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PARTICIPATORY DEMOCRACY AND THE ENTREPRENEURIAL GOVERNMENT: ADDRESSING PROCESS EFFICIENCIES IN THE CREATION OF LAND USE DEVELOPMENT AGREEMENTS

RAMSIN G. CANON*

INTRODUCTION

Local government control of land uses is a strong tradition in American law, stretching back to the colonial era. Land use planning is meant to balance individual property rights with the public good, understood in turn, as efficient and harmonious use of land. The early 20th Century saw the widespread adoption of zoning and planning codes by local governments, authorized to do so by state legislatures. The policy shift away from planning and towards “market solutions” in the late 20th Century resulted in a drop in federal and state support for cities. Planning codes were adapted to serve as vehicles for entrepreneurial governments to encourage economic development as a means for generating tax revenue. Development agreements between governments and developers, -essentially bilateral agreements that govern the terms of a particular project, and related instruments, such as planned developments- have become increasingly necessary to provide needed flexibility, entice economic growth, and mitigate risks for developers investing significant capital. Development agreements allow governments to seek benefits from developers, in exchange for certainty and freedom from zoning regulations for the developer.

However, development agreements that create particularly intense land uses —e.g., high-density, high-traffic, environmentally impactful— raise issues and risks of their own. In particular, courts may invalidate them as impermissible delegation of government power upon challenges from project opponents or recalcitrant governments. Additionally, cities that undergo a change in socio-economic circumstances incompatible with a previously agreed upon project, risk significant damages should they refuse to perform according to an agreement. More generally, opposition from a

* J.D., 2013, Chicago-Kent College of Law; B.A., 2003 University of Illinois-Chicago. I would like to thank Professor Sarah Harding and Luke Harriman for their invaluable guidance and immeasurably beneficial edits. I would also like to thank Waleeta, Malin, and Yousip Canon for their support and patience with me through this process.
community may force unprofitable alterations to, or outright rejection of, a project.

Alternative models of planning based broadly on principles of transparency and cooperation may be instructive towards addressing these problems. By using principles of mutual-gains negotiation and participatory problem solving as guideposts, reforms or fixes to planning processes may mitigate risk to the parties to a development agreement and enhance the certainty for the development party. The alternatives detailed herein aspire to provide such protections.

This Note will argue that development agreements, while conferring great benefits in terms of flexibility, also give rise to normative deficiencies in the form of risk of litigation and process inefficiencies. These deficiencies are by no means fatal to development agreements. Straightforward legislative and administrative mechanisms can address them.

In the area of land use planning, development agreements are bilateral agreements between developers and local governments that control the terms of a particular development project by binding both parties to procedural steps and vesting certain rights for the developers and creating responsibilities for both sides. Localities can both limit externalities and protect themselves from failed developments or unused entitlements. This is accomplished by extracting voluntary agreements from the developer for remediation of land use impacts (such as environmental hazards or increased traffic) and provision of infrastructure. Developers in turn may freeze regulations to those in place at the time of the agreement or secure exceptions to regulations, define the terms by which the project must develop, and extract guarantees of administrative swiftness and approvals for zoning or other entitlements. Development agreements will often include the creation of planned use development (PD or PUD) designations to ensure flexibility as to use guidelines. PDs are detailed development plans for

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1. This Note will use the term “developers” as short hand for the diversity of individuals and entities, and combinations of those individuals and entities that enter into development agreements with local governments. Developers may be individual property owners, financers, or developers under contract with property owners, partnerships of property owners and financers, or holding companies that include combinations of these different parties.

2. This Note will focus on local development agreements between municipalities or counties and development parties. However, state governments, specialty government districts, and the federal government could also enter into development agreements.

large properties, typically with a variety of uses (often termed “mixed uses”), that act as their own zoning designation.4

This Note is organized as follows. Section II provides background on the land use planning process and the role of the development agreement as a policy tool in that process. Section III details the specifics of development agreements and considers how they have been treated by state courts. Section IV analyzes recently developed alternative, participatory models of land use planning meant to address the legislative inefficiencies and legal weaknesses of development agreements. Section V proposes practical reforms for enhancing participation in the development agreement process to better insulate those agreements from judicial challenge. Section V concludes the Note.

II. BACKGROUND OF THE PLANNING PROCESS & THE HISTORICAL CONTEXT OF DEVELOPMENT AGREEMENTS

Land use planning has features of both the normal exercise of police powers and “quasi-judicial” exercises of state power that implicate due process concerns. Understanding the quirks of land use planning as a body of public policy is key to understanding its tools, including development agreements. In order to better understand development agreements as policy tools, this section will detail the typical features of the land use planning

4. JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 7:17 (3d ed. 2013) (“Planned unit developments are basically designed to permit the development of entire neighborhoods, or in some cases even towns, based on an approved plan. The completed development usually includes a variety of residential types, common open space for recreation, parks, and in some cases, commercial or even industrial areas. Since the entire project is preplanned the completed development can be based upon a logical and coherent mixture of uses.

The PUD principle is that a land area under unified control can be designed and developed in a single operation, usually by a series of prescheduled phases, and according to an officially approved “plan.” The plan does not necessarily have to correspond to the property and use regulations of the zoning district in which the development is located. As can be seen from the definition, the planned unit development concept abandons the lot by lot approach to development, and is primarily an alternative to zoning. The Supreme Court of Oregon in Frankland v. City of Lake Oswego, listed to following objectives of planned unit developments: (1) to achieve flexibility; (2) to provide a more desirable living environment than would be possible through the strict application of zoning ordinance requirements; (3) to encourage developers to use a more creative approach in their development of land; (4) to encourage a more efficient and more desirable use of open land; and (5) to encourage variety in the physical development pattern of the city.”).

5. Specific land use decisions have often been characterized by courts and legislatures as “quasi-judicial” exercises of state power, see generally ARDEN H. RATHKOPF, DAREN A. RATHKOPF & EDWARD H. ZIEGLER, JR., 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING § 40:21 (4th ed. 2013) (“Characteristics primarily cited in identifying a rezoning as quasi-judicial are the facts that: (1) A decision has a great impact upon a limited number of persons or property owners while having comparatively little impact on the community at large. (2) The proceeding is aimed at arriving at a fact based decision between two distinct alternatives, i.e., pro or con. (3) The decision, viewed functionally and analytically, presents an instance of policy application rather than policy setting.”).
process and the historical context that gave rise to development agreements. This understanding sets the stage for identifying and addressing the inherent deficiencies of development agreements.

A. The Typical Land Use Planning Process

Localities control the use of land through zoning maps and ordinances that define, proscribe and prescribe uses, and master or comprehensive plans that designate certain parcels and areas for particular types of uses. This type of control of land use by local governments is as old as American law itself, and is not only for the purpose of mitigating nuisances.

The Massachusetts colony’s proto-land use laws operated a sort of quasi or negative zoning by forbidding the building of residences too remote from town centers or “a place of public worship.” In Virginia, laws discouraged absentee landlords by favoring squatters who made good use of property over titleholders who left property fallow, “requir[ing] owners of certain town lots to build houses on their lots or have the lots sold to new purchasers.” These two examples underlie two of the central thrusts of comprehensive land use and urban planning: orderly, harmonious development and efficient use of land for the benefit of the community.

Today, communities prepare comprehensive land use plans as regulatory guidelines. Like the laws of yore, these plans bring predictability to communities in a way that reflects public policy objectives. That is, they allow property owners to better plan for the use of their own land because property owners know not only what is permitted, but whether their intend-

6. For example, an “R” zone where parcels may be used for residential purposes, with “R-1” “R-2” “R-3” etc., indicating increasing intensity of the use, such that an “R-1” zone would permit large-lot single family homes, and R-3 would permit townhomes and low-rise apartment complexes, with higher dwelling-per-acre ratios. Other zoning designations would include Commercial uses such as strip malls, shopping districts, and big-box stores; industrial uses including manufacturing, warehousing, waste-transfer stations, and so on. Typically, agricultural zones, permitting basic agricultural uses, are considered the “lowest” or least-intense use designation.


8. Id.

9. Id. at 1277.

10. See, e.g., Chrobuck v. Snohomish Cnty., 480 P.2d 489, 495 (Wash. 1971) (en banc) (“[W]e start with the premise that comprehensive planning and zoning proposes and imposes limitations upon the free and unhampered use of private as well as public property, and when such regulations are once enacted, the indiscriminate amendment, modification or alteration thereof tends to disturb that degree of stability and continuity in the usage of land to which affected landowners are entitled to look in the orderly occupation, enjoyment, and development of their properties. Perforce, by the very nature of our society, the initial imposition of zoning restrictions or the subsequent modification of adopted regulations compels the highest public confidence in the governmental processes bringing about such action.”) (emphasis added).
ed use will be served or harmed by the future uses of surrounding and nearby properties.11

The distinction between containing nuisance and pursuing the public good is an important one. In other words, comprehensive land use planning is not meant solely to protect property interests from interference, but exercising state power to improve the quality of life of the community in general—e.g., the “better populating and Inhabiting” of the community’s physical space to benefit the individuals that make it up.12

While the abstract principles of “harmony,” “orderliness,” and “efficiency,” help define comprehensive land use planning conceptually, they also give rise to questions. For example, harmony with what? Orderliness by what rubric? Efficiency towards achieving what ends?13 The breadth of opinion on these questions is too great to be addressed in this Note.14 Suffice it to say that regulating the uses of land for some general conception of the public benefit, rather than purely as a means of protecting the rights of individuals vis-à-vis one another or the state, underlies the control of land use.

Land use planning and zoning is calibrated to the public good, within the parameters created by property rights. Where zoning, particularly exclusive zoning,15 generally proscribes uses by property owners,16 planning, in the form of master or comprehensive plans, is more prescriptive in that it details shared public goals and the means for achieving those goals.17 Mas-

11. The most quotidian example of what could happen without the predictability of harmoniousness or efficient use of land: the family who buys a single family home near undeveloped land, only to find a high-traffic waste transfer station is to be developed there. The constant rumble of trucks, potential waste runoff or smells, and the stigma of living near a trash dump may act to injure the family’s enjoyment of their own property and see a loss in value of their investment.
12. See Hart, supra note 7, at 1279 n.8.
14. As one example of the ideologically disparate approaches to land use policy, both Karl Marx and Friedrich Engels engaged the topic, Engels in his criticism of “town planning” in Manchester in THE CONDITION OF THE WORKING CLASS IN ENGLAND (Tim Delaney ed. 1998) (1845), and Marx writing that the study of humanity required that “the first fact to be established is the physical organization of these individuals and their consequent relation to the rest of nature,” quoted in ERICH FROMM, MARX’S CONCEPT OF MAN 14 (1917) (internal quotation marks omitted) (citation omitted).
15. As compared to classic cumulative zoning; where in cumulative zoning, “higher” designations permit by incorporation all of the uses from “lower” designations (i.e., Industrial-6 would permit all of the uses permitted in Industrial-1 through 5), in exclusive zoning each designation permits only those uses enumerated for that designation.
16. E.g., by explicitly limiting what uses a particularly property can be put toward.

