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Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions

Installment One

Alejandro Esteban Camacho
Associate Professor of Law

Notre Dame Law School
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Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions

Installment One

Alejandro Esteban Camacho*

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* Fellow, Georgetown University Law Center. J.D., Harvard Law School, 1998; B.A., University of California at Irvine, 1995. I would like to thank Peter Byrne, Sheryll Cashin, Jody Freeman, Jerry Frug, Lisa Heinzerling, Emma Jordan, Richard Lazarus, Robin Lenhardt, Kathleen Marcus, Lindell Marsh, Carrie Menkel-Meadow, Doug Porter, Larry Susskind, Kathy Zeiler and the participants in the Georgetown Law Center Faculty Workshop for their encouragement and helpful comments on earlier drafts. I would also like to thank the editors of the *Environmental Law Journal* for their support and editorial assistance.

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I. INTRODUCTION

This is a precarious moment in modern land use regulation. Over the past several decades, many have criticized the command and control planning model that originated in the first half of the twentieth century as infeasible, inefficient, and undemocratic.[1] In response to these criticisms, current land use theory and practice emphasize a negotiated model of decisionmaking in which localities and applicants conduct the business of land use allocation through a variety of contract-like mechanisms.[2] Bilateral deal-making between developers and localities has become commonplace.[3] With the growing influence of large-scale real

1. *See infra* Part II.
2. *See infra* Part III.
3. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local*

estate developers and national "big-box" retailers such as Wal-Mart, Home Depot, and Target, and the intense competition among municipalities to secure revenue-producing development, the negative impacts of such deal-making all too often fall on community members with little direct influence on the planning process.[4]

To frame the discussion, consider a hypothetical illustration: A real estate developer wants to build a 300,000 square-foot entertainment center, featuring four nightclubs, some retail stores, a small outdoor music venue, and several billboards, in a deteriorating downtown area. The property is currently vacant, zoned residential, and located between a low-income Latino neighborhood and a strip of small, neighborhood-serving businesses. Rather than enforce the existing zoning designation for the parcel, most jurisdictions today would allow this developer to negotiate directly with local government officials and change the applicable regulations, without consulting with either the local residents or businesses. This shrouded, bilateral process largely prevents public input on the project's design and impacts. Although the local government might schedule a formal hearing on the project after striking a deal, residents might find it difficult to determine the time and location of the meeting, or to obtain all of the relevant materials ahead of time. Perhaps more importantly, the hearing format would not provide an opportunity for residents to have their questions answered, nor engage them in a meaningful discussion about project alternatives. Even those residents who come prepared would have no assurance that anyone would take their comments seriously.

In these bilateral, negotiated land use approaches, which

Legitimacy, 71 CAL. L. REV. 837, 849 (1983) [hereinafter Rose I] (tracing evolution of ad hoc bargaining approach); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 347-48 (2002) ("[M]ost agree that today, the raw material of most land use planning is the process of negotiation.").

4. *See, e.g.*, Constance E. Beaumont & Leslie Tucker, *Big-Box Sprawl (and How to Control It)*, MUN. LAW., Mar.-Apr. 2002, at 7, 30 (describing considerable long-term detrimental impacts from, and interlocal competition for, big-box retail, as well as high incidence of direct local government subsidies to big-box retailers); Jennifer Liberto, *Parts Builder to Bring 200 Jobs*, ST. PETERSBURG TIMES (Florida), Dec. 12, 2003, at 1 (noting incentives given to manufacturer (approximately $1 million) and Wal-Mart (approximately $2 million) to locate in county); *What Officials Say They Learned From Losing Arena*, ARIZ. REPUBLIC, Jan. 7, 2004, at 8 (describing interlocal competition for professional hockey team).

include incentive zoning, contract zoning, planned unit developments (PUDs), and development and annexation agreements, zoning regulations serve as the baseline from which a locality and applicant bargain, rather than as a development vision for the community. Public input on land use decisions occurs only indirectly through the local legislative authority's ratification of agreements struck by developers and local government officials.

The most far-reaching endorsement of bilateral negotiated land use regulation to date has been the rapid proliferation of enabling legislation for development and annexation agreements in fifteen states, including California, Florida, Maryland, and Arizona.[5] In addition to limiting public input, the long-term bilateral contracts allowed under these statutes eliminate a number of the substantive restrictions that previously applied to negotiations between cities and developers, providing exceptional bargaining flexibility. A developer may obtain a long-term relaxation of applicable regulations and thus a more profitable development, while a local government may receive cash or other forms of consideration that have no relationship to the project's direct impacts. This consideration may go directly into the local government's general fund, rather than funding measures designed to eliminate or reduce the impacts of the development. In the introductory hypothetical, although the adjacent low-income residents and businesses will bear the brunt of the burden from the new entertainment project, such as substantial traffic and noise impacts, they may receive none of the agreement's benefits.

This Article argues that bilateral negotiated land use regulation is of dubious legitimacy.[6] Analyses of this model have largely failed to address how most negotiated statutory schemes create numerous opportunities for, and widespread public perceptions of, favoritism in land use decisionmaking. Most commentators further overlook the fact that important land use decisions are frequently made in closed-door negotiations that exclude many affected parties, further disenfranchising those with the least influence and fewest resources. Furthermore, as the most recent enabling statutes for development and annexation agreements characterize these regulatory approvals as consensual agreements, courts rarely have the opportunity to consider them. In short, current bilateral negotiation approaches often hinder the

5. *See infra* Part III.B.

6. *See infra* Part IV.

promotion of open, democratic, and deliberative decisionmaking and the efficient distribution of project impacts and benefits. In addition, these approaches often erode and hinder effective comprehensive planning by legitimizing ad hoc land use decisions without reference to a long-term, adaptable community plan and by failing to make such agreements accountable to those parties affected by the land use decision.

Unfortunately, rather than attempting to restructure the regulatory process to address these deeply embedded problems, the few attempts at reforming bilaterally negotiated land use approvals have primarily sought to create legitimacy after the fact through less deferential judicial review that allows courts to second-guess local government decisions and substitute their own judgments as to the appropriateness of bargained-for agreements.[7] Because structural shortcomings persist in the very flexible and fragmented approval processes enabled by development and annexation agreement statutes, negotiated land use regulation remains quite susceptible to the favoritism and corruption long considered commonplace in local land use regulation.

This Article asserts that a nuanced conception of public regulation rooted in collaborative governance theory can legitimize negotiated land use regulation by incorporating principles of local and regional equity and deliberative democracy. By reformulating the negotiation and implementation processes to include a more multilateral and adaptive orientation, negotiated approaches to land use regulation can foster civic engagement and cooperation, achieving not only fairer but also more effective land use decisions. In addition, this Article asserts that collaborative, agreement-based land use regulation can be compatible with enduring comprehensive planning.

This Article is being published in two installments, the second of which will appear in the summer 2005 issue of the *Stanford Environmental Law Journal*. In this installment, the Article focuses on the historical evolution and shortcomings of the bilateral negotiated model of land use regulation. Part II briefly details the rise of zoning and the planning profession in modern land use regulation. It explores concerns about the legitimacy of the early land use zoning and planning model, including its inability to forecast and regulate through rigid rules the land uses and

7. *See infra* Part V.A.

requirements that best meet the long-term needs of communities; its tension with shorter-term democratic institutions; and its vulnerability to capture by special interests. Part III describes the evolution of flexible, negotiated approaches to land use regulation, including modified zoning mechanisms like PUDs and contract zoning as well as more recent, explicitly contractarian mechanisms like development and annexation agreements. Part IV details the fundamental legitimacy problems raised by these modern incarnations of negotiated land use regulation, focusing on the failure of such approaches to incorporate sufficient public participation, deliberation, and comprehensive planning during negotiation, implementation, and enforcement. This Part argues that while negotiated land use regulation has the potential to serve participatory and adaptive land use planning goals and to achieve deliberative, balanced, and efficient outcomes, existing regulatory processes consistently overlook the impact of land use negotiation regimes on community engagement, local and regional equity, and adaptive comprehensive planning.

Installment Two will set forth a collaborative model for land use regulation, drawing on insights regarding the relationship between regulator and regulated in administrative law, land use planning and alternative dispute resolution theory. By shifting toward a more collaborative model, this Article argues that agreement-based land use regulation can promote flexibility and efficiency while fostering equity, deliberative democratic and comprehensive planning goals.

II. TRADITIONAL COMMAND AND CONTROL LAND USE PLANNING AND ZONING

Traditional regulatory zoning and land use planning relied on ostensibly expert municipal planning officials to promulgate prospective, objectively valid zoning rules for their jurisdictions. This command and control approach assumed decisionmakers could intuit the appropriate rules for all properties and contexts, with little need for individualized changes. Under this model, the inclusion of non-government parties in the regulatory approval process was neither essential nor encouraged, and bargaining between municipalities and developers was considered inappropriate. By contrast, municipal bargaining and contracting with private parties was an accepted approach to non-land-use ministerial, proprietary or technical government functions.

Fairly early in the life of modern land use regulation, obvious flaws in this command and control model emerged. Many began criticizing zoning as infeasible and inefficient, and planning as undemocratic.[8] It became clear that strict command and control zoning could not effectively produce enduring and detailed land use rules, and many municipalities rejected or ignored comprehensive planning altogether. This environment set the stage for the rise of ad hoc, bilateral bargaining in American land use regulation.

A. *Early Regulatory Planning and Zoning*

The practice of modern land use regulation and planning in the United States began in the first half of the twentieth century. Its major tools were sweeping, ambitious comprehensive plans and command and control zoning.[9] As urban areas increasingly suffered from poverty, inadequate housing, insufficient infrastructure, unclean and disordered public spaces, and other problems associated with incompatible uses, metropolitan governments turned to professional planners to ameliorate the urban plight.[10] Modern land use planning was founded with the primary intent of ordering land uses "logically" and creating a well-organized and aesthetically pleasing physical environment based on what purported experts pronounced were the rational, objective criteria that constitute the public interest. City plans were intended to serve as almost scientific policy documents developed by planning staff to guide elected officials through their development decisions.[11]

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8. *See infra* Part II.B.

9. *See* Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 567 (1992) [hereinafter Kayden I].

10. *See* Donald A. Krueckeberg, *The Culture of Planning*, *in* INTRODUCTION TO PLANNING HISTORY IN THE UNITED STATES 3-6 (Donald A. Krueckeberg ed., 1983). Although not all planning professionals shared the same mission, as a whole the goals of the early land use planning and zoning movement were fairly explicit: (1) developing a rational, "scientific" order to the urban place environment, *see* Judith E. Innes, *Planning Through Consensus Building*, 62 AM. PLAN. ASS'N. J. 460, 461-62 (1996) [hereinafter Innes I]; Krueckeberg, *supra*, at 3; (2) making urban environments more beautiful and livable, *see* Krueckeberg, *supra*, at 4; (3) facilitating economic prosperity and development, *see* M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 64-65 (1983); and (4) promoting justice, distributive fairness, and social equity in metropolitan areas, *see* Krueckeberg, *supra*, at 6.

11. *See* JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND

Under this early system, the land use planner used both the general plan and zoning ordinance to declare and implement what she claimed was the public's vision for the locality. Theoretically, the general or comprehensive plan established the overarching development strategy for the locality, prospectively setting forth the "division of land between public and private uses and specifying the general location and extent of new public improvements, grounds and structures," as well as the distribution of various classes of private uses.[12] Comprehensive plans were understood to be long-term plans that: (1) covered an entire locality's "physical and nonphysical, local and regional" elements;[13] (2) arose out of "explicit reasoning," including "value judgments, standards and principles that do not depend on scientific bases;"[14] and (3) generally described the possible range of outcomes based upon a "package of policies."[15]

Under the early twentieth century model of command and control zoning, localities regulated land through their police power[16] by classifying it into various zones subject to height and bulk restrictions and use prohibitions.[17] These zones were predicated on the notion that separating incompatible uses and prescribing development height and mass limits would create a rational municipal order by reducing congestion, providing safer and quieter areas for residences, and protecting private property investments.[18] Despite constitutional limitations on zoning

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CONTROL LAW 21-22 (1998). In their influential book, Meyerson and Banfield argue that land use planning was originally envisioned as the articulation of goals and the rational consideration of various courses of action for achieving those goals. *See* MARTIN MEYERSON & EDWARD C. BANFIELD, POLITICS, PLANNING AND THE PUBLIC INTEREST 312-15 (1955).

12. JUERGENSMEYER & ROBERTS, *supra* note 11, at 22 (quoting *Planning Problems of Town, City and Region: Papers and Discussions of the Twentieth National Conference on City Planning*, *reprinted in* WILLIAM I. GOODMAN & ERIC C. FREUND, PRINCIPLES AND PRACTICE OF URBAN PLANNING 352-53 (1968)).

13. Innes I, *supra* note 10, at 462 (quoting T.J. KENT, THE URBAN GENERAL PLAN 98-99 (2d ed. 1964)).

14. *Id.*

15. *Id.* at 461-62 (emphasis omitted).

16. Zoning derives its legal legitimacy from the police power authority "to enact laws to promote the health, safety, morals, and general welfare," which is delegated to local governments through state zoning enabling acts or home rule legislation. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 45.

17. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding constitutionality of zoning ordinance with use, height, and area districts); Kayden I, *supra* note 9, at 567.

18. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 22-23; ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 89 (2d ed. 2000). Zoning

powers—most notably through the takings clause of the United States Constitution's Fifth Amendment—and the common view of zoning as a codification of common law nuisance principles,[19] courts in most jurisdictions allow zoning to restrict a great deal more than traditional nuisances.[20] The legitimacy of expansive zoning regulations fundamentally depended on the idea that the professional planner could, through the exercise of her expertise, ascertain the proper arrangement of uses, designate zones where they should be allowed, restricted, or prohibited, and delineate the permissible height and mass of structures within particular zones.

As previously described, traditional zoning rules were intended to embody and codify the community's vision for the locality, allowing for only limited flexibility in the execution of this vision. The bulk of the zoning ordinance was intended to be static and self-administering,[21] as frequent revision and adaptation were thought to create uncertainty and undermine fairness through uniformity. While early zoning regimes and the highly influential Standard State Zoning Enabling Act (adopted in some form by most states)[22] permitted some flexibility in the regulatory process, they discouraged piecemeal changes to the applicable rules. Zoning restrictions could be modified through administrative special permit[23] and variance[24] procedures, as well as through

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would thus protect community quality by increasing certainty and stability in the land market that nuisance law alone could not provide. *See* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 9 (1977).

19. *See Vill. of Euclid*, 272 U.S. at 387-88, 393, 394-95 (relying heavily on the law of nuisance in determining whether early regulatory zoning ordinances were permissible under the police power); Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RES. L. REV. 597, 611-14; ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 9, 16 (1977).

20. *See*, *e.g.*, Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (stating that the police power is "one of the most essential powers of government, one that is the least limitable . . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community."). Courts have upheld the use of zoning for a wide variety of purposes, including promotion of aesthetics or historic preservation, preservation of property values or community character, traffic safety, regulation of competition, fiscal zoning, promotion of morality, and growth management. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 51-58, 559-92; Robert H. Freilich, *Legal Constraints on Public/Private Negotiations: A Checklist of Issues and Cases*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS 139, 177-78 (Rachelle L. Levitt & John J. Kirlin eds., 1985) [hereinafter Freilich I].

21. *See* DOUGLAS R. PORTER ET AL., FLEXIBLE ZONING: HOW IT WORKS 5-6 (1988); BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION 3-4 (2d ed. 1999).

22. JUERGENSMEYER & ROBERTS, *supra* note 11, at 46.

23. Special or conditional use permits, also known as special exceptions, regulate

"rezonings" (legislative amendments to the zoning ordinance), but these mechanisms were intended to be employed sparingly to address only exceptional, unforeseen, or otherwise essential modifications to the comprehensive plan for the community.[25] As in the development of the underlying comprehensive plan, local government officials, through their supposed expertise, were expected to determine the appropriateness of any change with little direct input by the affected individuals.

The traditional zoning process was thus designed to give the local government planning authority virtually unilateral power to determine appropriate uses and applicable requirements for each property, with input from affected individuals or groups limited to (at best) comments at a public hearing just prior to approval of a development application.[26] While a developer would still have to apply for particular development approvals, in theory no bargaining would occur. Rather, the local government would determine in isolation whether the application met the pertinent zoning requirements, and then approve or deny the application on this basis alone.

It is worth noting that at the same time this command and control model governed *land use* regulation, municipalities in virtually all jurisdictions were free to enter into contractual relationships with private or public entities for a wide array of municipal services, as long as such activities did not involve the devolution of the localities' discretionary governmental powers.[27]

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uses allowed only where specified conditions and administrative review limit the undesirable impacts of the use. *See* J. BARRY CULLINGWORTH, THE POLITICAL CULTURE OF PLANNING 45 (1993).

24. A variance or "exception" to the zoning ordinance is "an administrative authorization to use property in a manner otherwise not allowed by the zoning ordinance." JUERGENSMEYER & ROBERTS, *supra* note 11, at 205. Generally, the applicant must show that due to distinctive features of a property or location, unnecessary hardship would occur if a variance were not approved. *See* STANDARD STATE ZONING ENABLING ACT § 7 (ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE 1926); JUERGENSMEYER & ROBERTS, *supra* note 11, at 205.

25. *See* U.S. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 202-03 (1968); CULLINGWORH, *supra* note 23, at 45.

26. *See* STANDARD STATE ZONING ENABLING ACT, *supra* note 24, at § 7; DANIEL R. MANDELKER, LAND USE LAW 2-51 (5th ed. 2003) [hereinafter MANDELKER I].

27. Local governments generally are accorded the power to enter into contracts as necessary to perform the functions conferred expressly or necessarily implied from such express powers. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (citing Carruth v. City of Madera, 43 Cal. Rptr. 855, 860 (Cal. Ct. App. 1965)). *See also* 10 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 29.05 (3d ed. 1990); OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 670 (2d ed.

Courts have long recognized municipalities' authority to contract for business-related, ministerial, or technical functions, including the purchase, sale, or lease of local government property; provision of utility services; establishment or maintenance of parks, hospitals, shelters, correctional facilities, or other public improvements; and retention of legal or financial counsel.[28] Conversely, courts have typically invalidated contracts binding municipalities' ability to exercise governmental or legislative functions as void as against public policy.[29] Courts traditionally employed this reasoning to prohibit any agreement to enact ordinances or secure zoning determinations[30] as an illegal "bargaining away" or "sale" of the police power[31] that "clearly curtails the legislative or administrative discretion that citizens are entitled to have from their government."[32] Such an agreement "not only creates the possibility of future conflicts of interest but also obligates the municipality to create future legislation."[33]

B. *The Shortcomings of Command and Control Regulation*

Despite early hopes that comprehensive planning and command and control zoning could provide an idyllic and rationally ordered environment, and although zoning quickly became the dominant means of land use regulation,[34] both planning and zoning were soon subject to many criticisms. The belief that expert planners can unilaterally discern and promote the public interest was quickly eroded, creating a crisis of legitimacy. This crisis set the stage for the movement away from traditional planning and zoning and toward a regulatory system of

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2001).

