)).

144. *See supra* text accompanying notes 68-74.

145. 483 U.S. 825, 837 (1987).

146. 512 U.S. at 393-95.

147. *Nollan*, 483 U.S. at 837.

148. *Dolan*, 512 U.S. at 391.

149. *Nollan*, 483 U.S. at 837-38 n.5.

150. *Id.* at 837 (quoting *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981)).

151. *Dolan*, 512 U.S. at 395 (quoting *Dolan v. City of Tigard*, 854 P.2d 437, 447 (Or. 1993) (Peterson, J., dissenting)).

lems.¹⁵² Others view the opinions as long-needed checks on a government power that tends to be abused.¹⁵³ Nonetheless, the need for *some* restraints to prevent overreaching is generally accepted, and increasingly reflected in state statutes limiting local authority to impose dedications or exactions.¹⁵⁴

2. Waiver of objections to overreaching

The transition to contract has offered a mechanism for local governments to redefine the limits on overreaching.¹⁵⁵ The local government can now negotiate for improvements that the developer will provide and that the government could not require under the constitutional constraints established by *Nollan* and *Dolan*. For example, a developer might agree to fund improvements in the street or sewer systems that extend beyond the impacts caused by the developer's own project. In return, the municipality grants assurances to the developer that government regulations on the property will not change for a significant period of time. The theory is that, because developers voluntarily agree to install the infrastructure improvements or other conditions imposed by contract, they waive any ability to contest them later as unconstitutional under *Nollan*

152. See James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 DICK. J. ENVTL. L. & POL'Y 1, 54 (2000) ("The *Dolan* Court extends the reach of *Nollan*'s analytical framework in order to buttress its application of the takings clause to limit at least one means of social policy-making.").

153. See, e.g., Matthew J. Cholewa & Helen L. Edmonds, *Federalism and Land Use After Dolan: Has the Supreme Court Taken Takings from the States?*, 28 URB. LAW. 401, 413 (1996) ("In *Dolan* and other recent pronouncements, the Court has explored new ways to keep states and municipalities in check . . ."); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 542 (1995) ("[T]he Court in *Dolan* . . . emphasized that local governments could not use their power to extort conditions from developers."); Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 148 (1995) ("[T]he Court has awakened to its responsibility under the Takings Clause to ensure the maintenance of the property-police power balance.").

154. See ARIZ. REV. STAT. ANN. § 9-463.05(B)(4) (2010) ("[D]evelopment fees . . . must bear a reasonable relationship to the burden imposed on the municipality to provide additional necessary public services to the development."); CAL. GOV'T CODE § 66005(a) (West 2010) ("When a local agency imposes any fee or exaction as a condition of approval of a proposed development, . . . those fees or exactions shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed."); GA. CODE ANN. § 36-71-4(a) (2010) ("A development impact fee shall not exceed a proportionate share of the cost of system improvements . . ."); WASH. REV. CODE ANN. § 82.02.050(3) (West 2010) ("The impact fees . . . [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development . . .").

155. See Pindell, *supra* note 85, at 445-46 ("Developers often attribute high housing costs to excessive local government land use regulations . . . Development agreements, in theory and often in practice, allow developers to evade some of these costly requirements.").

and *Dolan*.¹⁵⁶ The constitutional limitations apply only when the government imposes conditions by regulatory fiat, not when a developer freely chooses to comply with those conditions.

The overwhelming weight of commentary has viewed this development favorably,¹⁵⁷ largely on the grounds that the practice promotes economic efficiency.¹⁵⁸ By widening the bargaining field to satisfy a broader variety of municipal needs—ones that would be out of bounds under *Nollan* and *Dolan*—the use of contract creates additional avenues for increasing the mutual satisfaction of the parties to the agreement.

Moreover, this arrangement is equally attractive to both local governments and developers. The local government finds the situation beneficial because it opens up new areas for obtaining contributions from developers for infrastructure and similar municipal improvements.¹⁵⁹ Indeed, the attractiveness of this situation to local governments may account for reports that some local governments have demanded that developers enter into such agreements to secure regulatory approvals.¹⁶⁰ Demands of this type certainly sound like the type of “leveraging” that *Nollan* warned against and raise doubts about the “voluntariness” of the developer’s waiver of constitutional rights.¹⁶¹ As for developers,

156. See, e.g., Catherine Lockard, Note, *Gaining Access to Private Property: The Zoning Process and Development Agreements*, 79 NOTRE DAME L. REV. 765, 786 (2004) (“[A] majority of jurisdictions do not subject development agreement cases to regulatory takings analysis.”).

157. See, e.g., Callies & Sonoda, *supra* note 130, at 404 (“The question is whether the local government may go further since the development agreement is in theory a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is in fact voluntary, the answer is almost certainly yes.”).

158. See Dana, *supra* note 12, at 51 (“[T]he shift to contractarian regulation is beneficial [under one view] so long as the net benefits associated with the shift exceed the net costs associated with it . . .”). But see Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 263-64 (1998) (“If the stronger party in a non-competitive market lacks empathy for the weaker party and is not, through the interference of the law, constructively required to be empathetic, a one-sided surplus of utility will result.”).

159. See Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 727-28 (2001) (“Through the use of development agreements, however, municipalities can efficiently achieve long-range comprehensive planning goals . . .”).

160. See Michael B. Kent, Jr., *Forming a Tie that Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS: ENVTL. L. & POL’Y J. 1, 17 (2006) (“[There are] situations where the development agreement itself is forced upon the developer as an express requirement of development approval, as is done by some local governments in Georgia.”).

161. The New Jersey Supreme Court’s opinion in *Toll Bros. v. Board of Chosen Freeholders*, 944 A.2d 1 (N.J. 2008), is one of the few explicit recognitions of why the voluntary waiver theory is questionable: “Authorizing off-tract improvements beyond a developer’s pro-rata share through the guise of ‘volunteerism’ is problematic from many perspectives. At heart, it fails to provide an adequate safeguard against municipal duress to procure otherwise

they apparently will shoulder improvements greater than those allowed under *Nollan* and *Dolan* if, in return, they can avoid future changes in government regulation. The popularity of land use contracts confirms that, from the developer's viewpoint, the need for certainty in the regulatory landscape is a paramount concern.

The consequences of this change have received little scrutiny but are quite significant. First, by circumventing the protections against overreaching set forth in *Nollan* and *Dolan*, the use of contract in this manner widens the discretionary authority of local government. Governments can now utilize contracts to secure improvements from developers that the normal regulatory process would not allow, thus effectively expanding local government's authority into areas that were previously unavailable.¹⁶² By systematically obtaining infrastructure concessions from developers, governments have effectively expanded the constitutionally established boundary.¹⁶³

Furthermore, the scope of that change is largely open-ended. The use of contract does not merely circumvent the substantive limits of *Nollan* and *Dolan*; it also does not replace them with other limits. The legal structure set forth in *Nollan* and *Dolan* is intended to ensure that conditions imposed on projects relate to impacts from those projects. By skirting those limits, developers now agree to conditions unrelated to impacts of their own developments, as pure efficiency concerns guide the parties' choices. Of course, developers get a significant benefit in return—certainty during the contract's duration. But the question remains whether local governments should be able to engineer the triumph of efficiency in this way.