The basic instrument of city planning is the “master plan.” This master plan, a “comprehensive, long-term general plan” for the physical development of the community, embodies in-
ter and comprehensive plans are typically not binding on property owners and local governments in the way that zoning ordinances are.18

The Standard Zoning Enabling Act (SZEA),19 created by the Department of Commerce under then-Secretary of Commerce Herbert Hoover in 192120, provides21 that zoning ordinances should be prepared “in accordance with a comprehensive plan.”22 While courts have construed this provision broadly, localities have taken to preparing Master or Comprehensive Plans that detail how a community should develop physically. Comprehensive plans are unlike legislative enactments in that they are developed by insulated planning bodies rather than legislators. Communities will retain outside parties to gather demographic, economic, environmental, and physical data about a community. Governments then use this data to determine desirable or ideal outcomes for the community as a whole.23 It is nevertheless necessary to make an initial policy determination or set of determinations that will guide the drafting parties’ application of the data.

An example24 would be a city’s housing policy. An initial determination—or goal—“to ensure safe housing at a reasonable cost to residents,” will in turn direct the substance of a set of objectives meant to define and achieve that goal. The objectives would be, for example, achieving a portfolio of housing options, which, at its median, would be easily affordable

formation, judgments, and objectives collected and formulated by experts to serve as both a guiding and predictive force. Based on comprehensive surveys and analyses of existing social, economic, and physical conditions in the community and of the factors which generate them, the plan directs attention to the goals selected by the community from the various alternatives propounded and clarified by planning experts, and delimits the means (within available resources) for arriving at these objectives. With different local agencies concentrating on streets, parks, roads, and schools, and with the increasing tendency to delegate new techniques such as urban renewal or public housing to ad hoc authorities, there is danger that diverse legislative activities affecting the physical environment will not be coordinated, and that inefficiencies, inconsistencies, and waste will result. And in the press of day-to-day determinations in the field of land use, it is vital that there be some concrete unifying factor providing scope and perspective. Hence the need for city planning and the master plan, “guiding and accomplishing,” in the words of the Pennsylvania enabling statute, “a coordinated, adjusted, and harmonious development of the city . . . .”

Id. at 1157.
18. Id. at 1157.
20. The SZEA is not a piece of legislation, but a model for state statutes enabling localities to engage in land use planning and zoning. See id at 9 n.21.
21. The SZEA provides a useful standard model for the purposes of this Note; it should be understood that a particular community’s zoning code would resemble the requirements of a model state zoning act or the elements in a zoning enabling statute.
22. Haar, supra note 17, at 1157.
23. Haar, supra note 17, at 1155.
24. See MANDELKER, supra note 13, at 35.
for the median income family in the community. To achieve these objectives, a comprehensive plan will include detailed policies, such as dedicating un-annexed areas to multi-family residential developments; the use of bonuses to developers to encourage dense housing; and reserving space and dedications and easements for parks, schools, access roads, sewage lines, etc.

Land use planning, and in particular comprehensive plans, therefore reflect the political priorities and values of the community they mean to plan, even if they are technical in substance. Zoning in conformity with plans requires legislatures to exercise what discretion is available to them in harmony with the political priorities of the community as a whole.

Insofar as development agreements in particular permit ad hoc or intense departures from those plans, they may tend to subvert the expectation of the community represented by the comprehensive plan.

B. Development Agreements as a Necessary Tool for “Entrepreneurial” Government

The growing use of development agreements and related planning tools by local governments is a result of the change in urban planning over the last forty years. Development agreements and related instruments are important tools for localities. Nevertheless, they differ from typical government contracting because they are not procurement (as with, for example, the purchase of professional services) or delegation (as with privatization of a social service) but rather a form of actual governance through private negotiation. Often, among the products of an agreement is a legislative action, such a vote by a City Council to rezone a property. While this may undermine public trust in the government and its own police powers, the evolution of urban land use planning creates a compelling need for policy tools like development agreements absent larger, national policy changes.

25. Charles E. Lindblom, Still Muddling, Not Yet Through, 39 PUB. ADMIN. REV. 517, 517 (1979) (Remarking on the nature of “incrementalist” policy analysis and creation as “[a]nalysis marked by a mutually supporting set of simplifying and focusing stratagems of which simple incremental analysis is only one, the others being those listed in my article of 20 years ago: specifically, . . . an intertwining of analysis of policy goals and other values with the empirical aspects of the problem . . . .”) (footnote omitted).

26. While this Note will deal with development agreements, it is important to note the two related types of planning tools, annexation agreements and planned developments that share many of the same features. Both annexation agreements and planned developments contemplate bi-lateral agreements between development parties and governments, detail with particularity intense uses of land, and place conditions on approval that require consideration from development parties and some degree of commitment from governments. Development agreements will often entail a planned development.
The key to understanding the need for development agreements is to understand the shift in the role of local government with the onset of government policy neoliberalization in the 1970s. Neoliberalization impacted local governments in various ways, but the most directly relevant are, first, the shift in federal policy away from direct spending of federal tax dollars on local programs to “pro-growth” policies and, second, the liberalization of trade and regulatory regimes that introduced international competitive pressures on localities, particularly manufacturing, which eroded local tax revenues. The abandonment of federal and state commitments to infrastructure and social welfare programs required localities to resort to debt (in the form of bonds) and the active pursuit of capital investment to make up budgetary shortfalls. The introduction of international competitive pressures made this need more acute.

In the pre-neoliberal Keynesian context cities behaved more managerially, responsible for administering programs like public housing and developing complex versions of regulatory regimes like Euclidean zoning, as well as encouraging business development and protecting labor interests. When city governments were “disciplined” by a loss of federal and state funds, they were expected to either shrink in size or find private sources for revenue—the antithesis of the Keynesian principles of recession response. Both to avoid capital flight and to attract new capital, there-
Therefore, cities must act entrepreneurially, engaging businesses and enticing them to develop new projects.\textsuperscript{37}

Enticing investment can take many forms, of course. Among these are tax incentives\textsuperscript{38} like tax-increment financing ("TIF") overlay districts or sales tax rebates, direct subsidies, and "particularized"\textsuperscript{39} regulations that permit the government to be more flexible to the needs of developers.

Developers want to mitigate the unpredictability and vicissitudes of the administrative and legislative process; it reduces risk by vesting contractual rights, and thus ensuring predictability.\textsuperscript{40} In turn, local governments get assurances as to use and the development party is able to plan for the long-term, secure financing by defining the terms of the regulation applicable to a piece of property through a bi-lateral agreement.

Thus, the development agreement and related instruments have come to serve a critical role for localities. In a national policy regime that compels local governments to act as entrepreneurs, stoking economic growth to maintain or grow revenues, tools that allow \textit{ad hoc} tailoring of regulations are critical. The flexibility and assurances they offer makes them invaluable. However, their very nature, walking a thin line between contract and conditional zoning, and the competitive pressure to obscure them from the public until the point where a proposal is ready to move forward, create risks of their own.

\section*{III. Contours and Legality of Development Agreements}

Not all development agreements are the same, nor are they inherently controversial. The use of development agreements to mitigate externalities not otherwise addressed by permitting is precisely the type of thing city planning departments are meant to do. It is the problematic agreements that create high-intensity or dense uses and require some quasi-judicial or legis-

\textsuperscript{37} Leitner, supra note 28, at 147 ("[Cities'] preoccupation with local economic growth has been imposed on the process of urban land development. In numerous cities, the local state has moved beyond its traditional activities of land-use control and planning and the provision of public services to become a major player in urban land development.").

\textsuperscript{38} Id. ("[A] greater amount and new variety of financial incentives are now made available to developers and businesses for property development; incentives which range from tax abatements and rebates to land-purchase subsidies, low-interest loans, loan guarantees and equity-financing.").

\textsuperscript{39} Erin Ryan, Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Conflicts, 7 Harv. Negot. L. Rev. 337, 349 (2002) ("[L]and use decision-making has shifted significantly from the planned toward the particularized, affording more ad hoc responses to individual development proposals.").

\textsuperscript{40} See Shelby D. Green, Development Agreements: Bargained-For Zoning that is Neither Illegal Contract Zoning nor Conditional Zoning, 33 Cap. L. Rev. 383, 393 (2004) ("Though zoning ordinances contain standards for granting variances and special use permits and exceptions, these devices retain an ad hoc flavor and their application is not entirely predictable.").
lative action by the locality that are the subject of this Note. It is those types of projects that most require flexible bilateral agreements; these projects are also more likely to attract negative public attention and litigation. This section therefore will consider development agreements in general, and then consider the inefficiency phenomena that arise from those agreements that entail higher-intensity or inherently controversial proposals.

A. Development Agreements in Practice

While development agreements are sometimes presumed to be within the police power of local governments. Many state legislatures have passed authorizing statutes to grant localities the explicit power to enter into development agreements, and define those powers. These statutes create procedures for entering into development agreements, necessary elements of those agreements, and limits to what a local government can negotiate.

Development agreements evolved as flexible alternatives to planning within rigid Euclidean zoning. In a strict Euclidean regime, districts are zoned for narrow sets of uses according to a comprehensive planning document. Development agreements make exceptions to the structures of these zoning districts, incorporate mixtures of uses, and otherwise carve out an area within a zoning district that does not conform to the surrounding uses. Development agreements may also include a requirement for letters of

41. Id. at 395 n.65. Among the states explicitly authorizing states to engage in development agreements are California, Arizona, Colorado, Florida, Hawaii, Idaho, Louisiana, Maryland, Nevada, New Jersey, Oregon, South Carolina, Virginia, and Texas.

42. Modern zoning regimes are typically sourced to the Supreme Court case Village of Euclid v. Ambler Realty Corp. 272 U.S. 365 (1926). In Euclid, the Court upheld a municipal zoning ordinance against Takings and Due Process challenges by a realtor who alleged that the zoning ordinance affected a Fifth Amendment taking by seriously diminishing the value of their property. Id at 396-97.

