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THE CITY AS ENTREPRENEUR: FISCAL WISDOM OR REGULATORY FOLLY?

Richard F. Babcock*

The City necessarily played two distinct roles in this transaction. Here, the sale of a real property interest and receipt of proceeds therefor by the City was an act in its proprietary capacity. However, the review of the special permit application and grant of a zoning bonus in return for subway improvements was a separate regulatory, or "governmental," action by the City. This dual function, ignored by the Court below, both explains and justifies the structure of the contract.¹

I. INTRODUCTION

In 1843, the commonwealth of Pennsylvania auctioned off \$1,319,730.65 of property, stocks, and bonds it held in private enterprise. In doing so, "[t]otal municipal and county investments between 1840 and 1853 were estimated at fourteen million dollars—over twice the state investment at its 1843 peak."² Prior to 1860 public investment in private enterprise was pervasive. However, after the Civil War, financial crises, poor public judgment, and a growing sense that public corporations had no place being involved in private enterprise led to a divorce of public entities from private business. This change in attitude, in the last half of the nineteenth century, is exemplified by the court developed doctrine of separating private and public corporations, each with its own responsibilities,

© 1989 by Urban Land Institute, Washington, D.C. (This article is part of a chapter in a forthcoming book that the Urban Land Institute will publish in 1990. This book will focus on public/private deal-making and the entrepreneurial cities.) The author was unable to provide Santa Clara Law Review with verifiable page and/or column numbers, authors' names, or article titles for various publications cited in this Article. Thus, the citations for these publications will contain the name and date of the respective publication, and any other information available at the time of publication.

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1. Appellate Brief for the City of New York City, at 38, *Municipal Art Soc'y v. City of New York*, 522 N.Y.S.2d 800 (1987).

2. L. HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA 1776-1860*, 88 (1948).

and the express prohibitions found in many state constitutions forbidding public investments in private enterprises.³

For more than one hundred years, between 1860 and 1970, municipalities played the expected role of providing fire and police protection, and offering sewer and water service. During this time, the power of municipalities grew in the public sphere. This expansion of power along with pressure to have some method of municipal regulation, caused by the invention of steel-structured buildings and elevators, led to the concept of zoning.⁴ Further, municipal regulations in the form of health and building codes were spawned by the horror of immigrant tenements and catastrophes, such as the 1911 Triangle Shirt Waste Company fire in New York City, while the complexities of land sales produced subdivision regulations.

Yet there was a rub. As municipalities assumed greater responsibilities with the encouragement of the federal government, and poly-ethnic coalitions faded away in place such as Newark, Memphis, Kansas City, New York City, and Chicago, and the federal largesse dried up, the growing middle class received the benefits of tax restrictions such as Proposition 13 in California⁵ and Proposition 2-½ in Massachusetts.⁶ These cuts in tax revenues led cities into a financial crisis.

The cities, however, were not without their resources, namely, the development community. As a result, cities created new terms such as "impact fees," "linkage," and "exactions."⁷ These practices were far from old under-the-table corruption tactics (although some bitter commentators, here and in England, chose to label them "legalized extortion") and they did produce results.⁸ For example, the developer who had to obtain a subdivision approval or a rezoning was told that if he wanted his permits, something was expected from him. With increasing frequency, that something was infrastructure off-site or a cash contribution for low-cost housing. This practice be-

3. See *infra* note 91 and accompanying text.

4. Both of these technological developments led to "high-rise" buildings and caused loss of sunlight and increased traffic. This led to pressure to have some method of municipal regulation. Hence, zoning in New York in 1916. S. TOLL, *ZONED AMERICA* ch. 2 (1969).

5. CAL. CONST. art. XIII A, §§ 1-6. (Proposition 13 was an initiative measure approved by the voters on June 6, 1978.).

6. *Codified as amended* in MASS. GEN. LAWS ANN. ch. 59, § 21C (1988). (Proposition 2-½ was enacted on November 4, 1980 by the voters through the initiative process.).

7. Babcock, *Exactions: A Controversial New Source for Municipal Funds*, 50 *LAW & CONTEMP. PROBS.* (R. Babcock, Special ed. 1987); *DEVELOPMENT EXACTIONS* (J. Frank & R. Rhodes, eds., 1987).

8. Babcock, *supra* note 7, at 2. Sir Desmond Heap, England's pre-eminent land use lawyer, describes the same problem in Great Britain. *Id.* at 32.

came ubiquitous, and although the United States Supreme Court may have placed some uncertain limits on this custom,⁹ there are few developers today who want to risk the money and time to challenge these demands in court. The difficulty with this approach is that it involved confrontation between the public and private sector. Furthermore, it did not confront the formidable and seemingly insurmountable problem faced by many cities of how to revitalize central business districts which were in danger of total collapse.

This Article is the story of a renaissance of an old pattern, where the city joins with a private developer in ventures to become a partner who shares the risks in such an endeavor. Part II considers this trend toward municipal entrepreneurship. Part III describes this phenomenon, exploring in some detail four examples: Albuquerque, New Mexico; Richmond, Virginia; San Diego, California; and New York, New York. These examples raise questions about the potential for conflict of interest on the part of the city, about the city's qualifications to make good deals, and about the opposition such activities may raise. Part IV looks back two centuries to note the similarities and differences between then and today. Finally, Part V concludes with observations regarding what law, if any, may affect the outcome of this adventure in municipal entrepreneurship.

II. BACKGROUND

American cities, large and small, are fast becoming entrepreneurs. Public and private deals are spreading from the West (California) through the Midwest (Indianapolis and Cincinnati) to the East. In many of these deals, it is the undeveloped land cities hold title to that motivates the municipality. Looking back on the bleak experience of urban renewal, the municipality may believe it can do better by leasing instead of selling its surplus land. The motives may be jobs, redevelopment of downtown, or just an opportunity for profit.

Nell Surber, Director of the Department of Economic Development in Cincinnati, stated the problem bluntly:

Throughout the United States, cities are facing tough realities of financing services and economic development necessary for a better quality of life. Older, less prosperous cities in the American northeast and midwest are particularly hard pressed in a time of decreasing revenues and budget deficits—Cincinnati is no exception. Under such difficult circumstances, cities seeking

9. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

to revitalize their urban cores through new development often have no choice but to share in the financial risk that the private sector is unwilling or unable to shoulder alone. In Cincinnati, innovative financing mechanisms between the city and private developers have created a public/private partnership in which each party shares in risk, and the success, of a project.¹⁰

Cincinnati made a deal with Saks Fifth Avenue and Hyatt Regency. The agreement involved land in the central business district that the city had acquired in 1967, but which had remained undeveloped. Cincinnati contracted to construct much of the infrastructure, with Hyatt agreeing to build a 500-room hotel and Saks a 75,000 square foot store. The city loaned the developers state and federal funds principally from Urban Development Action Grants (UDAG), a frequent source of monies for these projects. Among other repayments the developers would make to the city, Hyatt agreed to pay the city ten percent of its "net cash flow" within sixteen months of the beginning of operations and continuing for the sixty-five year lease. Surber reported that among other benefits, the city would obtain "[t]ax base, loan repayment and profit-sharing cash benefits in excess of \$56 million over the first 30 years."¹¹

In Fairfield, California, a city of 73,000 located between San Francisco and Sacramento, another joint public/private deal between a city and a developer emerged. Gale Wilson, the City Manager, was approached by Ernest W. Hahn, Inc., to build a small shopping center. Wilson countered with the suggestion that Hahn build a regional mall. Lawrence Fisher of the *New York Times* detailed the story:

The city bought the land for \$1.25 a square foot and sold it to Hahn for \$2.25—a quick \$1 million profit. *In return, the city expedited zoning variances and building permits.*

Fairfield negotiated the deal to get increased revenue in property and sales taxes. But after Proposition 13 was passed in 1978, the city worked out a new deal with Hahn to compensate for the revenue cut. Under that arrangement, Fairfield will receive in perpetuity 10 percent to 17 percent of net cash flow after expenses from the merchants in the 1-million-square-foot mall. Despite initial reservations, the company says it has had no problem with the arrangement and has made similar deals

10. Speech given at the Urban Land Institute Seminar in St. Louis (Apr. 18, 1988). Oddly, when an interview was requested with Ms. Surber, she responded on June 17, 1988, "I have come to the conclusion that it would be a mistake for us to be involved."

11. *Id.*

since then.¹²

In California, "participating leases" are very popular. Allan Kotin, an economic consultant near Los Angeles, consulted with Los Angeles on the lease of Bunker Hill, city-owned land, and with San Diego County on seventeen acres of county-owned land. He explained:

In a participating lease . . . a minimum land rent is agreed to by the city or county and the developer, who pays a land rent based either on that minimum or some percentage of his sales or profits, whichever is higher. CRA in Bunker Hill, for example, arranged a profit participation lease, while the County of San Diego chose a gross participation lease (6 percent of all sales). 'The principle is the same: The more money the developer makes, the higher the rent. The rent goes up in proportion.'

For San Diego County, [my company] figures that 'the base rent' on the parcel (about 10 acres) would be the equivalent of property taxes on something in excess of half a billion dollars, in terms of the money that the county would actually receive. By the end of 20 years, the county will realize \$18 to \$10 million a year in rent.