28. *See, e.g.*, *Carruth*, 43 Cal. Rptr. at 860; Daly v. Stokell, 63 So.2d 644 (Fla. 1953); *see also* 10 MCQUILLIN, *supra* note 27, at §§ 29.05.05, 29.05.10; 7 *id.* § 24.251. *Cf.* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 418-19 (1978) (Burger, J., concurring) (making proprietary/governmental distinction in antitrust case).

29. *See* 10 MCQUILLIN, *supra* note 27, at § 29.07; REYNOLDS, *supra* note 27, at 675.

30. *See* 10 MCQUILLIN, *supra* note 27, at § 29.07; REYNOLDS, *supra* note 27, at 675-76.

31. 10 MCQUILLIN, *supra* note 27, at § 29.07; s*ee also* 10A *id.* at § 29.91.

32. REYNOLDS, *supra* note 27, at 676.

33. 10 MCQUILLIN, *supra* note 27, at § 29.07. In the words of a leading local government law treatise, "It seems that the public policy against any such restrictions on municipal exercise of power is now so firmly established that everyone should be on guard against entering into these contracts and that all relief on these agreements will universally be denied." REYNOLDS, *supra* note 27, at 676.

34. Even today, zoning remains "the core tool of land use control." JUERGENSMEYER & ROBERTS, *supra* note 11, at 41.

bilateral bargaining.

Critics of traditional planning and zoning focused on the lack of empirically supported bases for designating the appropriate uses in particular areas. Many understandably questioned the assumption that urban planners have the ability and expertise to create an "ideal" vision for cities, emphasizing the long time horizons[35] and consequent lack of concrete evidentiary bases, "intellectual capacities and sources of information" for developing plans.[36] Jane Jacobs famously criticized zoning's commitment to segregating differing land uses as contrary to the vitality of cities, asserting that cities only thrive when uses are diverse and interwoven.[37] A similarly "devastating critique" by Alan Altshuler[38] maintained that planners base their professional legitimacy on their ability to create comprehensive plans that "promote the common good,"[39] but present no evidence (beyond a mere assertion of expertise) that they can actually determine societal goals or correctly evaluate land use options.[40]

Other commentators argued that traditional planning and zoning perpetuate an inefficient regulatory system. For example, Robert Nelson argued that zoning impedes many transactions that would be economically desirable not only for property owners but also for the intended beneficiaries of zoning—the surrounding community.[41] Robert Ellickson criticized restrictive zoning for its

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35. *See* John Rahenkamp, *Land Use Management: An Alternative to Controls*, *in* FUTURE LAND USE 191, 191-92 (Robert W. Burchell & David Listokin eds., 1975).

36. Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN REV. 79, 80 (1959); *see also* MELVILLE C. BRANCH, CONTINUOUS CITY PLANNING (1981); Martin Meyerson, *Building the Middle-Range Bridge for Comprehensive Planning*, 22 J. AM. INST. PLANNERS 58 (1956).

37. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 15, 198 (1961).

38. Innes I, *supra* note 13, at 460.

39. *Id.* at 462.

40. Critics have also commented that land use planners lack sufficient incentives to assemble accurate information. *See* ELLICKSON & BEEN, *supra* note 18, at 80-81 (stating that in contrast to private developers who have the "incentive to gather reliable information about both consumer tastes and the production costs of alternative development schemes," government planners bear no direct risk of loss from allocative errors and lack other incentives to assemble information about market conditions).

41. *See* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS (1977). Nelson maintains that because community decisionmaking is usually not coordinated in any systematic fashion, zoning has made the value of individual and community rights more uncertain, has excessively stabilized prices, and has increased the transaction costs in land use development to a point where the costs are not appreciably different from the costs that could be expected under a regime relying solely on nuisance litigation. *Id.* at 19-21. *Cf. id.* at 85 ("[The] introduction of neighborhood zoning protections in the United States

high opportunity and administrative costs and its at-best limited reduction of negative externalities.[42] Further market-based critiques emphasized that land use planning and zoning foster inefficient competition among localities.[43] These critiques were largely founded on the premise that rigid, detailed, and largely unfounded prospective rules inevitably fail to result in efficient land use outcomes.

Still other commentators argued that long-term land use planning is insensitive to shorter-term democratic institutions and is fundamentally in tension with democratic decisionmaking.[44] They questioned the suitability of basing land use decisions on expertise, even where such determinations are possible,[45] because land use planning officials have significant decisionmaking discretion but no direct accountability to democratic institutions.[46]

III. THE EMERGENCE OF NEGOTIATED LAND USE REGULATION

The concerns about the early regulatory land use planning and zoning process described in Part II.B led many to doubt the value of inflexible, prospective land use planning and zoning regulation altogether. This loss of confidence in the traditional model, combined with the increasing influence of modern real estate developers and contemporary demands for large-scale, project-specific land use decisions,[47] has helped shift local land use theory

represented the establishment of a highly static and . . . somewhat feudal scheme of ownership.").

42. *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693-99 (1973).

43. *See* MICHAEL N. DANIELSON & JAMESON W. DOIG, NEW YORK: THE POLITICS OF URBAN REGIONAL DEVELOPMENT 75, 79 (1982); JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 180 (1987). Because the American federal system provides localities considerable autonomy over land use decisions and pits them in fiscal competition to maximize internal benefits, localities have often used zoning to maximize development with high projected property-tax revenues and minimize development expected to result in high service demands. *See* DANIELSON & DOIG, *supra*, at 77-78, 84-94. This competitive system does not create an efficient land use market; although development activities that are undesired by many community members are discouraged, so too are land uses for which there is a need and market (such as apartment and industrial projects that decrease property values). *See id.* at 89-95.

44. *See* ELLICKSON & BEEN, *supra* note 18, at 81, 83.

45. Innes I, *supra* note 13, at 462.

46. *See* ELLICKSON & BEEN, *supra* note 18, at 81, 83 (stating that planning staff are particularly vulnerable to capture by special interest groups because of their lack of accountability).

47. *See* PORTER ET AL., *supra* note 21, at 7; JUERGENSMEYER & ROBERTS, *supra* note 11,

and practice away from command and control zoning regulation and toward more flexible and negotiated approaches.

In these new approaches, a locality and developer exchange a regulatory approval for any number of benefits to the local government. Zoning regulations no longer serve as a fixed vision of the community's plan, but rather as a baseline rights allocation from which a locality and a developer bargain.[48] With the establishment of each new negotiated land use regulatory mechanism, developers and local governments have steadily increased their flexibility by supplanting traditional zoning's substantive restrictions with processes that afford extraordinary bargaining room. The most recent, explicitly agreement-based processes—development and annexation agreement regimes—afford the parties particularly extensive latitude to bargain. While each of these negotiated processes provides the applicant-developer with substantial opportunities to participate in the decision process, public input—and in particular the contributions of other affected parties—has not advanced beyond a traditional command and control model that only provides access to the process at the local agency's final approval of the agreement.[49]

A. *The Inauguration of Negotiated Zoning*

As described in Part II.A, recognition of traditional zoning's rigidity eventually prompted the drafters of the Standard State Zoning Enabling Act and the earliest zoning regimes to introduce some flexibility through administrative special permit and variance processes and legislative rezoning amendments. Over time, these exceptions—intended to be rare—have become the rule in most American cities and towns.[50] Numerous studies demonstrate that local boards routinely approve variance applications with limited examination and little regard for the law.[51] Similarly, requests for site-specific zoning amendments are common,[52] and courts usually

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at 329.

48. In this sense, zoning regulations both specify the local government's "first offer" to developers (which the developer can accept "as-of-right" without any negotiation) and dictate the procedure through which bartering can occur.

49. *See supra* note 26 and accompanying text.

50. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 207.

51. *See* CULLINGWORTH, *supra* note 23, at 47-48; JUERGENSMEYER & ROBERTS, *supra* note 11, at 207 (citing studies showing illegal issuance of variances is widespread).

52. *See* PORTER ET AL., *supra* note 21, at 8.

uphold rezonings as legislative actions with a presumption of validity.[53]

The increased availability of special permits, variances, and rezonings did not stem the demand for additional flexibility; to the contrary, it further eroded regulatory plans and paved a path toward even more flexible negotiated instruments. Localities began altering stringent zoning regimes to allow not only partial modifications of zoning through mechanisms like site plan review,[54] overlay,[55] and interim zoning schemes,[56] but also direct bilateral negotiations between applicants and local governments over the entire zoning schemes for properties. As discussed below, these include PUDs, incentive zoning, and contract zoning processes.

1. *Planned unit developments and floating zones.*

Although typically incorporated into zoning provisions, planned unit developments (PUDs) and floating zones depart substantially from traditional zoning by authorizing bilateral negotiations between developers and local governments. Floating zones allow for the approval of uses that are not identified on the zoning map, but that meet a series of "floating zone" characteristics listed in a zoning ordinance.[57] PUDs, currently the most common form of floating zoning, became widely utilized in the 1960s with the advent of large-scale real estate development

53. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 188.

54. Site plan review is a supplemental regulatory mechanism allowing for more detailed, site-specific review than available solely through traditional zoning. In conjunction with a permit application, an applicant submits to the locality a proposed plan detailing the intended development for the site, which the locality reviews to ensure zoning compliance and to impose better-tailored conditions. *See* MANDELKER I, *supra* note 26, at 6-79 to 6-81.

55. Overlay or special district zoning adds a supplemental zoning classification to the existing base use classification for a property. The overlay zone gives a local government the flexibility to impose additional restrictions on certain properties in a zone without having to impose such restrictions on all properties. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 114; CULLINGWORTH, *supra* note 23, at 58.

56. Interim zoning is a method of limiting or freezing development pending longer-term approval of a zoning scheme in areas: (1) subject to overburdened public services, (2) in an early formation stage, or (3) unprotected against unwanted uses. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 112.

57. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 104. The zoning ordinance would state that for land satisfying the listed characteristics, the landowner could apply for adoption of a subsequent ordinance that would place the land in the floating zone if that placement otherwise promoted the public interest. *See id.*

that many perceived as incompatible with traditional zoning.[58] PUDs allow the development of entire neighborhoods, towns, or even regions[59] based upon a design that wholly departs from standard zoning rules.[60] While PUDs are regulatory in the sense that they provide some prescriptive criteria for future development and remain marginally integrated into zoning through "floating zone" provisions,[61] they allow municipalities to make wholesale, ad hoc changes to zoning regulations based on negotiations with developers.[62]

The floating zone and PUD approval process combines substantial regulatory flexibility with limited public involvement. The developer and local administrative staff—typically planning staff and in some cases the city attorney—engage in a series of detailed nonpublic discussions and strike a deal covering a development's design, amenities, and impacts; no one else in the community is involved until after the negotiations are complete.[63]

While the flexibility provided by the bilateral PUD approach is considerable, municipalities still must provide some substantive criteria that restrict negotiations. In some cases these criteria are relatively minimal,[64] though increasingly they take the form of performance standards that limit negotiations to shaping the project's design and reducing its anticipated impacts.[65]

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58. *See* CULLINGWORTH, *supra* note 23, at 53; JUERGENSMEYER & ROBERTS, *supra* note 11, at 329.

59. *See* BLAESSER, *supra* note 21, at 166-68 (discussing regional PUDs).

60. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 329; MANDELKER I, *supra* note 26, at 9-29. PUD plans are not required to comply with standard lot size, bulk, density, lot coverage, open space, or use requirements. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 328. Frequently, PUDs do not place uses in districts or require uniform conditions or controls among similar uses. *See id.* at 328, 330.

61. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 331.

62. ELLICKSON & BEEN, *supra* note 18, at 377.

63. *See* BLAESSER, *supra* note 21, at 175-76; JUERGENSMEYER & ROBERTS, *supra* note 11, at 336-37. A planning or zoning commission holds a public hearing and recommends approval or disapproval of the negotiated proposal, after which the local government's legislative body reviews the negotiated proposal. *See id.* at 337.

64. *See* MANDELKER I, *supra* note 26, at 9-29; BLAESSER, *supra* note 21, at 155-56; JUERGENSMEYER & ROBERTS, *supra* note 11, at 104 (stating that restrictions may only include overall acreage, open space and use-mix minimums).

65. Performance or impact zoning establishes performance standards for measuring the impacts of land uses instead of creating a rigid use classification. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 110-11. The standards focus on ensuring that the potential environmental impacts of a proposed development and use are within acceptable levels given the existing context for the project. *See* PORTER ET AL., *supra* note 21, at 11 ("[I]n a regulatory system based solely on performance standards, any use could locate adjacent to

Although some early courts invalidated floating zones and PUDs as arbitrary failures to plan,[66] and although some commentators have criticized PUDs as "institutionalizing the bargaining process of land development,"[67] the vast majority of legal authorities have approved of such schemes[68] and deemed them more desirable than rigid traditional zoning.[69]

2. *Incentive zoning.*

In incentive zoning, a local zoning ordinance offers incentives, such as density bonuses,[70] to developers in exchange for developers' inclusion of particular public amenities within their development proposals.[71] These public amenities often bear no obvious relationship to the impacts of the density bonuses or other incentives offered to developers.[72] For example, a developer could receive a density bonus for providing job training, even if the development had no projected impact on local employment. Essentially, incentive zoning allows local governments to prospectively determinethat the offered amenities create sufficient public benefits for the locality *at large* to offset the impacts caused by the corresponding development incentives, even if the potential impacts of the incentives disproportionately affect particular

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any other use, provided that it could satisfy the criteria and standards.").

66. *See, e.g.*, Eves v. Zoning Bd. of Adjustment of Lower Gwynedd, 164 A.2d 7 (Pa. 1960) (invalidating floating zone); Hiscox v. Levine, 216 N.Y.S.2d 801 (N.Y. 1961) (invalidating PUD scheme).

67. JUERGENSMEYER & ROBERTS, *supra* note 11, at 336.

68. Courts have approved of these processes even where there is no enabling legislation, *see id.* at 329, 332, or where the uses are not identified in the locality's comprehensive plan, *see* BLAESSER, *supra* note 21, at 160.

69. One commentator claims that the process is more rational than zoning's "'cookie cutter' pattern of minimum lot sizes and setbacks" that "do not allow the variety in design that a planned unit development can provide if it is planned as an entity." MANDELKER I, *supra* note 26, at 9-27.

70. Other common incentives include increased allowable floor area, exemption from height and setback requirements, and reduction in the required number of parking spaces. *See* ELLICKSON & BEEN, *supra* note 18, at 378.

71. *See* KENNETH H. YOUNG, 2 ANDERSON'S AMERICAN LAW OF ZONING § 9.23, at 183 (4th ed. 1996). Incentive zoning has been used to promote theaters, affordable housing, day care centers, street-level retail, open space, transportation and streetscape improvements, historic preservation, and even job training. *See* Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 Wash U. J. URB. & CONTEMP. L. 3, 3 (1991) [hereinafter Kayden II].

72. In light of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which requires a nexus between a project condition and the project's impact, such schemes may be constitutionally suspect. *See* Kayden II, *supra* note 71, at 3; Ryan, *supra* note 3, at 337.

communities within the locality.[73] Public input on the amenity-incentive exchange is limited to hearings associated with the approval of the general incentive zoning regime.

In many early iterations of incentive zoning, zoning ordinances detailed what amenities the locality would demand in exchange for particular incentives or approvals,[74] thus limiting the amount of informal negotiation between municipalities and developers.[75] Some recent variations on incentive zoning, however, replaced this predefined exchange with a more open-ended process of bilateral negotiation limited by only a few flexible standards and requiring no direct public input.[76] In addition to not requiring any connection between the private incentives and public amenities, these incentive zoning variations may also not limit negotiations to those amenities that would directly mitigate the impacts of the proposed development.

3. *Contract or conditional zoning.*

In contract or conditional zoning, a landowner agrees to a set of conditions that limit the property to a particular use, protect the surrounding area, and/or secure additional amenities or contributions for the local government, in exchange for a rezoning of the property. This bargain can take the form of either a "unilateral" agreement ("conditional zoning") or a bilateral agreement between landowner and local government ("contract zoning").[77] In this context, existing zoning regulations serve as the local government's first offer to the landowner. The landowner counteroffers with a specific proposal to amend the zoning ordinance, thus initiating lengthy negotiations between the

73. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 109. Local governments typically are unconcerned about the impacts of such incentives. *Id.*

74. *See* ELLICKSON & BEEN, *supra* note 18, at 378.

75. Bargaining choices are strictly limited to the traditional zoning requirements or the delineated set of incentives and amenities. *See* CULLINGWORTH, *supra* note 23, at 89 (calling these schemes "mechanical as-of-right" schemes).

76. For example, although New York City originally had an "as-of-right" incentive zoning scheme, the City subsequently added an alternative "Uniform Land Use Review Process" allowing considerable flexibility through negotiated agreements without fixed guidelines. *See id.* at 88-89. The City subsequently eliminated this alternative process. *Id.*

77. MANDELKER I, *supra* note 26, at 6-75; *see* BLAESSER, *supra* note 21, at 186. Under traditional zoning, a local government could make a legislative amendment to zoning but could not condition the change in any manner; the change would have to be valid without taking into account any site-specific controls to mitigate new impacts. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 106-07.

administrative staff and the applicant over the conditions to be imposed. Once a bargain is struck, the locality's legislative body ratifies the agreement at an open public meeting, which sometimes includes a public hearing.[78] As with the other negotiated zoning instruments discussed, it is only at this hearing at the very end of the process that other interested parties are given the opportunity to provide any input.

Although courts and academics initially expressed strong disapproval of contract zoning,[79] most recent case law supports it as a means of better tailoring development to a property's physical environment and neighboring uses.[80] Still, even where courts tolerate conditional or contract zoning, no uniform agreement exists as to its permissible boundaries, and many courts continue to criticize the practice as adverse to thoughtful, comprehensive planning.[81]

Two criteria do apply in virtually all jurisdictions that permit contract or conditional zoning. First, the negotiated conditions must be reasonably related to the goal of protecting neighboring properties from the potential impacts of the proposed use.[82] Thus,

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78. JUERGENSMEYER & ROBERTS, *supra* note 11, at 188, 191-92 (explaining that most states treat rezonings as quasi-legislative processes, and that the evidentiary hearing requirement exists only when a rezoning is characterized as quasi-judicial).

79. Criticisms included claims that contract zoning: (1) violates procedural due process requirements; (2) constitutes arbitrary spot zoning that eviscerates planning; (3) fosters corruption and favoritism; and (4) represents an illegal sale of the police power. *See* ELLICKSON & BEEN, *supra* note 18, at 363-65; CULLINGWORTH, *supra* note 23, at 51; JUERGENSMEYER & ROBERTS, *supra* note 11, at 196-97.

80. *See* MANDELKER I, *supra* note 26, at 6-75 to 6-76, 6-78; ELLICKSON & BEEN, *supra* note 18, at 372.