A final consequence is that the extent of this enhancement in government power is not transparent, a subject that will be further discussed below.¹⁶⁴ Because the provisions are included in a lengthy contract, the improvements secured by the municipality are likely to be settled upon without any public debate about the need for them, their cost, or whether they are worth the expenditure. Furthermore, any debate that does occur is unlikely to center on the appropriateness of using the government's approval power in this manner. In short, the developer agrees to fund the improvements and not object to them, while the government avoids open debate about them.

unlawful exactions because the line between true volunteerism and compulsion is a fragile one." *Id.* at 17.

162. See Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 *FORDHAM URB. L.J.* 1051, 1070 (1995) ("Without the unconstitutional conditions doctrine requiring careful scrutiny of conditioned benefits, the government would always be able to bargain for what it wants, even in areas where the Constitution supposedly constrains its actions.").

163. See Sullivan, *supra* note 142, at 1421 ("[G]overnment can shift [the boundary between the public and the private realms] through the allocation of benefits as readily as through the use or threat of force.").

164. See *infra* text accompanying notes 233-35.

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At a minimum, these effects on what this Article terms the restraint norm call for greater conversation about whether local governments should be able to evade the constitutional limits on exactions simply because a developer voluntarily agrees to a contract. The consequences of that choice—a significant enhancement in the scope of governmental authority—are hardly trivial. Calling the agreement “voluntary” does not answer the underlying issue of whether the use of contract unduly extends the public agency’s ability to secure improvements through use of its approval power.

D. *The Equality Norm*

1. *Avoiding unequal treatment of applicants*

Another behavioral norm of local government is the concept of equal protection, a fundamental principle of American constitutional law. Under that principle, the government’s ability to draw distinctions depends in part on the type of decision made and the parties affected. The deference accorded to the government’s actions varies, with the tests ranging from strict scrutiny to rational basis.¹⁶⁵

Courts have accorded substantial discretion to local governments in drawing lines between individual classes of landowners, an approach evident as early as the seminal *Euclid* case. There the Court noted that under the police power “[t]he line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.”¹⁶⁶ As land use regulation further unfolded and a greater appreciation developed for the individuality of land use situations, the courts’ deference toward local governmental decisionmaking increased. By its nature, land use regulation requires drawing lines in different factual contexts, and applying equal protection principles to such line drawing is difficult.¹⁶⁷

Consequently, relatively few cases have found that local governments violated equal protection in making land use decisions. Nonetheless, two of the small number of land use cases decided by the Supreme Court have involved equal protection. Most recently, in *Village of Willowbrook v. Olech*,¹⁶⁸ a 2000 decision, the Court held that a single individual could bring a “class of one”

165. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.3(a) (4th ed. 2008) (discussing three standards of review that are used in equal protection decisions: the rational basis test, the intermediate test, and strict scrutiny).

166. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

167. See, e.g., *Maulding Dev., LLC v. City of Springfield*, 453 F.3d 967, 969-70 (7th Cir. 2006) (citing *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004), for the proposition that it is difficult to succeed with a “class of one” equal protection claim in a land use case).

168. 528 U.S. 562 (2000).

claim for an equal protection violation. In *Willowbrook*, the plaintiff alleged that the village had demanded a 33-foot water easement to connect plaintiff's property to the city water system but had required only a 15-foot easement from other property owners.¹⁶⁹ Fifteen years earlier, in *City of Cleburne v. Cleburne Living Center*,¹⁷⁰ the Court found that requiring a special use permit for a group home lacked a rational basis and thus violated equal protection.¹⁷¹ These two decisions give the equal protection doctrine some prominence in the land use field.

2. *Bargaining and inequality*

Adhering to the equal protection norm is difficult in the context of bargaining, as the variety of factors that play a role in negotiations can easily lead to disparate outcomes among similarly situated landowners.¹⁷² Perhaps most importantly, negotiating parties will not necessarily reach agreement at a single point. Instead, negotiation theory postulates a "bargaining zone" within which both parties will be satisfied,¹⁷³ and the interplay of various factors determines where the parties will end up in that zone.¹⁷⁴ For example, parties may differ in the bargaining resources that they bring to the table.¹⁷⁵ If one developer has

169. *Id.* at 563. The Court was unclear about whether the fact of the distinction, by itself, was sufficient to state a case of action. Justice Breyer concurred on the basis that the case did not raise the issue whether a simple faulty zoning decision would violate the Equal Protection Clause because the court of appeals had found that "respondent had alleged an extra factor as well—a factor that the Court of Appeals called 'vindictive action,' 'illegitimate animus,' or 'ill will.'" *Id.* at 565-66 (Breyer, J., concurring) (citations omitted).

170. 473 U.S. 432 (1985).

171. *Id.* at 448.

172. *See, e.g.*, Goodpaster, *supra* note 96, at 344 ("In bargaining, the points of settlement can either be: 1) at a position between the parties that one party has convincingly persuaded the other party to accept; or 2) at what is called a *focal point* or *mutually prominent alternative*, a salient point on the otherwise featureless negotiation landscape that seemingly and naturally draws the parties to it."); *see also id.* at 351 (summarizing a wide variety of behaviors found in bargaining); Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004) (discussing how heuristics influence the negotiator's decisionmaking processes).

173. *See* Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1792 (2000) ("In any negotiation, the maximum amount that a buyer will pay for a good, service, or other legal entitlement is called his 'reservation point' or, if the deal being negotiated is a monetary transaction, his 'reservation price' (RP). The minimum amount that a seller would accept for that item is her RP. If the buyer's RP is higher than the seller's, the distance between the two points is called the 'bargaining zone.'" (footnote omitted)).

174. *See, e.g.*, Leonard Greenhalgh, Scott A. Neslin & Roderick W. Gilkey, *The Effects of Negotiator Preferences, Situational Power, and Negotiator Personality on Outcomes of Business Negotiations*, 28 ACAD. MGMT. J. 9, 29 (1985) (suggesting that any bargaining study should consider three variables—personality, power, and preferences).

175. *See* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 5 (2000) ("The degree of power that each party brings to the negotiation affects the room for maneuver that each

more information available than another in an otherwise comparable situation, the first developer is likely to have bargaining power superior to that of the second.¹⁷⁶ Negotiating skills¹⁷⁷ and styles¹⁷⁸ also affect the outcome of negotiations, as do the parties' background situations,¹⁷⁹ decision biases,¹⁸⁰ personality differences,¹⁸¹ and emotions.¹⁸²

These variables in the bargaining process render it likely that negotiated outcomes will differ on otherwise similar developments. Even if, as a matter of policy, a local government makes it a negotiating priority to ensure that the provisions of its various land use contracts treat property owners consistently, the developers in those separate negotiations will likely have different value sets. Those sets will translate into different tradeoffs, thereby making it more difficult for the local government to achieve consistent outcomes.