Developers can also expect a more cooperative environment when a government agency is their partner. . . . Regulatory processing, zoning and public reaction are wrinkles that can be ironed out more smoothly when an agency is a developer's mate.¹³

Examples of this new look by cities could go on. Some persons and organizations have hailed them as the wave of the future. Indeed, Partners for Livable Places, a non-profit coalition in Washington, D.C., published a book, *The Return of the Livable City*, and a pamphlet, *The Entrepreneurial American City*, which acclaimed the success of joint public/private ventures:

The history of cities in the United States is entering a new era of public entrepreneurship. . . . This profound change in the way cities operate may best be termed 'urban entrepreneurship.' Cities are acting as risk-takers and active competitors in the urban economic game, and the key to each city's success is its ability to invest wisely and to market shrewdly. Urban entrepreneurship entails a new breed of municipal official, transcending

12. Fisher, *Government as Entrepreneur*, Sacramento Bee, Apr. 20, 1987, at D1, col. 1 (emphasis added).

13. L.A. News West, Oct. 27, 1982 (emphasis added).

the traditional local government roles of delivering services and enforcing regulations. The city entrepreneurial role includes characteristics traditionally viewed as distinctive to the private sector, such as risk-taking, inventiveness, self-reliance, profit motivation, and promotion. The bottom line for the public balance sheet is the enhanced competitiveness of the city, which is critical to urban rebuilding and economic revitalization.¹⁴

The Urban Land Institute, in its 1987 book, *Cities Reborn*, stated:

The public/private relationships formed within four cities to implement revitalization provide invaluable lessons to those cities and developers embarking on redevelopment projects. Bridging the gap left by dwindling federal funds, local public and private sectors teamed up to invest their own resources in revitalizing their cities. By doing so, each sector benefited.¹⁵

Not unexpectedly, this late twentieth century phenomenon is not without its embarrassments and its critics. In 1987, the Sacramento city employees pension fund loaned a developer \$2.45 million to buy 14 acres on which to build a shopping center. The catch was that the pension fund was not accountable to the Sacramento City Council. The developer had to come before the council to obtain the rezoning necessary for his mall. When he did, he encountered substantial resistance. The mayor claimed the loan raised ethical questions. One councilman said: "I'd feel a lot better if this were not a pending rezoning. Has the city prejudged its position because it's already made an investment? At least it raises the question."¹⁶ The story went on:

Opponents claim the store would clog streets, increase noise and hurt existing businesses. They call the retirement system's loan a conflict of interest.

'Probably nothing illegal has been done, but it puts a lot of pressure on the Planning Commission and the council to look at it more as a money issue than a land-use issue—and that's wrong,' said Ed a leader of neighborhood opposition.¹⁷

In an editorial, the *Sacramento Bee* on December 21, 1987, stated:

The controversy over City Hall wheeling and dealing on behalf

14. DUCKWORTH, SIMONS AND McNULTY, *THE ENTREPRENEURIAL AMERICAN CITY*, at 4-5 (1986).

15. *CITIES REBORN 2* (R. Levitt ed. 1987).

16. *Sacramento Bee*, Dec. 12, 1987, at B1, col. 4.

17. *Id.*

of a proposed Price Club discount warehouse ought to raise more than a few eyebrows on the City Council. It raises as well some serious questions both about the judgment of City Manager Walter Slipe and the integrity of the City Employees Retirement System. . . . The retirement system needs to be completely insulated from the rest of city government to ensure that local officials can't steer loans to whatever they think looks like a great deal for the city. Whether or not Price Club ever opens up along Mack Road, the City Council needs to take steps to protect the administration of the retirement system by removing the city officials who currently sit on its governing board and turning the fund over to professional money managers. In trying to serve both good city planning and the city pension fund, City Hall serves neither.

At the other end of the nation, a furor was raised in July, 1987, in Fairfax, Virginia, on a land swap between the county and a private developer. *The Washington Post* described the deal as follows:

Under the proposal, the Charles E. Smith Cos.—the Artery Organization Partnership would build an \$83.4 million government center on 100 acres near I-66 and Rte. 50 in exchange for 116 acres of adjoining land, \$24.6 million in cash and \$16.6 million in other forms of compensation. The entire government center complex is 216 acres, 183 acres of which the county bought for \$4.1 million in 1979. The 116 acres involved in land swap has been valued at \$42 million.¹⁸

The conflict arose because the county was accused of selling the land at too low a price in order to get its new building. Critics said it should have held on to the land (which rose substantially in value after the trade) and sold bonds to finance the government center.¹⁹ In August, 1987, the County Board of Supervisors voted 8-1 to approve the deal.²⁰

III. APPLICATION

Let us now look at four examples of public/private ventures in more detail. Perhaps they will tell us more of the "down side" of these efforts.

One important fact must be noted before examining these four examples. These cases are not typical. They are, however, significant

18. *Washington Post*, July 28, 1987, at B8, col. 1.

19. *Id.*

20. Cook, *Center of Attention*, *Great Falls/McLean Gazette*, Aug. 5, 1987.

for the shadow they cast. In June, 1988, the Urban Land Institute conducted a poll on joint public/private ventures. Approximately forty replies were received. While almost all respondents said they were involved in such programs, only three cities indicated that there had been any evident conflict of interest. A few significant facts emerged. Most projects involved UDAG grants which not only provided for a repayment of the federal grant but also stated that the city was to receive a share of the cash flow or a percentage of the profits and, in perhaps a dozen cases, it was necessary to obtain rezoning or variances.

It is not surprising that there was little evidence of conflict of interest. These joint ventures are relatively recent. They have occurred within the last ten years which have been relatively healthy economic times. Also, because they are so recent, it is too early for serious problems to have developed. In the 1920's, no one challenged the financial institutions' investment policies. Instead, it took the Great Depression to raise the fiduciary responsibilities of the moneyholders.²¹ Because so many of these ventures involved UDAG funds, the continued availability of these monies is crucial to their survival. Unfortunately, the continued survival of UDAG is in trouble in Washington.²²

One final note: many of these joint public/private ventures involved hotels. One might say the hotel is the equivalent of the early nineteenth century railroad or canal. It is appropriate to begin with a discussion of the most shocking and unsubtle case and then move to more sophisticated arrangements.

A. *Richmond, Virginia*

On February 13, 1982, Henry L. Marsh III, Mayor of Richmond, Virginia, and Gary Wilson, Marriott Hotel Executive Vice President, Finance, announced that the city and the hotel chain reached an agreement for the hotel chain to build a hotel and expand the convention center bounded by Fifth, Sixth, Broad, and Clay Streets. The hotel would be 14 stories with 400 rooms. According to George Little, attorney for the Richmond Redevelopment and Housing Authority: "The deal calls for the city, through the Richmond Redevelopment and Housing Authority, to loan Marriott \$24 mil-

21. See, e.g., *St. Augustine Paint Co. v. McNair*, 59 F.2d 755 (D.C. Fla. 1932); *Byrd v. Ross*, 58 F.2d 377 (D.C. Fla. 1932).

22. UDAG has been excised from the budget although there are still dollars from earlier appropriations in the pipeline.

lion, \$18 million for the convention center and \$6 million for the exhibition hall. Marriott will borrow the remaining \$20 million from Richmond banks.²³

The terms of the housing authority loans to Marriott included forty years duration at eight percent interest:

And when the loans are paid off the city will retain a 40 percent interest in proceeds from the convention center and exhibition hall.

The housing authority will retain ownership of the land it has bought and cleared for Project One at a cost of \$13 million. The two square blocks of the hotel-convention center will be leased to Marriott on a 49-year agreement with annual payments tied to Marriott's profits. The first payment be \$50,000 and the rest no less than that.²⁴

Apparently, the concept for this "Project One" had been simmering for nearly two decades. A report by the Richmond Planning Director, in December 1981, summarized the history:

Over two decades of planning and implementation actions have led to the identification of Project One as the single-most critical development opportunity in the City of Richmond.

The genesis of Project One goes back 20 years. Indeed, it is difficult to review the many planning studies written since 1960 and not read about the need to revitalize our downtown area.

Since 1977, there have been a variety of actions revolving around Project One: unsuccessful lawsuits challenging the validity of Project One; changes of developers; building demolition, etc., but the underlying tenet is unchanged. Our downtown needs a public/private mixed-use development. Our City needs Project One.²⁵

The Project One scheme was not without its detractors: four of the nine council members opposed the deal. Back in 1981, the council majority passed a resolution and Ordinance 81-200 requiring the city planning director to approve plans of development for all city construction. The plans were to be approved only if they were consistent with the Project One redevelopment plan and if approval "[would] not delay or impede" Project One's objectives.²⁶ The ordi-

23. Richmond Times Dispatch, Feb. 13, 1982.

24. *Id.*

25. Exhibit FF to Complaint, Hilton Assoc. v. City of Richmond, 532 F.2d 1298 (1987).

26. Richmond Times Dispatch, Nov. 10, 1981.

nance was written in general terms, but few were misled. It was directed to one perceived threat to the Project: a proposed 350-room Hilton Hotel only a few blocks away.

An interoffice memorandum of June 30, 1981, by Tom Van Housen, a city official, noted:

When [George] Little [attorney for the Housing Authority] arrived, we advised him of Hilton, and he advised us the City would block it since they obviously needed waivers, variances, building permits, etc. George said there was 'no way' anyone was going to interfere with Project One. George made a number of calls to Richmond, and by day's end learned the project was go, and that plans had been in the City for some time, and that City approvals would not be required.²⁷

On July 17, 1981, Mayor Marsh wrote to James Bristow, principal in the Hilton project, to express his concerns about the effect the Hilton project would have on Project One.

I understand from our City Manager that you are considering plans to construct a hotel in the City. For reasons which I am sure you will understand, I think it is important that the City of Richmond examine this proposal with some care in light of the fact that it may adversely affect a vitally important effort of the City.

As you know, for many years the City has been engaged in the Project One development program. We are convinced that this project is vital to the development of the downtown area of Richmond and will have important benefits for its residents and businesses. Substantial city efforts and tax dollars have been devoted to this project and its success has the very highest priority for the City government.

Accordingly, I am concerned about the possible adverse impact that your proposed plans would have on the viability of Project One. Because of my responsibility for the welfare of the City of Richmond, I am reviewing all of the possible options that are available to the City.²⁸

The battle continued. Hilton needed to buy a small parcel of land from the Richmond Redevelopment and Housing Authority. The city took the position that it held a reversionary interest in the parcel which the Authority denied. The city sued and lost.²⁹ Hilton then

27. Exhibit C, *Hilton Complaint*, *supra* note 25.

28. Exhibit D, *Hilton Complaint*, *supra* note 25.

29. Richmond Times Dispatch, Oct. 21, 1981.

filed a \$250 million anti-trust lawsuit against the city and the council members who had voted for Ordinance 81-200. Squabbles over whether one law firm could represent both the city and the individual council members took place in and out of court. In a separate court action, the mayor was ordered not to vote on any issue involving Hilton or Project One.³⁰

The resistance to Project One surfaced in an editorial on May 26, 1982, in the *Richmond News Leader*:

The posture of Mayor Marsh and his lock-stepping majority might be defensible if Richmond had a surplus of first-class hotels. It might be defensible if the city wanted to discourage tourism and conventions. It might be defensible in the wake of public clamor that such a hotel not be built. But there is no such surplus, no such discouragement, and no such clamor.