81. *See, e.g.*, MANDELKER I, *supra* note 26, at 6-75. Some courts engage in overly formalistic distinctions between contract and conditional zoning, upholding conditional zoning on the theory that the local government is not bargaining away any power where it is not bound by any promise. *See id.* at 6-54; JUERGENSMEYER & ROBERTS, *supra* note 11, at 197-98. *But see* Bartsch v. Planning & Zoning Comm'n, 506 A.2d 1093 (Conn. App. 1986) (holding conditional rezoning invalid as a blatant violation of state statutory uniformity requirement). However, several commentators have perceptively noted that the unilateral-bilateral distinction is illusory; in either circumstance, an applicant will only accept additional property restrictions if the local government provides some countervailing benefit. *See, e.g.*, DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 46 (1994) [hereinafter CALLIES I] (arguing that idea of a unilateral agreement is contradictory); Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 979 n.122 (1987); ROBERT R. WRIGHT & SUSAN W. WRIGHT, LAND USE IN A NUTSHELL 144 (2d Ed. 1985) ("What appear to be unilateral conditions have often been hammered out over a period of time involving numerous discussion sessions.").

82. YOUNG, *supra* note 71, § 9.20 at 171.

as with PUDs, the negotiations facilitated by contract zoning are limited to conditions that would mitigate the direct impacts of a development, such as traffic or noise. Second, courts typically require the rezoning to be consistent with some overall plan, although they predictably defer to local governments as long as the rezoning meets a minimal test of being rational or serving the public interest.[83]

B. *Development and Annexation Agreements*

Development and annexation agreements are the newest and least restrictive forms of bilateral negotiated land use regulation, providing unprecedented flexibility for municipalities and developers. These agreements are long-term, express, bilateral contracts between an applicant—typically a large-scale real estate developer—and a local government. They are designed to provide the applicant with a vested right to develop a property that may wholly deviate from otherwise applicable zoning regulations in exchange for any number of benefits to the local government.[84] In both development and annexation agreements, the parties barter over terms such as the long-term regulations, fees, and conditions to be applied to the property over the lifetime of the agreement.[85] The only difference between the two instruments is that annexation agreements apply to property located *outside* municipal boundaries and thus require the locality to exercise its annexation power, while development agreements apply only to land within a municipality.[86]

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83. JUERGENSMEYER & ROBERTS, *supra* note 11, at 196, 198. This deferential standard is slightly less deferential in the few jurisdictions requiring an independent comprehensive plan. *See id.* at 193-94.

84. *See* ELLICKSON & BEEN, *supra* note 18, at 234 ("[T]ypically [development agreements] give the developer a 'freeze period' during which subsequently enacted laws or regulations will not be applied to the project.").

85. David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663, 664 (2001) [hereinafter Callies & Tappendorf I].

86. *Id.* at 663-64; Ronald S. Cope, *Annexation Agreements—Boundary Agreements: Walking a Fine Line into the Future—A Map of the Dangers to the Unwary Land Use Traveler*, 17 N. ILL. U. L. REV. 377, 384. The local government obtains a larger tax base but must also provide public services to the newly annexed property; conversely, the landowner acquires public services but subjects itself to the local government's land use regulations and taxes. *See* Callies & Tappendorf I, *supra* note 85, at 664.

1. *The growth of development and annexation agreements.*

States adopted development agreement enabling statutes (DAAs) in response to strict judicial rules that prevented a developer from obtaining a vested right to develop property until well after it had obtained discretionary zoning approval. These rules allowed local governments to alter restrictions on properties well into the development process, often as late as the commencement of construction.[87] Until a developer obtains a vested right, any new regulatory changes apply to the property and constrain its use. This may be true even if the developer has a valid development permit from the local government or has incurred substantial costs preparing for construction.[88]

California was the first state to establish a DAA in an effort to counteract these strict judicial vesting rules.[89] Fourteen other states, including some of the largest and fastest growing, have followed California in adopting legislation specifically authorizing local governments to enter into development agreements.[90] Courts in two states have also upheld the use of development agreements in the absence of an enabling act,[91] and these agreements are

87. *See* NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 154A.02, at 145 (Supp. 2002).

88. The threshold for obtaining a vested right varies from state to state. It may be issuance of a preliminary subdivision tract approval, building permit or other last discretionary permit, or possession of a valid permit plus some showing of substantial progress in construction or substantial liabilities in furtherance of the permitted use. *See* Patricia G. Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 147-48 (1993).

89. *See* BLAESSER, *supra* note 21, at 207; WILLIAMS & TAYLOR, *supra* note 87, § 154A.02, at 149.

90. *See* ARIZ. REV. STAT. §§ 9-500.05, 11-1101 (West, WESTLAW through 2004); CAL. GOV'T CODE §§ 65864-65869.5 (West, WESTLAW through 2004); COLO. REV. STAT. ANN. §§ 24-68-101 to 24-68-106 (West, WESTLAW through 2004); FLA. STAT. ANN. §§ 163.3220-163.3243 (West, WESTLAW through 2004); HAW. REV. STAT. ANN. §§ 46-121 to 46-132 (West, WESTLAW through 2003); IDAHO CODE § 67-6511A (West, WESTLAW through 2004); LA. REV. STAT. ANN. §§ 33:4780.21-33:4780.33 (West, WESTLAW through 2004); MD. ANN. CODE, art. 66B, § 13.01 (West, WESTLAW through 2004); MINN. STAT. § 462.358(3c) (West, WESTLAW through 2004); NEV. REV. STAT. ANN. §§ 278.0201-278.0207 (West, WESTLAW through 2003); N.J. STAT. ANN. § 40:55D-45.2(l) (West, WESTLAW through 2004); OR. REV. STAT. §§ 94.504-94.528 (West, WESTLAW through 2003); S.C. CODE ANN. §§ 6-31-10 to 6-31-160 (West, WESTLAW through 2003); VA. CODE ANN. § 15.2-2303.1 (West, WESTLAW through 2004); WASH. REV. CODE §§ 36.70B.170-36.70B.210 (West, WESTLAW through 2004); *see also* MICH. COMP. LAWS §§ 432.201-432.226 (West, WESTLAW through 2004) (authorizing development agreements for casinos).

91. Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989); Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake, 512 N.W.2d 202 (Wis. Ct. App. 1993).

regularly employed in at least one other state without express statutory authorization.[92] Only a few states have statutorily authorized annexation agreements through annexation agreement acts (AAAs),[93] although other states permit these agreements without enabling statutes.[94] In addition, the influential American Planning Association's (APA) 2002 model code for land use regulation and planning includes development agreement authorizing provisions.[95] With the spread of authorizing legislation, municipalities of all types—large and small, new and old, and low- and high-growth—increasingly use development agreements to shape local land use.[96]

Despite the proliferation of state DAAs, few reported cases discuss these agreements even in passing, let alone directly rule on the legality of their authorizing statutes. Because these agreements involve a local government's exercise of its zoning and land use regulatory powers, they are fundamentally different from other public contracts. As detailed in Part II.A, courts historically prohibited local governments from bargaining over and entering into contracts impeding their future use of the police power.[97] A

92. *See, e.g.*, R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH L. REV. 955 (2001) (detailing Texas development agreement practice); TAC Realty, Inc. v. City of Bryan, 126 S.W.3d 558, 558-60 (Tex. Ct. App. 2003) (discussing city development agreement use).

93. A few states authorize annexation agreements in their DAAs. *See* ARIZ. REV. STAT. § 9-500.05 (West, WESTLAW through 2004); CAL. GOV'T CODE § 65865(b) (West, WESTLAW through 2004); WASH. REV. CODE § 36.70B.170 (West, WESTLAW through 2004). A few others provide distinct enabling authority. *See* COLO. REV. STAT. ANN. § 31-12-121 (West, WESTLAW through 2004); 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West, WESTLAW through 2004); KAN. STAT. ANN. §§ 12-534 to 12-535 (West, WESTLAW through 2003); OHIO REV. CODE ANN. §§ 701.07(C)(10), 709.192(C)(11) (West, WESTLAW through 2004).

94. *See* DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT 118-19, 122 (2003) (suggesting that authorizing statutes are less important for annexation agreements than development agreements, and citing cases from Maryland and Idaho that upheld annexation agreements without any authorizing statute).

95. AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND MANAGEMENT OF CHANGE 8-195 to 8-198 (Stuart Meck ed., 2002) [hereinafter APA MODEL CODE].

96. *See* Richard Cowart, *Experience, Motivations and Issues*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS 9, 10-25 (Douglas R. Porter & Lindell L. Marsh, eds., 1989); CALLIES I, *supra* note 81, at 53 (noting that hundreds of communities in California have used development agreements).

97. *See* 8 MCQUILLIN, *supra* note 27, § 25.54 ("It is fundamental that the enactment of a zoning ordinance constitutes the exercise of a legislative and governmental function . . . . A necessary consequence of the governmental character of zoning is that it is not subject to contract."). *See also* 10 *id* at § 29.07; 10A *id.* at § 29.91; 8 *id.* §§ 25.35, 25.95.

number of commentators have urged courts to extend this line of reasoning to development and annexation agreements.[98] However, several recent decisions have departed from this traditional approach to municipal agreements, upholding contracts in which the local government contracted to exercise or abstain from exercising its police power. These decisions conclusorily reasoned, without any discernible standard, that the local government was exercising rather than impeding future use of its police power function.[99] Some courts now apply a very deferential standard to agreements exercising land use regulatory powers, asking only whether the agreement serves the public interest.[100] The few reported cases discussing development agreements have found that these agreements do not constitute an impermissible bargaining away of the police power,[101] suggesting judicial

98. *See* MANDELKER I, *supra* note 26, at 6-25; CALLIES ET AL., *supra* note 94, at 92; Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENVTL. L. 451, 464-69 (1985); Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 37-45 (1981).

99. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (finding rule prohibiting the "contracting away" of a city's police power "void[s] only a contract which amounts to a city's 'surrender,' or 'abnegation,' of its control of a properly municipal function"); Bollech v. Charles County, 166 F. Supp 2d 443, 452-54 (D. Md. 2001), *aff'd*, 2003 WL 21546001 (4th Cir.) ("The real test, then, is not whether the County entered into a contract preserving zoning in exchange for promises from Developers, but whether the arrangement it did make is an exercise of or limitation on the government's police power."); County Mobilehome Positive Action Committee, Inc. v. County of San Diego, 73 Cal. Rptr. 2d 409, 415 (Cal. Ct. App. 1998) ("The controlling consideration in this area appears to be whether a disputed contract amounts to a local entity's surrender, abnegation, divestment, abridging, or bargaining away of its control of a police power or municipal function.") (internal quotations and citations omitted); Stephens v. City of Vista, 994 F.2d 650, 655 (9th Cir. 1993) (holding settlement agreement in which city commits to a specific plan and zoning for plaintiff's property is not an unlawful contracting away of police power).

100. *See, e.g.*, *Bollech*, 166 F. Supp. 2d at 453-54 (stating ban on bargaining away police power is limited to situations where agreement does not "benefit the general welfare" or is not "for the public good").

101. *See* Santa Margarita Area Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740, 747-49 (Cal. Ct. App. 2000) (holding development agreement and state DAA satisfy all constitutional mandates concerning a local government's exercise of its regulatory authority); Azalea Lakes P'ship v. Parish of St. Tammany, 859 So. 2d 57, 62-63 (La. Ct. App. 2003) ("Nothing in this statutory scheme attempts to delegate to the developer the right to rezone."); Giger v. City of Omaha, 442 N.W.2d 182, 192 (Neb. 1989) (stating agreement "enhances the city's regulatory control over the development rather than limiting it" because "the agreement provides more restrictive ceilings and development regulations than the current underlying zoning regulations"); *Bollech*, 166 F. Supp. 2d at 452-54 (finding development agreement was not an abdication of police power because agreement was limited in duration, required modification if subsequent

endorsement of the paradigm shift from unilateral command and control zoning to an expressly contractual model of land use regulation.

2. *Providing exceptional flexibility for negotiations.*

Although the original aim of DAAs and AAAs may have been to promote certainty for developers, the processes they authorize promote extraordinarily broad bilateral bargaining. DAAs and AAAs tend to contain little text and are "deliberately written to be flexible," with only limited instruction in even the more detailed statutes as to what may be included in an agreement.[102] Most DAAs do require agreements to include a minimal project description and the zoning requirements for the property, as well as details about the reservation or dedication of land and whether the developer has a permanent vested right or is entitled to some length of time during which the rules governing the property are frozen.[103] However, even the bare requirement to sufficiently describe the project has been interpreted very flexibly.[104] While most DAAs and AAAs establish certain mandatory procedural

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state or federal law required changes, and did not change zoning); Save Elkhart Lake, Inc. v. Vill. of Elkhart Lake, 512 N.W.2d 201, 204-05, 207 (Wis. Ct. App. 1993) (striking development agreement provision granting unqualified vested right to developer, but upholding agreement); Morgran Co. v. Orange County, 818 So. 2d 640, 643 (Fla. Dist. Ct. App. 2002) (stating that "[d]evelopment agreements are expressly permitted by the Florida Statutes"). *But see* Sprenger, Grubb & Assocs., Inc. v. City of Hailey, 903 P.2d 741, 746 (Idaho 1995) ("[P]olice power of a municipality cannot be bartered away even by express contract") (citing Idaho Falls v. Grimmett, 117 P.2d 461, 464 (1941)).

102. League of California Cities, *Development Agreements*, *reprinted in* DEVELOPMENT AGREEMENTS 75, 81 (Alice S. Barkley et al. eds., Cal. Continuing Educ. of the Bar, 1983); *see also* Erin J. Johnson, *Development Agreements: Planning Perspectives*, *in* DEVELOPMENT AGREEMENTS: ANALYSIS, COLORADO CASE STUDIES, COMMENTARY 3, 5 (Erin J. Johnson & Edward H. Ziegler eds., Rocky Mountain Land Use Institute, 1993) ("[D]evelopment agreements seemingly lack structure or a set methodology. This aspect of a development agreement is precisely what allows for flexibility and adaptability to differing situations, and the ability to resolve complex problems.").

103. The California DAA is typical, requiring agreements to "specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes." CAL. GOV'T CODE § 65865.2 (West, WESTLAW through 2004). In contrast, the Colorado and Minnesota DAAs simply authorize agreements and provide no additional detail. *See* COLO. REV. STAT. ANN. §§ 24-68-101 to 24-68-106 (West, WESTLAW through 2004); MINN. STAT. § 462.358(3c) (West, WESTLAW through 2004).

104. *See Santa Margarita Area Residents Together*, 100 Cal. Rptr. 2d at 743, 747 (upholding development agreement without precise project description because zoning ordinance contained height and use limitations in project's zone).

requirements[105] and outline other optional conditions,[106] they effectively allow open-ended bartering between the developer and local government.[107] Courts have emphasized that DAAs should be construed liberally to effectuate their purposes,[108] and most DAAs and AAAs include very broad language allowing agreements to include a wide range of terms.[109]

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105. These include local enabling legislation, public notice and hearing, adoption of an ordinance or resolution, recordation, and periodic monitoring. *E.g.*, CAL. GOV'T CODE §§ 65865, 65865.1, 65867, 65867.5, 65868.5 (West, WESTLAW through 2004); FLA. STAT. ANN. §§ 163.3225, 163.3235 (West, WESTLAW through 2004); HAW. REV. STAT. ANN. §§ 46-125, 46-128 (West, WESTLAW through 2003); 65 ILL. COMP. STAT. ANN. 5/11-15.1-3 (West, WESTLAW through 2004); LA. REV. STAT. ANN. § 33:4780.28 (West, WESTLAW through 2004).

106. *E.g.*, CAL. GOV'T CODE § 65865.2 (West, WESTLAW through 2004) (allowing but not requiring provisions addressing subsequent discretionary actions, phasing and timing, and applicant financing for public facilities); LA. REV. STAT. ANN. § 33:4780.24 (West, WESTLAW through 2004).

107. *See, e.g.*, WILLIAM FULTON, GUIDE TO CALIFORNIA PLANNING 202 (1999) ("[A]s written, the [California DAA] law permits virtually open-ended bargaining between developers and local governments."); Alvin S. Kaufer & David L. Colgan, *Development Agreements and Other Negotiated Land Use Agreements*, *in* CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 74.32[7][a], at 74-32 to -33 (Kenneth A. Manaster & Daniel P. Selmi eds., 1989) ("In addition to the operative provisions of a development agreement that are either specifically required or permitted . . . a developer and the local government may find it advantageous, depending on the specifics of the development plan, to include other provisions relating to conditions or other requirements associated with the land use entitlement approvals."); Theodore C. Taub & Robert M. Rhodes, *The Florida Local Government Development Agreement Act*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 59, 61 (stating that statutorily delineated required and permissive provisions are not exclusive).

108. *See, e.g.*, *Santa Margarita Area Residents Together*, 100 Cal. Rptr. 2d. at 745 (stating the DAA is "best served through a liberal construction which encompasses agreements that substantially comply with its specific terms and conditions and achieve its essential objectives . . . . To interpret the statute and Agreement in any other manner would unduly restrict the County from working with a private landowner to plan and develop facilities which support public needs.").

109. *E.g.*, ARIZ. REV. STAT. §§ 9-500.05(G)(1)(k), 11-1101(B)(10) (West, WESTLAW through 2004) ("any other matters pertaining to the development of the property"); COLO. REV. STAT. ANN. § 24-68-103(1)(c) (West, WESTLAW through 2004) (allowing any additional conditions "as may reasonably be necessary to protect the public health, safety, and welfare"); HAW. REV. STAT. ANN § 46-126(c) (West, WESTLAW through 2003) (allowing agreements to "cover any other matter not inconsistent with" the state code or prohibited by law); 65 ILL. COMP. STAT. ANN. 5/11-15.1-2(d), (f) (West, WESTLAW through 2004) (allowing "[c]ontributions of either land or monies, or both" and terms regarding "[a]ny other matter not inconsistent with" the AAA); VA. CODE ANN. § 15.2-2303.1(B) (West, WESTLAW through 2004) (authorizing terms regarding any "land use matters," and permitting "the property owner to transfer to the county land, public improvements, money, or anything of value to further the purposes of the agreement or other public purposes set forth in the county comprehensive plan"). Only one DAA specifically limits the additional conditions allowed to those otherwise authorized under

Furthermore, many states do not require development and annexation agreements to be consistent with comprehensive plans[110] or zoning codes.[111] The APA's new model code, for example, allows development agreements to "address any issue that local land development regulations can cover,"[112] specifically allowing an agreement to depart from any and all existing zoning code regulations applicable to a site as long as it remains consistent with the broad policies of the comprehensive plan.[113]

This flexibility allows the developer and local government extraordinary room to negotiate with few substantive restrictions and little regard for the interests of other affected parties,[114] who,

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state law. WASH. REV. CODE § 36.70B.210 (West, WESTLAW through 2004).

110. *E.g.*, COLO. REV. STAT. ANN. §§ 24-68-101 to -106 (West, WESTLAW through 2004); IDAHO CODE § 67-6511A (West, WESTLAW through 2004); LA. REV. STAT. ANN. §§ 33:4780.21-.33 (West, WESTLAW through 2004); MINN. STAT. § 462.358(2a) (West, WESTLAW through 2004) (local government may, but does not have to, require consistency with comprehensive plan); VA. CODE ANN. § 15.2-2303.1(B) (West, WESTLAW through 2004) (requiring consistency with comprehensive plan except as allowed by the zoning code); *see also* JUERGENSMEYER & ROBERTS, *supra* note 11, at 32 n.3 and accompanying text (noting the few states requiring consistency with plan for *any* land use approval).