43. See Green, supra note 40, at 389.

44. It may be useful as a conceptual tool to provide an example here. Often development agreements will spell out subdivisions of land, rezoning of different parcels, and the various special use permits and zoning variances or exceptions that will be provided in order to permit legal development of a particular project. A common example would be a development party purchasing a large tract of land at the edge of a city zoned Agricultural or Rural, but designated in the Comprehensive Plan for low-density residential development. The development party may be planning to build a dense, “new urbanist” style project, which blends low-rise luxury apartments and small-lot single family homes surrounding a small shopping district with office space and housing above storefronts, and mixed in with recreational facilities, music venues and theaters, department stores, restaurants, banks, filling stations, and bars. Within a Euclidean context, this would require subdivision of lots, with many lots falling outside of any neat zoning classification—for example, a commercial strip with condominiums and office space above storefronts and backed by parking structures. Therefore detailed “planned development” re-zonings would be necessary in order to provide the development party with the required legal relief, while allowing the locality sufficient control to permit only that which would be amenable to the community and harmonious with surrounding uses, to the finest detail—such as height and style of lighting fixtures, positioning of garbage dumps, hours of operation and ingress and egress points for cars. To orderly develop such a project, it would also be necessary to build in phases, to match housing with infrastructure (such as roads, traffic lights, and sewer hook-ups) and limit commer-
credit or sureties in case a development fails or the development party loses funding. Create requirements for infrastructure such as sewer lines and roads, and easements for bike trails, parks, or green space. Without a development agreement, complex plans would require numerous variances, rezonings, and special use permits, each with its own (often long) process. These agreements therefore significantly condense what would otherwise be a multifarious and often duplicative process. Developers can better secure financing and integrate the elements necessary to minimize potential conflicts with surrounding uses and comprehensive plan objectives.

At the same time, localities can avoid the risks of granting sweeping entitlements, such as high-intensity zoning designations, absorbing the cost of externalities, and the potential judicial scrutiny that would otherwise come from imposing conditions on the granting of entitlements. A broad entitlement granted without a development agreement opens up the possibility of developers changing their plans for the property to something more noxious to neighbors but still within a zoning district’s use limitations, or the subsequent auctioning of that property to developers with potentially less savory projects in mind.

The “bargained-for zoning” that development agreements create does come with drawbacks, particularly in the context of civil society and efficiency and efficacy of land use planning.

B. Inefficiencies of Development Agreements in Practice

This section deals with inefficiencies common to the development agreement process, particularly those arising from litigation and public opposition to development agreements. As throughout this Note, of greater concern are those development agreements that contemplate particularly
cial developments to what the number of “rooftops” (residences) can support. However, because phased
development still requires a long-term plan, developing without assurance of future land use relief could jeopardize the early phases.

45. Each subdivision, zoning change, special use permit, and variance would require a hearing because zoning ordinances treat such actions as legislative decisions requiring administrative or quasi-judicial hearings and legislative votes. Creating a large-scale mixed-use development would therefore require numerous hearings and votes for what is essentially a single integrated project with overlapping externalities, costs, and impacts. Thus, the timeline for full approval is extended and each element of the project becomes subject to political opposition or escalating of demands from the local government.

46. See, e.g., Nollan v. Cal. Coastal Comm’n., 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994), the lynchpin cases of takings and exactions jurisprudence. The holdings of Nollan and Dolan arose as a consequence of planning bodies attempting to mitigate the impacts and externalities of new or more intense developments by conditioning zoning relief on easements or dedications of land. The so-called “regulatory takings” jurisprudence that developed subsequent to Nollan and Dolan would understandably make planning bodies reticent to unilaterally impose conditions on development parties seeking land use relief.

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intense uses; commonly, agreements that provide for high-density mixed-use or planned development projects or noxious or inherently disruptive uses (such as landfills or industrial facilities).

1. State of litigation surrounding development agreements

The common elements of a useful development agreement subject it to several potentially actionable issues: contract zoning, conditional zoning, and common law breach of contract or default based on a change in public policy. Whether or not litigation over these issues is frequent is not as germane as the inherent risk they represent. After all, amelioration of risk is the purpose of entering into development agreements in the first place.

Two types of litigation primarily tend to arise from development agreements: enforcement actions and challenges to the terms or validity of an agreement premised on the contract or conditional zoning theories. Of particular relevance to the subject matter of this Note are challenges by parties or interested citizens to the validity of the agreement and challenges by developers to compel performance of the contract particularly as to zoning relief. The cases considered in this section show the broad spectrum of potential legal weaknesses inherent to development agreements. Particular reforms can reinforce development agreements’ legality by identifying these weaknesses.

The federal courts’ doctrinal aversion to hearing land use cases shunts those cases to state courts. This means that there is considerable disuniformity across jurisdictions. Also, the reporters do not show a huge number of cases litigating development agreements themselves. However, by identifying those elements of development agreements that give rise to litigation, we can better understand how to remedy the development agreement process to eliminate those problematic elements and minimize risk for all parties.

a. Commitments to Zoning Entitlements, or Contract Zoning

Developers have a strong incentive to seek a commitment from the government to grant a zoning entitlement at the point where a project is ready to move forward (i.e., with detailed plans and financing in place).

47. Federal courts prefer to leave land use issues to state courts. See, e.g., Land Use Regulation, the Federal Courts, and the Abstention Doctrine, 89 YALE L.J. 1134, 1134 (1980) (“Despite frequent invitations to impose constitutional restraints on local government regulation of private land use, the federal judiciary has consistently declined ‘to sit as a zoning board of appeals.’”).
However, this may create the appearance—or reality—of so-called contract zoning.48

Contract zoning describes a situation where a local government agrees to grant zoning relief in return for commitments from a property owner. The violation occurs when a government impermissibly contracts away its reserved powers.49 Legislative action approving such a contract is ultra vires as an initial matter because a legislature may not bind itself (or future legislatures) from exercising its reserved power to legislate for the health, safety, and general welfare.51 Relatedly, contract zoning would be impermissible because zoning statutes detail mandatory processes for rezonings, and a contract to re-zone, even if it acknowledges the process, makes the administrative process merely pro forma.52

An example may help illustrate the following cases: imagine a plot of land, about the size of a city block, in a small city. The property is made up of thirty two-story townhomes in poor condition, and the neighboring blocks are mostly small single-family lots and two and three story walk-up apartment buildings, with a few retail storefronts. A developer purchases the block and the townhomes are incrementally demolished as the leases expire. The purchaser intends to build mid-rise (six to eight stories) luxury housing for families, with retail stores and office space on the ground floor. The townhomes previously on the site housed thirty families. The mid-rises will house 96 families. There will also be six new businesses, including a planned small grocery and a restaurant. The zoning code lacks a provision for mixing residential uses (the apartments) with high traffic retail uses

48. Green, supra note 40, at 403-07.
49. McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002) (“The process is 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 whose interest is principally served by the zoning action.”).
50. 112 A M. JUR. PROOF OF FACTS 3D 343 Zoning § 1 (2010) (“Further, such an agreement made by the zoning authorities to zone or rezone for the benefit of a private landowner is often condemned as an ultra vires use of the municipality’s police power.”).
51. However because local governments are creatures of statute, a state legislature may authorize contract zoning. See 112 A. M. JUR. PROOF OF FACTS 3D, supra note 50 (“In jurisdictions that do not have a statute specifically permitting contract zoning, this practice has been found illegal by numerous state courts.”) (emphasis added).
52. League of Residential Neighborhood Advocates v. City of L. A., 498 F.3d 1052, 1056 (9th Cir. 2007) (“The district court’s analysis—a comparison between a traditional [conditional use permit (CUP)] and the terms of the Settlement Agreement—ignores the plain language of Los Angeles Municipal Code § 12.08: All ‘conditional use’ is forbidden in an R1 zone unless ‘approved pursuant to the provisions of [Section 12.24].’ The question is not whether the Congregation has been granted, in all respects, the de facto equivalent of a CUP. The question, rather, is whether, within the framework of the City’s zoning ordinance, the Congregation could engage in the uses permitted by the Settlement Agreement without first obtaining a CUP. Therefore, we need only ask whether the Settlement Agreement grants the Congregation permission to engage in a “conditional use” as defined by the ordinance that is forbidden in the absence of a valid CUP. If so, the statutory framework is triggered in full.”).
The developer meets with city officials and asks that the area be rezoned as a “planned development.” The ordinance that would create the planned development would list the specific ways the property could be used, including how much parking would have to be provided, the maximum hours of operation of the retail uses, etc.

The planning staff is concerned on the effect of more traffic on the surrounding blocks, the increased discharge to the sewer lines, and the effect of additional students on the neighborhood school. The developer is concerned that after buying the property and demolishing the homes, partnering with investors, and spending on attorneys, architects, and engineers, the city will ultimately deny the zoning he needs, leaving him with a less-lucrative property and immense sunk costs. The city and the developer may then enter into a development agreement. The agreement commits the city to granting necessary entitlements if the project application meets all the technical requirements of the zoning code, and unless the Council is unable to make findings sufficient to meet the purposes of the code. The developer in exchange agrees to fair-share payments for road-widening, paying for additional sewer-line hook-ups, and a lump-sum payment to the school district to upgrade school facilities and purchase an additional bus.

Ultimately, the City Council votes to deny the application for a planned development zoning after local residents organize to lobby the Council. The developer brings a suit to enforce the agreement, arguing that the Council could not deny his application so long as it met all the technical requirements, per the agreement. He petitions for a mandamus order to enforce the agreement; in addition he alleges breach of contract. What would be the result? The following cases all illustrate some aspect of this problem. The inclusion of a commitment by the government to re-zone a property has obvious advantages for developers, but it is also the most likely element of a development agreement to attract negative scrutiny from courts and the public as violating the reserved powers doctrine. This type of contract zoning rarely survives legal challenges. The case of Morgran Co., Inc. v. Orange County is particularly instructive, as it shows just how little some courts are willing to tolerate when it comes to possible violations of the reserved powers doctrine.

In Morgran, a developer entered into an agreement with Orange County, Florida, to dedicate ten or so acres of a four hundred acre property as a public park in exchange for, \textit{inter alia}, a commitment by the County to

\begin{footnotesize}
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\item[53.] See Stone v. Mississippi, 101 U.S. 814, 819 (1879) ("Government is organized with a view to [preserving its police powers], and cannot divest itself of [those] power[s].").
\item[54.] 818 So.2d 640, 640 (Fla. Dist. Ct. App. 2002).
\end{itemize}
\end{footnotesize}
“support” an application for the appropriate zoning relief. The zoning relief in Morgan, as in many development agreement scenarios, was for a planned unit development designation. The parkland would be dedicated upon the rezoning of the property. However when the developer decided to press forward with the rezoning application, the County executive directed his staff to treat it negatively and urged the planning bodies and the County commission to reject the application. The reasoning was simply because the developer wanted to build a dense mixed-use project that included significant housing elements, and the county’s school system was already overburdened. The developer sued for enforcement of the agreement, arguing that a promise to merely “support” a rezoning was not an impermissible delegation away of police powers because it did not bind the government to a particular legislative outcome. On appeal, the Fifth District court rejected this “fine distinction”:

Morgan responds that there is a distinction between an obligation to support the request for rezoning and an obligation to approve the request. They urge that both parties, aware of the law of contract zoning, developed this carefully worded, highly negotiated contract language that “does not purport, either impliedly or expressly, to restrict or in any way interfere with, the exercise of the Board of County Commissioner’s police power as the final zoning authority in the County.” This argument, we fear, draws too fine a distinction.