Why, then, the opposition? Is it, as Bristow writes, 'for unknown reasons'? Perhaps, but we think not. We think the reasons are known very well by the Mayor. In our opinion they boil down—bluntly—to this:

Project One has been transformed. No longer is it perceived as the salvation of the city's central core. Rather, it is perceived by the Mayor and by the Mayor's supporters and by the Mayor's paper-working sidekick—lawyer George Little—as a monument to the greater glory of Henry Marsh. When you're in the glory business, you want no competition. Hence, you want no competition to the Project One Marriott; you particularly do not want competition in the form of a Hilton down the street. So you do everything you can to fight the Hilton and tie it up until the subsidized Marriott can progress to the point that the Hilton's exasperated backers will conclude it's no use fighting city hall—and pull out.

In 1983, Marsh was defeated for re-election as mayor, and a new council entered office on a platform which included settling the Hilton suit. On March 28, the *Richmond Times-Dispatch* reported that the city had spent almost \$900,000 on legal fees in the Hilton battle and the case had not yet gone to trial:

The city should try to cut its losses before they become astronomical. It should seek a compromise that would terminate this no-win suit in exchange for the city's dropping its barriers to private development of a first-class hotel in the Main-to-the-James area. Henceforth, the city should make it plain that it

30. *Richmond Times Dispatch*, Mar. 23, 1982.

will let the market decide how much business of any kind can be supported rather than attempting to dictate those economic decisions to the market.

In late May, 1983, a settlement was reached with Hilton. The city agreed to pay \$7 million to Hilton in cash and to make low-interest loans for future development in the city. In return, the developers agreed to postpone any start on construction of a downtown hotel until January, 1985, unless the city agreed otherwise.³¹

On June 2, the *Times-Dispatch* editorialized:

Mayor Roy A. West inherited the mess left by the Marsh regime's unwise attempt to protect the Project One Marriott Hotel from the competition of other first-class downtown lodgings. He and Vice Mayor Andrew J. Gillespie III, with a helping hand from U.S. District Judge Robert R. Merhige Jr. and from plaintiffs willing to compromise, deserve credit for negotiating a way out of the legal morass. Dr. West pledges next to seek repeal of Ordinance 81-200, that stinker Mr. Marsh and his allies put on the books to shield Project One from competition. By all means, let us bury that misbegotten law and never let it rise again in this city that was built, and is being rebuilt, basically by free enterprise.

The results, five years later, have a strange twist. The Hilton was never built, but a Ramada Renaissance was erected in its place. Project One with its headstart was completed and is apparently doing very well. Furthermore, there has been a tremendous increase in the number of hotels in Richmond: Omni Hotels constructed a hotel, and the former Hotel Jefferson has been renovated and is now the Jefferson-Sheraton. There is a Raddison and a Berkley Suite Hotel. No one knows whether this resurgence has permitted the city to recoup its losses in the original fight. Nor can anyone venture a guess whether the Hilton suit would have been brought in 1985, after the Local Government Antitrust Act became law and exempted cities from treble damage lawsuits.³²

B. *Albuquerque, New Mexico*

UDAG grants have figured prominently in many of these public/private ventures. For example, the city of Albuquerque entered into an agreement with Albuquerque Plaza Partners (Partners), whereby Partners would construct a hotel in part with UDAG funds

31. The Richmond News Leader, June 1, 1983, at 8, col. 1.

32. Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (Supp. 1986).

provided by the city. The city agreed to spend an additional \$3 million on infrastructure and other improvements. Partners also agreed to choose a hotel operator.³³ This agreement was challenged, however, by Hotels of Distinction West, Inc., which had an arrangement with Hilton Hotels.³⁴

Hotels of Distinction filed suit alleging that the channeling of the UDAG funds through the city to Partners violated article IX, section 14, of the New Mexico Constitution. This particular clause, known as the antidonation clause, prohibited local governments from lending or donating funds to private enterprises.³⁵ The delay caused by the lawsuit created bitter tensions between Hilton, Partners, and the city, and would cost the city convention business. Hilton felt a city should not be involved in a private venture. Tilden Drinkard, the Hilton's manager, complained, "The city is going into a partnership with Beta West to build a hotel which will compete with every other hotel and motel in town."³⁶

The trial court entered summary judgment in December, 1987, for the city and the Hilton enterprise appealed. When the New Mexico Supreme Court expedited the hearing, Drinkard remarked, "We're a little pessimistic about the court's action. I hope there's not any political railroading going on."³⁷ In July, 1988, the New Mexico Supreme Court affirmed the trial court's decision and held that the antidonation clause of the state constitution was not violated. Chief Justice Scarborough for a unanimous court ruled:

[C]ontracts between municipalities and private enterprises that are beneficial to the community as a whole are not violative of article IX, section 14, when they do not involve municipal investment in the project through the lending of municipal funds.

...

This project is funded with ten million dollars in federal funds, approximately eighty-two million dollars in private funds and real estate, and three million dollars in public improvements to be constructed by the City. With regard to the federal contribution, Hotels argues that the City's channeling of federal funds to the project violates the antidonation clause. We do not agree. The antidonation clause prohibits the City to lend or

33. Albuquerque Journal, Mar. 17, 1988.

34. Albuquerque Journal, Apr. 26, 1988, at A-1.

35. Such provisions became very common in the second half of the nineteenth century and, generally, are still in effect.

36. Albuquerque Journal, Mar. 22, 1988.

37. *Id.*

pledge general municipal funds. Here, the City of Albuquerque is to receive ten million federal dollars for the express purpose of contracting for urban development in Albuquerque. The channeling of federal funds through the City does not violate the antidonation clause. Until the contractor commences repayment, those moneys do not become City funds. The trial court was correct in granting summary judgment on this issue for the City.

The UDAG agreement provides that all federal money channeled through the City to the Partners shall be repaid to the City. The agreement between the City and the Partners allows the Partners to use the federal grant money without interest with no obligation to repay for six years.³⁸

C. *San Diego, California*³⁹

San Diego seems to have more than its share of nationally-renowned disputes.⁴⁰ In some of these disputes, if not all, San Diego has been victorious. Horton Plaza may be one of these successes.

San Diego grew up in the age of the automobile, air conditioning, and the incursion of thousands of immigrants from the midwest to California. Most of the explosion in growth, however, has been in the suburban areas. At one time, it was hard to find downtown; retail was in the country and not in the central business district. The business that did exist involved mostly sailors on leave. Furthermore, government buildings were almost cheek by jowl with the red light district.⁴¹

Back in 1871, Alonzo Horton bought 960 acres in what is now "downtown" San Diego and gave the city a block of land for use as a public park. One hundred years later, according to one report, "Alonzo Horton's gift to the city became a gathering place for carousing drunks."⁴² By 1972, a movement was underway to bring shopping back to the downtown area. The city council created Cen-

38. *Hotels of Distinction West, Inc. v. City of Albuquerque*, 107 N.M. 257, 259, 755 P.2d 595, 597 (1988) (citations omitted).

39. Most of what follows is taken from a case study by Professors Bernard J. Frieden and Lynne B. Sagalyn for Massachusetts Institute of Technology, Center for Real Estate Development, entitled "Horton Plaza, San Diego: A Case Study of Public-Private Development," December, 1985.

40. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

41. The Urban Land Institute, Project Reference File, Vol. 16, No. 19 (Oct.-Dec. 1986).

42. *Id.* at 1.

tre City Development Corporation (CCDC) to act as negotiator between the city and developers. The city focused on one 11.5 acre site between Broadway and G Street, north and south, and Fourth and Union, east and west. This became known as Horton Plaza, and the international developer, The Hahn Company, was selected as the developer.

The years that followed can only be described as a latter day Perils of Pauline. One of the most severe blows to the city was Proposition 13. This proposition severely reduced the city's ability to secure its share of the funding. Consequently, Hahn agreed to assume a larger share. However, other problems soon arose. Preservationists constantly squabbled with the city over old theaters which they believed should be restored. At least two council members firmly believed that no public funds should go into what they regarded as a private, entrepreneurial venture. Opponents organized a referendum that killed a proposed convention center. As such, owners of businesses in the nearby Gaslamp Quarter—a sort of small Vieux Carre—were fearful that the project would dim their hopes of revitalizing their area.

Eleven years after the first agreement was signed with Hahn, after frequent revisions, after a miscellany of lawsuits, and after repeated threats by both sides to quit the whole deal, the Horton Plaza was opened in August, 1985. The deal was structured as follows:⁴³

43. *Id.* at 3.