111. *E.g.*, ARIZ. REV. STAT. § 9-500.05(B) (West, WESTLAW through 2004); CAL. GOV'T CODE § 65867.5(b) (West, WESTLAW through 2004); HAW. REV. STAT. ANN. § 46-129 (West, WESTLAW through 2003); 65 ILL. COMP. STAT. ANN. 5/11-15.1-2(b) (West, WESTLAW through 2004); NEV. REV. STAT. ANN. § 278.0203(1) (West, WESTLAW through 2003); *see also* APA MODEL CODE, *supra* note 95, § 8-701(4)(a), at 8-196 (allowing deviations from existing land development regulations); INSTITUTE FOR LOCAL SELF GOVERNMENT, DEVELOPMENT AGREEMENT MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS 55 (2002) ("[T]he attorneys need to decide what language to use in the event the parties agree to allow land uses that are inconsistent with the otherwise applicable zoning requirements in existence at the time the development agreement was negotiated. One approach is to include language saying the then-existing zoning ordinance governs, but only to the extent it is not inconsistent with any provisions of the agreement."); *id.* at 9, 11, 12, 26.

112. APA MODEL CODE, *supra* note 95, at 10-56 (commentary to § 10-504); *see also id.* § 8-701(1), at 8-196 (allowing local governments to enter into agreements "concerning the development and use of real property"); *id.* §8-701(2), (3), at 8-196 (defining and identifying purposes of development agreements).

113. *See id.* § 8-701(4)(a), at 8-196, § 8-701(6)(a)-(b), at 8-197 (requiring development agreement to be consistent with an adopted comprehensive plan); *id.* § 8-701(2)(b), at 8-196 (stating that purpose of agreements is to "promote innovation in land development regulation by allowing local governments to form agreements with owners and developers of land that include terms, conditions, and other provisions that may not otherwise be authorized under this Act"); *see also id.* at 8-195 (commentary): ("[The model code] allows development agreements to vary from otherwise-applicable land development regulations, so that flexibility and innovation are possible.").

114. *See* Daniel J. Curtin & Martin H. Zischke, *Development Agreements: Securing Vested Rights and Project Completion Benefits*, *in* ZONING AND PLANNING LAW HANDBOOK 349, 360 (Mark S. Dennison ed., 1989); ("[I]n California, one of the most important aspects of the

once again, are relegated to submitting comments at a public hearing immediately before the local legislative body's final approval or ratification of the agreement.[115] In states that do not require development and annexation agreements to comply with applicable land use plans and zoning, developers and local governments can work from a virtually blank slate in determining what type of development may occur on a given parcel. For annexation agreements in particular, parties always negotiate the land use regulations that will apply to the subject property, because by definition the subject land is unincorporated and thus not subject to the locality's zoning and planning regulations prior to the agreement.[116] Even in those jurisdictions that require conformity with applicable plan policies,[117] development and annexation agreements have been used to evade existing regulations.[118] In such jurisdictions, "[w]hile a development agreement must advance the agencies' local planning policies, it may also contain provisions that vary from otherwise applicable zoning standards and land use requirements."[119] Additionally, developers have combined such agreements with other flexible mechanisms, such as rezonings, variances, special permits, or plan amendments, to deviate from existing zoning constraints.[120] By

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[DAA] is present only silently in that the drafters of the statute abandoned earlier wording that would have limited conditions and exactions to those which are authorized by existing police powers. Thus, the [DAA] effectively opens the door for local governments to require substantial and creative concessions from developers in return for providing the security of a development agreement.").

115. *See supra* note 26.

116. *See* Cope, *supra* note 86, at 379-80; *see also* Town of Superior v. Midcities Co., 933 P.2d 596, 603-04 (Colo. 1997) (discussing annexation agreement content potentially covering issues of land use, design, public improvements, and public services).

117. *E.g.*, FLA. STAT. ANN. § 163.3231 (West, WESTLAW through 2004); HAW. REV. STAT. ANN. § 46-129 (West, WESTLAW though 2003).

118. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 9, 11-12, 14, 26, 53 (2002).

119. *Id.* at 9; *see also* Taub & Rhodes, *supra* note 107, at 69 ("[E]ven when a zoning code states that in a given area a structure cannot exceed 20 stories, a density of five dwelling units per acre, or a floor/area ratio (FAR) of 0.2, by entering into a statutorily enabled or ordinance-authorized agreement with local government, the capable owner or developer who knows how to negotiate and is willing to give a little may be able to build a 30-story office building or reach a density of eight dwelling units per acre or reach an FAR of 0.5 on the very same parcel of land.").

120. DAAs anticipate further bargaining for other permit approvals. *E.g.*, CAL. GOV'T CODE § 65867 (West, WESTLAW through 2004) (referring to other actions to be considered with development agreement); *see also* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, 483 U.S. 825 (1987), 22 URB. LAW. 23, 27-28 (1990) (stating that a development agreement "usually involves an agreement to rezone

fragmenting the approval process for a particular development into a series of individually negotiated entitlements,[121] developers and local governments can "engage in open-ended bargaining on virtually all aspects of the community's land use controls."[122]

3. *Escaping constitutional limitations through contract.*

Because development and annexation agreements are structured as voluntary contracts,[123] they also effectively circumvent some of the constitutional constraints that apply to traditional regulatory approvals, providing municipalities and developers with even more freedom to negotiate deals unconstrained by the public or courts. Under constitutional regulatory exactions rules, a "nexus" and "rough proportionality" must exist between any land use requirement a local government imposes on a development

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the property to a more favorable classification, a granting of a variation from the present zoning, or an increase in allowable density from that of similar, surrounding property").

121. In the various DAAs and AAAs, there is no requirement that all regulatory approvals required for buildout of a project be sought at the same time as the development agreement. Courts have upheld the fragmentation of development agreements from other discretionary land use approvals. *See* Santa Margarita Residents Together v. San Luis Obispo County, 100 Cal. Rptr. 2d 740, 746 (Cal. Ct. App. 2000) (stating DAA "does not require deferral of development agreements until construction is ready to begin or require any particular stage of project approval as a prerequisite" and is not limited "to development agreements which create 'vested rights' to complete construction of a project according to completed plans"). Development agreements "may be executed in conjunction with rezoning of land, at a post-zoning stage of the development review process, such as subdivision or site plan review, or at the time of permit approval." John J. Delaney, *Development Agreements Legislation: The Maryland Experience*, SB06 ALI-ABA 805, 811 (1996) [hereinafter Delaney I]. Although typically negotiated at the same time as the discretionary application review process for other zoning approvals, the developer and local government can seek to enter into agreements at any time in the regulatory process that they find most advantageous. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 32 ("Development agreements may be processed with other land use approvals for the same project, such as a conditional use permit or subdivision map, in which case the parties should consider whether it is advantageous to seek simultaneous approvals, or have one approval follow another.").

122. Cowart, *supra* note 96, at 9.

123. Neither a developer nor local government can be compelled to enter into a development or annexation agreement. *See, e.g.*, CAL. GOV'T CODE § 65865 (West, WESTLAW through 2004) (providing that a city or county "may" enter into a development agreement); MD. CODE ANN. art. 66B, § 13.01(m) (West, WESTLAW through 2004) (stating DAA does not "authorize a governing body to require a party to enter into [a development] agreement"); Citizens for Responsible Gov't v. City of Albany, 66 Cal. Rptr. 2d 102, 110 (Cal. Ct. App. 1997) (stating DAA "allows 'a builder to acquire by contract the equivalent of a vested right at an early stage of the project'") (quoting Eric Sigg, *California's Development Agreement Statute* 15 SW. U. L. REV. 695, 707 (1985)).

and that development's impact.[124] This requirement serves as a substantive limit on negotiations between developers and local governments in the context of both traditional zoning and the negotiated zoning models discussed at Part III.A. However, several courts have determined that regulatory takings restrictions do not apply to an express agreement between a developer and municipality, because, unlike traditional exactions, these negotiated conditions reflect the subjective, voluntary intent of the parties.[125] These decisions suggest that municipalities may be free to secure forms and amounts of consideration from developers that would be prohibited in either a traditional regulatory or negotiated zoning approval process.[126] Although a few commentators have voiced concerns about this flexibility,[127] the vast majority apparently accept that local governments may legally negotiate provisions in such agreements that differ from or exceed those legally permitted through regulatory exactions.[128] The few

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124. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), the Supreme Court held that, to avoid an unconstitutional taking of private property, a "nexus" must exist between any imposed land use exaction and the impact of a proposed development. In *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994), the Supreme Court supplemented *Nollan*'s nexus requirement with an additional "proportionality" requirement, holding that a local government must show that there is a "rough proportionality" between "the exactions and the projected impact of the proposed development."

125. *See, e.g.*, Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696, 698-99 (9th Cir. 1991) (holding nexus requirement does not apply in settlement agreement between agency and developer because "the promise is entered into voluntarily, in good faith and is supported by consideration"); Xenia Rural Water Ass'n v. Dallas County, 445 N.W.2d 785, 788-89 (Iowa 1989) (holding negotiated setback requirement not a taking where part of agreement between parties); Meredith v. Talbot County, 560 A.2d 599, 604 (Md. Ct. Spec. App. 1989) (stating that agreement between developer and county in which developer agreed to convey property to conservation group in exchange for approval was not a taking because the agreement was an "informed business decision" benefiting the developer and thus voluntary, even if "the decision was made in the face of likely adverse governmental action").

126. INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 17.

127. *See* Crew, *supra* note 120, at 37-42; BLAESSER, *supra* note 21, at 215-16.

128. *See, e.g.*, David L. Callies, *Development Agreements*, 2 ZONING AND LAND USE CONTROLS (MB) ch. 9A, at 9A-30.4 to 9A-30.4(1) (March 2004) ("While every governmental action must be invested with a public purpose, there are few conditions, exactions or dedications which a local government may not legitimately bargain for when negotiating annexation and development agreements . . . . The issue addressed here is whether the local government may go further since the development or annexation agreement is a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is indeed voluntary, the answer is almost certainly yes."); ROBERT E. MERRITT & ANN R. DANFORTH, UNDERSTANDING DEVELOPMENT REGULATIONS 50, 143 (1994) ("If a project involves a 'development agreement' as well as rezoning, the government agency may attempt to

courts to discuss the issue have found takings requirements to be inapplicable to development and annexation agreements.[129]

Given this treatment, it is not surprising that many local governments have used development and annexation agreements to negotiate novel terms with developers.[130] In fact, city attorneys

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negotiate fees and exactions beyond the needs of the project, as a *quid pro quo* for granting the developer vested rights under the agreement."); Donald L. Connors & Sarah C. Columbia, *Development Agreements: Affording Public Gain and Private Certainty in the Modern Development Regulatory Process*, C333 ALI-ABA 1083, 1107-08 (1988) ("Development Agreements, as voluntary contracts, are not bound by legal requirements for the justification of fees and exactions. Municipalities can obtain many types of contributions and commitments from developers which are otherwise often invalidated by courts."); Kaufer & Colgan, *supra* note 107, § 74.20[2], at 74-15 (suggesting development agreements can be used to bypass *Nollan* and *Dolan* requirements); Curtin & Zischke, *supra* note 114, at 360 (suggesting that local governments take advantage of the wide range of concessions and exactions they can secure through development agreements); Taub & Rhodes, *supra* note 107, at 61 ("Because it reflects voluntary action on the part of the developer, obligations of the agreement are not constrained by the usual legal requirements applicable to conditions and exactions."); ELLICKSON & BEEN, *supra* note 18, at 234 ("Because it reflects voluntary action on the part of the developer, obligations of the agreement are not constrainted by the usual legal requirements applicable to conditions and exactions, such as rational nexus, proportionality, fair share, and reasonably attributable tests."); BLAESSER, *supra* note 21, at 228-29 ("[A] developer who receives the benefits of the [development agreement], even if he claims he entered into it under duress, will not find a court sympathetic to the taking argument.").

129. *See* Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach, 103 Cal. Rptr. 2d 447, 464 (Cal. Ct. App. 2001) ("[I]t is likely that the City would have demanded additional consideration from [the developer] for . . . a separate development agreement."); Save the Sunset Strip Coalition v. City of W. Hollywood, 105 Cal. Rptr. 2d 172, 175 (Cal. Ct. App. 2001) (affirming trial court conclusion that development agreement cash payment of $5.2 million does not constitute an illegal sale of city's police power and that city need not "identify some particular cost attributable to the development to justify such a fee"); City of Colo. Springs v. Kitty Hawk Dev. Co., 392 P.2d 467, 472 (Colo. 1964) (holding city may impose conditions in annexation agreement because the city action is "purely contractual").

130. *See* Cowart, *supra* note 96, at 32 ("[T]he parties to development agreements often reported that extraordinary requirements were involved in the agreements."); CALLIES I, *supra* note 81, at 52-53 (describing development agreement as method for obtaining local government benefits beyond permissible exactions and impact fees, and detailing agreement providing $158.85 million to city in addition to other benefits); CALLIES ET AL., *supra* note 94, at 277-78 (providing that model annexation agreement can include "annexation fee" to local government beyond all other fees required by law "to be used at the sole and absolute discretion of the Village for the general purposes of the Village"); Deborah M. Rosenthal, *Orange County's Use of Development Agreements*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 48, 53 (detailing county's use of multiple development agreements to obtain "public improvements costing several thousand dollars per dwelling unit" beyond those required by subdivision exaction process); Daniel J. Curtin, Jr. & Sanford M. Skaggs, *Legal Issues and Considerations*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 121 (noting additional county fee of "approximately $5,000 per dwelling unit for the 'privilege' of entering into a development agreement"); Douglas R. Porter, *The*

emphasize such additional benefits in describing their expectations regarding development and annexation agreement negotiations.[131] A local government, in exchange for its willingness to forgo future regulation of a property parcel, may receive millions of unrestricted dollars or in-kind benefits untied to any project impact. [132] Those local residents or businesses that stand to bear the brunt of the burden of the development may receive none of the agreement's benefits. To date, there is no reported case invalidating a development or annexation agreement on the grounds that the agreement's terms are improper. Even though a developer may exchange substantial consideration for a favorable land use decision, apparently no "sale" of the police power is taking place.

C. *A Transformation in Land Use Regulation*

Development and annexation agreements bear some superficial similarities to negotiated zoning mechanisms such as contract zoning, in that all of these mechanisms involve essentially bilateral, negotiated transactions on significant land use decisions between a local government and a developer, with very limited public input. All of these mechanisms provide a fairly open-ended process that facilitates bartering, and use existing zoning as a baseline for negotiation rather than as a part of a considered, long-term comprehensive plan.

However, development and annexation agreements mark a fundamental departure from their negotiated zoning brethren.[133] Because of their distinctive treatment by state legislatures and courts, these agreements have significantly expanded the options available to localities and developers. Development and annexation agreements are subject to their own, very accommodating, statutory regimes. Furthermore, as discussed in

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Relation of Development Agreements to Plans and Planning, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 148, 151-52 (detailing "social exactions" such as job training programs and other extraordinary provisions such as public golf course and clubhouse dedication).

131. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 44.

132. *See* Callies & Tappendorf I, *supra* note 85, at 681; *see also* David L. Callies & Julie A. Tappendorf, *Annexation Agreements and Development Agreements*, *in* TRENDS IN LAND USE LAW FROM A TO Z 315, 330 (Patricia E. Salkin ed., 2001) [hereinafter Callies & Tappendorf II].

133. *See, e.g.*, WILLIAMS & TAYLOR, *supra* note 87, §§ 154A.02, at 150 and 154A.04, at 154.

Part III.B.1, because these instruments are viewed as legitimate exercises of the regulatory police power, they elude the traditional prohibition on municipal contracts of the police power. Yet, as discussed in Part III.B.3, because courts treat these mechanisms as primarily contractual and voluntary rather than regulatory, users of these mechanisms are simultaneously able to elude constitutional constraints on exactions.

This unique flexibility allows developers and cities to obtain significant benefits over and above those available under either traditional zoning or negotiated zoning systems. In addition to project approval, development and annexation agreements give developers valuable vested rights that freeze applicable land use regulatory rules and fees, immunizing projects from most regulatory changes.[134] This immunity typically decreases a developer's long-term risk and costs, offsetting any increase in the developer's initial financial outlay due to extensive negotiations,[135] and leaves the developer with substantial freedom to alter the timing or design of development well after basic agreement has been reached.[136] Local governments seeking development to increase their local tax base, revenues, or employment can use the promise of a development agreement to court potential developers, and then use the agreement device itself to exclude groups that might oppose development.[137] Additionally, as

134. City of W. Hollywood v. Beverly Towers, Inc., 805 P.2d 329, 334 n.6, 335 (Cal. 1991) ("[D]evelopment agreements . . . limit the power of that government to apply newly enacted ordinances to ongoing developments."). Agreements may also set applicable fees and exactions, giving increased certainty over project costs. *See, e.g.*, WASH. REV CODE § 36.70B.170(3)(b) (West, WESTLAW through 2003) (requiring inclusion in agreement of schedule of fees and charges).

135. Hammes, *supra* note 88, at 123-24; Connors & Columbia, *supra* note 128, at 1087 (noting advantages for "complex multi-phased development projects"). This certainty benefit is considerable, particularly in volatile regulatory environments. *See* Delaney I, *supra* note 121, at 812.

136. An agreement may include flexible schedules that establish sizeable windows within which project phases may be developed, *see, e.g.*, ARIZ. REV. STAT. ANN. § 9-500.05(G)(1)(f) (West, WESTLAW through 2004), or may provide the developer certainty that future applications related to the project can be developed as planned even though particular permits cannot yet be obtained, *e.g.*, CAL. GOV'T CODE § 65865.2 (West, WESTLAW through 2004).

137. *See* Cowart, *supra* note 96, at 31 (stating local elected officials often reported agreeing to development agreement simply to encourage the development and provide developer with additional security); Richard L. Fosmoen, *The Public Sector's Perspective*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 20, at 23, 24-25; VA. CODE ANN. §15.2-2303.1 (West, WESTLAW through 2004) (authorizing development agreements "for the purpose of stimulating and facilitating economic

described in Parts III.B.2 and III.B.3, such agreements allow a local government flexibility to demand different or additional concessions from the developer that would not be permitted under traditional or negotiated zoning processes.[138] Because the agreements are treated as voluntary and bilateral, developers and local governments are afforded an unprecedented opportunity to barter extensively and exclusively over the terms of development, insulated from legal restraints and—as detailed in the following section—the public eye.

IV. THE ILLEGITIMACY OF EXISTING LAND USE REGULATORY NEGOTIATION

The preceding sections describe how development and annexation agreements have ushered in a new, extraordinary age of land use regulation in which local governments and developers may conduct discreet negotiations with few substantive judicial or statutory constraints. As this section will demonstrate, these agreements also are characterized by limited and belated public participation, ad hoc municipal decisionmaking, and a lack of effective accountability mechanisms to those most impacted by the land use decision. As such, they may well hinder the important goals of flexible long-term planning and perpetuate the tradition of severely limited public involvement in land use decisions. In addition, these negotiated models seriously undermine equity goals by increasing the vulnerability of land use regulatory decisions to unfair dealing.