The court was convinced that even a mere promise to “support” a rezoning would make a quasi-judicial process of rezoning into a “pro forma exercise.” It was not germane that the promise to support the application would have applied only to County staff (presumably, the planning office) and not the Board of Commissioners, because “the County is still the County.”

Morgan is not merely an isolated case. Contract zoning is presumably if not per se illegal because of the violation of the reserved powers

55. Id. at 641-42.
56. Id. at 643.
57. Rezonings are typically considered quasi-judicial at least in part, where a public agency must make an inquiry as to the propriety of a change, balancing the property owner’s rights over their property against the health, safety, and general welfare of the community.
58. Morgan, 818 So.2d at 643 (citing Chung v. Sarasota County, 686 So.2d 1358, 1360 (Fla. Dist. Ct. App. 1996)).
59. Id. at 644.
60. See Chung, 686 So. 2d at 1360; County of Volusia v. Vill. of Wellington, 925 So. 2d 340, 345 (Fla. Dist. Ct. App. 2006); J.C. Vereen & Sons, Inc. v. City of Miami, 397 So. 2d 979, 983 (Fla. Dist. Ct. App. 1981); Hector v. City of Fargo, 760 N.W.2d 108, 115 (N.D. 2009) (conversations between city staff and developer did not of themselves rise to level of impermissible contract zoning); Childress v. Yadkin County, 650 S.E.2d 55, 64 (N.C. Ct. App. 2007) (contract zoning impermissible in North Carolina because local government had a duty to exercise independent judgment in zoning deci-
doctrine. This raises another serious issue for developers: not only may they be unable to enforce an agreement at the critical time when it is most necessary, but may not even enjoin a government from violating it. This is because of the equitable doctrine that states that a party cannot act in reliance on a promise that if kept would be illegal. Thus, even if the developer has paid some consideration, they may not be able to compel enforcement; and certainly, none of the costs they incur in reliance on a commitment to “support” a rezoning, including not only the financing of a plan, but potentially even the purchase of the land itself, could be recovered.

However, the reserved powers doctrine is not sufficient to understand why contract zoning is often invalidated. If a legislature simply could not bind a future legislature to a particular course of action, then governments would find themselves unable to contract in a variety of ways. In Mori- 
gran, the court cited to an Indiana case, Prock v. City of Danville, where a contract between Danville and Waste Management, a trash hauler, was valid despite a promise to support an expansion of an existing use of the property as a landfill. The court in Prock found it persuasive that the property had already been re-zoned for a landfill from an agricultural use, and that the city had committed itself only to promising to support necessary enhancements of that use insofar as those enhancements did not violate the letter and spirit of the zoning code.

The analyses and holdings of Prock and Mori- 
gran, together with the fact that governments may otherwise enter into contracts with private parties, suggest that the problematic element of contract zoning is not the binding agreement itself, but the way in which the state came to bind itself. A commitment to rezone at some future time may not be unenforceable where two elements are met: first, if the government has reserved for itself the ability to act in the health, safety, and general welfare of the public; and, second, where the commitment itself was not the result of a bilateral

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61. 818 So. 2d at 644; see also Brine v. Fertitta, 537 So. 2d 113 (Fla. Dist. Ct. App. 1989).
62. Green, supra note 40, at 407-08.
64. The very fact that a Florida appellate court relied on an Indiana appellate court case to find persuasive authority—the case was not cited by either party—speaks to the unsettled nature of the jurisprudence on this issue.
65. 655 N.E.2d at 560-61.
66. Green, supra note 40, at 408-09.
agreement but a truly public process acting as a substitution for the legislative authority otherwise being bypassed.67

b. Shifting Public Need and Common Law Breach

While the illegality of contract zoning may insulate a government from compelled enforcement of a development agreement, the basic principles of common law breach can take a devastating toll on cities. This happened in the small town of Mammoth Lakes, California in 2010. More than a decade earlier, the town entered into a development agreement with a developer to build timeshare-style and residential housing near the town’s small regional airport to facilitate ski tourism.68 The town council approved the development agreement despite reservations expressed by the Federal Aviation Administration (FAA) about the proximity of the development to the airport.

When time came for the project to move forward in 2004, the town had had a change in priority: rather than introduce more residential development, the town recognized the need to expand its airport.69 This conflicted with the construction of a dense housing development on land so near to the airport.70 As the developer pursued enforcement of the development agreement to build housing, town staff maneuvered to prevent that project from moving forward.71 Suspicious of the delays and statements coming from town staff, the developer (a successor to the original agreement) notified the city of its default. Eventually, they sued for specific performance of the agreement, and damages.72

The town answered the complaint by arguing inter alia that the suit was barred by a failure to exhaust administrative remedies,73 and that staff’s intransigence in moving the project forward could not be attributed to the town and thus could not rise to the level of a repudiation of the

67. Id.
69. Id. at 449.
70. Id. at 448.
71. Id. at 449-51.
72. Id. at 452.
agreement. To defeat this defense, the developer introduced into evidence intra-office emails and email between town staff and the FAA detailing how the city planned to kill the project. The jury was persuaded that the town staff’s machinations amounted to a repudiation of the contract and awarded the developer $43 million—or the equivalent of approximately $5,600 for every man woman and child in Mammoth Lakes, and three times the size of its annual budget.

On appeal, the court affirmed that decision, with disastrous results for the town of Mammoth Lakes—the city filed for bankruptcy in 2012. Mammoth Lakes is significant because the case did not involve failure of a city to grant official land use relief. Instead, the development party was able to show a breach of contract when town staff, acting presumably to further the community’s new development goals, failed to “move a project along” in a general sense. The court held that the development party was not required to pursue administrative remedies—in this case, an application for a conditional use permit—because the town staff in its behavior demonstrated a repudiation of the contract. Yet the town staff must have been surprised—they were presumably acting according to the identified needs of the community, and maneuvering to find a way to further that policy. This course of action is what planning staff are hired to do. Thus, a previous legislature, by approving that development agreement, had bound a subsequent legislature in a significant way: it forced them into a choice to reject a pressing economic development need (expansion of the airport) or risk defaulting on an agreement. Yet the court found no impermissible delegation of police powers or violation of the reserved powers doctrine. To the contrary, under a common law breach of contract theory, it affirmed a jury award that doomed an entire community to bankruptcy.

Morgan and Mammoth Lakes highlight the delicacy of development agreements and get to the issue that makes them so precarious: how can a government act entrepreneurially to attract land use development capital

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74. 191 Cal. App. 4th at 462.
75. Id. at 449-51.
77. Id.
78. 191 Cal. App. 4th at 455 (“[O]nce the Developer gave notice of default and the Town failed to cure the default, there was no longer a proposed land use to adjudicate in the Town’s quasi-judicial administrative process. At that point, all that remained was to determine whether the Town breached the Development Agreement and, if it did, what was the remedy. No administrative remedy would have sufficed.”) (citing Tahoe Vista Concerned Citizens v. Cnty. of Placer, 81 Cal. App. 4th 577, 590 (Cal. App. 3d 2000)).
without impermissibly forfeiting its defining duty, to act for the common
wealth?

These two cases also hint at the answer: by building in to the de-
velopment agreement process a mechanism that incorporates the public good. Another case, Heitman v. City of Mauston Common Council,79 speaks to
the limitations of this answer, albeit outside the development agreement context.

c. Public Control of the Use of Private Property

This subsection does not deal with development agreements in par-
ticular, but illustrates the limits to public participation over land use deci-
sions, particularly decisions that burden individualized property rights.

While the public may see a proposed intense use as, in essence, a pub-
lic project, the developer still has significant vested rights and financial
interests in the character of the project. In fact, the first Supreme Court
challenge brought to a zoning ordinance in Euclid v. Ambler Realty, was a
due process argument, alleging that zoning a property and limiting its uses
impaired the landowner’s individual property rights without due process.80
Zoning ordinances build in process rights precisely because land use deci-
sions inherently impact individualized property rights—thus why direct
democracy legislation may be incompatible with zoning.81

The treatment of specific zoning actions in the ballot initiative context
can be helpful for understanding the limitations to public participation over
specific development plans. Courts generally treat specific82 zonings and
re-zonings as uniquely exempt from legislation by initiative.83 Even a re-

80. 272 U.S. 365, 384 (1926).
82. Specific zoning actions can be distinguished from general actions where the action affects
only localized pieces of property rather than affecting a general change to the nature of a zoning code.
For a discussion of the distinction using the terms “site-specific” and “comprehensive,” see id. at 303-
04.
83. Id. at 317 n.89; L.A. Ray Realty v. Town Council of Town of Cumberland, 603 A.2d 311, 315
(R.I. 1992) (“The safeguards and procedural requirements incident to the adoption or amendment of
subdivision regulations or zoning ordinances contained in the general enabling acts are inconsistent
with and incompatible with the exercise of direct legislation by the voters through the initiative or
referendum process.”); Gumprecht v. City of Coeur d’Alene, 661 P.2d 1214, 1215 (Idaho 1983) (“[W]e
hold that the utilization of an initiative process for zoning matters is inconsistent with the comprehen-
sive statutory procedures mandated by the Local Planning Act of 1975 to be followed in enacting and
amending local zoning ordinances and is therefore invalid.”); Rice v. Stoff, 844 S.W.2d 529, 531 (E.D.
Mo. 1992) (“RSMo § 353.060 (1986) mandates a public hearing. . . . This statutory require-
ment . . . would be short-circuited by the instant initiative. We therefore conclude this situation is not a
proper one for the initiative.”); Korash v. City of Livonia, 202 N.W.2d 803, 808 (Mich. 1972) (“[T]he
zoning initiative of general applicability, if it burdens property owners’
rights, can run afoul of the due process rights guaranteed by a zoning ena-
bling statute. A Wisconsin case, Heitman v. City of Mauston Common
Council\textsuperscript{84} neatly lays out the problem of “too much” public participation in
land use development.