PROJECT DATA				
Land Use Information:				
Site Area: 11.5 acres				
Gross Building Area (GBA): 1,161,000 square feet				
Gross Leasable Area (GLA): 885,000 square feet				
Floor Area Ratio (FAR): ² 2.32				
Parking:				
Total Spaces: 2350 (structured)				
Spaces for Handicapped: 18				
Compact Car Spaces: 470				
Parking Index: 2.66 spaces per 1,000 square feet of GLA				
Land Use Plan:				
	Acres	Percent of Site		
Retail	5.5	48		
Parking Structure ³	3.0	26		
Common Area	2.5	22		
Office/Retail Pads ⁴	.45	4		
Total	11.45	100		
Economic Information:				
Site Acquisition Costs:				
The Hahn Company		\$ 1,000,000		
CCDC ⁵		24,209,000		
Total		\$25,209,000		
Site Improvement Costs:				
The Hahn Company:				
Excavation/Grading		\$ 960,000		
Parking Structure		17,700,000		
CCDC:				
Public Improvements ⁶		7,625,000		
Total		\$26,285,000		
Tenant Information:				
Classification	Square Feet of GLA	Percent of GLA	Number of Stores	Percent of Total Tenants
Department Stores	482,000 ¹¹	54.5	4	2.9
Women's Apparel	36,624	4.1	15	10.7
Men's Apparel	10,161	1.1	4	2.9
Family Apparel	17,634	2.0	10	7.1
Specialty Apparel	14,358	1.6	12	8.6
Shoes	17,334	2.0	13	9.3
Jewelry	11,065	1.3	6	4.3
Cards and Gifts	14,910	1.7	9	6.4
Home Furnishings	30,414	3.4	9	6.4
Home Entertainment	7,995	0.9	3	2.1
Health and Beauty	5,166	0.6	4	2.9
Specialty Stores	44,859	5.1	19	13.6
Fast Food	11,961	1.4	15	10.7
Restaurants	20,848	2.4	4	2.9
Packaged Food	27,501	3.1	4	2.9
Gourmet Market	25,000	2.8	1	.7
Entertainment	65,000 ¹²	7.3	3	2.1
Other (nonretail)	15,683	1.8	5	3.6
Vacant	26,587	3.0	-	-
Total	885,000	100.0	140	100.0
Notes:				
¹ Includes 368,000 square feet divided among three department stores that own their buildings: Robinson's, 135,000 square feet; Mervyn's, 88,000 square feet; and Nordstrom, 145,000 square feet.				
² FAR equals GBA divided by site area.				
³ Plans call for the construction of 300,000 square feet of office space atop the parking structure.				
⁴ To be constructed.				
⁵ Includes land cost, soft costs, relocation funds, and site preparation.				
⁶ Includes infrastructure and Horton Plaza Park improvements.				
⁷ Costs to The Hahn Company only; does not include \$40 million costs to three department store owners.				
Construction Costs:				
Superstructure		\$30,600,000		
HVAC/Electrical/Plumbing/Elevators		54,400,000		
Total ⁷		\$85,000,000		
Amenities Costs:				
The Hahn Company:				
Replication of Facades/Public Art		\$1,000,000		
Lyceum Theater Shell		1,000,000		
CCDC:				
Lyceum Theater Interior		7,451,000		
Total		\$9,451,000		
Total Hard Costs: \$145,945,000				
Total Soft Costs⁸: \$11,100,000				
Public Financing:				
Tax Allocation Bonds ⁹		\$21,379,000		
Site Disposition		1,000,000		
Project Revenue ¹⁰		6,513,000		
City Loans		10,393,000		
Total		\$39,285,000		
Private Financing:				
The Hahn Company:				
Permanent		\$ 85,000,000		
Equity		15,000,000		
Department Store Owners		40,000,000		
Total		\$140,000,000		
Rents per square foot: \$22 (average)				
Sales per square foot: \$225 (1986)				
Lease Provisions:				
Lease terms range between five and 15 years; are triple net; and are based on the greater of a minimum rent between \$15 and \$65 per square foot (rents of stores facing the mall are higher than those facing the street) against a percentage of sales.				

The person responsible for negotiating the public sector through all this turmoil was Gerald Trimble, executive director of CCDC and the highest paid official in San Diego. He was the sort of person needed to lead a municipality through these new ventures with the private market. According to Dean Dunphy, Chairman of the CCDC Board:

If you're going to avoid the ruffling of feathers, you're not going to get things done. Aggression is, in fact, a required characteristic of his [Trimble's] job. The role that he is performing is one of real estate developer, and that is an occupation not normally

found in city government. He's playing the private sector guy with all the public power.⁴⁴

Hahn displayed a conviction that this development would be his monument: "This damn place [Horton Plaza] should have as little resemblance to a typical shopping center as possible. I don't want to see a bench, a tree grate, a handrail or anything else that has ever been used before. I want it utterly unique!"⁴⁵ He kept the design of the plaza free from public veto, and he did not follow the pattern of his earlier suburban malls. He also managed to bring in "four major department stores, three theaters, and many restaurants and night clubs to a city that had only one remaining department store downtown and no significant new retail development south of Broadway in forty years"⁴⁶ and all this without the use of federal funds.

Sam Hall, urban design critic for the *Los Angeles Times*, described it as: "a multilevel, multicolored, multiangled, open-air maze of steps, ramps, passageways, terraces, arcades and courts serving a variety of stores, eateries and theaters . . . a refreshing departure from the usual hermetically sealed, climate-controlled, predictable, homogenized shopping malls that have marked suburbia mauled downtowns over the last few decades."⁴⁷

The venture was very good for San Diego:

[T]he city will participate in three sources of revenue that are tied to the performance of the project: 31 percent of the parking receipts, ten percent of the overage [sic] rents of the mall tenants, and ten percent of the gross rental income from office development in phase two. CCDC also maintains an interest analogous to that of a general partner with regard to Horton Plaza's operations.⁴⁸

There apparently was no hard evidence that the "skids were greased" insofar as local regulations were concerned although one redevelopment official who worked with Trimble on another municipal agency said: "In my opinion, he has little regard for what is right or wrong as far as regulations are concerned. He will stretch them right to the limit of what he can get away with."⁴⁹

What about threats from proposed developments potentially competitive with Horton Plaza? William Fulton, a freelance writer

44. Frieden & Sagalyn, *supra* note 39, at 79.

45. Frieden & Sagalyn, *supra* note 39, at 147.

46. Frieden & Sagalyn, *supra* note 39, at 146.

47. Frieden & Sagalyn, *supra* note 39, at vii.

48. Frieden & Sagalyn, *supra* note 39, at 146-47.

49. Frieden & Sagalyn, *supra* note 39, at 79.

in the Los Angeles area, in an article in the *Los Angeles Times*, made the following report:

An ambitious participation-lease project in San Diego, for example, recently fell victim to the political process.

San Diego County had planned to develop about 10 acres of prime harbor-front property surrounding its County Administrative Center and had petitioned the Legislature for immunity from city redevelopment control to do so. According to Lucy Frank of the county's chief administrative office, the county selected a developer—Harbor Square Associates—to construct a 400-room hotel, a 300,000-square foot World Trade Center and restaurants and retail shops. The county expected \$4 million a year in profits. However, the city Planning Commission rejected the project and an appeal to the City Council was never voted on.

County officials suspect city leaders were worried that the project would compete with the city's own redevelopment showpiece, Horton Plaza, scheduled to open August 9. In March, the developer stopped paying the \$25,000-a-month option to the county, and in June, Board of Supervisors killed the deal.⁵⁰

D. *New York, New York*

This conflict over disposition of the Coliseum site in Central Park involves a major dispute between the city of New York and a group, led by the Municipal Art Society (the Society), whom Mayor Koch labeled "the parasol set" for the 500 umbrellas they used in Central Park in October, 1987, to demonstrate the shadow that would be cast by the proposed building. While this case differs from the others discussed herein, in that the city did not have an ongoing financial interest in the deal, it does raise troublesome questions about a city's responsibilities and its obligations to its citizens.

The Coliseum, 3.5 acres on Columbus Circle at the southwest corner of Central Park, was acquired by the city and the Metropolitan Transport Authority, in 1953, for \$2.1 million. It was located on the west side of Columbus Circle just north of 59th Street near the southwest entrance to Central Park.

When the Javits Convention Center was built in New York City, it became apparent that the Coliseum was obsolete. Therefore,

50. L.A. Times, July 14, 1985, at 8.

in 1982, the Koch administration decided to dispose of it. The city issued a Request for Proposal (RFP). The principal criteria were, to put it mildly, blunt:

The criteria for selection of the winning proposal will include: (i) the amount of the purchase price offered, which will be the primary consideration; (ii) the economic viability of the proposal. . . ; and (iii) the overall benefit of the proposal to the City. . . . The Sponsor intends to sell the site to the applicant whose proposal most successfully meets the Sponsor's goals, *particularly the goal of realizing the highest financial return from the sale.*⁵¹

The RFP also required the responder to apply for a bonus of twenty percent of the "floor area ratio" by agreeing to spend money to refurbish and connect with the IRT, a subway station at Columbus Circle.

When the bids came in, the most attractive bid (although not the highest) came from Boston Properties. It was for \$455 million. Boston Properties joined with Salomon Brothers who was to be the principal tenant.⁵²

When the city announced the deal in February, 1987, a most unusual provision of the agreement was disclosed. Boston Properties would apply to the City Planning Commission and the Board of Estimate for the bonus (and agree to spend \$40 million on subway improvements), but if the developer did not get the bonus, New York City would give back \$57 million! When Boston Properties applied, however, it got its bonus. To illustrate how this deal was "greased," when it came to a vote at the Board of Estimate, it was 10-1 in favor of the proposal. The lone dissenter was David Dinkins, the president of the Borough of Manhattan. "Dinkins was the only member of the Board of Estimate to deem the issue important enough to appear in person. All the others [members of Board of Estimate] sent surrogates to occupy their chairs, by that act affirming that the conclusion, as the cliché goes, was foregone."⁵³

When the design concept was disclosed, the reaction was one of outrage. The design included: twin towers of 68 and 58 stories, 2.3

51. See HARV. J. OF PUB. POL'Y, at 35 (Summer-Fall 1986) (emphasis added).

52. The principal owner of Boston Properties was Mortimer Zuckerman, a real estate developer from Boston who has not been without controversy. For instance, he had a major battle in Boston when he proposed a Park Plaza next to Boston Common. In August, 1987, he received approval to build an office park near Walden Pond in Concord, Massachusetts, which had local preservationists in an uproar. See N.Y. Observer, Sept., 28, 1987.

53. Schanberg, *Editorial*, Newsday, Feb. 2, 1987.

million square feet of floor area, 350 luxury condominiums at the top, enough office space for 8,000 or more workers, a 5-story indoor retail mall, and 10 movie theaters. As Sydney Schanberg, a columnist for *Newsday*, reported on February 2, 1987: "Just the bonus floor space alone—450,000 square feet—is two-thirds the size of the largest building in the Columbus Circle vicinity, the 43-story Gulf and Western Building."

The three community boards in the area formed a coalition to oppose the design concept. Paul Goldberger, architecture critic for the *New York Times*, repeatedly criticized the appearance and bulk. He wrote:

Boston Properties went to Moshe Safdie, the architect best known for Habitat, the boxy, 20-year-old apartment complex in Montreal. He produced a hulking pair of towers, one 68 stories, the other 58 stories, a design that turned the situation from vulgar to pathetic. Mr. Safdie's building is slice-and-dice architecture. The design would have a series of slanted roofs which would meld into a gangling composition of anxious angles, inappropriate for the corner of Central park not only in size, but also in form, mass and detail. So not only had the city decided to sell off a corner of the park for cash; it had not even cared enough to guarantee good architecture in the bargain. It is the city that is the real villain of this tale, for the same indifference to any deeper values on the part of the city government that led to its failure to set strong design guidelines for Columbus Center was evident in the project's very conception.