Precursor "negotiated" planning models such as contract zoning, PUDs, and incentive zoning, although not as far reaching in the flexibility provided to developers and local governments, nonetheless have serious legitimacy problems as well. As detailed in this Part, despite their considerable potential, both negotiated zoning and agreement-based land use regulation are fostering

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growth"). As detailed in Part IV.A, *infra*, a major reason for the proliferation of development agreements was a desire to counter community activism against unrelenting growth by circumventing the conventional community planning process through secretive bargaining. *See* Cowart, *supra* note 96, at 37; *see also* John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make A Deal!"*, 25 URB. LAW. 49, 49-50 (1993) [hereinafter Delaney II] (noting how other methods of regulation potentially thwart development).

138. As a result, development agreements have often been "used to legally sanitize . . . otherwise insecure arrangement[s]," as in cases where "parties feared that failure to follow requirements of city codes or state law would subject a desired deal to legal challenge." Cowart, *supra* note 96, at 31.

increasingly exclusionary, inefficient, and poorly planned land use decisions.

A. *Perfunctory and Imbalanced Public Participation*

1. *The foundations of limited public participation.*

A negotiation approach to land use regulation has the potential to encourage a robust comprehensive planning process with active citizen participation. In the words of one commentator, a bargaining model is most politically and legally defensible when "it occurs in a well-prepared context where public participation has been widespread and effective."[139] Unfortunately, virtually all current bilateral negotiation approaches severely restrict public input in planning decisions, compromising the participatory potential of negotiated land use and facilitating favoritism in land use agreements.

Since the inception of modern land use regulation, public input has been an important element of those municipal land use decisions, such as variances or special permits,[140] that are considered "quasi-judicial" in nature.[141] For these decisionmaking processes, state and federal constitutional procedural due process requirements,[142] the Standard State Zoning Enabling Act,[143] and most state zoning laws require a rudimentary public hearing prior to the final municipal decision.[144] However, in most states, negotiated processes including PUDs, contract zonings, and

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139. John J. Kirlin, *The Bargaining Process: Trends and Issues*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 20, at 1, 11.

140. For a discussion of variances or special permits, *see supra* notes 23-24.

141. "Quasi-judicial" describes those decisions or actions by a government entity that are deemed adjudicative because they directly affect the legal rights of a person. Because these actions are adjudicative, they are subject to procedural rules and protections similar to those available in courts (such as hearings, findings of fact, and prohibitions on ex parte communications). *See* BLACK'S LAW DICTIONARY 1245 (8th ed. 2004) (defining quasi-judicial as "[o]f, relating to, or involving an executive or administrative official's adjudicative acts . . . which are valid if there is no abuse of discretion, [and] often determine the fundamental rights of citizens").

142. Procedural due process requires that parties affected by a government decision be given a minimal level of notice and an opportunity to be heard prior to the final government decision. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 465.

143. STANDARD STATE ZONING ENABLING ACT, *supra* note 24, § 7.

144. *See* MANDELKER I, *supra* note 26, at 2-51. The APA model code requires one hearing for development agreements. APA MODEL CODE, *supra* note 95, § 8-701(6)(c), at 8-197.

development agreements typically escape due process requirements, including a public hearing, findings of fact, and prohibitions on ex parte communications between local legislative officials and development applicants.[145] As amendments to the locality's general legislative zoning ordinance or statute, these negotiated processes are usually characterized as "quasi-legislative."[146] States may require only the official, final development decision to be made at a noticed public hearing.[147] While public involvement requirements for most negotiated land use approvals are thus relatively minimal, it is worth noting that all states have open meeting laws that at least require certain meetings on public business to be open to the public, and that these laws typically extend to the ultimate municipal approval of a quasi-legislative decision.[148]

This system affords a developer and local government wide latitude to prenegotiate the extensive and intricate terms of their agreements outside of public forums, excluding affected third parties from the extensive information exchanges and substantive trading that occur during negotiations and severely limiting these parties' abilities to challenge the decisions that emerge from such contacts.[149] Laws requiring only legislative meetings to be open or at best allowing only for brief public comment at a last-minute hearing on a project proposal rarely afford interested parties any meaningful participation in the negotiation of project-specific development approvals,[150] particularly when such hearings occur

145. MANDELKER I, *supra note* 26, at 2-50.

146. *See id.* at 2-50, 6-83; JUERGENSMEYER & ROBERTS, *supra* note 11, at 188, 195-96, 337 (describing contract zonings and PUDs as rezonings and are legislative acts); CAL GOV'T CODE § 65867.5(a) (West, WESTLAW through 2004) (stating that development agreements are legislative acts); *see also* APA MODEL CODE, *supra* note 95, § 8-701(4), at 8-196 (deeming all development agreements to be land development regulations, which are treated as legislative decisions). The sometimes ambiguous distinction between the quasi-judicial and quasi-legislative character of local government decisions is discussed *infra* at Part V.A.

147. APA MODEL CODE, *supra* note 95, at § 6.76, at 6-92 to -93.

148. MANDELKER I, *supra* note 26, at 6-92 to -93; JUERGENSMEYER & ROBERTS, *supra* note 11, at 465 n.4.

149. *See* MANDELKER I, *supra note* 26, at 2-50.

150. *See id.* at 2-51. The APA model code only requires that a public hearing occur before the legislative body's adoption of an agreement. APA MODEL CODE, *supra* note 95, § 8-701(6)(c), at 8-197. *But see* Callies & Tappendorf II, *supra* note 132, at 337 (questioning whether public hearing on development agreements is required in some states).

Public participation appears to be emphasized more at the initial plan or code adoption stage. *See, e.g.*, APA MODEL CODE, *supra* note 95, at 7-63, 7-195 to -200

well after negotiations between municipal officials and the developer have taken place.

Unfortunately, local officials often treat public participation as if it obstructs or provides only marginal benefits to the decision process, rather than embracing it as an essential element of decisionmaking.[151] Current procedures enable officials to relegate interested third parties to a limited observational or after-the-fact commenting role, eliminating any meaningful direct dialogue or informational exchange between the public and local government representatives.[152] During the active and often significant early negotiations of the approval process, even the limited opportunity for comment at a hearing is not available.[153] Indeed, some commentators have expressly advocated limits on public notice and participation[154] in order to further reduce developer and local government costs.[155]

Development agreements, as detailed in Part III.B, are the most recent and clear illustration of limited participation by nondeveloper affected parties in the land use negotiation process. As mentioned previously, these regulatory mechanisms are typically bilateral, in that only the developer and local government

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(commentary), § 8-103(3), at 8-30, § 8-701(2)(d), at 8-196, §8-701(6)(c), at 8-197 (including provisions and commentary encouraging public participation for comprehensive plan adoption but requiring only one public hearing for project-specific zoning amendments or development approvals).

151. THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 74-75 (2002).

152. Even when a hearing is held, some states and the model code allow a hearing examiner, who may not even be an official or employee of the local government, to hold the hearing and collect comments to convey to the legislative body. *E.g.*, WASH. REV. CODE ANN. § 36.70B.200 (West, WESTLAW through 2004); APA MODEL CODE, *supra* note 95, §§ 10-301 to -308, at 10-45 to -50; s*ee also* MD. ANN. CODE, art. 66B, § 13.01(e) (West, WESTLAW through 2004) (allowing legislative body to delegate all or part of its authority to enter into agreements, including holding public hearings, to a possibly unelected "public principal").

153. Indeed, the APA's latest model code for land use and planning does not require public hearings on permit applications, and—for those municipalities that opt to hold hearings—expressly limits the number of public hearings to one. APA MODEL CODE, *supra* note 95, § 10-201(3), at 10-24; *see also* Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 URB. LAW. 635, 646 (2003) (recommending a single hearing because the "two-hearing procedure is wasteful and unnecessary").

154. *See* BLAESSER, *supra* note 21, at 179-80 (recommending limiting notice and participation for amendments to PUDs to only those landowners in direct proximity to the proposed application). These hearings may even occur after the agreement has already been executed. Delaney II, *supra* note 137, at 52.

155. Mandelker, *supra* note 153, at 646.

where the subject property is located enter into the agreement.[156] The more detailed state enabling statutes only allow parties with a legal or equitable interest in a piece of real property to negotiate a development agreement with the local government.[157] Most DAAs do not expressly allow other public actors, such as neighboring local governments, counties, or state or federal agencies or districts to be parties to development agreements. Those statutes that do not incorporate this prohibition give the local governments negotiating the agreements the discretion to decide what (if any) third parties to include.[158] Excluding other public agencies—particularly those governments or agencies with independent authority to review projects, such as the fish and wildlife service if a development could impact the habitat of an endangered species—from the negotiation process weakens the efficacy and legitimacy of the development agreement mechanism.[159] Furthermore, none of the state statutes or local enabling ordinances requires, or even allows, private third parties—such as neighboring property owners, other concerned residents, neighboring local governments without permitting authority, or public interest groups–to be parties to the agreement.

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156. *See* Cowart, *supra* note 96, at 35 ("[D]evelopment agreements are almost always two-party deals."); BLAESSER, *supra* note 21, at 207 (stating development agreement is a bilateral contract).

157. *See* Hammes, *supra* note 88, at 160; Theodore C. Taub, *Development Agreements*, C629 ALI-ABA 555, 559 (1991).

158. A few DAAs do allow a local government to include other local governments or state or federal agencies as parties to the agreement if that entity has permitting jurisdiction over the subject property, but none requires such agency involvement. *E.g.*, ARIZ. REV. STAT. ANN. § 9-500.05(G)(1) (West, WESTLAW through 2004) (community facilities district may be party to the agreement); CAL. GOV'T CODE § 65865(a) (West, WESTLAW through 2004) (city and county may enter into development agreement); FLA. STAT. ANN. § 163.3221(10) (West, WESTLAW through 2004) (special district defined as local government); HAW. REV. STAT. ANN. § 46-126(d) (West, WESTLAW through 2003) (federal, state, or local agency or body may be included as party). Similarly, the APA model code's DAA defines a development agreement as an agreement between a property owner, the local government, and possibly other governmental entities with jurisdiction (if invited to participate). APA MODEL CODE, *supra* note 95, § 8-701(1), (3), at 8-196. *Cf.* Lindell L. Marsh, *The Future of Development Agreements*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 153, 162 [hereinafter Marsh I] (citing circumstance in California where federal agencies joined a development agreement under their existing regulatory authority, but arguing that states expressly authorize such joinder).

159. *See* Joseph E. Coomes, Jr., *Practical Concerns in Drafting and Negotiating Development Agreements*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 133, 137 (arguing that failure to include other public agencies as parties is "an inherent weakness in the [California DAA] statute").

While participation by affected parties and the public at large is often strictly curtailed, negotiations between developers and local government staff are typically extensive. These negotiations constitute a central and critical phase in the decisionmaking process—one in which important information is shared and intricate tradeoffs and decisions are made. In many instances, the deals being struck concern complex long-term development proposals, requiring numerous negotiation sessions akin to those used in modern private real estate deals.[160] The resulting agreements are closer in length and complexity to modern private real estate contracts than to traditional zoning permit applications.[161]

Yet, in all DAA states, development agreement negotiations are conducted solely by the local government's executive or administrative personnel, such as the city attorney, mayor's staff, or a planning department head.[162] State public records laws may even shield some products of these negotiations, such as preliminary draft agreements, from public disclosure.[163] While most state DAAs maintain the historical requirement of a ceremonial public hearing to provide the imprimatur of public participation,[164] these

160. *See* Gary Stout, *Pointers for Negotiation*, *in* DEVELOPMENT AGREEMENTS: ANALYSIS, COLORADO CASE STUDIES, COMMENTARY, *supra* note 102, at 261, 261 (detailing pointers for negotiating); BLAESSER, *supra* note 21, at 175-76; JUERGENSMEYER & ROBERTS, *supra* note 11, at 336-37; CULLINGWORTH, *supra* note 23, at 53.

161. *See* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, app. at 170-92, 198-205 (providing detailed excerpts from sample development agreements); CALLIES ET AL., *supra* note 94, at 239-57, 265-99 (providing detailed list of potential agreement terms and lengthy skeleton model development and annexation agreements); WILLIAMS & TAYLOR, *supra* note 87, § 154A.06, at 165-88 (providing skeleton model development agreement); Stout, *supra* note 160, at 261-62 (providing advice on negotiations similar to real estate deals).

162. *See, e.g.*, INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 43-44 (discussing the bilateral "art of negotiation," and suggesting that city manager and planning director serve as a city's main negotiators, possibly with engineering/public works staff and city attorney). The Hawaii and Maryland DAAs specifically delegate the power to negotiate, execute, and administer development agreements to local government executive or administrative personnel. HAW. REV. STAT. ANN. §§ 46-123, 46-124 (West, WESTLAW through 2003); MD. ANN. CODE, art. 66B, § 13.01(b) (West, WESTLAW through 2004) (delegating power to a "public principal").

163. *See, e.g.*, INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 34 n.55 (citing CAL. GOV'T CODE § 6254(a) as authority for excluding preliminary drafts of development agreements from public disclosure if they are not kept in the ordinary course of business).

164. *See* Taub, *supra* note 157, at 560. *But see* Callies & Tappendorf II, *supra* note 132, at 337 (questioning whether some states require hearings); CALLIES ET AL., *supra* note 94, at 107 (same); APA MODEL CODE, *supra* note 95, § 8-701(6)(c), at 8-197.

hearings usually occur well after the local government administrative staff and the developer have engaged in substantial negotiations. Some commentators suggest that these hearings may even occur after the agreement has been executed by the parties.[165]

Ironically, while developers often involve their supporting ensembles of architects, planners, and attorneys in negotiations,[166] even planning commissioners and the local government's legislative body or council cannot participate.[167] Thus, negotiations are too frequently shielded from not only direct but also indirect observation and input by the other parties the proposed development affects.[168] Indeed, the only published study on the use of development agreements reported: "[R]esearchers could not find a single jurisdiction in California that had by ordinance established a procedure for including affected third parties, such as neighborhood associations, good government groups, chambers of commerce, fair housing councils, or environmental groups, in the formal bargaining process for negotiating development agreements."[169]

Surprisingly, few proponents of development agreements have even admitted that these agreements may serve as exclusionary mechanisms, despite public interest groups' concerns about the secretive potential of these agreements.[170] One commentator has suggested that officials could defuse community backlash by consulting stakeholders "ahead of time, or perhaps on a 'meet and confer' basis as negotiations proceed."[171] Although such consultations would presumably result in more participation than the complete exclusion that is currently the norm, they are nonetheless ancillary to negotiations and subject to the whims of developers or local government staff. Moreover, they may not give interested parties access to the most useful or current project information or keep those parties adequately apprised of how

165. *See* Delaney II, *supra* note 137, at 52 (providing that "[a] public hearing or meeting usually precedes or follows execution of the development agreement").

166. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 42.

167. *See, e.g.*, *id.* at 26 ("[O]pen meeting laws do not generally allow an exception for public agency negotiators on development agreements to receive direction from the governing body.").

168. *See, e.g.*, Cowart, *supra* note 96, at 35; INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 43-44.

169. *See* Cowart, *supra* note 96, at 35.

170. CALLIES I, *supra* note 81, at 53.

171. INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 31-32.

important issues are being resolved in the course of negotiations. All told, DAAs often fail to "address the significant representational issues raised by the bargaining process, particularly when the result is a long-term freeze on local government's ability to respond to future concerns of citizens."[172]

2. *Vulnerability to unfair dealing and corruption.*

As mentioned earlier, the agreement-based model expressly facilitates unfair dealing by providing real estate developers special access to local officials at a critical stage of the land use and development process. This favoritism often exacerbates established patterns of favoritism and discrimination in local government.

James Madison and many commentators since have argued that local legislative bodies drawn from a small constituency are more susceptible to both corruption and domination by a few powerful interests than larger state or national legislatures.[173] The history of land use regulation, particularly under the modern bilateral negotiation model, all too often supports this thesis. There are many accounts of unfair dealing facilitated by bilateral deal-making in local land use regulation—with outright corruption of local officials as the extreme,although not exceptional,case[174] In

172. Cowart, *supra* note 96, at 34-35; *see also* Marsh I, *supra* note 158, at 158; Porter, *supra* note 130, at 150.

173. THE FEDERALIST NO. 10 (James Madison); Rose I, *supra* note 3, at 855-56.

174. *See* FRANK J. POPPER, THE POLITICS OF LAND-USE REFORM 52 (1981) ("Zoning and subdivision regulation have traditionally been the greatest single source of corruption in local government. Zoning personnel rarely constitute even 2 percent of a city government's work force, but zoning scandals seem to account for nearly half the convictions of local officials."); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272 n.130, 1273 n.134 (1997) (referencing numerous anecdotal accounts of developer power, favoritism, and bribery); Robert H. Freilich, *The Nature of Land Use Proceedings: Legislative, Adjudicatory, or Administrative?*, SB06 ALI-ABA 695, 702 (1996) [hereinafter Freilich II] (referencing STANFORD RESEARCH INSTITUTE, CORRUPTION IN LAND USE BUILDING REGULATION (1978), a study revealing that widespread corruption permeates municipal land use decisions); Denis Binder, *The Potential Application of RICO in the Natural Resources/Environmental Law Context*, 63 DENV. U. L. REV. 535, 560 (1986) (stating the "most likely area of application of RICO" is in land use regulation, since "fraud, kickbacks, and corruption are very common in land development"); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 588 (1990) ("It is well-known that land use control offers many opportunities for corruption."); ELLICKSON & BEEN, *supra* note 18, at 347-49, 365 (discussing concerns regarding favoritism and corruption in land use regulation, and in particular in contract zoning processes); Kris Wernstedt, *Terra Firma or Terra Incognita? Western Land Use, Hazardous Waste, and the Devolution of U.S. Federal Environmental Programs*, 40 NAT. RESOURCES J. 157, 182 (2000) ("[F]ew areas of local

fact, land use control has long been called "the government activity 'most closely associated with corruption in the public's mind.'"[175]

At the very least, bilaterally negotiated regulation exacerbates the strong potential for unfair dealing that exists in modern land use planning by obscuring the influence of some of its most powerful participants: real estate developers. Developers have considerable incentives to play the negotiating game, and have substantial monetary and political resources to devote to it.[176] Developers and their consultants and lobbyists maintain long-term relationships with elected officials and administrative staff at all levels of local government, and are often major contributors to local election campaigns.[177] Thus, it is not uncommon for developers to attempt to pay off elected officials in exchange for favorable decisions,[178] and it is no surprise that developers have come to expect regulatory approvals that manifestly favor their interests over those of other community members.[179]Of course, the community segments most harmed by such favoritism are often the same ones who have historically been denied influence in local politics, namely low-income and minority neighborhoods.[180]

The asymmetrical access to planning decisions described in Part IV.A.1 exacerbates this more general problem of the excessive influence of financially powerful interests in municipal decisionmaking. While the developer has access to all stages of the decision process under the bilateral negotiation model, affected parties in the surrounding community, whether in the regulating local government or across the border in a neighboring jurisdiction,

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government administration have been skewered by charges of cronyism and corruption as have local land use decisions.").

175. ELLICKSON & BEEN, *supra* note 18, at 348 (quoting GEORGE AMICK, THE AMERICAN WAY OF GRAFT 77 (1976)).

176. *See id.* at 345.

177. *See* LOGAN & MOLOTCH, *supra* note 43, at 230-32; ELLICKSON & BEEN, *supra* note 18, at 345-46.