In \textit{Heitman}, a Wisconsin appellate court rejected a petition for man-
damus directing a town common council to either adopt an initiative as
worded or refer it to the people for a vote, per a state initiative-enabling
statute\textsuperscript{85}. The initiative was written to forbid particular types of develop-
ments, namely, “secured treatment facilities,” that housed sexually violent
criminals. The court held that even though the initiative acted on all prop-
erties equally, the fact that in effect it “burdened” those landowners who
could otherwise build such a facility by-right transformed the initiative into
a zoning amendment. It thus necessarily conflicted with the zoning act,
which vested landowners with process rights before their rights of use over
their property could be changed\textsuperscript{86}.

\textbf{If Mauston were to enact the land use restrictions proposed by Heitman
under the zoning enabling act, it would be required to first submit them
to the planning commission. All landowners would be given notice and a
public hearing would be held. Any citizen aggrieved by the enactment of
the restrictions would have a right of appeal. By contrast, if Heitman’s
initiative were adopted, the owners of the land upon which use re-
strictions were placed would not be provided with a review by the plan-
ing commission, with notice, with a public hearing or with an appeals
procedure.\textsuperscript{87}}

In other words, process rights act to preserve one’s more fundamental
right against deprivation of property. Given the presumption that ballot
initiatives are constitutionally coequal with legislative enactments by legis-
latures, an initiative that circumvented a process the legislature could not
also legally circumvent must be \textit{ultra vires}.\textsuperscript{88}

The principle derived from this line of cases is that when a land use
action may seriously impair a landowner’s rights to otherwise legally use
their property, public or majoritarian control of the process must be bal-
anced with property rights. This distinguishes land use regulations from

\begin{itemize}
\item \textsuperscript{84} 595 N.W.2d at 456-57.
\item \textsuperscript{85} \textit{id.} at 544-46.
\item \textsuperscript{86} \textit{id.} at 553.
\item \textsuperscript{87} \textit{id.} at 553-54 (internal citations omitted).
\item \textsuperscript{88} \textit{id.}
\end{itemize}
typical exercises of the police power, where notice and adjudicatory hearings are not required.

Morgan, Mammoth Lakes, and Heitman illustrate the challenge for governments and development parties. Although the typical regulatory and political land use processes can be risky for developers—and thus a deterrent to capital investment—the development agreement alternative, which is supposed to eliminate that risk, may instead just be substituting the risk of judicial invalidation. Conversely, local governments that permit too much political control over development may be restrained by the courts.

2. Public Opposition to Development Agreements

Regulatory and political risk to a proposed development can also be understood as the risk that needed entitlements—like re-zonings—will not be issued as a result of a change in or lack of political will. Public and popular opposition to a project often directs that political will. Public opposition to land use changes, including development agreements, can cause delays and introduce uncertainty into the process in its late phases, and often set the stage for subsequent litigation.\footnote{This follows naturally from two justiciability doctrines: ripeness and exhaustion of administrative remedies (itself a species of ripeness). Just as a property owner may not seek a judicial remedy until the administrative process has played itself out, so too opponents may not seek remedy until injury becomes imminent through the granting of an entitlement or permission from the state.}

Local opposition to new developments, often characterized as “NIMBYism”\footnote{NIMBY being an acronym for “Not In My Backyard.” See Barak D. Richman, Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response, 20 UCLA J. ENVTL. L. & POL’Y 223, 223 (2002) (“NIMBY conflicts arise from projects that typically generate widely dispersed benefits while imposing concentrated costs.”).} is so widespread\footnote{P. Michael Saint et al., NIMBY WARS: THE POLITICS OF LAND USE, 204 (2007).} as to be a built-in expectation for developers of controversial or high-intensity projects (such as dense housing or high-traffic commercial developments). As many as one in five Americans has opposed a new development by attending hearings, writing or calling elected officials, or gathering petition signatures.\footnote{Id. at 205.} This level of participation is unmatched in other political areas. Of those who have opposed development, preserving the local environment and protecting real estate values are the most reported motivations.\footnote{Id.} This high degree of engagement for local residents to mobilize against a proposed project should not be surprising given the importance of home equity as a vehicle for wealth creation for the American working and middle classes.
The inverse may also be the case: for those with little equity in absolute terms, the prospect of a project that could quickly accelerate property value growth could also be suspect. The turbocharging of gentrification in urban cores with the onset of neoliberalization has created suspicion among working class city residents when a major new development is proposed for their neighborhoods. Thus even otherwise non-objectionable or non-noxious development proposals risk neighbors’ wrath, depending on the character and history of the local community.

The legal reporters are replete with cases of local residents bringing litigation to stop development, but they cannot tell the larger and perhaps more troubling problem for developers; the huge number of citizens’ associations that participate in the administrative or entitlement stage to stop a development. The survey data suggests this opposition is not ideological but a result of the fear of the externalities caused by that development—externalities like pollution, changes in property values, and decreased quality of life. Thus, public opposition is very fact-dependent.

Another phenomenon bolsters the assumption that the threat to equity is a strong motivator. Cognitive psychologists refer to it as the *endowment effect* or *divestiture aversion*. The endowment effect refers to an individual impulse to protect what one has, more than to value what one could pursue—potential or unrealized gains. Consequently, a potential threat to

94. Jason Hackworth, *The Neoliberal City: Governance, Ideology, and Development in American Urbanism* 78 (2007) (“[T]he neoliberal city is increasingly characterized by a curious combination of inner city and exurban private investment, disinvestment in the inner suburbs, the relaxation of land use controls, and the reduction of public investment that is not likely to lead to an immediate profit.”).

95. For a more complete discussion of this facet of gentrification, see Travis Sumter, *Move Up or Move Out: Gentrification and the Futility of the Intent Doctrine*, 4 S. Regional Black L. Students Ass’n L.J. 117, 117 (2010) (“Gentrification in the 21st century has mainly sought to supply the upper class with gleaming skyscrapers and upscale shopping, while disregard the negative effects that this phenomenon has on African Americans and other minority communities.”); Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. Pa. J. Const. L. 1, 21-22 (2006) (“Redevelopment’s many attractive synonyms—urban revitalization, regeneration, and economic development—obscure the fact that redevelopment necessarily embodies, initiates and executes racial and class transformation.”); John J. Betancur, *Can Gentrification Save Detroit? Definition and Experiences from Chicago*, 4 J. L. Soc’y 1, 6 (2002) (“The context of class and race led to a highly conflictive process in which low-income people, minorities, and their organizations, fought hard to retain their spaces and communities, while middle class individuals and their groups formed worked to take areas away from the poor and minorities. In exceptional cases, government mediated the process in an effort to help the disadvantaged. Most of the time, however, it intervened to accelerate or subsidize gentrification.”).

96. A Westlaw search for “citizens w/25 group & oppo! & zon!” yielded more than 600 recent cases.

97. See John J. Delaney et al., *Handling the Land Use Case* § 5:25 (3d ed. 2013) (“A substantial number, if not a majority, of civic groups can trace their genesis to a zoning controversy.”).

98. Paul B. Marrow, *Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations*, 74 N.Y. St. B.J. 46, 47 (“Endowment effect: People will often place a higher value on
property values may be a stronger motivator than the long-term benefit of a broader tax base.

By identifying the source of this opposition, we can conclude that the issue of public opposition is not an inherently intractable one. Instead, the risk associated with public opposition can presumably be controlled by addressing, early in the process and in a meaningful way, those externalities and the impulse created by the endowment effect.

IV. ALTERNATIVE MODELS OF PLANNING

The general uniformity of planning and zoning processes in the U.S. is a result of the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act, both created in the Twentieth Century.99 The model zoning process balances individual property rights against public policy controls by vesting authority in insulated fact-finding bodies and limiting the amount of discretion legislatures can exercise.

The zoning process follows this typical format: a developer initiates an application process with a zoning administrator or planner, typically an appointed official. For more complex zoning requests, such as planned developments, developers and city officials will typically work together to ensure the application meets the zoning code’s technical requirements. The application will then come before an appointed fact-finding body, such as a Board of Zoning Adjustments or Planning Commission, which will conduct a public hearing. These hearings may be treated as “quasi-judicial”100 where the government is applying the policy created by the city plan and the zoning code to adversarial parties, i.e., the proponents and opponents of a zoning change.101 The fact-finding body swears in witnesses, allows for

something they already have than on the same thing if it belongs to someone else. The effect represents a resistance to parting with something, not an increase in its value to the owner. In one experiment, subjects were asked to imagine owning a coffee mug and then asked to predict a selling price. Before receiving the mug, the average estimated selling price was $3.73. Once they had received the mug, the average price jumped to $5.40.

99. See MANDELKER supra note 13, at 34, 226.

Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interest are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally.

Fleming, 502 P.2d at 331.
cross-examination of experts, creates a record for review, and makes a
(typically) non-binding recommendation to the city council, village board
or County Commission, which makes the ultimate legislative determina-
tion, enjoying the typical presumption of validity accorded to legislative
enactments. In some jurisdictions, an appointed commission or board may
be empowered to make final decisions.

Zoning actions are constrained to this format because of their quasi-
judicial nature and the particularized quality of the property rights in-
volved. However, the comprehensive planning process, and large, gener-
alized re-zonings, including high-intensity development agreements, are
amenable to a variety of participatory approaches because they are legisla-
tive. This section of the Note will draw from several models of planning as
potential “standard models” for the creation of high-intensity development
agreements (and related planned developments). It will consider not only
practical models but also more theoretical approaches to planning that
could guide local governments in designing a process. These will include
the mutual gains approach, a theoretical approach to dispute resolution
propounded by Dr. Lawrence Susskind and Patrick Field of the MIT-
Harvard Public Disputes Program; the charette, a European model for par-
ticipatory planning in increasing use across the U.S.; and models from ex-
periments in participatory government in U.S. cities.

A. The Mutual Gains Approach

The mutual gains approach is a theoretical approach to dispute resolu-
tion between private parties or the government and an adversarial portion
of the public. As throughout this Note, the inclusion of the Mutual Gains
Approach (“MGA”) presumes a potentially or predictably contentious situ-
ation arising upon publication of notice for a proposed development
agreement. The mutual gains approach counsels organizations to treat “the
interaction with the public as a multiparty, multi-issue negotiation.” The
objectives of the MGA include:

1. Acknowledging the concerns of opposing parties;
2. Engaging in joint fact finding;
3. Creating contingency plans to minimize impacts of a project,
   and make commitments to compensate for predictable costs;

102. Because a zoning map amendment or re-zoning deals with the use of a particular piece of
   property, there is always a greater potential for a property owner to bear the burden of a government
   action and thus be able to show injury.

103. LAWRENCE SUSSKIND & PATRICK FIELDS, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL
   GAINS APPROACH TO RESOLVING DISPUTES 13 (1996).
4. Making explicit declarations of responsibility, acknowledge mistakes and share power in a real way;
5. Acting in a trustworthy fashion;
6. Focus on building long-term relationships.