There was a complete confusion of roles at Columbus Center, a confusion that is really rather horrifying in its implications. Real estate developers are not supposed to be the guardians of the public trust; they are supposed to make money. The city government, through its zoning power, is supposed to act as a check on the zeal of the private sector, as a protector of the public interest. When Boston Properties bid \$455.1 million for the Coliseum site, it was simply doing what it was supposed to do, and was playing by the rules. It was the city that had set those rules, and turned the development process into something resembling a land rush. Had the city decided, instead, that a smaller building would be in the public interest, and set a ceiling on bids and established meaningful design guidelines, would have been altogether different.⁵⁴

Kent Barwick, president of the Municipal Art Society, said:

54. N.Y. Times, Oct. 18, 1987.

"I'm not nominating Mort [Zuckerman] for man of the year, but at least he's a developer who is behaving like a developer. . . . Our complaint is that the city is a government that's behaving like a developer."⁵⁵

With a flair reminiscent of its performance at the time of the battle over saving Grand Central,⁵⁶ the Municipal Art Society assembled several prominent figures to speak out and protest against the proposal. Even Zuckerman acknowledged the problem: "No developer wants to go up against the likes of Jackie Onassis, Paul Newman, and Norman Lear. No matter what the facts are, a developer will never be perceived as a victim or a sympathetic figure."⁵⁷ The Society added Henry Kissinger and Bill Moyers (who testified before the Board of Estimate) as vocal protestors.⁵⁸ On Sunday, October 18, 1987, in a display redolent of its Preservation Whistle Stop Train to Washington two days prior to the oral arguments before the U.S. Supreme Court in the Grand Central case, the Society brought out more than 800 people to Central Park to form a line from Columbus Circle to Fifth Avenue. When a signal was given at 1:30 P.M., the protestors opened their umbrellas to demonstrate the shadow the building would cause.

The Society did even more. Joined by the Metropolitan Chapter of the American Planning Association and the New York Parks Council, it filed suit against the city of New York, the Board of Estimate of the city of New York, Edward Koch, individually and as mayor of the city of New York, the City Planning Commission of the city of New York, the Metropolitan Transportation Authority, and the Triborough Bridge and Tunnel Authority. The plaintiffs sought to annul the actions of respondents authorizing the sale. They pointed out, as had appeared in local press, that the proceeds from the sale already had been included in its 1988 budget. The city and the Metropolitan Transportation Authority agreed to split the money from the sale evenly. "Abraham Biderman, the chief advisor to Koch on the huge real estate transaction, said the deal had been revised so that the city will get all the money up front, then float bonds to pay the [Metropolitan Transportation Authority]."⁵⁹

More importantly, the plaintiffs' first charge was that the "bid requirements amounted to a sale of a zoning bonus." Because this

55. N.Y. Times, Oct. 11, 1987.

56. See, R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 65-70 (1985).

57. N.Y. Times, Oct. 11, 1987.

58. *The Livable City*, at 6 (Municipal Art Society, June, 1987).

59. Schanberg, *Editorial*, *Newsday*, Dec. 9, 1987, at 31.

was New York City (where an environmental impact statement is required by state law), they also charged that there was not an adequate environmental analysis on traffic, light, and pollution.

On December 7, 1987, Judge Edward H. Lehner handed down his opinion:

Although the transaction may well have been structured to paint a different picture, the clear fact of the matter is that in return for the grant by the [City Planning Commission] of the twenty percent floor area ratio bonus, the City is obtaining not only \$35 to \$40 million of local subway improvements, but an additional \$57 million in cash to be employed for other purposes. This is not contemplated by the Zoning Resolution.

Zoning is a " 'vital tool for maintaining a civilized form of existence' for the benefit and welfare of an entire community," . . . and is 'designed to preserve the character of zoned areas from encroachments of uses which devalue living conditions,' . . . with its goal being 'to provide for the development of a balanced, cohesive community which will make efficient use of a town's available land.'

When disposing of its property, government, of course, has an obligation to maximize the revenue it receives, consistent with its governmental responsibilities. Increasing the bulk of a project imposes a certain burden on the local community. The Zoning Resolution provides a means by which, in return for the imposition of that burden, a benefit is granted to the community.

Here, the major portion of the benefit which the purchaser is willing to pay for the right to construct a building of greater density than is permitted 'as of right' is to be paid to the City to be employed for purposes other than local improvements. A proper *quid pro quo* for the grant of the right to increase the bulk of a building may not be the payment of additional cash into the City's coffers for citywide use.

Although the members of the [City Planning Commission] may well in good faith have approved the full 20% [Floor Area Ratio] bonus as a fair incentive for the developer agreeing to make \$35 to \$40 million of subway station improvements, the developer and the City officials who approved the contract obviously recognized that this bonus was worth a great deal more. However, government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items.

Although the court today is ruling that the City is prohibited from making what, in effect, is a "cash sale" of a zoning bonus, it should be noted that even without a higher sales price, construction of a larger building will, over the years, result in increased revenues to the City. Undoubtedly, such a building will receive a higher assessed valuation, with consequently greater annual payments of real estate taxes, and will presumably also generate additional income tax payments from the owner.

In conclusion, the court finds that the contract with the developer provides for an illegal payment. Consequently, the approvals thereof by the City and [Triborough Bridge and Tunnel Authority] are null and void.⁶⁰

The Society was jubilant, while Koch was apoplectic. After suggesting that the people who opposed the venture probably never rode the subway, Koch barked: "There will be fewer policemen, fewer sanitation workers, fewer teachers and substantially fewer dollars for transit. Thousands of municipal jobs [will] be at risk."⁶¹

What would the city do? What would Zuckerman do? These were tough questions. Salomon Brothers had withdrawn from this venture after the crash in October, 1987. Zuckerman agreed to scale down the project by sixteen percent and give back the bonus. The city proposed that Zuckerman receive a reduction of up to \$75 million on his purchase price and freed him from his \$40 million obligation to improve the subway at Columbus Circle. In addition, the new deal gave Zuckerman \$50 million in tax concessions and \$15 million relief on interest payments.⁶² Fourteen other developers submitted bids and wanted the city to reopen all the bids, but according to the city, this would result in too much of a delay.⁶³ The *New York Times* architecture critic, Paul Goldberger, suggested the whole smear should go back to square one:

So there is now proposed for Columbus Circle a smaller building and a better piece of architecture. A perfect solution to an anguished problem, then? Not so quick. The building is indeed somewhat smaller, and Mr. Childs has indeed replaced Mr. Safdie's cool abstraction with a sensitive piece of urbanism, but the architectural improvements here are not the point. What we

60. *Municipal Art Soc'y v. City of New York*, 137 Misc. 2d 832, 834-35, 522 N.Y.S. 800, 803-04 (S. Ct. 1987) (citations omitted) (emphasis in original).

61. Schanberg, *supra* note 59.

62. Schanberg, *supra* note 59.

63. Schanberg, *supra* note 59.

now have at Columbus Circle is exactly the right answer— but to the wrong question. Mr. Childs has done a splendid job at designing a smaller version of the building that was there before—a huge skyscraper, not necessarily higher than it should be but far bulkier. He has done exactly what he was asked to do, and done it well—but no one went back to square one and questioned the fundamental aspects of this vast project's program.

To understand why this is a problem, it is worth going back a bit into this project's history, and also saying something about the problems of zoning in New York City right now.

There is a quirk of the city's zoning law that is crucial here. Bulk of buildings is determined for zoning purposes by a measure called floor-area ratio, or F.A.R., which is the relationship between a building's total floor space and the size of its site. The current design has a smaller ratio than the Safdie design—meaning relatively less floor space. But there is a catch. Because the Coliseum site is an immense "superblock," covering two full city blocks and the street area in between, the floor-area ratio on this site allows for a building that is much bigger and bulkier than a building on a normal plot.

This situation reminds us that the authors of the city's zoning ordinances did not consider superblocks, which drastically affect the kind of buildings that these ratios permit. If the new Columbus Circle building were to be built under a ratio formula that would exclude the street area of the superblock complex, thereby narrowing the site floor, there would be a noticeable drop in floor space and thereby in the bulk of the structure.

And such a reduction would be far more appropriate for a building on this huge and unusual site. . . .⁶⁴

In July, 1988, the city insisted it would appeal Judge Lehner's decision. The president of the Municipal Art Society, Kent Barwick, however, scoffed at this and said a Notice of Appeal (filed by the city) was just a "publicity ploy." Nonetheless, in August of 1988, the city filed a brief on appeal. At the beginning of its brief, the city frankly stated its reasons for pursuing the case: "[T]he extraordinary result below touches on an issue of vital public importance. Unless it is reversed, it is likely to thwart or cast doubt on the legality of similar future transactions in property owned by any governmental en-

64. Schanberg, *supra* note 59.

tity in the State of New York." The city had a problem with this appeal: mootness. After all, Salomon was gone and the design was changed. What was there to appeal?

Zuckerman apparently was prepared to try a third time. The architects went back to their drawing boards. They came to the city with the following proposal: two 59-story towers with 2.1 million square feet (700,000 square feet less than in the original); the height was 752 feet (the original was 925); the price was \$337 million (the original price was \$455 million); and the developer agreed to provide 4,000 square feet for public use on the third floor. In addition, Zuckerman agreed to provide over 100 single-room occupancy units within the neighborhood. No longer providing \$40 million for subway improvements, the parties agreed to split \$12 million in subway improvements.

Of course, briefs had been filed in the appeal of the original decision, but the community boards, the Municipal Art Society, and others involved approved of the new plan. On May 4, 1989, the Board of Estimates also gave its approval to the proposal.

E. Observations

Were all of these deals lawful? If lawful, were they right and equitable? What is a city's duty? Is a city in a fiduciary position with its constituents? If so, is a city's duty to realize the best financial return, or does it have a more vague and intangible obligation that involves such ineffable values as traffic congestion, air, viable open space, or quality of life?

Further, does a court exceed its judicial responsibility when, in the absence of fraud or illegality, it declares an action by a city's legislature and plan commission illegal? New York state does not have a doctrine of "appearance of fairness" like that which exists in Washington state.⁶⁵ In *Conduit and Foundation Corp. v. Metropolitan Transportation Authority*,⁶⁶ the Metropolitan Transportation Authority threw out all bids for improvements to the subways and called for new bids. After the first bids were received, the Metropolitan Transportation Authority talked with each bidder separately. The plaintiff alleged this was improper and illegal. The court rejected this argument and said: "Only upon a showing of actual impropriety or unfair dealing—i.e., 'favoritism, improvidence, extravagance, fraud and corruption' . . . can the decision to reject all bids

65. *Swift v. Island County*, 87 Wash. 2d 348, 552 P.2d 175 (1976).