Negotiations may implicate the equality norm in yet another way. A negotiated outcome will almost certainly differ from the outcome arrived at through the traditional land use decisionmaking process. Nonetheless, a local government is free to negotiate land use contracts in some instances but refuse to do so in others, even though the landowners are similarly situated. The constitutional limits on exactions will apply to this latter situation, but arguably not to a

feels is available in bargaining situations."); Barnhizer, *supra* note 140, at 150 ("Bargaining power disparities . . . can affect the ability of the 'weak' party to obtain its preferred terms in a contractual interaction with a 'strong' party.").

176. See Goodpaster, *supra* note 96, at 333 ("[T]he information a party has about the other party's needs may provide some relative bargaining power because the information enables a party to structure proposals based on the other's needs.").

177. See, e.g., Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1586 (1998) ("A bargaining party can gain a strategic advantage by establishing a set of favorable contract terms as the reference point for negotiations.").

178. See Christopher Honeyman & Andrea Kupfer Schneider, *Catching Up with the Major-General: The Need for a "Canon of Negotiation"*, 87 MARQ. L. REV. 637, 643-44 (2004) (listing subjects that should be part of any negotiation canon, beginning with "the idea of personal style or strategy or personality in a negotiation (including the concepts of competitive or adversarial v. interest based or principled or problem-solving)").

179. See Adler & Silverstein, *supra* note 175, at 11 ("Power's complexity stems no doubt from its highly situational nature—even slight changes in a setting may substantially affect the underlying power dynamics.").

180. See Robert S. Adler, *Flawed Thinking: Addressing Decision Biases in Negotiation*, 20 OHIO ST. J. ON DISP. RESOL. 683, 690 (2005) ("These and other examples . . . illustrate the surprisingly large extent to which humans analyze situations according to deep-inborn impulses outside the boundaries of classical rationality models."); Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459, 1470 (2006) ("Numerous studies have illustrated the role of cognitive biases in decision-making processes.").

181. See Greenhalgh, Neslin & Gilkey, *supra* note 174, at 9-10 ("[N]egotiators' personalities have been recognized as having important effects on negotiations . . .").

182. See Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 236 (2005) ("[N]egotiators are increasingly exhorted to appreciate the impact of raw emotions at the table . . .").

negotiation. If the landowner sought to negotiate a contract with the city but was refused, it may be able to claim that the city treated it unequally by agreeing to negotiate with other developers but denying the landowner that opportunity.¹⁸³

In sum, the nature of the negotiating process substantially increases the likelihood that local governments will treat comparable developments dissimilarly. As with the issue of exactions discussed above,¹⁸⁴ the justification for allowing disparate outcomes is that, by contracting, developers waive any claim of discriminatory treatment. But even if legally accepted, that justification begs the policy question of whether the efficiency goal of private contract law should trump the equal protection norm grounded in public constitutional law.

E. *The Rationality Norm*

A fifth norm affected by the transition to contract relates to substantive decisionmaking. This norm responds to the vast discretion exercised by local governments over land use and attempts to rationalize and channel the use of that discretion, largely through planning.

1. *Structuring the exercise of discretion*

Almost from the outset of modern land use regulation, the question of how regulators exercise their discretion has preoccupied both supporters and critics of the regulatory system. Zoning proponents initially argued that zoning outcomes would be rational because they would reflect expertise. Zoning embodied the progressive movement's belief that the application of expertise to a problem would produce better outcomes, a notion underlying the *Euclid* decision.¹⁸⁵ And the application of that expertise was closely associated with the concept of planning. The Standard State Zoning Enabling Act famously required that zoning ordinances must be "in accordance with a comprehensive plan,"¹⁸⁶ and planning was further encouraged by the creation of a second model legislation, the Standard City Planning Enabling Act.¹⁸⁷

183. In the worst case, dissimilar treatment by local government can lead to charges of corruption. See Camacho, *Installment One*, *supra* note 3, at 44 (suggesting that "disproportionate access" can result in "procedural favoritism" that makes the process "unnecessarily vulnerable to substantive corruption").

184. See *supra* text accompanying note 156.

185. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926) ("The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports.").

186. ADVISORY COMM. ON ZONING, *supra* note 30, § 3.

187. ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), available at <http://law.wustl.edu/landuselaw/StdPlanEnablingAct1928.pdf>.

The notion of planning as a check on discretion evolved as land use regulation changed through the twentieth century. For example, the advent of large-scale subdivisions after World War II required planning for infrastructure on a scale not previously undertaken.¹⁸⁸ Ultimately, the idea of planning reached its full fruition in the early 1970s with the advent of the environmental movement. In this era the discretion available to land use regulators expanded to take into account specific environmental goals, such as ensuring water quality and preserving endangered species.¹⁸⁹ Pressure grew to consider some land uses from a regional standpoint, to safeguard certain sensitive areas,¹⁹⁰ and to preserve open space.¹⁹¹ At the same time, critics argued that regulators had ignored the environmental ramifications of their land use decisions.¹⁹² A particular aspect of this local government deficiency was the problem of “piecemeal” changes to land use regulation.¹⁹³

A principal solution to these deficiencies was to reinvigorate the idea that comprehensive planning must inform land use regulation.¹⁹⁴ Statutes now more

188. See 1 JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* § 1:12 (2010) (“When the suburban growth movement exploded after World War Two, communities anxious to develop often made subdivision improvements to encourage growth.”).

189. See Christopher H. Schroeder, Essay, *Global Warming and the Problem of Policy Innovation: Lessons from the Early Environmental Movement*, 39 ENVTL. L. 285, 288 (2009) (“In a tremendous burst of lawmaking between 1969 and 1980, Congress enacted several dozen significant federal laws to cope with just about all the major environmental problems as they were understood at that time.”).

190. See, e.g., Symposium, *State and Regional Land Use Planning: An Idea Whose Time Has Come*, 73 ST. JOHN’S L. REV. 1 (1999); see also N.Y. EXEC. LAW § 805(4) (McKinney 2010) (listing factors relating to the “potential for adverse impact upon the [Adirondack] park’s natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources” that must be considered before any new development is undertaken in the park); VA. CODE ANN. § 10.1-2109 (2010) (“Counties, cities, and towns in Tidewater Virginia shall incorporate protection of the quality of state waters into each locality’s comprehensive plan . . .”).

191. See, e.g., John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 369 (1989) (“The character of the land and of communities and regions, and the preservation of dwindling open spaces, are shared concerns. A new land ethic of planning and stability has replaced the pioneer land ethic of autonomy and change.”).

192. See, e.g., Charles M. Haar & Michael Allan Wolf, *Yes, Thankfully*, *Euclid Lives*, 73 FORDHAM L. REV. 771, 773 (2004) (“Negative externalities of misdirected zoning and planning decisions include . . . environmental degradation . . .”); Ashira Perlman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 719-20 (2008) (“[T]here is a growing belief that excessive reliance upon local governments to regulate land use has . . . created problems such as exclusionary zoning, fiscal zoning, [and] environmental degradation . . .” (footnotes omitted)).

193. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 853 (1983).