178. *See* SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 25 n.20 (1978) ("[Z]oning boards and city councils have frequently been the object of payoff attempts by land developers.").

179. *See* ELLICKSON & BEEN, *supra* note 18, at 345.

180. *See, e.g.*, Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (discussing disproportionate and discriminatory facility siting). *See generally* Vicki L. Been, *Environmental Justice and Equity Issues*, *in* 4 ZONING AND LAND USE CONTROLS (MB) Ch. 25D, § 25D.06 (October 1995) (detailing federal and state environmental justice efforts and evidence regarding disproportionate and discriminatory facility siting).

may only have access to the final approval. This disproportionate access erodes the legitimacy of the bargaining approach to land use decisionmaking by explicitly authorizing procedural favoritism and making the process unnecessarily vulnerable to substantive corruption. Because developers are involved much earlier and more extensively than all other parties, their interests, issues, and ideas greatly impact the crafting of the project approval, the alternatives considered, the analysis of the project's impacts, and the terms of the agreement. By the time a project is presented to a local legislative body or council for ratification, both the developer and local government administrative officials often have a significant stake in preserving the agreement as drafted. Local government staff may become so invested in the project that they actually serve as project advocates rather than more neutral agents.[181] In such cases, the decision to actually approve the project can be little more than a pro forma exercise.[182]

Because interested third parties are so thoroughly excluded from negotiations, the only remedy available to these parties may be to seek judicial annulment of projects through costly litigation. However, even lawsuits may be of little avail. Because DAAs and other state laws governing existing bilateral negotiated approaches afford substantial discretion to local governments, courts often are unable to scrutinize the substance of development agreements.[183] As a result, developer-applicants are systematically favored to the detriment of other parties, even in litigation.[184]

These deficiencies of development agreements are not merely speculative. Indeed, a study of development agreements in California has already concluded that some local governments use the agreement process "to frustrate actively the interests of third

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181. *See* Marsh I, *supra* note 158, at 158.

182. One author summarizes the problem as follows:

> [D]evelopment agreements are almost always two-party deals, negotiated in private by representatives of the developer and the local legislative body, and presented to the public as "done deals" just before a public legislative hearing on the contract. Because it is next to impossible to renegotiate the terms of these complex contracts in the midst of a public hearing and the local legislative body and planning staff are usually heavily invested in the contract as drafted, it is very difficult for affected third parties to alter the proposed contract at a legislative hearing.

Cowart, *supra* note 96, at 35-36.

183. *See infra* Part V (discussing judicial review of bilateral negotiated regulatory approvals).

184. *See* ELLICKSON & BEEN, *supra* note 18, at 349.

parties."[185] The study further notes that local governments and developers have often treated third parties with at best "benign neglect."[186] Only in "the seemingly rare occasion" did local governments and developers voluntarily include a range of third parties in their negotiations.[187] The study also noted that the development community and the California League of Cities were the impetus for passage of the California DAA, and that "perhaps it is no surprise that these parties considered two-party bargaining desirable and had no real interest in pursuing more complex models of negotiation."[188]

B. *Inefficient Bartering*

As detailed below, existing agreement-based processes often collapse land use planning and regulation decisions to crude bilateral, zero-sum bargains between developer and local government interests. These approaches are not only inefficient, but also inhibit the development of community engagement or a more cooperative civic ethos.

1. *Causing inefficiency.*

Advocates of bilateral negotiation approaches often claim that these models are more flexible, and hence more efficient, than traditional models. They posit that traditional zoning is inefficient because the landowner is not able to "compensate the community for costs that would result if the landowner's property were rezoned to a classification less restrictive and more beneficial to the landowner."[189] Negotiated approaches arguably allow developers to proceed with uses that are more valuable to them than those permitted under the original zoning, while ostensibly compensating those third parties potentially injured by the use changes through an array of mitigation measures and concessions.[190]In essence, the bargaining process allows developers

185. Cowart, *supra* note 96, at 36.

186. *Id.*

187. *Id.*

188. *Id.*

189. Jennifer G. Brown, *Concomitant Agreement Zoning: An Economic Analysis*, 1985 U. ILL. L. REV. 89, 110 (1985); *see also* Bruce Kramer, *Contract Zoning—Old Myths and New Realities*, 34 LAND USE L. & ZONING DIG. 4, 5, 10 (1982).

190. *See* Brown, *supra* note 189, at 110. Some even claim that this bargaining creates more value for both the real estate developer and the local government apparatus. *See*

to make damage payments to the local government, or provide amenities for the community, instead of conforming to zoning restrictions intended to presumptively control the impacts of their developments.[191] In fact, the texts of many DAAs[192] and PUD ordinances[193] suggest that their approaches allow for more efficient development. The regulatory flexibility provided is undoubtedly vital given the limited ability to prospectively determine the most appropriate development configuration for a particular property.

These efficiency arguments invoke the prevailing-interest based, pluralist theory of governmental decisionmaking, which "assumes that private interests are prepolitical variables, exogenous to and thus not shaped by the political process."[194] In this model, no generalized public interest exists, only "concatenations of particular interests or private preferences."[195] Governments make

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Kirlin, *supra* note 139, at 5, 11.

191. Ellickson, *supra* note 42, at 708. In incentive zoning, the local government offers developers an alternative to zoning rules that the local government has determined results in greater value for the local government than the underlying zoning scheme. *See* Kayden I, *supra* note 9, at 568. The developer agrees to supply the amenity if the cost of the amenity is less than the cost of complying with existing zoning requirements.

192. For instance, the South Carolina DAA addresses efficiency in three separate sections. S.C. CODE ANN. § 6-31-10(C) (West, WESTLAW through 2003) (stating that development agreements will "encourage the efficient use of resources"); *id.* § 6-31-10(B)(3) ("Because the development approval process involves the expenditure of considerable sums of money, predictability encourages the maximum efficient utilization of resources at the least economic cost to the public."); *id.* § 6-31-10(B)(1) ("The lack of certainty in the approval of development projects can result in a waste of economic and land resources."). Other states' DAAs contain similar references. *See, e.g.,* CAL. GOV'T CODE § 65864(a) (West, WESTLAW through 2004); FLA. STAT. ANN. § 163.3220(2)(a) (West, WESTLAW through 2004); HAW. REV. STAT. § 46-121 (WEST, WESTLAW through 2003) LA. REV. STAT. ANN. § 33:4780.21(1) (West, WESTLAW through 2004); *see also* CAL. GOV'T CODE § 65864(b) (West, WESTLAW through 2004) (stating that certainty will "reduce the economic costs of development"); FLA. STAT. ANN. § 163.3220(2)(b) (West, WESTLAW through 2004) (same); LA. REV. STAT. ANN. § 33:4780.21 (2) (West, WESTLAW through 2004) (same); S.C. CODE ANN. § 6-31-10(C), (D) (West, WESTLAW through 2003) (same); HAW. REV. STAT. § 46-121 (West, WESTLAW through 2003) (providing that certainty will serve to reduce the escalating costs of development to consumers); *see also* Lindell L. Marsh, *Introduction*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS, *supra* note 96, at 2, 3 [hereinafter Marsh II].

193. *E.g.*, NEB. REV. STAT. § 19-4401 (West, WESTLAW through 2004) (stating flexibility, efficiency, and promotion of development are the main purposes of the PUD device).

194. Note, *Civic Republican Administrative Theory; Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401, 1402 (1994) (citing Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32-33 (1985)).

195. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148 (1977-78) [hereinafter Michelman I].

decisions through the aggregation and resolution of competing private interests in a "zero-sum" game that merely registers the final balance of private interests.[196] In the local government context, this theory posits that the government officials should seek to allocate resources to their "highest-paying employments," namely by maximizing the aggregate value of the land within the locality.[197] Key to this model, then, is the presumed ability to maximize aggregate welfare by inventorying the interests of all affected parties, either directly or indirectly through local officials in the decisionmaking process.

However, this theory assumes that the development approval process actually integrates the interests of all affected parties into decisions. In fact, bilateral land use negotiation approaches are essentially designed to discount the preferences of many of those affected by the ultimate land use decision. As detailed in Part IV.A, the bilateral negotiated model rarely allows anyone other than developers and local government administrative officials or staff to bargain over suitable uses and appropriate conditions. The local legislative body or council, which is presumably representative of the locality's many, varied interests, becomes directly involved only upon ratification of final development agreements, when it decides whether developers have "offered a sufficiently attractive package of donations and preventive measures" to warrant waiving otherwise applicable zoning regulations.[198] More precisely, then, the process incorporates the interests of the specific officials present at negotiations, rather than the affected parties. For this process to result in efficient land use decisions, either the local government staff or legislative body must serve as a reliable proxy for the affected parties.

While the local government staff and legislative body's interests may overlap with those of affected parties, they are by no means congruent. As in the traditional command and control model, officials will have little incentive to represent any excluded parties that reside outside the jurisdiction. Additionally, neither the local government staff nor the legislative body is a adequate surrogate for the parties affected by any particular project. Because these entities are designed to represent the general public in the locality, they typically do not reflect the specific interests of those

196. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32-33 (1985).

197. Michelman I, *supra* note 195, at 153; *see* ELLICKSON & BEEN, *supra* note 18, at 57.

198. Ellickson, *supra* note 42, at 708.

parties most affected by a development proposal for any specific site. Moreover, because both local government staff and legislators often lack the sophistication and institutional incentives to negotiate the best deals for their communities, they may fail to effectively represent even broader community interests.[199] In contrast, developers have their own seats at the negotiating table, and typically ample sophistication, incentives and resources to ably represent their own private interests.[200] Finally, even if affected parties have direct access to the decisionmaking process, they may be systematically underrepresented due to collective action and prisoner's dilemma problems.[201]

Because of these representational challenges, developers often have disproportionate influence over local land use project decisions,[202] and the interests of other affected parties often receive short shrift. As a result, current negotiated processes do not result in agreements that maximize the aggregate community value, the metric for legitimacy in the pluralist model. Indeed, even proponents of bilateral regulatory negotiation approaches rarely claim that such processes result in optimal development for the area; instead, they merely assert that such processes are more efficient than their traditional alternatives.[203] While this assertion may be borne out in some cases, the analysis above suggests that because of the way the agreement-based model is structured, any

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199. As one commentator notes,

> Unfortunately, the experience in many United States cities shows a consistent pattern of underpricing incentives by granting more of them than is necessary to encourage the desired behavior. The reasons for this practice include a paucity of on-staff real estate financial expertise, the utilization of inadequate or incorrect analytical frameworks for evaluating deals, and the absence of any market-driven imperative for government to negotiate the best deal.

Kayden I, *supra* note 9, at 571 (citations omitted); *see also* Bernard Frieden, *Center City Transformed: Planners as Developers*, 56 J. AM. PLAN. ASS'N 423, 426 (1990); CULLINGWORTH, *supra* note 23, at 88.

200. *See supra* notes 176-177 and accompanying text (discussing the resources and influence of real estate developers).

201. *See* Neil K. Komesar, *Housing, Zoning, and the Public Interest*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 218, 221 (Burton A. Weisbrod et al. eds., 1978); Dana, *supra* note 174, at 1272-73.

202. *See* Dana, *supra* note 174, at 1272-73 (noting the ability of small minority of developers to capture local political processes due to greater financial resources and political organization); Freilich II, *supra* note 174, at 702 ("In the land use context, the monied developer has been acknowledged as the principal threat to responsible and independent representation [by officials].").

203. *See* Ellickson, *supra* note 42, at 708.

incremental efficiency benefits it delivers will tend to accrue to the party with the most direct interest and influence—the developer.

2. *Ignoring community.*

The existing bilateral negotiated model also limits the capacity of the land use process to foster deliberative democratic values such as community involvement, cooperation, and citizen self-governance.[204] Negotiated processes have the potential to reduce and resolve conflict and to delineate, in the approved agreement, means of resolving future conflicts between the affected parties.[205] Yet few if any of the extant institutional mechanisms in bilateral land use negotiation foster meaningful community cooperation. As the discussion above has illustrated, these shortcomings are particularly apparent at the project permitting and implementation stages. Adversarialism and self-interest, rather than cooperative problem solving, are the mainstays;[206] none of the agreement-based or negotiated zoning regimes offer a sense of community engagement or cohesion. Furthermore, the bartering orientation of these regimes can fundamentally transform the role of public officials by encouraging them to "behave like developers rather than guardians of the public interest."[207] Local governments are left free to focus solely on increasing municipal profitability through concessions that attract developers and improve the

204. In a deliberative or civic republican view of democratic decisionmaking, the public interest is jointly ascertained through a deliberative political process that focuses on collective self-determination and the interdependence of citizens, rather than through competing private interests. *See* Sunstein, *supra* note 196, at 31-32; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547-48 (1988); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1502 (1988). In this model, land use decisions and processes that enhance trust, cooperation, and interdependence are valued because such virtues cultivate quality civic life and assist in the public deliberation process. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 329, 334-36 (1996). Although arguably "sentimental," Michelman I, *supra* note 195, at 149, and perhaps not descriptive of many democratic decisionmaking processes, this normative model and the values espoused by it serve as ideals which the local land use decisional system might attempt to foster.

205. Taub, *supra* note 157, at 559 (stating development agreements can "set up the ground rules for years to come"); *see also* Cowart, *supra* note 96, at 31; ELLICKSON & BEEN, *supra* note 18, at 234. If the interests of affected parties are considered and incorporated into development agreements, the parties will be less likely to contest approved development projects.

206. *See* Marsh I, *supra* note 158, at 158 (stating that negotiated zoning and development agreement processes are adversarial, based on the common law judicial process).

207. Porter, *supra* note 130, at 150.

general tax base, to the detriment of particularly affected community members and more abstract community interests, such as environmental preservation.[208]

C. *Planning Professionals as Ineffective Negotiators*

By directing public officials, and land use professionals in particular, to negotiate with developers, the bilateral negotiated model shifts much of the burden of representing the many varied interests in the locality and region to land use planning staff. As detailed earlier, land use planning professionals traditionally relied upon their assessments of the "objective" public interest to order land uses and create well-organized and aesthetically pleasing physical environments.[209] As detailed in Part III.C, the negotiated paradigm of land use regulation became the norm as criticism for the original planning model mounted. However, this gradual paradigm shift did nothing to prepare the land use professionals for their new role as negotiators.

Limited public participation only magnifies this problem; without input from the often competing and subjective interests that regularly exist in a local land use dispute, local government administrative staff cannot manage and aggregate these various interests. Thus, planning staff once again find themselves in the almost impossible role of representing all other interests, including those of other affected parties and the individual local government legislators.[210] Negotiation training and experience alone cannot adequately prepare planners for this role; they simply cannot succeed at assembling and weighing the competing and subjective interests of a typical land use dispute without some form of participatory input.

For example, in the entertainment center hypothetical provided in the Introduction, the neighboring small businesses may oppose the proposed project for any number of reasons, such as concerns regarding increased traffic, or they may support it precisely because they believe the increased traffic will actually improve the area's commercial vitality. Nearby residents might support the project for its employment or entertainment opportunities, or oppose it due to concerns about traffic, noise, or

208. *See id.*

209. *See supra* Part II.A.

210. *See* Fosmoen, *supra* note 137, at 24-25.

design. However, the residents and small businesses may be willing to endure negative impacts from the development in exchange for some offsetting benefits from the developer, such as construction of a local community center or cash contributions to a streetscape improvement fund.

When other affected parties are excluded from negotiations and other components of the decision process, local government administrative staff must guess, with respect to every facet of the project, what resolution would best balance and serve these various affected (and often conflicting) interests.[211] Compounding this impracticability is the fact that local government planning staff are typically outmatched in bilateral negotiations. Unlike modern sophisticated real estate developers, who often can devote substantial money, time and expertise to negotiations, local government staff tasked with negotiating land use agreements regularly have considerably less money and time and often less negotiating and development experience.[212] Thus, even if local government planning staff have good intentions, agreements may be "badly bargained and badly drafted from the point of view of local government, adjacent and neighboring landowners, and other interested parties."[213]

These problems may be particularly pronounced in smaller or quickly growing cities. One study of development agreements in California found that a large percentage of such agreements are entered into by local governments in small localities, rural municipalities, and cities with high rates of growth.[214] Planning staff in these localities typically have "far less expertise in development negotiations and fewer resources" than even their counterparts in other localities.[215] These vital actors in the bilateral negotiating model regrettably "often have many diverse demands on their time and little experience in drafting contracts, and they are more likely to turn this essential task over to the developer's attorney or to legal and planning firms."[216] As a result of these

211. *See* Robert H. Freilich, *Public/Private Partnerships in Large-Scale Development Projects*, *in* MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS, *supra* note 20, at 18-19 (detailing the many competing objectives and interests of the local government) [hereinafter Freilich III]; Fosmoen, *supra* note 137, at 24-25 (same).

212. *See* Cowart, *supra* note 96, at 35.

213. *Id.*

214. *See id.* at 16.

215. *Id.*

216. *Id.* This is likely to be true in high-growth cities as well because they face

pressures, the study concludes:

> It thus becomes more difficult for the planning staff to control the drafting of the contract. An eagerness to attract development to a rural community may result in reluctance to bargain for special public benefits in exchange for the regulatory advantages conferred on the developer. The result of the limited resources in small and rural communities is contracts that are often more advantageous to the developer than the public.[217]

Relying solely on the land use planning staff to represent the public interest is not only ineffective but also unwarranted. Local governments, despite their unique vulnerability to corruption and favoritism,[218] have traditionally been considered the most accessible level of government, primarily because interested parties can more easily participate in their decisionmaking processes.[219] By failing to seek input from all affected parties during the negotiation process, local officials lose the benefit of important insights about the potential project, its impacts and alternatives and deprive their communities of the key structural advantages of small-scale governance.

Lastly, while land use planners continue to play a crucial role in negotiating land use agreements—albeit one that is inevitably unable to effectively serve all affected interests—as in the traditional zoning model they often perform only a peripheral role in the implementation and enforcement of agreements. Too often, agreement implementation and enforcement are neglected altogether[220] or relegated to developer self-reporting.[221] To the extent municipalities provide any resources for these tasks, they

are consigned to code enforcement staff[222] who may lack the

considerable demands for regulatory approval of new developments that may quickly outstrip governmental resources.

217. *Id.* at 16-17.

218. *See* Part IV.A.2, *supra*.

219. *See* Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1068-71 (1980); Rose I, *supra* note 3, at 883-85.

220. *See* ELLICKSON & BEEN, *supra* note 18, at 108; INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 55, 57 n.102.

221. After initial approval, the developer, as the primary executor of the agreement, may be expected to self-monitor and report its compliance with agreement terms, such as phasing requirements or conditions intended to mitigate the impacts of the project construction or operation, to the local government. *E.g.*, CAL GOV'T CODE § 65865.1 (West, WESTLAW through 2004) (requiring developer to report to city on compliance with development agreement).

222. *See* ELLICKSON & BEEN, *supra* note 18, at 108-09.

requisite familiarity with particular properties' negotiation histories and complex, site-specific rules. In addition, no one consults other affected parties during agreement implementation, and as a result these parties are as poorly protected in this regulatory phase as during the original negotiations. This fragmentation of roles undermines local governments' ability to effectively monitor compliance with land use decisions. Perhaps more importantly, it needlessly impedes a local government's learning process by segregating those who create agreements from those who observe how they function on the ground. As further detailed in the following sections, fragmentation undermines the potential for negotiated land use agreements to foster pragmatic planning by ignoring information that could facilitate the adaptive management of the negotiated agreement and other future planning efforts.