66. 66 N.Y.2d 144, 485 N.E.2d 1005, 495 N.Y.S.2d 340 (1985).

and readvertise for a second round of bidding be deemed unlawful"⁶⁷ These issues will be explored in the final section.

IV. HISTORICAL PERSPECTIVE

Both Justices Burger and Rehnquist, in recent court decisions, appear somewhat taken aback by cities that act as business enterprises. In his concurring opinion in *City of Lafayette v. Louisiana Power & Light Co.*,⁶⁸ Justice Burger observed: "This case turns, or ought to, on the District Court's explicit conclusion, unchallenged here, that '[t]hese plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized.'"⁶⁹ And in his dissent in *Community Communications Co. v. City of Boulder*,⁷⁰ Justice Rehnquist said, "[T]he Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business."⁷¹ Had the Court examined the early history of some cities in this country, they would not have displayed such surprise.

This historical note may or may not give reassurance to those advocates of public/private joint ventures. The early history can give them confidence that the current practice is not new in this country. The later part of the story may alert them to danger signals.

A. *New York City*

Before the Revolution, New York City had a charter that gave it remarkable freedom to act as an entrepreneur. Professor Hendrik Hartog in his book, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, described the Montgomerie Charter as follows:

Toward the end of the document, the drafters made a general confirmation of all of the property rights previously granted to the corporation with a covenant of quiet enjoyment. That confirmation encompassed not just the real estate of the corporation, including the ferries, ferriage, dockage, crantage, wharfage, and other profits to be gained from the newly granted waterlots, the market houses, and the other public buildings of the city; it also included, among the properties to which the corporation now had title, the 'Jurisdictions court powers Offices Authori-

67. *Id.* at 148, 485 N.E.2d at 1009, 495 N.Y.S. at 344 (citations omitted).

68. 435 U.S. 389 (1977).

69. *Id.* at 418 (Burger, J., concurring).

70. 455 U.S. 40 (1982).

71. *Id.* at 60.

ties fines Americaments perquisites fees' also granted in the charter. All of what seemed to be governmental attributes of the charter in fact were confirmed as private property of the corporation.⁷²

There was, from 1730 through 1835, no such thing as a distinction between "public" and "private" corporations, and municipal law when used meant "domestic" law.⁷³

In 1730, the estate of the city of New York,

included all of the 'waste and common' lands of Manhattan Island, the land lying under water surrounding the settled city up to four hundred feet beyond low-water mark, much of the shoreline of what is now Brooklyn, and the ferry franchise between the city and Long Island. All of this property, and more, the city owned in fee simple without restrictions on use or fiduciary obligations to any public beneficiary.

Questions of 'public,' noncommercial regulation were raised no more frequently before the Common Council than were questions of commercial regulation. In both 1737 and in 1767 the minutes of the council record only nine entries even arguably concerned with health and safety.

It is clear that by 1730 the corporation of the city of New York could not be defined as the embodiment of a commercial community. Neither was it a public welfare agency on the order of a nineteenth-century municipal corporation. What, then, was its proper business? How may its concerns be described?

From the perspective of the citizens of the city who petitioned the corporation the answer was unmistakable. The proper business of the corporation was the management, and disposal of the real estate it owned.⁷⁴

The major source of revenue for the city was the disposition of waterfront lots. The city did not build streets; the buyers of the lots did. The city did not worry about drainage, the disposition of water, or the construction of docks; covenants in the deeds to the lots placed this burden on the grantees. Indeed, the system resembled what in modern times have come to be known as exactions or impact fees:

Along with their lots and their potential profits, grantees accepted a set of restrictive covenants that ran with the land and

72. H. HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730-1870*, 18 (1983) (footnotes omitted).

73. *But see* Williams, Book Review, 64 *TEX. L. REV.* 225, 230-42 (1985).

74. H. HARTOG, *supra* note 72, at 33, 40.

determined the precise ways in which the real estate would be developed. Satisfying the terms of these covenants was the major consideration paid by grantees. Almost uniformly the city required grantees to build two streets or wharves, one at either end of the length of their lots and each parallel to the river. These streets were to be constructed and paved by the grantees at their own expense, were to be dedicated and applied to the use of the public, and were to be maintained in perpetuity for the benefit of the public and the grantee, his assigns, or heirs.⁷⁵

In the forty-five years between the reception of the Montgomerie Charter and the beginning of the American Revolution, "disposing of the waterlots of lower New York City was unquestionably the major property-related concern of the officers of the corporation."⁷⁶ But circumstances changed in the fifty years after the Revolution. The city began to take on more the features of an agent of the State, and as such it began to assume more the role of a "public" agency. Nothing better illustrates this point than the case of *Corporation of the Brick Presbyterian Church v. Mayor of New York*.⁷⁷ In 1766, the city conveyed to the plaintiff's predecessors in title the premises on which the church stood. The lessees covenanted to pay an annual rent. In addition, they covenanted that the property should be used as a church or a cemetery. In turn, the city covenanted to the lessees the right of quiet enjoyment.

On October 27, 1823, a by-law was passed prohibiting the use of the land as a cemetery. The supreme court held for the city:

[The defendants] are particularly charged with the care of the public morals, and the public health within their own jurisdiction.

Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city. They were a common; and bounded on one side by a vineyard. Now they are in the very heart of the city. When the defendants covenanted that the lessees might enjoy the premises for the purpose of burying their dead, it never entered into the contemplation of either party, that the health of the city might require the suspension, or abolition of that right. It would be unreasonable in the extreme, to hold that the plaintiffs should be at liberty to endanger not only the lives of such as belong to the Corporation of the church, but also those of the citizens generally, because their

75. H. HARTOG, *supra* note 72, at 50.

76. H. HARTOG, *supra* note 72, at 44.

77. 5 Cow. 538 (N.Y. Sup. Ct. 1826).

lease contains a covenant for quiet enjoyment.⁷⁸

As Hartog observed: "Just as urban cemeteries were regarded as relics made anachronistic by growth and change, so the proprietary character of a chartered city stood revealed as an atavism in a republican governmental order. Property rights were no part of the repertoire of legitimate public action."⁷⁹

In the next twenty years, the courts and the legislature increasingly transformed what had once been a propertied entrepreneur into a public entity subservient to the state legislature. This was particularly evident in the battle between Brooklyn and New York over ferry service. Brooklyn—then a separate entity—believed New York's monopoly over ferry service was unduly burdening the citizens of Brooklyn. After years of in-fighting, the legislature amended the New York charter to require that the franchise for ferry service be leased to the highest bidder. The legislature was sustained in this action by the court in *People v. Mayor of New York*.⁸⁰ "The 'powers' to control, establish, and maintain ferries found in the Montgomerie Charter were 'public or governmental' rights properly belonging only 'to the sovereign authority.' They were a 'delegation of authority for public purposes, and not for private emolument,' subject to the continuing intervention of the legislature."⁸¹ Dillon's Rule had arrived.⁸²

B. Pennsylvania

Probably nowhere in the nation was the practice of public investment in private companies more evident than in the commonwealth of Pennsylvania from the Revolution until about the middle of the nineteenth century. In large part this was stimulated by intense urban rivalries, between east and west, Philadelphia and Pittsburgh.⁸³ The commonwealth itself was involved in these mixed investments although by far the largest public subscriptions to private development came from cities and counties. Banks, railroads, canals, bridges, and roads were all the subject of public investment until 1857.

78. *Id.* at 540, 542 (the defendants [the aldermen] had no power to limit their legislative discretion by covenant).

79. H. HARTOG, *supra* note 72, at 80.

80. 32 Barb. Ch. 102 (N.Y. App. Div. 1860).

81. H. HARTOG, *supra* note 72, at 257 (footnote omitted).

82. *See infra* note 98 and accompanying text.

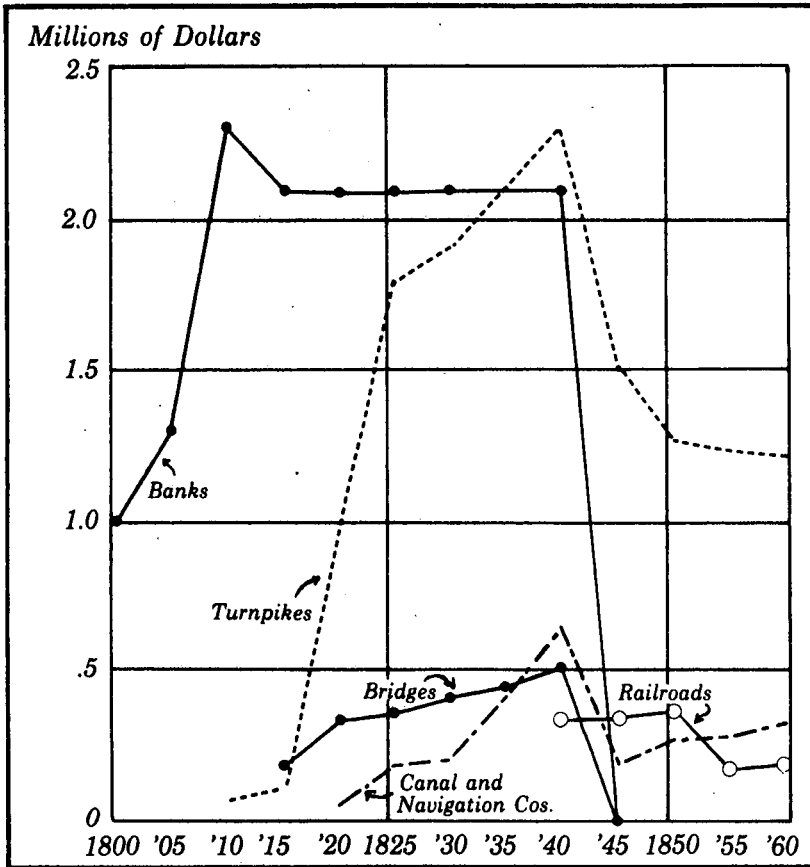
83. L. HARTZ, *supra* note 2, at 42-50.

Mixed corporation policy first appeared in the banking field. In chartering the Bank of Pennsylvania, the state subscribed twenty-five hundred shares at a par value of one million dollars. Holdings in bank stock were increased in 1803 when the Bank of Philadelphia was chartered. Three thousand shares were taken in the stock of that bank at a total value of three hundred thousand dollars. In 1810, as a result of the accession of new shares in both the Pennsylvania and the Philadelphia banks and as a result of a subscription to the stock of the Farmers' and Mechanics' Bank, the government of Pennsylvania held 7,364 shares of bank stock amounting at par value to \$1,990,793. By 1815 the total had risen to \$2,108,700. After that year the amount of bank stock held by the state remained static until 1843 when the entire investment was liquidated at public auction.⁸⁴

The following chart, in Professor Louis Hartz' *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860*, suggests the extent of this investment by the commonwealth.