194. See, e.g., *Riya Finnegan LLC v. Twp. Council of S. Brunswick*, 962 A.2d 484, 489 (N.J. 2008) (“[T]he requirement that the zoning ordinance be ‘substantially consistent’ with [the Master Plan] connotes a recognition by our Legislature of the importance of comprehensive planning.”); Joseph Schilling & Sheila D. Keyes, *The Promise of Wisconsin’s 1999 Comprehensive Planning Law: Land-Use Policy Reforms to Support Active Living*, 33 J.

explicitly require comprehensive planning processes.¹⁹⁵ The emphasis on planning is particularly prevalent in those statutes that aim to preserve areas with outstanding environmental features,¹⁹⁶ but it also is present in specific environmental laws.¹⁹⁷ Some states now require that land use decisions must be consistent with a previously adopted comprehensive general plan.¹⁹⁸

The concept of planning as a means of structuring land use discretion embodies two important ideas. One is that the sound exercise of discretion requires a sufficient information base upon which to make decisions. For example, decisions about infrastructure needs are impossible without an analysis of the infrastructure capacity currently in place for services like traffic, sewage, water, and police. Likewise, rational choices about projects that affect the environment are possible only if the decisionmaker has information about the existing or “baseline” environment.

Thus, one function of planning is to ensure a sufficient information base, and statutes now often mandate the inclusion of a wide variety of information in plans.¹⁹⁹ Some states also require environmental impact statements,²⁰⁰ while vast improvements in modern technology, such as geographic information sys-

HEALTH POL. POL'Y & L. 455, 455 (2008) (noting that Wisconsin's Comprehensive Planning Law “ensures that a comprehensive plan will guide” almost every locality).

195. *See, e.g.*, N.J. STAT. ANN. § 40:55D-28 (West 2010) (requiring a master plan with up to sixteen elements).

196. For example, one stated purpose of the Tahoe Regional Planning Compact, entered into by California and Nevada and approved by Congress in the Act of Dec. 18, 1969, Pub. L. No. 91-148, 83 Stat. 360, is “to provide for the region as a whole the planning, conservation and resource development essential to accommodate a growing population within the region's relatively small area without destroying the environment.” *People ex rel. Younger v. Cnty. of El Dorado*, 487 P.2d 1193, 1196 (Cal. 1971).

197. For example, the Endangered Species Act requires habitat conservation planning to protect endangered species. 16 U.S.C. § 1539(a)(2)(A) (2006). Similarly, the Clean Water Act requires water quality plans. 33 U.S.C. § 1288.

198. *See* A. Dan Tarlock & Lora A. Lucero, *Connecting Land, Water, and Growth*, 34 URB. LAW. 971, 978 (2002) (“A number of states have incorporated consistency provisions into their planning statutes . . .”). On the subject of consistency generally, *see* DIMENTO, *supra* note 52.

199. *See, e.g.*, WASH. REV. CODE ANN. § 36.70.330 (West 2010) (“The comprehensive plan . . . shall include . . . : (1) A land use element which designates the proposed general distribution and general location and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land, including a statement of the standards of population density and building intensity . . . ; (2) A circulation element consisting of the general location, alignment and extent of major thoroughfares, major transportation routes, trunk utility lines, and major terminal facilities, all of which shall be correlated with the land use element . . . ; (3) Any supporting maps, diagrams, charts, descriptive material and reports necessary to explain and supplement the above elements.”).

200. *See, e.g.*, CAL. PUB. RES. CODE §§ 21000-21177 (West 2010); CONN. GEN. STAT. ANN. §§ 22a-1 to -1h (West 2010); HAW. REV. STAT. ANN. §§ 343-1 to -8 (LexisNexis 2010); N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2010); WASH. REV. CODE ANN. §§ 43.21C.010-910.

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tem (GIS) mapping, have enhanced the ability to generate information.²⁰¹ The theory is that better information is a prerequisite for more rational decisionmaking.

A second function of planning is to channel local government's discretion by imposing a form of discipline on its decisionmaking. The preparation of land use plans can force local governments to identify tradeoffs among conflicting goals, debate them, and resolve them before deciding actual development proposals. Some state statutes demand this resolution through requirements that local governments prepare general plans that are "internally consistent."²⁰²

Thus, plans can serve as a means for promoting rational decisionmaking based on adequate information and channeling the exercise of discretion. Courts have reinforced the rationality norm, citing comprehensive planning as an important factor in their review of local government decisions.²⁰³ A local government's creation of a comprehensive plan, particularly one undertaken after an extensive information-gathering process with public participation, suggests that the plan reflects the public interest rather than arbitrarily favoring private or political interests. Consistent with this conclusion, landmark cases have pointed to planning studies in upholding growth management systems where the courts easily could have found a lack of statutory authorization for those systems.²⁰⁴ Similarly, planning is seen as a method for complying with the Supreme Court's decisions that require local governments to justify dedications.²⁰⁵

201. See generally Tye Warren Simpson & Patricia Carbajales, *A Coastal Campus Prepares for Growth: GIS Aids Long-Range Development Planning*, GEOWORLD, Apr. 2009, at 25 (explaining that GIS was used in planning efforts as "an effective way of . . . analyzing the physical infrastructure necessary to accommodate growth and its effect on environmental resources").

202. See CAL. GOV'T CODE § 65300.5 (West 2010) ("[T]he Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency."); FLA. STAT. ANN. § 163.3177(2) (West 2010) ("Coordination of the several elements of the local comprehensive plan shall be a major objective of the planning process. The several elements of the comprehensive plan shall be consistent . . .").

203. See, e.g., *Wolf v. City of Ely*, 493 N.W.2d 846, 849-51 (Iowa 1992) (concluding that requirement that zoning must be "in accordance with a comprehensive plan" did not require a separate plan, but still considering the city's planning efforts in finding that the requirement was violated).

204. See, e.g., *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) (upholding five-year growth management plan known as the "Petaluma Plan"); *Golden v. Planning Bd.*, 285 N.E.2d 291, 294 (N.Y. 1972) (detailing planning that preceded adoption of eighteen-year capital plan).

205. See Carlson & Pollak, *supra* note 61, at 142 ("74 percent of city planners and 81 percent of county planners either mostly or strongly agree that *Nollan* and *Dolan* amount to good planning practice.").

In short, planning became a decisionmaking tool designed as a response to the question of how to ensure that regulatory discretion was rationally exercised.²⁰⁶

2. *Bargaining, information, and planning*

Both the context and the actual process of bargaining can conflict with the rationality norm. First, bargaining may interfere with the government's ability to acquire information before land use decisions are made. In the traditional regulatory process, a local jurisdiction gathers information before deciding on a development proposal, and the planning staff will study a proposal before making a recommendation.²⁰⁷ For example, additional information may be needed to identify resources on the property in question or the impacts that different development plans may have on those resources.