D. *Disregarding Comprehensive Land Use Planning*

Agreement-based land use regulation has the potential to serve as a vehicle for comprehensive local land use planning.[223] Unfortunately, this potential is all too often overlooked or ignored. As discussed in Part II, the early model of land use planning was criticized for enshrining rigid plans that failed to account for new information, changed circumstances, or evolving community preferences. This rigidity left many jurisdictions wary of comprehensive planning. Although planning advocates and professionals considered comprehensive plans essential to the land use planning process, several state statutes and the Standard City Planning Enabling Act[224]—the first influential model act for land use planning—made comprehensive plans optional. Moreover, even where localities adopted comprehensive plans, the plans themselves were often purely advisory.[225]

While modern comprehensive plan theory has discarded the overly simplistic notion of a static, inflexible plan,[226] contemporary

223. *See, e.g.*, Hammes, *supra* note 88, at 124.

224. ADVISORY COMMITTEE ON CITY PLANNING, STANDARD STATE PLANNING ENABLING ACT (rev. ed., U.S. GPO 1926).

225. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 30-32.

226. For example, the APA Model Code states:

> Plans and land development regulations should not be static documents and should be revisited on a periodic basis . . . . A community's values may change, in part as a result of changed issues facing it. New land uses and forms of

land use planning theorists have not rejected long-term planning outright. On the contrary, most theorists now envision a comprehensive, continuous planning process that relies on continual reevaluation and periodic revision of plans to account for changed circumstances or new demographic, economic, or environmental information.[227] With these modern adaptations, comprehensive planning can continue to serve an important role in land use regulation.

Indeed, some of the DAAs and AAAs mention comprehensive planning as a central purpose of development or annexation agreements[228] and require local governments to ensure that development agreements are consistent with applicable comprehensive plans.[229]Negotiated regulatory approvals, including development agreements, can provide greater assurance that development of infrastructure and other public amenities willkeep pace with new development.[230] Because declining federal grants and state-imposed limits on local revenue generation have limited available funding for local infrastructure improvements, local governments are increasingly seeking to shift the costs of public-service and infrastructure demands associated with proposed developments to developers.[231] In contrast to the general,

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> development may arise that need to be taken into account. The supply and demand for developable land may change substantially due to significant economic or social changes. Old development regulations may, for a variety of reasons, prove unworkable or ineffective in addressing the problems for which they were originally enacted.

APA MODEL CODE, *supra* note 95, at 7-230.

227. *See id.* at 7-64, 7-230. The recent APA model code requires systematic evaluation of development regulations and comprehensive plans at least every five years and as often as once a year, with periodic revisions of the plan at least every ten years. *Id.* § 7-405, at 7-229, § 7-406, at 7-232 to -233.

228. *E.g.*, CAL. GOV'T CODE § 65864(b) (West, WESTLAW through 2004); FLA. STAT. ANN. § 163.3220(2)-(3) (West. WESTLAW through 2004); HAW. REV. STAT. § 46-121 (West, WESTLAW though 2003); LA. REV. STAT. ANN. § 33:4780.21(2) (West, WESTLAW through 2004); S.C. CODE ANN. § 6-31-10(B)(2), (C) (West, WESTLAW through 2003).

229. *E.g.*, CAL. GOV'T CODE § 65867.5 (West, WESTLAW through 2003); FLA. STAT. ANN. § 163.3231 (West, WESTLAW through 2004); HAW. REV. STAT. § 46-129 (West, WESLAW through 2003).

230. *See* Delaney I, *supra* note 121, at 811.

231. *See* Kirlin, *supra* note 139, at 1, 3, 4 (stating that in California, bargaining is the most common method for funding public works); Hammes, *supra* note 88, at 124 (stating that development agreements allow municipalities to shift costs of infrastructure to developers). Several DAAs and AAAs state that a purpose of the agreement process is to encourage sound capital improvement planning and financing. *E.g.*, CAL. GOV'T CODE § 65864(b) (West, WESTLAW through 2004); FLA. STAT. ANN. § 163.3220(2)(a) (West,

prospective regulations set forth in traditional plans and zoning codes, negotiated regulatory models can serve comprehensive planning by detailing site-specific guidelines on planned project characteristics; potential impacts; measures such as public infrastructure, dedications, and fees designed to accommodate the development impacts; and the phasing of such development, infrastructure, and conditions.[232]

Unfortunately, existing negotiated approaches often fail to embrace comprehensive land use planning, sacrificing enduring community-oriented planning for closely tailored but ad hoc decisionmaking. The use of these strongly individualized approaches, with few if any firm or standardized requirements, virtually ensures that similarly situated properties will not be treated consistently with respect to long-term planning goals.[233] Ad hoc negotiated approaches may also fail to account for the cumulative effects of individual land use decisions,[234] and make local governments more inclined to trade subtle land use planning goals for more tangible financial benefits.[235]

Although comprehensive planning is a critical means of reconciling short-term negotiated land use decisions with long-term community and individual welfare, the vast majority of states do not currently require local governments to adopt comprehensive plans or give such plans binding legal force.[236] As a result, many localities now rely exclusively on zoning ordinances to order land uses, rather than following the original planning

Westlaw through 2004); HAW. REV. STAT. § 46-121 (West, Westlaw through 2003); LA. REV. STAT. ANN. § 33:4780.21(1), (2) (West, WESTLAW through 2004); S.C. CODE ANN. § 6-31-10(B)(1), (2) (West, WESTLAW through 2003).

232. *See* Taub, *supra* note 157, at 559; Connors & Columbia, *supra* note 128, at 1107-08 ("The typical land use development review is conducted by part-time volunteer boards with limited time to carefully consider the positive and negative impacts of a proposal. Negotiating Development Agreements allows for a disciplined focus on all interests and problems.").

233. *See, e.g.*, MANDELKER I, *supra* note 26, at 6-75; WILLIAMS & TAYLOR, *supra* note 87, § 154A.02, at 150 (stating "the development agreement approach constitutes a substantial deviation for the traditional approach to land use controls, primarily because by its very nature it emphasizes to some degree project-specific regulations"); *id.* § 154A.04, at 154.

234. *See* Porter, *supra* note 130, at 149; Marsh I, *supra* note 158, at 159.

235. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 14 ("[T]he agency's staff and legislative body may become convinced that, in exchange for the significant sales tax revenue the agency is likely to receive from a particular project, or in consideration of the fact that the project proponent is willing to construct a new city park or other significant public amenity, the agency should agree to compromise its planning standards in a manner that could reduce the quality of life in the community.").

236. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 30-33.

approach of first developing comprehensive plans and then adopting zoning ordinances to implement the standards and policies in those plans.[237]

The rejection of the comprehensive plan, in conjunction with the rise of negotiated zoning and agreement-based mechanisms that allow for the overhaul of zoning requirements, has paved the way for truly extemporized approaches to local land use regulation. Numerous jurisdictions now allow development and annexation agreements to carve out wholesale exceptions to zoning requirements.[238] As discussed above, states that do require comprehensive plans often make them advisory.[239] Even those municipalities who adopt plans may make plan goals and policies so vague that they impose few if any substantive restrictions on specific land use decisions.[240] Municipalities with outdated plans or approval processes may also resort to the negotiated regulatory approach as a "quick fix for regulatory shortcomings,"[241] rather than undertaking a more systematic and comprehensive reevaluation of their planning goals and procedures. The prevailing bilaterally negotiated model thus too often serves to further fragment and frustrate effective, comprehensive local land use planning.

E. *Agreements as Impediments to Flexible Planning*

Because development and annexation agreements are long-term, they have considerable potential to either serve or impede land use planning. These agreements mark an explicit shift in local land use regulation to a paradigm that attempts to crystallize, through a contract, the long-term substantive and procedural rules for a particular development at the project, rather than city-wide, level. As a result, development and annexation agreements create explicit continuing relationships between local governments and developers.

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237. *See id.* at 22, 25.

238. *See supra* note 110 and accompanying text.

239. *See supra* notes 225-224 and accompanying text. A number of DAAs do not require development agreements to be consistent with applicable comprehensive plans. *E.g.* COLO. REV. STAT. ANN. §§ 24-68-101 to 24-68-106 (West, WESTLAW through 2004); LA. REV. STAT. ANN. §§ 33:4780.21-33:4780.33 (West, WESTLAW through 2004); MINN. STAT. ANN. § 462.358(2a) (West, WESTLAW through 2004).

240. *See* Rose I, *supra* note 3, at 879-80.

241. Porter, *supra* note 130, at 149-50.

Depending on whether an agreement is linked to comprehensive, adaptable planning, these relationships may either promote or hinder developer accountability and land use planning goals at the implementation stage of the regulatory agreement.[242] Certainly, agreement-based mechanisms are not necessarily antithetical to effective comprehensive planning. In theory, negotiated agreements can encourage local officials to plan more proactively while seeking to align public and private planning interests at the project level. Development and annexation agreements can also be used to field-test the soundness of basic policies and plans or to coordinate relationships between various developers and agencies.[243] As long as agreements are approached thoughtfully, flexibly, and inclusively, they can promote effective land use planning rather than thwart it.

However, most modern development and annexation agreements fail to achieve their potential as planning instruments because they often leave even critical project-related issues open to interpretation. For example, many of the state DAAs and the development agreements they authorize fail to clearly specify the extent of the vested development right such agreements can provide to developers. Many of the DAAs are vague about whether development agreements grant a developer a concrete vested right to build a project or simply freeze the applicable rules until the local government next considers the project in a subsequent development review process.[244] Unfortunately, development agreements adopted under these DAAs often do little to clarify this issue.[245] As a result, development agreements may fail to accurately define which entitlements the local government is granting to the developer and which it is withholding, leaving critical long-term issues open to interpretation.[246] The risk that these ambiguities will

242. *See id.* at 150.

243. *See id.* For example, development agreements can serve as vehicles for coordinating infrastructure construction between various developers, utility companies, and other local governments or agencies.

244. *See, e.g.*, Cowart, *supra* note 96, at 33-34 (describing conflicting language in California's DAA); LA. REV. STAT. ANN. § 33:4780. 24, 33:4380.27 (West, WESTLAW through 2002) (with identical language to California's DAA).

245. *See* Cowart, *supra* note 96, at 33-34.

246. For example, in the entertainment center hypothetical, the development agreement adopted by the city might be interpreted as either (1) granting the developer a vested right to build all aspects of the project, such that the city would have no discretion to reject a subsequent application for a billboard for the site; or (2) merely "freezing" the rules applicable to the property, such that the city would retain the discretion to reject or

inure to the benefit of the developer is high.[247]

Furthermore, because development and annexation agreements often vest the developer's development right far into the future, these agreements may impede a local government's ability to undertake adaptive, comprehensive planning for the locality. Most state enabling acts allow local governments to include promises not to impose any new regulations that might impact subject properties in development agreements governing those properties, but many do not limit the duration of such commitments. These acts thus explicitly[248] or implicitly[249] allow a local government to bind itself to existing property restrictions in perpetuity. Even in those DAAs and AAAs with maximum duration limitations, durations can be quite long, ranging from ten years in Florida[250] to fifteen years in Virginia[251] and twenty in New Jersey and Illinois.[252] Moreover, a number of the DAAs could be construed to allow parties to extend an agreement's term bilaterally without public input,[253] and some commentators have

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substantially condition a subsequent billboard application if that application would otherwise not conform to the "frozen" land use rules.

247. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 48 ("[G]iven that the agency will be able to terminate the agreement only upon substantial evidence of noncompliance . . . there is a high degree of risk that ambiguities will ultimately be resolved against the public agency.").

248. South Carolina explicitly allows agreements for very large properties to have no term limitation whatsoever. S.C. CODE ANN. §§ 6-31-10 to 6-31-160 (West, WESTLAW through 2004).

249. *E.g.*, ARIZ. REV. STAT. ANN. §§ 9-500.05, 11-1101 (West, WESTLAW through 2004); COLO. REV. STAT. ANN. § 24-68-104(2) (West, WESTLAW through 2004); MINN. STAT. ANN. § 462.358(3c) (West, WESTLAW through 2004). In addition, there are no explicit duration limitations for either annexation or development agreements in states, like Nebraska, that lack statutory enabling acts. *See* CALLIES ET AL., *supra* note 94, at 110, 125. Several other acts require agreements to include a duration but do not mandate a maximum term. *E.g.*, CAL. GOV'T CODE § 65865.2 (West, WESTLAW through 2004); HAW. REV. STAT. ANN. § 46-126(a)(4) (West, WESTLAW through 2003); MD. ANN. CODE, Art. 66B, § 13.01(f)(1)(iii), (g) (West, WESTLAW through 2004).

250. FLA. STAT. ANN. § 163.3229 (West, WESTLAW through 2004).

251. VA. CODE ANN. § 15.2-2303.1(B) (West, WESTLAW through 2004).

252. 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West, WESTLAW 2004); N.J. STAT. ANN. § 40:55D-45.1(b) (West, WSTLAW through 2004). Only Oregon provides short maximum durations: four years if the property includes fewer than seven lots and seven years if it includes seven or more lots. OR. REV. STAT. § 94.504(2)(a) (West, WESTLAW through 2003); *see also* APA MODEL CODE, *supra* note 95, § 8-701(6)(f)(6), at 8-198 (maximum duration of five years if single phase and ten years if multiphased).

253. All of the DAAs are silent regarding procedures for agreement term extensions, so such changes presumably would be handled like other amendments. *See* Part IV.E.1, *infra*, for a discussion of limited public involvement for agreement amendments generally.

openly advocated automatic extensions.[254] In a study of the use of development agreements in California, 25 percent of development agreements had terms of over fifteen years, almost 50 percent had terms over ten years, and an additional 15 percent had no explicit duration.[255] These long durations can seriously constrain a community's ability to engage in adaptive planning for properties subject to such agreements.

Development and annexation agreements may not only freeze land use regulations applicable to specific properties, but also force local governments to place the interests of real estate developers above those of other affected parties. For example, a development agreement may require a local government to cooperate with a developer in the event another affected party sues to challenge project approval.[256] Similarly, a development agreement may require the local government to cooperate with the developer in securing all future discretionary permits;[257] some have argued that such agreements should even *obligate* the local government to approve subsequent discretionary applications.[258]

These features of development agreements underscore not only the broad *initial* flexibility these agreements afford local

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254. *See* BLAESSER, *supra* note 21, at 218 (stating that "[t]he developer should negotiate a provision that allows for extensions, including 'automatic' extensions of the time period").

255. *See* Cowart, *supra* note 96, at 29.

256. *See* WILLIAMS & TAYLOR, *supra* note 87, § 154A.06, at 184; CALLIES ET AL., *supra* note 94, at 246; Daniel J. Curtin, Jr., *Legal Aspects of Development Agreements in General and the California Experience in Particular*, *in* HANDLING LAND USE AND ENVIRONMENTAL PROBLEMS OF REAL ESTATE, 367 PLI/REAL ESTATE LAW AND PRACTICE COURSE HANDBOOK, 551, 594 (1991). One commentator, in reviewing the results of a California study on the use of development agreements, noted:

> As one might expect, one common motivation for employing development agreements is a desire to insulate a development decision from later review, opposition, or revocation by citizens . . . . The permanence of the agreements, however, creates a powerful temptation to local government officials to preempt known opposition from citizens by adopting a development agreement.

Cowart, *supra* note 96, at 36.

257. *See* WILLIAMS & TAYLOR, *supra* note 87, § 154A.06, at 180; Callies & Tappendorf II, *supra* note 132, at 377; CALLIES ET AL., *supra* note 94, at 253; Curtin, *supra* note 256, 593-94.

258. *See* Coomes, *supra* note 159, at 145. For example, in the entertainment center hypothetical, the developer may not be ready to submit plans to the city for billboard approvals at the time it seeks agreement approval. If the development agreement includes a provision requiring subsequent city approval of future discretionary permits, the city may be left with no discretion to deny any subsequent billboard permit submitted by the development, despite the fact that the permit would be entirely discretionary in the absence of an agreement.

governments and developers prior to project approval, but also the constraints such agreements impose on local governments' planning discretion after project approval. While local government commitments to work in good faith with developers are not inherently problematic, they may hinder long-term, participatory, and flexible planning to the extent that they exclude other interested parties and limit a local government's ability to modify agreements to serve evolving community needs.

Because of the constraints they impose on adaptive land use planning, development agreement regimes place "a premium on an agency being able at the outset to identify all of the issues presented by a project."[259] However, the lesson of traditional land use planning is that rigid prospective rules are inevitably hampered by informational limitations and the inability to perfectly anticipate future circumstances. Development agreements may have a localized calcifying effect not unlike that of the traditional, rigid comprehensive plans, and may be even more likely than their historical antecedents to enshrine mistakes and abuses of power.[260] Even agreements that conform to localities' comprehensive plans or long-term planning when adopted may have long-term vesting effects that eventually inhibit or paralyze a community's ability to implement adaptive planning.[261] These local vesting effects, especially for particularly large or prominent development sites, may hamper general planning and ultimately render comprehensive plans irrelevant.

1. *Inadequate accountability for agreement and project amendments.*

A development or annexation agreement may limit community participation and undermine comprehensive planning not only at its adoption, as discussed in Parts IV.A.1. and IV.E., above, but also throughout its life. Some development agreements allow

259. INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 21.

260. *See* Cowart, *supra* note 96, at 37.

261. *See id.*

> A development agreement can limit the public agency's ability to respond to a changing regulatory environment, precisely because it locks in the regulatory requirements in effect at the time the agreement is approved. If the agency's planning regulations are in need of review or updating, the agency may be subject to criticism if the conditions imposed by the agreement do not sufficiently protect the community's interests.

INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 20-21.

developers to unilaterally transfer or convert densities or land uses within the development without formally amending the agreement.[262] Such agreements provide the developer considerable flexibility to alter the project subsequent to adoption without any involvement by the *local government*, let alone other affected individuals.

Moreover, while most DAAs and AAAs expressly allow for amendment or cancellation of agreements by mutual consent of the developer and local government, few explicitly require public input into, or even public notification of, proposed amendments.[263] Hawaii's DAA does not require a public hearing unless the modification of the agreement would "substantially alter the original development agreement,"[264] and South Carolina's statute only requires a hearing when the amendment is a "major modification of the agreement."[265] Even in these two states, local governments and developers may make what the developer and local government officials deem to be "minor" alterations to the agreement without any notice to or participation by other parties potentially affected by such a change.[266] Other state authorizing statutes entirely fail to address development agreement amendments.[267]

As written, these statutes effectively cede control over the amendment process—and hence the discretion to involve or exclude other affected parties—to local governments and developers.[268] Nevertheless, some commentators have suggested

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262. *See* Coomes, *supra* note 159, at 146. For example, a development agreement might allow a developer to, at its own option, convert an office use into a nightclub or restaurant use, perhaps subject to a number of operational conditions.