84. L. HARTZ, *supra* note 2, at 82-83 (footnotes omitted).

VALUE OF STOCK HELD BY PENNSYLVANIA IN MIXED CORPORATIONS,
BY TYPES OF ENTERPRISE, AT FIVE-YEAR INTERVALS, 1800-1860



This practice of investment by the commonwealth was not without its opponents. Many believed the state, cities, and counties should stick to "more legitimate purposes." One person wrote: "The government which degrades itself to be a common carrier of merchandise, a trader, a manufacturer, a broker, departs from its proper sphere, [and] usurps the rights of its citizens. . . ." ⁸⁵

Public fears of graft were confirmed, particularly in railroads and canals. The anti-investment movement became more outspoken:

85. L. HARTZ, *supra* note 2, at 167.

The anti-state doctrine was a remarkable creation. Formulated with a keen sense of polemical strategy, striking the theory of state action at some of its weakest points, it nevertheless had a positive quality as well. In place of the elaborate philosophy of state participation it offered the people of Pennsylvania a novel philosophy of its own. In this new world of doctrine, where a peculiar blend of political and economic higher law charged the atmosphere with righteousness, businessmen were heroes and politicians were villains, a balanced budget was the mark of state morality, and the menace of communism was, as in the Sharpless Case, ground for constitutional argument. It was an excellent set of symbols for the task at hand: the substitution of the concept of negative for the concept of positive government.⁸⁶

Finally, with a growing anti-investment policy in the courts and the depression of 1837, the commonwealth of Pennsylvania auctioned off its investment of hundreds of thousands of dollars in 1843.⁸⁷ This was followed by a constitutional amendment which forbade public investment in business corporations.⁸⁸ Yet Hartz points out:

The record of public administration can be fairly evaluated, indeed, only when it is set alongside the record of private enterprise. If many of the public investments were lost, what is to be said of the estimated one hundred million dollars sunk simultaneously by private capital in mineral industry failures alone? If there were public administrative breakdowns, what is to be said of the devastating succession of monetary debacles which marked periods in the economic history of the age? If there was public corruption, what is to be said of the fictitious stock, false promises, and worthless shiplasters which accumulated in the wake of private action? We must not fall into the error of gazing at only one side of the coin.⁸⁹

We should not forget that there was a period in our short history as a nation when many public entities were entrepreneurs, when they enjoyed the fruits of private property. Nor should we today in this revival of joint public/private ventures forget that there was a revolt and the emergence, after the Civil War, of the Gilded Age of the "Robber Barons" and the elevation of substantive due process as a shield against government intrusion into the sanctity of

86. L. HARTZ, *supra* note 2, at 314.

87. *See supra* note 2 and accompanying text.

88. L. HARTZ, *supra* note 2, at 82.

89. L. HARTZ, *supra* note 2, at 295.

private enterprise.

C. General

This brief sketch of the history of municipal corporations and the public/private dichotomy is important in any attempt to foretell what may occur in the present enthusiasm for public/private co-ventures. This is done in the broadest strokes.

Two articles in the past eight years have demonstrated academic scholarship in this regard: Frug, *The City as a Legal Concept*⁹⁰ and Joan Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*.⁹¹ Professor Frug describes the powerlessness of cities and calls for a return to greater municipal sovereignty ("real power must be given to cities")⁹² and verges close to a wistful hope. Professor Williams seems more detached yet still appears to look forward to a reemergence of the city as a significant power.⁹³ After spending a professional lifetime dealing with local government—not always a pleasant experience—this author has difficulty with both theses.

Following the Civil War in the Gilded Age, two distinct developments in the law took place. First, the courts drew a clear distinction between public and private enterprises. (Of course, this marked departure from the early years had antecedents well before 1865—witness the *Dartmouth College* case⁹⁴ in 1819.) Second, once cities were recognized as "public," they became definitely subject to the authority of the state legislature.⁹⁵

Probably the first of these events was due to the rise of substantive due process as a shield for private property rights and the evident corruption and scandals that surrounded many municipal corporations. Equally disturbing was the financial bind widespread among municipalities when the bonds they floated to finance railroads went "bottoms up." Williams describes a common scene:

After the Civil War, a typical scenario emerged: an entrepreneur would come into a tiny hamlet with a proposal to construct a railroad. He would tell residents that a railroad connection would make their town into a boomtown—the next Cincinnati,

90. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

91. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986).

92. Frug, *supra* note 90, at 1150.

93. Williams, *supra* note 91, at 152-53.

94. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

95. Frug, *supra* note 90, at 1110-11.

or even Chicago—so that their farmland would become prime urban real estate. To attain the wealth of Midas, all the town had to do was issue bonds to help finance the railroad. Many towns did and the debt of municipalities rose exponentially during the course of the century.⁹⁶

The *Lochner*⁹⁷ Court's philosophy of private rights became the standard through the last half of the nineteenth century and the first two decades of this century. Cities, on the other hand, were expected to deal with matters clearly public—sewer, water, police, and fire protection. Their business was not business, except in a few instances where public health and safety could be involved—such as electricity, trash collecting, and an occasional public swimming pool.

The subjugation of the city to the state was equally powerful. The great champion of this doctrine was John Dillon. While still chief justice of the Iowa Supreme Court, Dillon published his treatise on municipal corporations,⁹⁸ the first of its kind. After serving on the U.S. Eighth Circuit Court of Appeals, he resigned and returned to his milieu—an attorney for major corporations. “Dillon's Rule”—that municipalities enjoyed only such power as granted them by the state—became widely accepted and cities and towns were in a straightjacket.

At the same time, stung by the fiasco of bonding, many states passed laws or amended their constitutions to forbid municipal loans to or investments in private enterprise, many of which are still on the books today. Not atypical is section 10 of article VII of the Florida Constitution:

Section 10. Pledging Credit.—Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing:

- (a) the investment of public trust funds;
- (b) the investment of other public funds in obligations of, or insured by, the United States or any of its instrumentalities;
- (c) the issuance and sale by any county, municipality, special district or other local governmental body of (1) revenue bonds to finance or refinance the cost of capital projects for airports or

96. Williams, *supra* note 91, at 93 (footnotes omitted).

97. *Lochner v. New York*, 198 U.S. 45 (1905).

98. T. DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* (1872).

port facilities, or (2) revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States, when, in either case, the revenue bonds are payable solely from revenue derived from the sale, operation or leasing of the projects. If any project so financed, or any part thereof, is occupied or operated by any private corporation, association, partnership or person pursuant to contract or lease with the issuing body, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately owned property.

(d) a municipality, county, special district, or agency of any of them, being a joint owner of, giving, or lending or using its taxing power or credit for the joint ownership, construction and operation of electrical energy generating or transmission facilities with any corporation, association, partnership or person.

The exceptions in the above provision offered a challenge to smart municipal attorneys and were, of course, the reason why similar exceptions in the New Mexico Constitution led the supreme court of that state to find no problem in Albuquerque providing UDAG funds to Beta West.

In the last fifty years, there has been a notable departure from these strict rules that existed for seventy-five years. The grant of home rule status by many states⁹⁹ to discrete segments of local government have broadened municipal power although not all of these provisions have been treated gently by the courts.¹⁰⁰ Furthermore, the construction of the "public use" clause of the fifth amendment to "public purpose" broadened the scope of municipal power to assist in industrial and commercial development.¹⁰¹ In some cases, even the protest that city investment was inimical to private enterprise was dismissed.¹⁰²

And now we come to the present and the issue of whether these burgeoning public/private ventures are within, outside, or on the edge of the law.

V. CONCLUSION

Unfortunately, in this area of law there are no easy answers.

99. COLO. CONST. art. XX, § 6; MINN. CONST. art. XII, § 4.

100. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982).

101. *See In re Port of Grays Harbor*, 30 Wash. App. 855, 638 P.2d 633 (1982); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

102. *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974).

There is no black letter law of modern vintage on the city as both entrepreneur and regulator. After six months of research, this author has had few firm convictions; only a sense of unease mingled with sympathy for our cities. The purpose of this section is to raise some warning flags.

There is not much to be gained by examining recent Supreme Court decisions. Professor Williams writes: "In sharp contrast to traditional local government law doctrines crystallized by Dillon, Burger Court decisions setting out the principle of local government sovereignty reveal a pattern of solicitude for localities, structural integrity and a broad judicial deference to their programmatic choices."¹⁰³ Williams invokes the imagery of Jefferson's local autonomy in school cases including *Milliken v. Bradley*¹⁰⁴ and *San Antonio Independent School District v. Rodriguez*,¹⁰⁵ and in the zoning cases *Village of Belle Terre v. Boraas*,¹⁰⁶ *Warth v. Seldin*,¹⁰⁷ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹⁰⁸ and *City of Eastlake v. Forest City Enterprises*.¹⁰⁹ (Williams does not acknowledge the abysmal ignorance of the Court when it comes to land use law as a partial explanation.)¹¹⁰ The in-

103. Williams, *supra* note 91, at 105.

104. 418 U.S. 717 (1974).

105. 411 U.S. 1 (1973).

106. 416 U.S. 1 (1974).

107. 422 U.S. 490 (1975).

108. 429 U.S. 252 (1977).

109. 426 U.S. 668 (1976).

110.

In important situations, the result of the Court's intervention has frequently been to upset long-settled law, and the Court has contributed to confusion in other ways. Finally, in the many cases involving the 'taking issue,' the Court has relied on a large assortment of vague phrases, and the result has been to replace a fair degree of predictability (at the state level) with a vast sea of uncertainty. Perhaps the best short summary of the Court's performance comes from Justice Rehnquist in one of the important later decisions [*Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981)]:

In a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn. . . .