The negotiation process, however, can inhibit the gathering of information. The concept of negotiation presumes that the parties have acquired the information they need before they begin to bargain; otherwise, any agreement might be less than optimal. If a need for additional information arises thereafter, the negotiation process—unlike the planning process in which an application is studied—includes no mechanism for gathering information. Moreover, developers possess little incentive to voluntarily agree to such a mechanism because, before they enter negotiations, they usually have secured all the information that they believe is necessary to go forward with a development. They acquire this information to measure the effect that various proposals arising during the negotiations may have on their profit margins for the property.²⁰⁸

The bargaining context can also actively discourage information sharing. Bargaining parties view information as a resource affecting the balance of power between the parties, and thus the outcome of the negotiation. Consistent with the adage that “knowledge is power,” the bargaining context puts a premium on the confidentiality of information, because a party unilaterally possessing information can use it to advantage.²⁰⁹

206. See Rosenberg, *supra* note 57, at 227 (“[C]ourts often required that the capital improvements funded by impact fees be a part of a comprehensive plan or planning process. This element connected the impact fee to preexisting plans for community development and provided judges the ability to assess whether the fees were fairly priced and whether they reasonably related to the actual needs of the jurisdiction.”).

207. See Arnold, *supra* note 93, at 497 (“Land use decision makers study the details of proposed projects and the likely impacts of those projects before making decisions Decisions about public infrastructure development typically follow periods of study and assessment about needs, locations, scope, design, and numerous other details.”).

208. See *id.* (“[P]rivate landowners and developers typically engage in their own study and assessment activities as they evaluate potential land uses, project financing needs, plan and design the details of their projects, and identify likely regulatory issues.”).

209. See Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1473-74 (1979) (“In ‘conflict’

Of course, if the local government previously completed a plan for the geographic area that is the subject of the negotiations, the information it possesses may be sufficiently robust for decisionmaking through bargaining. However, in this situation another question arises: whether the bargaining will produce an outcome consistent with the plan.²¹⁰

A consistent outcome is, of course, possible from a bargaining process.²¹¹ If the applicable law in the jurisdiction where the proposed development is located requires a development's consistency with the jurisdiction's plan, meeting that requirement presumably would constrain the outcome of the bargaining and require adherence to previous planning.²¹² Indeed, some state statutes expressly require consistency between development agreements and plans.²¹³

However, adhering to a plan in a bargaining context is difficult for several reasons. First, bargaining is an ad hoc process²¹⁴ involving tradeoffs whose nature is not preordained.²¹⁵ Different outcomes are possible depending upon how the parties respond to proposals.²¹⁶ Furthermore, the weight assigned to certain factors in preparing a plan may differ from the weight assigned to those

bargaining . . . knowledge is power. The object of each party is to obtain as much knowledge about the other's position while concealing as much as possible about its own position.”).

210. See LARSEN, *supra* note 121, at 11 (“Because development agreements are themselves ordinances, they may supersede existing land use regulations as long as they are consistent with the general plan and any applicable specific plan.”). *But see* Neighbors in Support of Appropriate Land Use v. Cnty. of Tuolumne, 68 Cal. Rptr. 3d 882 (Ct. App. 2007) (holding that a development agreement could not authorize use inconsistent with zoning ordinance).

211. See Curtin & Witten, *supra* note 90, at 345. The authors argue that in states where development must be consistent with plans, “the bargaining is constrained and therefore predictable.” *Id.* In contrast “bargaining without a plan against which the legitimacy of the bargain can be measured will lead to chaotic development.” *Id.* at 329.

212. The jurisdiction might, for example, establish the land uses *prior* to negotiating the development agreement, thus limiting the scope of that agreement.

213. See, e.g., ARIZ. REV. STAT. ANN. § 9-500.05(B) (2010) (“A development agreement shall be consistent with the municipality’s general plan or specific plan . . . applicable . . . on the date the development agreement is executed.”); FLA. STAT. ANN. § 163.3231 (West 2010) (“A development agreement . . . shall be consistent with the local government’s comprehensive plan . . .”).

214. See Camacho, *Installment One*, *supra* note 3, at 55 (“[E]xisting negotiated approaches often fail to embrace comprehensive land use planning, sacrificing enduring community-oriented planning for closely tailored but ad hoc decisionmaking.”).

215. John Applegate has made much the same point in discussing regulatory negotiation. See John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 919 (1998) (“Negotiation tends to dispense with the idea that the agency is acting as the disinterested guardian of the general good, and with it any claim that the result is the ‘right’ or ‘best’ resolution. Rather, it is the solution that could be agreed upon.”).

216. See Renee A. Pistone, *Case Studies: The Ways to Achieve More Effective Negotiations*, 7 PEPP. DISP. RESOL. L.J. 425, 458 (2007) (presenting three negotiation illustrations employing different strategies and concluding that “each illustrated negotiation had a different outcome”).

same factors in a negotiation, particularly given the participation of third parties in the public planning process who are not present during the bargaining.

Second, although economics traditionally assumes fixed preferences by bargainers—for example, the preferences established in the city's plan—that assumption is questionable. The bargaining process itself may alter the preferences of those who participate in it.²¹⁷ The new preferences could lead to outcomes inconsistent with the previous planning process.

The third reason, though, is the most telling. As was discussed above,²¹⁸ municipalities often use the bargaining process to seek exactions or dedications from a developer that they could not directly impose because of Fifth Amendment constraints. If the Takings Clause no longer establishes a constraint, the field for negotiation is considerably larger. As Alejandro Camacho has observed, the flexibility inherent in this bargaining structure affords the developer and local government large room to negotiate with few substantive restrictions.²¹⁹

Thus, negotiation can lead to outcomes that, at least partially, lie outside the boundaries of the public planning process, which by definition cannot empower extralegal outcomes. Put another way, the negotiation process is attractive to municipalities *because* it can bring benefits that are unavailable through planning. In that event, the land use system loses the check on governmental discretion that the comprehensive planning process was intended to provide.

F. *The Democratic Norm*

A last norm affected by the use of contract concerns democratic values. As land use regulation evolved to take into account a broader variety of goals, the procedures used by local governments changed to expand opportunities for public involvement in land use decisions and to increase transparency in decisionmaking. These developments promote democratic values, but the shift to contract has important implications for them.

217. See Freeman, *supra* note 8, at 657 (“Traditionally, economists have modeled behavior assuming fixed preferences, but preferences form through the confluence of culture, environment, and experience. Conceivably, they shift as a function of both time and context. Recent research in cognitive psychology suggests, in fact, that preferences are not as fixed as traditional economics assumes.” (footnotes omitted)).

218. See *supra* text accompanying note 90.

219. Camacho, *Installment One*, *supra* note 3, at 28; see also *id.* at 29 (“In states that do not require development and annexation agreements to comply with applicable land use plans and zoning, developers and local governments can work from a virtually blank slate in determining what type of development may occur on a given parcel.”).

1. *Public participation and transparency*

The original conception of land use regulation had little need for public participation, as land use decisions were perceived as best left to experts.²²⁰ The role of public participation in the Standard State Zoning Enabling Act was small, largely taking the form of public hearings that accompany certain decisions.²²¹ By the mid-1970s, however, the situation had substantially changed.²²² Energized by the environmental and other social movements, citizens' groups sought and obtained broadened rights of participation in local decisions.²²³ The famous acronym "NIMBY," short for "not in my backyard," is a backhanded compliment to the expanded influence of citizens in land use decisions.²²⁴

Largely as a result of the widespread citizen participation, the role of public hearings in land use decisions changed. Opponents of a project now viewed the hearing as a vehicle for building political opposition, such as by having many project opponents testify. They also seized upon the hearing as an opportunity to create a record of the project's impacts, anticipating later litigation.