These six principles of the MGA are designed to meet general objectives of responsiveness, quality, and problem solving. They also address one of the problems that face development parties and governments in land use scenarios: asymmetrical information and public mistrust.

At the core of these types of public disputes is a phenomenon social psychologist Lee Ross terms naïve realism. Naïve realism describes the belief that individuals perceive reality objectively, and therefore that their beliefs about the world are the result of rational interpretation of data. Therefore, disagreements over policy issues in particular must be due to irrationality in adverse parties. If one party believes their policy opponents are misinterpreting data or behaving irrationally, they are unlikely to credit the possibility of cooperation or compromise.

Susskind and Fields point to a study by Elizabeth Newton at Stanford University to illustrate this point. In this study, one group of subjects were given popular songs and told to tap out the melodies to another group of subjects who were asked to identify the songs. While the tappers estimated the listeners would be able to identify the song fifty percent of the time, the actual success rate was actually less than three percent. In the study, the tappers would grow increasingly frustrated that the listeners could not accurately interpret the information they were communicating.

The analogy to land use disputes around development agreements is more evident than may be apparent. By the time the details of a proposed development—or even the fact of its existence—reaches the public, the developer and the local government have likely already engaged in months or even years of negotiations. The substance of negotiations between property owners and planning staffs may not even be available to vigilant residents because negotiations do not require public notice and drafts of

104. Id. at 14.
105. Id. at 18.
106. Id. at 19.
107. Id. at 37.
108. Id. at 19.
109. Id.
110. Zoning codes typically require notice when a concrete proposal to amend a zoning code or zoning map is going to go before a public body. See, e.g., STANDARD STATE ZONING ENABLING ACT § 4 (rev. ed. 1928) [hereinafter STANDARD ACT].
City planning staff have two reasons for engaging in such intensive negotiations: an entrepreneurial one, serving local governments’ need to attract capital as a way to fund government and encourage growth, and a regulatory one, serving the public health, safety, and general welfare to the extent possible given property owners’ vested rights under the existing zoning and land use regulations. In other words, city staff may view negotiations as a vehicle for mitigating externalities and shaping a proposed project to meet local needs.

Developers have a number of interests in engaging in closely-held negotiations with city staff before going before a public body. First, once a proposal is submitted to the government for review, public scrutiny is triggered in the form of both notice requirements and applicability of freedom of information rules, and what may be an inchoate plan could spark unnecessary concern or misplaced enthusiasm from the community. Second, there is also a competitive disadvantage in revealing a development plan to potential competitors early on in the process; it gives them an opportunity to interfere or seek a competitive position in the community. This is particularly true for commercial developments seeking to capture market share—for example, a developer seeking to build a grocery store in an otherwise underserved but growing area.

As a result, by the time residents become aware of a major development project being proposed in their community, both the developer and the government may be trying to sell it to them. But having been excluded from the process, residents may not be willing or able to hear the tune being tapped out.

It is easy in such a situation for developers and supportive city planners on one side, and the public on the other, to view the situation with distrust. “Naïve realism” helps explain the adversarial posture that can develop in such situations: those who support the development see the best possible plan built on the best available evidence; those who oppose it see one-sided evidence and collusion between a property owner and government officials.

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111. Unif. Information Practices Code § 2-103(a)(5) (“(a) This article does not require disclosure of: . . . (5) information which, if disclosed, would frustrate government procurement or give an advantage to any person proposing to enter into a contract or agreement with an agency.”).


For instance, according to one study, sixty-nine percent of Americans think the relationship between developers and the government makes the planning process unfair. The incentive for government and developers to cooperate to generate a compromise agreement before presenting it to the public contributes to this perception, and public anxiety over the externali-
ties of that project provide excellent motivation to fight the project.

In such a scenario, the mutual gains principles of joint fact-finding and creating contingency plans to minimize impacts are of particular relevance. In the land use context, litigation often arises over public participation in the administrative fact-finding phase. Short of litigation, public oppo-
nents of a development may seek to sway a public agency or derail a pro-
ject by entering countervailing or critical evidence that provides the admin-
istrative agency with enough evidence to reject a development. A process for joint fact-finding circumvents this common feature of develop-
ment fights.

Two presumptions operate together to recommend the creation of mit-
igation plans. Mitigation plans are another principle of the Mutual Gains
Approach. The first is the presumption that development opponents are
motivated by threats to the environment, home values or the generalized threat of gentrification; the second is the presumption that the endowment effect operates in these adversarial situations. These two relatively safe assumptions suggest that by making contingent but real commitments to the public—organized citizen associations and/or neighbors—the mutual gains approach can facilitate a more efficient land use plan that fulfills the needs of both the public and the developer.

B. The Charrette Model

The term “charrette” describes a set of closely-related practical models
for public participation in land use planning. Different organizations have
different, sometimes proprietary models of charrettes, but there is an identi-

114. SAINT ET AL., supra note 91, at 204.
115. See, e.g., Save Our Peninsula Committee v. Monterey County Board of Supervisors, 104 Cal.
Rptr. 2d 326, 344 (2001) (“And since [probative evidence] first appeared in supplemental information
supplied to the County shortly before the Board convened, there was little opportunity for public com-
ment and meaningful response as to either the methodology or the evidence to support the figures
used.”).
116. See DELANEY, supra note 97, at § 5:30 (“Rebuttal evidence, demonstrating why the proposal,
if approved, would have an adverse impact upon public health, safety, and welfare, must then be intro-
duced. Thus, as a practical matter, counsel for the citizens association is free to adopt a “sniper strate-
gy,” in contrast to the comprehensive approach that applicant’s counsel must undertake. In order to
succeed, the opposition need only raise serious doubts regarding one or more of the matters of proof the
applicant is required to meet (e.g., traffic impact).”).
fiable, general process. A “charrette team” is chosen by a developer, a government, or both, to lead the process. This team, typically working as consultants, is comprised of professionals, experts, and technocrats from a number of fields such as urban planning, environmental planning, architecture, traffic engineering, economics, etc. This team is usually headed by a facilitator with ultimate decision-making authority over the team.

The charrette team will identify interested parties, ideally both those with positive and negative interests in the project. These are the “stakeholders” who will participate in the charrette. Typical stakeholders are of course the developer and the local government (including if necessary different agencies or bodies—such as departments of transportation and school districts), chambers of commerce, conservation groups, and site neighbors either individually or as represented by homeowners associations or ad hoc groups.117 The stakeholders are provided with notice of the charrette, and information meetings may be held to inform them of the operation of a charrette.

An initial, “visionary” meeting is held. At this meeting, stakeholders will be put into small, representative groups, and encouraged to hash out “wish lists” or general visions for a given property. The charrette team may not tell participants about the extant restrictions on property uses if it is theoretically within the power of the government agency to change those restrictions to accommodate different uses.118 Subsequent meetings will incorporate review and comments by stakeholders on those initial visions. The development party and the government will offer presentations as to preferences and legal or practical limitations on the development. Typically, several more meetings are held as stakeholders provide feedback that is needed to come to a “final” charrette plan.

Charrettes are often used as a way to get “stakeholder buy-in” before an official proposal, but the final charrette plan is typically not binding; however, it can be as some jurisdictions have written charrettes into the planning code.119 In these jurisdictions, the final plan produced by the process may be used to rezone the property, or become an “overlay district” which controls the ultimate development of the property.120

A charrette has several advantages: First, it insulates government and development parties from charges of collusion or untoward secrecy. Sec-

118. Id.
119. Id. at 34.
120. Id.
ond, it allows adversarial stakeholders to air grievances and concerns early on in the process and expend energy and resources that would otherwise later be directed at defeating the project to improving it. However, there are of course disadvantages. For instance, because the developer or the government selects the charrette team, they may either in fact or appearance not be a purely neutral party; and in most jurisdictions, the results of a charrette are not binding. In addition, for the development party, the process is inherently unpredictable and may produce an undesirable result.

V. A PARTICIPATORY PLANNING MODEL FOR DEVELOPMENT AGREEMENTS

This section purports to offer an ameliorative model by synthesizing into a model plan the lessons of adverse litigation, public opposition to development, and alternative models of planning. Specifically, four elements will be proposed: transparency requirements, statutory triggers for public participation, joint fact-finding, and “certainty commitments” for development parties, the government, and elements of the public.

A. Transparency Requirements

Developers and governments both have an interest in keeping negotiations on development agreements quiet. For the former, screening off competition and protecting trade secrets are just as important as preventing the public from becoming inflamed against an incipient plan. For the latter, the major concern is inviting intrusive and unwarranted scrutiny from the public at a point where the plan is not in its final or even preliminary form.

The concern over scrutiny is justifiable, but secrecy is a not inherently beneficial for several reasons. First, secrecy may heighten the public perception of collusion between planning staff and a developer. Second, the prevalence of comprehensive planning documents reduces the expectation of privacy over the fact of development of a particular property: because comprehensive plans generally announce a city’s plan to put undeveloped properties to use, the fact that a property is being considered for development will not come as a significant surprise to competitors. Lastly, details and trade secrets related to a development can still be obscured while the fact of plans for a property is released to the public or a segment thereof.

Providing notice that a major proposal is in the works can work two goals. First, it provides a prerequisite to involving the public in planning—without notice, the public would obviously be unable to meaningfully participate in any process. Second, it serves the normative goal of transparency
and evaporates the dampening perception of collusion between government and development parties. Three statutory requirements could be implemented into city planning codes to increase transparency without unnecessarily gumming up the works for developers and local governments:

1. Announcement of Negotiations and Progress

Currently notice requirements typically apply only when an application for specific zoning relief has been submitted to a public body like a Planning Commission or a City Council, although an application may become subject to freedom of information laws as soon as a planning official, such a zoning administrator, receives it in its tentative form. A typical notice requirement compels the government or the developer to send certified letters to property owners within a specified distance from the project (e.g., within a 500 foot radius from the property line) and post a notice of a certain size on the property itself, or to place a notice in a newspaper of general circulation.121

Any notice given before a formal application will not fall under an enabling statute’s ambit, and therefore the notice would not have to be generalized—specialized early notice can be designed to inform only the most intensely interested parties. Significant discretion can be granted to governments and development parties as to the timing, substance, and focus of this kind of notice.