263. *E.g.*, CAL. GOV'T CODE § 65868 (West, WESTLAW through 2004); 65 ILL. COMP. STAT. ANN. 5/11-15.1-3 (West, WESTLAW through 2004); LA. REV. STAT. ANN. § 33:4780.30 (West, WESTLAW through 2004); NEV. REV. STAT. ANN. § 278.0205 (West, WESTLAW through 2003); OR. REV. STAT. §§ 94.508(2)-.522 (West, WESTLAW through 2003).

264. HAW. REV. STAT. ANN. § 46-130 (West, WESTLAW through 2003).

265. S.C. CODE ANN. § 6-31-60(B) (West, WESTLAW through 2003).

266. *Cf.* Rosenthal, *supra* note 130, at 53 (detailing county's extensive negotiations over development agreement amendment with developer exacting added benefits beyond those provided in original agreement).

267. *E.g.*, COLO. REV. STAT. ANN. § 24-68-104(2) (West, WESTLAW through 2004); MINN. STAT. Ann. § 462.358(3c) (West, WESTLAW through 2004); *see also* APA MODEL CODE, *supra* note 95, § 8-701, at 8-195 to -198.

268. Even in states requiring agreement amendments to be adopted only by public hearing, courts make exceptions. *E.g.*, French v. Vill. of Lincolnshire, 335 N.E.2d 29 (Ill. App. Ct. 1975) (allowing village to extend developer's time of performance under agreement without notice or hearing).

that negotiated regulatory approvals should be structured to *further* limit the already minimal public input in the agreement modification process, arguing that providing for public input "can be time-consuming and costly for both sides."[269] Such restructurings would almost certainly further isolate affected community members and hamper the participatory planning processes that are central to the legitimacy of modern land use planning.

In addition to virtually eliminating the procedural check of public participation on agreement amendments, some DAAs and AAAs do not require that such amendments be consistent with the comprehensive plan or zoning code. Even states that require initial development agreements to be consistent with the local government's comprehensive plan are silent on whether modifications to these agreements must also be consistent.[270] Thus, even if the original negotiated approval is consistent with the locality's vision for future land use and development, the parties to the agreement retain broad discretion to make subsequent modifications that may be entirely inconsistent with the locality's long-term, evolving comprehensive plan.

2. *Unreliable and exclusionary compliance review.*

Many enabling acts do not require municipalities to monitor

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269. BLAESSER, *supra* note 21, at 219. One commentator recommends allowing local governments to approve even *major* project changes without any additional public hearing. *See* CALLIES ET AL., *supra* note 94, at 272 (providing in a sample annexation agreement that a public hearing is not required for minor adjustments to a project plan, and that a public hearing shall be held only at the city's election for major changes). Another recommends that the negotiated approval use a very broad definition of "minor" changes (including up to 10% increases in height or floor area ratios, or 10% decreases in open space) and then classify all "minor" changes as exempt from public review. BLAESSER, *supra* note 21, at 178-79, 219-20. *See also id.* at 177-78 (detailing provisions often included in local PUD ordinances that allow staff to approve "minor" amendments to PUDs without any public involvement); WILLIAMS & TAYLOR, *supra* note 87, § 154A.06, at 171-72 (including provision in a sample development agreement that public notice or involvement is not required for certain amendments); Curtin, *supra* note 256, at 592-93 (same); CALLIES ET AL., *supra* note 94, at 245, 247 (providing in a sample agreement that public hearing and formal agreement amendment are not required for certain changes to the agreement).

270. *E.g.*, ARIZ. REV. STAT. ANN. §§ 9-500.05(C), 11-1101(D) (West, WESTLAW through 2004); FLA. STAT. ANN. § 163.3237 (West, WESTLAW through 2004). *But see* CAL. GOV'T CODE §§ 65868, 65867.5(b) (West, WESTLAW through 2004) (requiring amendments to be consistent with the comprehensive plan); MD. CODE ANN. art. 66B, § 13.01(h) (West, WESTLAW through 2004); NEV. REV. STAT. ANN. § 278.0205 (West, WESTLAW through 2003); OR. REV. STAT. § 94.508(2) (West, WESTLAW through 2003).

executed development agreements—removing a critical feedback mechanism for ensuring both compliance with agreement provisions and an adaptive and participatory land use planning process. Some DAAs and AAAs do mandate periodic local government review of agreements and provide for termination or modification where a government determines a developer has not complied with an agreement in good faith.[271] However, there is evidence that many local governments fail to implement these procedures.[272] In fact, some city attorneys recommend that local government not incorporate explicit periodic review requirements into agreements as a "contractual obligation" because "they may be setting the agency up for a failure to perform."[273] Worse, a number of other states do not require periodic compliance review at all,[274] allowing developers to enjoy regulatory certainty without concomitant accountability.

Not only may enforcement be limited or nonexistent, but also other potentially affected individuals may be shut out during this lengthy implementation stage, which could include both construction and project operation. Only Florida requires any entity other than the local government (specifically the state planning agency) to oversee compliance with development agreements.[275] In other states requiring compliance review, local

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271. Some of the DAAs set a minimum term for such periodic review. *E.g.*, CAL. GOV'T CODE § 65865.1 (West, WESTLAW through 2004) (at least every 12 months); FLA. STAT. ANN. § 163.3235 (West, WESTLAW through 2004) (same); LA. REV. STAT. ANN. § 33:4780.23 (West, WESTLAW through 2004) (same); NEV. REV. STAT. ANN. § 278.0205(1) (West, WESTLAW through 2003) (at least every 24 months); S.C. CODE ANN. § 6-31-90 (West, WESTLAW through 2003) (at least every 12 months). Others let the parties determine how often the review should occur. *E.g.*, HAW. REV. STAT. ANN. §§ 46-123(3), 46-125 (West, WESTLAW through 2003); OR. REV. STAT. § 94.504(2)(g) (West, WESTLAW through 2003). The APA's model code addresses compliance only by requiring that land development regulations be reviewed every five years. APA MODEL CODE, *supra* note 95, § 7-406, at 7-232 to -235.

272. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 111, at 57 n.102 (manual for local governments implementing development agreements, stating that "[a] number of agencies admit to having neglected annual reviews").

273. *Id.* at 55.

274. *E.g.*, ARIZ. REV. STAT. ANN. §§ 9-500.05, 11-1101 (West, WESTLAW through 2004); COLO. REV. STAT. ANN. § 24-68-104 (West, WESTLAW through 2004); IDAHO CODE § 67-6511A (West, WESTLAW through 2004); MD. CODE ANN. art. 66B, § 13.01 (West, WESTLAW through 2004); N.J. STAT. ANN. § 40:55D-45.2(l) (West, WESTLAW through 2004); WASH. REV. CODE ANN. §§ 36.70B.170-210 (West, WESTLAW through 2004); 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West, WESTLAW through 2004).

275. FLA. STAT. ANN. § 163.3235 (West, WESTLAW through 2004) (requiring local government to prepare a monitoring report and submit such report to the state land

planning staff are often solely responsible for monitoring.[276] Most DAAs do not expressly give any affected party the opportunity or responsibility for regular monitoring and oversight. These omissions are particularly alarming given how expensive and time-consuming the monitoring and enforcement of development and annexation agreements can be for local governments,[277] especially those with small planning departments. This approach overburdens local government planning staff and undervalues the capacity of nongovernmental groups to participate in implementation and enforcement.

In addition, many DAAs and AAAs are either silent regarding who may enforce agreements[278] or only allow enforcement by agreement parties.[279] Adversely affected nonparties may be able to sue to compel local government to enforce agreements, but lawsuits are costly and incorporate stringent evidentiary requirements.[280] Perhaps more importantly, without access to the compliance review process, an affected third party may lack the information necessary even to identify noncompliance that impairs its interest. When affected third parties are excluded from agreement implementation and enforcement, comprehensive planning is undermined and valuable opportunities for more adaptive, inclusive approaches to negotiated land use regulation are regrettably overlooked.

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planning agency at least every twelve months).

276. *See, e.g.*, League of California Cities, *supra* note 102, at 92 (stating that periodic review may "be conducted by the planning commission or by city staff").

277. *See* Rosenthal, *supra* note 130, at 54-55.

278. *E.g.*, ARIZ. REV. STAT. ANN. §§ 9-500.05, 11-1101 (West, WESTLAW through 2004); COLO. REV. STAT. ANN. § 24-68-104 (West, WESTLAW through 2004); IDAHO CODE § 67-6511A (West, WESTLAW through 2004); N.J. STAT. ANN. § 40:55D-45.2(l) (West, WESTLAW through 2004); VA. CODE ANN. § 15.2-2303.1 (West, WESTLAW through 2004).

279. *E.g.*, CAL. GOV'T CODE § 65865.4 (West, WESTLAW through 2004); HAW. REV. STAT. ANN. § 46-127(a) (West, WESTLAW through 2003); 65 ILL. COMP. STAT. 5/11-15.1-4 (West, WESTLAW through 2004); LA. REV. STAT. ANN. § 33:4780.26 (West, WESTLAW through 2004); MD. ANN. CODE art. 66B, § 13.01(l) (West, WESTLAW through 2004); OR. REV. STAT. § 94.522(2) (West, WESTLAW through 2003); WASH. REV. CODE § 36.70B.180 (West, WESTLAW through 2004); *see also* APA MODEL CODE, *supra* note 95, § 8-701(5)(a), (6)(d)-(e), at 8-197 (identifying only the governmental parties and landowner/developer as potential enforcers of development agreements). Florida specifically allows the state land planning agency to enforce the development agreement terms or challenge agreement compliance. FLA. STAT. ANN. § 163.3235 (West, WESTLAW through 2004).

280. *See generally* JUERGENSMEYER & ROBERTS, *supra* note 11, at 244-51 (summarizing legal remedies for challenging land use approvals and standing requirements, including those for neighbors and extraterritorial parties).

V. CONCLUSION

A. *Improving Land Use Regulation—Beyond Judicial Review*

Flexible, bilaterally negotiated approaches are now pervasive in American land use regulation. Unfortunately, such approaches tend to make land use decisionmaking more opaque and less inclusive, to the detriment of deliberative democracy, substantive and procedural fairness, efficiency, and coherent long-term land use planning. As negotiated approaches have come to dominate the local land use regulatory landscape, the legitimacy of local land-use decisions, and indeed of the local regulatory process itself, has substantially eroded. Expanded judicial oversight of the development approval process is perhaps the most commonly proffered means of restoring this legitimacy.[281] As detailed below, although courts may certainly help restrain particularly egregious local government decisions, increasing the scope of judicial review cannot be relied upon to either legitimize or in any sense improve the quality of local negotiated land use approvals.

Site-specific negotiated zoning approvals, because they are implemented through amendments to local zoning ordinances, have typically enjoyed the same deferential review standard applied to those ordinances and other citywide legislation. The traditional basis for such deference is the ostensibly superior ability of local legislative processes to gauge and express the public interest.[282] Although this justification may be credible when the decision being made is generally applicable, it is not easily extended to zoning amendments or planning approvals that affect only discrete projects. Nonetheless, in most jurisdictions, this deferential standard still applies to even those negotiated zoning approvals and development agreements that pertain only to single properties.[283]

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281. *See* Rose I, *supra* note 3, at 844.

282. "The act of legislating necessarily entails political trading, compromise, and ad hoc decisionmaking which, in the aggregate, produce policies that at least approximate a fair and equitable distribution of social resources and obligations." Rogin v. Bensalem Township, 616 F.2d 680, 693 (3d Cir. 1980).

283. *See* MANDELKER I, *supra* note 26, at 2-50, 6-83; JUERGENSMEYER & ROBERTS, *supra* note 11, at 188. The federal courts also treat rezonings as legislative. *See Rogin*, 616 F.2d at 692-94; *see also* MANDELKER I, *supra* note 26, at 2-49 to 2-50.

Even before the advent of development agreements, courts typically gave local governments and developers substantial latitude to bargain. *See* Rose I, *supra* note 3, at 879-81. This deference, combined with the ambiguity and malleability of many comprehensive land use plans, makes it relatively easy for local governments to comply

A few jurisdictions have rejected traditional deferential review of bilateral negotiated land use approvals due to concerns about unfettered discretion and the potential for unfair dealing in project-specific decisions.[284] These jurisdictions have taken the view that local governmental councils are more akin to administrative agencies acting in a quasi-judicial capacity.[285] Under this alternative view, negotiated alterations of the zoning scheme are not adoptions of the types of broad policies characteristic of legislative acts, but rather applications of the comprehensive plan's broad policy standards to specific properties.[286] Some judicial decisions, starting with the seminal case of *Fasano v. County Board of Commissioners*,[287] have endorsed the quasi-judicial view of negotiated agreements and accordingly increased judicial scrutiny of such local government approvals.[288]

Only a few jurisdictions have followed *Fasano* in adopting the quasi-judicial standard, tasking the judiciary with a more searching review that requires substantial evidence to support the local government's decision.[289] It is important to note, however, that review of negotiated agreements under the quasi-judicial standard remains relatively deferential to local governments; any decision supported by "substantial evidence" will be upheld, even where "substantial evidence" would also support the contrary

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with plan consistency requirements. Takings law may constrain governments' discretion at the margins, but it typically provides only a limited backstop for the most egregious local government incursions on private property rights. *See id.*

284. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 189-92; BLAESSER, *supra* note 21, at xv.

285. For definition of quasi-judicial, *see* note 141.

286. *See* Rose I, *supra* note 3, at 851-53.

287. Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973).

288. Rose I, *supra* note 3, at 851-52. The courts also require the approving local legislative body to apply a number of court-like procedural requirements to the land use approval process. As one commentator explains:

> [I]t should act as an impartial tribunal and receive no ex parte contacts; it should allow the interested parties to present and rebut evidence; it should make decisions on a record, together with appropriate findings; judicial review of its decisions should be stricter than the traditional loose review for mere legislative arbitrariness, and should instead require substantial evidence to support the decision, with the burden on the local government to show plan conformity.

Id. at 852.

289. In comparison, one set of commentators has likened quasi-legislative review of local approvals as looking "for any conceivable reason to uphold a legislative act." JUERGENSMEYER & ROBERTS, *supra* note 11, at 259.

conclusion.[290] This nonetheless more invasive review relies on the fundamental assumption that the judiciary itself is proficient at determining the appropriate aggregation, accommodation and resolution of the various subjective and competing interests implicated in particular land use regulatory disputes.

However, the legitimacy, and ultimately the workability, of categorizing local negotiated land use approvals as quasi-judicial decisions is fundamentally suspect. In administrative law, the basis for categorizing certain decisions as quasi-judicial rests on the presence of preexisting standards, procedural rules that guide discussion and decisions in furtherance of those standards, and the decisionmaker's technical expertise.[291] Negotiated approvals ratified by local legislative bodies fail to satisfy the first and last of these standards. Local legislative bodies lack any discernible claim to expertise in land use regulation,[292] and are constrained only (if at all) by broad comprehensive plans more designed to promote flexibility than to maintain strict standards.[293] The characterization of these approvals as quasi-judicial is particularly problematic for mechanisms such as development agreements that may simultaneously create wholesale exceptions to existing land use rules and escape constitutional takings limitations.

Moreover, courts are poorly positioned to assess the subjective, competing values of the comprehensive plan, determine whether negotiated agreements are congruent with the plan, or appropriately reconcile the various subjective interests implicated in particular land use decisions.[294] The courts' ineffectiveness is

290. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 257-59; MANDELKER I, *supra* note 26, at 6-59.

291. *See* Rose I, *supra* note 3, at 868.

292. *See id.* at 868-70.

293. *See id.* at 879-81. Under this approach, all land use decisions, no matter how general, could be rendered quasi-judicial. By treating the comprehensive plan as the general standard, any land use approval could be characterized as quasi-judicial because each regulatory approval would have to be evaluated against the plan's general policy standards. *See id.* at 873.

294. *See* Dana, *supra* note 174, at 1268-69 ("The courts . . . arguably stand at greater remove from the community than local officials or regulators and hence may be less well-equipped to understand, for example, the magnitude of the loss in community welfare that would result from an increase in traffic congestion.").

As one court recently stated regarding project consistency with a general plan:

> [T]he body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and

especially pronounced when the initial local government regulatory process essentially excludes a number of the affected parties from the negotiating process. These difficulties, and a reluctance to engage in time-consuming review of local governmental decisions,[295] have led most courts to maintain the quasi-legislative approach in spite of that standard's questionable legitimacy.[296]

In any event, under either the quasi-judicial or quasi-legislative standard of review, courts can generally be expected to defer to local governments' negotiated land use determinations, and to thus provide at best a limited backstop for negotiated land use decisions. Particularly when there are few statutory limitations on the substance of negotiated regulatory approvals, as is the case for annexation and development agreements, courts have only a narrow basis for second-guessing local governments' decisions to approve agreements. Even on the rare occasions when excluded third parties successfully invalidate negotiated approvals, courts typically just remand the invalidated agreements back to the local government.[297] Courts almost never seek to impose specific outcomes such as a restructured deal that they view as more efficient or appropriate for the affected parties; the agreement is merely sent back to the developer and local government officials to bilaterally negotiate again.

In short, because the design of existing negotiated regulatory processes itself is flawed, we cannot rely solely on the *courts* to legitimize negotiated land use decisions. If the ultimate goal is to improve the efficiency, inclusivity and robustness of local land use decisionmaking, it is the decisionmaking process *itself*, rather than the judicial review of that process, that must be altered.

B. *Toward a New Model of Negotiated Land Use Regulation*

This first installment has demonstrated that the simplistic and

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> balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. A reviewing court's role "is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies."

Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors, 104 Cal. Rptr. 2d 326, 357 (Cal. Ct. App. 2001) (citations omitted).

295. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 192 (citing Arnel Development Co. v. City of Costa Mesa, 620 P.2d 565 (Cal. 1980)).

296. *See* MANDELKER I, *supra* note 26, at 2-50, 6-28, 6-83; JUERGENSMEYER & ROBERTS, *supra* note 11, at 192.

297. *See* JUERGENSMEYER & ROBERTS, *supra* note 11, at 260.

rigid command and control regulatory model, with its unwarranted reliance on expertise and rigid prospective rules, is no more a viable approach today than it was at the advent of modern land use regulation. Negotiated land use regulation, with its inherent adaptability, can be used to promote more deliberative, balanced, and efficient land use decisions. However, for the myriad reasons identified here, the true promise of the negotiated model is far from being realized. In its current incarnation, the negotiated model is actually more likely to suppress the goals of inclusive democratic decisionmaking, adaptable land use planning, and efficient land use decisions than it is to promote them.

The second installment of this Article, to be published in summer 2005, will propose a more nuanced, collaborative model that addresses the legitimacy concerns of negotiated land use regulation. The collaborative model seeks to cultivate negotiation processes that are open and oriented toward problem-solving as well as to foster agreements that provide both adaptability and accountability to those parties that local land use decisions affect. A fundamental premise of the collaborative model is that participatory processes not only provide a crucial check on the corruption and favoritism associated with many local land use decisions, but also serve as a valuable conduit for information about the entire array of parties and interests affected by any given project. The model challenges the traditional premise that negotiated land use regulation simply cannot be reconciled with democratic principles and planning goals, and argues that the negotiated model can in fact be adapted to promote these goals. Done right, negotiated approaches to land use regulation can continue to promote flexibility and efficiency without sacrificing equity, deliberative democratic values or comprehensive long-term planning.