220. See *supra* text accompanying note 21.

221. See ADVISORY COMM. ON ZONING, *supra* note 30, § 4 ("[N]o such regulation, restriction, or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard." (footnotes omitted)).

222. See Bojan Bugarcic, *Openness and Transparency in Public Administration: Challenges for Public Law*, 22 WIS. INT'L L.J. 483, 487 (2004) (discussing the "open public administration theory" which "gives the individual a greater role in the adoption of executive regulations" and requires "greater transparency in public administration operations").

223. See Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1132 (2005) ("[P]ublic participation is an integral part of the American land-use planning process . . ."); Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 663 (2005) ("Some scholars have found that public participation . . . fosters important social goals such as incorporating public values into environmental decisions, increasing the substantive quality of decisions, resolving conflict among competing interests, building trust in institutions, and educating and informing the public."); David L. Callies, Book Review, 23 URB. LAW. 291, 293 (1991) (concluding that "[t]he openness of local land-use decisionmaking and the level of public participation is a good thing").

224. See Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the "Not in My Backyard" Syndrome*, 43 SYRACUSE L. REV. 945, 956-57 (1992) ("Opponents fear that siting a group home in their neighborhood will lower their property values, frighten their children, and threaten their quality of life. The intensity of these feelings of risk fosters demonstrations, lawsuits, and pressure on politicians to enact restrictive legislation." (footnote omitted)); Barak D. Richman & Christopher Boerner, *A Transaction Cost Economizing Approach to Regulation: Understanding the NIMBY Problem and Improving Regulatory Responses*, 23 YALE J. ON REG. 29, 37-38 (2006) ("Even though NIMBY projects benefit more actors than they harm, and even though they generate an overall gain in social surplus, the nature of democratic institutions makes it extremely difficult for them to win political support."); Michael Wheeler, *Negotiating NIMBYs: Learning from the Failure of the Massachusetts Siting Law*, 11 YALE J. ON REG. 241, 243 (1994) ("Local defiance of projects whose value is widely recognized has become so frequent—and so effective—that 'NIMBY' is now standard usage in our political vocabulary.").

At the same time, the decisionmaking process became more open. Members of the public demanded and received access to information, and state public records acts ensured the availability of documents relied upon in the decisionmaking process.²²⁵ In those states with environmental reporting laws, the information in an environmental impact document became a focal point for public participation.²²⁶ Members of the public could comment on the analysis in that document, and the public agency was required to respond in writing.²²⁷

Both the increase in public participation and the related emphasis on transparency in decisionmaking serve a couple of purposes. First, participation is seen to promote democratic ends and is a cornerstone of democratic theory.²²⁸ Participating in a transparent process increases the power of citizens to persuade by enabling them to strongly express an informed position to those in power.²²⁹

A second purpose of public participation is providing information.²³⁰ Participation in the land use process can be a means of enhancing the information base used by decisionmakers for specific land use choices.²³¹ This rationale assumes that individual decisionmakers otherwise may have incomplete or inade-

225. See generally Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720 (1981) (discussing state freedom of information laws).

226. See generally Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW 949 (2006) (discussing the development of state environmental reporting laws).

227. See *id.* at 974-80 (discussing public participation and the rationales for it).

228. See Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537, 557-58 (2009) (“[T]he underlying assumption is that public participation and more narrowly confined democratic processes will produce better results, that is, policies more tailored to the practical context and actual needs of the community. Furthermore, liberal political theory . . . is committed to the idea that political legitimacy is correlated to the degree of opportunity for public participation in decision-making.” (footnote omitted)).

229. See Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. & POL’Y REV. 1, 19 (1997) (“Public participation is proffered as a mechanism fostering political legitimacy and politically viable decisions.” (footnote omitted)); see also Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1123-24 (1996) (arguing the costs of participation are lower in smaller government units, and “smaller political units enhance the benefits of participation by increasing the likelihood that a citizen’s ‘action will make a significant difference in the outcome, that is, that he will be effective’ in determining policy . . . or, at least, in being heard” (footnote omitted) (quoting ROBERT A. DAHL & EDWARD R. TUFT, *SIZE AND DEMOCRACY* 41 (1973))).

230. See Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 345 (2006) (“Public involvement can provide information to managers and stakeholders.”).

231. See, e.g., Applegate, *supra* note 215, at 947 (postulating that “the involvement of the general public adds value to administrative decisions, even (or especially) decisions that involve highly technical and complex questions of human health”).

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quate information available through the normal planning procedures.²³² Local citizens can fill that informational gap.

A third rationale for public participation and transparency is preventing abuse of power. Local government officials exercise substantial economic power over land use,²³³ and this power creates opportunities for self-dealing.²³⁴ Even if no illegal actions take place, the nature of the political process at the local level can give rise to suspicion about the fairness of that process. Indeed, suspicion about government land use “deals” formed one basis for the doctrine prohibiting local governments from “contracting away the police power.”²³⁵

In sum, the democratic norm of public participation includes the ability to understand the issues at stake, to provide information, to access decisionmakers and documents, and to hold decisionmakers accountable by requiring them to explicate their decisions.²³⁶ The norm assumes that hearings are meaningful and do not have preordained outcomes. The legal vehicles for ensuring meaningful public participation include open meetings laws,²³⁷ which require notice and meeting in public when a quorum of local decisionmakers is

232. Critics of expanded public participation in the regulatory area argue that regulators should ignore public sentiment for a variety of reasons, including biased information sources and cognitive dissonance. *See* Jones, *supra* note 229, at 66-67 (summarizing the criticisms).

233. *See* Applegate, *supra* note 215, at 945 (noting that closed meetings, while having benefits, “are a source of distrust in public decisionmaking”).

234. *See* Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. & CONTEMP. L. 5, 54 (1996) (“Bribery and graft in land-use planning decisionmaking have inspired Hollywood screenwriters and finished countless political careers.” (footnote omitted)); *see also* FRANK J. POPPER, *THE POLITICS OF LAND-USE REFORM* 52 (1981) (citing zoning and subdivision regulation as “traditionally . . . the greatest single source of corruption in local government”).

235. *See* Fenster, *supra* note 29, at 737 n.54 (“In the period prior to the widespread delegation to local governments of authority to impose exactions, courts frequently struck down as illegal ‘contract zoning’ those land use bargains that manifested excessive agency capture or corruption.”); Michael Wainwright Whitcher, Comment, *Durand v. IDC Bellingham, LLC: Towns for Sale?*, 39 NEW ENG. L. REV. 871, 878 (2005) (“Although generally regarded as a useful tool for land use planning, this process of bargaining may, under certain circumstances, serve as a vehicle for government corruption, at least in the eyes of the general public.”).

236. *See* Briffault, *supra* note 58, at 268 (“[L]ocal control [of land use] provides a powerful means for enabling grass-roots participation in land-use decision-making, for assuring that elected and appointed decision-makers are accountable to the public, and for facilitating regulation that is responsive to a wide variety of differing local needs, circumstances, and conditions.”).

237. *See* Patience A. Crowder, “Ain’t No Sunshine”: *Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623 (2007); Teresa Dale Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 (1993).

present,²³⁸ and public records acts,²³⁹ which require local governments to make documents available to citizens.