Consider the notice requirement from the City of Chicago’s Zoning and Land Use ordinance,122 which details the variable notice requirements

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121. See, e.g., W.C. Crais III, Annotation, Validity and Construction of Statutory Notice Requirements Prerequisite to Adoption or Amendment of Zoning Ordinance or Regulation, 96 A.L.R. 2d 449 (1964) (“Units of local government such as cities, towns, and counties ordinarily derive the zoning power from the state by virtue of an enabling statute or an appropriate section of their charter. Oftener than not, these statutes or charter provisions require that a notice be given to designated property owners or to the public at large preliminary to the exercise of the zoning power therein granted. Notice published in a newspaper a specified number of days before the hearing to be held on the matter is the usual requirement of the statute or charter provision, but service by mail or in person is called for in some of them.”).


Written Notice. Whenever the provisions of this Zoning Ordinance require that “Written Notice” be provided, such notice must be given as specified in this section.

1. Timing.

(a) One written notice of administrative adjustment applications must be provided by the applicant at least 10 days before the Zoning Administrator takes action on the application. The Zoning Administrator may not take final action on an administrative adjustment application until at least 10 days after the date that notices were mailed to abutting property owners.

(b) One written notice for all other applications requiring written notice must be provided by the applicant no more than 30 days before filing the application.

2. Radius. Unless otherwise expressly stated, the notification radius for applications requiring written notice is as follows:
Written Notice. Whenever the provisions of this Zoning Ordinance require that “Written Notice” be provided, such notice must be given as specified in this section.

1. Timing.

(x) Written notice of negotiations to enter into a development agreement must be provided by the applicant within at least 30 days of an initial meeting between agents of the city and agents of the developer or property owner. Informal written and telephonic communications shall not be considered meetings for the purpose of this requirement.

2. Radius. Unless otherwise expressly stated, the notification radius for applications requiring written notice is as follows:

(x) In the case of negotiations to enter into development agreements, the applicant must provide written notice only to the Alderman/representative of the legislative district in which the subject property is located, or where there is no such representative, to the presiding legislator of the body responsible for referring applications for relief to the legislature as a whole. The city may at its discretion post a notice for public viewing for no less than ten days on a publicly

3. All required written notices must be sent USPS first class mail unless otherwise expressly stated.

5. Written notices must contain:

(a) the common street address of the subject property,
(b) a description of the nature, scope and purpose of the application or proposal;
(c) the name and address of the applicant;
(d) the date that the applicant intends to file the application; and
(e) a source for additional information on the application or proposal.

Id.
viewable bulletin board in the official office of the noticed legislator, within thirty days of receiving notice from the developer.

False

X. Written notices must contain:

(a) the common street address of the subject property,
(b) a description of the nature, scope and purpose of the application or proposal;
(c) the name and address of the applicant;
(d) the date that the applicant intends to file the application; and
(e) a source for additional information on the application or proposal.

With the exception that notices to enter into negotiations to enter development agreements must contain only (a) and (c), and the following:

(f) the current use classifications of the subject property;
(g) the current designation of use of the property in the Comprehensive Plan.

For example, formally providing notice only to the affected alderman allows a duly elected official to make a determination as to the necessity of disseminating the information to the public, in constituent newsletter, on a website, or by any other appropriate means. Limiting the information that must be contained in public notices provides information to the public without revealing what may be tentative plans.

Related to this element would be a requirement to publish significant progress in negotiations. This could be no more than a requirement that the developer inform the same party about an intent to file a formal application, per (d) above, sixty days before the anticipated date of application, with a requirement that requirement (b) be also included in that notice.

2. Broader Notice Requirements Upon Application

At the point of application for approval of a development agreement, a broader notice requirement in terms of timing and effected area “radius” (both literal and figurative) satisfies the principle of including the greater number of potential stakeholders. Note that in the charrette model described in § IV, supra, the charrette team will pull together a group of various stakeholders that includes but is not limited to nearby property owners. The reasoning is that major land use changes have an impact beyond that on the immediate geographic neighbors—including on small business owners, school districts, etc.
However, notice requirements are not as amenable to this type of discretion because they are binding on a developer and government, and a nebulous requirement would jeopardize a proposal’s progress on procedural grounds. Therefore, requiring giving notice to specified agencies, and expanding the radius for required notice to property owners could enhance transparency without introducing uncertainty for the developer. In this regard, the following elements would enhance transparency:

1. For development agreements, increase the radius for notice by a factor of 1.5 to 2;
2. Require notice be sent to affected school districts or other affected taxing bodies, elected officials from overlapping legislative districts (such as state representatives and Congressmen), and regional planning or conservation agencies with jurisdiction.
3. Increase the lead-time by a factor of 1.5 or 2, such that after submitting notice, an official hearing (or related process, e.g., a charrette) could not be held for 45 or 60 days rather than 30 (or 90 days rather than 60, etc.).
4. Do not require a formal hearing within a certain time frame from an Initial Meeting.

B. Participation Triggers

Not all development agreements are controversial. Often they are merely vehicles to control costs, including the provisioning of quotidian planning elements like streetlights or sewer lines. Thus planning reforms that acted on all development agreements would be needlessly broad. Instead, development agreements of certain intensities could be tagged as triggering a requirement for greater transparency and participation requirements.

These triggers could be of several types: classes of uses; particular types of regulatory relief; or multiple level up-zonings including mixed uses or planned developments.

Conditioning greater participation requirements on particular classes of uses involved would ensure that only those development agreements that

123. See Crais III, supra note 121, at 449 (“Applicable statutes calling for notice in a particular manner and form preliminary to the adoption or amendment of a zoning law are generally construed as mandatory and jurisdictional so that measures passed in contravention thereof are invalid.”).
contemplate commonly objectionable, noxious, or impactful uses\textsuperscript{125} compel public participation. Examples of such uses would be waste handling or storage facilities, power stations, quarries or mining operations, industrial or logistical uses (such as intermodal transportation operations) and casinos. Given the greater scrutiny afforded to these types of proposals, requiring greater transparency and participation in arriving at a development agreement is not particularly controversial. Because these types of uses will be less flexible as to design—unlike mixed uses, there is not much variability in industrial-style uses.

Particular types of regulatory relief, such as air quality permits, Army Corps of Engineer 404 (affecting navigable waters) permits, FAA permits,\textsuperscript{126} or hazardous materials storage permits, would similarly prompt public participation in the creation of mitigation measures. In these cases, superseding statutes would limit the possible range of public input. Like the above, this would not be significant departure from the already intense level of scrutiny public agencies give to these types of projects.

Multiple level up-zonings, including planned developments with mixed uses, would be broader and likely pull in a significant number of the development agreements generally proposed. The basic idea is that where a development agreement entails “up-zoning” of more than one level,\textsuperscript{127} or to a wholly different category of use (such as from residential to commercial), the transparency and participation requirements will kick in. Because they are typically vast in size, development agreements often, though not always, include parcels not yet annexed into a municipality, and thus zoned for a general agricultural use. Agricultural uses are the least intense, so most zoning changes would require multiple-level up-zonings. Planned developments and mixed-use developments are often coterminous: they act as their own zoning designation, subject to particular controls detailed in the “plan” for the development. This category of uses is not inherently noxious, but the impacts on communities and neighbors could be great. It is with these types of developments that a charrette-style process would be

\textsuperscript{125} For a quantitative discussion of commonly opposed uses, see STANT ET AL., supra note 91, at 207-212.

\textsuperscript{126} As for example with hospitals that include helipads to service emergency medicine operations.

\textsuperscript{127} “Levels” refers to a remnant of cumulative zoning, which created levels of zoning; as the levels went up, they incorporated the uses from the lower levels, and added more. In the contemporary context, however, each zoning classification is often exclusive but do include gradations that permit greater and greater intensity of uses (for example, an “R1” district permits single family homes, but an “R5” permits multi-unit apartment buildings of 25 units or more). For a discussion of cumulative zoning, see Euclid v. Ambler Realty, 272 U.S. 365, 381 (1926).
most useful, since design and operations issues can address many concerns.  

Joint fact-finding would take the form of a process requirement, but there are a number of possibilities for the substance of such a requirement. The language of the fact-finding process delegated to planning commissions may be a useful starting point. In considering a planned development, a plan commission will be charged with evaluating at least the following factors: (1) compliance with standards and guidelines for the proposed use; (2) compatibility with the uses, character, and density of the surrounding area; and (3) adequacy of public infrastructure and city services. An additional requirement, evaluating the economic impact of various alternatives of use, can be added to address externality concerns. The principle of joint fact-finding suggests that the public, or interested agencies, will be solicited to submit third parties to generate, or particular standards of evaluation to be used in generating, the evidence to address these issues.

C. A Participatory Process

The charrette provides a good model for a planning process that could be incorporated when creating a development agreement. After noticing the necessary parties and soliciting input on fact-finding, a participatory planning meeting, with features of a public hearing and a charrette, would be convened to generate a model plan for the subject property. A planning agency can train staff to act as facilitators, or contract outside parties to act as facilitators; in either case, developers can be compelled to subsidize that cost through permit fees.

Statutory language should restrict the areas of debate to issues amenable to planning: those elements of a project, which require technical expertise or professional knowledge, such as civil engineering, should be outside

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128.  Examples of design improvements would be moving ingress and egress points, providing screening and landscaping buffers for residential neighbors, mitigating light and noise spillover, or incorporation of a historical local aesthetic. Examples of operations improvements would be restricting hours of operation, confining the time of truck deliveries, and funding for site security.

129.  See, e.g., MUNICIPAL CODE OF CHICAGO, ILL. § 17-13-0609: 17-13-0609 Review and Decision-Making Criteria. In reviewing and making decisions on proposed planned developments, review bodies and decision-making bodies must consider at least the following factors: 17-13-0609-A whether the proposed development complies with the standards and guidelines of Sec. 17-8-0900; 17-13-0609-B whether the proposed development is compatible with the character of the surrounding area in terms of uses, density and building scale; and 17-13-0609-C whether public infrastructure facilities and city services will be adequate to serve the proposed development at the time of occupancy.
the ambit of such planning meetings. However, the mixture of uses, general design standards, operational limitations, and substantially related exactions, such as paying for road widening or new bike lanes, adding a bus stop or funding additional fire department equipment or training, should be included, as these are matter inherently part of the general health, safety, and welfare.

As with a charrette, stakeholders would be invited to participate in a series of meetings that result in a project plan of sufficient specificity to notice the community at large about the general character of the coming project. At the same time, the plan would be general enough to permit the development party and planning staff to refine it to meet technical standards and satisfy the economic interests of the developer.

D. Reducing Risk for Development Parties

Increasing transparency and public participation supports the integrity of the planning process and mitigates risk for development parties and the government, in an imprecise way. This section offers statutory and administrative fixes that may provide for more security in securing entitlements.

The reforms suggested to this point intend to satisfy the public interest in land use decisions. They are meant to mitigate public distrust, address the community’s policy objectives at an early point in the negotiations, ameliorate fears of uncompensated externalities, and allow for a mild form of expression of the police power.130 The other side of the development agreement process is to provide the development party with some guarantees to mitigate the risk of a rejection of the agreements or the larding of the agreement with onerous conditions.