The Supreme Court's performance, now that it has reentered the land use field, leaves a lot (in fact, practically everything) to be desired. The problem can be summarized briefly as follows:

1. The Court has been almost totally out of touch with the broad range of issues in zoning law and with the major relevant trends, and has shown no serious interest in looking into the same.
2. In some instances the Court's intervention has reversed long-settled law in ways that are at best confusing, and at worst, arguably, highly undesirable.

trusion of the fourteenth amendment is an attack on local autonomy. But these cases preceded the decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*¹¹¹ and *Nollan v. California Coastal Commission*¹¹² where local government and "community" were not accorded such deference. So it seems fair to conclude that we do not know what the current U.S. Supreme Court would do if confronted by this recent emergence of the city as entrepreneur.

All we can do at this incipient stage is ask some questions. First, does this desire to change conditions in the central business district amount to "selling zoning", as Judge Lehner concluded in the Coliseum case? As noted, there have been occasional changes in zoning to accommodate these public/private ventures. Is that wrong? There is a growing body of academics who believe we should either abolish zoning entirely¹¹³ or that we should dispose of zoning on the market—sell the rights. The latter are often economists.¹¹⁴ This idea is nothing new. In 1966, the noted land use economist Marion Clausen wrote a brief note entitled, *Why Not Sell Zoning and Rezoning (legally, that is)*, in which he said:

As long as present zoning methodology continues, suspicion of improper action will persist.

This might all be changed by open, competitive sale of zoning and rezoning classifications. The zoning authority might offer to sell, at open competitive bid, the rezoning of some tract of (say) 20 to 100 acres within a mile square or some other similar area. Conditions to be met by the buyer should be specified and made part of the contract (and later enforced). Owners of land or of options on land would bid cash sums for the rezoning classification. While the zoning authority should retain the right to reject any and all bids, normally the reclassification would be awarded to the highest bidder. . . .

Competitive sales are not without their problems, but they do have major virtues. There will certainly be opposition to this

1 N. WILLIAMS, *AMERICAN PLANNING LAW* 132, 168 (1988 Revision).

111. 482 U.S. 304 (1987).

112. 483 U.S. 825 (1987).

113. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980); Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261 (1984); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U.L. REV. 435 (1983); Zeigler, *The Twilight of Single Family Zoning*, 3 UCLA J. OF ENVTL. L. & POL'Y 161 (1983).

114. R.H. NELSON, *ZONING AND PROPERTY RIGHTS* (1977); W.A. FISCHER, *THE ECONOMICS OF ZONING LAWS* (1985).

proposal from those who think they can get the rezoning they want more cheaply by the present process as well as from those planners whose pride will be wounded at the suggestion the market knows better than they do. But think it over.¹¹⁵

More recently, Robert Nelson, an economist with the Office of Policy Analysis of the U.S. Department of the Interior, advocated the same position in an article entitled *Marketable Zoning: A Cure for the Zoning System*.¹¹⁶ He noted the growing practice of residents of old neighborhoods joining together to sell their lots to a developer (at a higher price than they would have received if they had sold them individually):

The idea of legally selling zoning at present seems novel, peculiar, and, perhaps for some, even inconceivable. Yet, it may be useful to recall that in earlier centuries similar perceptions existed with respect to charging interest on loans, selling ordinary land, and other transactions that today are among the mainstays of a modern commercial economy. Future historians may someday look back and wonder how it was that putting zoning on the market could be considered such a heresy.¹¹⁷

This idea could be the next step. The municipality today takes a small bite of the apple, then it consumes the entire fruit.

But what does this imply for planning? Skeptics ask: What difference would it make? Zoning is a political game and, faced with its bleak history, why shouldn't the city profit from the zoning power it has received from the state legislature? Some argue that, especially in the central business district, planning in most of our cities means very little and considering the dismal condition of most central business districts and the notable lack of planning, little would have changed.¹¹⁸

On balance, if municipalities increasingly take an equity position in these deals, it would probably be a severe setback to urban planning as we have been taught to understand that phrase. Instead of a degree from, for example, North Carolina University Graduate School of Planning, planners would be expected to attend MIT and be armed with a degree in land management and the intricacies of

115. CLAWSON, *Why Not Sell Zoning and Rezoning?* CRY CALIFORNIA, at 9-10 (Winter 1966-67).

116. NELSON, *A Cure For The Zoning System*, LAND USE LAW AND ZONING DIGEST, at 3 (1985).

117. *Id.* at 8.

118. C. WEAVER & R. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* 295-96 (1979).

finance. The "highest and best use" as a test, now generally discredited,¹¹⁹ would be in the ascendency.

Nor is it likely that state legislatures would protest. If the deal promises greater financial security for the city, that could relieve the state of the need to help. Currently, there has been no evident objection to the municipal practice of exactions, linkage, and impact fees; indeed, some states have expressly authorized such techniques.¹²⁰

There is the risk of allegations of conspiracy, witness the unhappy experience of Richmond, Virginia, or consider the events in Fairfield, California. Suppose a city took a share of the profits in a shopping center. Suppose a second developer then comes along with a request for rezoning for a shopping center. Does the city council turn him down to protect its interest in the first center? Or does it ask for a larger equity interest? Is the city protected from a claim for damages because of the Local Government Antitrust Act?

The U.S. Supreme Court's treatment of sweetheart deals between unions and employers under the Norris-LaGuardia Act¹²¹ should be noted. In 1932, Congress passed the Act and withdrew from the federal courts the authority to issue injunctions against peaceful conduct arising out of labor disputes. Nevertheless, the Supreme Court continued to apply the Sherman Act when a union conspired with an employer. In *Local 167, International Brotherhood of Teamsters v. United States*,¹²² the Supreme Court upheld an injunction under the Sherman Act because a combination of employees and businessmen had little connection with the needs of the union. Might the same be said of a municipality which departs from its usual functions of public service to join hands with a private enterprise with the goal of making a profit?

The most disturbing issue, however, is one in which there appears to be the least law; namely, does the governance of a municipality represent a trusteeship to its residents? Is a city council acting in a fiduciary capacity and accountable as such when it makes decisions on development, zoning, and subdivision controls? If in fact it

119. "The principal aim of official planning [in New York City] is no longer 'rational' land use (much less comprehensive planning or a particular aesthetic vision) but job creation. The idea of social planning has disappeared almost altogether: equity is an 'unrealistic' planning objective." Fainstein & Fainstein, *Economic Restructuring and the Politics of Land Use Planning in New York City*, 53 AM. PLAN. A. J. 237, 244 (1987).

120. BOSTON, MASS. ZONING CODE, art. 26 (1983), amended by BOSTON, MASS. ZONING CODE, art. 26A (1986); SAN FRANCISCO, CAL., ORDINANCE 358-85 (Aug. 18, 1985).

121. Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1932).

122. 291 U.S. 293 (1934); See also *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

is, what does this mean? Does this role require the city to get the best financial deal it can get? Or does it mean it must sacrifice the opportunity if the deal would force the city to sacrifice amenities such as the enjoyability of a park, or to make its residents endure greater traffic gridlocks and air pollution? In the absence of fraud or illegality, does a city have an accountability to its citizens other than that which is determined at the ballot box?

It is unfortunate that there are few if any recent cases that provide answers to these questions. What law there is suggests that land owned by the municipality is held in trust for its citizens. It does not mean, however, the city cannot dispose of land (unless it had been conveyed to the city for a specific purpose). One such case is *Haesloop v. City Council of Charleston*.¹²³ The city had received a block of land from the English crown. In 1922, it donated the land to a private party who agreed to erect a hotel on it. A Charleston taxpayer and citizen brought an action to enjoin the conveyance. The Supreme Court of South Carolina upheld the conveyance and said: "Certain general principles of law applicable to the solution of the question may be thus stated. In the sense that all powers of municipal corporations are held in trust for public use, all property held by such corporations is held in a fiduciary capacity."¹²⁴ There are a score of cases of about the same date that take similar positions.¹²⁵ But most of these were decided well before a concern with amenities and a "way of life" became major issues in American law and life; and most of these cases were before land use regulations and environmental law were so pervasive.

Probably there will be no definitive answer as long as "le bon temps rouler."¹²⁶ There are not many Municipal Art Societies ready to jump in on the side of amenities when the city stands to receive \$455 million for land it bought for \$2.1 million.¹²⁷ But should a general economic crisis arrive or if one of these ventures go sour, we

123. 123 S.C. 272, 115 S.E. 596 (1923).

124. *Id.* at 282, 115 S.E. at 600 (citation omitted).

125. *Green v. City of Rock Hill*, 149 S.C. 234, 147 S.E. 346 (1929); *Little River Bank & Trust Co. v. Johnson*, 105 Fla. 212, 141 So. 141 (1932); *Wheat v. Platte City Ben. Assessment Special Road Dist.*, 227 Mo. App. 869, 59 S.W.2d 88 (1933).

126. The English equivalent for the French maxim "Laissez le bon temps rouler," is "Let the good times roll."

127. It is arguable that if the city of New York not been so greedy and had set some standards and limits on bulk in its Request for Proposal, there would have been no lawsuit. Kent Barwick said that if the bulk had been limited and the city accepted a bid of, for example, \$300 million, there would have been no lawsuit. Interview with Kent Barwick, President, Municipal Art Society, 457 Madison Ave., New York City, July 14, 1988.

can expect a taxpayer suit and a challenge to the city as a public corporation venturing into private entrepreneurships. Dillon may indeed ride again.

In this connection one may ask whether the cities possess the know-how to undertake these deals. Based on inquiries in Cincinnati, Indianapolis, and St. Louis, it is this author's opinion that some of them do bring in qualified real estate accountants and bright lawyers—at least the first two of those three did. But, the author also believes that many cities simply do not know how to bargain with a sophisticated private party,¹²⁸ and if this proves to be correct then the deal may be challenged by a taxpayer who alleges a violation of a fiduciary duty to the citizens.

When the municipality is acting in a fiduciary capacity on behalf of its citizens, and becomes involved as a partner in property ventures, it nevertheless must make decisions in its capacity as a public corporation. It would appear that because the municipality is acting both as an investor for maximum profit on the one hand and regulating the scope and scale of the project in the public interest, a conflict of interest exists which compromises its citizens' best interests.

128. Letter of September 15, 1988 to Sylvia Deutsch, Chairperson, New York City Planning Commission, from the Office of the New York State Comptroller, commenting on the practice in New York City of trading floor area bonuses for "amenities" or cash. The Deputy State Comptroller said, "The amenities associated with the special permits in our audit sample were estimated by [City Planning Commission] to cost about \$5 million. We estimate the market value of the bonus floor area allowed to developers under these permits to be about \$108 million." *Id.*