2. *Bargaining, the hearing process, and transparency*

The use of contract profoundly affects the democratic norm. Most importantly, it moves the real locus of decisionmaking from the public hearing process to the negotiation process.²⁴⁰ The parties now make substantive decisions through the give and take of bargaining, a process that, for a large development, can occur over a lengthy period of time.²⁴¹

After an agreement is reached, the municipality must hold a public hearing to approve it, but the hearing tends to be far less meaningful, as the key parties have taken entrenched positions in the negotiations.²⁴² While the elected officials may not have participated in the actual negotiations, negotiators for the jurisdiction will normally take care to ensure that the final agreement satisfies those officials. No party to the negotiations is likely to want to change the draft contract during the public hearing process, and any changes made unilaterally by the municipality run the risk of unraveling the deal.

Most negotiations do not involve participation by third parties such as citizens' groups,²⁴³ as both the length and structure of the negotiating process do

238. Pupillo, *supra* note 237, at 1170 ("Most open meeting statutes apply only to gatherings which meet the statutory definition of 'meeting.' To qualify as a 'meeting,' a quorum typically must be present. In addition, the term 'meeting' usually encompasses only gatherings at which deliberation or action on a public matter will occur." (footnote omitted)).

239. See Nancy Leong, Note, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 182-83 (2007) ("Every state has FOIA provisions and other public records acts, which are designed to allow public access to virtually all government documents that do not fall within a recognized exception."); see *also, e.g.*, *Mason v. City of Hoboken*, 951 A.2d 1017, 1025 (N.J. 2008) ("OPRA's purpose is 'to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process.'" (quoting *Asbury Park Press v. Ocean Cnty. Prosecutor's Office*, 864 A.2d 446, 458 (N.J. Super. Ct. Law Div. 2004))).

240. See Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 474 (2005) (noting that the discussion over the allocation of burdens and benefits from exactions shifts from the "public planning process" to the "offices of the municipal planning staff").

241. See, e.g., Pindell, *supra* note 85, at 443 ("Potentially eighty-seven percent of [the] acreage [totaling over 10,000 acres] . . . will be planned largely between local governments and developers behind closed doors and out of public view.").

242. See Camacho, *Installment One*, *supra* note 3, at 37-38 ("Laws requiring only legislative meetings to be open or at best allowing only for brief public comment at a last-minute hearing on a project proposal rarely afford interested parties any meaningful participation . . . particularly when such hearings occur well after negotiations between municipal officials and the developer have taken place.").

243. See Applegate, *supra* note 215, at 916 (noting that in negotiated decisionmaking, "practicality demands a limited number of parties in any kind of negotiation"); Dana, *supra* note 12, at 53 ("[I]n the contractarian model of regulation in which regulations result from

not easily allow for their participation.²⁴⁴ It is possible that, during the negotiations, the public could express opinions to decisionmakers about the issues being negotiated. Informal means are available to do so, such as letter submissions and individual meetings, as well as more organized political pressure. Arguably, each of these alternate means promotes democratic values as well. However, as a practical matter, effective participation by third parties is difficult.

The informal structure of negotiations also interferes with the information-generation aspect of the democratic norm, with the extent of the information loss likely dependent on the type of development in question. For small developments in existing neighborhoods, nearby residents have knowledge of current conditions and are well situated to supply information that enhances the decisionmaking record. For larger projects on pristine land, however, citizens generally have somewhat less to offer, as they lack particularized knowledge of the land on which the project will be built. While they may be able to offer insights into the impacts of the proposed development on surrounding property, the larger scale means that the impacts can be more difficult to analyze. Thus, the effect on the information-generation function of public participation is mixed.

In sum, the contract model challenges the democratic norm of public participation now prevalent in the land use system. This aspect of the transition to contract has received some academic attention, with commentators tentatively offering solutions to inject more transparency into the negotiation process and enhance public participation. One suggestion is to make all negotiating meetings open to the public.²⁴⁵ Perhaps members of the public should be given a seat at the bargaining table,²⁴⁶ or a surrogate appointed to represent their interests.²⁴⁷ These methods, however, place substantial new burdens on members of the public and are not easily implemented.

bilateral, site-specific negotiations between regulators and related entities, environmentalists are at a comparative disadvantage because they, unlike the regulated entities, are literally not at the table when key exchanges of information and key decisions are made.”).

244. See Pindell, *supra* note 85, at 449 (“The public hearing arises after months of conversations and negotiations between the developer and planning staff within the local government. The resulting agreement is often fifty pages or more in length, making it difficult for the average citizen to meaningfully comment, and decreasing the chances the governing body will significantly reevaluate key terms.”).

245. See Camacho, *Installment Two*, *supra* note 3, at 279; Pindell, *supra* note 85, at 450 (“Increased public participation by those affected by land use decisions would provide some check against abuses of power in development agreements. Greater public participation would increase the quality and accountability of the development process.” (footnote omitted)).

246. See Freeman, *supra* note 8, at 668 (“Perhaps interested individuals, or representative groups should be entitled to participate in contract negotiation.”).

247. See Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 386 (2002) (“[P]erhaps the better solution is to entrust . . . representation [of absentee parties] to a designated member of the negotiating team distinct from the rest of the zoning board. This per-

Another idea is to institute separate negotiations between citizens' groups and developers, a practice that has resulted in what are known as "community benefits agreements."²⁴⁸ These agreements contain explicit promises by developers of benefits to the community, such as job creation,²⁴⁹ and in some instances the agreements have been incorporated into development agreements.²⁵⁰ However, their use is not widespread, in part because developers have little incentive to enter into them.

Thus, the current bargaining process clearly devalues the democratic norm of public participation by moving the actual locus of decisionmaking from the formal process of local government and placing it in the negotiation process. Effective participation by the public in that process is quite difficult.

Finally, the shift to contract has important effects on the democratic norm's emphasis upon transparency in public decisionmaking. Most municipalities appoint representatives to negotiate contracts, but that team usually does not include elected officials. Accordingly, because a quorum of the elected officials does not participate in the negotiations, open meetings laws generally do not require that the negotiation meetings be open to the public.²⁵¹

Moreover, the negotiation process is structured quite differently from the public hearing process. Negotiations usually proceed with parties tackling issues sequentially, gradually arriving at an overall consensus. They can reach tentative agreements on points and then reconsider those agreements as other issues are addressed. In doing so, the municipal negotiators make judgments about what factors they are willing to concede.²⁵² They prioritize the municipi-

son could be deputized with the special obligation of representing the interests of vulnerable absentee parties . . .").

248. See Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 37 (2007/2008) (proposing to define a community benefits agreement as "a legally binding contract (or set of related contracts), setting forth a range of community benefits regarding a development project, and resulting from substantial community involvement").

249. See Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVT'L. L. & POL'Y 291, 292 (2008) (noting that community benefits agreements may merely "require a developer to mitigate potential impacts of the development," but that they can also "ask[] the developer to work with the community to improve housing, employment options, and recreational and cultural facilities").

250. *Id.* at 295.