Two elements operating together could provide this security: an incremental fact-finding process and a cumulative standard for approval.

1. Incremental Fact-Finding Process and Exhaustion of Administrative Remedies

Insofar as a charrette, or similar process, notices the public and solicits involvement in the development process, it may be considered a fact-finding process for the purpose of creating an administrative record, and a form of administrative remedy. Zoning is a creature of statute and thus the administrative process is defined by the particular zoning or planning stat-
utes. For a general sense of the law of administrative remedy, federal procedure offers guidance.

Generally speaking, the requirement of exhaustion of administrative remedies has two facets; first, a duty on objectors to administrative decisions to avail themselves of all non-judicial administrative processes before seeking judicial review, and second, an implicit waiving of issues not raised before administrative bodies.131

The Supreme Court discussed the animating jurisprudential principles underlying the administrative exhaustion doctrine in two military draft cases, McKart v. United States132 and McGee v. United States.133 In McKart, the government indicted a draft resister and tried to bar his claim that he was exempt from the draft because he had not challenged with the draft board his reclassification as “available for military service,” after his “sole surviving son” status expired with the death of his mother. In rejecting the government’s argument, the Court detailed the purposes of the exhaustion doctrine. Among these were that “judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise.”134 Exceptions would be recognized where the interest of the statute do not outweigh the “severe” harm to the challenging party.135 In McKart, the fact that criminal penalties would arise was a heavy factor to acknowledge an exception.

In the land use context, harm to the challenging party (project opponents) would rarely rise to the level of criminal penalties. More importantly, the interest in allowing the public agency to create a factual record is a pressing one given the volume of land use decisions and the “quasi-judicial” nature of land use decisions. Zoning and planning codes detail with specificity the requirements of such hearings and fact-finding. Unlike McKart, the local agencies are rarely if ever charged with issues of statutory construction,136 and thus the local agency administrative process is

131. 33 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & DUDLEY W. WOODBRIDGE, FEDERAL PRACTICE & PROCEDURE § 8398 (1st ed.) (“One challenging an agency decision must exhaust all administrative remedies before seeking judicial review. Related is the requirement, often included under the exhaustion doctrine, that one must raise issues with the agency or lose the right to challenge those issues on review. Particularly important are the instances in which courts will entertain a claim for an exception to exhaustion, listed and discussed below.”).


133. 402 U.S. 479 (1971).

134. 395 U.S. at 194.

135. Id. at 197.

136. Id. at 197-98 (“The question of whether petitioner is entitled to exemption as a sole surviving son is, as we have seen, solely one of statutory interpretation. The resolution of that issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion.”).
meant to facilitate fact-finding and allow for the application of expertise and exercising of discretion. These rationales were specifically identified by the Court in McKart as persuasive justifications for barring claims that did not exhaust administrative remedies.

A charrette-style planning process would necessarily be part of the fact-finding process. First, it would entail a notice requirement, thus justifying the presumption that interested parties had an opportunity to participate on their own behalf. Secondly and more importantly, it would create a plan or set of parameters against which the legislature would judge a final proposal.

Thus potential objecting litigants would be precluded from attacking a project if they failed to in essence inform the development party and the planning agency of their objections at an early point in the process, where they could be ameliorated. This is the precise intent of the exhaustion doctrine in general and the planning process in particular: to allow administrative agencies to apply statutory land use standards to particular factual scenarios.

Further, even where litigants could raise substantive challenges to a project, such as failure to comply with comprehensive plan objectives or arbitrary and unreasonable application of the terms of a zoning ordinance, their cause of action would be barred or impaired by a failure to raise the issue and create a record for the determining agency to review.

An explicit recognition in a planning ordinance or enabling statute of the charrette-style meetings as evidentiary and part of the record for review would accomplish this risk-mitigation measure. Relatedly, acknowledging the product of that participatory planning process as a part of the administrative record can limit discretion and increase a development party’s ability to challenge an adverse decision judicially.

137. These claims typically turn on the presentation of “clear and convincing evidence” that the agency acted arbitrarily and unreasonably given the record before it. See 4 SALKIN, E. PATRICIA, AMERICAN LAW OF ZONING § 42:38 (5th ed. 2013) (“A reviewing court will disturb a decision of a board of adjustment only if it is found to be illegal, fraudulent, clearly erroneous, unreasonable, arbitrary and capricious, or an abuse of discretion.”); Marjorie Webster Junior College, Inc. v. Dist. of Columbia Bd. of Zoning Adjustment, 309 A.2d 314, 319 (D.C. 1973) (“Our only duty, then, in reviewing this order is to determine whether detailed findings were made upon each material contested issue of fact, Dietrich v. BZA, D.C.App., 293 A.2d 470 (1972), whether those findings are supported by and in accordance with reliable, probative, and substantial evidence in the whole of the administrative record, Schiffmann v. ABC Board, D.C.App., 302 A.2d 235 (1973), and whether the conclusions of the Board flow rationally from these findings, Stewart v. BZA, D.C.App., 305 A.2d 516 (1973).”) (emphasis added).
2. Narrowing the Range of Discretion

The product of a collaborative early planning process could not be binding because of the legislative assignation to local governments of discretionary powers to plan for the health, safety, and general welfare. Discretion however must be exercised based on the record created through the hearing and fact-finding process. A plan produced through a collaborative process could be designated as a guiding document because it synthesizes facts and evidence entered in the fact-finding process.

More concretely, development parties could find security in a statutory requirement that legislatures (or other final decision-making bodies) limit their discretion in adverse judgments that a final plan represents a substantial departure from the final plan produced by a charrette. In other words, the final decision-maker can be constrained from denying a proposed plan except in those cases where the final plan represents a significant departure from the charrette plan. A narrower range of discretion increases certainty that approvals will eventually be granted so long as the basic terms of project plan are satisfied. Predictability could be additionally bolstered by detailing what standards should be applied in determining a “substantial” departure.

Such “decision-making criteria” guidelines are common to zoning ordinances. As one example, the City of Chicago’s zoning ordinance contains the following section controlling decision-making on planned development districts:

17-13-0609 Review and Decision-Making Criteria. In reviewing and making decisions on proposed planned developments, review bodies and decision-making bodies must consider at least the following factors:

17-13-0609-A whether the proposed development complies with the standards and guidelines of Sec. 17-8-0900;

17-13-0609-B whether the proposed development is compatible with the character of the surrounding area in terms of uses, density and building scale; and

17-13-0609-C whether public infrastructure facilities and city services will be adequate to serve the proposed development at the time of occupancy.138

It would be relatively straightforward therefore to craft such a decision-making criteria provision applicable to development agreements. Such a provision would require only that a substantial departure from a preliminary plan be based on factors such as: whether the contemplated use is

substantially similar to that in the charrette plan; whether the proposed development reflects the objectives of the charrette plan; whether the mitigation provisions are not inferior to those in the charrette plan. The essence of discretion is that some ambiguity exists, so these criteria cannot be quantitative. Nevertheless, having such guiding criteria would encourage extreme caution on the part of local governments. To deny a project for any but a narrow range of reasons could subject them to judicial review.

At the same time, that restraint on discretion accounts for public participation. In other words, because of the greater degree of public participation throughout the process, discretion is being restrained in deference to public concerns over health, safety, and general welfare as expressed in the planning process. This creates a qualitative distinction from contract zoning, where the concern is the binding of the legislature from exercising its police powers in order to confer a private benefit.

This fix comports with the slight but extant trend to consider the outcome of a contractual relationship between the government and a development party rather than find it inherently ultra vires. Applying this narrowed-discretion reform to the facts and reasoning in Morgran Co., Inc. v. Orange County, its benefits become immediately apparent.

The court in Morgran found the development agreement to be unenforceable in large part because it would have transformed a quasi-judicial proceeding and legislative deliberation to mere “pro forma exercise[s].” In other words, even a nebulous commitment to “support” a proposal, crafted in a context where both parties were aware of the presumed illegality of contract zoning, would have impermissibly tainted the neutral processes of fact-finding administrative hearings and legislative deliberations. If, however, Morgran Company had engaged in a participatory process to develop an initial plan, even a somewhat vague one, the objectionable elements—somewhat dense residential developments—could not have provided the sole grounds for rejection of a proposal. The commitment for support would have been unnecessary; the developer would have had the security of knowing that even if conditions in the community had changed, the basic elements necessary to make their plan profitable would be pro-

139. See, e.g., BRIAN W. BLAESER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 7.03[1], at 262 (2002) (“[S]ome state legislatures have taken the step of expressly authorizing contract zoning. I think [the] judicial trend away from finding contract zoning inherently flawed on police power and statutory grounds is salutary; it is far more useful to look at the timing, structure, and outcome of an actual contractual relationship between the local government and the developer or landowner.”).

140. Morgran Co., Inc. v. Orange County, 818 So. 2d 640, 643 (citing Chung v. Sarasota County, 686 So. 2d 1358, 1360 (Fla. 2d Dist. App. 1996)).
ected. With no bi-lateral commitment on the part of the legislature, there would be nothing to invalidate.

Where a commitment to zone is not authorized by statute, even a vague commitment to zone may be held unenforceable by a court, as Morgan shows. By expanding the fact-finding stage, the opportunity for late-stage challenges diminishes, and the grounds upon which such a challenge may be brought are narrowed based on the doctrine of administrative remedies exhaustion. Limiting the discretion of decision-making bodies to articulated factors based on a participatory process, certainty for development parties increases in a way not susceptible to judicial invalidation by a court.

Taken in toto, the foregoing participatory elements accomplish several goals: first, they serve normatively desirable public participation and transparency practices; second, they defuse likely political and legal opposition by incorporating likely objectors into the process at an early and thus less high-stakes stage; third, they increase certainty of approval for development parties; and last, they preserve an important tool for governments forced by a macro policy and economic regimes into entrepreneurial behavior.

V. CONCLUSION

In the era of entrepreneurial government, development agreements between development parties and local governments have become invaluable tools. Development agreements provide numerous benefits, allowing for flexibility and certainty despite a traditionally and somewhat unpredictable and rigid statutory regime. Despite general acceptance by courts, development agreements implicate certain judicial doctrines that make them susceptible to litigation. Their very nature also encourages suspicion from the public because of a perception that they are anti-democratic and impermissibly bind governments from exercising their police powers. A participatory model of planning that both encourages community participation and reduces risk for the developer and municipality could avoid the inefficiencies that come with opaque and undemocratic planning, but provide the certainty and flexibility developers and governments need in order to spur economic development.