251. See, e.g., IOWA CODE ANN. § 21.2(2) (West 2010) (defining "meeting" as "a gathering . . . of a majority of the members of [the relevant] governmental body"); Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. REV. 2221, 2232 (1993) (noting that the Texas Open Meetings Act "requires any deliberation involving a quorum of a governmental body to be open to the public unless expressly exempted under the Act").

252. See LARSEN, *supra* note 121, at 12 ("There may also be instances in which the legislative body wishes to promote unwritten policies, such as those involving growth management.").

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pality's interests, an activity at the heart of any negotiation that lies out of public view.²⁵³ Even if all negotiations were open to the public, this decisionmaking is informal and not easily monitored. Only if the final agreement and previous drafts of that agreement are carefully studied will indications as to the particular priorities begin to appear.

In contrast to the informality and lack of transparency in the negotiation process, the normal public hearing process is procedurally uniform and open. It begins with an application for development permission and proceeds through a well-established series of steps.²⁵⁴ The agency creates a record that documents the agency's sources of information. The municipality's decision must find support in that record, and all parts of it are either compiled in public at a hearing or are available to the public.²⁵⁵

The transition to contract diminishes the transparency of the public hearing process. No formal record of the negotiations is kept; thus, no specific documentation of the municipal decisionmaking during the negotiations will exist. Rather, the record will largely consist of documents that are prepared after the conclusion of the negotiations. The purpose is to support the negotiated contract and to justify the outcome.

These effects highlight the need to more closely consider the impact of contract on the democratic norm. The lack of transparency in the negotiating process means that much of the real decisionmaking is masked. Given the importance of the tradeoffs made in the bargaining and the effects of those tradeoffs on publicly stated goals in documents such as plans, shedding more light on how individual contracts evolve is important.

CONCLUSION: EVALUATING THE TRANSFORMATION

The transition to contract in the land use field is well under way. It has occurred quickly and with little debate. Because of the attractiveness of contract to both local government officials and development interests, almost no opposition to its use has surfaced.

In one sense, the transition to contract seems inevitable. As Part I of this Article showed, the use of contract seemed to flow logically from the evolution

253. See Sarah Devlin, Comment, "*I Lost My Home, Don't Take My Voice!*" *Ensuring the Voting Rights of the Homeless Through Negotiated Rulemaking*, 2009 J. DISP. RESOL. 175, 185 ("Negotiation allows parties to concentrate and prioritize their actual interests in order to effectively compromise with the other players.").

254. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 7.6 (2d ed. 2007) (describing in detail the typical "two-step" public approval process for subdivision plats).

255. See James Olmsted, *Handling the Land Use Case: A User's Manual for the Public Interest Attorney*, 19 J. ENVTL. L. & LITIG. 23, 55-71 (2004) (discussing several types of documents, proceedings, and testimony that could become part of the record in a land use case).

of land use regulation.²⁵⁶ In particular, the need of local government officials to consider land uses on a case-by-case basis inevitably led to informal bargaining. The step from there to the actual use of contract seemed short.

However, the use of contract has important effects on previously accepted norms governing local government decisionmaking in the land use field. Because development agreements arise in a public law setting, their use is not analogous to contracts between private parties. The close connection of such contracts with the land use regulatory function, the voluntary relinquishment of the local government's ability to change regulations, and the potential impacts on participation by third parties all serve to distinguish development agreements from other private contracts.

Examining the incentives of municipalities and developers to enter into such agreements also demonstrates the importance of thinking more carefully about the contract model. One author identified four gains for municipalities from using contract: (1) facilitating comprehensive planning and long-range planning goals; (2) commitments for infrastructure; (3) public benefits not obtainable under the regulatory takings doctrine; and (4) the avoidance of administrative and litigation expenses.²⁵⁷ Municipalities, however, can secure at least the first and second goals through the usual regulatory process. And there is good reason to question whether use of contract actually facilitates planning.

From the municipality's standpoint, the third benefit is controlling. Contract stands principally as a vehicle by which local governments can expand their prerogatives in dealing with development approvals and thereby enlarge the range of outcomes from them. This expansion allows the local government's choices to be made in a fashion that promotes efficiency. However, it also constitutes a de facto increase in the discretion available to local governments, an increase enabled by the local government's monopoly on the permit process. This same monopoly caused the Supreme Court to adopt the restrictions, found in *Nollan* and *Dolan*, that were intended to avoid municipal employment of the land use system in an unfair manner.

By contrast, while developers cede much to municipalities in negotiations over land use contracts, they find such agreements attractive because of the certainty they provide. The popularity of development agreements strongly suggests the extraordinarily high value of certainty to developers, and the large amount they are willing to pay to achieve it. Notably, however, contractual agreements are not the only vehicle for achieving this goal; legislative changes to land use statutes can do so as well. But the use of contracts has reduced the need for legislative bodies to confront the issue of the developers' need for certainty.

256. See Nolon, *supra* note 56, at 9 (noting that recent local government actions seeking sustainable development "demonstrate remarkable adaptation to contemporary needs and challenges").

257. Green, *supra* note 2, at 394.

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The impact on the various local government norms identified in this Article suggests a need to examine whether land use contracts could be changed to more closely align their use with those norms. For example, Camacho sketches a solution that would open bargaining to much greater public participation.²⁵⁸ Perhaps members of the public should actually be given a seat at the table, or a surrogate appointed to negotiate for their interests.²⁵⁹ The difficulties of arranging such participation, however, are substantial, given the time burden on participants. Another possibility is ensuring more uniformity in the contracts themselves to alleviate at least some impacts outlined in this Article.²⁶⁰ For example, more uniformity might lessen the possibility that local governments will violate the equal protection norm.

The common thread to these suggestions is the need for further legislative oversight of land use contracts and for greater debate over how such contracts affect accepted land use norms. State legislatures have been too passive in accepting the transition to contract without setting more specific rules governing its use.

Finally, any analysis must recognize that the use of land use contracts constitutes a zero-sum exercise in one crucial respect: the longer the period of certainty offered to developers by contract, the greater the possible impairment to the norm of responsiveness. Politicians are well known for engaging in short-term thinking that centers on their need for reelection.²⁶¹ Accordingly, there is reduced incentive for today's politicians, focused on immediate results, to worry about the long-term ramifications of a development agreement, and thus to factor those ramifications into the bargaining.

In short, while the use of contract has undeniable benefits, it raises important questions about how to merge the public law of land use regulation with the private law of contract. Those questions demand evaluation that has not yet occurred.

258. Camacho, *Installment Two*, *supra* note 3, at 271-72 (advocating a "collaborative model" that "emphasizes enhancing local democratic institutions by fostering broad and meaningful participation in agreement negotiation").

259. See Ryan, *supra* note 247, at 386 (suggesting that representation of absent third-party interests be entrusted "to a designated member of the negotiating team").

260. See Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903 (2000) (grouping contracts according to whether they are fully negotiated or subject to uniform provisions, and proposing that public policy should vary depending on the type of contract in question).

261. Jack Estill, Benjamin Powell & Edward Stringham, *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1, 21 (2006) ("[P]oliticians must cater to current residents because future residents do not vote in current elections. Consequently, politicians may focus on short-term policies that benefit current residents at the expense of future residents.").

